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**Safeguarding a fair copyright balance -
contemporary challenges in a changing world:
Lessons to be learnt from a developing country perspective**

by

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SUBMITTED TO THE UNIVERSITY OF CAPE TOWN
in fulfilment of the requirements for the degree Ph.D.

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February 2009

Declaration

I, Tobias Schönwetter, hereby declare that the work on which this thesis is based is my original work (except where acknowledgements indicate otherwise) and that neither the whole work nor any part of it has been, is being, or is to be submitted for another degree in this or any other university.

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Abstract

The question that underlies this research is whether, and to what extent, the prevailing understanding of copyright protection (as promoted by the relevant international copyright treaties and agreements) is fair to developing countries.

Copyright law around the world tries to strike a fair balance between the interests of copyright holders and the public. In each country, finding and maintaining a fair copyright balance is a continuing process that depends on technological progress and domestic peculiarities. Most important of these domestic peculiarities is the level of development a country has achieved. The prevailing one(minimum)-size-fits-all approach to copyright protection, which is the basis of most of the relevant multilateral copyright treaties and agreements, does not take this into account.

This thesis looks at how to achieve a fair copyright balance from the perspective of developing countries. The thesis examines the international legal framework which developing countries such as South Africa have to respect. It analyses the flexibilities in this framework and, in particular, copyright exceptions and limitations. These flexibilities are important because they allow domestic lawmakers to develop country-specific domestic copyright legislation.

The thesis then goes on to discuss why getting the right balance between protecting copyright and giving adequate access to knowledge material is of particular concern for developing countries. As part of this discussion, the thesis looks at the impact of digital technologies on copyright law in general and for the copyright balance in particular.

The thesis draws numerous conclusions and makes specific recommendations as to how developing countries can legislate to achieve and maintain a fair copyright balance.

Preface

This thesis is the result of a long journey which leaves me deeply indebted to many who have helped me along the way. First, I would like to thank my supervisor, Professor Julien Hofman, for his great confidence in me, his constant support and his many valuable comments during this project. Our many talks and discussions substantially contributed to the completion of this work. They were always inspiring both personally and legally.

I also wish to thank the University of Cape Town in general and the Faculty of Law in particular for the support I have been receiving over the years. It makes me proud that I have been awarded the prestigious UCT Research Associateship Award for my doctoral studies for three years in a row. Much appreciated financial support also came from the Mellon Foundation and the Mark Shuttleworth Foundation.

During my studies, I had the privilege to meet many fascinating people from within the copyright arena and beyond who have in one way or the other influenced and enriched my research. It is, of course, impossible to make mention of all the individuals who contributed to my research but the following persons deserve special mentioning here: Andrew Rens from the Shuttleworth Foundation for his insight and enthusiasm, Denise Nicholson from WITS University for collecting and distributing copyright law-related information via her IP newsletter, the members of the University of Cape Town IP Research Unit (chair: Professor Kinderlerer), my colleagues from Chetty Law and the African Copyright and Access To Knowledge (ACA2K) Project for giving me the opportunity to practically apply my knowledge for a worthy cause, and, finally, various individuals from Creative Commons and iCommons for making me a part of an exciting movement and for bringing me in touch with the people that copyright law is really about: users and creators of creative material.

In addition, I would like to thank Reto Hilty, Frederik Willem Grosheide, Coenraad Visser, Tana Pistorius, Lucie Guibault and Martin

Senftleben for their quick, supportive and very helpfully responses to some of my questions.

I am also grateful to Mare Schabort who read and commented on many papers and other documents I wrote about copyright law during the research for this thesis.

Finally, a special and heartfelt thank you goes to my family for all the support they have given me - and to S'maralda for her love and patience.

All these people, together with many others, have made this project a far less lonely task than expected. It is needless to say that despite all the support, I am solely responsible for errors and omissions in this work.

The research for this thesis was, with a few exceptions, completed on 31 December 2007.

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List of Abbreviations

A2K	Access to Knowledge
AAKA	African Access to Knowledge Alliance
AC	Law Reports, Appeal Cases (UK)
A.D.	Anno Domini
All ER	All England Law Reports (UK)
All SA	All South African Law Reports
ALR	Australian Law Reports
AUSFTA	Australia-United States Free Trade Agreement
B.C.	Before Christ
Berne Appendix	Appendix to the Berne Convention
Berne Convention	The Berne Convention for the Protection of Literary and Artistic Works of 1886
BGBL	Bundesgesetzblatt (Germany)
BGH	Bundesgerichtshof (Germany)
BGHZ	Entscheidungen des Bundesgerichtshofes in Zivilsachen (Germany)
BIRPI	Bureaux Internationaux Réunis pour la Protection de la Propriété Intellectuelle
BSA	Business Software Alliance
Burr	Burrow's King's Bench Reports tempore Mansfield (UK)
CCT	Constitutional Court (South Africa)

List of Abbreviations

CD	Compact Disc
CDPA	Copyright, Designs and Patents Act of 1988 (United Kingdom)
Ch	Law Reports, Chancery Division (UK)
CIA	Central Intelligence Agency
CIPR	Commission on Intellectual Property Rights (UK)
Cir.	United States Circuit Court of Appeals
Classroom Guidelines	Agreement on Guidelines for Classroom Copying in Not-for-Profit Educational Institutions (U.S.)
CLR	Commonwealth Law Reports (High Court of Australia)
CONFU	Conference on Fair Use (U.S.)
CONTU	Commission on New Technological Uses of Copyrighted Works (U.S.)
CRIA	Canadian Recording Industry Association
CR International	Computer Law Review International
CSS	Content Scrambling System
DMCA	Digital Millennium Copyright Act of 1998 (U.S.)
DOT Force	G8 Digital Opportunity Task Force
DRM	Digital Rights Management
CTEA	Copyright Term Extension Act of 1998 (U.S.)
DVD	Digital Versatile Disc
EC	European Community

ECJ	European Court of Justice
ECR	European Court Reports
ECT Act	Electronic Communications and Transactions (ECT) Act 25 of 2002 (South Africa)
EEA	European Economic Area
EEC	European Economic Community
EFTA	European Free Trade Association
E.I.P.R.	European Intellectual Property Review
EMLR	Entertainment and Media Law Reports (UK)
ER	English Reports (1210-1865)
EU	European Union
EWHC	High Court of England and Wales
F. 2d.	Federal Reporter, Second Series (U.S.)
F. 3d.	Federal Reporter, Third Series (U.S.)
FCA	Federal Court of Australia
FCAFC	Federal Court of Australia Full Court
FCR	Federal Court Reports (Federal Court of Australia)
Fed. Cas.	Federal Cases (before 1880) (U.S.)
FSR	Fleet Streets Reports (UK)
F. Supp.	Federal Supplement (U.S.)
FTA	Free Trade Agreements
GATT	General Agreement on Tariffs and Trade

GDP	Gross Domestic Product
GG	(1) Government Gazette (South Africa) (2) Grundgesetz (Germany)
GNI	Gross National Income
GRUR	Gewerblicher Rechtsschutz und Urheberrecht (Germany)
GRUR Int	Gewerblicher Rechtsschutz und Urheberrecht, Internationaler Teil (Germany)
HDI	Human Development Index
H.R.	United States House of Representatives
H.R. Rep.	House Report (U.S.)
HTML	HyperText Markup Language
ICT	Information and Communication Technology
ICTSD	International Centre for Trade and Sustainable Development
IFPI	International Federation of the Phonographic Industry
IGC-GRTKF	Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore
IIPA	International Intellectual Property Alliance
IITF	Information Infrastructure Task Force (U.S.)

ILSA	International Law Students' Association
IP	Intellectual Property
IPR	Intellectual Property Rights
IPRIA	Intellectual Property Research Institute of Australia
ISP	Internet Service Provider
MPAA	Motion Picture Association of America
MPEG	Moving Picture Experts Group
MMR	MultiMedia und Recht (Germany)
Music Guidelines	Guidelines for Educational Uses of Music of 1976 (U.S.)
NAFTA	North American Free Trade Agreement
NIC	Newly Industrialised Country
NII	National Information Infrastructure (U.S.)
OECD	Organisation for Economic Co-operation and Development
Off-Air Videotaping Guidelines	Guidelines for Off-Air Recordings of Broadcast Programming for Educational Purposes of 1981 (U.S.)
OLG	Oberlandesgericht (Germany)
OPEC	Organization of Petroleum Exporting Countries
p.a.	per anno
P2P	Peer-to-Peer
PICC	Print Industries Cluster Council (South Africa)

PPP	Purchasing Power Parity
RGZ	Reichsgerichtssentscheidungen in Zivilsachen (until 1945) (Germany)
Rome II	EC Regulation On The Law Applicable To Non-Contractual Obligations
Rome Convention	International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organisations of 1961
RS-DVR	Remote-Storage Digital Video Recorder
SA	South African Law Reports
S.Ct.	Supreme Court Reporter (U.S.)
S. Rep.	Senate Report (U.S.)
TPM	Technological Protection Measures
TRIPS	Agreement on Trade-Related Aspects of Intellectual Property Rights
Tunis Model Law	Tunis Model Law on Copyright for Developing Countries of 1976
UCC	Universal Copyright Convention of 1952
UCLA	University of California, Los Angeles
UN	United Nations
UNCTAD	United Nations Conference on Trade and Development
UNDP	United Nations Development Programme
UNESCO	United Nations Educational, Scientific and Cultural Organization

UNESCO/WIPO Model Provisions	Model Provisions for National Laws on the Protection of Expressions of Folklore Against Illicit Exploitation and other Prejudicial Actions (published by WIPO and UNESCO)
UK	United Kingdom
UrhG	Gesetz über Urheberrecht und verwandte Schutzrechte (Urheberrechtsgesetz) (Germany)
U.S.	(1) United States of America (2) Reports of Cases in the Supreme Court of the U.S.
USC	United States Code
USPQ	United States Patent Quarterly
VCR	Videocassette Recorder
WCT	World Intellectual Property Organization Copyright Treaty of 1996
WIPO	World Intellectual Property Organization
WLR	Weekly Law Reports (UK)
WPPT	World Intellectual Property Organization Performances and Phonograms Treaty of 1996
WTO	World Trade Organization

Chapter 1: Introduction

'IP protection is not an end in itself, but should serve a wider social and economic interest.'

Former WIPO Director General Kamil Idris

Copyright laws around the world try to strike a fair balance between the interests of copyright holders and the public. How to achieve this balance is the crucial question. Answering this question requires, first, that the notion of fair balance that is followed be clarified. In this thesis, a fair copyright balance is understood to create, on the one hand, sufficient incentives for creators of copyright protected materials to create and provides, on the other, adequate access for users of such materials. However, a fair copyright balance can only be achieved if the possible repercussions of what copyright does on all sectors of society are also taken into account.¹

In every country, finding and maintaining a fair copyright balance is a continuing process which is influenced by technological progress and domestic peculiarities. Most important of these domestic peculiarities is the level of development a country has achieved. The global one(-minimum)-size-fits-all approach toward copyright protection, which is the basis of the most relevant multilateral copyright treaties and agreements does not take this into account.

The thesis approaches the issue from the perspective of developing countries for which South Africa serves as an example. The thesis examines the international legal framework which developing countries such as South Africa have to respect and analyses existing flexibilities in this framework, especially copyright exceptions and limitations. These flexibilities are important because they allow domestic

¹. G Davies *Copyright and the public interest* 2ed (2002) 236.

lawmakers to develop country-specific domestic copyright legislation. This thesis then goes on to discuss why getting the right balance between protecting copyright and giving adequate access to knowledge material is of particular concern for developing countries. Lastly, it looks at the impact of digital technologies on copyright law in general and for the copyright balance in particular.

The question that underlies this research is whether, and to what extent, the current concept of copyright protection (as promoted by the relevant international copyright treaties and agreements) is adequate and fair to developing countries.

1.

A little more than a decade ago, South Africa reappeared on the global stage after a long period of international isolation during the apartheid era. The first free and democratic multiracial elections in 1994 and the most progressive Constitution that came two years later, showed how South Africa had changed for the better. Since then South Africa has experienced strong economic performances - especially in comparison with other African countries. In part this has been due to its wealth in natural resources but it has also been due to a relatively modern infrastructure in areas such as finance, law and transport. South Africa's development over the last years is an inspiration to many of the other countries of Africa - a continent where millions of people still live in extreme poverty and where, in various countries, war or warlike events are commonplace.

South Africa is also facing a number of significant challenges. Nelson Mandela is South Africa's best-known anti-apartheid activist, a Noble Peace Prize winner and South Africa's first democratically elected State President. In 2007 he noted that the biggest challenges facing

South Africa are in the areas of education, HIV/AIDS and poverty.² South Africa is the country with the highest number of HIV infected people in the world.³ It has a Gini coefficient⁴ of 0.578 that puts it among the ten most unequal societies in the world in terms of wealth distribution.⁵ It also has one of the highest crime rates worldwide and experiences an unacceptably high number of violent crimes such as murder, robbery, rape and assault.⁶ This affects the victims and their relatives and friends and also constrains economic growth.⁷ Due to the high violent crime rate, South African cities have in the past been repeatedly dubbed by the media as “rape capital[s] of the world”⁸ and South Africa “the most dangerous country in the world, which is not at war.”⁹

The causes for these challenges are manifold and complex, and viable solutions have yet to be developed. Having said that, this thesis is based on the belief that poor education is associated with most of these challenges. More precisely, education is one of the essentials for the realisation of a sustainable society without poverty,¹⁰ and poverty

². J Gordin and B Esbach ‘Big three’ challenges won't cast a shadow over Madiba's 89th birthday’ (15 July 2007) *Sunday Independent (South Africa)* at 1.

³. Joint United Nations Programme on HIV and AIDS (UNAIDS) *Key facts by region – 2007 AIDS Epidemic Update* (2007) fact sheet, available at http://data.unaids.org/pub/EPISlides/2007/071118_epi_regional%20factsheet_en.pdf [accessed on 25 January 2009].

⁴. The Gini coefficient is a common tool to measure income inequality. It shows, on a scale with values between 0 and 1, the extent to which the distribution of income among households in a certain economy differs from a perfectly equal distribution (Gini coefficient=0). The Gini coefficient is named after its Italian inventor Corrado Gini who introduced the coefficient in 1912.

⁵. United Nations Development Programme (UNDP) *Human Development Report 2007/2008* Table 15: Inequality in income and expenditure, available at http://hdr.undp.org/en/media/HDR_20072008_EN_Complete.pdf [accessed on 25 January 2009].

⁶. The South Africa Police Service (SAPS) publishes official crime statistics at <http://www.saps.gov.za/statistics/reports/crimestats/2006/categories.htm> [accessed on 25 January 2009].

⁷. C Stone ‘Crime, justice, and growth in South Africa: Toward a plausible contribution from criminal justice to economic growth’ (August 2006) *CID Working Paper No. 131* at 2.

⁸. See, for example, C Nullis ‘South Africa debuts tougher laws on rape’ *USA Today* (14 December 2007) available at http://www.usatoday.com/news/world/2007-12-14-135309796_x.htm [accessed on 25 January 2009].

⁹. BBC News, *Have you experienced crime in South Africa?* (16 April 2002), available at http://news.bbc.co.uk/1/hi/talking_point/1924251.stm [accessed on 25 January 2009].

¹⁰. I Miyamoto at the 32nd General Conference of UNESCO, available at: http://portal.unesco.org/education/en/ev.php-URL_ID=23455&URL_DO=DO_TOPIC&URL_SECTION=201.html, [accessed on 25 January 2009].

and inequality are among the reasons for committing property-related or violent crimes.¹¹ It is also beyond doubt that a better educated population is more likely to understand how to prevent diseases such as HIV/AIDS. In the end, proper education results in knowledge. An Afrikaans saying rightly states that 'Kennis is Mag' – knowledge is power.

The subject of this thesis is copyright law. This is part of the larger intellectual property system. Copyright law plays a significant role in education and knowledge transfer.¹² This is because protecting intellectual property rights in general and copyright in particular slows the free reproduction and distribution of knowledge material. In essence, copyright laws give property-like rights to holders of knowledge material. Whether such protection is always appropriate is questionable when one considers the non-rivalrous character of knowledge which can be consumed (non-exclusively) by many.¹³ Thomas Jefferson, the third president of the United States of America, explained the non-rivalrous character of knowledge as follows: 'no one possesses the less because everyone possesses the whole of it. He who receives an idea from me receives [it] without lessening [me], as he who lights his taper at mine

¹¹. See M Kelly 'Inequality and crime' (2000) 82 *Review of Economics & Statistics* 530 at 531 et seq; R Jarjoura et al 'Growing up poor: Examining the link between persistent childhood poverty and delinquency' (2002) 18 *Journal of Quantitative Criminology* 159 at 161-65 and 181 (with further references); see also: speech by the South African Minister of Finance, T Manuel, at the City of Angels Awards Dinner, Cape Town (17 November 2005), available at <http://www.info.gov.za/speeches/2005/05111810151002.htm> [accessed on 25 January 2009].

¹². Some commentators argue that 'copyright is 'the sleeping giant' on the international intellectual property agenda, especially for the poor and least developed nations', A Story 'Copyright, Software and the Internet' (2002) *Study Paper 5 (background paper for the UK Commission on Intellectual Property Rights)* at 8; available at www.iprcommission.org/papers/pdfs/study_papers/sp5_story_study.pdf [accessed on 25 January 2009].

¹³. The following remarks by Sun are of interest in this context: 'Intellectual products are public goods in that they can be consumed in a nonexclusive and nonrivalrous manner. As economists have pointed out, however, the maker of intellectual products suffers from the so-called free-rider problem. When the number of free riders keeps increasing, intellectual products "are likely to be produced at socially suboptimal levels", for the makers of such products would not reap their investment due to the competition brought about by free riders. Market failure occurs in this context because resources for producing intellectual products are not allocated to the person who directly and positively contributes to making of such products.' H Sun 'Overcoming the Achilles Heel of copyright law' (2007) 5 *Northwestern Journal of Technology and Intellectual Property* 267 at 324.

receives light without darkening me.¹⁴ Physical property, by contrast, is typically rivalrous as one person's possession of physical property usually prevents others from possessing the same property.

Having said this, the impact of copyright law goes well beyond the educational sphere. This is because copyright law governs and restricts access to and participation in significant parts of our culture. These parts are those contained in books, journals, paintings, sculptures, photography, music, movies and the like. Our culture builds heavily on what has gone before.¹⁵ Yet, as one commentator noted:

For the first time in our tradition, the ordinary ways in which individuals create and share culture fall within the reach of the regulation of the [copyright] law, which has expanded to draw within its control a vast amount of culture and creativity that it never reached before.¹⁶

Not too long ago copyright law was seen by many as a relatively dry, technical and rather exotic domain that interested only a few experts. As Mark Twain wrote in 1903: 'Only one thing is impossible for God: To find any sense in any copyright law on the planet.'¹⁷ These days, however, copyright protection is a major policy concern in many countries which, due to the advent of affordable digital technology and the Internet, affects the everyday life of millions. These inventions - which include services like Google, Wikipedia, and file-sharing software tools - have revolutionised the way people use information material. They have enabled people to access and reproduce works and to manipulate or disseminate such reproductions easily, quickly and worldwide. It has been rightly noted that due to digital technology,

¹⁴. Letter from T Jefferson to I McPherson (13 August 1813), reprinted in T Jefferson *The Writings of Thomas Jefferson* vol. 13 (1903) 333-4.

¹⁵. C Bailey Jr 'Strong copyright + DRM + weak net neutrality = digital dystopia?' (2006) 25 *Information Technology and Libraries* 116.

¹⁶. L Lessig *Free culture* (2005) 8.

¹⁷. A Paine (ed) *Mark Twain's notebook* (2006) 381.

knowledge users need no longer be passive consumers of content. They can modify the content and so participate in the creative chain.¹⁸

Ironically, the digital age has not only greatly improved access possibilities, it has also made it possible to limit access to knowledge. This is done by using technologies, such as Digital Rights Management systems (DRMs) and, more specifically, technological protection measures (TPMs). The protection afforded to rights holders by these technologies has been strengthened by legislation on both the national and the international level giving such technological tools special protection. In addition, licensing, that is contracting out of copyright legislation, has become increasingly popular among copyright holders in recent years. Often such licensing agreements are more restrictive in the access they allow to copyright protected works than domestic copyright law. While it is beyond the scope of this thesis to discuss whether contract can over-ride copyright exceptions and limitations¹⁹, it is obvious that DRM systems and TPMs affect well-tried exceptions and limitations which are the main tool for ensuring a fair balance between the colliding interests within the copyright arena.²⁰

All these changes clearly challenge our copyright laws. These laws were formulated in different circumstances, when the new media and communications were not foreseen. In particular, copyright law was not originally meant to directly affect the mass of (end-)users in the way it does today. Rather, the target group of copyright law was originally the professional intermediaries who had the financial means to carry out

¹⁸. R Okediji 'Givers, takers, and other kinds of users: A fair use doctrine for cyberspace' (2001) 53 *Florida Law Review* 107 at 108; Issues Paper by the Australian Government (May 2005) *Fair use and other copyright exceptions – An examination of fair use, fair dealing and other exceptions in the Digital Age* at 2.9, available at [http://www.ag.gov.au/www/agd/rwpattach.nsf/VAP/\(CFD7369FCAE9B8F32F341DBE097801FF\)~FairUseIssuesPaper050505.pdf/\\$file/FairUseIssuesPaper050505.pdf](http://www.ag.gov.au/www/agd/rwpattach.nsf/VAP/(CFD7369FCAE9B8F32F341DBE097801FF)~FairUseIssuesPaper050505.pdf/$file/FairUseIssuesPaper050505.pdf) [accessed on 25 January 2009].

¹⁹. For more information see L Guibault *Copyright rules and limitations – An analysis of the contractual overridability of limitations on copyright* (2002).

²⁰. World Intellectual Property Organization (WIPO) *Intellectual property on the internet – a survey of issues* (2002) WIPO Doc. WIPO/INT/02, at 41, available at <http://www.wipo.int/export/sites/www/copyright/en/ecommerce/pdf/survey.pdf> [accessed on 25 January 2009].

large-scale copying, ie printers and publishers.²¹ Stallman, a pioneer of the free software movement, even argues that copyright's role has been completely reversed over the years: 'It was set up to let authors restrict publishers and for the sake of the general public. Digital technology has transformed it into a system to let publishers restrict the public in the name of the authors.'²²

In 1993, Drucker observed that knowledge had become the economic 'central, key resource that knows no geography.'²³ Now, in an increasingly globalised world, the cross-border exchange of information material is still gaining momentum. It should not come as a surprise that trade in copyright protected material has become a multi-billion U.S. dollar business which significantly contributes to the modern wealth of nations.²⁴ Winston Churchill was right when he predicted in 1943 that 'the empires of the future are the empires of the mind'.²⁵ In the U.S. alone, for example, core copyright industries are responsible for roughly 820 billion U.S. dollars, or more than 6.5 per cent of the nation's gross domestic product (GDP).²⁶ In comparison, South Africa's total GDP (PPP)

²¹. D Gervais 'Towards a new core international copyright norm: The reverse three-step test' (2005) 9 *Marquette Intellectual Property Law Review* 1 at 3.

²². Interview with R Stallman (29 May 2002), available at http://www.opendemocracy.net/media-copyrightlaw/article_31.jsp [accessed on 25 January 2009].

²³. P Schwartz 'Post-Capitalist' (July/August 1993) interview with Peter Drucker, *Wired magazine* (issue 1.03), available at <http://www.wired.com/wired/archive/1.03/drucker.html> [accessed on 25 January 2009].

²⁴. For intellectual property in general: F Warshofsky *The Patent Wars: The Battle to Own the World's Technology* (1994) 3; M Jackson 'Harmony or discord? The pressure toward conformity in international copyright' (2003) 43 *IDEA: The Journal of Law and Technology* 607 at 627; J Tehranian 'All rights reserved? Reassessing copyright and patent enforcement in the digital age' (2003) 72 *University of Cincinnati Law Review* 45 at 47.

²⁵. Speech at Harvard University (6 September 1943) as quoted in T Goodman (ed) *The Forbes Book of Business Quotations: 10,000 Thoughts on the Business of Life: 10, 000 Thoughts on the Business of Life* (2007) 247.

²⁶. According to the International Intellectual Property Alliance (IIPA) 'Copyright Industries in the U.S. Economy' (2006) report, at 2, available at http://www.iipa.com/pdf/2006_siwek_full.pdf [accessed on 25 January 2009]. The report defines "core copyright industries" as 'those industries whose primary purpose is to create, produce, distribute or exhibit copyright materials. These industries include newspapers, books and periodicals, motion pictures, recorded music, music publishing, radio and television broadcasting, and business and entertainment software' (at 7).

in 2007, according to the International Monetary Fund, amounted to approximately 664 billion U.S. dollars.²⁷

International trade in copyright protected material has made copyright protection the subject-matter of international legislative activity. Substantial work has been done by two international organisations based in Geneva, Switzerland: the World Intellectual Property Organisation (WIPO) and the World Trade Organisation (WTO). WIPO is a specialised agency of the United Nations. WIPO and the WTO administer the multilateral copyright treaties and agreements which this thesis examines: the 1886 Berne Convention for the Protection of Literary and Artistic Works (Berne Convention), the 1994 Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS) and the 1996 WIPO Copyright Treaty.²⁸ Moreover, regular discussions on copyright-related issues between stakeholders take place both at WIPO and the WTO.²⁹ These discussions show a clear trend towards strengthened copyright protection and they have been accompanied by highly protective provisions in bilateral or regional Free Trade Agreements (FTA).

²⁷. International Monetary Fund website, *Data and Statistics*. Available at: <http://www.imf.org/external/pubs/ft/weo/2007/02/weodata/weoseladv.aspx?a=&c=199&s=PPPGBP> [accessed on 25 January 2009].

²⁸. Another copyright treaty of considerable (though diminishing) importance is administered by the United Nations Educational, Scientific and Cultural Organization (UNESCO): the 1952 Universal Copyright Convention (UCC).

²⁹. For instance, WIPO has commissioned most relevant studies with regard to exceptions and limitations: S Ricketson *WIPO Study on Limitations and Exceptions of Copyright and Related Rights in the Digital Environment* (2003), WIPO doc SCCR/9/7, available at http://www.wipo.int/edocs/mdocs/copyright/en/sccr_9/sccr_9_7.pdf [accessed on 25 January 2009]; R Knights *Limitations and Exceptions under the “Three-Step-Test” and in National Legislation – Differences Between the Analog and Digital Environments* (2001), WIPO Doc. WIPO/CR/MOW/01/2, available at http://www.wipo.int/edocs/mdocs/copyright/en/wipo_cr_mow_01/wipo_cr_mow_01_2.pdf [accessed on 25 January 2009]; N Garnett *Automated Rights Management Systems and Copyright Exceptions and Limitations* (2006) WIPO Doc. SCCR/14/5, available at http://www.wipo.int/edocs/mdocs/copyright/en/sccr_14/sccr_14_5.pdf [accessed on 25 January 2009]; J Sullivan *Study on copyright limitations and exceptions for the visually impaired* (2007), available at http://www.wipo.int/edocs/mdocs/copyright/en/sccr_15/sccr_15_7.pdf [accessed on 25 January 2009]; K Crews *Study on copyright limitations and exceptions for libraries and archives* (2008), available at http://www.wipo.int/edocs/mdocs/copyright/en/sccr_17/sccr_17_2.pdf [accessed on 25 January 2009].

Before outlining the structure of the thesis, it is necessary to understand what we mean by “copyright”. In general, there are two main traditions regarding the protection of creative works such as literary, musical and artistic works: (a) the functional copyright tradition, which derived from the common-law system and (b) the civil law system which is based on author’s rights.³⁰ Both traditions are examined in detail in chapter 2.2.

In simple terms, the rights holder under both traditions has for a limited period of time the exclusive right to prohibit or authorise significant kinds of exploitation.³¹ However, the author-centric view of the author’s rights tradition has regarded certain subject-matters as unsuited to be protected as authors’ rights since they do not sufficiently reflect an author’s vision. Thus, performances, sound recordings, phonograms, broadcasts and the like do not qualify for copyright protection.³² For this reason, an additional protection regime for so-called neighbouring, or related rights³³ was introduced. There are specific International Treaties that protect neighbouring rights, such as the 1961 International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organisations (Rome Convention) and the 1996 WIPO Performances and Phonograms Treaty (WPPT).

The distinction between author’s rights and neighbouring rights is unknown in countries with a functional copyright tradition and both categories of subject-matter are treated as copyright. In the following, the term “copyright” will be employed as a generic term for copyright that embraces author’s rights and neighbouring rights. However, subject-matters which usually fall into the category of neighbouring rights in civil law countries will only be dealt with in

³⁰. In French: droit d’auteur; in German: Urheberrecht.

³¹. S von Lewinski ‘Protecting cultural expressions: The perspective of law’ in E Kasten (ed) *Properties of culture – culture as property. Pathways to reform in post-soviet Siberia* (2004) 111 at 113.

³². P Goldstein *International copyright – principles, law, and practice* (2001) 11.

³³. In French: droits voisins, in German: Leistungsschutzrechte.

passing, and where appropriate, the term “neighbouring rights” will additionally be utilised.

2.

This thesis covers many of the most-discussed copyright-related issues as they apply to developing countries. Regrettably little research and policy attention has so far been paid to copyright law in developing countries, particularly in Africa³⁴, and information on copyright law in these countries is scarce. This has resulted in a low level of awareness regarding this important area of law.

This thesis assumes that the basics of copyright protection are known: the general requirements for copyright protection, its automatic coming into being and the fact that copyright law protects the expression of an idea and not the idea itself (idea/expression dichotomy). The importance of the international dimension of copyright protection in an increasingly globalised world cannot be overstated, especially in light of the way digital technologies have changed the creation, use and dissemination of copyright protected works.³⁵ In particular, familiarity with international tools such as the three-step test and the Berne Appendix is, although often startlingly poor, essential. The international approach of this thesis will be backed by a comparative examination of the copyright environment in selected other jurisdictions around the world: the United States of America, Australia, and the European Union in general as well as Germany and the United Kingdom in particular. Such a comparison is a well-suited tool for pointing out the different philosophical traditions which underpin copyright laws around the world.

³⁴. A Rens et al ‘Intellectual Property, Education and Access to Knowledge in Southern Africa’ (2006) *Tralac Working Paper No. 13/2006*, available at <http://www.iprsonline.org/unctadictsd/docs/06%2005%2031%20tralac%20amended-pdf.pdf> [accessed on 25 January 2009].

³⁵. G Dinwoodie ‘A new copyright order: Why national courts should create global norms’ (2000) 149 *University of Pennsylvania Law Review* 469 at 471.

There are a number of reasons why copyright law is a highly-contested area: the high economic value of copyright protected works, the broad scope of copyright protection, the different existing legal traditions regarding copyright protection. The divide in perspectives on this issue between developing countries and developed countries is due to the fact that the copyright in most works is held by individuals and corporations in developed countries.³⁶ It is likely that the latter aspect may influence one's view regarding copyright protection. Those living in a developing country are therefore more likely to be against copyright protection, while those living in developed countries are more likely to be in favour of copyright protection. However, this correlation is far from absolute. Some commentators from developed countries have taken a stance against strong copyright protection while the call for a strengthened protection regime is sometimes also made by groups and individuals in developing countries. This thesis tries to adopt an impartial approach to the problems and issues at hand and to provide objective solutions which fairly balance the interests of both copyright holders and copyright users.

The current South African Copyright Act of 1978³⁷ is typical of copyright acts in developing countries in that it is, in many respects, outdated and noticeably out of touch with reality. In particular, it does not sufficiently take into account new, digital technologies. As a result, a number of common everyday activities, such as copying legally purchased music onto an MP3 player, are copyright infringements. Furthermore, the South African Copyright Act was drafted at a time when the former South African apartheid government still claimed that South Africa was not a developing country. This is shown by the fact that

³⁶. A Story supra note 12 at 8. Musungu noted that the economic success of industrialised countries is primarily based upon their superior knowledge. He stated that '[w]ith recent scientific and technical advances, particularly in biotechnology and information and communications technology (ICT), knowledge is now the principal source of competitive advantage for both companies and countries', S Musungu 'Rethinking innovation, development and intellectual property in the UN: WIPO and beyond' (2005) *TRIPs Issues paper 5* at 5, available at <http://www.uno.org/geneva/pdf/economic/Issues/TRIPS53.pdf> [accessed on 25 January 2009].

³⁷. Copyright Act 98 of 1978.

the South African Copyright Act of 1978 bears strong resemblance to the British Copyright Act of 1956.³⁸ A similar situation can be observed in numerous other developing countries because, even today, many developing countries are reluctant to admit their developing country status. This is often done against the advice of legal experts who stress the advantages of developing country status in the area of copyright law to lawmakers.

The future of copyright law is uncertain, particularly in South Africa and many other developing countries. South Africa is at a crossroads and the debate about the future shape of copyright law and its balancing features has just begun. The following months and years will surely have a major impact on how copyright protected material, especially but not exclusively material of educational value, can be accessed and used in South Africa.

The thesis looks at both the current system of copyright protection and the internationally followed one(-minimum)-size-fits-all approach towards copyright protection. The one(-minimum)-size-fits-all approach is characterised by the fact that the most relevant international copyright treaties and agreements, particularly the Berne Convention for the Protection of Literary and Artistic Works and the TRIPS Agreement, prescribe binding minimum standards for copyright protection which domestic legislatures are bound to follow. Member states may, however, introduce laws containing more extensive protection than is required by these treaties and agreements. There is growing concern as to what extent our traditional copyright laws are at all suited to deal with contemporary challenges and conflicts, especially those which arise in connection with digital technology. Many commentators have therefore predicted the death of copyright law as we know it today³⁹ and a number of alternatives have been suggested. This thesis, however, concentrates on the existing copyright flexibilities that allow national lawmakers to

³⁸. O H Dean *Handbook of South African Copyright Law* (1987) at 1-3.

³⁹. G Cho *Geographic information science – mastering the legal issues* (2005) 118..

take account of specific domestic needs. Among these flexibilities, copyright exceptions and limitations are of crucial importance but it appears that they are often underutilised. This thesis, therefore, goes to great lengths to explain this tool that is vital for the balancing of the competing interests in the copyright arena.⁴⁰

It appears that for a variety of reasons, some of which are discussed in this thesis, public support for copyright protection is on the decline. On the other hand, most content industries – notably the music industry – have chosen to counteract the growing deficit in public acceptance with calls for even stronger protection regimes. In many cases, due to proficient lobbying, these calls have resulted in stricter copyright laws. However, history has shown that legislation which is not backed or complied with by substantial parts of the population is often not effective and becomes irrelevant.⁴¹ The collapse of the South African apartheid legislation which conflicted with the will of the majority is an example of this happening. This is not to say that copyright protection is unreasonable or unnecessary. On the contrary, this thesis presents a number of valid reasons for such protection. However, those who stand up for the interests of creators need to acknowledge that fundamental changes in our copyright laws and environments may be needed to win back the public support without which any copyright regime is eventually doomed to fail. These changes may include adjusting the direction of copyright law to focus on the multi-faceted interests of the actual creators and the users of the works rather than the financial interests of multinational conglomerates owning the rights.

⁴⁰. It should be noted that this thesis is not going to address the issue of blanket licence schemes. Blanket licence schemes have been negotiated between rights holders and many universities in developed countries and a growing number of universities in developing countries, eg the University of Cape Town in South Africa, to allow wholesale copying and downloading of books. However, such licence schemes – while being important for universities as a tool offering indemnity to them – are strictly speaking not a copyright law-internal balancing tool. Rather, the decision regarding the appropriate fee for wholesale copying ultimately depends on the extent to which copying in the university environment falls under existing copyright exceptions and limitations and is therefore, in any case, permission- and remuneration-free.

⁴¹. L van den Bosch ‘A burning question: Sati and sati temples as the focus of political interest’ (1990) 37 *Numen* 174 at 187; J Litman ‘Copyright noncompliance (or why we can’t “just say yes” to licensing)’ (1996/97) 29 *New York University Journal of International Law and Politics* 237.

In light of the purposes of this thesis, it is intended to present, towards the end of the thesis, various options from within the existing system to solve some of the most pressing problems and to restore a broad public consensus regarding copyright protection. While some of these options, especially those pertaining to copyright exceptions and limitations, are easy to implement, others would require more drastic changes on the national and international level. Not all of the measures which are to be proposed in this thesis need to be put into practice at the same time. However, at least some of the measures appear necessary to achieve a fair and broadly respected copyright regime.

3.

Apart from this introduction there are seven chapters in the thesis. Chapter 2 gives a brief overview of the main reasons for copyright protection and the history of copyright law. This provides a foundation upon which to build the examination that follows. Understanding the historic roots and the subsequent evolution of a particular area of law is important because a number of lessons can be learnt from past experiences, which can further the understanding of the law as well as its future development. The value of experience, however, should not be overstated since some of the current challenges for our copyright laws are truly unprecedented. With regard to the rationales of copyright, the thesis distinguishes between the utilitarian concept on the one hand and the natural law concept on the other. These two rationales represent very different approaches to copyright protection which, in turn, are the real cause of some of the most contentious copyright disputes at present. Thus, a thorough reflection on the varying philosophical underpinnings of copyright protection is more than a mere academic pastime.

Chapter 2 closes with a discussion of the often overlooked fact that the concept of copyright protection as such came from Western Europe. Consequently, copyright protection is often met with incomprehension or straightforward rejection in other regions of the world. This is especially likely if the concept of copyright protection in some areas openly conflicts with old traditions and beliefs. It seems that this may be one possible explanation for the high levels of illegal copying in certain regions of the world.

Chapter 3 deals with the international framework for copyright exceptions and limitations. It argues that copyright limitations and exceptions form the backbone of copyright law, in that such provisions make possible a fair and optimal balance between the often competing interests in the copyright arena. After some remarks about terminology as well as the formal and substantial categorisation of existing limitations and exceptions, the international framework in the area of copyright law is briefly summarised. The thesis asks to what extent the relevant international instruments such as the Berne Convention, TRIPS and the WCT address copyright exceptions and limitations. Copyright exceptions and limitations are often described as the panacea to avoid an overly restrictive copyright environment. It must not be forgotten, however, that most national legislators are bound by these international treaties and agreements. They are not free when it comes to the introduction of copyright exceptions and limitations into their own domestic laws.

It follows from the examination in chapter 3 that the so-called three-step test has - unnoticed by some - become a common international standard for copyright exceptions and limitations. As such, the test has an important harmonising effect in this area of law. Yet, the exact meaning and scope of the three-step test remain disputed. Chapter 4 therefore strives to shed some light on this issue by providing a sound and practical understanding of each of the three steps. This understanding is based on the interpretation given by a WTO Dispute

Resolution Panel in 2000. Chapter 4 also addresses some more general objections to the application of the test.

Chapter 5 complements the findings of the previous chapters by providing a comparative overview as to how the issue of exceptions and limitations is dealt with in selected jurisdictions: the EU (and in particular Germany and the UK), Australia, the United States and South Africa. It shows that, in essence, three main approaches can be distinguished – a “specific provisions” approach, a “general clause” or fair use approach and a so-called fair dealing approach. The “specific provisions” approach describes a legislative regime under which limitations and exceptions are phrased in as specific terms as possible. Most copyright laws in civil law countries contain usually a very well-defined and narrowly worded list of exceptions and limitations, whereas countries with a common law tradition (eg the UK, Australia and South Africa) often allow fair dealing with a protected work in the context of specific purposes. The “general clause” approach basically refers to the fair use doctrine which is most prominently found in the U.S. Copyright Act.

Chapter 6 addresses the conflict between developing countries as net importers of knowledge and other creative material and developed countries as net exporters of such material. It also examines selected international instruments in which the needs of developing countries were specifically recognised. In addition, chapter 6 briefly deals with one category of copyright exceptions and limitations that is of utmost importance for achieving developmental goals: copyright exceptions and limitations for educational purposes. Chapter 6 also looks at copyright flexibilities other than copyright exceptions and limitations that are available to legislators in developing countries under international copyright treaties and agreements to support, among other things, the developmental needs of their countries. Chapter 6 also addresses the controversial issue of parallel importation and closes with a discussion

regarding the protection of traditional knowledge by means of copyright law.

Chapter 7 complements chapter 6 by first addressing the so-called digital divide between developed countries and developing countries. It explains that, because digital technologies are less available in developing countries than in the developed world, a further widening of the knowledge gap between developing countries and developed countries is to be expected in the short term. Thereafter, chapter 7 aims to assess what has really changed in the digital age with regard to the subject-matter of copyright law. It does this to determine advantages and threats for both creators and users of creative works. On the basis of this assessment, chapter 7 specifically looks at the issue of piracy and addresses the conflict between technological protection measures and traditional copyright exceptions and limitations.

The final chapter of this thesis, chapter 8, first summarises the findings of this thesis. Chapter 8 then draws numerous conclusions from these findings and makes specific recommendations as to how a fair copyright balance can be achieved and maintained. These recommendations are attentive to the needs of developing countries. They pay special attention to existing copyright flexibilities such as copyright exceptions and limitations.

Chapter 2: Rationales and history of copyright law

'Copyright was not a product of the common law. It was a product of censorship, guild monopoly, trade-regulation statutes, and misunderstanding.'

Lyman Ray Patterson⁴²

A lot has been written about both the history of copyright law and its underlying rationales, and it is beyond the scope of this dissertation to explore these topics comprehensively.⁴³ However, a brief overview of the more important copyright rationales is necessary for a discussion of a fair copyright balance.

Reflecting on the varying philosophical underpinnings of copyright protection is far more than a mere academic pastime. For the different rationales lead to diverse approaches to copyright protection in general. It is the existence of different approaches that causes many of the most contentious copyright disputes at present and which makes a settlement of these disputes sometimes so difficult and complex. One's approach to copyright protection inevitably affects one's approach to copyright flexibilities, especially copyright exceptions and limitations, which are of particular importance for developing countries, as will be shown in this thesis.

Copyright protection is resented in many regions of the world and this may contribute to the high levels of piracy in some of these regions. There are two main reasons for the resentment. First, copyright protection regimes as well as membership of international copyright treaties or agreements were usually imposed upon developing countries by their former colonial powers. These protection regimes often did not

⁴² L Patterson *Copyright in historical perspective* (1968) 19.

⁴³ For more information on the history of copyright protection see especially the works of copyright historian Mark Rose; for instance: M Rose *Authors and owners: The invention of copyright law* (1993). See also L Patterson *supra* note 42.

reflect or take into account the interests and needs of developing countries. Second, in many regions copyright protection of creative works conflicts with old traditions and beliefs. Part 2.3 of this chapter examines the second reason while the first one will be discussed in chapter 6.

2.1 Brief history of copyright

In the ancient world and during most of the Middle Ages, copyright as a legal concept did not exist⁴⁴, even though a multiplicity of intellectual works of utmost importance was created during these times, and although a number of Roman legal instruments eventually became essential building blocks of modern copyright law.⁴⁵ The modern concept of copyright protection is relatively recent. We are only one year away from the tri-centenary of what is usually considered the world's first piece of copyright legislation: the UK's Statute of Anne of 1710.⁴⁶

One reason for the denial of any copyright protection was that the individual personality of the creator was generally considered irrelevant and often remained even unknown. It was commonly thought, either from a philosophical perspective or for religious reasons, that a creator does in effect not create but merely reveals something that has always existed, albeit possibly in a somewhat hidden way.⁴⁷ Consequently, the information had always belonged to the general

⁴⁴. See with regard to the Roman Empire: R VerSteeg 'The Roman Law roots of copyright' (2000) 59 *Maryland Law Review* 522 at 523; see also M van Schijndel and J Smiers *Imaging a world without copyright* (2005) essay, at 2, available at http://gerdleonhard.typepad.com/the_future_of_music/files/joost_smiers_imagine_a_world_without_copyright_feb_2005.pdf [accessed on 25 January 2009]).

⁴⁵. For instance, theories of intangible property, public property, the metaphysical components of property as a legal concept (types of copyrightable works), ownership (eg, joint authorship and work for hire), the sale of copyrights, and theft and/ or damage to property (infringement), see : R VerSteeg supra note 44 at 531 et seq.

⁴⁶. Full title: An Act for the Encouragement of Learning, by vesting the Copies of Printed Books in the Authors or purchasers of such Copies, during the Times therein mentioned.

⁴⁷. M Rehbinder *Urheberrecht* 14ed (2005) § 3 I.

public. In other words, what mattered was not who said it, but what was said.⁴⁸

Another reason for the lack of a broad legal protection against extensive unauthorised reproduction was that it was simply not necessary. Works were usually copied by hand in insignificant numbers. The cost of copying meant that any form of unauthorised reproduction was economically unattractive. Creators themselves hardly ever strived for financial reward through the sale of copies of their works since they were frequently funded by patrons, the government⁴⁹ or the church. Notwithstanding the lack of protection, poets in Greece increasingly started to specifically claim authorship for their works from around 600 B.C. onwards.⁵⁰ Furthermore, contractual relationships often existed between poets and those who bought their poems.⁵¹ A similar recognition of authors' rights over their work apparently existed in Rome.⁵² In addition, the unauthorised use of someone's intellectual work was condemned from a moral point of view⁵³ as the famous case of the Roman poet Martial (42 – 104 A.D.) shows. Martial referred to his epigrams as freed slaves and, consequently, called a certain Fidentinus, who passed Martial's poems off as his own, a trafficker in human beings – in Latin: *plagiarius*.⁵⁴

A dispute in sixth-century Ireland is often regarded as the world's first formal copyright dispute, although it remains doubtful whether the event really took place.⁵⁵ In this particular case, Finnian of Moville objected to the copying of one of his psalm books by his student Saint Columba. When the case eventually went before King Diarmid,

⁴⁸. D Mendis 'The historical development of exceptions to copyright and its application to copyright law in the twenty-first century' 2003 (vol 7.5) *Electronic Journal of Comparative Law*. Available at <http://www.ejcl.org/75/art75-8.html> [accessed on 25 January 2009].

⁴⁹. R VerSteege supra note 44 at 530-1.

⁵⁰. C May and S Sell *Intellectual property rights – a critical history* (2005) 46.

⁵¹. Ibid.

⁵². Ibid at 48.

⁵³. In the Middle Ages, however, this attitude changed and copying was considered socially necessary, see P Yu 'Of monks, medieval scribes and middlemen' 2006 *Michigan State Law Review* 1 at 25.

⁵⁴. Martial and P Howell *A Commentary on Book One of the Epigrams of Martial* (1980) I 29, 52.

⁵⁵. C May and S Sell supra note 50 at 49.

the king famously decided in Finnian's favour by ruling 'to every cow her calf, and accordingly to every book its copy'.⁵⁶

At the beginning of the modern times, the invention of the movable type by Johannes Gutenberg around 1440⁵⁷ enabled, for the first time in history, a relatively inexpensive reproduction of works.⁵⁸ As a result authors quickly realised the possibility of profiting from the sale of copies of their works⁵⁹ as well as the profit-diminishing effect of unauthorised reprinting. Prior to the invention of the printing press, copying of a work was a slow, tedious and costly process since no mechanical means for making multiple copies existed. As a matter of fact, it could take years to make a copy of a fine manuscript. Moreover, the actual work of copying was confined to a group of educated persons with the ability to read and write, such as monks. Thus, the difficulties of copying were a natural barrier to large scale copying.⁶⁰ The technical invention of Gutenberg spread rapidly all over Europe.⁶¹ It coincided with an increasingly individualistic orientation of the Renaissance era (1400 – 1530) as well as the decline of the Catholic Church as a centre of social and political life - especially after the Reformation⁶² in 1517.⁶³ These

⁵⁶. L Stearns 'Copy wrong: Plagiarism, process, property, and the law' (1992) 80 *California Law Review* 513 at 535.

⁵⁷. Gutenberg developed his printing press in Mainz, Germany. The forty-two-line Bible or Gutenberg Bible, published in 1455, is regarded the first substantial work printed and published by means of the new technology. The origin of the printing press is, however, not undisputed. Although Gutenberg clearly popularised mass printing and is therefore often regarded as the inventor of the printing press, the underlying principle of utilising moveable type arguably originated in China in the 11th century. It has been claimed that 70 years prior to the advent of Gutenberg's press, a book was printed using movable metal type in a Buddhist temple in Korea. Moreover, various claims for the invention of the printing press in other parts of Europe have been brought forward, eg by Laurens Janszoon Coster in the Netherlands and Panfilo Castaldi in Italy. (See Wikipedia entry "Printing Press", available at http://en.wikipedia.org/wiki/Printing_press [accessed on 25 January 2009])

⁵⁸. However, printing was very expensive in the early days and the price of a printed work could easily double or even triple the price of a manually copied work.

⁵⁹. B Matthews 'The Evolution of Copyright' (1890) 5 *Political Science Quarterly* 583 at 586; Broom and Haley noted in their Commentaries on the Laws of England in 1875 that the necessity for copyright protection 'was less, if at all, felt' before the invention and utilisation of the printing press (H Broom and E Hadley *Commentaries on the laws of England* (1875) 794).

⁶⁰. C Dallan 'The problem with congress and copyright law: Forgetting the past and ignoring the public interest' (2004) 44 *Santa Clara Law Review* 365 at 378.

⁶¹. Gutenberg's printing press technology arrived during the 1460s in Italy and France and made its way to the rest of Europe during the 1470s.

⁶². The invention of the printing press was one of the main factors facilitating the Reformation. When Martin Luther disclosed his 95 theses in 1517 in Wittenberg, Germany, the number of books printed

developments led to a strengthened social recognition of the need for copyright protection.⁶⁴ Therefore, it has been rightly noted that 'the invention of the printing press in the fifteenth century literally put in motion the machinery that precipitated copyright protection'.⁶⁵

At first, however, the basic principle of everybody's freedom to reprint the work of others remained unchanged. Legal protection was granted only by way of exceptional prohibitions to copy, so-called privileges. These special privileges were usually granted by government authorities as a reward for the loyalty of the beneficiary, to control the content of what was printed or to encourage the development of a publishing industry to the benefit of the public.⁶⁶ Principally, three different kinds of privileges could be distinguished, ie the privileges issued in order to protect the printer or publisher, the privileges awarded to protect certain works, and the privileges serving the protection of the creator.

Following the invention and the spread of Gutenberg's new printing technology, the Most Serene Republic of Venice, a city-state, became a capital of printing and book trade.⁶⁷ Consequently, the first known privilege was issued by the Senate of Venice in 1469 for a term of five years to the printer Johann von Speyer to print the letters of Cicero and Pliny.⁶⁸ In 1486, the first author privilege was also granted in Venice to Marcus Antonius Sabellicus for his work on the history of Venice.⁶⁹ Numerous European countries used the privilege system. In Germany, for example, the first privilege was issued in 1501.⁷⁰ France had its first

in Germany amounted to roughly 150; seven years later that number had risen to about 1,000. The majority of these books were written in favour of the Reformation (D Schwantitz *Bildung – Alles, was man wissen muss* (1999) 111).

⁶³. M Jackson *supra* note 24 at 613.

⁶⁴. Y Tian *Re-thinking intellectual property – the political economy of copyright protection in the digital era* (2009) 13.

⁶⁵. C Dallon *supra* note 60 at 366-7.

⁶⁶. *Ibid* at 391.

⁶⁷. C Yriarte *Venice: Its history - art - industries and modern life* (1896) 319.

⁶⁸. D Mendis *supra* note 48.

⁶⁹. M Reh binder *supra* note 47 at § 3 II 3.

⁷⁰. B Matthews *supra* note 59 at 589.

privilege granted in 1507⁷¹ and in England the first printing privilege was received in 1518 by a certain Pynson for a term of two years.⁷²

Arguably the first formal provision for the protection of copyright originates from the so-called Council of Ten in Venice. In 1544-5, the Council issued a decree according to which it was prohibited to print, or to offer for sale when printed, any work without the written permission from the author or his immediate heirs. The written consent had to be submitted to the Commissioners of the University of Padua.⁷³

The world's first fully-fledged parliamentary⁷⁴ copyright statute, however, entered into force in England in 1710 with the Statute of Anne. The Statute of Anne was introduced to establish the principles of authors' ownership of copyright as well as a fixed term of protection of copyright protected works – that is 14 years for all books subsequently published, renewable for fourteen more years if the author was still alive upon expiration of the first term.⁷⁵ As mentioned, England originally used a system of privileges.⁷⁶ However, the English monarch Queen Mary I granted in 1557 a near monopoly⁷⁷ on the entirety of English publishing to a guild called the Stationers' Company of London.⁷⁸ This led to a system of private contractual and arguably perpetual copyright.⁷⁹ It is noteworthy that bookbinders, printers as well as booksellers were members of the guild but not the actual authors of the works themselves. As a result, authors were not eligible to hold copyright. The stationers' copyright was therefore primarily a publishers' right. Yet, it is often overlooked that, usually, stationers did pay authors for their works

⁷¹. C Blagden *The Stationers' Company: A History, 1403-1959* (1960) 32.

⁷². R Bowker *Copyright: Its History and Its Laws* (1921) 19.

⁷³. P David 'Intellectual Property Institutions and the Panda's Thumb: Patents, Copyrights, and Trade Secrets in Economic Theory and History' in M B Wallerstein et al (eds) *Global dimensions of intellectual property rights in science and technology* (1993) 19 at 52.

⁷⁴. As opposed to royal decree.

⁷⁵. Already existing copyrights held by the stationers were extended for twenty-one years, see L Patterson supra note 42 at 143.

⁷⁶. Patterson however speaks of 'printing patents'; L Patterson supra note 42 at 5.

⁷⁷. Copying texts by hand remained an alternative to the stationers' monopoly in the printing sector.

⁷⁸. This was done in an attempt to prevent the spread of unwanted printed works, especially with regard to the Protestant Reformation.

⁷⁹. C Dallon supra note 60 at 389.

and obtained the author's permission before acquiring the stationers' copyright.⁸⁰

The stationers' monopoly was later reconfirmed by the Licensing Act of 1662⁸¹. Under this Act, company officials had, inter alia, the power to seize as well as destroy unauthorised books and printing presses⁸², and it was specifically prohibited for members of the company to publish without permission a work that another member of the Company had registered beforehand.⁸³ In 1694, the stationers' near monopoly ended with the expiration of various licensing acts⁸⁴ passed by Parliament after it had become obvious that the monopoly system had caused high book prices and a shortage in available books on the market.⁸⁵ In the following years, the stationers campaigned eagerly for a bill to protect copyright so as to reinforce their lost influence⁸⁶ but attempts to obtain new protective legislation failed in 1703 and in 1706.⁸⁷

The Statute of Anne, which was enacted on 10 April 1710, ultimately relocated copyright from the stationers to the authors⁸⁸ and stringently followed a public benefit objective as an 'Act for the Encouragement of Learning'.⁸⁹ In spite of benefitting authors of creative works, however, the Statute of Anne's legislative history suggests that its main purpose was initially to dynamically regulate the dysfunctional

⁸⁰. L Patterson supra note 42 at 69-70.

⁸¹. Full title: An Act for preventing Abuses in Printing Seditious, Treasonable and Unlicensed Books and Pamphlets, and for Regulating of Printing and Printing Presses (13 & 14 Car. II, c. 33).

⁸². L Patterson supra note 42 at 27.

⁸³. Section V of the Licensing Act of 1662.

⁸⁴. It was only for a few years during the English Civil Wars between 1642 and 1651 that books printed in England were not required to be licensed.

⁸⁵. G Davies supra note **Error! Bookmark not defined.** **Error! Reference source not found.** at 11.

⁸⁶. C Seville *Literary copyright reform in early Victorian England* (1999) 9.

⁸⁷. A Yen 'Restoring the natural law: Copyright as labor and possession' (1990) 51 *Ohio State Law Journal* 517 at 525.

⁸⁸. B Z Khan 'Intellectual property and economic development: lessons from American and European history' (2002) *study paper for the UK Commission on Intellectual Property Rights*, available at http://www.iprcommission.org/graphic/documents/study_papers/spa1a_khan_study.pdf [accessed on 25 January 2009] at 33-4.

⁸⁹. The Statute of Anne is, however, often described as a late success for the stationers as authors were typically forced to assign their copyrights to the stationers in order to get their works published. See A Yen supra note 87 at 526.

book trade at the time⁹⁰ and preventing future monopolies of the booksellers.⁹¹ Having said this, English booksellers argued for a long time after the inception of the Statute of Anne that copyright was a common law property⁹² and therefore unlimited and perpetual.

Two English landmark court cases during the 18th century are noteworthy in this context as they were of pivotal importance for the development and interpretation of copyright law: *Millar v Taylor*⁹³ in 1769 and *Donaldson v Beckett*⁹⁴ in 1774. Despite the passage of the Statute of Anne, the stationers' monopoly had remained strong in those years due to their simple argument that authors still had a perpetual common law copyright based on their natural right as authors.⁹⁵ In *Millar v Taylor*, Robert Taylor had begun to publish James Thomson's poem 'The Seasons' after the copyright term for the poem granted under the Statute of Anne had expired. Andrew Millar, who had purchased the publishing rights to the poem in 1729, sued Robert Taylor arguing that the author of a book still had a copyright at common law and that such right was not taken away by the Statute of Anne. In a three-to-one decision, the majority of Court of King's Bench – led by Lord Mansfield – essentially held that after the expiration of the statutory copyright, the rights holder was still left with the common law rights to the work. Millar won the case and copyright protection was, once again, declared perpetual.

In his dissenting opinion, Justice Yates referred vividly to the potentially detrimental effects of the ruling for the public, and it took only five years before the precedent of *Millar v Taylor* was overruled by the British House of Lords in the case *Donaldson v Beckett*. This case was also concerned with the reprint of James Thomson's poem 'The

⁹⁰. R Deazley *Rethinking copyright: history, theory, language* (2006) 13.

⁹¹. L Patterson supra note 42 at 143; R Deazley *On the origin of the right to copy: charting the movement of copyright law in eighteenth-century Britain (1695-1775)* (2004) xix..

⁹². R Deazley supra note 90 at 14.

⁹³. (1769) 4 Burr 2303.

⁹⁴. (1774) 4 Burr 2408.

⁹⁵. L Patterson supra note 42 at 158.

Seasons'. Thomas Beckett was one of fifteen partners who had purchased the copies of several poems after Andrew Millar's death. When Alexander Donaldson published an unauthorised edition of Thomson's work in the early 1770s, Beckett relied on the *Millar* decision and received an injunction against Donaldson. Donaldson, however, appealed to the House of Lords which ultimately rejected the existence of a perpetual common law copyright and established an exclusive time-limited statutory copyright instead.⁹⁶ It has been argued that it was only then, when '[c]opyright had ceased to be a publisher's right and had become an author's right.'⁹⁷

The United States of America introduced its first national Copyright Act in 1790⁹⁸ after all U.S. states⁹⁹, except Delaware, had already introduced their own copyright legislation.¹⁰⁰ In addition, the so-called copyright clause had been introduced into the U.S. Constitution in 1787, which to this day empowers the United States Congress 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'.¹⁰¹ The U.S. Copyright Act of 1790 was clearly modelled after the Statute of Anne.

It was a court case similar to the aforementioned English case *Donaldson v Beckett* that further shaped the understanding of copyright law in the young United States: *Wheaton v Peters*¹⁰², decided in 1834. In this case, Henry Wheaton, a former reporter for the United States Supreme Court, sued his successor Richard Peters for copyright infringement after Peters had started to publish his 'Condensed Reports

⁹⁶. C May and S Sell supra note 50 at 95.

⁹⁷. L Patterson supra note 42 at 179.

⁹⁸. Prior to the national Copyright Act, English law had governed U.S. copyright law until the Federal states started to enact their own copyright laws. Twelve of the then thirteen states passed copyright statutes between 1783 and 1786, see L Patterson 'Copyright and the exclusive right of authors' (1993) 1 *Journal of Intellectual Property Law* 1 at 15.

⁹⁹. Viz Connecticut, Georgia, Maryland, Massachusetts, New Hampshire, New Jersey, New York, North Carolina, Pennsylvania, South Carolina, Virginia, Rhode Island.

¹⁰⁰. The state acts are reproduced in M Nimmer and D Nimmer *Nimmer on copyright* vol 8 (1997) app. 7-1 – 7-40.

¹⁰¹. Article I, Section 8, Clause 8 of the United States Constitution.

¹⁰². 33 US 591 (1834).

of Cases in the Supreme Court of the United States'. Peters' work contained, inter alia, a shortened version of Wheaton's published reports. After Wheaton had lost in the Circuit Court in Pennsylvania¹⁰³, he appealed to the Supreme Court. In essence, the Supreme Court had to decide on two issues, namely the question whether an author does have a common law copyright in his work after publication and, secondly, whether an author has to strictly comply with the requirements of the Copyright Act in order to gain copyright protection.¹⁰⁴ The first question is of interest here. For the majority, Associate Justice McLean declared that 'Congress, then, by this [Copyright] act, instead of sanctioning an existing right, as contended for, created it'¹⁰⁵ and, thus, rejected the existence of a common law copyright.

The French copyright decrees of 1791 and 1793 were arguably¹⁰⁶ the first Continental European pieces of legislation dealing with copyright protection¹⁰⁷. These two laws emerged after the previous system of printing monopolies had ended with the beginning of the French Revolution and recognised a *propriété littéraire et artistique* – a literary and artistic property.¹⁰⁸ The first copyright laws on German territory were introduced on 11 June 1837 in Prussia¹⁰⁹, and a federal copyright protection was introduced only after the foundation of the German Empire in 1871.¹¹⁰ The philosophical differences between the Continental European and Anglo-American approaches to copyright protection are discussed in the following subchapter.

¹⁰³. *Wheaton v Peters*, 29 Fed. Cas. 862 (1832).

¹⁰⁴. L Patterson supra note 42 at 208.

¹⁰⁵. *Wheaton v Peters*, 33 US 591 (1834) at 660-1.

¹⁰⁶. It could be argued, however, that Denmark's Ordinance of 1741 was the first Continental European legislation as it recognised, among other things, a general statutory right for authors.

¹⁰⁷. For an overview of the subsequent development of copyright in the aforementioned countries see G Davies supra note **Error! Bookmark not defined.** at 28 – 177.

¹⁰⁸. P Goldstein supra note 32 at 8.

¹⁰⁹. Gesetz zum Schutze des Eigenthums an Werken der Wissenschaft und Kunst in Nachdruck und Nachbildung [Law to protect ownership in scientific and artistic works against reproduction and copying].

¹¹⁰. Based on the 1870 Gesetz betreffend das Urheberrecht an Schriftwerken, Abbildungen, musikalischen Kompositionen und dramatischen Werken [Law governing copyright in literary works, illustrations, musical compositions and dramatic works] of the Northern German Federation.

It is noteworthy that statutory copyright exceptions and limitations were virtually non-existent in the earliest pieces of copyright legislation. In the UK, for instance, it was only in 1911 that such provisions were first introduced.¹¹¹ One reason for the lack of statutory copyright exceptions and limitations in earlier copyright legislation appears to be that the relatively short protection term and the narrow scope of copyright protection made the promotion of user interests by means of statutory limitations and exceptions less imperative.

Like in most African countries, the South African history of copyright law is intimately connected with the country's colonial past. Copyright protection in the territory of the present-day Republic of South Africa was first introduced in 1803 in the Cape of Good Hope colony by way of a variant of Roman-Dutch common-law copyright which in fact was based upon the Batavian Republic's Copyright Act of the same year. The Batavian Republic was a legal predecessor of the present-day The Netherlands, and the Cape of Good Hope was a colony of the Batavian Republic between 1803 and 1806. In the following years, this copyright law also became part of the law in three other colonies in the region: the Orange Free State, the Transvaal and Natal.¹¹² Later, these colonies – with the exception of the Orange Free State – adopted their own Provincial Copyright Acts.¹¹³

In 1910, the Union of South Africa came into being and the four colonies became the founding provinces of the Union.¹¹⁴ In 1916, Parliament passed the Patents, Designs, Trade Marks and Copyright Act.¹¹⁵ This Act repealed the previous Provincial Copyright Acts.

¹¹¹. G Davies supra note **Error! Bookmark not defined.****Error! Reference source not found.** at 56.

¹¹². O H Dean supra note 38 at 1-3.

¹¹³. The most important pieces of legislation were: Cape of Good Hope: The Copyright Act (Act No. 2 of 1873); Natal: The Copyright Act (Act No. 17 of 1897); Transvaal: Copyright Law (Law No. 2 of 1887).

¹¹⁴. Until 1931, the Union of South Africa was a self-governing dominion of the British Empire and then became a Commonwealth realm.

¹¹⁵. Act No. 9 of 1916.

Section 143 of this Act declared – subject to certain variations¹¹⁶ – the British Copyright Act of 1911 to be in force in the Union of South Africa.

In 1965, four years after the Republic of South Africa came into existence, the 1916 Patents, Designs, Trade Marks and Copyright Act was repealed by the Copyright Act 63 of 1965.¹¹⁷ Despite being a formally independent piece of legislation, the 1965 Copyright Act resembled British copyright law. It took over substantial provisions of the newly introduced 1956 British Copyright Act.

The current Copyright Act of 1978 was the first really independent South African piece of copyright legislation. It came into force on 1 January 1979.¹¹⁸

On the international level the Berne Convention for the Protection of Literary and Artistic Works of 1886 (Berne Convention) and the International Copyright Treaty of 1891 marked the first multilateral copyright treaties. Prior to the ratification of these treaties, states had entered into numerous (and often contradictory) bilateral treaties to meet the requirements of the increasing international trade in copyright protected goods at this time. The international dimension of copyright law is discussed in detail in chapters 3 and 4 of this thesis.

2.2. Copyright rationales

Since the inception of intellectual property rights protection, a wide range of legal theories has been invoked to justify the existence of intellectual property rights in general and copyright protection in particular. Some commentators have discovered up to seven rationales behind the adoption of copyright laws, ie the “personal right argument”, the “just reward argument”, the “economic argument”, the “social

¹¹⁶. For instance, the 1916 Patents, Designs, Trade Marks and Copyright Act contained a noteworthy additional copyright exception in favour of licensed broadcasters.

¹¹⁷. Act No. 63 of 1965.

¹¹⁸. With the exception of ss 1, 39 and 40, which came into operation upon promulgation in the *Gazette* (30 June 1978), and s 45 which ‘shall come into operation on a date fixed by the State President by proclamation in the *Gazette*’ (see s 47 of the Act).

argument”, the “cultural argument”, the “freedom of expression argument” and the “pragmatic argument”.¹¹⁹ None of these theories has undisputedly prevailed.¹²⁰ Yet, two competing approaches concerning the foundations and objectives of a copyright system are predominant and therefore merit a closer examination. These approaches are (1) the utilitarian conception and (2) the notion of natural law.¹²¹

2.2.1. The utilitarian concept

According to the utilitarian rationale¹²², protection for a creator against unauthorised copying for a limited period of time provides a monetary incentive that is necessary to encourage, in the interest of society, the creation and dissemination of the widest possible variety of new works to the public.¹²³ The utilitarian concept therefore includes public benefit considerations.¹²⁴ Such public benefit considerations can be traced back to Roman law (*pro bono publico*), and it was Roman statesman and lawyer Cicero who said that ‘[t]he good of the people is the chief law’ (*salus populi, suprema lex*).¹²⁵ It has been argued that in the absence of copyright protection, the market price for a book would eventually equal the mere copying costs resulting in the book not being created in the first place due to the lack of a financial incentive for the creator.¹²⁶ The economic reasoning within the utilitarian concept is evident¹²⁷ and lawmakers are entrusted with the difficult task to counteract the

¹¹⁹. F W Grosheide *Auteursrecht op maat* (1986) 128.

¹²⁰. C Ann ‘Die idealistische Wurzel des Schutzes geistiger Leistungen’ 2004 GRUR Int 597 at 598.

¹²¹. It has to be pointed out, however, that even within each group of nations sharing the same rationale, significant differences exist between their copyright laws (M Jackson supra note 24 at 611).

¹²². Also referred to as “rhetoric of incentives” or “stimulus for creativity”.

¹²³. J Cohen et al *Copyright in a global information economy* (2006) at 7; L Guibault supra note 19 at 10; P Goldstein supra note 32 at 3.

¹²⁴. V Mayer-Schönberger ‘In search of the Story’ in N Stehr and B Weiler *Who owns knowledge?: Knowledge and the law* (2008) at 238; von der Dunk, F ‘Intellectual property rights as a policy tool for Earth observation data in Europe’ in R Harris *Earth observation data policy in Europe* (2002) at 52. W W Fisher III ‘Theories of Intellectual Property’ in S R Munzer (ed) *New essays in the legal and political theory of property* (2000) 168 at 169.

¹²⁵. M T Cicero et al *De legibus libri tres* (1973) at 386.

¹²⁶. W Landes and R Posner *The economic structure of intellectual property law* (2003) 11.

¹²⁷. Increasingly, contemporary neo-economic arguments are qualified as a stand-alone theory; see L Guibault supra note 19 at 12 et seq.

potentially hampering effect of the limited monopolies awarded to creators by striking an optimal balance between the rights of creators and the interests of the public, eg by means of limitations and exceptions or by adjusting the term of copyright protection.

The Statute of Anne contained utilitarian considerations and became a model for countries following the common law tradition.¹²⁸ To date, the utilitarian justification is strongly linked to common law copyright systems. U.S. jurisprudence, in particular, provides materials elucidating the underlying principle. The language of the U.S. Constitution's Copyright Clause¹²⁹, for example, is clearly based on utilitarian considerations. The U.S. House Report on the 1909 Copyright Act declared that

[t]he enactment of copyright legislation by Congress under the terms of the Constitution is not based upon any natural right that the author has in his writings [...] but upon the ground that the welfare of the public will be served [...] Not primarily for the benefit of the author, but primarily for the benefit of the public, such rights are given.¹³⁰

In addition, the U.S. Supreme Court has repeatedly underlined the utilitarian character of the copyright legislation.¹³¹ For instance, the court held in *Sony Corp. v Universal City Studios, Inc.*¹³² that copyright's monopoly privileges 'are neither unlimited nor primarily designed to provide a special private benefit. Rather, the limited grant is a means by which an important public purpose may be achieved. It is intended to

¹²⁸. J Tehranian 'Et tu, fair use? The triumph of natural-law copyright' (2005) 38 *UC Davis Law Review* 465 at 468; M Jackson *supra* note 24 at 613, M Senfleben *Copyright, limitations and the three-step test – An analysis of the three-step test in international and EC copyright law* (2004) 8; L Zemer *The idea of authorship in copyright* (2007) 9 (FN36).

¹²⁹. Art. I, Section 8, Clause 8 of the U.S. Constitution.

¹³⁰. H.R. Rep. no. 60-2222 (1909) at 7.

¹³¹. See, for example, *United States v Paramount Pictures, Inc.*, 334 US 131, 158 (1948); *Twentieth Century Music Corp. v Aiken*, 422 US 151, 156 (1975); *Harper & Row Publishers, Inc. v Nation Enterprises*, 471 US 539, 558 (1985).

¹³². 464 US 417 (1984).

motivate the creative activity of authors and inventors by the provision of a special reward'.¹³³

2.2.2. The natural law concept

The moral-based natural law concept¹³⁴ is based on the belief that authors should – naturally and not only created by law¹³⁵ – have an inherent ownership right in their works and should be entitled to reap the fruits of their creations as a matter of right and justice.¹³⁶ The natural law concept of copyright recognises moral and economic interests of the author with little regard to incentives or public benefits.¹³⁷

It was the English philosopher John Locke (1632-1704) who laid the groundwork for this author-centred legal theory¹³⁸ by claiming in his *Second Treatise of Government* in 1690 that persons have a natural right of property in their bodies and, consequently, in their labour as well as the fruits of that labour.¹³⁹ It should be noted, however, that Locke had physical property in mind when formulating his labour-based argument.

¹³³. 464 US 417 429 (1984).

¹³⁴. Also referred to as “inherent entitlement”; for an overview see also A Yen supra note 87 at 517 et seq.

¹³⁵. B Hugenholtz ‘Copyright and freedom of expression in Europe’ in R Cooper Dreyfuss et al (eds) *Innovation Policy in an Information Age* (2000) 343 at 344.

¹³⁶. P Goldstein supra note 32 at 3-4.

¹³⁷. C Dallon supra note 60 at 368; L Guibault supra note 19 at 9.

¹³⁸. A C Yen ‘The interdisciplinary future of copyright theory’ in M Woodmansee and P Jaszi *The construction of authorship: textual appropriation in law and literature* (eds) (1994) at 161-2; J Tehranian supra note 128 at 468.

¹³⁹. See J Locke *Second Treatise on Government* (1690) Chapter 5, sec. 27:

‘Whatsoever then he removes out of the State that Nature hath provided, and left it in, he hath mixed his Labour with, and joined to it something that is his own, and thereby makes it his Property. It being by him removed from the common state Nature placed it in, it hath by his Labour something annexed to it, that excludes the common right of other Men. For this Labour being the unquestionable Property of the Labourer, no Man but he can have a right to what that is once joined to, at least where there is enough, and as good left in common for others’.

A similar reasoning already formed the basis of the Roman law of *specificatio*, according to which someone acquired a new thing by making it of materials belonging to another. This Roman law of *specificatio* arguably also influenced lawmakers in continental Europe in their opinion on copyright protection. For more information on the Roman law of *specificatio* see W W Buckland *A text-book of Roman law – from Augustus to Justinian* (1963) 215-8.

The natural law concept visibly reflects the typical reinforcement of the element of individuality during the era of Enlightenment which resulted in more value being attached to the individual creativity of the author.¹⁴⁰ The natural law concept became the primary ideological justification for Continental European civil law copyright systems, most prominently for the French droit d'auteur and the German Urheberrecht legislation.¹⁴¹ However, it is noteworthy that nowadays it is not Locke's labour-based model alone that provides the theoretical underpinning for the author-centred natural law concept. Other philosophical models have been evolved; most notably German philosopher Hegel's personality-based model, claiming that intellectual property is in the first place a means for self-realisation and, more general, crucial to the satisfaction of some fundamental human needs.¹⁴²

Closely related to the creator-orientated natural law concept is the so-called just reward theory. This theory is founded on the belief that it is fair to reward creators for their intellectual effort and for sharing the result of this effort with the public.¹⁴³ Recalling Locke's assertion that persons have a natural right of property in their bodies and, consequently, in their labour *as well as the fruits of that labour*, it is obvious that the just reward theory descends from Locke's natural law argument.

2.2.3. Concluding remarks

Both the utilitarian concept and the natural law rationale have dogmatic as well as practical deficiencies that one should be aware of.

Any theory arguing for and justifying a property-like protection regime for intangible intellectual goods is from the outset problematic as

¹⁴⁰. J Hofman *Introducing copyright – a plain language guide to copyright* (forthcoming 2009) at 13 (draft version, in possession of the author).

¹⁴¹. F Macmillan *New directions in copyright law* vol 1 (2005) at 74.

¹⁴². G F W Hegel 'Philosophie des Rechts' (1820), reproduced in E Moldenhauer (ed) *Werke 7* (*G.W.F. Hegel - Grundlinien der Philosophie des Rechts*) (2000).

¹⁴³. L Bently and B Sherman *Intellectual Property Law* 2ed (2004) 33.

such an argument bears the risk of ignoring substantial differences between tangible and intangible goods. A closer look reveals that intellectual goods do not possess the same characteristics which give reason for tangible property protection.¹⁴⁴ More specifically, the terms “non-exclusivity” and “non-excludability” can be used to describe the most important characteristics of intangible intellectual goods in comparison with physical property which may necessitate differing treatment of tangible property and intangible intellectual goods.¹⁴⁵ Both elements are distinct aspects of public goods¹⁴⁶ and essentially mean that one person’s use and possession is not diminishing another’s possession and use (“non-exclusivity”), and that the prevention of someone else’s use is very difficult (“non-excludability”). The element of “non-exclusivity” is often referred to as “non-rivalry”¹⁴⁷, as opposed to mostly rivalrous physical property.

The aforesaid objections especially apply to the utilisation of Locke’s natural rights concept to intangible goods. As mentioned, Locke had physical property in mind when formulating his labour-based argument. In particular, Locke linked the desire for a propertisation of the commons in the physical world with the need to preserve resources which, he claimed, was best served if property is privately owned. If left in the commons, the utility of the resource would gradually diminish due to either over-use or neglect. However, one of the distinct characteristics of information is its non-rivalousness, which means that the use of specific information does not impair the utility of the information for someone else. Therefore, the threat of diminishment does not exist for intangible intellectual goods.¹⁴⁸

¹⁴⁴. L Liang et al *Copyright/Copyleft: Myths About Copyright* (2005). Available at <http://www.countercurrents.org/hr-suresh010205.htm> [accessed on 25 January 2009].

¹⁴⁵. M Jackson supra note 24 at 614.

¹⁴⁶. D R Henderson (ed) *The Concise Encyclopedia of Economics* (2007) 431.

¹⁴⁷. See, for example, A Gowers *Review of intellectual property rights* (2006) para 1.2, available at http://www.hm-treasury.gov.uk/d/pbr06_gowers_report_755.pdf [accessed on 25 January 2009].

¹⁴⁸. L Liang supra note 144.

In addition, it has been claimed that Locke's natural law approach has become a rather unrealistic one due to the fact that the initiative as well as the financial backing for the creation of works increasingly originate from legal persons.¹⁴⁹ Furthermore, and especially in the context of digitising and the Internet, works are often created by a vast number of contributors so that the individual part of each author can hardly be identified.¹⁵⁰

Some commentators have also questioned the extent to which, in these days, a creation materialises its creator's personality. If, in the majority of cases, the creator's personality is not transferred to the copyright protected work – especially because it is, after all, the consumers' tastes which determine a product's commercial success –, the natural law rationale is deprived of one of its key arguments.¹⁵¹

Finally, some commentators have pointed out that in other areas of law property rights are ordinarily neither created nor modified solely on the basis of labour expended.¹⁵²

The main criticism regarding the utilitarian justification of copyright protection is that this rationale overemphasises the causal connection between monetary incentives and the awarding of property-like protection for creative works on the one hand and creative productivity on the other. While monetary incentives are doubtlessly important for some creators, various other reasons for the creation of works are easily imaginable (such as the yearning for academic recognition or merely for personal pleasure). Moreover, the actual creator of a work is nowadays often not identical with the (legal) person holding the copyright in that specific work. Thus, the creator may not profit financially in as direct a manner as suggested.

¹⁴⁹. EU Commission *Copyright and Related Rights in the Information Society* (1995) Green Paper (document Com(95) 382 final), at 25, available at http://aei.pitt.edu/1211/01/copyright_info_society_gp_COM_95_382.pdf [accessed on 25 January 2009].

¹⁵⁰. M Senftleben *supra* note 128 at 18.

¹⁵¹. *Ibid* at 19.

¹⁵². S Breyer 'The uneasy case for copyright' (1970) 84 *Harvard Law Review* 281 at 289.

Moreover, the incentive-based utilitarian justification for copyright protection understates other market-related factors that may benefit creators of creative works in the absence of copyright protection. In particular, being the first on the market appears to be a decisive competitive advantage that should not be underestimated. Surely enough, however, the absence of copyright protection would increase the amount of unauthorised copying. Yet, even in nineteenth-century America, where anybody was free to reproduce foreign publications¹⁵³, some American publishers paid foreign authors for their works in order to gain the significant advantage towards competitors of being the first on the market.¹⁵⁴ Thus, it appears that in the absence of copyright protection creators would be able to secure a good price for their product, provided a market exists for it.¹⁵⁵

Another argument put forward against the utilitarian approach is that abolishing copyright protection could eventually serve the public interest better by inducing competition and consequently leading to lower prices and wider distribution.¹⁵⁶

Lastly, it should not be overlooked that the utilitarian argument not only provides a justification for copyright protection. Conversely, it can also be invoked as the basis for justifying, for instance, broader copyright exceptions and limitations by arguing that the consequences of such action are, after all, useful. This is because the general doctrine of utilitarianism essentially states that the determining consideration for right conduct should be the usefulness of its consequences.¹⁵⁷ Utilitarianism as such is therefore a useful starting point for determining a fair copyright balance rather than just forming the philosophical underpinning for copyright protection.

¹⁵³. B Z Khan *The democratization of invention: patents and copyrights in American economic development, 1790-1920* (2005) 258.

¹⁵⁴. A Plant 'The Economic Aspects of Copyright in Books' in A Plant *Selected Economic Essays and Addresses* (1974) 57 at 62.

¹⁵⁵. G Davies *supra* note **Error! Bookmark not defined.** at 249.

¹⁵⁶. *Ibid* at 250.

¹⁵⁷ Website of The Merriam-Webster Dictionary, <http://www.merriam-webster.com>, "utilitarianism" [accessed on 25 January 2009].

This thesis is not the place to solve the disputes regarding the cogency of the predominant rationales for copyright protection. Rather, it is intended here to stress that there is no unobjectionable and absolute philosophical or other justification for copyright protection. This is not a general criticism against copyright protection as such. However, the absence of a clear justification for copyright protection calls for more critical scrutiny and due consideration of the real circumstances in a country before that country adopts new and more stringent copyright laws or agrees to new or more stringent copyright treaties. Yet it appears that supporters of strict copyright regimes, mainly in developed countries, often avoid a true and meaningful discussion and simply refer to the aforementioned rationales. Ultimately, copyright theories may provide useful vocabulary, but they are at the same time indeterminate in respect of their specific implications.

National copyright laws are primarily based on either utilitarian or natural right principles. However, elements of both rationales are often present. The copyright rationales are cumulative, amorphous and interdependent¹⁵⁸ It has therefore been noticed correctly that the two law traditions differ 'more in emphasis than in outcome'¹⁵⁹ although the natural law approach essentially aims to achieve the highest protection possible while the utilitarian approach aims towards the lowest protection necessary. Other scholars have pointed out that the differences between the predominately utilitarian orientated U.S. and the natural law based French copyright systems are neither as extensive nor as venerable as typically described.¹⁶⁰

German copyright law, as an example, illustrates the interplay between the principles. It has been mentioned before that German Copyright law in general adheres to the natural right rationale. The German constitution (Grundgesetz (GG), Basic Law) protects in its

¹⁵⁸ Ibid. at 17.

¹⁵⁹ P Goldstein supra note 32 at 10; see also W Cornish 'Sound recordings and copyright' (1993) 24 *International Review of Intellectual Property and Competition Law* 306 at 307.

¹⁶⁰ J Ginsburg 'A tale of two copyrights: Literary property in revolutionary France and America' (1990) 64 *Tulane Law Review* 991 at 994.

Article 14(1) private property, including the economic rights granted under the German Copyright Act.¹⁶¹ However, Article 14(2) GG contains the so-called 'Grundsatz der Sozialbindung', a principle according to which property in the meaning of Article 14(1) GG entails obligations and must also serve the public good. The latter clause stipulates clearly and precisely that utilitarian purposes have to be taken into account.

On the other hand, U.S. copyright law is based on utilitarian principles, but at the same time it arguably rests in part on natural law considerations. This proposition might surprise since it seems to contradict the above-cited sole utilitarian wording of the U.S. Constitution's Copyright Clause. Yet, natural law and natural law-related considerations can be found in various Supreme Court decisions¹⁶², including *Wheaton v Peters*¹⁶³ and *Mazer v Stein*¹⁶⁴. In this respect, the following observation by Tehranian is of interest:

The [fair use] factors enumerated by Justice Story [in *Folsom v. Marsh*], and later codified in the Copyright Act, were grounded in a natural-rights vision of copyright, focusing on what was borrowed from the original work and on Lockean protection of the original work's value, not on the use made through the act of borrowing.

Thus, the paramount purpose of an infringement action became the preservation of the commercial value of an author's intellectual property, not the balancing of a fair return on creative works with the public's right to make transformative uses of such works in order to advance progress in the arts. [...] In fact, instead of limiting the scope of the copyright monopoly, the fair use test expanded the property rights of copyright holders, thereby frustrating copyright's utilitarian goals.¹⁶⁵

A major impact for the approximation of philosophically differently rooted national laws can be attributed to the harmonising effect of the relevant intellectual property treaties and agreements, ie the Berne Convention, the TRIPS Agreement, and the WIPO Copyright

¹⁶¹. Moral rights are in general protected under Art 2 of the German Constitution.

¹⁶². See also J Garon 'Normative copyright: A conceptual framework for copyright philosophy and ethics' (2003) 88 *Cornell Law Review* 1278 at 1299.

¹⁶³. 33 US 591 (1834).

¹⁶⁴. 347 US 201, 219 (1954).

¹⁶⁵. J Tehranian supra note 128 at 484-5.

Treaty. While the Berne Convention primarily embraced natural law considerations¹⁶⁶, TRIPS emphasised the utilitarian approach.¹⁶⁷ The WIPO Copyright Treaty eventually combined both concepts by '[d]esiring to develop and maintain the protection of the rights of authors in their literary and artistic works' and, at the same time, '[e]mphasizing the outstanding significance of copyright protection as an incentive for literary and artistic creation'.¹⁶⁸ Therefore states are today inevitably obliged to account for both concepts in their national copyright laws if they are member states to more than one of those treaties (or to the WIPO Copyright Treaty alone).

2.3. Copyright as a Western concept

Before moving on to the next chapter, it is important to point out that the roots of our modern concept of copyright protection are euro-central – copyright is a product of Western culture.¹⁶⁹ It was mainly by way of colonisation that this concept started to spread out into other regions of the world. In recent years, however, copyright protection has spread even further since such protection was often made a condition for participating in world trade by means of bilateral or multilateral trade agreements.¹⁷⁰ Hence, it was economic might rather than a common belief in the underlying principles that made the Western concept of copyright a universal one.

It was highlighted above that the notion of individualism as well as economic-driven considerations during the 18th and 19th century played a determinative role for the development of copyright protection in Europe and, later, in the United States of America. However, neither the notion of individualism nor economic considerations have the same importance in all cultures as they have in the Western world.

¹⁶⁶. M Senftleben supra note 128 at 17.

¹⁶⁷. Ibid.

¹⁶⁸. Preamble of the WIPO Copyright Treaty of 1996.

¹⁶⁹. F W Grosheide supra note 119 at 312-3.

¹⁷⁰. M Jackson supra note 24 at 612.

This explains that the concept of copyright protection, especially when it conflicts with old traditions and beliefs in these regions, remains somewhat alien and incomprehensible to the people in many regions of the world.¹⁷¹ This fact is often overlooked as a possible contributing factor for high occurrences of copyright infringement in certain regions of the world.

The situation in China illustrates this assertion. China has introduced a number of intellectual property laws and regulations since the mid-1990s¹⁷²; mainly as a result of heightened political and economic pressure from the U.S.¹⁷³ These legislative efforts notwithstanding, piracy remains rampant. It is commonly accepted that lax enforcement of intellectual property rights is to blame.¹⁷⁴ This argument is, however, one-sided and does not sufficiently explain why in other regions of the world with less protection and even weaker enforcement mechanisms, unauthorised copying is not as prevalent. It appears that the point is the apparent incompatibility of copyright protection with fundamental cultural norms in China, ie Confucian beliefs. The Confucian doctrine puts emphasis on the importance of sharing of intellectual products with other members of society. The individual is regarded subservient to the community and it is expected from the individual to freely share any inventions and creations.¹⁷⁵

On this basis, some scholars have argued that the copying of such creations is not condemnable but rather a high form of flattery for a

¹⁷¹. For a more comprehensive overview on this topic see *Copy/South Issues in the economics, politics, and ideology of copyright in the global South* (2006) dossier, at 56-65, available at <http://www.kent.ac.uk/law/copysouth/en/documents/csdsossier.pdf> [accessed on 25 January 2009].

¹⁷². Moreover, China became a member of WIPO in 1980, acceded to the Berne Convention for the Protection of Literary and Artistic Works in 1992, and ratified the Geneva Convention for the Protection of Producers of Phonograms Against Unauthorized Duplication of Their Phonograms in 1993.

¹⁷³. Alford even observed that the problem in China is not so much a lack of intellectual property laws, but the existence of too many (W Alford 'How theory does - and does not - matter: American approaches to intellectual property law in East Asia' (1994) 13 *UCLA Pacific Basin Law Journal* 8 at 21).

¹⁷⁴. W Shi 'Cultural perplexity in intellectual property: Is stealing a book an elegant offense?' (2006) 32 *North Carolina Journal of International Law & Commercial Regulation* 1 at 44.

¹⁷⁵. A Wineburg 'Jurisprudence in Asia: Enforcing Intellectual Property Rights' (1997) 5 *University of Baltimore Intellectual Property Law Journal* 25.

creator in these cultures.¹⁷⁶ Others pointed out that the past is highly valued in Chinese culture and that the Chinese thus expect unhindered access to all knowledge of the past.¹⁷⁷ Consequently, stealing a book has repeatedly been described as an 'elegant offence' in China.¹⁷⁸ Similarly, it has been observed that copyright protection 'goes firmly against the grain of Asian culture, which supports the concept of sharing, not protecting, individual creative work'.¹⁷⁹

Confucianism and other Chinese traditional values are, however, surely not the main reason for widespread copyright infringement and lack of enforcement in China.¹⁸⁰ In fact, newer writings by some Chinese scholars suggest that Chinese traditional values contain elements of copyright protection and that therefore China's piracy problem should not be ascribed to the country's traditional values.¹⁸¹

As a compromise, it is thus suggested here that a multitude of reasons - which are to some extent interdependent - must be considered. Some of these reasons are the stage of economic development a country has reached and the existence of a socialist economic system. Otherwise, it becomes difficult to explain why in other countries with equally strong or even stronger Confucian roots (eg Korea) copyright infringement is not as widespread¹⁸², or why unauthorised copying has been equally prevalent at some point in history in Western countries. However, it would be wrong to ignore altogether the antinomy between the law and culture in matters concerning copyright.

¹⁷⁶. Ibid.

¹⁷⁷. W Alford *To steal a book is an elegant offence. Intellectual property law in Chinese civilisation* (1995) 19 et seq.

¹⁷⁸. As W Alford's book title (supra note 177) suggests.

¹⁷⁹. W R Swinyard et al 'The morality of software piracy: A cross-cultural analysis' (1990) 9 *Journal of Business Ethics* 655 at 662.

¹⁸⁰. W Shi supra note 174 at 44-6.

¹⁸¹. K Shao 'An alien of copyright? A reconsideration of the Chinese historical episodes of copyright' (2005) 4 *Intellectual Property Quarterly* 400 at 402 and 431.

¹⁸². Ibid.

The situation in Muslim communities is, to some extent, comparable to that in Confucian-based societies. Nonetheless, it has to be pointed out that the individual's right to property is recognised here as an absolute right.¹⁸³ The shari'a, the body of Islamic law including the Koran, considers property rights to be sacred.¹⁸⁴ Although the shari'a does not specifically mention the protection of intellectual property as such, copyright protection does, in principle, conform with shari'a law.¹⁸⁵ It is generally left to the legislators in Islamic countries to enact laws in this respect. However, one of the most important doctrines within Islam is the concept of 'sharing for the good of all' (maslaha – public interest).¹⁸⁶ In light of this, the protection of essential knowledge becomes problematic and such knowledge is often not considered as something that an individual can or should own because of the possible prejudicial consequences for the wider community.¹⁸⁷ It has been observed that the Islam aims at striking a compromise between the communal property rights of Confucianism and the individualistic natural rights approach.¹⁸⁸

This is not the place for an all-embracing analysis of possible cultural roots for copyright infringement, and other reasons such as developmental necessities are likely to be of more significance. However, the impact of cultural beliefs on copyright should always be considered. An ever-smaller minority of the world's population originates from the so-called Western world. And as Alan Greenspan, the former Chairman of the Board of Governors of the Federal Reserve of the United States of

¹⁸³. More precisely, all property belongs to Allah and is given to Man in inheritance only ("The earth is God's; He gives it to those of His servants whom He chooses." (N J Dawood *The Koran: With a Parallel Arabic Text* (1990) 7:128)). For that reason, the owner has absolute rights against all but Allah.

¹⁸⁴. J Brand 'Aspects of Saudi Arabian law and practice' (1986) 9 *Boston College International and Comparative Law Review* 1 at 26.

¹⁸⁵. S Jamar 'The protection of intellectual property under Islamic law' (1992) 21 *Capital University Law Review* 1079 at 1106.

¹⁸⁶. It has to be noted, however, that the various Islamic schools put differing emphasis on this element. (S Jamar *ibid* at 1091).

¹⁸⁷. Copy/South dossier *supra* note 171 at 61.

¹⁸⁸. R Vaughan 'Defining terms in the intellectual property protection debate: Are the North and South arguing past each other when we say "property"? A Lockean, Confucian, and Islamic comparison' (1996) 2 *ILSA Journal of International & Comparative Law* 307 at 357.

America, noted insightfully, 'much of what we took for granted in our system and had grown to assume to be human nature was not nature at all, but culture'.¹⁸⁹

University of Cape Town

¹⁸⁹. A Greenspan 'Thoughts about the transitioning market economies of Eastern Europe and the former Soviet Union' (1993-4) 6 *DePaul Business Law Journal* 1 at 2.

Chapter 3: Copyright exceptions and limitations: the international framework

'We must take care to guard against two extremes equally prejudicial; the one that men of ability, who have employed their time for the service of the community may not be deprived of their just merits and the reward of their ingenuity and labour; the other, that the world may not be deprived of improvements, nor the progress of the arts be retarded.'

Lord Mansfield¹⁹⁰

3.1 Introduction

International copyright treaties and agreements contain flexibilities that national lawmakers may use to support the public interest as well as the interests of users of copyright protected material. Essentially, national lawmakers have three categories of flexibilities at their disposal:

- (1) The utilisation of copyright exceptions and limitations;
- (2) the determination of the scope of copyright protection regarding
 - (a) the kinds of works protected and
 - (b) the rights which are granted; and
- (3) the determination of the duration of copyright protection.

It is suggested, for reasons provided below, that copyright exceptions and limitations are potentially the single most important tool for achieving and safeguarding a fair copyright balance. It is because of this

¹⁹⁰. *Sayre v Moore*, 102 ER 140.

that this chapter and the following two chapters deal extensively with copyright exceptions and limitations. Subsequently, chapter 6 complements the findings of these chapters by addressing the other two categories of flexibilities in a developing country context.

This chapter looks at the international dimension of copyright exceptions and limitations.¹⁹¹ Emphasis is placed on the Berne Convention for the Protection of Literary and Artistic Works of 1886, the Universal Copyright Convention of 1952, the TRIPS Agreement of 1994 and the WIPO Copyright Treaty of 1996.

While copyright exceptions and limitations are potentially the most important tool for national lawmakers for achieving and safeguarding a fair copyright balance, national legislators are, however, not free to introduce copyright exceptions and limitations into their own domestic laws. They are bound by the international treaties and agreements dealing with copyright protection. It should be noted, however, that all attempts to establish an international instrument on minimum limitations and exceptions, for example at WIPO, have hitherto failed - chiefly because of opposition from the U.S. and the EU.

Before addressing the international framework for copyright exceptions and limitations, some preliminary remarks are required with regard to copyright exceptions and limitations in order to provide a solid basis for the subsequent examination. In particular, these remarks concern (1) different philosophical approaches to copyright exceptions and limitations, (2) the terminology used in the context of copyright exceptions and limitations, and (3) the general categorisation of copyright exceptions and limitations.

¹⁹¹. See also the remarks regarding the three-step test in chapter 4.

3.2. Copyright exceptions and limitations: preliminary remarks

It is accepted that granting absolute rights to copyright holders in their works will cause undesirable economic and social costs, such as higher monopolistic prices, limited access to knowledge material and a restricted public discourse.¹⁹² To minimising some of those unwanted effects and to achieve a fair balance of interests, national lawmakers have flexibilities they can use, including prescribing the duration and subject-matter of copyright protection.

Statutory copyright exceptions and limitations are a particularly important tool. It is often by way of limitations and exceptions that existing knowledge material is disseminated and new knowledge material is created. If copyright law is described as the legal environment in which a fair and optimal balance ought to be struck between the competing interests¹⁹³, it is by means of copyright limitations and exceptions that this objective is, copyright internally, best achieved.¹⁹⁴ Therefore, the issue of copyright limitations and exceptions forms the backbone of the whole body of copyright law.

Limitations and exceptions curtail the exclusive rights assigned by copyright law to the copyright holder. They do this to promote the public interest and to respect users' legitimate interests in using copyright protected material in certain circumstances without the permission of the rights holder.¹⁹⁵

¹⁹². V R Moffat 'Mutant copyrights and backdoor patents: the problem of overlapping intellectual property protection' (2004) 19 *Berkeley Technology Law Journal* 1473 at 1480-1; P B Hugenholtz *Copyright and electronic commerce: legal aspects of electronic copyright management* (2000) 127. See also: Issues Paper by the Australian Government supra note 18 at 7-8.

¹⁹³. For an overview of the core interests involved see, from an U.S. perspective, L Gasaway 'Values conflict in the digital environment: Librarians versus copyright holders' (2000) 24 *Columbia - VLA Journal of Law & the Arts* 115 at 117.

¹⁹⁴. Extrinsic means, which are not discussed in this thesis, include competition law and human rights laws.

¹⁹⁵. On this basis, some scholars argue that provisions restricting the mere exercise of rights (eg provisions allowing for collective licensing) are not copyright exceptions and limitations in the legal sense of the terms (see, for instance, C Geiger 'The role of the three-step test in the adaptation of copyright law to the information society' *UNESCO e-Copyright Bulletin* (Jan-March 2007) at 12, available at: <http://unesdoc.unesco.org/images/0015/001578/157848e.pdf> [accessed on 25 January 2009]).

It is important to acknowledge that there is a strong interplay between human rights on the one hand and copyright law in general and copyright exceptions and limitations in particular on the other. From a users' and public interest perspective, fundamental rights such as the freedom of expression, the freedom of education and the rights to cultural participation are obviously affected whenever access to copyright protected material is hampered by means of copyright law. The right to freedom of expression, for example, not only pertains to the right to communicate but also concerns the freedom of receiving ideas.¹⁹⁶ Read together with the fundamental right to education, the right to freedom of expression may therefore require that learning materials, for instance, are made available in as unrestricted a manner as possible, and that copyright exceptions and limitations in this respect are generally interpreted broadly.¹⁹⁷ It must not be forgotten, however, that some of the interests of creators of intellectual works are also protected as a human right. Article 27(2) of the Universal Declaration of Human Rights, passed by the General Assembly of the United Nations in 1948, says that '[e]veryone has a right to the protection of the moral and material interest resulting from any scientific, literary or artistic production of which he is the author.' Similarly, Article 15(1)(c) of the International Covenant for Social and Cultural Rights provides that State Parties to the Covenant recognise the right of everyone "[t]o benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author".

While this thesis does not examine the human rights aspect of copyright protection in detail¹⁹⁸, it appears worth mentioning that intellectual property protection as such is not a universally accepted fundamental right. The Constitutional Court in South Africa, for instance,

¹⁹⁶. E S Nwauche 'The public interest in Namibian copyright law' (2009) 1(1) *Namibia Law Journal* 66.

¹⁹⁷. Ibid at 67-8

¹⁹⁸. For more information on this topic see P L C Torremans *Copyright And Human Rights: Freedom Of Expression, Intellectual Property, Privacy* (2004) and P Yu 'Reconceptualizing intellectual property interests in a human rights framework' (2007) 40 *UC Davis Law Review* 1039 (with further references).

expressly declined to give constitutional protection to intellectual property.¹⁹⁹ Having said this, a number of other rights, such as the right to property or the right to privacy, may capture some parts of intellectual property rights. Therefore, the relationship between copyright laws and human rights must always be kept at the back of one's mind when discussing how to achieve a fair balance between the conflicting interests in the copyright arena. Copyright exceptions and limitations, on the other hand, are one of the main vehicles through which fundamental rights (not merely the interests!) of users can be safeguarded and respected in the public interest.²⁰⁰ Hence, it is important to also bear the human rights framework in mind when curtailing and interpreting existing copyright exceptions and limitations.²⁰¹ In other areas of intellectual property law, the interaction with human rights has been demonstrated more clearly. For instance, the right to health and access to medicine have affected patent protection, particularly in developing countries and especially in relation to the compulsory licensing of patented products such as antiretroviral drugs.²⁰²

Creators, collecting societies and other rights holders often argue strongly against limitations and exceptions. Many user groups, however, want an ever-broader regime of limitations and exceptions

¹⁹⁹. Case CCT 23/96 at 75. In this case, the South African Constitutional Court had to deal with an objection regarding the fact that intellectual property as such was not recognised in the 1996 Constitution of the Republic of South Africa. The Constitutional Court explained:

“[T]he objection was based on the proposition that the right advocated is a "universally accepted fundamental right, freedom and civil liberty". Although it is true that many international conventions recognise a right to intellectual property, it is much more rarely recognised in regional conventions protecting human rights and in the constitutions of acknowledged democracies. It is also true that some of the more recent constitutions, particularly in Eastern Europe, do contain express provisions protecting intellectual property, but this is probably due to the particular history of those countries and cannot be characterised as a trend which is universally accepted. In the circumstances, the objection cannot be sustained.”

²⁰⁰. H Sun *supra* note 13 at 322.

²⁰¹ The legal doctrine of proportionality, as employed within human rights law, may be of particular use when reconciling the conflicting interests. In essence, the doctrine of proportionality states that a state and its agents are only permitted to take measures that bear a reasonable relationship to the aim of the measure (V Condé *A handbook of international human rights terminology* (1999) 208).

²⁰² E S Nwauche ‘A development oriented intellectual property regime for Africa’, at III.II(A), paper presented at the 11th General Assembly of the Council for the Development of Social Science Research for Africa (CODESRIA) in Maputo, Mozambique, 6-10 December 2005, available at http://www.codesria.org/Links/conferences/general_assembly11/papers/nwauche.pdf [accessed on 25 January 2009].

which would ultimately result in eroding effective copyright protection. A rash categorisation of copyright exceptions and limitations as an instrument whose use is contrary to the interest of creators is however as ill-conceived as the presumption that an infinite expansion of copyright limitations and exceptions would always serve user interests. Creators normally build upon material and knowledge of others while creating their own works and therefore often need limitations and exceptions themselves when they are – metaphorically speaking – ‘standing on the shoulders of giants’.²⁰³ At the same time, a certain degree of unrestricted copyright protection seems, even from a user perspective, desirable to achieve the highest output of creative works possible. Therefore, it is necessary to examine copyright exceptions and limitations in an unbiased way.

3.2.1. Different approaches to copyright exceptions and limitations

The scope of copyright exceptions and limitations is influenced by the philosophical foundation on which copyright protection rests domestically.²⁰⁴ As a general rule, limitations and exceptions in natural law based copyright regimes are usually less far-reaching or broad than exceptions and limitations in countries and regions with a utilitarian tradition of copyright protection. This is because the author-centric natural law approach naturally results in a more reserved stance towards unauthorised uses of copyright protected works than the utilitarian copyright rationale which focuses on public benefit considerations. It is therefore not surprising that the payment of an equitable remuneration for uses permitted under an exception or limitation is typical in natural

²⁰³. A phrase famously used by Isaac Newton in a letter to Robert Hooke (5 February 1676). R Okediji observed that ‘the innovative and creative process is in part backward-looking and in part forward-moving’ (R Okediji ‘The international copyright system: Limitations, exceptions and public interest considerations for developing countries’ (2006) *UNCTAD – ICTSD Project on IPRs and sustainable development, Issue Paper No. 15* at X. Available at http://www.unctad.org/en/docs/iteipc200610_en.pdf [accessed on 25 January 2009]).

²⁰⁴. See chapter 2.2 of this thesis for an overview of the predominant copyright rationales.

law copyright legislations. In countries with a utilitarian approach to copyright protection, however, the provision of such payments is seldom seen.²⁰⁵

Apart from the differences regarding the philosophical roots of copyright protection, developmental considerations play a significant role when it comes to a country's approach to copyright exceptions and limitations. In a developing country like South Africa for instance, where educational deficiencies are a main cause for many of the most pressing socio-economic problems, copyright exceptions and limitations are a crucial national policy tool to overcome developmental shortfalls. For it is by way of such exceptions and limitations that access to educational material can be facilitated since copyright protection would otherwise bar considerable amounts of knowledge material from being reproduced and disseminated freely.

3.2.2. Terminology

The analysis of relevant literature dealing with copyright exceptions and limitations soon reveals that a variety of terms is being used by legal scholars in this context.²⁰⁶ The inconsistency arguably stems from differing opinions in relation to the rationale and justifications of copyright exceptions and limitations. Yet, it is suggested here that the introduction and use of terms other than 'copyright exceptions and limitations' is, for the reasons provided below, of little help and should therefore be avoided to not cause unnecessary confusion.

Most commonly, commentators refer to limitations, exceptions, defences, permitted acts, users' rights or restrictions. Obviously, some of the terms, especially "users' rights" and "defences", were introduced in an attempt to express a particular opinion as to the

²⁰⁵. In the U.S., for example, the fair use doctrine provides no compensation to copyright holders and digital home recording is one of the few areas where U.S. law provides for the payment of remuneration.

²⁰⁶. For a more comprehensive overview on this topic see C Geiger 'De la nature juridique des limites au droit d'auteur' (2004) 13 *Propriétés intellectuelles* 882 (with further references).

legal nature of these provisions. The term users' rights, for instance, puts users and copyright holders at least verbally on equal footing since the rights of copyright holders have consequently to be balanced against user rights. Qualifying a legal provision as a mere defence, however, verbally weakens the position of the beneficiary of that provision (the user).²⁰⁷ The use of such biased terms is counter-productive since it provokes additional tension in an already highly disputed area of law. It also unnecessarily anticipates the philosophically influenced discussion about the legal nature of copyright limitations and exceptions. Having said this, the terms "limitation" and "exception" are also not per se unbiased. Rather, both terms recognise the copyright holder's copyright as the default situation with only certain uses being exempted from this general rule. Hence, one could support the use of other, more neutral terms such as "permitted acts".

It must however not be ignored that the terms "limitation" and "exception" are internationally recognised, especially through their implementation into the relevant international treaties by way of the three-step test. It will be shown below in detail that the three-step test is by far the most important instrument to validate the legitimacy of national copyright exceptions and limitations. Therefore, any departure from the terms "limitation" and "exception" would require an additional examination whether the norm in question qualifies as a limitation and exception in the meaning of the three-step test. For these reasons, the traditional terms "limitation" and "exception" are used within this thesis. Moreover, the following paragraph shows that using these terms has the additional advantage of giving due consideration to the most prevalent copyright rationales, namely the utilitarian concept and the natural law concept.

²⁰⁷. The qualification of – at least some of - the provisions as rights instead of mere defences may furthermore justify positive actions by users, such as circumventing technological protection measures, whereas such actions would probably be illegal if a provision is qualified as a mere defence (Committee on Intellectual Property Rights in the Emerging Information Infrastructure and National Research Council *The Digital Dilemma: Intellectual Property in the Information Age* (2000), at 5, available at http://www.nap.edu/html/digital_dilemma [accessed on 25 January 2009]).

Once one has decided to use the term copyright exceptions and limitations, a more thorough interpretation of the terms “limitation” and “exception” is necessary to determine the difference between the two terms. Two main approaches can be distinguished. Some commentators argue that while copyright limitations expressly remove particular categories of works or material from the scope of copyright protection (for example official texts of a legislative, administrative and legal nature or news of the day)²⁰⁸, copyright exceptions allow for certain uses of otherwise copyright protected works without the user being liable for copyright infringement (for example for teaching purposes or quotations).²⁰⁹

Others have defined the two terms as expressing the two main rationales of copyright law²¹⁰ described in chapter 2.2. It has been pointed out that the utilitarian rationale is based on the belief that copyright protection is only to be granted as far as protection is necessary to promote the creation of intellectual works. Therefore, the inclusion of permitted acts is not exceptional but rather inherent in the system so that the term “limitation” is more appropriate than the term “exception”. By contrast, the natural law rationale results in broad exclusive rights with only certain uses exempted. Therefore, the term “exception” is better suited than the term “limitation” for such an (exceptional) curtailment of the copyright holder’s rights.²¹¹

None of the interpretations is either unfounded or incorrect from a legal point of view. However, the second approach is preferred here since it stresses the crucial differences between the two main law traditions. These are often overlooked when certain exceptions and limitations are examined.

²⁰⁸. S Ricketson supra note 29 at 3.

²⁰⁹. Ibid.

²¹⁰. M Senftleben supra note 128 at 22.

²¹¹. Ibid.

3.2.3. Formal and substantial categorisation of limitations and exceptions

Copyright exceptions and limitations can be categorised either from a formal angle or under consideration of substantial aspects.²¹²

Formally, copyright exceptions and limitations, in the broader sense, can be best distinguished by asking whether or not authorisation is necessary and whether the particular use is remuneration-free or not. Authorisation-free and remuneration-free uses qualify as limitations and exceptions in the narrow sense of the term.²¹³ Uses that are authorisation-free but against a fixed remuneration fall into the category of so-called statutory licenses. If both an authorisation and payment of remuneration are required but if an obligation exists for the copyright holder to give permission for the use in question one speaks of compulsory licenses.²¹⁴ Statutory licenses and compulsory licenses can be grouped under the more general term 'non-voluntary licences'.²¹⁵

From a substantial point of view, the underlying purpose and function can be regarded as a reasonable factor for a distinction and categorisation of copyright limitations and exceptions. Such a substantial categorisation is helpful for broadly determining the general importance of a specific copyright exception and limitation for a fair copyright balance. Furthermore, considering the functions of particular copyright exceptions and limitations may help prescribing the future scope of copyright exceptions and limitations, especially in the digital environment.

²¹². Gervais, however, proposes the following categorisation:

“[I]n 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.”, D Gervais supra note 21 at 7.

²¹³. Issues Paper by the Australian Government supra note 18 at 8.

²¹⁴. These categories are mentioned by L Guibault (supra note 19 at 20-1). The distinction between compulsory and statutory licenses is, however, not always drawn and both terms are used interchangeably. See, for instance, S Ricketson supra note 29 at 4.

²¹⁵. K Garnett et al *Copinger and Skone James on Copyright* [15ed] (2005) para 29-02.

Essentially, it is possible to distinguish the following substantial categories of copyright exceptions and limitations:²¹⁶

- (1) Exceptions and limitations that are based on fundamental rights;
- (2) exceptions and limitations that are based on public interest grounds;
- (3) exceptions and limitations that arise from competition policy;
- (4) exceptions and limitations to promote flexible adaptation of the law to new circumstances;
- (5) exceptions and limitations that arise from noted market failures;
- (6) exceptions and limitations that are fruit of successful lobbying;
- (7) exceptions and limitations to cover situations in which uses or copying or protected works are de minimis, incidental to otherwise legitimate activities, or implicitly lawful given the circumstances.

3.3. The international framework

It is important to acknowledge that in spite of the existence of bilateral and multilateral copyrights treaties, there is still no uniform “international copyright” which automatically protects a work throughout the world.²¹⁷ Rather, the protection against unauthorised uses in a

²¹⁶. According to the U.S. Committee on Intellectual Property Rights in the Emerging Information Infrastructure and the U.S. National Research Council (supra note 207 at 136 et seq (including examples of exceptions and limitations for each of these categories)).

²¹⁷. Okediji stated in this respect: ‘The idea of a uniform international code dealing with all aspects of copyright protection was explicitly rejected by the Berne Convention negotiators in favor of a limited agreement which set forth basic principles and minimum standards of protection. [...]The TRIPS Agreement, and its progeny, reflect the steady march toward such a universal copyright law’.

particular country depends essentially on the national laws of that country or region.

Having said this, copyright protection has been greatly harmonised by international copyright treaties and agreements. When it comes to copyright law in general and, specifically, to the issue of copyright exceptions and limitations, the international dimension of this area of law is, however, often not sufficiently taken into account. Exceptions and limitations are important national policy instruments. Yet, most of the relevant international bilateral, regional and multilateral treaties to which a country is a party influence and – after all – considerably restrict the scope of copyright exceptions and limitations.²¹⁸

The common perception of copyright law as a primarily domestic issue is based on two factors: (1) the growth of cross-border trade in copyright protected goods and (2) the absence of a comprehensive international copyright protection. This requires further explanation: Until the end of the 1800s, authorship and the buying, selling as well as any other transfer of intellectual goods were mainly domestic in nature. Only when both transportation and communication improved significantly by the late 1800s, could intellectual goods be easily moved between countries. When this happened they became an important object of international trade. Subsequently, states entered at first into bilateral treaties dealing with reciprocal copyright protection. Many states however signed numerous bilateral treaties²¹⁹, and the increase in international trade made it difficult to police the various – and, sometimes, even conflicting – duties under these treaties.²²⁰ The international community realised that some form of harmonisation on an international level was necessary.²²¹

R Okediji 'Toward an International Fair Use doctrine' (2000) 39 *Columbia Journal of Transnational Law* 75 at 104-5.

²¹⁸. The following examination is limited to international substantive norms of copyright law. The question of the applicable law in transnational copyright cases, ie the legal area referred to as 'conflict of laws' or private international law, is deliberately left out here.

²¹⁹. In 1886, France had signed 13, Belgium 9 and Germany and Great Britain each 5 treaties

²²⁰. R Okediji supra note 217 at 95.

²²¹. A Sterling *World Copyright Law* (2008) marginal number 1.14.

In the latter half of the nineteenth century, the first steps were taken to develop a multilateral copyright treaty.²²² These efforts eventually led to the adoption of the Berne Convention. The Berne Convention was ratified in 1886 and initially signed by Belgium, France, Germany, Haiti, Italy, Liberia, Spain, Switzerland, Tunisia, and the United Kingdom. Since then, numerous multilateral copyright treaties and agreements have been adopted of which the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) is the most important one.

In recent years though, developed countries and regions – chiefly the United States²²³ and the European Union – have again started to negotiate bilateral and regional (free trade) agreements amongst each other and with developing countries. They did this to raise the minimum standard of copyright protection provided for under TRIPS.²²⁴ Due to the higher level of protection for copyright protected goods, such agreements are often referred to as TRIPS plus agreements.²²⁵ It is beyond the scope of the present text to examine such bilateral agreements in detail. It is however essential to make note of the impact

²²². M Jackson supra note 24 at 620.

²²³. The U.S. alone has entered into well over 100 bilateral agreements relating to intellectual property standards (R Mayne ‘Regionalism, Bilateralism, and “TRIP Plus” Agreements: The Threat to Developing Countries’ *Human Development Report 2005* 3. Available at http://hdr.undp.org/en/reports/global/hdr2005/papers/hdr2005_mayne_ruth_18.pdf, [accessed on 25 January 2009], citing a paper prepared by P Drahos.

²²⁴. See, for example, the Australia-U.S. Free Trade Agreement (AUSFTA) of 2005 and the EU-Mexico Free Trade Agreement of 2000. For the U.S., J Jackson has described this change in trade policy as ‘a more ‘pragmatic’ - some might say *ad hoc* approach - of dealing with trading partners on a bilateral basis, and ‘rewarding friends’ (J Jackson *The World Trading System: Law and Policy of International Economic Relations* (1997) 173). In this context, section 310 of the U.S. Trade Act is highly important: Section 301 deals with unfair foreign trade practices. It allows the United States to ‘impose trade sanctions against foreign countries that maintain acts, policies and practices that violate, or deny U.S. rights or benefits under, trade agreements, or are unjustifiable, unreasonable or discriminatory and burden or restrict U.S. commerce.’ Intellectual property falls within the scope of this provision and the U.S. Trade Representative performs an annual “Special 301 report” on intellectual property in many nations. An investigation under section 301 investigation may lead to the conclusion of a bilateral agreement between the U.S. and the other state in question or, eventually, to the imposition of trade sanctions against the other state. In 2007, the following countries were put on the special report’s watch list: Argentina, China, Chile, Egypt, India, Israel, Lebanon, Russia, Thailand, Turkey, Ukraine, and Venezuela.

²²⁵. See, for example, P Drahos ‘BITS and BIPS – Bilateralism in intellectual property’ (2001) 4 *The Journal of World Intellectual Property* 791 at 792-3.

of the so-called “most favoured nation” clause as contained in Article 4 of TRIPS. Article 4 of TRIPS stipulates that

any advantage, favour, privilege or immunity granted by a Member to the nationals of any other country [with respect to the protection of intellectual property] shall [in general] be accorded immediately and unconditionally to the nationals of all other Members.

Hence, if a country signs a bilateral agreement (for example a Free Trade Agreement) which includes TRIPS plus provisions, the higher protection standard for intellectual property rights can automatically be demanded for nationals of all other WTO member states.

The relevant international copyright treaties and agreements establish on the one hand a system of minimum rights for rights holders and permit on the other the inclusion of various specific limitations and exceptions (including non-voluntary licenses) into national copyright legislation. In the following, the most relevant international copyright treaties and agreements will be briefly introduced. It will be examined to what extent these international instruments address copyright exceptions and limitations.

3.4. The Berne Convention of 1886

3.4.1. Introductory remarks regarding the Berne Convention

The Berne Convention of 1886 entered into force on 5 December 1887 and has currently 163 contracting parties.²²⁶ Today, WIPO administers the Berne Convention. WIPO was established in 1970 as an international organisation dedicated to promote the use and protection of intellectual property.²²⁷ With headquarters in Geneva, Switzerland, WIPO is one of

²²⁶ As of 31 December 2007.

²²⁷ WIPO website, <http://www.wipo.int/about-wipo/en/>, [accessed on 25 January 2009].

the 16 specialised agencies of the United Nations system of organisations. It currently has 184 member states.²²⁸

The Berne Convention is rooted in the author-centric law tradition of Continental Europe.²²⁹ It can be described as the cornerstone of modern international copyright protection.²³⁰ The Convention grants several exclusive rights to the authors of literary and artistic works regarding the economic exploitation of the works, most importantly the reproduction right in any manner or form as contained in Article 9(1) of the Berne Convention.²³¹ The Berne Convention is fundamentally based on two principles, the “principle of national treatment” and “the principle of minimum rights”.²³² The former principle means that foreign nationals of other member states of the Berne Convention are to be treated equally to nationals of the member state in question. The latter principle grants certain minimum rights to authors who are protected under the Berne Convention. Member states are, however, permitted to exceed these minimum standards. The Berne Convention has been revised several times,²³³ with the most recent revision known as the Paris Act of 1971.²³⁴

Further copyright treaties and agreements have been adopted since the inception of the Berne Convention as a result of progress in the technological field and in international trade. Besides, some countries²³⁵ were unable or unwilling to implement the strict requirements of the

²²⁸ As of 31 December 2007.

²²⁹ FW Grosheide supra note 119 at 313.

²³⁰ M Jackson supra note 24 at 620.

²³¹ Other economic rights protected under the Berne Convention include adaptation rights, distribution rights, public performance rights, translation rights, broadcast rights and rights regarding other forms of communication to the public. In addition, the Berne Convention protects certain moral rights of the author, namely the right to claim authorship of his work and the right to object to ‘any distortion, mutilation or other modification of, or other derogatory action in relation to, the said work, which would be prejudicial to his honor or reputation’ (Art 6*bis* of the Berne Convention).

²³² A Sterling supra note 221 at marginal number 1.14.

²³³ Revised at Berlin on 13 November 1908; at Berne on 20 March 1914; at Rome on 02 June 1928; at Brussels on 26 June 1948; at Stockholm on 14 July 1967; at Paris on 24 July 1971; for a summary of the most important changes of the Berne Convention in the course of these revisions see P Goldstein supra note 32 at 21 et seq.

²³⁴ The Paris Act entered into force on 10 October 1974. The Paris Act was amended on 28 September 1979.

²³⁵ Most notably the United States of America.

Berne Convention. These subsequent copyright treaties and agreements include the Universal Copyright Convention (UCC) of 1952, the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) of 1994 and the WIPO Copyright Treaty (WCT) of 1996.²³⁶

3.4.2. Express exceptions and limitations contained in the Berne Convention

The Berne Convention permits the following exceptions and limitations (including non-voluntary licences for some works):

- (1) Official texts of a legislative, administrative and legal nature, and official translations of such texts, Art 2(4);
- (2) news of the day and press information, Art 2(8)²³⁷;
- (3) political speeches and speeches delivered in the course of legal proceedings, Art 2*bis*(1)²³⁸;
- (4) reporting of lectures, addresses and other similar works, Art 2*bis*(2);
- (5) quotations, Art 10(1)²³⁹;
- (6) illustrations for teaching, Art 10(2)²⁴⁰;
- (7) reproduction of newspaper articles, articles in periodicals as well as broadcast works on certain current topics, Art 10*bis*(1);
- (8) reporting of current events, Art 10*bis*(2)²⁴¹;

²³⁶. Neighbouring rights are mainly dealt with in the following treaties: International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations of 1961 (Rome Convention), Convention for the Protection of Producers of Phonograms Against Unauthorized Duplication of Their Phonograms of 1971 (Geneva Convention), Convention Relating to the Distribution of Programme-Carrying Signals Transmitted by Satellite of 1974 (Brussels Convention). The TRIPS Agreement pertains to both copyright and neighbouring rights.

²³⁷. Strictly speaking, this provision concerns the scope of copyright protection. It excludes ‘news of the day’ and ‘miscellaneous facts having the character of mere items of press information’ from the scope of protection of the Berne Convention.

²³⁸. In this context Article 2*bis*(3) of the Berne Convention should be noted. This Article provides that ‘the author shall enjoy the exclusive right of making a collection of his works mentioned in [Article 2*bis* (1) and (2)]’.

²³⁹. Article 10(1) refers, inter alia, to fair practice. Ricketson suggests that the criteria of the three-step test can be used as a guideline in order to determine whether or not a particular quotation qualifies as fair (Ricketson supra note 29 at 13, citing W Nordemann et al *International copyright and neighboring rights law :Commentary with special emphasis on the European Community* (1990) 83-4).

²⁴⁰. Article 10(2) refers, inter alia, to fair practice. Ricketson suggests that the criteria of the three-step test can be used as a guideline in order to determine whether or not a particular utilisation is fair (S Ricketson supra note 29 at 15).

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- (9) non-voluntary licence regarding the broadcasting (and related rights) of works, Art 11*bis*(2)²⁴²;
- (10) ephemeral recordings of broadcast works, Art 11*bis*(3);
- (11) non-voluntary licence regarding the recording of musical works and any words pertaining thereto, Art 13(1);
- (12) certain contributions to cinematographic works, Article 14*bis*(2)(b)²⁴³;
- (13) state control regarding the circulation, presentation and exhibition of works, Art 17;
- (14) non-voluntary licenses regarding developing countries in respect of the right of reproduction and the right of translation, Art II, III of the Appendix to the Paris Act of the Berne Convention.

In most cases, the wording of the exceptions and limitations is fairly clear and self-explanatory. It is noteworthy, however, that only the exceptions and limitations contained in Articles 2(8) and 10(1) are mandatory. Consequently, it is left to the national legislator to decide whether or not to introduce any of the other copyright limitations and exceptions. In addition, attention needs to be drawn to the fact that the limitations and exceptions concern different rights of the rights holder - only Articles 2(4), 2(8), 2*bis*(1), 10(1) and 17 cover all rights protected under the Berne Convention.²⁴⁴

²⁴¹. Means of reporting current events other than those mentioned in this Article (ie photography, cinematography, broadcasting or communication to the public by wire) can be justified under Article 10 (1) or 9 (2) of the Berne Convention.

²⁴². The latter sentence of Article 11*bis* (2) arguably pertains only to moral rights protected in Article 6*bis* (1) (S Ricketson supra note 29 at 32). Others, however, suggest extending the scope of moral rights to additional moral rights protected under national laws (see, for instance, H Desbois et al *Les conventions internationales du droit d'auteur et des droits voisins* (1976) 190).

²⁴³. Article 14*bis*(2) only applies in countries 'which, by legislation, include among the owners of copyright in a cinematographic work authors who have brought contributions to the making of the work'. In addition, Art 14*bis* (3) needs to be considered in this context. It stipulates that

[u]nless the national legislation provides to the contrary, the provisions of paragraph (2)(b) above shall not be applicable to authors of scenarios, dialogues and musical works created for the making of the cinematographic work, or to the principal director thereof [...]

²⁴⁴. Articles 2*bis*(2), 10(2) and 10*bis*(1) cover the right of reproduction and to all broadcasting as well as broadcasting-related rights granted under Art 11*bis*(1). Art 10*bis*(2) covers photography as well as cinematography and all broadcasting as well as broadcasting-related rights granted under Art 11*bis*(1). Art 11*bis*(2) covers all broadcasting as well as broadcasting-related rights granted under Art 11*bis*(1). Articles 11*bis*(3) and 13(1) cover the rights of reproduction. Art 14*bis*(2)(b) covers the right of reproduction, all broadcasting as well as broadcasting-related rights granted under Art 11*bis*(1) and the public performance right.

3.4.3. Other public interest exceptions and limitations and so-called “implied exceptions”

Two further categories of exceptions and limitations exist which are often overlooked. These are “other limitations on authors’ rights imposed in the public interest” and so-called “implied exceptions”.

The existence of the first category of exceptions and limitations was confirmed by the following statement in the Report of Main Committee I at the Stockholm Conference:

The Committee accepted, without opposition, the proposal of its Chairman that mention should be made in this Report of the fact that questions of public policy should always be a matter for domestic legislation and that countries of the Union would therefore be able to take all necessary measures to restrict possible abuses of monopoly.²⁴⁵

The category of implied exceptions, however, relates to two different sets of rights. These are (1) the rights of public performance, public recitation, broadcasting, recording of musical works as well as cinematographic rights (“minor reservations doctrine”²⁴⁶), and (2) the right of translation.

Under the implied “minor reservations doctrine”, member states of the Berne Convention are allowed to provide minor exceptions and limitations to the rights provided under Articles 11, 11*bis*, 11*ter*, 13 and 14. A proposal to insert a general provision in this respect into the Berne Convention was not adopted at the Brussels Conference of 1948. However, the following statement concerning the possibility to provide for minor exceptions and limitations in national legislations was included

²⁴⁵. World Intellectual Property Organization (WIPO) *Records of the intellectual property conference of Stockholm (11 June to 14 July 1967)* (1971) 1174. According to the interpretation rules of the 1969 Vienna Convention on the Law of Treaties, this statement is a legitimate source of interpretation of the Berne Convention (see Articles 31 and 32 of the Vienna Convention, cited in footnote 359).

²⁴⁶. The term “reservation” is, however, misleading in this context because the term is used in the Berne Convention in Article 30 for formal reservations by Member States. For that reason, some commentators suggested to use the term “minor exception doctrine” (see, eg, WTO Panel decision WT/DS160/R at 6.49).

into the General Report in the context of Article 11 of the Berne Convention:

Your Rapporteur-General has been entrusted with making an express mention of the possibility available to national legislation to make what are commonly called minor reservations. [Many] Delegates have [...] mentioned these limited exceptions allowed for religious ceremonies, military bands and the needs of the child and adult education. These exceptional measures apply to articles 11*bis*, 11*ter*, 13 and 14. [T]hese references are just lightly pencilled in here, in order to avoid damaging the principles of the right.²⁴⁷ [...] [T]he Conference noted, however, that these exceptions should be of a limited nature and, in particular, that, it was not sufficient that the performance or recitation was “not for profit” in order that it be excepted from the exclusive right of the author [...].²⁴⁸

This statement was confirmed during the 1968 Stockholm Conference.²⁴⁹ It needs to be noted that statements of this kind qualify as so-called agreed statements. Agreed statements are legitimate sources of interpretation of the Berne Convention.²⁵⁰ It is, however, commonly understood that the list of examples provided in the Brussels statement (religious ceremonies, military bands, child and adult education) is non-exhaustive.²⁵¹ It appears that the statement is ultimately based on the so-called de minimis principle which requires that the law must not be concerned with trivia.²⁵² As a result, minor reservations do only apply to uses with minimal, or no, significance to

²⁴⁷. See the deliberations at the 1948 Brussels Conference for the revision of the Berne Convention *Documents de la conférence réunie à Bruxelles du 5 au 26 juin 1948* (1951) 100.

²⁴⁸. Ibid. at 264.

²⁴⁹. At this conference, the following statement was included into the report of the Main Committee I (WIPO *Records of the intellectual property conference of Stockholm, (11 June to 14 July 1967)* (1971) 1166):

It seems that it was not the intention of the Committee to prevent States from maintaining in their national legislation provisions based on the declaration contained in the General Report of the Brussels Conference.

²⁵⁰. M Ficsor *The law of copyright and the internet – the 1996 WIPO treaties, their interpretation and implementation* (2002) marginal number 5.63.

²⁵¹. Ibid. at marginal number 5.66; S Ricketson supra note 29 at 37; WTO Panel decision WT/DS/160/R at marginal number 6.57.

²⁵². This interpretation is backed by the fact that the term “minor” reservation was used within the statement.

the rights holder.²⁵³ It should be noted, however, that one scholar in particular has raised a number of valid objections against the above-mentioned scope of the “minor reservations” doctrine - especially regarding Articles 13 and 14(1)(i) of the Berne Convention. One of his main arguments is that some of the acts would nowadays fall within the scope of the three-step test.²⁵⁴ The three-step test is discussed in detail in the following chapter.

The question whether or not implied exceptions and limitations do also exist for the right of translation²⁵⁵ was raised at the Stockholm Conference. It seems to follow from the discussions that took place at this conference that implied exceptions and limitations regarding translations apply at least to the reproduction rights addressed in Articles 2*bis*(2), 9(2), 10(1) and (2), and 10*bis*(1) and (2).²⁵⁶

3.4.4. Article 9(2) of the Berne Convention

Apart from the above-mentioned (express and implied) specific exceptions and limitations, the Berne Convention contains in its

²⁵³. S Ricketson supra note 29 at 36.

²⁵⁴. M Ficsor supra note 250 at marginal number 5.64.

²⁵⁵. For which no express exceptions and limitations are contained in the Berne Convention apart from the special provision for developing countries in the Appendix of the Convention.

²⁵⁶. This conclusion is drawn from the following statement at the conference (WIPO *Records of the intellectual property conference of Stockholm, (11 June to 14 July 1967)* (1971) 1165):

As regards the right of translation in cases where a work may, under the provisions of the Convention, be lawfully used without the consent of the author, a lively discussion took place in the Committee and gave rise to certain statements on the general principles of interpretation. While it was generally agreed that Articles 2*bis* (2), 9 (2), 10 (1) and (2), and 10*bis* (1) and (2), virtually imply the possibility of using the work not only in the original form but also in translation, subject to the same conditions, in particular that the use is in conformity with fair practice and that here too, as in the case of all uses of the work, the rights granted to the author under Article 6*bis* (moral rights) are reserved, different opinions were expressed regarding the lawful uses provided for in Articles 11*bis* and 13. Some delegations considered that those Articles also applied to translated works, provided the above conditions were fulfilled. Other delegations, including those of Belgium, France and Italy, considered that the wording of those Articles in the Stockholm text did not permit of the interpretation that the possibility of using a work without the consent of the author also included, in those cases, the possibility of translating it. In this connection, the said delegations pointed out, on the level of general principles, that a commentary on the discussion could not result in an amendment or extension of the provisions of the Convention

For a more detailed discussion see S Ricketson supra note 29 at 39.

Article 9(2) a general provision regarding limitations and exceptions²⁵⁷ to the reproduction right²⁵⁸. Article 9(2) reads as follows:

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.

This provision, commonly referred to as the three-step test, is of utmost importance and is discussed in detail below.²⁵⁹ Most of the other relevant copyright treaties and agreements contain a similar test.

3.5. The Universal Copyright Convention (UCC) of 1952

3.5.1. Introductory remarks regarding the UCC

The UCC was the result of an intergovernmental conference in which 50 countries took part in Geneva, Switzerland, in 1952.²⁶⁰ The UCC entered into force on 16 September 1955 and has been revised in 1971.²⁶¹ The objective behind the UCC was in particular to establish a multilateral copyright protection regime for countries that found the provisions of the Berne Convention, for various reasons, unacceptable. The purpose of the UCC was to improve copyright relations between those countries as well as between non-Berne countries and Berne member states.²⁶² The U.S.,

²⁵⁷. It is disputed, however, whether the three-step test also applies to copyright limitations in the broader sense, ie to compensated, non-voluntary licences. The three-step test is discussed in chapter 4.

²⁵⁸. Interestingly, the Berne Convention itself does not define what “reproduction” means. Arguably, a statutory domestic clarification of the term would not be subject to the three-step test.

²⁵⁹. See chapter 4 of this thesis.

²⁶⁰. A Bogsch *The Law of Copyright under the Universal Convention* (1972) 1.

²⁶¹. 1971 Paris Act of the Universal Copyright Convention. The UNESCO website contains two lists of countries which have ratified, accepted or acceded to either the 1952 version and/ or the 1971 version of the UCC (http://portal.unesco.org/culture/en/ev.php-URL_ID=1814&URL_DO=DO_TOPIC&URL_SECTION=201.html [accessed on

25 January 2009]).

²⁶². P Goldstein *supra* note 32 at 28; S von Lewinski ‘The role and future of the Universal Copyright Convention’ *UNESCO e-Copyright Bulletin* (Oct-Dec. 2006), available at:

for instance, disapproved for a long time the recognition of moral rights and the absence of formal requirements for copyright protection within the Berne Convention. It was for these reasons that the U.S. only became a Berne member state in 1989.²⁶³ Numerous countries of Latin America²⁶⁴ as well as the then U.S.S.R. and some developing countries also preferred the provisions of the UCC to those of the Berne Convention. Interestingly, the UCC contains a so-called Berne safeguard clause. It stipulates that 'works which, according to the Berne Convention, have as their country of origin a country which has withdrawn from the Berne Union after 1 January 1951 shall not be protected by the Universal Copyright Convention in the countries of the Berne Union.'²⁶⁵ The clause aims at preventing Berne member states from leaving the Berne Convention and to adopt the less stringent UCC standards instead. However, it was later taken into account that many developing countries had never chosen to adhere to the Berne Convention; they were forced into the Berne Union by their colonial rulers. For that reason, the operation of the Berne safeguard clause was effectively suspended for developing countries during the Paris revision of the UCC in 1971.²⁶⁶

In essence, the UCC stipulates that

- (1) no signatory nation shall grant its citizens a higher degree of copyright protection than authors of other signatory nations;
- (2) a formal copyright notice shall appear on all copies of a work (consisting of the symbol ©, the name of the copyright holder, and the year of first publication);

http://portal.unesco.org/culture/en/files/32622/11718941731ucc_study_e.pdf/ucc_study_e.pdf

[accessed on 25 January 2009].

²⁶³. See the U.S. Berne Convention Implementation Act of 1988.

²⁶⁴. A number of Inter-American conventions (such as the Pan-American copyright conventions and the Convention of Montevideo of 1889) already existed between various American countries at the time when the Universal Copyright Convention was introduced. These treaties have, however, mostly been superseded by UCC (and later by Berne and TRIPS) provisions (P Geller *International copyright law and practice* (2004) § 3[3][b][vi]).

²⁶⁵. Appendix declaration relating to Article XVII of the UCC (Paris Text).

²⁶⁶. See paragraph b) of the Appendix declaration relating to Article XVII of the UCC (Paris Text).

- (3) the minimum term of copyright protection in signatory nations shall be the life of the author plus 25 years (except for photographic works and works of applied art, which have a 10-year protection term); and
- (4) all member nations are required to grant an exclusive right of translation for a seven-year period, subject to a compulsory license under certain circumstances for the balance of the term of copyright.

There is no comprehensive system of minimum standards in the UCC comparable to that established under the Berne Convention.²⁶⁷

Over the last few decades, the significance of the UCC has diminished significantly.²⁶⁸ The U.S. as well as several Latin American countries and most of the successor states of the former U.S.S.R. have acceded to the Berne Convention.²⁶⁹ In addition, most countries in the world are now member states of the World Trade Organisation (WTO) and as such bound by the TRIPS Agreement, which incorporates substantial provisions of the Berne Convention. It appears that only one single country, Laos, is at present exclusively bound by the UCC.²⁷⁰ It is therefore unlikely that the UCC will regain importance in the near future.²⁷¹ The following examination of the exceptions and limitations within the UCC will thus be brief.

²⁶⁷. L Guibault and B Hugenholtz 'Nature and scope of limitations and exceptions to copyright and neighbouring rights with regard to general interest missions for the transmission of knowledge: Prospects for their adaptation to the digital environment' *UNESCO e-Copyright Bulletin* (Oct-Dec. 2003), <http://unesdoc.unesco.org/images/0013/001396/139671e.pdf>, [accessed on 25 January 2009].

²⁶⁸. P Geller supra note 264 at § 3[3][b][iii].

²⁶⁹. For example, Estonia and Lithuania became Member States of the Berne Convention in 1994, Russia, Latvia, Ukraine and Georgia in 1995, Belarus in 1997, Kazakhstan and Kyrgyzstan in 1999; Brazil became a Member State in 1922, Argentina and Uruguay in 1967, Venezuela in 1982, Colombia and Peru in 1988, Ecuador in 1991, Paraguay in 1992, Bolivia in 1993, El Salvador in 1994, Nicaragua in 2000; the USA became a Berne Member State in 1989.

²⁷⁰. The 2007 Special 301 Report on Laos of the International Intellectual Property Alliance states, however, that 'the Government of Laos is in the process of preparing legislation for Laotian accession to the Berne Convention'. The report is available at <http://www.iipa.com/rbc/2007/2007SPEC301LAOS.pdf> [accessed on 25 January 2009].

²⁷¹. S von Lewinski supra note 262 at 12.

3.5.2. Express exceptions and limitations contained in the UCC

The relevant provisions under the UCC on copyright exceptions and limitations are:

- (1) Art *IVbis*(2);
- (2) Art V(2);
- (3) Art *Vter*;
- (4) Art *Vquater*.

Article *IVbis*(2) qualifies as a copyright limitation and exception in the narrower sense. It provides that a contracting state may, by its domestic legislation, make exceptions that do not conflict with the spirit and provisions of the Convention, to the rights granted therein. Any State whose legislation so provides, must nevertheless accord a reasonable degree of effective protection to each of the rights to which exception has been made.

In addition, Articles V(2), *Vter* and *Vquater* provide a system of non-voluntary licensing. Article V(2) allows for the granting of non-voluntary licences in respect of the right of translations if, after the expiration of a period of 7 years from the date of first publication, a translation has not been published in a language in general use in the contracting state. Articles *Vter* and *Vquater* contain special provisions for developing countries: Article *Vter* permits non-voluntary licensing for the purpose of teaching, scholarship or research in respect of the rights of translation of works published in printed or analogous forms of reproduction. Article *Vquater* – subject to various conditions – allows non-voluntary licences for publishing literary, scientific and artistic works where the editions of such works are not made available to the public, or in connection with systematic instructional activities at a price reasonably related to that normally charged in the state for comparable works.

3.6. The TRIPS Agreement of 1994

3.6.1. Introductory remarks regarding the TRIPS Agreement

On 1 January 1995, the TRIPS Agreement came into force. The Agreement was added to the General Agreement on Tariffs and Trade (GATT) at the end of the Uruguay Round of trade negotiations (1986-94) in 1994 after forceful lobbying by the U.S., supported by the EU, Japan and other developed nations. Because of the increased importance of intellectual property issues for international trade, the TRIPS Agreement established, among other things, a uniform international copyright regime of minimum standards for the (currently) 151 member states of the WTO²⁷². Member states may, however, introduce laws containing more extensive protection than is required by TRIPS.

TRIPS marked a milestone in developing intellectual property protection in the 20th century.²⁷³ It contains, in addition to the broad scope of the agreement which includes neighbouring rights²⁷⁴, detailed

²⁷². As of 31 December 2007 - a list of Member States is available at http://www.wto.org/english/thewto_e/whatis_e/tif_e/org6_e.htm [accessed on 25 January 2009]. Another 31 countries currently hold official observer status. With the exception of the Holy See, observers must start accession negotiations within five years of becoming observers.

²⁷³. D Gervais *The TRIPS agreement – drafting history and analysis* (2003) 1.01.

²⁷⁴. See Article 14 TRIPS. This detailed provision reads as follows:

1. In respect of a fixation of their performance on a phonogram, performers shall have the possibility of preventing the following acts when undertaken without their authorization: the fixation of their unfixed performance and the reproduction of such fixation. Performers shall also have the possibility of preventing the following acts when undertaken without their authorization: the broadcasting by wireless means and the communication to the public of their live performance.
2. Producers of phonograms shall enjoy the right to authorize or prohibit the direct or indirect reproduction of their phonograms.
3. Broadcasting organizations shall have the right to prohibit the following acts when undertaken without their authorization: the fixation, the reproduction of fixations, and the rebroadcasting by wireless means of broadcasts, as well as the communication to the public of television broadcasts of the same. Where Members do not grant such rights to broadcasting organizations, they shall provide owners of copyright in the subject matter of broadcasts with the possibility of preventing the above acts, subject to the provisions of the Berne Convention (1971).
4. The provisions of Article 11 in respect of computer programs shall apply *mutatis mutandis* to producers of phonograms and any other rights holders in phonograms as determined in a Member's law. If on 15 April 1994 a Member has in force a system of equitable remuneration of rights holders in respect of the rental of phonograms, it may maintain such system provided that the commercial rental of phonograms is not giving rise to the material impairment of the exclusive rights of reproduction of rights holders.

rules regarding the issues of enforcement²⁷⁵ and dispute settlement.²⁷⁶ In other words, TRIPS supplied the elements the Berne Convention was lacking.²⁷⁷ Consequently, TRIPS is considered the most comprehensive international agreement on intellectual property so far.²⁷⁸ The TRIPS Agreement strives to narrow the gaps in copyright protection around the world. The Preamble highlights its general goals. Those include the reduction of 'distortions and impediments to international trade, and taking into account the need to promote effective and adequate protection of intellectual property rights, and to ensure that measures and procedures to enforce intellectual property rights do not themselves become barriers to legitimate trade'. The Preamble should be read with Article 7 ("Objectives") and Article 8 ("Principles") of TRIPS.²⁷⁹

5. The term of the protection available under this Agreement to performers and producers of phonograms shall last at least until the end of a period of 50 years computed from the end of the calendar year in which the fixation was made or the performance took place. The term of protection granted pursuant to paragraph 3 shall last for at least 20 years from the end of the calendar year in which the broadcast took place.

6. Any Member may, in relation to the rights conferred under paragraphs 1, 2 and 3, provide for conditions, limitations, exceptions and reservations to the extent permitted by the Rome Convention. However, the provisions of Article 18 of the Berne Convention (1971) shall also apply, *mutatis mutandis*, to the rights of performers and producers of phonograms in phonograms.

²⁷⁵. See part III of the TRIPS Agreement.

²⁷⁶. See part V of the TRIPS Agreement. Disputes between Member States regarding their obligations under TRIPS are made subject to the WTO's dispute settlement procedures.

²⁷⁷. S Perlmutter 'Future directions in international copyright' (1998) 16 *Cardozo Arts & Entertainment Law Journal* 369 at 375.

²⁷⁸. See Wikipedia entry "TRIPS", available at <http://en.wikipedia.org/wiki/TRIPS> [accessed on 25 January 2009].

²⁷⁹. Article 7 of TRIPS reads:

The protection and enforcement of intellectual property rights should contribute to the promotion of technological innovation and to the transfer and dissemination of technology, to the mutual advantage of producers and users of technological knowledge and in a manner conducive to social and economic welfare, and to a balance of rights and obligations.

Article 8 of TRIPS reads:

1. Members may, in formulating or amending their laws and regulations, adopt measures necessary to protect public health and nutrition, and to promote the public interest in sectors of vital importance to their socio-economic and technological development, provided that such measures are consistent with the provisions of this Agreement.

2. Appropriate measures, provided that they are consistent with the provisions of this Agreement, may be needed to prevent the abuse of intellectual property rights by rights holders or the resort to practices which unreasonably restrain trade or adversely affect the international transfer of technology.

TRIPS identifies the protected subject-matters and defines the rights granted. In addition, the agreement deals with the requirements for permissible exceptions and limitations and the issue of the term of copyright protection. In general, TRIPS adopts the substantive obligations of the Paris Act of 1971 of the Berne Convention. More precisely, TRIPS Article 9(1) incorporates Articles 1-21 of the Berne Convention and the Appendix thereto.²⁸⁰ As a result, TRIPS confirmed, among other things, the general protection term of no less than 50 years after the death of the author²⁸¹ for copyright works other than photographic works,²⁸² cinematograph films²⁸³ and works of applied art.²⁸⁴ Also in line with the provisions of the Berne Convention, no formalities, such as a registration, are required for copyright protection under TRIPS. Furthermore, the Agreement stipulates in its Article 10 that computer programs – both in source code and in object code – are protected as literary works under the Berne Convention.²⁸⁵ Compilations of data or other material are also protected as such if the selections or arrangements of the contents constitute intellectual creations.²⁸⁶ In addition, rental rights are protected under TRIPS, at least regarding computer programs and cinematographic works.²⁸⁷ This chapter has already mentioned the so-called most favoured nation clause in Article 4

²⁸⁰. Article 9 of TRIPS determines, however, that Members shall not have rights or obligations under TRIPS in respect of the rights conferred under Article 6bis [“moral rights”] of the Berne Convention or of the rights derived therefrom.

²⁸¹. Article 12 of TRIPS contains additional provisions for cases where the protection term is calculated on a basis other than the life of a natural person.

²⁸². The protection term for photographic works is 25 years from the making of such a work.

²⁸³. The protection term for cinematograph films is 50 years after the film has been made available to the public or 50 years after the making of the film.

²⁸⁴. The protection term for works of applied art is also 25 years from the making of such a work. It is noteworthy that Article 14 (5) of TRIPS contains specific regulations regarding the term of protection for performers and producers of phonograms as well as regarding the rights of broadcasting organisations.

²⁸⁵. See Article 10(1) of TRIPS.

²⁸⁶. See Article 10(2) of TRIPS.

²⁸⁷. Article 11 of TRIPS. With respect to cinematograph works, however, Article 11 of TRIPS contains a so-called impairments test:

A Member shall be excepted from this obligation in respect of cinematographic works unless such rental has led to widespread copying of such works which is materially impairing the exclusive right of reproduction conferred in that Member on authors and their successors in title.’ With regard to computer programs, the obligation does not apply to rentals ‘where the program itself is not the essential object of the rental.

of TRIPS according to which 'any advantage, favour, privilege or immunity granted by a Member to the nationals of any other country [with respect to the protection of intellectual property] shall [in general] be accorded immediately and unconditionally to the nationals of all other Members'. Moreover, the TRIPS Agreement includes the principle of national treatment in its Article 3. According to this principle, member states must accord the same level of intellectual property protection to the nationals of other members as it accords to its own nationals. Thus, any discrimination between a member state's own nationals and the nationals of another member state is prohibited.²⁸⁸ Lastly, the TRIPS Agreement stipulates that governments have the right to take action against anticompetitive licensing which abuses intellectual property rights.²⁸⁹

As a WTO agreement, TRIPS automatically applies to all WTO member states. However, developing countries as well as least developed²⁹⁰ countries were given more time to implement applicable changes into their domestic laws because of their special needs and requirements.²⁹¹ While the so-called transition period for developing countries expired in 2005, the transition period for least developed countries was extended by the WTO's Council for TRIPS until 1 July 2013.²⁹²

²⁸⁸. Certain exceptions, contained in Articles 3 and 5 of TRIPS, do however apply in this respect.

²⁸⁹. See Article 40 of TRIPS.

²⁹⁰. Chapter 6 of this thesis discusses the terms "developing country" and "least developed country". A United Nations list of the 50 least developed countries can be found at <http://www.un.org/special-rep/ohrlls/ohrlls/allcountries.pdf> [accessed on 25 January 2009].

²⁹¹. See Articles 65, 66 of TRIPS.

²⁹². Initially, the transition period was due to expire on 1 January 2006 - 11 years after the TRIPS Agreement came into force. (The transition period for least-developed countries regarding patents for pharmaceutical products only expires in 2016).

3.6.2. Express exceptions and limitations contained in the TRIPS Agreement

The TRIPS Agreement contains several provisions which are relevant for copyright exceptions and limitations. These include the²⁹³:

- (1) national treatment requirement, Art 3(1);
- (2) incorporation of certain provisions of the Berne Convention, Art 9(1);
- (3) general provision: three-step test, Art 13;
- (4) reference to the Rome Convention, Art 14(6).

Article 3(1) of TRIPS²⁹⁴ specifically refers to the exceptions provided in the Berne Convention. It thereby confirms, within the context of the national treatment principle, the applicability of national exceptions which are based upon the provisions of the Berne Convention. In addition, Article 9(1) of TRIPS expressly incorporates Articles 1-21 and the Appendix of the Berne Convention into the TRIPS Agreement, including all the exceptions and limitations discussed under 3.4.2 and 3.4.4.²⁹⁵

Most civil law countries distinguish for philosophical reasons between authors' rights and so-called neighbouring rights. As a result, specific international treaties for neighbouring rights were adopted of which the Rome Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organisations of 1961 and the WIPO

²⁹³. It should be noted that the TRIPS Agreement, unlike the Berne Convention, contains an express codification of the idea/ expression dichotomy in its Art 9(2). Furthermore, Art 10(2) of TRIPS excludes data or material itself from the protection of compilations of data or other material which is provided for in the same paragraph. It is also noteworthy that Art 6 of TRIPS specifically permits the exhaustion of rights rule/ first-sale doctrine by stipulating that: 'subject to the provisions of Articles 3 and 4 nothing in this Agreement shall be used to address the issue of the exhaustion of intellectual property rights'.

²⁹⁴. Art 3(1) reads:

Each Member shall accord to the nationals of other Members treatment no less favourable than that it accords to its own nationals with regard to the protection³ of intellectual property, subject to the exceptions already provided in, respectively, the Paris Convention (1967), the Berne Convention (1971), the Rome Convention or the Treaty on Intellectual Property in Respect of Integrated Circuits [...]

²⁹⁵. With the notable exception of Art 6*bis* of the Berne Convention which addresses moral rights.

Performances and Phonograms Treaty of 1996 are the most important ones. They are discussed below. The TRIPS Agreement, however, is not confined to either authors' rights or neighbouring rights. Therefore the inclusion of Article 14(6) became necessary. This provision expressly refers to the exceptions and limitations in the Rome Convention as far as performers, phonogram producers or broadcasting organisations are concerned.²⁹⁶

Lastly, Article 13 TRIPS is derived from Article 9(2) of the Berne Convention and contains – although in a slightly different wording – the three-step test.²⁹⁷ Hence, a double insertion of the three-step test can be observed: first, by way of reference in Article 9(1) TRIPS to Article 9(2) of the Berne Convention and, second, through its explicit mentioning in Article 13 TRIPS. This double insertion implies that the three-step test not only applies to domestic limitations and exceptions regarding the reproduction right under the Berne Convention as well as domestic limitations and exceptions to the exclusive rental rights newly granted under TRIPS. It also applies to domestic limitations and exceptions to all other exclusive rights contained in Article 1-21 of the Berne Convention. However, a detailed system of requirements for specific exceptions and limitations does already exist under the Berne Convention.²⁹⁸ This causes a severe dogmatic problem which is discussed in detail in the context of the three-step test since a similar problem arises with the WCT of 1996.²⁹⁹ In essence, such a broadened application of the three-step test could violate the principle laid down in Article 20 of the Berne Convention according to which subsequent special agreements

²⁹⁶. Article 3(1) also refers to the Rome Convention and further stipulates that in respect of performers, producers of phonograms and broadcasting organisations, the obligation contained in Article 3(1) only applies in relation to the rights provided under TRIPS. These rights are contained in Article 14 (1)-(5).

²⁹⁷. Chapter 4 of this thesis discusses the three-step test. It is disputed whether the three-step test also applies to copyright limitations in the broader sense, ie to compensated, non-voluntary licences.

²⁹⁸. See, for instance, WTO Panel decision, WT/DS/160/R, 6.94. It should be pointed out, however, that Article 13 has not extended the applicability of the three-step test to related rights (M Ficsor *supra* note 250 at marginal number 16.02).

²⁹⁹. The WIPO Copyright Treaty and the WIPO Performances and Phonograms Treaty.

among Berne member states (such as TRIPS)³⁰⁰ may not contain provisions which further restrict the rights of the authors. Yet, such a further restriction appears possible if Article 13 of TRIPS is interpreted so that its three-step test supersedes the explicit requirements of the specific limitations and exceptions contained in the Berne Convention. This would mean that limitations and exceptions can, alternatively, be based on Article 13 TRIPS.

3.7. The WIPO Copyright Treaty (WCT) of 1996

3.7.1. Introductory remarks regarding the WCT

In 1996, WIPO member states adopted, after much debate, two new treaties: the WIPO Copyright Treaty (WCT) and, for neighbouring rights, the WIPO Performances and Phonograms Treaty (WPPT).³⁰¹ These treaties are commonly referred to as the WIPO Internet Treaties.³⁰² The treaties were signed in Geneva, Switzerland, with the intention of updating the existing international treaties on copyright and neighbouring rights.³⁰³ This was done in order to give an adequate response on the level of international copyright legislation to the challenges for copyright law brought about by new digital technologies and the Internet.³⁰⁴ On 6 March 2002 the WCT entered into force after being ratified by 30 contracting parties. The WCT is a special agreement in the meaning of Article 20 of the Berne Convention.³⁰⁵

Essentially, the WCT incorporates various operational provisions of the Berne Convention as well as some TRIPS provisions.³⁰⁶

³⁰⁰ M Senftleben has pointed out quite rightly that a confinement of Article 20 of the Berne Convention to bilateral agreements would be absurd since Article 20 seeks to prevent derogations to the standard of protection reached in the Berne Convention. (M Senftleben *supra* note 128 at 88-9).

³⁰¹ The WPPT, which entered into force on 20 May 2002, is briefly discussed in the next subchapter.

³⁰² See, for instance, WIPO survey *Intellectual property on the internet – A survey of issues* (2002) WIPO Doc. WIPO/INT/02 *supra* note 20 at 31.

³⁰³ *Ibid.*

³⁰⁴ M Ficsor *supra* note 250 at vii (Foreword).

³⁰⁵ See Article 1 (1) of the WCT.

³⁰⁶ See, for instance, Article 3 of the WCT. Article 3 of the WCT expressly incorporates Articles 2-6 of the Berne Convention; see also P Geller *supra* note 264 at § 3[3][b][ii].

In addition to the protection of traditional literary and artistic works, the WCT specifically protects computer programs (Article 4) as well as databases (Article 5) and provides explicitly for the rights of distribution, rental and communication to the public.³⁰⁷ Of particular interest are Articles 11 and 12 of the WCT, which contain obligations for member states concerning TPMs and Rights Management Information.³⁰⁸ The anti-circumvention provision in Article 11 of the WCT, especially, has given rise to widespread criticism. This is because Article 11 contains a general prohibition of circumvention devices and services which is seen to impede important uses that, to safeguard a just copyright balance, have been expressly made the subject of domestic copyright exceptions and limitations. This problem is discussed in detail in chapter 7.4.

3.7.2. Express exceptions and limitations contained in the WCT

The WCT contains principles for national limitations and exceptions in the digital environment.³⁰⁹ The relevant provisions are these³¹⁰:

- (1) incorporation of certain provisions of the Berne Convention, Art 1(4);
- (2) general provision: the three-step test, Art 10.

³⁰⁷ See Articles 6-8 of the WCT.

³⁰⁸ More precisely, Article 11 of the WCT obliges member states, to 'provide adequate legal protection and effective legal remedies against the circumvention of effective technological measures that are used by authors in connection with the exercise of their rights [...] and that restrict acts, in respect of their works, which are not authorized by the authors concerned or permitted by law.' Article 12 requires member states to provide adequate and effective legal remedies against persons who unlawfully alter or remove so-called Rights Management Information, as defined in paragraph 2 of Article 12, knowing or having reason to know that such unauthorised modification will induce, enable facilitate or conceal copyright infringement.

³⁰⁹ N Garnett supra note 29 at iv.

³¹⁰ It should be noted that the WCT, unlike the Berne Convention, contains in its Art 2 an express codification of the idea/ expression dichotomy. Furthermore, Art 5 WCT excludes data or material itself from the protection of compilations of data or other material which is provided for in the same article. It is also noteworthy that Art 6(2) WCT specifically permits the exhaustion of rights rule/ first-sale doctrine by stipulating that: '[n]othing in this Treaty shall affect the freedom of Contracting Parties to determine the conditions, if any, under which the exhaustion of the right [...] applies after the first sale or other transfer of ownership of the original or a copy of the work with the authorization of the author'.

According to Article 1(4) of the WCT, contracting parties are compelled to comply with Articles 1-21 and the Appendix of the Berne Convention, even if a contracting party is not a member of the Berne Convention. This incorporation especially encompasses the three-step test contained in Article 9(2) of the Berne Convention. It is noteworthy that an agreed statement was adopted for Article 1(4) which expressly states that the reproduction right of Art 9(1) of the Berne Convention as well as the exceptions permitted thereunder do fully apply in the digital environment.³¹¹

Article 10(1) of the WCT extends the scope of the three-step test³¹² to the newly granted rights to authors of literary and artistic works under the WCT. These are the right of distribution (Article 6), the right of rental (Article 7), and the right of communication to the public (Article 8). Article 10(2) of the WCT, however, imposes the additional requirements of the three-step test to any copyright limitations and exceptions recognised in the Berne Convention.³¹³ This is not unproblematic; additional requirements for the permissibility of limitations and exceptions may cause a further restriction on the scope of these provisions with adverse impacts for users as well as the public interest. Such concerns were openly expressed during the discussions in

³¹¹. The agreed statement concerning Article 1(4) reads:

The reproduction right, as set out in Article 9 of the Berne Convention, and the exceptions permitted thereunder, fully apply in the digital environment, in particular to the use of works in digital form. It is understood that the storage of a protected work in digital form in an electronic medium constitutes a reproduction within the meaning of Article 9 of the Berne Convention.

For a discussion of the scope, interpretation and meaning of the (not unanimously passed) statement see S Ricketson supra note 29 at 57-60. The lack of consensus arguably conflicts with Article 31(2)(a) of the Vienna Convention on the Law of Treaties which states that

[t]he context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:

(a) any agreement relating to the treaty which was made between **all the parties** in connection with the conclusion of the treaty [...]

(emphasis added).

³¹². It is unclear, however, whether the three-step test also applies to copyright limitations in the broader sense, ie to compensated, non-voluntary licences.

³¹³. Article 10(2) of the WCT reads:

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.

the Main Committee I of the 1996 Diplomatic Conference. The delegate from Singapore, for instance, suggested deleting Article 10(2)³¹⁴ 'because it was inconsistent with the commitment to balance copyright laws, where exceptions and limitations adopted by the Conference were narrowed, and protection was made broader'.³¹⁵ The same delegate noted that Article 10 might violate Article 20 of the Berne Convention which prohibits provisions in other treaties that are contrary to the Berne Convention.³¹⁶ As a result of these concerns, the following agreed statement regarding Article 10 of the WCT was adopted:

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.

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.³¹⁷

The second part of the statement obviously aims to dispel the aforementioned concerns brought forward during the discussions in the Main Committee I of the 1996 Diplomatic Conference. Yet it seems to result in an oxymoron. The additional application of the three-step test within the context of the Berne Convention does not extend the scope of applicability of copyright limitations and exceptions. However, if at the same time any reduction of the scope of applicability of copyright limitations and exceptions is prohibited, the question about the whole

³¹⁴. Then Article 12 (2).

³¹⁵. World Intellectual Property Organization (WIPO) *Summary minutes, main committee I* (1996) Diplomatic conference on certain copyright and neighboring rights question [WIPO Doc. CRNR/DC/102], at 492, available at http://www.wipo.int/edocs/mdocs/diplconf/en/cnrn_dc/cnrn_dc_102.pdf [accessed on 25 January 2009].

³¹⁶. Ibid.

³¹⁷. World Intellectual Property Organization (WIPO) *Agreed statements concerning the WIPO Copyright Treaty* (1996) WIPO Doc. CRNR/DC/96, available at http://www.wipo.int/edocs/mdocs/diplconf/en/cnrn_dc/cnrn_dc_96.pdf [accessed on 25 January 2009].

purpose of the test contained in Article 10(2) WCT arises. This objection becomes relevant in cases where a national exception and limitation meets the requirements of specific copyright exception and limitation provision of the Berne Convention but does not comply with the criteria of the three-step test. This problem ultimately concerns the scope of the three-step test and is therefore discussed in chapter 4.

3.8. The 1961 Rome Convention and the 1996 WPPT

The International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organisations of 1961 (“Rome Convention”) and the WIPO Performances and Phonograms Treaty of 1996 (WPPT) are the primary international treaties for neighbouring (or related) rights.³¹⁸ Essentially, neighbouring rights are not associated with the author of the work and refer to subject-matters which do not necessarily reflect an author’s vision, for example performances, phonograms, broadcasts and the like.³¹⁹ In common law-based countries, neighbouring rights generally fall nonetheless within the scope of copyright law. However, in civil law countries a legislative distinction is made between authors’ rights and neighbouring rights, and this distinction was often followed by international policy- and lawmakers. It is for this reason that from a practical point of view, neighbouring rights have been defined as being copyright-type rights which are not covered by the Berne Convention.³²⁰ It was said in the introduction to this thesis that subject matters which usually fall under the rubric of neighbouring rights in civil law countries will only be dealt with in passing. Yet, a brief report on the provisions contained in the Rome Convention and the WPPT addressing exceptions and limitations appears apt.

³¹⁸. The Rome Convention addresses the rights of performers, phonogram producers and broadcasting organisations. The WPPT deals with the rights of performers and phonogram producers.

³¹⁹. P Goldstein supra note 32 at 11.

³²⁰. See Wikipedia entry “related rights”, available at http://en.wikipedia.org/wiki/Related_rights [accessed on 25 January 2009].

Within the context of the Rome Convention, Article 15 deals with limitations and exceptions. It provides:

1. Any Contracting State may, in its domestic laws and regulations, provide for exceptions to the protection guaranteed by this Convention as regards:
 - (a) private use;
 - (b) use of short excerpts in connection with the reporting of current events;
 - (c) ephemeral fixation by a broadcasting organisation by means of its own facilities and for its own broadcasts;
 - (d) use solely for the purposes of teaching or scientific research.
2. Irrespective of paragraph 1 of this Article, any Contracting State may, in its domestic laws and regulations, provide for the same kinds of limitations with regard to the protection of performers, producers of phonograms and broadcasting organisations, as it provides for, in its domestic laws and regulations, in connection with the protection of copyright in literary and artistic works. However, compulsory licences may be provided for only to the extent to which they are compatible with this Convention.

The WPPT also only contains one provision regarding limitations and exceptions, that is Article 16, which reads as follows:

- (1) Contracting Parties may, in their national legislation, provide for the same kinds of limitations or exceptions with regard to the protection of performers and producers of phonograms as they provide for in their national legislation, in connection with the protection of copyright in literary and artistic works.
- (2) Contracting parties shall confine any limitations or exceptions to rights provided for in this treaty to certain special cases which 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.³²¹

Article 16(1) WPPT resembles Article 15(2) of the Rome Convention, including the voluntary character of the provision. However, unlike Article 15(1) of the Rome Convention, Article 16 WPPT does not

³²¹. In this context, the agreed statement concerning Article 16 WPPT should be noted: “The agreed statement concerning Article 10 (on limitations and exceptions) of the WIPO Copyright Treaty is applicable *mutatis mutandis* also to Article 16 (on limitations and exceptions) of the WIPO Performances and Phonograms Treaty.”

contain a reference to specific cases. Yet more importantly, Article 16(2) WPPT expands the scope of the three-step test to exceptions and limitations to the rights of performers and producers of phonograms.³²²

3.9. Concluding remarks

The preceding sections have detailed the international legislative framework for copyright law, particularly with respect to copyright exceptions and limitations. From this examination it becomes clear that most of the relevant international treaties and agreements to which a country is a party influence and considerably restrict the scope of copyright exceptions and limitations. The so-called three-step test emerges as the most important instrument to validate the legitimacy of national copyright exceptions and limitations. It therefore merits closer examination. It is for this reason that the following chapter scrutinises the three-step test.

³²² It is unclear, however, whether the three-step test also applies to copyright limitations in the broader sense, ie to compensated, non-voluntary licences.

Chapter 4: The three-step test

'By now, the [...] three-step test is at the core of copyright law.'

Kamiel J. Koelman³²³

4.1 Introduction

We saw in the previous chapter that the so-called three-step test sets a common international standard for copyright exceptions and limitations. We also argued that copyright exceptions and limitations are the most important legislative tool for national lawmakers to fairly balance the interests of copyright holders against those of users of copyright protected material. Copyright exceptions and limitations can be used to facilitate widespread access to learning and other materials which in turn help to achieve developmental goals and generally promote welfare these countries. Thus, when discussing how to achieve a fair copyright balance, especially from a developing country perspective, the three-step test's requirements need to be carefully looked at. This is done in this chapter.³²⁴ At the end of this chapter, we will look at some general objections against the three-step test.

National legislators in countries that are members of one or more of the international treaties and agreements containing the test have to comply with the test's requirements when addressing copyright exceptions and limitations. Hence, the test has an important harmonising effect in this area. The three-step test appears in the Berne Convention (Article 9 (2)), TRIPS (Article 13), the WCT (Article 10) and the WPPT (Article 16). In addition, several European Directives³²⁵ as well as

³²³ K. Koelman 'Fixing the three-step test' (2006) 28 *European Intellectual Property Review* 407.

³²⁴ It is intended to outline the status quo of the legal discussion regarding the three-step test. For a comprehensive treatise on the three-step test see M Senftleben supra note 128.

³²⁵ See Article 5(5) of the EU Copyright Directive (2001/29/EC), Article 6(3) of the Computer Programs Directive (91/250/EEC), Article 6(3) of the EC Database Directive (96/9/EC) and Article

numerous Free Trade Agreements³²⁶ and national copyright laws³²⁷ contain the test.

It needs be noted, however, that the precise wording of the three-step test in the aforesaid legal instruments differs.³²⁸ Yet, the overall similarity in language justifies a combined examination of the test.³²⁹ In the following, the wording of the test used in the TRIPS

10(3) of the EC Rental Right Directive (2006/115/EC). Especially in the European context, the question is discussed who the true addressee of the test is. This could be the judge who has to apply the test or the legislative body introducing a domestic copyright exception or limitation. It is apparent that while the former interpretation makes the test ultimately a rule of interpretation, the latter view qualifies the test as a (mere) guideline for the legislature. It goes beyond the scope of this thesis to elaborate on this issue; for more information see B Hugenholtz et al *The Recasting of Copyright & Related Rights for the Knowledge Economy* (2006), at 70, available at http://www.ivir.nl/publications/other/IViR_Recast_Final_Report_2006.pdf [accessed on 25 January 2009].

³²⁶ See, for example, Article 17.4(10)(a) of the Australia-U.S. Free Trade Agreement (AUSFTA); Article 1705(5) of the North American Free Trade Agreement (NAFTA) and Article 16.4(10) of the U.S.-Singapore Free Trade Agreement.

³²⁷ See, for instance, section 13 of the South African Copyright Act No 98 of 1978 as amended and section 200AB(1) of the Australian Copyright Act 1968 as amended. The three-step test was also introduced in France (Art.L. 122-5 as well as Art 211-3 and Art 342-3 IPC), Italy (Art 71nonies and Art 71sexies(4) of the Italian Copyright Statute), Greece (Art 28(c) of the Greek Copyright Act), Portugal (Art 75(4) of the Portuguese Act on Copyright), Spain (Art 40bis of the Spanish Copyright Act). China introduced the second and the third steps into its law (Art 21).

³²⁸ See, for example, the differences between Article 9(2) of the Berne Convention, Article 13 of TRIPS and Article 10 of the WCT:

Article 9(2) of the Berne Convention reads:

It shall be a matter for legislation in the countries of the Union to permit the reproduction of such works in certain special cases, provided that such reproduction does not conflict with a normal exploitation of the work and does not unreasonably prejudice the legitimate interests of the author.

Article 13 TRIPS provides:

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.

Article 10 WCT reads:

(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.

³²⁹ Okediji observed in her examination of the WTO Dispute Resolution Panel decision (*United States – Section 110 (5) of the U.S. Copyright Act*, document WT/DS160/R) that the ‘WTO panel resolved that [the tests under TRIPS and the Berne Convention] required essentially the same analysis’ (R Okediji supra note 203 at 14). Ricketson is more cautious. He points out that ‘there are specific features of the TRIPS Agreement that suggest that the individual components of the three-step test in Article 13 should bear a different nuance or emphasis’. Yet, Ricketson eventually admits that ultimately such differences are more apparent than real (S Ricketson supra note 29 at 47).

Agreement will form the basis for the interpretation. This is because the only decision by an international body regarding the three-step test concerned Article 13 of TRIPS.³³⁰ Relevant differences in the wording of the test are pointed out where appropriate.³³¹

4.2 The area of application of the three-step test

It was in 1967 that international policy-makers first introduced an abstract formula concerning the question of permissible exceptions and limitations to the general right of reproduction under national copyright laws. This was at the Stockholm Conference for the revision of the Berne Convention. Over the years, this three-step test was embodied in several international treaties and other agreements. Although there have been only minor changes in terms of the wording of the three steps, the scope of application of the test has broadened significantly. Most notably, newer copyright treaties and agreements do not confine the test to the reproduction right. While the Berne Convention attached different exceptions and limitations to each exclusive right granted by the Convention, the three-step test later essentially became a single standard for measuring domestic copyright exceptions and limitations.³³²

The expansion of the scope of three-step test causes, however, some problems. In particular, it is unclear to which national copyright exceptions and limitations the three-step test applies if a country is a member of the Berne Convention and, at the same time, adheres to one or more of the newer copyright treaties and agreements which contain the three-step test. Before looking at the actual meaning of each step of the three-step test, this difficulty needs to be discussed.

³³⁰. WTO Dispute Resolution Panel decision: United States – Section 110 (5) of the U.S. Copyright Act, document WT/DS160/R.

³³¹. It is important to realise, however, that the strictly trade-focussed nature of the TRIPS Agreement might – to some extent - cause a deviant interpretation of the three-step in comparison with other international instruments. These take a wider variety of objectives into account.

³³². L Helfer 'World music on a U.S. stage: A Berne/TRIPS and economic analysis of the fairness in music licensing act' (2000) 80 *Boston University Law Review* 93 at 147.

The problem is, at first, being exemplified on the basis of the three-step test as contained in Article 13 of TRIPS. The starting point for the discussion of the problem is the assumptions that the three-step test contained in the TRIPS agreement applies to

- (1) national limitations and exceptions regarding the reproduction right under the Berne Convention;
- (2) national limitations and exceptions to the exclusive rights newly granted in later treaties and agreements³³³ which contain the three-step test; and
- (3) national limitations and exceptions to all other exclusive rights contained in Article 1-21 of the Berne Convention.³³⁴

These assumptions take into account the general wording of Article 13 TRIPS and the incorporation of Articles 1-21³³⁵ of the Berne Convention via Article 9(1) TRIPS. Assumptions one and two are unproblematic and undisputed.

The problem is, however, that a fairly detailed system of requirements exists under the Berne Convention for exceptions and limitations to exclusive rights other than the reproduction right.³³⁶ For example, Article 11*bis*(2) provides for equitable remuneration to be paid to authors in relation to their broadcasting and related rights. The three-step test does not contain such a requirement. As a result, a conflict arises between the third assumption and the basic rules laid down in Article 20 of the Berne Convention and Article 2(2) TRIPS. The main question is whether Article 20 of the Berne Convention militates against Article 13 being used as an *alternative* basis for all national copyright

³³³. That is, for TRIPS, the rental right contained in Article 11 of TRIPS.

³³⁴. Including the following rights: translation (Article 8), the public performance (Article 11), broadcasting and other communications (Article 11*bis*), public recitation (Article 11*ter*) and adaptation (Article 12).

³³⁵. Other than Article 6*bis* of the Berne Convention.

³³⁶. See, for example, the exception for quotations contained in Article 10 of the Berne Convention.

exceptions and limitation. If Article 13 could be used in such a way, obviously the detailed requirements contained in the Berne Convention for exceptions and limitations to exclusive rights other than the reproduction right would be obsolete once a Berne member state becomes bound by TRIPS. It also appears that the legal principle *lex specialis derogat legi generali* (a special law supersedes the general ones) may be violated by the third assumption. This conflict requires further explanation.

Article 20 of the Berne Convention provides that '[t]he Governments of the countries of the Union reserve the right to enter into special agreements among themselves, in so far as such agreements grant to authors *more extensive rights* than those granted by the Convention, or contain *other provisions not contrary to this Convention*'.³³⁷ It is submitted that TRIPS is a special agreement in the meaning of Article 20 of the Berne Convention.³³⁸ Article 2(2) of TRIPS complements Article 20 of the Berne Convention by stipulating that '[n]othing in Parts I-IV of this Agreement shall derogate from existing obligations that Members may have towards each other under the [...] Berne Convention [...]'.³³⁹

These two provisions, read together, are incompatible with understanding the three-step test as an *alternative* legal basis for copyright exceptions and limitations. If this were the case, the specific provisions of the Berne Convention dealing with limitations and exceptions, such as Articles 10 and 10bis of the Berne Convention, could then easily be bypassed. A limitation and exception would be admissible in spite of not fulfilling the requirements of the relevant specific provision contained in the Berne Convention if it instead passed the requirements of the three-step test. This would obviously potentially undermine the standard of copyright protection provided for in the Berne Convention.³³⁹

³³⁷. Emphasis added.

³³⁸. For more on this particular issue see M Senftleben supra note 128 at 88-9.

³³⁹. S Ricketson supra note 29 at 48.

With regard to provisions contained in the Berne Convention dealing with specific limitations and exceptions to the exclusive right of reproduction, the legal principle *lex specialis derogat legi generali* provides another argument against such a broad application of the three-step test. According to this legal principle, a specific norm takes priority over more general provisions. In the context of the Berne Convention, this principle effectively prohibits the application of the Berne Convention three-step test in relation to other, specifically regulated, exceptions and limitations regarding the reproduction right contained in the same Convention. The broad wording of the three-step test in Article 13 TRIPS, however, seems to revoke this fundamental legal principle by essentially stipulating that the test applies to all exclusive rights (including the reproduction right).

Within the context of the WCT, the situation is equally problematic: The three-step is phrased as the sole benchmark for copyright exceptions and limitations under Article 10 of the WCT. Article 1(4) of the WCT, however, incorporates Article 1-21 of the Berne Convention. Article 1(1) expressly declares that the WCT is a special agreement in the meaning of Article 20 of the Berne Convention. Moreover, Article 1(2) of the WCT contains a non-derogation clause in relation to the Berne Convention similar to the one contained in Article 2(2) of TRIPS. Article 10 of the WCT introduces the three-step test as follows:

(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.

Article 10(1) of the WCT is unproblematic and expressly declares the test applicable to the rights of authors of literary and artistic works newly introduced under the WCT: the rights of distribution, rental and communication to the public.³⁴⁰ Article 10(2) of the WCT, however, expressly extends the test to any limitation of or exception to the (economic) rights provided for in the Berne Convention.³⁴¹

It appears the best viable solution for the described conflict is to understand the three-step test as an *additional* rather than *alternative* set of requirements against which specific copyright exceptions and limitations have to be tested.³⁴² Hence, copyright exceptions and limitations which fall under one of the specific provisions for exceptions and limitations contained in the Berne Convention must also pass the three-step test. That way, a conflict between the Berne Convention and the newer agreements or treaties as well as a derogation from the existing obligations under the Berne Convention can be avoided.³⁴³

This interpretation, however, causes an interesting follow-up problem because the following agreed statement concerning Article 10 WCT was issued by the Diplomatic Conference which adopted the WCT³⁴⁴:

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

³⁴⁰. See Articles 6-8 of the WCT.

³⁴¹. M Ficsor 'The spring 1997 Horace S. Manges lecture – Copyright for the digital era: The WIPO "Internet" treaties' (1997) 21 *Columbia-VLA Journal of Law & the Arts* 197 at 215.

³⁴². See, for instance, M Senfileben *supra* note 128 at 90.

³⁴³. Ricketson, however, points out a relevant practical problem by stating that 'the language in which these [specific] limitations and exceptions [in the Berne Convention] is couched is generally different from that of the three-step test in Article 13 [of TRIPS], and it is therefore difficult, if not impossible, to determine whether these differing criteria are, in effect, the same or whether one extends beyond the other or is more restricted' (S Ricketson *supra* note 29 at 51-2).

³⁴⁴. World Intellectual Property Organization (WIPO) *Agreed statements concerning the WIPO Copyright Treaty* (1996) WIPO Doc. CRNR/DC/96, at 3, available at http://www.wipo.int/edocs/mdocs/diplconf/en/cnrn_dc/cnrn_dc_96.pdf [accessed on 25 January 2009].

Parties to devise new exceptions and limitations that are appropriate in the digital network environment.

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.

The second paragraph is of interest here. For it seems possible that an *additional* application of the requirements contained in the three-step could reduce the scope of limitations and exceptions permitted by the Berne Convention. A contradiction can be solved, however, by relying on a finding in a WIPO study of 1997. This WIPO study suggested that none of the exceptions and limitations permitted by the Berne Convention should, in any event, conflict with the three-step test³⁴⁵ - particularly because the three-step test serves as a means to clarify open-worded exceptions and limitations contained in the Berne Convention, such as Articles 10(1) and 10(2) ("fair practice").

4.3 The meaning of the three steps

After dealing with the preliminary yet important issue of the scope of the three-step test, it is necessary to examine the actual meaning of each of the three steps of the test. It has been said before that the three-step test has become a single standard for measuring domestic copyright exceptions and limitations.³⁴⁶ Consequently, any serious discussion regarding the introduction as well as interpretation of national exceptions and limitations to the rights holders' exclusive rights need to begin with a careful analysis of the requirements stipulated in the three-step test.

In essence, the three-step test determines the circumstances under which domestic legislation can limit the exclusive rights of the

³⁴⁵. WIPO *Implications of the TRIPs Agreement on Treaties Administered by WIPO* (1996) WIPO publication No. 464E at 22-3. However, this WIPO study dealt with the relation between the Berne Convention and TRIPS.

³⁴⁶. L Helfer *supra* note 332 at 147.

rights holders.³⁴⁷ More precisely, the test allows exceptions and limitations to exclusive rights only

- a) in certain special cases;
- b) that do not conflict with the normal exploitation of the work; and
- c) do not unreasonably prejudice the legitimate interests of the author/ rights holder.

Interestingly, there is no agreement about the precise meaning of the test, even though it has been incorporated into numerous legal instruments. None of these instruments defines any of the significant terms used in the test. Also, the theoretical possibility of a clarifying dispute resolution by the International Court of Justice³⁴⁸ has never been used.³⁴⁹ Some commentators have expressly lamented the scarcity of case law in relation to interpreting the three-step test.³⁵⁰ And the few cases decided by national courts differ significantly.³⁵¹

Recently, the three-step test has started to attract increased scholarly attention.³⁵² But before 2000 most of what was known about

³⁴⁷. See Copy/South dossier supra note 171 at 140.

³⁴⁸. As provided for in Article 33(1) of the Berne Convention.

³⁴⁹. J Oliver 'Copyright in the WTO: The panel decision on the three-step test' (2001-2) 25 *Columbia Journal of Law & the Arts* 119 at 134.

³⁵⁰. N Garnett supra note 29 at 7.

³⁵¹. B Hugenholtz and R Okediji 'Conceiving an international instrument on limitations and exceptions to copyright' *Final Report by the IViR and the University of Minnesota Law School* (6 March 2008) at 21, available at http://www.soros.org/initiatives/information/articles_publications/publications/copyright_20080506/copyright_20080506.pdf [accessed on 25 January 2009]; C Geiger 'From Berne to national law, via the copyright directive: The dangerous mutations of the three-step test' (2007) 29 *E.I.P.R.* 486 at 489 (with further references).

³⁵². See, for instance, M Senftleben supra note 128; C Geiger supra note 351; K Koelman supra note 323; J Ginsburg 'Toward supranational copyright law? The WTO panel decision and the "Three-Step Test" for copyright exceptions' (2001) *Revue Internationale du Droit d'Auteur*, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=253867 [accessed on 25 January 2009]; D Brennan 'The three-step test frenzy – why the TRIPS panel decision might be considered per incuriam' (2002) 2 *Intellectual Property Quarterly* 212; J Oliver supra note 349; H Cohen Jehoram 'Restrictions on copyright and their abuse' (2005) 27 *E.I.P.R.* 364; T Heide 'The Berne three-step test and the proposed copyright directive' (1999) 21 *E.I.P.R.* 105. See also C Geiger 'Right to copy v.

the test was based upon the writings of a few leading legal commentators.³⁵³ In 2000, however, a WTO Dispute Resolution Panel dealt with the interpretation and application of the three-step test as contained in Article 13 of TRIPS.³⁵⁴ The occasion was a dispute between the European Union and the United States over an exception to the rights holders' copyright in U.S. copyright law.³⁵⁵ This dispute is sometimes referred to as the "homestyle case". The WTO panel's decision extensively analysed each of the steps. It was the first and remains the only decision by an international body concerning the three-step test in copyright law.³⁵⁶

The decision itself as well as the subsequent scholarly discussion of the decision has shed some additional light on how the test is to be understood. A number of objections have been raised to the WTO decision, of which the most important ones are highlighted and discussed below. Yet, it seems appropriate to give a summary of the WTO panel's decision in respect of each step. This is because the decision provides valuable guidance and sets, at present, the only effective benchmark from a practical point of view. Moreover, the decision is unlikely to be simply ignored in future international disputes. Note should, however, be taken of two significant factors: first, the WTO panel decision is of limited value as a precedent since neither other WTO member states nor domestic courts are bound by the decision. It may be

three-step test: The future of the private copy exception in the digital environment' 2005 *Computer Law Review International* 7.

³⁵³. See S Ricketson *The Berne Convention for the Protection of Literary and Artistic Works: 1886-1986* (1987); C Masouyé *WIPO Guide to the Berne Convention* (1978); H Desbois et al supra note 242.

³⁵⁴. For a detailed examination of the panel decision and a brief outline of the WTO dispute settlement procedure see J Oliver supra note 349 at 119 et seq.

³⁵⁵. United States – Section 110(5) of the U.S. Copyright Act, document WT/DS160/R The underlying dispute concerned the exceptions in section 110(5)(a) and (b) of the U.S. Copyright Act - the so-called homestyle exception and the so-called business exception. This provision excludes a broad range of retail and restaurant establishments from the need to obtain authorisation for the public performance of musical works on their premises via radio and television transmissions. The European Union claimed that these exceptions violate the three-step test as contained in the TRIPS Agreement because they create too broad an exception to the public performance right.

³⁵⁶. For an interpretation of the three-step test within the realm of patent law see the WTO panel decision concerning Article 30 TRIPS of 2000 (WTO document WT/DS114/R); also of interest in this context are the for trademark-related decisions WT/DS174/R and WT/DS290/R.

that even a later WTO panel would not be legally obliged to follow the decision.³⁵⁷ Secondly, a WTO panel naturally tends to deliver a decision driven by economical reasoning. Such an approach may not always take public policy considerations sufficiently into account. Yet, such considerations, especially from a developing country perspective, are fundamental in the context of copyright exceptions and limitations.

It is also important to acknowledge that the wording of the test suggests a cumulative application of the three steps. The WTO panel expressly confirmed such an interpretation by stating that '[f]ailure to comply with any one of the three conditions results in the Article 13 exception being disallowed'.³⁵⁸

In its decision, the WTO Panel stressed that Article 31 ("General rule of interpretation") and Article 32 ("Supplementary means of interpretation") of the 1969 Vienna Convention on the Law of Treaties³⁵⁹ are the fundamental rules of treaty interpretation.³⁶⁰ The

³⁵⁷. J Oliver supra note 349 at 133. Baude et al pointed out quite rightly that prior reports of a WTO Dispute Settlement Panel nevertheless often affect future interpretations (W Baude et al 'Model language for exceptions and limitations to copyright concerning access to learning materials in South Africa' (2006) 7 *Southern African Journal of Information and Communication* 82 at 89).

³⁵⁸. United States – Section 110 (5) of the U.S. Copyright Act, document WT/DS160/R para. 6.97.

³⁵⁹. Article 31 of the 1969 Vienna Convention on the Law of Treaties reads:

- (1) A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given the terms of the treaty in their context and in the light of its object and purpose.
- (2) The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:
 - (a) any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty;
 - (b) any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.
- (3) There shall be taken into account, together with the context:
 - (a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;
 - (b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;
 - (c) any relevant rules of international law applicable in the relations between the parties.
- (4) A special meaning shall be given to a term if it is established that the parties so intended.

Article 32 of the 1969 Vienna Convention on the Law of Treaties reads:

Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31:

Vienna Convention combines objective, teleological and subjective elements but puts emphasis on the objective element, which places the actual treaty text into the centre of any interpretation.

4.3.1 First step: certain special cases

The first step of the three-step test requires that limitations and exceptions are confined to “certain special cases”. The WTO panel considered the ordinary, dictionary meanings of the terms “certain”³⁶¹, “special”³⁶² and “case”³⁶³ as stated in the New Shorter Oxford English Dictionary. On this basis, the WTO panel declared that³⁶⁴

the first condition of Article 13 [TRIPS] requires that a limitation or exception in national legislation should be clearly defined [“certain”] and should be narrow in its scope and reach [in a quantitative as well as a qualitative sense³⁶⁵] [“special”]. On the other hand, a limitation or exception may be compatible with the first condition even if it pursues a special purpose whose underlying legitimacy in a normative sense cannot be discerned. The wording of Article 13’s first condition does not imply passing a judgment on the legitimacy of the exceptions in dispute.

The WTO panel further explained that not every situation to which a limitation or exception could apply needs to be explicitly identified in order to fulfil the requirement of (legal) certainty - provided the scope of the limitation is known and particularised.³⁶⁶

-
- (a) leaves the meaning ambiguous or obscure; or
 - (b) leads to a result which is manifestly absurd or unreasonable.

³⁶⁰. United States – Section 110 (5) of the U.S. Copyright Act, document WT/DS160/R para. 6.43.

³⁶¹. ‘[K]nown and particularised, but not explicitly identified’, ‘determined, fixed, not variable; definitive, precise, exact’ (see L Brown (ed) *New Shorter Oxford English Dictionary* 2ed (1993) 364).

³⁶². ‘[H]aving 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’ (see L Brown (ed) *supra* note 361 at 2971).

³⁶³. ‘[O]ccurrence’, ‘circumstance’ or ‘event’ or ‘fact’ (see L Brown (ed) *supra* note 361 at 345).

³⁶⁴. United States – Section 110 (5) of the U.S. Copyright Act, document WT/DS160/R para. 6.112.

³⁶⁵. *Ibid* at para. 6.109.

³⁶⁶. *Ibid* at para. 6.108.

The WTO panel expressly rejected the opinion, previously put forward by several commentators, that the first step, qualitatively, requires the existence of a “special purpose” for the limitation or exception in a normative sense.³⁶⁷ The most prominent proponent of such a special purpose requirement, Professor Sam Ricketson, subsequently endorsed the WTO panel’s finding. He acknowledged that ‘the preferable view is that the phrase “certain special cases” should not be interpreted as requiring that there should also be some “special purpose” underlying it’ since the purpose behind a limitation and exception is being tested by the second and third step of the three-step test in any event.³⁶⁸ By rejecting a “special purpose” requirement which needs to be objectively justified, the WTO panel’s interpretation essentially leaves it to the national legislators to decide whether or not a certain copyright limitation and exception is needed. This can be of particular importance for developing countries.

4.3.2 Second step: no conflict with a normal exploitation of the work

In its interpretation of the three-step test’s second step, the WTO panel firstly considered the dictionary meaning of the terms “normal”³⁶⁹ and “exploitation”³⁷⁰ as defined by the New Shorter Oxford English Dictionary. In addition, the WTO panel noted that each individual right of the right owner is to be considered separately when probing whether the normal exploitation of a right is affected or not.³⁷¹

³⁶⁷. Ricketson argues that an exception must be justified by some ‘clear reason of public policy or some other exceptional circumstance’ (S Ricketson supra note 353 at 482).

³⁶⁸. S Ricketson supra note 29 at 22. Ricketson refers to Ginsburg. Moreover, Ricketson admits that ‘[t]here is also some support for this approach on the drafting history of Article 9 (2) of the Berne Convention’.

³⁶⁹. ‘[C]onstituting or conforming to a type or standard; regular, usual, typical, ordinary, conventional ...’ (see L Brown (ed) supra note 361 at 1940).

³⁷⁰. ‘[M]aking use of’ or ‘utilizing for one’s own ends’ (see L Brown (ed) supra note 361 at 888).

³⁷¹. United States – Section 110 (5) of the U.S. Copyright Act, document WT/DS160/R para. 6.172 - 6.173. The panel noted that a ‘possible conflict with a normal exploitation of a particular exclusive right cannot be counterbalanced or justified by a mere fact of the absence of conflict with a normal exploitation of another exclusive right, even if the exploitation of the latter right would generate more income’.

After these preliminary remarks, the WTO Panel focused on the actual meaning of “normal exploitation”. Most importantly, the panel recognised that if the term “normal” is merely understood in its empiric, dictionary meaning, the problem of a circular argument arises: A rights holder would normally not expect income from uses which fall into the scope of a copyright exception or limitation.³⁷² Hence, no copyright exception and limitation could ever be in conflict with the normal exploitation of a work. In order to avoid the problem of circularity, the WTO panel confirmed the widespread conception that the term “normal” has also a weighty normative connotation. This connotation includes a dynamic element capable of taking into account technological and market developments.³⁷³

By accepting the normative element of the term “normal”, the WTO panel essentially established that not only actual but also potential effects are to be considered when assessing the permissibility of copyright exceptions and limitations.³⁷⁴ The WTO Panel based its finding on suggestions by a study group, composed of representatives of the Swedish Government and the United International Bureaux for the Protection of Intellectual Property (BIRPI)³⁷⁵, which was set up to prepare for the Berne Revision Conference at Stockholm in 1967.³⁷⁶ In

³⁷². See P Goldstein *supra* note 32 at 295-6.

³⁷³. The WTO panel stated (United States – Section 110 (5) of the U.S. Copyright Act, document WT/DS160/R para. 6.166):

In our opinion, these definitions [of normal] appear to reflect two connotations: the first one appears to be of an empirical nature, i.e., what is regular, usual, typical or ordinary. The other one reflects a somewhat more normative, if not dynamic, approach, i.e., conforming to a type or standard. We do not feel compelled to pass a judgment on which one of these connotations could be more relevant. Based on Article 31 of the Vienna Convention, we will attempt to develop a harmonious interpretation which gives meaning and effect to both connotations of “normal”.

³⁷⁴. As a matter of fact, the WTO panel put it more carefully (United States – Section 110 (5) of the U.S. Copyright Act, document WT/DS160/R para. 6.180):

[I]t 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.

³⁷⁵. BIRPI was the predecessor organisation to WIPO.

³⁷⁶. United States – Section 110 (5) of the U.S. Copyright Act, document WT/DS160/R para. 6.179.

relation to the reproduction right, the study group had suggested to allow countries

[to] limit the recognition and the exercising of that right, for specified purposes and on the condition that these purposes should not enter into economic competition with these works [in the sense that] all forms of exploiting a work, which have, *or are likely to acquire*, considerable economic or practical importance, must be reserved to the authors.³⁷⁷

Ultimately, the WTO panel issued the following clarifying statement in relation to the second step of the three-step test³⁷⁸:

[N]ot every use of a work, which in principle is covered by the scope of exclusive rights and involves commercial gains, necessarily conflicts with a normal exploitation of that work. If this were the case, hardly any exception or limitation could pass the test of the second condition and Article 13 might be left devoid of meaning, because normal exploitation would be equated with full use of exclusive rights. [...] [A]n exception or limitation to an exclusive right in domestic legislation rises to the level of a conflict with a normal exploitation of the work [...], if uses, that in principle are covered by that right but exempted under the exception or limitation, enter into economic competition with the ways that right holders normally extract economic value from that right to the work (i.e., the copyright) and thereby deprive them of significant or tangible commercial gains.

4.3.3 Third step: no unreasonable prejudice to the legitimate interests of the author

Before analysing the last step of the three-step test, it needs to be pointed out that the actual wording of the international instruments containing the test differs with regard to the protected persons. Article 9(2) of the Berne Convention and Article 10 WCT refer to the “author”, whereas Article 13 of TRIPS protects the “right-holder”. It is

³⁷⁷. Document S/1: Berne Convention; Proposals for Revising the Substantive Copyright Provisions (Articles 1-20); prepared by the Government of Sweden with the assistance of BIPRI at 42; as quoted in United States – Section 110 (5) of the U.S. Copyright Act, document WT/DS160/R para. 6.179.

³⁷⁸. United States – Section 110 (5) of the U.S. Copyright Act, document WT/DS160/R para. 6.182 – 6.183.

obvious that the term “rights holder” encompasses a wider range of protected persons than the term “author”.³⁷⁹

At the beginning of the examination of the final step of the three-step test, the WTO Panel stated that the analysis of the third step would require the following steps:

First, one has to define what are the “interests” of right holders at stake and which attributes make them “legitimate”. Then, it is necessary to develop an interpretation of the term “prejudice” and what amount of it reaches a level that should be considered “unreasonable”.³⁸⁰

The panel initially considered - in line with the analysis of the first two steps - the (dictionary) meanings of the relevant terms “interests”³⁸¹, “legitimate”³⁸², “unreasonable”³⁸³ and “prejudice”³⁸⁴. The WTO Panel observed that “interests” are not necessarily confined to actual or potential economic issues.³⁸⁵ It further noted that the term “legitimate” refers to both lawfulness from a legal positivist perspective and legitimacy from a normative angle, ‘in the context of calling for the protection of interests that are justifiable in the light of the objectives

³⁷⁹. Geiger interprets this change in wording as ‘the slight and progressive transition from the protection of the author to the protection of the exploiter’ (C Geiger supra note 351 at 487).

³⁸⁰. Ibid at para. 6.222.

³⁸¹. The WTO Panel stated that ‘the ordinary meaning of the term ‘interests’ may encompass a legal right or title to a property or to use or benefit of a property (including intellectual property)’ (United States – Section 110 (5) of the U.S. Copyright Act, document WT/DS160/R para. 6.223). Further meanings as cited in FN 199 of the WTO Panel decision: ‘The fact or relation of having a share or concern in, or a right to, something, especially by law; a right or title, especially to a (share in) property or a use or benefit relating to property’, ‘a financial share or stake in something’, ‘a thing which is to the advantage of someone, a benefit, an advantage’, ‘the relation of being involved or concerned as regards potential detriment or advantage’, ‘a thing that is of some importance to a person, company, state etc’.

³⁸². ‘[C]onformable to, sanctioned or authorized by, law or principle; lawful; justifiable; proper’; ‘normal, regular, conformable to a recognized standard type’, United States – Section 110 (5) of the U.S. Copyright Act, document WT/DS160/R para. 6.224.

³⁸³. The WTO Panel defined the term “reasonable” (‘proportionate’, ‘within the limits of reason, not greatly less or more than might be thought likely or appropriate’, or ‘of a fair, average or considerable amount or size’ (see L Brown (ed) supra note 361 at 2496) and then stated that “not unreasonable” connotes a slightly stricter threshold than “reasonable” (United States – Section 110 (5) of the U.S. Copyright Act, document WT/DS160/R para. 6.225).

³⁸⁴. ‘Harm, damage or injury to a person or that results from a judgement or action, especially one in which his/her rights are disregarded’ ((see L Brown (ed) supra note 361 at 2333).

³⁸⁵. United States – Section 110 (5) of the U.S. Copyright Act, document WT/DS160/R para. 6.223.

that underlie the protection of exclusive rights.³⁸⁶ At last, the WTO panel approached the crucial question of what degree of “prejudice” would be necessary to qualify as “unreasonable”. The panel concluded that the ‘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 owner’.³⁸⁷ However, the WTO Panel adopted the view expressed in the Guide to the Berne Convention³⁸⁸ that the prejudice contained in the third step of the three-step test may not be unreasonable if the rights holder is equitably compensated, for example through a system of non-voluntary licensing with equitable remuneration.³⁸⁹

4.4 The interpretation of the three-step test by national courts

By now, some national courts have also applied and interpreted the test – either because the relevant national copyright law itself contains the three-step test³⁹⁰, or parts thereof, or because the three-step test forms part of the country’s obligations under international law. In general terms, most courts have, in line with the WTO Panel decision already discussed, adopted a rather restrictive and rights holders-focused.³⁹¹

In the *Mulholland Drive* case³⁹², for instance, the French Supreme Court had to decide whether the private use exception

³⁸⁶ Ibid at para. 6.224.

³⁸⁷ Ibid at para. 6.229.

³⁸⁸ See WIPO *Guide to the Berne Convention* (1978) 55-6.

³⁸⁹ United States – Section 110 (5) of the U.S. Copyright Act, document WT/DS160/R para. 6.229 FN 205. Prior to the WTO Panel decision, Ricketson had already taken this view (see S Ricketson supra note 353 at 9.8).

³⁹⁰ See, for instance, section 13 of the South African Copyright Act No 98 of 1978 as amended and section 200AB(1) of the Australian Copyright Act 1968 as amended. The three-step test was also introduced in France (Art.L. 122-5 as well as Art 211-3 and Art 342-3 IPC), Italy (Art 71nonies and Art 71sexies(4) of the Italian Copyright Statute), Greece (Art 28(c) of the Greek Copyright Act), Portugal (Art 75(4) of the Portuguese Act on Copyright), Spain (Art 40bis of the Spanish Copyright Act). China introduced the second and the third steps into its law (Art 21).

³⁹¹ C Geiger ‘Rethinking copyright limitations in the information society – the Swiss Supreme Court leads the way’ (2008) *International Review of Intellectual Property and Competition Law* at 943.

³⁹² French Cour de Cassation, 1st Civil Division, decision of 28 February 2006.

regarding the right of reproduction contained in the French Intellectual Property Code (IPC)³⁹³ is compatible with a test contained in L122-5 § 9 of the IPC which incorporates the second and third step of the three-step test. L122-5 § 9 of the IPC stipulates:

The exceptions listed in this Article shall neither conflict with the normal exploitation of the work nor cause an unjustified prejudice to the legitimate interests of the author.

The facts of the case were that the claimant had legally purchased a DVD copy of the Hollywood movie "Mulholland Drive", directed by David Lynch. In order to watch the movie at his parents' house, the claimant intended to create an analogue VHS copy of the movie because his parents did not own a DVD player. Such copying was, however, prevented by Technological Protection Measures embedded in the DVD. The claimant argued that these TPMs unlawfully prevented him from exercising his rights under the private copy exceptions. After two conflicting judgments by lower courts, the French Supreme Court had to deal with the matter. First of all, the Supreme Court confirmed that the private copy exception gave no rise to a subjective right that the user could invoke and enforce against the copyright holder. Instead, it was a mere exception to the rights of the copyright holder. Secondly, and more importantly for the present purposes, the French Supreme Court held that the private copying exception was, at least in relation to movies and audiovisual works, usually in conflict with the normal exploitation of the work and therefore in breach of the second step of the three-step test. In this context, the French Supreme Court expressly stressed the importance of the DVD market for the movie industry for recovering the costs of producing a movie.

A decision handed down by Swiss Supreme Court on 26 June 2007 is of particular importance because it contained a

³⁹³ Articles L122-5 and L211-3.

noteworthy interpretation of the three-step test, especially regarding the last step of the test. The case before the Supreme Court concerned the creation and distribution of electronic press reviews. These press reviews were, on the basis of keywords specified by the orderer and against a set fee, compiled by a third party. The Swiss Supreme Court confirmed that under Swiss law such use falls under the private use exception contained in Article 19 of the Swiss Federal Copyright and Related Rights Act of 1992. In doing so, the Swiss Supreme Court adopted a particularly broad interpretation of the scope of the private use exception – which in Switzerland provides for a statutory licence. Consequently, the court had to examine whether such broad interpretation was in conflict with the three-step test by which Switzerland is bound through international law.

In its examination of the three-step test, the Swiss Supreme Court saw no conflict between the private use exception and the first step of the test, ie the requirement that copyright exceptions and limitations must be confined to certain special cases. When dealing with the test's second step, which states that copyright exceptions and limitations must not conflict with the normal exploitation of the copyright protected work, the Supreme Court held that the party claiming a violation of the three-step test must provide proof that the permitted use effectively resulted in a conflict with the normal exploitation of the copyright protected work. In the present case, the Supreme Court found the plaintiff had not provided such proof. With regard to the third step of the three-step test, the Swiss Supreme Court first stressed that this step contains an important proportionality test, which allows for the consideration of the different and conflicting interests at stake. In addition, the court noted that the wording of the third step of the three-step test varies in the different international instruments in that it sometimes refers to the interests of the rights holders whereas in other instruments it refers to the interests of the author. It is for this reason that the interests of both authors and rights holders must be considered. This distinction, of course, only becomes relevant if the interests of the

author and rights holders differ. In the case at hand, the Swiss Supreme Court stated that both society at large and the authors of the articles contained in the electronic press reviews are interested in as wide a distribution as possible of the articles in question. At the same time, the authors are interested in the right to prohibit the use in electronic press reviews, vested in the rights holders, ie the publishers, being replaced by a right to remuneration. This is because payment to the publishers usually leads to a part of the payment being paid out to the authors. On the basis of these observations, the court stated that because the publishers/ rights holders receive payment through the statutory licence contained in the private use exception, the result is in the end proportionate and does therefore not prejudice the legitimate interests of the rights holders in an unreasonable manner. In ruling so, the Swiss Supreme Court essentially emphasised the WTO Panel's aforementioned view according to which the prejudice contained in the third step of the three-step test may not be unreasonable if the rights holder is, for instance, equitably remunerated through a system of non-voluntary licensing.³⁹⁴

4.5 Concluding remarks

Both the aforementioned interpretation of the three-step test by the WTO panel and the three-step test in general have been criticised. The most important criticisms are summarised and discussed in this sub-chapter.

Some commentators have criticised the panel's equation of "certain" cases with "clearly defined" cases in the context of the first step.³⁹⁵ It has been suggested that such understanding of the term "certain" contradicted the fact that the term "clearly defined" was discussed prior to the passage of both the TRIPS agreement and the

³⁹⁴. United States – Section 110 (5) of the U.S. Copyright Act, document WT/DS160/R para. 6.229 FN 205. Prior to the WTO Panel decision, Ricketson had already taken this view (see S Ricketson *supra* note 353 at 9.8).

³⁹⁵. See, for example, M Senftleben *supra* note 128 at 134 et seq.

WCT but was in the end not adopted.³⁹⁶ Moreover, the requirement of clearly defined cases would make it difficult for typically open-ended provisions in Anglo-American copyright laws, eg fair use³⁹⁷, to pass the first step of the test.

These objections are not without merit although the WTO panel to some extent supported broader phrased limitations and exceptions such as fair use by stating that 'there is no need to identify explicitly each and every possible situation to which the exception could apply, provided that the scope of the exception is known and particularised'.³⁹⁸ It seems therefore appropriate to follow Senftleben's suggestion to rather define "certain special cases" as "some special cases".³⁹⁹ As a result, the first step essentially prohibits shapeless exceptions and limitations which encompass a wide variety of dissimilar uses.⁴⁰⁰

Various respected scholars have also complained that the WTO panel in its examination of the first step chiefly relied on quantitative elements and neglected qualitative considerations.⁴⁰¹ The criticism is that when the WTO panel expressly rejected a "special purpose" requirement, it depreciated the qualitative element by accepting that the mere existence of any public policy was sufficient.⁴⁰² This is arguably true. It must not however be forgotten that the purpose behind a limitation and

³⁹⁶. See for TRIPS: Group of Negotiations on Goods (GATT) *Draft Agreement on the Trade-Related Aspects of Intellectual Property Rights – Communication from the United States* (1990) GATT Doc. MTN.GNG/NG11/W70, Article 6, available at http://www.wto.org/gatt_docs/English/SULPDF/92100144.pdf [accessed on 25 January 2009] and for the WCT, Experts on the Printed Word 1988, Cf. subsection 3.3.1

³⁹⁷. See chapter 5 of this thesis.

³⁹⁸. United States – Section 110 (5) of the U.S. Copyright Act, document WT/DS160/R para. 6.108.

³⁹⁹. M Senftleben supra note 128 at 134. Senftleben persuasively cites the French text of the Berne Convention (certains cas spéciaux) in order to support his view.

⁴⁰⁰. Ibid at 137.

⁴⁰¹. See, for instance, M Ficsor 'How much of what? The three-step test and its application in two recent WTO dispute settlement cases' (2002) 192 *Revue Internationale du Droit d'Auteur* 111 at 133. Ficsor states that more is necessary 'than that policy makers wish to achieve any kind of political objective. There is a need for a clear and sound political justification [...]'. See also for the three-step test as contained in the WCT: J Reinbothe and S von Lewinski *The WIPO Treaties 1996* (2001) 124. While the quantitative connotation basically demands that a limitation facilitates only a limited number of unauthorised uses, the qualitative element calls for the existence of an exceptional or distinctive objective for a limitation or exception.

⁴⁰². M Senftleben supra note 128 at 140.

exception is tested by the second and third step of the three-step test.⁴⁰³ So, the first step of the three-step test serves basically as an initial threshold which disallows exceptions and limitations that are ill-defined, and leaves a more substantial examination to the second and especially the third step of the test.

This interpretation of the first step, however, causes an interesting follow-up problem: If the first step is effectively confined to quantitative considerations, important limitations or exceptions from a public policy point of view could fail the first step of the test if they are phrased too broadly. This would prevent sufficient weight being attached to their importance.⁴⁰⁴ However, despite the fact that the WTO panel did indeed predominantly rely in its decision on quantitative factors it nevertheless stated that both quantitative and qualitative elements are to be considered. This statement seems to prevent a scenario in which a socially important exception or limitation fails the first step of the test merely because of quantitative concerns.

In the end, the lukewarm recognition of qualitative elements by the WTO panel probably facilitates rather than impairs the use national copyright exceptions and limitations. This is because before the decision, the qualitative element could have been considered a significant *additional* constraint for the legitimacy of copyright exceptions and limitations. If this was true, a limitation or exception would, regardless of the number of unauthorised uses, also violate the first step of the three-step test when the limitation or exception lacked an exceptional or distinctive objective. Yet such an additional qualitative restraint for national copyright exceptions and limitations can arguably no longer be applied.

With regard to the second step, it appears that the acceptance of a normative connotation of the term “normal” is widely

⁴⁰³. S Ricketson supra note 29 at 22.

⁴⁰⁴. M Senftleben supra note 128 at 144.

uncontested.⁴⁰⁵ This is reasonable, since such an interpretation allows for a dynamic consideration of future developments, especially in the technological field, which could otherwise not be guaranteed. Having said this, the WTO panel decision's clear focus on the economic interests of the rights holders is problematic. It suggests that little or no consideration be given to non-economic public policy and public interest considerations.⁴⁰⁶

At this point, however, it becomes important to acknowledge two things: First, the WTO panel was a body of the trade-focused World Trade Organisation. Second, the decision of the panel merely concerned Article 13 of the trade-focused TRIPS Agreement. In addition, no significant public-policy justification, such as free speech or education, was applicable in the case presented to the WTO panel. Rather, the case revolved around an exception in the U.S. Copyright Act concerning amusement issues by excluding a broad range of retail and restaurant establishments from the need to obtain authorisation for the public performance of musical works on their premises via radio and television transmissions. In this light, it appears reasonable to argue that applicable, non-economic policy considerations, including public interest considerations expressed by fundamental human rights such as the right to education and the freedom of expression, may be considered in the context of the second step although the WTO Panel did not do so. As far as the three-step test in the Berne Convention is concerned, such an argument is corroborated by the fact that numerous other copyright exceptions and limitations of the Berne Convention are founded upon

⁴⁰⁵. Ricketson, however, seems to favour a purely empirical approach. He states that 'common sense would indicate that the expression "normal exploitation of a work" refers simply to the ways in which an author might reasonably be expected to exploit his work in the normal course of events. Accordingly, there will be kinds of use which do not form part of his normal mode of exploiting his work – that is, uses for which he would not ordinarily expect to receive a fee – even though they fall strictly within the scope of his reproduction right' (S Ricketson, *supra* note 353 at 483).

⁴⁰⁶. S Ricketson and J Ginsburg *International Copyright and Neighbouring Rights: The Berne Convention and Beyond* vol 1, 2ed (2006) 771.

non-economic policy considerations.⁴⁰⁷ Ultimately, such an interpretation ensures that the final step of the three-step can more easily be reached by copyright limitations and exceptions which go beyond mere de minimis uses. This, in turn, is crucial since the third step contains an all-important proportionality test.

The WTO panel's remarks regarding the final step of the three-step test have been subjected to relatively little substantial criticism. It is important to stress again that the third step contains an important proportionality test which relates the rights holder's harm to the user's benefits.⁴⁰⁸ Essentially, the prejudice for the rights holder has to be proportionate. Hence, lawmakers should always opt for the least onerous of all suitable measures. The WTO panel rightly noted that within the realm of the proportionality test the payment of "equitable remuneration" can serve as a means to avoid the prejudice reaching an unreasonable level. It remains unclear though, what "equitable remuneration" exactly means.

The above discussion of the interpretation of the steps of the three-step test does not challenge the legitimacy of the test itself. A more fundamental criticism is, however, whether or not the three-step test in its present wording is an adequate tool for examining national copyright exceptions and limitations.⁴⁰⁹ A number of proposals have been

⁴⁰⁷. S Ricketson and J Ginsburg, *ibid* at 771-2. For the TRIPS Agreement, a similar result can be reached by taking into account articles 7 and 8 of TRIPS which suggest a due consideration of public policy considerations.

⁴⁰⁸. It has been rightly noted that the importance of the proportionality test contained in the third step together with the cumulative application of the test's three steps necessitate a liberal interpretation of the first and second step since the important third step would otherwise hardly ever be reached (B Hugenholtz and R Okediji *supra* note 351 at 21).

⁴⁰⁹. Koelman, for instance, suggests that the three-step was merely the result of a compromise in order to accommodate most of the existing national copyright exceptions and limitations as contained in the laws of the contracting states of the Berne Convention at the time when the three-step test was first introduced. As such, the test is not fit to fulfil its current tasks, ie dealing 'with the issue of which usage should exclusively be controlled by the right holder and which should not' (K Koelman *supra* note 323 at 408). The assertion that the original three-step test was merely the result of a compromise is shared by Geiger (C Geiger *supra* note 351 at 487).

submitted as to the modification, refinement or complete replacement of the test.⁴¹⁰

Obviously, the present use of the test as an all-embracing instrument for testing domestic copyright exceptions and limitations goes well beyond what was originally envisaged by the drafters when the test was first developed in 1967 as mere tool for facilitating a compromise among the members to the Berne Convention. Two additional issues are of particular relevance here and therefore deserve express mentioning.

First, by placing pecuniary interests of the rights holders at the centre of the examination, the test seems to disregard other valid interests, particularly those important to developing countries such as facilitating widespread education. At the same time it helps safeguarding the interests of developed countries as net exporters of copyright protected material.

Secondly, it is apparent that the three-step test in its current form faces unanticipated difficulties in the digital age. In particular, a growing number of works can now be marketed directly to the end-user by using so-called Digital Rights Management systems (DRMs). As a result, a general exception for private copying potentially conflicts always with copyright holders' market opportunities and therefore arguably violates the second step of the international three-step test. The Swiss Supreme Court's decision may be of some help for users in this context,

⁴¹⁰. Sun calls for the complete abolishment of the three-step test because of 'its fundamental misconceptions, unfounded absoluteness, and unnecessary arbitrariness'. He suggests the introduction of the following test instead (H Sun supra note 13 at 270, 302 and 305): 'Members may provide limitations on the exclusive rights, provided that such limitations take account of the legitimate interests of right holders and of third parties'. Other notable proposals have been submitted by Okediji and Gervais. Okediji argues for the development and introduction of a robust international fair use doctrine into the Berne Convention (R Okediji supra note 217 at 148). Gervais suggests that an internationalised fair use doctrine, combined with the Berne three-step test, could serve as a basis to build the copyright of the future. Gervais concludes that with his proposed method, 'international copyright treaties would no longer constitute a 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' (D Gervais supra note 21 at 27-8, 32 and 34-5). Lastly, Koelman has suggested to either replace the three-step test with a fair use-like instrument or, as a quick fix, to merge the second and the third step of the test as follows: 'exemptions may be inserted if they do not unreasonably conflict with a normal exploitation of the [work]'. That way, other interests than the right holders' interests can be sufficiently taken into account (K Koelman supra note 323 at 410).

however, in that it requires the party invoking the test to prove the test's requirements have been satisfied. That, of course, is of particular relevance for the second step of the test. The conflict between private copying on the one hand and the three-step test on the other is dealt with in more detail in chapter 7. For now, however, it appears essential to grasp the general meaning of the three-step test as it currently stands. The test is likely to remain unchanged in the foreseeable future since international consent with respect to a modification of the test is unlikely.

After all, the current test can be summarised and clarified as follows: Copyright exceptions and limitations are permissible if they (1) are not unduly vague, (2) do not deprive the rights holders of tangible income in areas in which rights holders normally obtain such income from copyright, and (3) do not harm the interests of the rights holders in a disproportional way.

It follows from the preceding analysis that the three-step test allows both the relatively broad general clause exceptions and limitations and the more specific lists of copyright exceptions and limitations as they can be found, *inter alia*, in (Continental) Europe. Both approaches are described in greater detail in the following chapter. Having said this, it is worth mentioning that the test clearly favours the specific provisions approach. A general clause exception or limitation is more likely to violate the requirements contained in the first step of the three-step test. One could even argue that existing broad fair use exceptions, particularly in the U.S., only pass the three-step test because their lack of definiteness is compensated by rich bodies of case law. Any country considering the introduction of a fair use provision should take into account that such clarifying domestic case law does in their country naturally not exist.

Finally, it needs to be mentioned that some commentators have recently argued that the three-step test is an enabling clause rather than a restriction on national copyright exceptions and limitations.

They argue that the proportionality test contained in the third step allows for striking a fair balance between rights and limitations.⁴¹¹ It is submitted that such a broad statement is misleading. It ignores the fact that the three-step test is first and foremost a limiting provision in relation to copyright exceptions and limitations. The three-step test curbs a national lawmaker's leeway regarding copyright limitations and exceptions; and in doing this primarily serves the interests of rights holders. Interests other than those of the rights holders are only a secondary consideration within the three-step test.⁴¹² Having said this, there is an enabling *element* within the three-step test, and it is suggested here that national lawmakers in developing countries make note of this observation and adequately utilise this often overlooked flexibility.

⁴¹¹. T Dreier and B Hugenholtz (eds) *Concise European Copyright Law* (2006) 111.

⁴¹². K Koelman *supra* note 323 at 408.

Chapter 5: Copyright exceptions and limitations in selected national laws and regions

'Take not from others to such an extent and in such a manner that you would be resentful if they so took from you.'

Joseph McDonald⁴¹³

5.1 Introduction

Chapters 3 and 4 of this thesis have shown that the freedom of national lawmakers to utilise copyright exceptions and limitations is significantly constrained by a state's international treaty obligations and its obligations arising from other international agreements. The three-step test is of particular importance in this respect. These chapters also showed that the wording and scope of the international legal framework for copyright exceptions and limitations is often vague.

Given the crucial importance of copyright exceptions and limitations as a legislative tool for realising national public policy considerations - such as the enforcement of developmental targets, the stimulation of domestic creativity, the dissemination of knowledge, the access to educational material, and the promotion of welfare as a whole – it is appropriate to look at how different countries have dealt with the often vague international requirements in their domestic legislation.

In fact, WIPO's Standing Committee on Copyright and Related Rights (SCCR) recently concluded that a comparative analysis is a precondition for meaningful further discussions in this field.⁴¹⁴ Such an exercise serves two basic purposes:

⁴¹³. *Harper & Row Publishers v Nation Enterprises*, 471 US 539, 550 (1985).

⁴¹⁴. World Intellectual Property Organization (WIPO) *Conclusions of the SCCR: prepared by the chair* (2008) SCCR Seventeenth Session, at 1, available at

First, it gives lawmakers and other interested parties an idea of what lawmakers around the world believe the current international copyright regime permits by way of exceptions and limitations. This is particularly important for lawmakers in developing countries, whose copyright laws are often incomplete and outdated and need revision.

Secondly, a comparative survey shows the different approaches states have followed when drafting national copyright exceptions and limitations.

Naturally, it will only be possible to examine a limited number of national laws. This thesis examines the legal situation in South Africa, Europe (more precisely: the EU, Germany and the UK), the United States and Australia. South Africa's law is an example of the situation that prevails in many developing countries, particularly in Africa. The examination of European and U.S. laws is promising since these copyright laws were recently updated and are generally considered to be advanced pieces of legislation. In addition, lawmakers in the U.S, and Europe have opted for differing legislative techniques with respect to copyright exceptions and limitations which are worth discussing.

Using copyright laws from Europe and the United States as sample legislations is, however, not without difficulties. The United States and countries in Europe are among the most developed countries. Without anticipating the observations to be made in chapter 6, the interests developed countries have in copyright differ from those of developing countries like South Africa. This is because developed countries are typically net exporters of copyright protected material. As a result, many developed countries tend to favour a copyright regime with more protectionist elements than are arguably suitable for developing countries. And an important tool for attaining a protectionist copyright regime is a reserved use of copyright exceptions and limitations.

For these reasons this thesis also looks at the legal framework regarding copyright exceptions and limitations in Australia. Despite being considered a developed country⁴¹⁵, Australia shares striking similarities in social and even economic issues with developing countries, especially with South Africa.⁴¹⁶ These include settlement from Europe, a long history of colonial rule, the geographic isolation from important world markets, the existence of a large export-orientated natural resource sector, and problems in race relations which resulted in an ill-treatment of indigenous people. In addition, both Australia and South Africa face pressing issues in areas of identity, reconciliation and unjust access to wealth and resources. Furthermore, economic scientists have observed that South Africa, in many respects, has economic restructuring problems that are similar to those Australia faced in the 1980s. Hence, it seems that Australia's policies and strategies can, at least to some extent, be usefully exploited in the South African context and arguably also in many other developing countries.

5.2 Domestic approaches to copyright exceptions and limitations: preliminary remarks

In general it is convenient to distinguish three main approaches to copyright exceptions and limitations in national copyright laws: First, some countries, especially civil law countries in continental Europe, follow a specific provisions approach and incorporate rather long lists of specifically phrased copyright exceptions and limitations into their copyright laws. Secondly, some countries, most notably the U.S., have chosen to introduce into their copyright laws broad, open-ended so-called fair use provisions. These provisions are usually accompanied by

⁴¹⁵. In fact, Australia was ranked third in the UN 2007 Human Development Index (see United Nations Development Programme (UNDP) *Human Development Report 2007/2008*, supra note 5 Table 1: Human development index).

⁴¹⁶. For more information see, for instance, T O'Regan 'Thinking about policy utility: Some aspects of Australian cultural policy development in a South African context' (1998) 12 *Critical Arts: A South-North Journal of Cultural & Media Studies* 1 et seq.

only a few more specific copyright exceptions and limitations. Thirdly, there are countries, especially those in the common law tradition, that have opted for a compromise. While their copyright laws contain, specific copyright exceptions and limitations, they also employ broader so-called fair dealing provisions. According to these fair dealing provisions, the unauthorised use of protected works is permitted if the use can be considered fair in light of the underlying purpose. Such underlying purposes are research, (private) study, criticism and review, news reporting, teaching, use by disabled persons and use by archives as well as libraries.⁴¹⁷

The concepts of fair use in the U.S. and fair dealing in other countries must not be confused. Both concepts share the same fundamental idea of permitting uses which are considered fair. However, the concept of fair use is, in general, much broader than the concept of fair dealing because it is not confined to specific purposes such as research, study, criticism and review or news reporting. Furthermore, some of the uses permitted under the concept of fair dealing only pertain to certain kinds of protected works⁴¹⁸. Therefore, fair use and fair dealing are analogous rather than synonymous. In a way, the concepts may even be described as converse: Under the fair dealing concept permitted uses are regulated by law and the courts are required to develop certain general principles from those kinds of uses. By contrast, under the fair use doctrine the principles for permitted uses are specified, and it is left to the courts to determine certain kinds of uses.⁴¹⁹

⁴¹⁷. D Gervais supra note 21 at 21.

⁴¹⁸. For instance, section 29 of the UK CDPA only applies to literary (including computer programs), dramatic, musical or artistic works.

⁴¹⁹. The difference between both concepts has also been described as follows (H Laddie et al *The modern law of copyright and designs* [3ed] (2000) para 3.134):

Fair use should be distinguished from the statutory defences based on fair dealing; the latter are conceptually distinct since they pre-suppose that a substantial part has been taken.

5.3 The ‘specific-provisions’ approach

This subchapter looks at variants of the specific provisions approach. The 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 (“EU Copyright Directive”) and Germany’s copyright legislation serve as examples for this approach.

5.3.1 The EU Copyright Directive

As a result of different cultural traditions and also because of varying business practices as well as a number of other reasons, the domestic legal landscape relating to copyright exceptions and limitations differed (and still differs) greatly in Europe.⁴²⁰ Hence, harmonising legislative action at the level of the European Union was necessary. Since 1991 there have been several European Directives aiming at harmonising copyright-related areas of law, including the issue of copyright exceptions and limitations. In the following, the focus is on the most relevant EU Copyright Directive.⁴²¹

⁴²⁰. B Hugenholtz ‘Why the copyright directive is unimportant, and possibly invalid’ (2000) 22 *E.I.P.R.* 499 at 500.

⁴²¹. The requirements of three other European Directives should be noted. First, the Council Directive on the legal protection of computer programs of 1991 (91/250/EEC) contains in its articles 5 and 6 requirements for exceptions and limitations to the rights in computer programs. Secondly, the Directive on the legal protection of databases of 1996 (96/9/EC) provides in its Article 6 as follows

1. The performance by the lawful user of a database or of a copy thereof of any of the acts listed in Article 5 which is necessary for the purposes of access to the contents of the databases and normal use of the contents by the lawful user shall not require the authorization of the author of the database. Where the lawful user is authorized to use only part of the database, this provision shall apply only to that part.

2. Member States shall have the option of providing for limitations on the rights set out in Article 5 in the following cases:

(a) in the case of reproduction for private purposes of a non-electronic database;
(b) where there is 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;
(c) where there is use for the purposes of public security or for the purposes of an administrative or judicial procedure;
(d) where other exceptions to copyright which are traditionally authorized under national law are involved, without prejudice to points (a), (b) and (c).

Generally, European Directives do not become effective in EU member states until the directive is implemented domestically.⁴²² This gives member states considerable leeway as to the precise implementation of such directives in their countries and means that directives do not completely eliminate existing legal differences among member states.

The EU Copyright Directive was adopted on 22 May 2001 by the European Council after lengthy negotiations had taken place. The adoption of the directive brought to an end a discussion about harmonisation in the field of copyright law between the member states of the European Union and about necessary adjustments of copyright law to the information society. These discussions had started in 1995 with a European Commission's Green Paper.⁴²³ Two of the main issues European lawmakers had to deal with, were (1) the increasing cross-border rights exploitation of copyright protected material and (2) the issue of digital exploitation.

The EU Copyright Directive was to be implemented into domestic laws by 22 December 2002⁴²⁴ and mainly aimed at⁴²⁵

3. In accordance with the Berne Convention for the protection of Literary and Artistic Works, this Article may not be interpreted in such a way as to allow its application to be used in a manner which unreasonably prejudices the rightholder's legitimate interests or conflicts with normal exploitation of the database.

Lastly, the Directive on rental right and lending right and on certain rights related to copyright in the field of intellectual property of 2006 (2006/115/EC) allows in its art 6 certain derogations from the exclusive public lending right. In addition, art 10 of this directive stipulates that EU member states may provide for exceptions and limitations to the related rights addressed in the directive in respect of (a) private use, (b) use of short excerpts in connection with the reporting of current events, (c) ephemeral fixation by a broadcasting organisation, and (d) use solely for the purposes of teaching or scientific research. Paragraph 2 of the same article furthermore provides that 'Member State may provide for the same kinds of limitations with regard to the protection of performers, producers of phonograms, broadcasting organizations and of producers of the first fixations of films, as it provides for in connection with the protection of copyright in literary and artistic works. However, compulsory licences may be provided for only to the extent to which they are compatible with the Rome Convention'. Article 10(3) of the Rental Right Directive contains the three-step test.

⁴²². See Article 249 III of the Treaty Establishing the European Community.

⁴²³. European Commission's Green Paper on Copyright and Related Rights in the Information Society (document Com(95) 382 final).

⁴²⁴. See Art 13 of the EC Copyright Directive of 2001. However, Denmark and Greece were the only countries that met this deadline.

⁴²⁵. B Hugenholtz supra note 420 at 499.

- (1) aligning national laws of the EU member states with the WIPO Internet Treaties; and
- (2) harmonising the laws of member states within the scope of the directive.

The Copyright Directive addresses the following exclusive rights in its Articles 2-4: the reproduction right (Art 2), the right of communication to the public as well as the right of making available to the public (Art 3) and the distribution right (Art 4).

Article 5 of the Copyright Directive extensively deals with the issue of copyright exceptions and limitations to these exclusive rights.⁴²⁶ Article 5 contains twenty-one limitations and exceptions. It should be noted, however, that several exceptions and limitations are subject to qualifications. In particular, the exceptions and limitations contained in Art 5(2)(a), (b) and (e) are permitted only under the condition that the rights holder receives fair compensation.

The exceptions and limitations contained in Art 5 of the Copyright Directive are:

- (1) Transient or incidental temporary reproductions which are integral or essential parts of a technological process, Art 5(1)⁴²⁷;
- (2) reproductions on paper (or similar media) carried out by the use of photographic or similar techniques, Art 5(2)(a)⁴²⁸;
- (3) reproductions for non-commercial private uses, Art 5(2)(b);
- (4) reproductions made by public libraries, educational establishments, museums or certain archives, Art 5(2)(c);

⁴²⁶. It is of interest that recital 44 of the Copyright Directive determines that '[w]hen applying the exceptions and limitations provided for in this Directive, they should be exercised in accordance with international obligations.'

⁴²⁷. For the purpose of enabling either a network transmission by an intermediary or a use which has no independent economic significance.

⁴²⁸. With the exception of sheet music.

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- (5) ephemeral recordings by broadcasting organisations and archiving of such recordings, Art 5(2)(d);
- (6) reproduction of broadcasts by social, non-commercial institutions such as hospitals and prisons, Art 5(2)(e);
- (7) illustrations for teaching or scientific research, Art 5(3)(a);
- (8) non-commercial uses for the benefit of disabled people, Art 5(3)(b);
- (9) reporting of current events, Art 5(3)(c);
- (10) quotations for purposes such as criticism or review, Art 5(3)(d);
- (11) uses for the purposes of public security and for the benefit of administrative, parliamentary or judicial proceedings, Art 5(3)(e);
- (12) uses of political speeches as well as extracts of public lectures etc., Art 5(3)(f);
- (13) uses in the course of religious celebrations or official celebrations organised by a public authority, Art 5(3)(g);
- (14) uses of works made to be located permanently in public places, Art 5(3)(h);
- (15) incidental inclusions, Art 5(3)(i);
- (16) promotion of an public exhibition or sale of artistic works, Art 5(3)(j);
- (17) uses for caricature, parody or pastiche, Art 5(3)(k);
- (18) uses in connection with the demonstration or repair of equipment, Art 5(3)(l);
- (19) uses of models, drawings or plans of a building for the purpose of reconstructing a building, Art 5(3)(m);
- (20) communicating or making available works contained in the collections of public libraries, educational establishments, museums and certain archives by means of terminals situated on the premises of such establishments for the purpose of research or private study, Art 5(3)(n)⁴²⁹;
- (21) analogue uses of minor importance which are in compliance with existing domestic exceptions and limitations, Art 5(3)(o)⁴³⁰.

Article 5(1) of the Copyright Directive is the only mandatory provision in Article 5 and basically aims at technical activities such as browsing⁴³¹ and caching.⁴³² By contrast, the limitations and exceptions

⁴²⁹. Article 5(3)(n) of the Copyright Directive only pertains to works and other subject-matter which are not subject to purchase or licensing terms.

⁴³⁰. Provided that such uses 'do not affect the free circulation of goods and services within the Community'.

⁴³¹. Browsing is defined as '[looking] at a series of electronic documents on a computer screen by means of a computer program that permits the user to view multiple electronic documents in a flexible sequence by the process of activating hypertext "buttons" within one document, which serves as a reference to the location of related document' (website of The Webster Dictionary, <http://www.webster-dictionary.org> [accessed on 25 January 2009]).

⁴³². Caching is defined as using a 'form of memory in a computer which has a faster access time than most of main memory, and is usually used to store the most frequently accessed data in main memory during execution of a program' (website of The Webster Dictionary, <http://www.webster-dictionary.org> [accessed on 25 January 2009]).

allowed under Articles 5(2) and 5(3) are optional. Hence, member states are free to adopt, maintain or ignore these exceptions and limitations. Yet, apart from certain minor exceptions and limitations⁴³³, member states may not allow other exceptions and limitations other than those mentioned in Article 5. Furthermore, the six limitations and exceptions contained in Articles 5(1) and 5(2) apply solely to the reproduction right, whereas the fifteen limitations and exceptions enumerated in Article 5(3) may also apply to the rights of communication and making available to the public.

As far as the distribution right is concerned, Article 5(4) provides that member states may introduce exceptions and limitations similar to the ones for the right of reproduction as contained in Article 5(2) and (3) - albeit only to the extent justified by the purpose of the authorised act of reproduction.

As mentioned in the previous chapter, the Copyright Directive also contains the three-step test. More precisely, Art 5(5) stipulates that all the exceptions and limitations contained in Article 5 are subject to the requirements of the three-step test.

5.3.2 German Copyright legislation

The German copyright legislation is a good example of how copyright exceptions and limitations are dealt with in civil law countries. It is one example of how the EU Copyright Directive can be interpreted and transformed into national law.

Germany was the fifth country in the European Union to start implementing the EU Copyright Directive. The German legislature decided, however, to start by first tackling only the mandatory obligations set up by the Directive in a so-called "first basket" which went into effect in September 2003. Among other things, the legislation

⁴³³. See Art 5(3)(o).

brought about extensive amendments to exceptions and limitations to the protection of copyright and related rights (Schranken des Urheberrechts).

The “second basket” came into force on 1 January 2008 and contained further amendments addressing outstanding matters concerning new technological means and other issues related to the digital age.

The German Copyright Act of 1965 has a closed list of limitations and exceptions (in the narrow sense)⁴³⁴ to the copyright holders’ exclusive exploitation rights.⁴³⁵ Most of the exceptions and limitations are contained in sections 44a – 60.⁴³⁶ They are:

- (1) Transient or incidental temporary reproductions which are integral or essential parts of a technological process, sec 44a;
- (2) reproduction, distribution as well as public exhibition and public communication for the purpose of judicial and administrative proceedings as well as for the benefit of the administration of justice and public safety, sec 45⁴³⁷;
- (3) non-commercial reproduction and distribution for the benefit of disabled people, sec 45a⁴³⁸;
- (4) reproduction, distribution and making available to the public of works in collections which are designed for religious, school or non-commercial instructional purposes, sec 46⁴³⁹;

⁴³⁴. For more information on the terminology in the context of copyright exception and limitations see chapter 3.2.

⁴³⁵. The German Federal Court (Bundesgerichtshof) has declared that a mutatis mutandis application of these exceptions and limitations is only possible in exceptional cases (BGHZ = GRUR 2001, 51 (52) (*Parfümflakon*)).

⁴³⁶. In addition, sec 5 of the German Copyright Act expressly excludes official documents, such as acts, regulations and decrees from the scope of copyright protection. Furthermore, sec 24 (free use) and sec 12(2) (communication of the content of a published work) of the German Copyright Act are noteworthy in this context. The free use provision contained in sec 24, however, must not be confused with “fair use” (A Sterling supra note 221 marginal number 10.23). Rather, sec 24 stipulates that an independent work created by the free use of someone else’s work may be published and exploited without permission of the author of the used work. The compulsory licence provision in sec 42a of the German Copyright Act (compulsory licence for the creation of phonorecords) should also be noted. For computer programs see also sections 69d and 69e of the German Copyright Act, and for databases see sec 87c of the German Copyright Act of 1965.

⁴³⁷. Section 87c(2) of the German Copyright Act contains a similar provision for databases.

⁴³⁸. Section 45a(2) of the German Copyright Act requires that rights holders receive equitable compensation. The claim for the payment of equitable compensation is to be made by a collecting society only.

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- (5) reproduction of works for teaching purposes which have been broadcasted in school broadcasts, sec 47;
- (6) reproduction, distribution and public communication of public speeches, sec 48⁴⁴⁰;
- (7) reproduction, distribution and public communication of newspaper articles, broadcast commentaries etc, concerning political, economic or religious issues of the day, sec 49⁴⁴¹;
- (8) reproduction, distribution and public communication of works by the media in the course of reporting on events of the day, sec 50;
- (9) quotations from published works, sec 51;
- (10) non-commercial public communication of a published work, sec 52⁴⁴²;
- (11) making available of works for (non-commercial) educational and research purposes as well as related reproductions, sec 52a⁴⁴³;
- (12) making available of published works contained in the collections of non-commercial and publicly accessible libraries, museums or archives by means of terminals situated in reading rooms on the premises of such establishments for the purpose of research or private study, sec 52b⁴⁴⁴;
- (13) reproduction for private and other personal uses, sec 53;
- (14) reproduction and transmission on request by public libraries of articles published in newspapers or periodicals as well as small parts of a published work by means of mail, fax or in another electronic manner, sec 53a⁴⁴⁵;
- (15) ephemeral recordings by licensed broadcasting organisations and archiving of such recordings, sec 55;

⁴³⁹. Section 46(4) of the German Copyright Act requires, among other things, that a rights holder receives equitable compensation. Authors may prohibit the reproduction and distribution if the work no longer reflects their conviction.

⁴⁴⁰. The reproduction and distribution of such speeches in collections which predominantly contain speeches of the same author are not permitted.

⁴⁴¹. Section 49 of the German Copyright Act requires that rights holders receive equitable compensation unless only short extracts from a number of commentaries or articles are used in the form of an overview. The claim for the payment of equitable compensation is to be made by a collecting society only. In 2002, the German Federal Court decided that sec 49 of the German Copyright Act also usually covers electronic press reviews (BGH I ZR 255/00 (*Pressespiegel*)).

⁴⁴². Section 52(1) of the German Copyright Act requires, subject to numerous exceptions, that rights holders receive equitable compensation. However, sec 52 of the German Copyright Act does arguably not cover public communication via the Internet (G Schricker *Urheberrecht: Kommentar* [3ed] (2006) at §52 para 23).

⁴⁴³. Section 52a(4) of the German Copyright Act requires that rights holders receive equitable compensation. The claim for the payment of equitable compensation is to be made by a collecting society only.

⁴⁴⁴. Provided that no opposing contractual agreement exists. The number of electronic copies shown in the reading-rooms must, however, not exceed the number of offline copies possessed by the library. Moreover, sec 52b of the German Copyright Act requires that rights holders receive equitable compensation. The claim for the payment of equitable compensation is to be made by a collecting society only.

⁴⁴⁵. Section 53a of the German Copyright Act requires that the use by the orderer is permitted under sec 53 of the German Copyright Act. The transmission in ‘another electric manner’ is subject to a number of further requirements such as the absence of alternative as well as reasonable contractual offerings. Furthermore, equitable compensation of rights holders is required. The claim for the payment of equitable compensation is to be made by a collecting society only.

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- (16) reproduction and modification of a database work by certain persons to the extent necessary for accessing and using the database work, sec 55a;
- (17) uses in connection with the demonstration or repair of technical equipment, sec 56;
- (18) reproduction, distribution and public communication of works of secondary importance for the main subject of the use, sec 57;
- (19) reproduction, distribution and making available to the public of photographs and works of fine art which are publicly displayed, or intended to be publicly displayed or sold, for the purpose of advertising, or by publicly accessible libraries, educational institutions and museums, sec 58;
- (20) reproduction, distribution and public communication of works permanently located in public places, sec 59⁴⁴⁶;
- (21) reproduction and non-commercial distribution of portraits, sec 60.

Section 62 of the German Copyright Act prohibits, subject to various exemptions, altering a work if one of the aforementioned exceptions and limitations is utilised.

It is important to point out that, in spite of considerable opposition from rights holders in recent years, German law still allows reproductions for private and other personal uses (sec 53 of the German Copyright Act).⁴⁴⁷ The opposition was based on concerns caused by the changes brought about by the digital age.⁴⁴⁸ These concerns primarily relate to the fact that the creation of private copies has become much easier in the digital age than it used to be in the analogue world. Chapter 7 examines this issue in more detail. German lawmakers attempted to tackle the problem (1) essentially by outlawing the creation of private

⁴⁴⁶. The German Federal Court (BGH), in its *Verhüllter Reichstag* (Wrapped Reichstag) decision, held that public exhibitions do not qualify as “permanant” in the meaning of sec 59 of the German Copyright Act (BGH I ZR 102/99 (decision of 24.01.2002)). Furthermore, the German Federal Court held in its *Hundertwasser-Haus* decision, in agreement with most legal scholars, that sec 59 of the German Copyright Act only applies to photographs taken from public places, as opposed to, for instance, a private flat ((BGH I ZR 192/00 (decision of 05.06.2002)).

⁴⁴⁷. It is noteworthy that sec 53 of the German Copyright Act does not apply to computer programs. The creation of a backup copy may, however, be permitted under sec 69d(2) of the German Copyright Act.

⁴⁴⁸. One of the main reasons for the German lawmaker to adhere to the permissibility of private copies was the Ministry of Justice’s belief that prohibitions in this regard are of no avail due to the lack of efficient monitoring systems. The lack of efficient monitoring systems is partly caused by the fact that since the 1960s, the use of such monitoring systems in Germany has been regarded as being in violation of the constitutionally protected right safeguarding the inviolability of the home (see Art 13 of the German constitution).

copies in cases where the source is obviously unlawfully (a) produced or (b) made available publicly⁴⁴⁹, and (2) by providing for an obligation to pay remuneration to the rights holder. This obligation does, however, not pertain to the person making the copy but to the manufacturer, retailer or commercial importer of storage media and other devices facilitating such copying.⁴⁵⁰

Section 53(1) of the German Copyright Act also allows private reproductions to be made by another person, provided that either no payment is received or in cases where the reproduction is made on paper or any similar medium by way of a photographic technique or a method leading to a similar result. This provision is accompanied by the newly introduced sec 53a of the German Copyright Act which permits offline as well as online delivery services offered by public libraries.

5.4 The fair dealing approach

As mentioned, the copyright laws of many countries with a common law tradition contain a number of specific copyright exceptions and limitations as well as broader so-called fair dealing provisions which allow uses which are considered fair in light of the underlying purpose. Copyright law in the UK, Australia and South Africa embodies this approach.

5.4.1 The UK

On 31 October 2003, the Copyright and Related Rights Regulations 2003 came into force in the UK. They implemented the EU Copyright Directive in UK copyright law which is principally laid down in the Copyright, Designs and Patents Act 1988 (CDPA). UK copyright law nowadays deals with copyright exceptions and limitations primarily through enumerated

⁴⁴⁹. See sec 53(1) of the German Copyright Act. This rule aims at preventing illegal downloads from so-called peer-to-peer (P2P) and other file-sharing platforms, such as Gnutella and BitTorrent.

⁴⁵⁰. See sections 54 et seq. of the German Copyright Act.

statutory exceptions and limitations. However, unlike most Continental European countries, it also has the broader concept of fair dealing which is discussed below.

Part I chapter III⁴⁵¹ of the CDPA specifically deals with limitations and exceptions to copyright works.⁴⁵² After several introductory provisions⁴⁵³, the following groups and sub-groups of copyright exceptions and limitations are specified:

- (1) General, sections 28A – 31;
 - (a) making of temporary copies, sec 28A;
 - (b) fair dealing for research and private study, sec 29;
 - (c) fair dealing for criticism, review and news reporting, sec 30;
 - (d) incidental inclusion of copyright material, sec 31;
- (2) visual impairment, sections 31A – 31F;
 - (a) making a single accessible copy for personal use, sec 31A;
 - (b) making and supply of multiple copies for visually impaired persons by an educational establishment or a body that is not conducted for profit, sec 31B;
 - (c) holding, lending and transfer of intermediate copies and records by an approved body, sec 31C;
- (3) education, sections 32 – 36A;
 - (a) things done for the purposes of instruction or examination, sec 32;
 - (b) inclusion in anthologies for educational use, sec 33;
 - (c) performing, playing or showing work in course of activities of educational establishment, sec 34;
 - (d) recording by educational establishments of broadcasts, sec 35;
 - (e) reprographic copying by educational establishments of passages from published works, sec 36;
 - (f) lending of copies by educational establishments, sec 36A;
- (4) libraries and archives, sections 37 – 44A;
 - (a) copying by librarians: articles in periodicals, sec 38;

⁴⁵¹. Chapter III is entitled ‘Acts Permitted in Relation to Copyright Works’ [sections 28-76 CDPA].

⁴⁵². Other important exceptions and limitations are contained in sections 79 and 81 CDPA regarding certain moral rights. Furthermore, sec 16 CDPA contains an exception and limitation for ‘insubstantial’ uses. A similar list of exceptions and limitations regarding the rights in performances is contained in schedule 2 to the CDPA. For other defences to a claim of copyright infringement, including a public interest defence which is based on sec 171(3) CDPA, see K Garnett supra note 215 para 22-50 et seq.

⁴⁵³. See sec 28 CDPA.

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- (b) copying by librarians: parts of published works, sec 39;
 - (c) lending of copies by libraries or archives, sec 40A;
 - (d) copying by librarians: supply of copies to other libraries, sec 41;
 - (e) copying by librarians or archivists: replacement copies of works, sec 42;
 - (f) copying by librarians or archivists: certain unpublished works, sec 43;
 - (g) copy of work required to be made as condition of export, sec 44;
 - (h) uses by and for the benefit of legal deposit libraries, sec 44A;
- (5) public administration, sections 45 – 50;
- (a) uses related to parliamentary and judicial proceedings, sec 45;
 - (b) uses related to proceedings of a Royal Commission or statutory inquiry, sec 46;
 - (c) uses with regard to material which is open to public inspection or on official register, sec 47;
 - (d) copying and issuing copies to the public of material communicated to the Crown in the course of public business, sec 48;
 - (e) copying of public records as well as supplying of copies of public records, sec 49;
 - (f) acts done under statutory authority, sec 50;
- (6) computer programs: lawful uses, sections 50A – 50C;
- (a) making of back up copies, sec 50A;
 - (b) decompiling of computer programs, sec 50B;
 - (c) observing, studying and testing of computer programs, sec 50BA
 - (d) copying and adapting of computer programs to enable lawful use, provided that such use is not prohibited under any term or condition of an underlying agreement, and for the purpose of correcting errors, sec 50C;
- (7) uses which are necessary for the purposes of legitimate access to and use of the contents of a database, sec 50D;
- (8) designs; sections 51 – 53;
- (a) uses regarding design documents and models, sec 51;
 - (b) uses regarding exploited designs derived from artistic work after the end of a period of 25 years from the end of the calendar year in which such articles are first marketed, sec 52;
 - (c) things done in reliance on registration of design, sec 53;
- (9) typefaces, sections 54 – 55;
- (a) use of a typeface in the ordinary course of printing, as well as related acts, sec 54;
 - (b) uses regarding articles for producing material in a particular typeface after the period of 25 years from the end of the calendar year in which the first such articles are marketed, sec 55;
- (10) works in electronic form: transfers of copies of works in electronic form, sec 56;
- (11) miscellaneous: literary, dramatic, musical and artistic works, sections 57 – 65;

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- (a) anonymous or pseudonymous works: acts permitted on assumptions as to the expiry of copyright or death of author, sec 57;
 - (b) use of notes or recordings of spoken words in certain cases, sec 58;
 - (c) public reading or recitation, including the making of a sound recording, or the communication to the public, of a reading or recitation, sec 59;
 - (d) copying and issuing copies to the public abstracts of scientific or technical articles, sec 60;
 - (e) making of a sound recording of a performance of a song for the purpose of including it in an archive maintained by a designated non-commercial body, sec 61;
 - (f) making a representing graphic work, photograph or film, or broadcast of a visual image of buildings and sculptures, models for buildings and works of artistic craftsmanship, if permanently situated in a public place or in premises open to the public on public display, sec 62;
 - (g) copying and issuing copies to the public of an artistic work for the purpose of advertising its sale, sec 63;
 - (h) making of subsequent works by same artist, sec 64;
 - (i) uses for the purpose of reconstructing a building, sec 65;
- (12) miscellaneous: lending of works – statutory licences regarding the lending to the public of copies of literary, dramatic, musical or artistic works, sound recordings or films [non-voluntary license], sec 66;
- (13) miscellaneous: films and sound recordings, sections 66A – 67;
- (a) films: acts permitted on assumptions as to expiry of copyright, sec 66A;
 - (b) playing of sound recordings for purposes of club, society etc, sec 67;
- (14) miscellaneous: broadcasts, sections 68 - 75;
- (a) incidental recording for purposes of broadcast, sec 68;
 - (b) recording for purposes of supervision and control of broadcasts and other services, sec 69;
 - (c) recording for purposes of time-shifting in domestic premises for private and domestic use, sec 70;
 - (d) making of photographs of broadcasts, or copies of such photographs, in domestic premises for private and domestic use, sec 71;
 - (e) free public showing or playing of broadcast, sec 72;
 - (f) reception and re-transmission of wireless broadcast by cable, sec 73⁴⁵⁴;
 - (g) making and provision of sub-titled copies of broadcast to physically or mentally handicapped persons by a designated body, sec 74;
 - (h) recording of a broadcast of a designated class, as well as the making of copies of such recordings, for archival purposes by a designated body, sec 75;

⁴⁵⁴. Section 73(4) CDPA contains a non-voluntary licence.

Section 76 extends the above exceptions and limitations to adaptations of literary, dramatic or musical works.

In addition to the aforementioned copyright exceptions and limitations, UK law also provides for non-voluntary, mostly compulsory licences.⁴⁵⁵ Among other things, these relate to (a) uses of sound recordings in broadcasts⁴⁵⁶, (b) powers exercisable in consequence of a competition report⁴⁵⁷, (c) the duty to provide advance information about programmes⁴⁵⁸, (d) instances where copyright protection had expired but had been revived by a subsequent term extension.⁴⁵⁹

The detailed wording of the law makes superfluous an in-depth examination of the named exceptions and limitations. It is necessary, however, to address the fair dealing provisions contained in the first group of copyright exceptions and limitations.⁴⁶⁰

The concept of fair dealing was first introduced in 1911 and is nowadays contained in sections 29 and 30 of the CDPA.⁴⁶¹ Despite the detailed list of exceptions and limitations, it can be argued that the fair dealing provisions are the centrepiece of the UK's legislation regarding copyright exceptions and limitations.

The boundaries of fair dealing are fairly vague and it is therefore sometimes difficult, if not impossible, to assess in advance whether a certain use will pass for fair dealing. In *Hubbard v Vosper*,

⁴⁵⁵. The non-voluntary licences contained in sections 66 and 73(4) have already been mentioned in the above list. The terms "compulsory licence" and "non-voluntary licence" were explained in chapter 3.2 of this thesis.

⁴⁵⁶. Sections 135A-H CDPA.

⁴⁵⁷. Section 144 CDPA.

⁴⁵⁸. Section 176 of and Schedule 17 to the Broadcasting Act 1990. The Broadcasting Act 1990, Schedule 17, para 7(1) provides as follows:

This Schedule and the Copyright, Designs and Patents Act 1988 shall have effect as if the Schedule were included in Chapter III of Part I of that Act, and that Act shall have effect as if proceedings under this Schedule were listed in section 149 of that Act (jurisdiction of the Copyright Tribunal).

⁴⁵⁹. The Duration of Copyright and Rights in Performances Regulations 1995 (No. 3297), reg 24(1).

⁴⁶⁰. For more information see, for instance, K Garnett et al supra note 215 at para 9-15 et seq.

⁴⁶¹. A fair dealing other than private study requires, subject to exemptions, a sufficient acknowledgement identifying the work in question by its title or other description, and identifying the author.

Lord Denning said that 'it is impossible to define what [...] 'fair dealing' [is]. It must be a question of degree. [...] [A]fter all is said and done, it must be a matter of impression. As with fair comment in the law of libel, so with fair dealing in the law of copyright. The tribunal of fact must decide'.⁴⁶²

Having said this, a due consideration of the ordinary (dictionary) meanings of the various terms employed in sections 29 and 30 CDPA is, as a first step, advisable and usually helpful.⁴⁶³

There is a settled body of court decisions that further interprets and clarifies the scope of fair dealing in the UK. The most relevant decisions are *British Oxygen Company Limited v Liquid Air Limited*⁴⁶⁴; *Hubbard v Vosper*⁴⁶⁵; *Beloff v Pressdram Ltd*⁴⁶⁶; *Sillitoe v McGraw-Hill Book Co (UK) Ltd*⁴⁶⁷; *British Broadcasting Corporation v British Satellite Broadcasting Ltd*⁴⁶⁸; *Time Warner Entertainment Co Ltd v Channel 4 Television Corporation plc*⁴⁶⁹; *Pro Sieben Media AG v Carlton UK Television Ltd*⁴⁷⁰; *Hyde Park Residence Ltd v Yelland*⁴⁷¹; *Newspaper Licensing Agency Ltd v Marks and Spencer plc*⁴⁷² and *Ashdown v Telegraph Group Ltd*⁴⁷³.

A detailed examination of each relevant decision is beyond the scope of this thesis. What is more important is that this case law offers the following factors for establishing fair dealing in the UK⁴⁷⁴:

⁴⁶². [1972] 1 All ER 1023 (C.A.) 1023 at 1027.

⁴⁶³. It is noteworthy that in 1990, the Federal Court of Australia dealt in detail with the dictionary meaning of the relevant terms contained in the equivalent Australian fair dealing provisions, see *De Garis v Neville Jeffress Pidler Pty Ltd* (37 FCR 99).

⁴⁶⁴. [1925] 1 Ch 383.

⁴⁶⁵. [1972] 1 All ER 1023 (C.A.), 1027.

⁴⁶⁶. [1973] 1 All ER 241.

⁴⁶⁷. [1983] FSR 545.

⁴⁶⁸. [1992] Ch 141.

⁴⁶⁹. [1994] EMLR 1.

⁴⁷⁰. [1999] 1 WLR 605.

⁴⁷¹. [2001] Ch 143.

⁴⁷². [2001] Ch 257.

⁴⁷³. [2002] Ch 149.

⁴⁷⁴. According to *Ashdown v Telegraph Group Ltd* [2002] Ch 149, citing H Laddie et al supra note 419 at para 20.16. Other factors previously considered by the courts include (a) whether or not the

- (1) the degree to which the use is in commercial competition with the copyright holders exploitation of the work;
- (2) whether the work is unpublished or published⁴⁷⁵;
- (3) the amount of work which has been taken and the importance of what has been taken.

It also follows from the case law that the requirement of fairness is to be tested objectively rather than subjectively.⁴⁷⁶

Lastly, it should not be overlooked that educational institutions and other stakeholders, including collecting societies, have issued several guidelines about what is considered to be fair in the context of fair dealing.⁴⁷⁷ Guidelines often provide a valuable practical indication and a rule-of-thumb as to what is permitted and what is prohibited, such as the amount of pages which may be copied. In 2006, a widely recognised study pointed out that the UK public is relatively aware of one of these guidelines, ie that one complete chapter from a book or 5 per cent of the total may be copied under the fair dealing provisions.⁴⁷⁸

work was improperly obtained (see, for instance, *Beloff v Pressdram Ltd* [1973] 1 All ER 241) and (b) the real motives for a use (*Pro Sieben Media AG v Carlton UK Television Ltd* [1999] 1 WLR 605).

⁴⁷⁵. The fact that a work is unpublished speaks against fair dealing.

⁴⁷⁶. See, for example, *Newspaper Licensing Agency Ltd v Marks and Spencer plc* [2001] Ch 257.

⁴⁷⁷. See, for instance, guidelines issued by the Cardiff University Copyright – 'Fair Dealing'

Guidelines (2006) available at

[http://www.cardiff.ac.uk/insrv/resources/guides/copyright/inf036%20Fair%20Dealing%20Guidelines](http://www.cardiff.ac.uk/insrv/resources/guides/copyright/inf036%20Fair%20Dealing%20Guidelines.pdf)

[.pdf](#) [accessed on 25 January 2009]. According to these guidelines, the following limits for fair dealing copying are generally accepted: (1) one complete chapter from a book or 5% of the total, whichever is the greater; (2) one article from a journal issue or set of conference proceedings; (3) one short story or poem (up to a maximum of 10 pages) from an anthology; (4) one illustration, diagram or map not exceeding A4 size (illustrations forming an integral part of a chapter or article may be included in the above extracts); (5) up to 10% from a pamphlet, report or standard (up to a maximum of 20 pages); and (6) a short excerpt from a musical work, provided it is not for performance purposes.

See also Joint Information Systems Committee (JISC) and the Publishers Association *Guidelines for Fair Dealing in an Electronic Environment* (1998) available at

<http://www.ukoln.ac.uk/services/elib/papers/pa/fair/intro.html> [accessed on 25 January 2009].

⁴⁷⁸. A Gowers *supra* note 147 at para 3.27.

A general limitation and exception for private copying does not exist under UK copyright law and, consequently, there is no private copy levy system of the sort found in countries such as Germany.⁴⁷⁹ There are, rather, a few narrowly phrased exceptions that deal with private copying.⁴⁸⁰ These cover specific activities such as non-commercial research⁴⁸¹, private study⁴⁸² and time-shifting⁴⁸³. Hence, most unauthorised reproductions for private purposes are in violation of the copyright holders' copyrights. Common activities such as copying music from a CD to an MP3 player (so-called 'space-shifting'/'format-shifting') are copyright infringements.⁴⁸⁴ Typically, rights holders do not enforce their rights, chiefly because small-scale infringements are difficult and costly to trace. However, such inactivity on the enforcement level may not last much longer in light of the remarkable increase of small-scale infringements in the digital age. In fact, an increasing eagerness to take legal action against small-scale infringers can be detected around the globe.⁴⁸⁵ Having said this, the described difference between the law in the books and the law on the ground is generally unsatisfactory. As a result, the call for new copyright rules which improve access to, and use of copyright protected works – especially through additional exceptions and limitations for private copying – is growing louder in the UK.⁴⁸⁶

⁴⁷⁹. It is also noteworthy that there is currently no exception or limitation in UK copyright law with regard to satire or parody.

⁴⁸⁰. K Garnett et al supra note 215 at para 9-13.

⁴⁸¹. Section 29 CDPA

⁴⁸². Ibid. A related question is whether permitted copying for non-commercial research and private study can be carried out by a third person, eg a librarian. To some extent, the CDPA explicitly allows such copying in sec 29(3) CDPA as well as, for librarians, in sections 38 and 39 CDPA.

⁴⁸³. Section 70 CDPA.

⁴⁸⁴. Another, yet related question is to what extent permitted copying can be carried out by a third person, such as a librarian or teacher. The CDPA explicitly allows such copying for the purposes of non-commercial research and private study in sec 29(3) CDPA as well as, for librarians, in sections 38 and 39 CDPA.

⁴⁸⁵. See, for instance, International Federation of the Phonographic Industry (IFPI) *Recording industry launches fresh wave of actions against illegal file-sharing* (17 October 2006) news, available at http://www.ifpi.org/content/section_news/20061017.html [accessed on 25 January 2009].

⁴⁸⁶. See A Gowers supra note 147 at paras 4.76 and 4.77. In January 2008, the UK Intellectual Property Office issued a follow-up document entitled *Taking forward the Gowers review of intellectual property – proposed changes to copyright exceptions* (available at <http://www.ipo.gov.uk/consult-copyrightexceptions.pdf> [accessed on 25 January 2009]) makes suggestions and raises questions as a basis for further discussions.

5.4.2 Australia

Australia's principal piece of copyright legislation is the Copyright Act of 1968.⁴⁸⁷ In recent years there have been several significant changes and amendments to this Act.

The first changes came about when the Copyright Act was amended in 2000 by the Copyright Amendment (Digital Agenda) Act 2000. The amendment brought Australia's copyright law into line with international obligations under the WCT.⁴⁸⁸ It introduced provisions outlawing the circumvention of technological protection measures and broadcast decoder devices (accompanied by criminal penalties and civil remedies).⁴⁸⁹ Moreover, the Copyright Amendment (Digital Agenda) Act 2000 altered the meaning of 'reproduction' in the way that a digitised version of non-digitised material is a reproduction, and vice-versa (Section 21A). The Copyright Amendment (Digital Agenda) Act 2000 also introduced a number of new copyright exceptions and limitations. In particular, it extended special exceptions and limitations for libraries and educational institutions into the digital environment. In addition, the copyright exceptions and limitations regarding computer programs (Sections 47B-47H) were amended.

When the Australia/ U.S. Free Trade Agreement (AUSFTA), came into force on 01 January 2005, Australia again had to amend its

⁴⁸⁷. Copyright Act 1968 Commonwealth of Australia 63/1968, as amended. This Act is accompanied by the Copyright Regulations 1969. The following subject matters are protected: literary, dramatic, musical and artistic works as well as sound recordings, cinematograph films, television and radio broadcasts, and published editions of works (sections 32 and 89 et seq of the Australian Copyright Act).

⁴⁸⁸. Australia acceded to the WCT and the WPPT on 26 April 2007. The treaties entered into force, with respect to Australia, on 26 July 2007.

⁴⁸⁹. A brief yet instructive overview over the changes being made is provided on the website of Ladas & Parry LLP, available at <http://www.ladas.com/BULLETTINS/2002/0202Bulletin/AustraliaDigitalCopyLaw.html> [accessed on 25 January 2009].

Copyright Act.⁴⁹⁰ This was done through the U.S. Free Trade Agreement Implementation Act 2004 and the Copyright Legislation Amendment Act 2004. Among other things, the term for copyright protection was extended for most copyright material by 20 years, the type of electronic rights management information which can receive legal protection was extended and wider criminal provisions for copyright infringement were introduced.

The Copyright Amendment Act 2006 was the Australian lawmaker's response to the tremendous technological developments in recent years.⁴⁹¹ It also dealt with some remaining requirements imposed by the AUSFTA which had not been addressed by the aforementioned acts in 2004.

The Copyright Amendment Act 2006 brought about significant changes to copyright exceptions and limitations.⁴⁹² The new Act addressed controversial matters such as format- and space-shifting, private copying, copying of library and archive material. Currently, the Australian Copyright Act contains a number of copyright exceptions and limitations. The most important of these are⁴⁹³:

- (1) Fair dealing for specific purposes;
 - (a) fair dealing for the purpose of research or study, sections 40 and 103C;

⁴⁹⁰. The final text of the U.S./ Australia Free Trade Agreement can be found on the website of the office of the U.S. trade representative at http://ustr.gov/Trade_Agreements/Bilateral/Australia_FTA/Final_Text/Section_Index.html [accessed on 25 January 2009].

⁴⁹¹. Not all provisions of the Copyright Amendment Act 2006 came, however, into force at the same time: While the provisions contained in schedules 6 to 8 and 10 to 11 came into force immediately after the Royal Assent on 11 December 2006, the provisions contained in schedules 1 to 5 and 12 came into force on 01 January 2007. Lastly, the provisions contained in schedule 9 came into force only on 08 January 2007.

⁴⁹². See especially schedule 6 of the Copyright Amendment Act 2006.

⁴⁹³. In addition, and based on the 1980 case *Commonwealth of Australia v John Fairfax and Sons Ltd* ((1980) 147 CLR 39), a non-statutory public interest defence has been considered in Australia. However, the existence of such a defence is highly disputed and more recent court decisions seem to reject a public interest defence (see, eg, *Collier Constructions Pty Ltd v Foskett* ((1990) 97 ALR 460 at 473)). For this reason, a public interest defence is not discussed here. Furthermore, sec 25(3) for secondary broadcasts as well as sec 28 for performances and communications of literary, dramatic or musical works or other subject-matter in the course of educational instruction should be noted.

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- (b) fair dealing for the purpose of criticism or review, sections 41 and 103A;
 - (c) fair dealing for the purpose of parody or satire, sections 41A and 103AA
 - (d) fair dealing for the purpose of reporting news, section 42 and 103B;
 - (e) fair dealing for the purpose of giving professional advice, sec 43(2);
- (2) uses for the purpose of judicial proceedings, sections 43(1) and 104(a)
- (3) temporary copies made in the course of communication, sections 43A and 111A;
- (4) temporary copies of works as part of a technical process, sections 43B and 111B;
- (5) private uses;
- (a) format shifting, sections 43C, 47J and 110AA;
 - (b) time-shifting, sec 111;
 - (c) space-shifting, sec 109A;
- (6) inclusion of short extracts of works in print or audiovisual collections for use by places of education, sec 44 (1)⁴⁹⁴;
- (7) importation of articles;
- (a) books and published editions; sections 44A and 112A;
 - (b) accessories to imported articles, sections 44C and 112C;
 - (c) sound recordings, sections 44D and 112D;
 - (d) computer programs, sec 44E;
 - (e) electronic literary or music items, sections 44F and 112DA;
- (8) reproduction of writing on an approved label for containers for a chemical product, sections 44B and 112B;
- (9) reading or recitation of an extract of reasonable length of a literary or dramatic work in public or for a broadcast, sec 45;
- (10) performance of literary, dramatic, or musical works at premises where persons reside or sleep, sec 46;
- (11) ephemeral reproductions of literary, dramatic, musical or artistic works and sound recordings by a broadcaster for the purpose of broadcasting, sections 47, 70, 107;
- (12) copying for the purpose of simulcasting⁴⁹⁵, sections 47AA and 110C;
- (13) permitted uses relating to computer programs;
- (a) reproduction for normal use or study of computer programs, sec 47B;
 - (b) back-up copy of computer programs, sec 47C;
 - (c) reproducing computer programs to make interoperable products (decompilation), sec 47D;
 - (d) reproducing computer programs to correct errors, sec 47E;
 - (e) reproducing computer programs for security testing, sec 47F;

⁴⁹⁴. Section 83 of the Australian Copyright Act should be noted in this context.

⁴⁹⁵. According to section 10 of the Australian Copyright Act ‘simulcasting means simultaneously broadcasting a broadcasting service in both analog and digital form in accordance with the requirements of the Broadcasting Services Act 1992 or of any prescribed legislative provisions relating to digital broadcasting’.

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- (14) Copying of works in libraries or archives
- (a) Acts done by Parliamentary libraries for members of Parliament, sections 48A and 104A;
 - (b) reproducing and communicating works by libraries and archives for users for research and study purposes; sec 49;
 - (c) inter-library copying, sec 50;
 - (d) reproducing and communicating unpublished works, sound recordings and cinematograph films in libraries or archives, sections 51, 110A;
 - (e) reproducing and communicating works in Australian Archives, sec 51AA;
 - (f) reproducing and communicating as well as copying of works, sound recordings and cinematograph films for preservation and other purposes, sections 51A and 110B;
 - (g) making preservation copies of significant works, recordings, films and published editions in key cultural institutions' collection, sections 51B, 110BA and 112AA;
 - (h) publication of unpublished works kept in libraries or archives, sec 52;
- (15) acts not constituting infringements of copyright in artistic works;
- (a) making of a painting, drawing, engraving or photograph of sculptures, or other works of artistic craftsmanship, which are permanently located in public places, and the inclusion of such works in a cinematograph film or in a television broadcast, sec 65⁴⁹⁶;
 - (b) making of a painting, drawing, engraving or photograph of a building or a model of a building, and the inclusion of the building or model in a cinematograph film or in a television broadcast, sec 66⁴⁹⁷;
 - (c) incidental filming or televising of artistic works (including a subsequent publication), sections 67, 68⁴⁹⁸;
 - (d) reproduction of a part of an artistic work in a later artistic work, sec 72;
 - (e) reconstruction of buildings, sec 73;
- (16) uses regarding sound recordings, cinematograph films, broadcasts, and published editions for the purpose of seeking professional advice or for the purpose of, or in the course of, the giving of professional advice, sec 104(b),(c);

⁴⁹⁶. Section 68 of the Australian Copyright Act extends the scope of this provision to the publication of the exempted painting, drawing, engraving, photograph or cinematograph film. Section 216 of the Australian Copyright Act should, however, be noted (see below).

⁴⁹⁷. Section 68 of the Australian Copyright Act extends the scope of this provision to the publication of the exempted painting, drawing, engraving, photograph or cinematograph film. Section 216 of the Australian Copyright Act should, however, be noted (see below).

⁴⁹⁸. The regulation contained in section 216 of the Australian Copyright Act needs to be taken into account. Section 216 provides:

Section 68 does not apply in relation to a painting, drawing, engraving, photograph or cinematograph film made before the date of commencement of this Act, but the copyright in an artistic work is not infringed by the publication of a painting, drawing, engraving, photograph or cinematograph film made before that date if, by virtue of section 65 or section 66, the making of the painting, drawing, engraving, photograph or film would not have constituted an infringement of the copyright under this Act if this Act had been in operation at the time when it was made.

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- (17) causing of a published sound recording to be heard in public or by the broadcasting of the recording if the first publication of the recording took place in Australia, sec 105;
- (18) causing a sound recording to be heard at a guest house or club, etc., sec 106;
- (19) causing of a film (which consists wholly or principally of images that were means of communication news) to be seen or heard in public after the expiration of 50 years after the end of the calendar year in which the principal events depicted in the film occurred, sec 110(1);
- (20) exhibiting old films⁴⁹⁹ incorporating literary, dramatic, or musical works, section 110(2);
- (21) using a record embodying film sound tracks⁵⁰⁰, sec 110(3);
- (22) reproductions of published editions of works, sec 112;
- (23) multiple reproduction (and communication) of insubstantial portions of literary or dramatic works on the premises of an educational institution for the purposes of a course of education provided by it, sections 135ZG and 135ZMB;
- (24) reprographic reproduction of statutory instruments, judgments, etc, sec 182A;
- (25) causing a published literary or dramatic work, or an adaptation thereof, to be performed in public by way of the reception of a broadcast, sec 199(1);
- (26) causing of a sound recording or cinematograph film to be heard or seen in public by way of the reception of a television broadcast or sound broadcast, sec 199(2), (3);
- (27) reproduction and adaptation of literary, dramatic, musical or artistic works in the course of educational instruction or in the context of an examination, sec 200(1);
- (28) making records of educational sound broadcasts, sec 200(2), (2A);
- (29) proxy web caching by educational institutions, sec 200AAA;
- (30) making of a record of a sound broadcast by or on behalf of an institution assisting persons with an intellectual disability, sec 200AA;
- (31) use of works and other subject-matter for certain purposes by libraries or archives, educational institutions or by or for persons with a disability (three-step test), sec 200AB
- (32) non-voluntary licence regarding the making of ephemeral recordings and films solely for the purpose of broadcasting (where the maker is not the broadcaster), sec 47(1), (3);
- (33) non-voluntary licence regarding sound broadcasts by holders of print disability radio licences, sec 47A;
- (34) non-voluntary licences regarding the making of records of musical works, sections 55, 59;
- (35) non-voluntary licence regarding the making of ephemeral cinematograph films solely for the purpose of including an artistic work in a television broadcast (where the maker is not the broadcaster), sec 70(1), (3);

⁴⁹⁹. The provision relates to films in which copyright originally subsisted but has since expired.

⁵⁰⁰. Provided that the record is not a sound-track itself or a record derived directly or indirectly from such a sound-track.

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- (36) non-voluntary licence regarding the making of an ephemeral copy of a sound recording solely for the purpose of the broadcasting of the recording (where the maker is not the broadcaster), sec 107(1), (3);
- (37) non-voluntary licence regarding the causing of a published sound recording to be heard in public, sec 108;
- (38) non-voluntary licence regarding the broadcasting (other than a broadcast transmitted for a fee payable to the person who made the broadcast) of a published sound recording, sec 109;
- (39) non-voluntary licences regarding the reproduction by educational institutions of literary, dramatic, musical or artistic works, sections 135ZGA – 135ZME⁵⁰¹;
- (40) non-voluntary licences regarding the reproduction and communication of literary, dramatic, musical or artistic works by institutions assisting persons with a print disability, sections 135ZN – 135ZQ;
- (41) non-voluntary licences regarding the reproduction and communication of literary, dramatic, musical or artistic works etc by institutions assisting persons with an intellectual disability, sections 135ZR – 135ZT;
- (42) non-voluntary licences regarding the copying and communication of broadcasts (including underlying works, films and sound recordings) by educational institutions and institutions assisting persons with intellectual disabilities, sections 135E, 135F, 135U, 135V;
- (43) non-voluntary licences regarding the retransmission of so-called free-to-air broadcasts⁵⁰², sections 135ZZK, 135ZZY;
- (44) non-voluntary licence regarding the use of copyright material for the services of the Commonwealth or State, sec 183.

As in the UK, the Australian Copyright Act's fair dealing provisions remain - despite all recent changes - the centrepiece of Australia's copyright law with regard to limitations and exceptions. Australian law follows the lead of the UK legislation by providing semi-open fair dealing exceptions that are confined to specific purposes; ie research or study⁵⁰³, review or criticism⁵⁰⁴, parody or satire⁵⁰⁵, news-reporting⁵⁰⁶, and professional legal advice⁵⁰⁷. It is submitted that fair dealing applies broadly to all exclusive rights subsisting in a particular

⁵⁰¹. The exception and limitation contained in sections 135ZG and 135 ZMB (multiple reproduction of insubstantial parts of works) is remuneration-free and therefore listed above as an own category.

⁵⁰². For a definition of 'free-to-air broadcast' see sec 10 of the Australian Copyright Act.

⁵⁰³. Sections 40 and 103C of the Australian Copyright Act.

⁵⁰⁴. Sections 41 and 103A of the Australian Copyright Act.

⁵⁰⁵. Sections 41A and 103AA of the Australian Copyright Act.

⁵⁰⁶. Sections 42 and 103B of the Australian Copyright Act.

⁵⁰⁷. Section 43(2) of the Australian Copyright Act.

subject matter falling into the scope of the exception or limitation.⁵⁰⁸ Whether a particular use qualifies as a fair dealing is then a matter to be determined on the facts of the individual case.

Most notably, the Copyright Act contains in sections 40(2) and 103C(2) a non-exclusive set of factors to be taken into account in the case of reproductions for the purpose of research or study.⁵⁰⁹ These factors resemble the factors which are relevant for the determination of fair use under sec 107 of the U.S. Copyright Act⁵¹⁰ and include:

- (1) the purpose and character of the dealing;
- (2) the nature of the work or adaptation or other subject-matter;
- (3) the possibility of obtaining the work or adaptation or other subject-matter within a reasonable time at an ordinary commercial price;
- (4) the effect of the dealing upon the potential market for, or value of, the work or adaptation or other subject-matter; and
- (5) the amount and substantiality of the part used in relation to the whole work or adaptation or other subject-matter.

Regardless of these factors, sec 40(5) of the Australian Copyright Act – but not sec 103C – says that a reproduction of not more

⁵⁰⁸. Copyright Law Review Committee report *Simplification of the Copyright Act 1968 – Part I - Exceptions to the Exclusive Rights of Copyright Owners* (1998) para 4.04 – 4.05, available at [http://www.ag.gov.au/www/agd/rwpattach.nsf/VAP/\(756EDFD270AD704EF00C15CF396D6111\)~CLRC+Simplification+of+the+Copyright+Act+1968+-+Part+1.pdf/\\$file/CLRC+Simplification+of+the+Copyright+Act+1968+-+Part+1.pdf](http://www.ag.gov.au/www/agd/rwpattach.nsf/VAP/(756EDFD270AD704EF00C15CF396D6111)~CLRC+Simplification+of+the+Copyright+Act+1968+-+Part+1.pdf/$file/CLRC+Simplification+of+the+Copyright+Act+1968+-+Part+1.pdf) [accessed on 25 January 2009].

⁵⁰⁹. Australian copyright law grants users broader fair dealing rights for the purposes of research and study than the copyright law of the UK because it neither confines fair dealing to *non-commercial* research nor to *private* study purposes.

⁵¹⁰. Section 107 of the U.S. Copyright is discussed in detail below.

than a reasonable portion of certain works and adaptations⁵¹¹ for research or study purposes is a fair dealing. Section 40(5) provides further guidance by clarifying the term 'reasonable portion' in a table. According to this table, 10 per cent of the number of pages in a published edition of at least 10 pages qualify as a reasonable portion, provided the published edition contains a literary, dramatic or musical work (except a computer program), or an adaptation of such a work. If the work or adaptation is divided into chapters, a single chapter is considered a reasonable portion. As far as a published literary work in electronic form (except a computer program or an electronic compilation, such as a database), a published dramatic work in electronic form or an adaptation published in electronic form of such a literary or dramatic work are concerned, a single chapter equally amounts to a reasonable portion if the work or adaptation is divided into chapters. Furthermore, 10 per cent of the number of words in the work or adaptation is also a reasonable portion. The new subsections 40(6) and (7) contain special provisions for works that exist in both electronic and hard copy form as well as for multiple reproductions in the context of section 40(5).⁵¹² After all, it is important to point out, however, that the use of more than a reasonable portion may still be a fair dealing for the purposes of research or study under subsections 40(1) and (2) of the Australian Copyright Act.⁵¹³

Unlike fair dealing for research or study, the Australian Copyright Act provides no guidelines as to what constitutes fair dealing for the other permitted purposes. It has been submitted that the factors mentioned in sec 40(2) of the Australian Copyright Act are also relevant

⁵¹¹ Provided the work or adaptation is not contained in an article in a periodical publication.

⁵¹² Section 40(8) of the Australian Copyright Act excludes the application of sections 10(2) and (2A) to section 40(5), (6) and (7).

⁵¹³ Commonwealth of Australia Explanatory Memoranda *Copyright Amendment Bill 2006* at 14, available at http://www.austlii.edu.au/au/legis/cth/bill_em/cab2006223/ [accessed on 25 January 2009].

for assessing fairness for other purposes.⁵¹⁴ At first glance this appears to be a reasonable submission. Yet, this approach conflicts with the legislative technique employed by the Australian lawmaker. The Australian lawmaker deliberately chose to only mention these factors in the context of research and study. It could have easily changed and widened the area of application of these factors in the course of one of the amendments of the Copyright Act. Therefore, it seems the lawmaker did in fact not want to extend the scope of the factors to other purposes than research and study. Having said this, it remains obscure where this reluctance comes from.

The Copyright Amendment Act 2006 also introduced a new fair dealing defence for parody and satire for literary, dramatic, musical and artistic works⁵¹⁵ and for sound recordings, film and broadcast.⁵¹⁶ The Act does, however, not define the terms parody or satire.

The above comments have shown that it is ultimately left to the courts, on a case-by-case basis, to interpret the vague fair dealing provisions. Nevertheless, leading copyright cases in which a fair dealing defence was raised are rare in Australia. When confronted with the question of fair dealing, Australian courts still often refer to relevant decisions of the courts of the United Kingdom and the United States concerning fair dealing or fair use respectively. Four Australian fair dealing cases stand out. These are *University of New South Wales v Moorhouse*⁵¹⁷, *The Commonwealth of Australia v John Fairfax & Sons Ltd*⁵¹⁸, *De Garis v Neville Jeffress Pidler Pty Limited*⁵¹⁹ and *TCN Channel*

⁵¹⁴. See, for instance: Australian Copyright Law Review Committee *Copyright and Contract Report* (2002) at 28, available at <http://152.91.15.12/www/clrHome.nsf/AllDocs/RWP092E76FE8AF2501CCA256C44001FFC28?OpenDocument> [accessed on 25 January 2009].

⁵¹⁵. Section 41A of the Australian Copyright Act.

⁵¹⁶. Section 103AA of the Australian Copyright Act.

⁵¹⁷. (1975) 133 CLR 1.

⁵¹⁸. (1980) 147 CLR 39.

⁵¹⁹. (1990) 37 FCR 99.

*Nine Pty Ltd v Network Ten Pty Limited*⁵²⁰. In the following, the principal findings of these cases in respect of fair dealing are briefly summarised.

The Australian High Court's ruling in *University of New South Wales v Moorhouse*⁵²¹ is for many reasons regarded as a landmark decision in the area of copyright law. The decision has been decisive in shaping many features of the Australian copyright legislation. However, the High Court's remarks on fair dealing were short and rather general. The High Court addressed the abstract character of fair dealing and stated that '[t]he principles laid down by the Act are broadly stated, by reference to such abstract concepts as 'fair dealing' (s 40) and 'reasonable portion' (s 49) and it is left to the courts to apply those principles after a detailed consideration of all the circumstances of a particular case'.⁵²²

In the case *Commonwealth of Australia v John Fairfax & Sons Ltd*⁵²³, the High Court of Australia dealt, among other things, with the meaning of 'criticism and review'. The High Court had to consider whether to restrain the defendants from publishing sensitive governmental information of which the plaintiff was the copyright holder. The High Court noted the popular view that criticism or review of unpublished literary work could never qualify as a fair dealing.⁵²⁴ However, following the UK decision in *Hubbard v Vosper*,⁵²⁵ the High Court held that although not officially published, a literary work might be circulated so widely that criticising or reviewing it may qualify as fair dealing. The High Court stated that express or implied consent regarding the circulation was an important factor in determining whether or not there had been a fair dealing under sec 41 of the Australian Copyright

⁵²⁰. (2001) 108 FCR 235; (2002) 118 FCR 417; (2004) 218 CLR 273.

⁵²¹. (1975) 133 CLR 1.

⁵²². Ibid at 12.

⁵²³. (1980) 147 CLR 39.

⁵²⁴. Ibid at 54.

⁵²⁵. [1972] 1 All ER 1023.

Act.⁵²⁶ Furthermore, the High Court noted that a work must be used for genuine criticism or review and cannot be published under the veneer of mere quotation.⁵²⁷ The High Court also addressed (without deciding on this issue because of the interlocutory nature of the application) a possible new approach to the concept of fair dealing regarding the copyright in government documents in order to enhance political discourse. It stated that '[i]t is to say that a dealing with unpublished works which would be unfair as against an author who is a private individual may nevertheless be considered fair as against a government merely because that dealing promotes public knowledge and public discussion of government action'.⁵²⁸ Lastly, the High Court suggested that 'reporting of news' can go beyond a report of events which are current.⁵²⁹

In *De Garis and Another v Neville Jeffress Pidler Pty Limited*⁵³⁰, the Federal Court of Australia examined the limits of the fair dealing provisions. The facts of the case were that the applicants had originally authored articles for two Australian newspapers. Subsequently, the respondent, who offered a so-called press-clipping service, had provided photocopies of the material to paying subscribers. The Federal Court clarified that the terms research, study, criticism and review ought to have their ordinary dictionary meanings as defined in the Macquarie Dictionary.⁵³¹ As a result, the Federal Court held that the press-clipping service could not rely on fair dealing since it did not itself engage in research, study, criticism and review.

Finally, the case *TCN Channel Nine Pty Ltd v Network Ten Pty Limited*⁵³² originally revolved around the issues of substantial reproduction and fair dealing in the context of television broadcasts. TCN

⁵²⁶. (1980) 147 CLR 39 at 55.

⁵²⁷. Ibid at 56.

⁵²⁸. Ibid at 55.

⁵²⁹. Ibid at 56.

⁵³⁰. (1990) 37 FCR 99.

⁵³¹. Ibid at 105-107.

⁵³². (2001) 108 FCR 235; (2002) 118 FCR 417; (2004) 218 CLR 273.

Channel Nine sued Network Ten for copyright infringement after Network Ten had rebroadcasted twenty excerpts from various TCN Channel Nine television programmes in its own entertainment programme, *The Panel*, for the purpose of discussing recent and current events. Although the case went all the way up to the Australian High Court, the remarks of the primary judge at the Federal Court of Australia, Justice Conti, are of particular importance here. This is because the primary judge noted eight key principles that have emerged from the authorities on fair dealing in Australia.⁵³³ These are:

- (1) Fair dealing involves questions of degree and impression; it is to be judged by the criterion of a fair minded and honest person, and is an abstract concept;
- (2) fairness is to be judged objectively in relation to the relevant purpose. In short, it must be fair and genuine;
- (3) 'criticism and review' should be interpreted liberally; nevertheless criticism and review involve the passing of judgement. Criticism and review may be strongly expressed;
- (4) criticism and review must be genuine and not a pretence for some other form of purpose, but if genuine, need not necessarily be balanced;
- (5) a hidden motive may disqualify reliance upon criticism and review;
- (6) criticism and review extends to thoughts underlying the expression of the copyright works or subject matter;
- (7) 'news' is not restricted to current events; and
- (8) 'news' may involve the use of humour though the distinction between news and entertainment may be difficult to determine in particular situations.

⁵³³. (2001) 108 FCR 235 at 285.

From a practical point of view, introducing several private use provisions was arguably the most important amendment contained in the Copyright Amendment Act 2006. It legalised several widespread but previously illegal uses. As a result, it does no longer infringe copyright to record a broadcast in order to watch or listen to the material at a time more convenient than the time when the broadcast was originally carried out (time-shifting, sec 111 of the Australian Copyright Act).⁵³⁴ It is also no longer an infringement of copyright for owners of a sound recording to make a copy of the sound recording for private and domestic use with their own device, for example an MP3-player (space-shifting, sec 109A of the Australian Copyright Act).⁵³⁵ Furthermore, the owners of books, newspapers, periodical publications, photographs and videos are now allowed to copy the material from one format to another for private and domestic use (format-shifting, sections 43C, 47J, 110AA of the Australian Copyright Act).⁵³⁶ It is clarified in sec 10(1) of the Australian Copyright Act that private and domestic use means such use on or off domestic premises.

It is also worth noting that the Australian Copyright Act now contains the three-step test in sec 200AB. This section applies to uses by libraries, archives and educational institutions as well as to uses by or for

⁵³⁴. This exception is subject to several restrictions. For instance, the provision does, in general, not apply to podcasting and webcasting. Moreover, the legitimate copy may not be sold, rented, by way of trade offered or exposed for sale or hire, distributed, used for causing the film or recording to be seen or heard in public, or broadcasted. With regard to performers rights, sub-sections 248(A) and (C) have been changed accordingly to avoid a performer being able to bring an action for an unauthorised use of a performance arising from the making under section 111(2) of a cinematograph film or a sound recording of the performance.

⁵³⁵. This exception is subject to certain restrictions. The provision does, for example, not apply if the copy the person owns is an infringing copy. Moreover, the copy may not be sold, rented, by way of trade offered or exposed for sale or hire, distributed, used for causing the sound recording to be heard in public, or broadcasted.

⁵³⁶. These exceptions are subject to certain restrictions. For instance, sec 47J only covers the conversion from hardcopy form to electronic form and vice versa. Section 110AA only covers the conversion of analogue material into a digital format. The provisions do not apply if the copy the person owns is an infringing copy itself or if the person has already made a copy in that format. Moreover, the copy may, in general, not be sold, rented or distributed. In addition, the owner may not dispose of the original to another person.

persons with a disability. The intention behind the introduction of sec 200AB of the Australian Copyright Act was to provide a flexible exception for certain socially useful purposes in compliance with Australia's international copyright treaties obligations.⁵³⁷ Section 200AB does, however, not apply if, because of another provision of the Copyright Act, the use in question is not an infringement or would not be an infringement of copyright assuming the conditions or requirements of that other provision were met.⁵³⁸ Hence, specific exceptions and limitations may not be overtaken by the three-step test, for example, to avoid an obligation to pay remuneration.⁵³⁹ Section 200AB(7) determines that the three steps have the same meaning as in Article 13 of the TRIPS Agreement. Article 13 of the TRIPS Agreement was discussed in detail in the previous chapter.

5.4.3 South Africa

In South Africa, the Copyright Act No. 98 of 1978 governs copyright-related matters. The Copyright Act has been amended several times and is essentially based on the provisions of the Berne Convention.⁵⁴⁰ Section 41(4) expressly states that 'no copyright or right in the nature of copyright shall subsist otherwise than by virtue of this Act or of some other enactment in that behalf'. Hence, no protection of copyright exists in terms of the common law.

Currently, the South African Copyright Act protects literary, musical and artistic works, sound recordings, cinematograph films, broadcasts, programme-carrying signals, published editions and computer programs.⁵⁴¹ The Copyright Act defines each of these works in

⁵³⁷ Commonwealth of Australia Explanatory Memoranda *Copyright Amendment Bill 2006* at 109.

⁵³⁸ See sec 200AB(6) of the Australian Copyright Act.

⁵³⁹ Commonwealth of Australia Explanatory Memoranda *Copyright Amendment Bill 2006* at 111.

⁵⁴⁰ J T R Gibson *South African Mercantile and Company Law* [8ed] (2003), 706. South Africa's legislative history regarding copyright protection and particularly the fact that South Africa's copyright law was based for a long time on UK Copyright law was highlighted in chapter 2.

⁵⁴¹ Section 2(1) of the South African Copyright Act.

its section 1. Under the Act, copyright violations are limited to the reproduction of substantial parts or more of protected works.⁵⁴² The term 'substantial' is to be understood qualitatively rather than quantitatively.⁵⁴³ Once a substantial reproduction has taken place, the question of applicable copyright exceptions and limitations arises.⁵⁴⁴ Copyright exceptions and limitations are contained in chapter 1 ('Copyright in original works') of the South African Copyright Act. These are the following:

- (1) Fair dealing for the purposes of
 - (a) research and private study, sections 12(1)(a), 15(4), 18, 19A;
 - (b) personal private use, sections 12(1)(a), 15(4), 18, 19A;
 - (c) criticism and review, sections 12(1)(b), 15(4), 16(1), 17, 18, 19A, 19B(1); and
 - (d) reporting current events, sections 12(1)(c), 15(4), 16(1), 17, 18, 19A, 19B(1);
- (2) uses for judicial proceedings, sections 12(2), 15, 16, 17, 18, 19A, 19B;
- (3) quotations, sections 12(3), 16, 17, 18, 19B;
- (4) uses by way of illustration for teaching, sections 12(4), 15, 16, 17, 18, 19A, 19B;
- (5) ephemeral reproductions by a broadcaster, sections 12(5), 15, 17, 18, 19A, 19B;
- (6) reproductions or broadcasts of works delivered in public for informatory purposes, sec 12(6);
- (7) reproductions or broadcasts of an article on current events, sec 12(7);
- (8) uses relating to official texts of a legislative, administrative or legal nature; political and legal speeches; news of the day that are mere items of press information, sections 12(8), 19A⁵⁴⁵;
- (9) demonstrations of technical equipment by a dealer in such equipment, sections 12(12), 15, 16, 17, 18, 19A, 19B;
- (10) broadcasts of residual works, sections 12(13), 15, 16, 17, 18, 19A, 19B;
- (11) reproductions permitted by regulations, sec 13⁵⁴⁶;

⁵⁴². Section 1 (2A) of the South African Copyright Act.

⁵⁴³. See, for instance, *Galago Publishers (Pty) Ltd v Erasmus* [1989 (1) SA 276 (A)] and W Baude et al supra note 357 at 84. In essence, the substantiality requirement represents the equivalent to the de minimis requirement under U.S. law.

⁵⁴⁴. O H Dean supra note 38 at 1-51.

⁵⁴⁵. The South African Copyright Act stipulates that no copyright subsists in these works. However, authors of such unprotected speeches have the exclusive right of making a collection of the speeches (sec 12(8)(b)).

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- (12) special exception in respect of records of musical works, sec 14;
- (13) background or incidental use of artistic material in a cinematograph film, television broadcast or transmission in diffusion service, sec 15(1);
- (14) reconstruction of a work of architecture, sec 15(2);
- (15) reproduction or inclusion of artistic works, situated in public places, in a cinematograph film, television broadcast or transmission in a diffusion service, sec 15(3);
- (16) three-dimensional reproductions or adaptations of authorised three-dimensional reproductions of artistic works for utilitarian purposes by an industrial process ('reverse engineering'), sec 15(3A);
- (17) use of a record which embodies literary and musical works which are also embodied in a sound-track, sec 16(2);
- (18) distribution of short excerpts from program-carrying signals, sec 19(1);
- (19) back-up copies of computer programs, sec 19B(2).

In addition to the above scenarios, copyright is not infringed if an act is conducted in compliance with a compulsory licence granted by the South African Copyright Tribunal, for which provision is made in sections 29–36 of the South African Copyright Act.

Essentially, the South African lawmaker allowed, in sec 12 of the South African Copyright Act, several general exceptions and limitations for literary and musical works and extended the scope of these exceptions and limitations to other kinds of protected works, such as artistic works and sound recordings.⁵⁴⁷ Moreover, sec 12(9) of the South African Copyright Act stipulates that the provisions of sec 12 (1)-(7) also apply to adaptations of a work.⁵⁴⁸ As to the issue of translations, sec 12(11) of the South African Copyright Act states that the provisions of subsections 12(1)-(4), (6), (7) and (10) embrace the right to use a work in both the original and a different language. Several special and general exceptions and limitations for different kinds of protected works are contained in sections 14–19B of the South African Copyright Act.

⁵⁴⁶. Copyright Regulations of 1978 (*Government Gazette* no 6252 of 22 December 1978), as amended.

⁵⁴⁷. See sections 15-19B of the South African Copyright Act.

⁵⁴⁸. For a definition of the term 'adaptation' see sec 1 of the South African Copyright Act.

Section 13 stipulates that copyright in a work is not infringed by the reproduction of a work if such reproduction is permitted by regulations, provided the reproduction is not in conflict with a normal exploitation of the work and is not unreasonably prejudicial to the legitimate interests of the copyright holder. Hence, the South African Copyright Act incorporates the internationally recognised three-step test which was discussed in detail in chapter 4. Section 39 of the South African Copyright Act gives the Minister of Trade and Industry the power to issue such regulations, and the Copyright Regulations of 1978 (as amended) have been promulgated in terms of this power. Chapter 1 of these regulations is of particular relevance.

The basic rule for reproductions is contained in regulation 2 of chapter 1. According to this provision a reproduction is normally allowed if not more than one copy of a reasonable portion of the work is made and if the cumulative effect of the reproduction does not conflict with the normal exploitation of the work to the unreasonable prejudice of the legal interest and residuary rights of the author. It is not clear what exactly a 'reasonable portion' is but the term arguably refers to both the quantity and quality of the portion used in relation to the original work.⁵⁴⁹ Apart from the basic rule in regulation 2, chapter 1 of the Copyright Regulations of 1978 contains several specific exceptions and limitations for libraries, archives, and educational institutions/teachers.⁵⁵⁰ However, some of the requirements contained in these exceptions and limitations appear overly restrictive and their general usefulness has been doubted.⁵⁵¹ From a practical perspective, the adoption of more specific guidelines is inevitable, especially for the key issue of multiple copying.

⁵⁴⁹. E Gray and M Seeber *PICC report on intellectual property rights in the print industries* (2004) at 71.

⁵⁵⁰. For an instructive summary of the requirements for (multiple) copying by teachers as contained in the Copyright Regulations of 1978 see D J Pienaar *Statutory defences against actions for infringement of copyright* (LL.M. thesis, University of South Africa) (1988) at 95-97.

⁵⁵¹. *Ibid* at 99.

In line with the situation in the UK and Australia, semi-open fair dealing provisions are of particular importance in South Africa's copyright law. The specific purposes mentioned in sec 12(1) of the South African Copyright Act are (1) research and private study, (2) personal or private use, (3) criticism and review, and (4) reporting current events. Unlike in other countries, research does not need to be 'private'. Thus, research for purely commercial purposes appears to be permissible under South African law. In as far as the Act distinguishes between personal and private use, it has been explained cogently that such a distinction can be useful. For instance, a use in public, eg a public lecture, qualifies as personal but not as private.⁵⁵²

The precise limits of fair dealing in South Africa remain, however, uncertain and vague.⁵⁵³ As a result, courts have much discretion in determining whether or not a certain use of copyright protected material is fair in light of the purpose for which the material was used.⁵⁵⁴ Consequently, fair dealing in South Africa remains a controversial issue.⁵⁵⁵

It is noteworthy that cinematograph films, sound recordings and computer programs are excluded from the operation of the exceptions and limitations contained in section 12(1)(a) [fair dealing for research and private study; personal and private use]. Therefore, newer common and widespread private uses such as time-shifting, format-shifting and space-shifting remain, in general, illegal under South African copyright law.⁵⁵⁶ This is but one indication that the South African apartheid-era Copyright Act is outdated.⁵⁵⁷ The South African

⁵⁵². D J Pienaar supra note 550 at 8.

⁵⁵³. O H Dean supra note 38 at 1-52.

⁵⁵⁴. J T R Gibson supra note 540 at 725.

⁵⁵⁵. E Gray and M Seeber supra note 549 at 72.

⁵⁵⁶. Section 12(1)(a) does apply to broadcasts and, as a result, copying of sound recordings or cinematograph films that are legally integrated in a broadcast should be permissible in the course of the copying of the broadcast. Hence, time-shifting in this regard should be permitted (O H Dean supra note 38 at 1-53).

⁵⁵⁷. For instance, the South African Copyright Act does also not address the needs of the disabled and the issue of distance learning.

Government has proposed several amendments to the Act in recent years.⁵⁵⁸ So far, however, all proposed amendments have been withdrawn. Effectively, in the field of copyright law legislative reform has been stalled since 1999 (except for certain provisions addressing the protection of technological protection measures contained in the Electronic Communications and Transactions (ECT) Act 25 of 2002). This is a remarkably long period of time given the significant technological developments in recent years.

One of the major problems in South Africa is the lack of relevant case law on the meaning of fair dealing.⁵⁵⁹ Hence it is necessary to rely on decisions from other jurisdictions with similar fair dealing provisions such as sections 29 and 30 of the UK CDPA or section 40-43 of the Australian Copyright Act. It must not be overlooked, however, that adopting foreign court judgements is always a double-edged sword. For these decisions do often not sufficiently reflect specific domestic policy considerations in the adopting country – and it has been shown that policy considerations are of crucial importance in the context of copyright limitations and exceptions. Section 39(2) of the South African Constitution reinforces the relevance of domestic considerations by stating that ‘when interpreting any legislation [...], every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights’.⁵⁶⁰

A fairly recent South African trade mark law case is arguably the most helpful judgement at this point. It concerns the general balancing of interests in the realm of intellectual property law – in this case with particular emphasis on Constitutional law - which also

⁵⁵⁸. The South African Department of Trade and Industry published in May 2000 in the Government Gazette (GG no. 21156, notice no. 1805) certain proposed amendments to the Copyright Act, including one to sec 12(1)(a). For further details on the recent history of unsuccessful attempts to amend the Copyright Act and its Regulations see E Gray and M Seeber supra note 549 at 77-9.

⁵⁵⁹. W Baude et al. have noted that no South African court has yet explained the meaning of fair dealing in the Copyright Act (W Baude et al supra note 357 at 85).

⁵⁶⁰. For instance, the right to education contained in sec 29 of the Bill of Rights might be of importance.

underlies the concept of fair dealing. Therefore, the judgement is summarised in brief. In the case *Laugh It Off Promotions CC v South African Breweries International (Finance) B.V. t/a Sabmark International*, the respondent South African Breweries (SAB) acted as trade mark holder of the slogan 'America's Lusty Lively Beer, Carling Black Label Beer, brewed in South Africa'. The applicant Laugh it Off had produced and sold printed T-shirts with the similarly designed slogan 'Black Labour White Guilt, Africa's Lusty Lively Exploitation since 1652, no regard given worldwide'. At first instance, SAB obtained an injunction in terms of the anti-dilution provision of the Trade Marks Act⁵⁶¹ before the Cape High Court based on the unfair advantage taken of, or the detriment caused to, the repute of the mark.⁵⁶² The applicant's subsequent appeal to the Supreme Court of Appeal was unsuccessful.⁵⁶³ The Constitutional Court held that the requirement of 'unfair advantage or detriment' within the anti-dilution provision ought to be understood through the prism of the Constitution and specifically that of the guarantee of free expression conferred by sec 16 of the Constitution.⁵⁶⁴ Thus, the intellectual property rights of the respondent were to be duly balanced against the constitutional rights of the applicant and, hence, a real likelihood of economic harm needed to be shown on the respondent's side. However, such real likelihood could not be established by the respondent and the Constitutional Court, therefore, upheld the appeal. In his concurring judgement, Sachs J stated that the respondent's case did not only fail because of lack of evidence.⁵⁶⁵ He made the following more fundamental remarks regarding the issue of parodies which can arguably be generalised for any balancing between intellectual property rights and the right to freedom of expression:

⁵⁶¹. Section 34 of the Trade Marks Act No 194 of 1993.

⁵⁶². *SAB International t/a Sabmark International v Laugh It Off Promotions* [2003] 2 All SA 454 (C).

⁵⁶³. *Laugh It Off Promotions CC v South African Breweries International (Finance) BV t/a Sabmark International* 2005 (2) SA 46 (SCA).

⁵⁶⁴. Case CCT 42/04 at 43.

⁵⁶⁵. *Ibid.* at 74.

Parody, like any other use, has to work its way through the relevant factors and be judged case by case, in light of the ends of trademark law and the free speech values of the Constitution. Given the importance of trademark protection on the one hand and free speech on the other it becomes necessary to balance the one against the other. [...] At the end of the day this will be an area where nuanced and proportionate balancing in a context-specific and fact-sensitive character will be decisive, and not formal classification based on bright lines.⁵⁶⁶

5.5 The general clause approach: the fair use doctrine

Instead of compiling lists of specific copyright exceptions and limitations, possibly accompanied by semi-open fair dealing provisions, a few countries, the most important of these being the United States, have introduced into their copyright laws broad, open-ended fair use provisions.⁵⁶⁷ It appears that a growing number of countries are considering following this path due to the fact that fair use provisions promise a high degree of legal flexibility.⁵⁶⁸ In the following the basic principles of the U.S. version of the fair use doctrine as contained in sec 107 of the U.S. Copyright Act are described.

Before dealing with the fair use doctrine in detail, however, it is important to note that fair use is not the only way in which unauthorised access to and use of copyright protected works is allowed under U.S. law. U.S. copyright law has some specific copyright exceptions and limitations to specific rights. Most of these are in sections 108 – 122 of the U.S. Copyright Act. Fair use operates as a general

⁵⁶⁶. Ibid. at 81 and 83.

⁵⁶⁷. Israel's new copyright law, for instance, contains a fair use provision in sec 19 as well as, for moral rights, sec 50. The new law permits the fair use of copyright protected works for purposes such as private study, research, criticism, review, news reporting, quotation, or instruction or testing by an educational institution. The law sets up four factors to determine whether a use is fair or not.

⁵⁶⁸. For example, in 2005, the Australian Government conducted a review on whether the Australian Copyright Act should include a general fair use exception. The review is accessible at http://www.ag.gov.au/www/agd/agd.nsf/Page/Publications_Copyright-ReviewofFairUseExemption-May2005 [accessed on 25 January 2009].

provision designed to reach cases of worthy, unauthorised uses that do not fall within the scope of one of these exceptions.⁵⁶⁹

The most relevant specific copyright exceptions and limitations contained in the U.S. Copyright Act are the following:

- (1) Reproduction and distribution of works by qualified libraries and archives, sec 108;
- (2) distribution or transfer of copyright material ('first-sale-doctrine'), sec 109(a) and (b);
- (3) public display of a lawful copy, sec 109(c);
- (4) certain (offline and/or online) live performances and displays, sec 110;
- (5) certain secondary transmissions embodying a performance or display, sections 110(5), 111⁵⁷⁰;
- (6) ephemeral recordings by a broadcasting station or other transmitting organisation (including governmental bodies or other nonprofit organisations), sec 112;
- (7) making, distributing, or displaying of pictures or photographs of useful articles in connection with advertisements or commentaries related to the distribution or display of such articles, or in connection with news reports, sec 113(c);
- (8) reproducing, adapting and distributing of sound recordings by educational television and radio programs, sec 114(b);
- (9) sound-alike recordings of sound-recordings; sec 114(b);
- (10) certain copies and adaptations of computer programs, sec 117;
- (11) reproductions for the blind or other people with disabilities, sec 121;
- (12) exceptions to the importation ban contained in sec 602(a), sec 602(a)(1)-(3);
- (13) prohibition on certain infringement actions with regard to the manufacture, importation, distribution, or non-commercial use of digital audio recording devices and mediums or analogue recording devices or mediums upon payment of fees, sections 1003 and 1008⁵⁷¹;
- (14) non-voluntary licence for secondary transmissions by cable systems of primary transmissions, sec 111(c)-(f);
- (15) voluntary and non-voluntary licences for certain digital transmissions regarding certain sound recordings, sec 114(d)-(j);

⁵⁶⁹. M Leaffer 'The uncertain future of fair use in a global information marketplace' 62 *Ohio State Law Journal* (2001) 860 at 863.

⁵⁷⁰. This provision caused the aforementioned dispute between the U.S. and the EU as to whether the provision complies with the three-step test contained in TRIPS (see WTO doc WT/DS160/R).

⁵⁷¹. These provisions are based on the Audio Home Recording Act of 1992. Section 1008 applies to the non-commercial use of such devices by consumers as well as to the manufacture, importation, or distribution of such devices. However, the importation, manufacture and distribution of digital audio devices are prohibited unless the device incorporates certain copying controls (see section 1002). Moreover, sections 1003-1007 impose a royalty obligation upon the manufacturer or importer of digital audio recording devices or digital audio recording medium.

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- (16) non-voluntary licence for making and distributing phonorecords of non-dramatic musical works, sec 115;
- (17) non-voluntary licence between music owners and jukebox owners; sec 116;
- (18) non-voluntary licence for non-commercial broadcasters, sec 118;
- (19) non-voluntary licence regarding secondary transmissions by satellite carriers, sections 119 and 122.

Legal commentators in the U.S. have argued that these copyright exceptions and limitations can be divided into three categories: (1) simple, bright-line rules such as the first-sale-doctrine contained in sec 109; (2) very complex and technical provisions like sections 110(5) or 114(d) that may cover several pages in the U.S. Code; and (3) fair use.⁵⁷² While the first category requires, naturally, little explanation, the examination of the complexity and precise scope of the second category is beyond the scope of this thesis. Hence, this thesis focuses on the most important copyright exception and limitation which applies to all copyrights granted by sec 106 and 106A⁵⁷³: the open-ended fair use doctrine enshrined in sec 107 of the U.S. Copyright Act.

It was in 1841 when Justice Story first promulgated the doctrine in *Folsom v March*⁵⁷⁴. In this case, the defendant had written a biography of George Washington and was subsequently sued for using excerpts of letters from the plaintiff's copyright protected and published biography of the first U.S. president. During the proceedings, the question arose over the copyright in George Washington's letters. Justice Story famously stated that

in truth, in literature, in science and in art, there are, and can be, few, if any, things, which in an abstract sense, are strictly new and original throughout. Every book in literature, science and art, borrows, and must necessarily borrow, and use much which was well known and used before. [...] The question, then, is, whether this is a justifiable

⁵⁷². J Cohen et al supra note 123 at 525.

⁵⁷³. Ibid.

⁵⁷⁴. 9 Fed. Cas. 342 (1841).

use of the original materials, such as the law recognizes as no infringement of the copyright of the plaintiffs.⁵⁷⁵

Nowadays, fair use has its statutory basis in sec 107 of the U.S. Copyright Act of 1976. This provision reads:

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 statutory formulation of fair use was intended to codify the previous judicial doctrine.⁵⁷⁶ Fair use applies to all exclusive rights of the copyright holder. Section 107 of the U.S. Copyright Act sets out in its preamble various categories of illustrative fair uses for purposes such as criticism, comment, news reporting, teaching, scholarship, or research. In addition, and most importantly, four non-exclusive factors are to be considered in determining whether a particular use is fair. These four factors are intended to give further guidance to the courts rather than restricting the courts' application of the fair use exemption to a fixed,

⁵⁷⁵. Ibid at 348.

⁵⁷⁶. H.R. Rep. No. 94-1476 at 66 (1976).

four-part test.⁵⁷⁷ Yet, the use of the word 'shall' in sec 107 of the U.S. Copyright Act indicates that courts must, as a minimum, consider these four factors in their fair use analysis.⁵⁷⁸ Interestingly, recent empirical research has shown that a significant number of court decisions failed to refer to one or more of the factors.⁵⁷⁹

In the following, it is attempted to further clarify the meaning of each of the four factors contained in sec 107 of the U.S. Copyright Act in order to shed light on the scope of fair use.⁵⁸⁰ To this end, the relevant decisions by the U.S. Supreme Court⁵⁸¹ are briefly analysed. However, an all-embracing definition for the fair use doctrine can naturally not be provided as the House Report to sec 107 of the U.S. Copyright Act explained⁵⁸²:

Although the courts have considered and ruled upon the fair use doctrine over and over again, no real definition of the concept has ever emerged. Indeed, since the doctrine is an equitable rule of reason, no generally applicable definition is possible, and each case raising the question must be decided on its own facts.

⁵⁷⁷. H Goldberg 'A Proposal for an international licensing body to combat file sharing and digital copyright infringement' (2002) 8 *Boston University Journal of Science & Technology Law* 272 at 283.

⁵⁷⁸. T Newby 'What's fair here is not fair everywhere: does the American fair use doctrine violate international copyright law?' (2000) 51 *Stanford Law Review* 1639.

⁵⁷⁹. B Beebe 'An empirical study of U.S. copyright fair use opinions, 1978-2005' (2008) 156 *Pennsylvania Law Review* 549, 610 (for the second factor).

⁵⁸⁰. For further information see in particular William Patry's treatise on fair use (W Patry *The fair use privilege in copyright law* [2ed] (1995)). Most valuable contributions were also made by Dratler, Jr (J Dratler, Jr, 'Distilling the witches' brew of fair use in copyright law' (1988) 43 *University of Miami Law Review* 233); Fisher (W W Fisher 'Reconstructing the fair use doctrine' (1988) 101 *Harvard Law Review* 1659); Gordon (W Gordon 'Fair use as market failure: a structural and economic analysis of the Betamax case and its predecessors' (1982) 82 *Columbia Law Review* 1600); Anderson and Brown (M Anderson and P Brown 'The economics behind copyright fair use: a principled and predictable body of law' (1993) 24 *Loyola University Chicago Law Journal* 143); Raskind (L Raskind 'A functional interpretation of fair use' (1984) 31 *Journal of the Copyright Society of the USA* 601); and Patterson (L Patterson 'Understanding fair use' (1992) 55 *Law and Contemporary Problems* 249).

⁵⁸¹. For an instructive list (including summaries) of U.S. fair use cases see also the Stanford Copyright & Fair Use website, available at [http://fairuse.stanford.edu/Copyright and Fair Use Overview/chapter9/9-c.html](http://fairuse.stanford.edu/Copyright%20and%20Fair%20Use%20Overview/chapter9/9-c.html) [accessed on 25 January 2009].

⁵⁸². H.R. Rep. No. 94-1476 at 65 (1976).

5.5.1 The U.S. fair use doctrine's four part test as interpreted by the U.S. Supreme Court

The U.S. Supreme Court has addressed the fair use doctrine in four cases⁵⁸³ since express statutory recognition was accorded to the doctrine in 1976. These cases are: *Sony Corp. of America v Universal City Studios, Inc.*⁵⁸⁴; *Harper & Row Publishers v Nation Enterprises*⁵⁸⁵; *Stewart v Abend*⁵⁸⁶; and *Campbell v. Acuff-Rose Music, Inc.*⁵⁸⁷. In brief, the relevant facts of these cases were as follows:

In *Sony Corp. of America v Universal City Studios, Inc.*⁵⁸⁸, Universal City Studios as the copyright holder in television programmes sued Sony as the creator, manufacturer and seller of the Betamax videotape recorder ("VTR") for contributory copyright infringement. The VTR allowed users to record broadcasts and play them back at a later time ("timeshifting").

In *Harper & Row Publishers v Nation Enterprises*⁵⁸⁹, Harper & Row Publishers as the copyright holder of former U.S. President Ford's unpublished memoirs negotiated a pre-publication licensing agreement with Time Magazine. Before the scheduled release of an article in the Time Magazine, however, The Nation Magazine obtained an unauthorised manuscript of the memoirs and published an article which quoted large portions of the manuscript, including passages relating to Ford's pardon of Richard Nixon. As a result, Time Magazine cancelled the pre-publication licensing agreement with Harper and Row Publishers.

In *Stewart v Abend*⁵⁹⁰, director Alfred Hitchcock, actor James Stewart and others entered during the first half of the 1970s into a licence agreement with ABC Television Network to broadcast their 1954

⁵⁸³. These four cases have produced seven opinions, with one dissent each in the *Sony* and *Harper & Row* cases and one concurrence in the *Campbell* case.

⁵⁸⁴. 464 US 417 (1984).

⁵⁸⁵. 471 US 539 (1985).

⁵⁸⁶. 495 US 207 (1990).

⁵⁸⁷. 510 US 569 (1994).

⁵⁸⁸. 464 US 417 (1984).

⁵⁸⁹. 471 US 539 (1985).

⁵⁹⁰. 495 US 207 (1990).

film "Rear Window". The film was largely based on Cornell Woolrich's story "It Had to be Murder" in which Hitchcock and Stewart had previously obtained the motion picture rights. However, after Woolrich had died in 1968, his executors had renewed the copyright and assigned the rights to Sheldon Abend in 1971. Abend sued for copyright infringement alleging the TV-broadcasting of the film in 1981 and the subsequent release of the film on video cassette and videodisc in 1983 infringed his copyright in the story. Among other things, the petitioners claimed the film, as a derivative, was a new work and as such protected by the fair use doctrine.

The case *Campbell v. Acuff-Rose Music, Inc.*⁵⁹¹ centred on the famous 1964 rock ballad "Oh, Pretty Woman" written by Roy Orbison and William Dees. The rights in the song were held by Acuff-Rose Music. When in 1989 a member of the rap music group 2 Live Crew, L R Campbell, composed a parody song called "Pretty Woman", Acuff-Rose Music refused to give permission for the intended use. Despite the refusal, 2 Live Crew produced and released the song, identifying on all albums and CDs Orbison and Dees as the authors of "Oh, Pretty Woman" and Acuff-Rose Music as the publisher. Acuff-Rose Music sued 2 Live Crew and its record company for copyright infringement after almost one year; nearly 250,000 copies of the song had been sold by then. 2 Live Crew pleaded that their parody qualified as fair use.

From these U.S. Supreme Court cases, the following principles regarding the four factors of the fair use doctrine emerged.

5.5.1.1 The purpose and the character of the use

The first factor of sec 107 of the U.S. Copyright Act requires courts to consider 'the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes'.

⁵⁹¹. 510 US 569 (1994).

In *Sony Corp. of America v Universal City Studios, Inc*⁵⁹², the Supreme Court introduced what became known the 'Sony presumption'. Justice Stevens noted that 'every commercial use of copyrighted material is presumptively an unfair exploitation of the monopoly privilege that belongs to the owner of the copyright [...]'.⁵⁹³ Later, this presumption was half-heartedly confirmed in both *Harper & Row Publishers v Nation Enterprises*⁵⁹⁴ and *Stewart v Abend*.⁵⁹⁵ In 1994, the Supreme Court, however, revoked the Sony presumption and confirmed a less strict tendency element. Such an element was already adumbrated in *Harper & Row*.⁵⁹⁶ As a result, it seems that while a non-commercial use speaks for a finding of fair use, a commercial use alone does not play a significant role any more in determining fair use.

In addition to the criterion of commerciality, the Supreme Court has distinguished between transformative uses, such as commentaries and parodies, and non-transformative uses. In *Campbell v Acuff-Rose Music, Inc*.⁵⁹⁷, the Supreme Court heavily relied on the concept of transformativeness. It defined a transformative work as a work which 'supersedes the objects of the original [...] or [...] adds something new, with a further purpose or different character, altering the first with new expression, meaning, or message'.⁵⁹⁸ In principle, transformative uses are favoured against non-transformative uses within the context of fair use.

⁵⁹². 464 US 417 (1984).

⁵⁹³. Ibid at 451.

⁵⁹⁴. 471 US 539, 562 (1985).

⁵⁹⁵. 495 US 207, 237 (1990).

⁵⁹⁶. Before confirming the Sony presumption, the Supreme Court stated less starkly in *Harper & Row Publishers v Nation Enterprises* that '[t]he fact that a publication was commercial as opposed to nonprofit is a separate factor *that tends to weigh against* a finding of fair use' (emphasis added, 471 US 539 at 562 (1985)).

⁵⁹⁷. 510 US 569 (1994).

⁵⁹⁸. Ibid at 579.

5.5.1.2 The nature of the copyright work

The second factor of the U.S. four part test focuses on the work that has been copied. Two sub-factors have been developed; ie (1) whether or not the copied work has previously been published and (2) whether the work is of factual or creative nature.

Regarding the first sub-factor, the U.S. Supreme Court noted in 1985 in its majority opinion in *Harper & Row Publishers v Nation Enterprises*⁵⁹⁹ that '[u]nder ordinary circumstances, the author's right to control the first public appearance of his undissemated expression will outweigh a claim of fair use [...] [and that] the scope of fair use is narrower with respect to unpublished works'.⁶⁰⁰ As a result, lower courts tended towards interpreting this judgment as a general presumption against fair use of not published works.⁶⁰¹ However, in 1992, sec 107 of the U.S. Copyright Act was amended and the following statement was added: '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.' While this sentence clearly opposes the presumption against fair use of unpublished works, it does not necessarily contradict the Supreme Court's original remarks. Empirical research reveals that at present, lower courts often rule in favour of fair use if a work is published rather than ruling that a work being unpublished disfavours the finding of fair use.⁶⁰²

With respect to second sub-factor, that is the distinction between factual and fictional works, the Supreme Court has stated that the law generally recognises a greater need to disseminate factual works than works of fiction or fantasy.⁶⁰³ Therefore, copying of factual works is more readily accepted as a fair use than the unauthorised copying of a

⁵⁹⁹. 471 US 539 (1985).

⁶⁰⁰. Ibid at 555 and 564.

⁶⁰¹. See, for instance, *Wright v Warner Books* (953 F.2d 731, 737 (1991)). This interpretation was based on corresponding remarks contained in Justice Brennan's dissenting opinion in *Harper & Row Publishers, Inc. v Nation Enterprise* (471 US 539, 595 (1985)).

⁶⁰². B Beebe supra note 579 at 613.

⁶⁰³. *Harper & Row Publishers, Inc. v Nation Enterprises*, 471 US 539, 563 (1985).

publication that is non-factual in nature.⁶⁰⁴ In *Campbell v Acuff-Rose Music, Inc.*, the Supreme Court expressly noted that ‘some works are closer to the core of intended copyright protection than others, with the consequence that fair use is more difficult to establish when the former works are copied’.⁶⁰⁵

5.5.1.3 The amount and substantiality of the portion used

The third factor requires an examination of both the quality and the quantity of what was taken.⁶⁰⁶ This factor is intertwined with two other factors.⁶⁰⁷ Firstly, the extent of permissible copying varies with the purpose and character of the use as determined in the first factor. Secondly, the findings within the context of factor three can help to measure the likely impact on the market for the copyright protected work under factor four (“market effect”).⁶⁰⁸ As a rule of thumb, the more of a work is used the less likely becomes fair use. However, the Supreme Court has noticed in *Harper & Row Publishers v Nation Enterprises* that copying of a rather small portion may constitute copyright infringement if this particular part is the ‘heart’ of the work.⁶⁰⁹ In contrast, it has been submitted by some commentators that in exceptional circumstances even copying an entire work may qualify as fair use.⁶¹⁰

5.5.1.4 The effect of the use upon the potential market

In its *Harper & Row Publishers, Inc. v Nation Enterprises* decision, the Supreme Court stated that the last factor of the four part test was the

⁶⁰⁴. S Smit “‘Make a copy for the file ...’: copyright infringement by attorneys’ (1994) 46 *Baylor Law Review* 1 at 12.

⁶⁰⁵. 510 US 569, 586 (1994).

⁶⁰⁶. *Harper & Row Publishers, Inc. v Nation Enterprises*, 471 US 539, 564-6 (1985).

⁶⁰⁷. P Leval ‘Toward a fair use standard’ (1990) 103 *Harvard Law Review* 1105 at 1123.

⁶⁰⁸. *Ibid.*

⁶⁰⁹. *Harper & Row Publishers, Inc. v Nation Enterprises*, 471 US 539, 565 (1985).

⁶¹⁰. See, for instance, M Nimmer and D Nimmer supra note 100 at §13.05 [A][3].

single most important element of fair use.⁶¹¹ However, this statement was arguably effectively revoked in *Campbell v Acuff-Rose Music, Inc.* when the Supreme Court noted that '[a]ll [factors] are to be explored, and the results weighed together, in light of the purposes of copyright.'⁶¹²

The precise meaning of the fourth factor remains disputed. The general rule seems to be, however, that a use of a copyright protected work, which has an adverse impact on the economic interests of the copyright holder does not constitute fair use.⁶¹³

As mentioned before, the Supreme Court had stated in *Sony Corp. of America v Universal City Studios, Inc.* for the first factor of the four part test that every commercial use of copyright material presumably unfairly exploits the copyright holder's monopoly privilege.⁶¹⁴ For the fourth factor, the Supreme Court further noted in the same decision that '[i]f the intended use is for commercial gain, [a] likelihood [of future market harm] may be presumed'.⁶¹⁵ However, in *Campbell v Acuff-Rose Music, Inc.*, the Supreme Court found that if the use is of transformative nature, market harm may not be so readily inferred.⁶¹⁶ In addition, the Supreme Court stated that the fourth factor 'requires courts to consider not only the extent of market harm caused by the particular actions of the alleged infringer, but also whether unrestricted and widespread conduct of the sort engaged in by the defendant [...] would

⁶¹¹. *Harper & Row Publishers, Inc. v Nation Enterprises*, 471 US 539, 566 (1985). Nimmer calls the fourth factor the most important and central fair use factor (M Nimmer and D Nimmer supra note 100 at §13.05 [A][4]). Moreover, Nimmer suggests the application of a so-called "functional test" in the context of the fourth factor in order to determine if a given use is fair. According to this test, 'a comparison must be made not merely of the media in which the two works may appear, but rather in terms of the function of each such work regardless of media'. For more details see M Nimmer and D Nimmer supra note 100 at §13.05 [B].

⁶¹². 510 US 569, 578 (1994). In *Princeton University Press v Michigan Document Services, Inc.*, the Sixth Circuit referred to the fourth factor as *primus inter pares* (99 F.3d 1381, 1385 (1996)).

⁶¹³. C Hawke *Computer and internet use on campus: A Legal Guide to Issues of Intellectual Property, Free Speech, and Privacy* (2001) 18.

⁶¹⁴. 464 US 417, 451 (1984).

⁶¹⁵. Ibid.

⁶¹⁶. 510 US 569, 591 (1994).

result in a substantially adverse impact on the potential market for the original'.⁶¹⁷

5.5.2 Additional means of interpretation: lower court decisions and fair use guidelines

The Supreme Court cases have doubtlessly clarified the scope of the U.S. fair use doctrine. As mentioned before, it can even be argued that it is because of these cases that the U.S. fair use doctrine meets the international requirements for copyright exceptions and limitations under the three-step test. This is especially in as far as the first step of the test requires a confinement to certain special cases. It seems possible that without the relatively rich body of Supreme Court cases the broad statutory fair use doctrine lacked the clear definition as well as the narrowness in scope that was demanded by the WTO Dispute Resolution Panel in 2000 when interpreting the first step of the three-step test.⁶¹⁸ Having said this, it needs to be noted that the relevant decisions of the Supreme Court are neither comprehensive nor entirely consistent. Recent (empirical) research shows that, as a result of this inconsistency, lower courts frequently and systematically resisted the authority of the Supreme Court.⁶¹⁹ To fully grasp the scope of the fair use doctrine it is, therefore, advisable to not only rely on the relevant decisions by the U.S. Supreme Court but to also consider lower court decisions which addressed important fair use issues, such as reverse engineering⁶²⁰,

⁶¹⁷. Ibid at 590. See also M Nimmer and D Nimmer supra note 100 at §13.05 [A][4]. Nimmer points out to the danger of circularity: '[A] potential market, no matter how unlikely, has always been supplanted in every fair use case, to the extent that the defendant, by definition, has made some actual use of the plaintiff's work, which use could in turn be defined in terms of the relevant potential market.'

⁶¹⁸. United States – Section 110(5) of the U.S. Copyright Act, document WT/DS160/R para. 6.112.

⁶¹⁹. B Beebe supra note 579 at 556.

⁶²⁰. *Sega Enterprises v Accolade Inc.*, 977 F.2d 1510 (1992). For more reverse engineering case law see also *Atari Games Corp. v Nintendo of America Inc.*, 975 F.2d 832 (1992) and *Sony Entertainment, Inc v Connectix Corp.*, 203 F.3d 596 (2000).

copying for commercial research purposes⁶²¹ or the making of student coursepacks.⁶²²

Lower courts and legal commentators have submitted a number of additional criteria in the context of the four part test of sec 107 of the U.S. Copyright Act. These include “fairness” (in the context of the first factor)⁶²³ and the requirement of a substantial similarity between the original work and its copy (in the context of the third factor).⁶²⁴ A statement by the Second Circuit regarding the fourth factor is, however, of particular importance because it addressed the balancing of competing interests. The Second Circuit noted that ‘where a claim of fair use is made, a balance must sometimes be struck between the benefit the public will derive if the use is permitted and the personal gain the copyright owner will receive if the use is denied. [...] The less adverse effect that an alleged infringing use has on the copyright owner's expectation of gain, the less public benefit need be shown to justify the use’.⁶²⁵

Despite the general usefulness of the above remarks regarding the meaning of the four part test as determined by the courts, legal commentators caution against overestimating the importance of the four part test. Nimmer, for instance, has stated that ‘[c]ourts tend first to make a judgment that the ultimate disposition is fair use or unfair use, and then align the four factors to fit that result as best they can. At base, therefore, the four factors fail to drive the analysis, but rather serve as convenient pegs on which to hang antecedent conclusions.’⁶²⁶

⁶²¹. *American Geophysical Union v Texaco Inc.*, 60 F.3d 913 (1994).

⁶²². *Basic Books Inc. v Kinko's Graphics Corp.*, 758 F.Supp 1522 (1991). Other interesting fair use decisions of lower courts include: *Salinger v Random House* (811 F.2d 90 (1987)); *Time Inc. v Bernard Geis Associates* (293 F. Supp. 130 (SDNY 1968)); *Triangle Publications, Inc. v Knight-Ridder Newspapers, Inc.* (626 F.2d 1171 (1980)); *Los Angeles Times v Free Republic* (54 USPQ 2D (BNA) 1453 (2000)).

⁶²³. See, for instance, L Weinreb ‘Fair’s fair: a comment on the fair use doctrine’ (1990) 103 *Harvard Law Review* 1137, 1138.

⁶²⁴. See, eg, *SunTrust Bank v Houghton Mifflin Co.*, 268 F.3d 1257, 1271-3 (2001).

⁶²⁵. *MCA, Inc. v Wilson*, 677 F.2d. 180, 183 (1981).

⁶²⁶. D Nimmer “‘Fairness of them all’ and other fairy tales of fair use’ (2003) 66 *Law and Contemporary Problems* 263 at 281.

Recent empirical research regarding the use of the four part test by U.S. courts has, however, to some extent disproven this assertion.⁶²⁷

Apart from the interpretation of the fair use doctrine by U.S. courts, several fair use guidelines provide valuable additional guidance on the scope of fair use. This is in spite of the fact that none of the guidelines has the force of law.⁶²⁸ The most important fair use guidelines are

- (1) the Agreement on Guidelines for Classroom Copying in Not-for-Profit Educational Institutions of 1976 (Classroom Guidelines)⁶²⁹;
- (2) the Guidelines for Educational Uses of Music of 1976 (Music Guidelines)⁶³⁰;
- (3) the Guidelines for Off-Air Recordings of Broadcast Programming for Educational Purposes of 1981 (Off-Air Videotaping Guidelines)⁶³¹;
- (4) the National Commission on New Technological Uses of Copyrighted Works (CONTU) Guidelines⁶³²; and
- (5) the Conference on Fair Use (CONFU) Guidelines⁶³³.

Both the Classroom Guidelines and the Music Guidelines accompanied the 1976 U.S. Copyright Act. While the Classroom

⁶²⁷. See B Beebe supra note 579 at 555.

⁶²⁸. For an in-depth examination of the various fair use guidelines see K Crews 'The law of fair use and the illusion of fair-use guidelines' (2001) *62 Ohio State Law Journal* 599-702.

⁶²⁹. Developed by an ad hoc committee convened by the House Judiciary Committee in 1976 during deliberations on the Copyright Bill. Published in House Report 94-1476.

⁶³⁰. Developed by an ad hoc committee convened by the House Judiciary Committee in 1976 during deliberations on the Copyright Bill. Published in House Report 94-1476.

⁶³¹. Published in 127 Congressional Record 18, 24049 (1981).

⁶³². Republished in US Copyright Office Circular 21, at 18-9, available at <http://www.copyright.gov/circs/circ21.pdf> [accessed on 25 January 2009].

⁶³³. The guidelines were issued by CONFU as part of the final report in 1998, available at <http://www.uspto.gov/web/offices/dcom/olia/confu/confurep.pdf> [accessed on 25 January 2009].

Guidelines permit, subject to various conditions, the reproduction of materials by teachers for distribution to their classes, the Music Guidelines address copying of music for instructional purposes by essentially specifying five permissible types of copying musical recordings and five prohibited types of copying.

The 1981 Off-Air Videotaping Guidelines deal with the issue of off-the-air recording of television broadcasts for later use or performance in classroom teaching in nonprofit educational institutions.

The 1979 CONTU "Guidelines on Photocopying under Interlibrary Loan Arrangements" are intended to provide guidance for copyright holders and librarians regarding the amount of photocopying for use in interlibrary loan arrangements allowed under U.S. copyright law.

The most significant set of guidelines regarding the fair use doctrine resulted from the Conference on Fair Use (CONFU) between 1994 and 1998. This conference was set up for bringing 'together copyright owner and user interests to develop guidelines for fair uses of copyrighted works by and in public libraries and schools.⁶³⁴ As part of its final report in 1998, CONFU issued the following guidelines:

- (1) CONFU Fair Use Guidelines for Distance Learning;
- (2) CONFU Guidelines on Educational Fair Use for Digital Images;
- (3) CONFU Guidelines of Educational Fair Use in Multimedia Materials; and
- (4) CONFU Guidelines for Electronic Reserve Systems.

⁶³⁴. Information Infrastructure Task Force, Working Group on Intellectual Property Rights, Intellectual Property and the National Information Infrastructure *A Preliminary Draft of the Report of the Working Group on Intellectual Property Rights* (1994) Green Paper, at 134, available at http://w2.eff.org/IP/?f=ipwg_nii_ip_lehman_report.draft.txt [accessed on 25 January 2009].

All CONFU guidelines were intended to provide a 'safe harbor' for the fair use of copyright protected material. The Guidelines for Distance Learning address fair use in the contexts of (a) live interactive distance learning classes and (b) faculty instruction recorded without students present for later transmission. The CONFU Guidelines on Educational Fair Use for Digital Images stipulate under which circumstances a library or educational institution may make a digital version of an image and make it available for teaching and research. The CONFU Fair Use Guidelines for Educational Multimedia apply to unauthorised uses of portions of lawfully acquired copyright protected works in educational multimedia projects which are created by educators or students as part of a systematic learning activity by nonprofit educational institutions. Lastly, the Fair Use Guidelines for Electronic Reserve Systems were not formally adopted by participants in the Conference on Fair Use. Yet they provide a helpful starting point for institutions wishing to develop their own electronic reserve guidelines, and many educational institutions and libraries have issued guidelines based on the Fair Use Guidelines for Electronic Reserve Systems.⁶³⁵

5.6 Evaluation of the different approaches

This chapter has shown that there are three main approaches to copyright exceptions and limitations in national copyright laws. These are (1) a specific provisions approach with long lists of specifically phrased copyright exceptions and limitations, (2) the open-ended fair use approach, and (3) the fair dealing approach, which makes use of a number of specific copyright exceptions and limitations and also employs broader fair dealing provisions. It is obvious that the specific provisions approach comes with the advantage of the greatest possible level of

⁶³⁵. See, for instance, the University of Kentucky Libraries *Fair use guidelines for electronic reserve systems* available at http://www.uky.edu/Libraries/page.php?lweb_id=296 [accessed on 25 January 2009].

legal certainty. At the same time, however, the approach lacks much-needed flexibility. The fair use approach on the other hand, and to a lesser extent the fair dealing approach provide more flexibility. Yet, they are often deficient in terms of legal certainty.

At first glance, the more flexible approaches appear preferable. Legal flexibility is crucial in times where rapid technological developments facilitate new uses which could not be anticipated when the law was drafted. Yet flexibility, particularly the high level of flexibility offered by the fair use doctrine, comes at a high price. The vagueness of open-ended fair use provisions results in a legal uncertainty which is hardly tolerable. Vagueness obviously allows different interpretations, and if a provision can be interpreted in two or more ways, it is almost inevitable that it will involve the courts in deciding cases concerning fair use.

While this may be intended to attain fair decisions on a case-by-case basis, it can safely be assumed that nowadays at least some users will shy away from time-consuming and costly litigation and not be willing to test the limits of fair use. This will mean that a doctrine designed to allow the use of copyright material actually prevents uses in numerous cases. It is, therefore, problematic to make such a doctrine a country's legislative backbone for copyright exceptions and limitations. Moreover, it must not be overlooked that a possible conflict exists between the broad wording of the fair use doctrine and the first step of the three-step test, which requires that exceptions and limitations must be confined to certain special cases.

Inflexible specific provisions appear, however, to be an equally poor alternative. It became obvious in recent years that, in times of rapid technological developments, fixed lists of copyright exceptions and limitations are often inappropriate. For example, even in developed countries numerous now-popular activities such as time-shifting, space-shifting and reverse-engineering were, if at all, only addressed with

considerable delay because legislative amendment procedures could not keep up with the pace of development. This is likely to be even truer in developing countries. As a result, everyday activities such as the copying of music from legitimately purchased CDs onto a portable MP3 player remain, in principle, illegal in many countries.

The following solution is suggested here. It combines the advantages of both approaches while, at the same time, minimising the described disadvantages: in order to achieve the highest degree possible in respect of legal certainty, developing countries should strive to include as many (inflexible) specific copyright exceptions and limitations as possible into their respective copyright laws. The extensive list of copyright exceptions and limitations contained in Article 5 of the EU Copyright Directive provides a helpful starting point in this respect. In certain areas, however, eg for study and research purposes, more flexible fair dealing provisions may be of use. In addition, a fair use provision should be included as a subordinate catchall clause which only applies if no other copyright exception and limitation is available. The main application of this provision would be in areas where lawmakers have not yet been able to adjust the law to changed circumstances and technological realities, for instance by way of introducing new or amending existing copyright exceptions and limitations. Wherever possible, the adoption of clarifying, non-binding guidelines is advised in order to improve legal clarity and to minimise the aforementioned conflict with the three-step test. Often, the interpretation of such guidelines falls on collecting societies and large-scale commercial users such as broadcasters or radio stations or university consortiums; and there will surely be a need for these stakeholders to provide such clarifications and clarifications in the future. Having said this, future guidelines should ideally be formulated in a manner that is more intelligible to all in order to not simply provide an interpretation tool that itself requires interpretation and thus merely shifts the conflict among stakeholders from one level (the interpretation of the law) to another

(the interpretation of guidelines). The decisive advantage of guidelines, generally, is that they can easier and faster be updated than legislation or regulations. They would provide a safe harbour and might fall under what in Commonwealth countries is known as quasi-legislation.

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Chapter 6: Copyright flexibilities for developing countries and the issue of traditional knowledge

'Sometimes the grossest discrimination can lie in treating things that are different as though they were exactly alike.'

Justice P Stewart, U.S. Supreme Court (1991)⁶³⁶

6.1. Introduction

Economic wealth and resources are unevenly distributed among nations and individuals. Remarkably, for instance, each cow in Northern Finland is, on average, subsidised to the extent of 6 U.S. dollars a day. At the same time, one-fifth of all human beings on this planet have to live on less than 1 U.S. dollar a day. Worse even, 40 per cent of all children in developing countries have to get by on the latter amount.

The previous chapters took as a hypothesis that economic and developmental differences between countries and regions lead to differing policy preferences which, among other things, affect a country's copyright regime. In particular, the chapters assumed that it is usually in the interest of developing countries to adopt less strict copyright protection regimes. It was suggested that while international instruments such as the Berne Convention or TRIPS formulate binding minimum standards for copyright protection in member states, they also contain various flexibilities that allow for the specific developmental needs of developing countries. The use of domestic copyright exceptions and limitations was singled out as the most important such flexibility. Consequently, chapters 3 and 4 examined in detail the international requirements for introducing domestic copyright exceptions and limitations and chapter 5 provided a comparative overview of copyright exceptions and limitations in selected countries.

⁶³⁶. *Jenness v Fortson*, 403 US 431, 442 (1971).

The purpose of the present chapter is fourfold. First, it scrutinises the assumption that less strict copyright regimes are usually beneficial for developing countries. Secondly, it deals with the category of copyright exceptions and limitations arguably most relevant for developing countries in their efforts to overcome developmental challenges. That is copyright exceptions and limitations concerning educational material. Thirdly, this chapter points to flexibilities for national lawmakers other than copyright exceptions and limitations, in particular in relation to the scope and duration of copyright protection. In this context, also the permissibility of parallel importation of copyright protected materials is addressed. Lastly, this chapter briefly looks at the issue of traditional knowledge. This is because from a developing country perspective, the issue of protection for traditional knowledge is often brought forward as an important example of where current copyright protection regimes unfairly disregard the interests of developing countries.

It needs to be noted that this chapter uses the term “developing country” in a broad sense as a shorthand term for all countries with

- (2) a relatively low standard of living,
- (3) a sub-standard level of industrialisation, and
- (4) a fairly low Human Development Index (HDI) as established by the United Nations (UN).

The HDI measures a country’s achievements in terms of life expectancy, educational attainment and adjusted real income. The precise meaning of the term “developing country” is difficult to determine because no clear-cut definition exists. Not even international organisations use the same definitions. The WTO, for instance,

distinguishes in its agreements between developed, developing and least developed countries. Yet, it does not define these terms. The WTO leaves it to the member states to declare themselves a developing country - subject to challenge from other member states. The World Bank determines on the basis of a country's gross national income (GNI) (per capita) whether a country qualifies as a low-income, middle-income or high-income country. Both low-income (905 U.S. dollars p.a. or less) and middle-income (906 U.S. dollars – 11,115 U.S. dollars p.a.) countries are considered developing countries. Lastly, the UN considers a country's income level, stock of human assets and economic vulnerability and distinguishes on this basis between least developed, less developed and developed countries.⁶³⁷

The examination in this chapter does, in general, not distinguish between developing countries and least developed countries⁶³⁸ unless such distinction becomes relevant from a legal point of view. Hence, the term "developing country" in this chapter comprises both developing countries and least developed countries.

In what follows, the South African situation again serves as the main example for the conditions faced in a developing country.⁶³⁹ It must be noted, however, that developing countries are socio-economically, culturally, politically and linguistically different. South Africa is in many ways not a typical developing country. It contains aspects of both a small sophisticated, high-tech developed society and a larger poor and undereducated developing society.

⁶³⁷. WTO website (available at http://www.wto.org/english/thewto_e/whatis_e/tif_e/org7_e.htm [accessed on 25 January 2009]); World Bank website (available at <http://web.worldbank.org/WBSITE/EXTERNAL/DATASTATISTICS/0,contentMDK:20420458~menuPK:64133156~pagePK:64133150~piPK:64133175~theSitePK:239419,00.html> [accessed on 25 January 2009]); United Nations Conference on Trade And Development (UNCTAD) *The Least Developed Countries Report 2007 - Knowledge, technological learning and innovation for development* (2007) at iii, available at http://www.unctad.org/en/docs/ldc2007_en.pdf [accessed on 25 January 2009].

⁶³⁸. The UN website contains a list of the 50 least developed countries (available at <http://www.un.org/special-rep/ohrlls/ohrlls/allcountries.pdf> [accessed on 25 January 2009]).

⁶³⁹. South Africa is classified as a developing country by WIPO, the United Nations Development Programme (UNDP) and the Organisation for Economic Cooperation and Development (OECD).

6.2. Are less stringent copyright regimes truly beneficial for developing countries?

The traditional conflict between developing countries and developed countries in relation to copyright protection is caused by starkly different outputs of knowledge material. Knowledge material is predominantly produced in developed countries. For instance, researchers in 10 developed countries (the U.S., the UK, Germany, Japan, France, Canada, Italy, Switzerland, Netherlands and Australia) produced almost 90 per cent of the world's most cited publications between 1993 and 2001. In the same period of time, South Africa accounted for roughly 0.15 per cent and another 163 countries, mostly developing countries, produced less than 2.5 per cent.⁶⁴⁰ As a result, copyright is a right mainly held by corporations and individuals in developed countries. Hence, developing countries are net importers of such material and thus huge amounts of royalties are transferred from poor developing countries to wealthy developed countries, particularly the U.S., Japan and countries in Western Europe.⁶⁴¹

Given this gap in knowledge material production between developing countries and developed countries, and because of the associated royalty flow from the developing world to developed regions, developed countries tend to adhere to a policy of strong copyright protection. After all, much of the current economic wealth of developed countries depends on superior knowledge and its protection⁶⁴² after the

⁶⁴⁰. D King 'The scientific impact of nations - What different countries get for their research spending' (2004) 430 *Nature* 311 at 312 (Table 1 (Rank order of nations based on share of top 1% of highly cited publications, 1997–2001)).

⁶⁴¹. C Deere *The implementation game: the TRIPS Agreement and the global politics of intellectual property reform in developing countries* (2009) 10. A world-map which displays the unequal distribution of royalty fees around the world can be accessed at <http://www.worldmapper.org/display.php?selected=168> [accessed on 25 January 2009].

⁶⁴². S Musungu *supra* note 36 at 5-6. Gowers similarly observed for the UK that '[t]he UK's comparative advantage in the changing global economy is increasingly likely to come through high value added, knowledge intensive goods and services' (A Gowers *supra* note 147 at E.1).

competitiveness of these countries in other areas has long vanished, for instance because of far higher labour costs.

However, for developing countries such as South Africa, achieving developmental goals is a primary policy objective and unhindered and affordable access to knowledge material in turn is a key determinant for a country's development. This is because most of the areas where developing countries face developmental challenges - such as extensive poverty or widespread epidemics - are in some way or the other associated with educational deficiencies.⁶⁴³ It, therefore, appears reasonable to suggest that less strict copyright protection regimes are in the interest of developing countries in that they help achieving developmental policy goals by, for instance, reducing access costs and improving access possibilities.

⁶⁴³. This is not to say that current copyright and intellectual property protection regimes are solely responsible for all problems regarding knowledge distribution and education in developing countries. Rather, a variety of reasons needs to be taken into account, such as low levels of income, insufficient numbers of both schools and teachers, and inadequate infrastructure. Yet, the high economic costs for developing countries which are de facto associated with accessing and using of knowledge material are a matter of concern, especially against the backdrop of limited financial resources. A recent UN report (United Nations Economic Commission for Africa *Sustainable Development Report on Africa* (2008) available http://uneca.org/eca_resources/Publications/books/sdra/SDRAfull.pdf [accessed on 25 January 2009]) described the importance of education as follows (at 150):

Access to basic education, in addition to being recognized as a human right, and a vital part of individuals' capacity to lead lives they value, is an important instrument with which people can improve their lives in other ways. Education enhances the capacity of poor people to participate in the political process and thus to organize for other social and political rights and to demand governments that are more representative and accountable. Better-educated people earn more, not only or primarily because they are better credentialed, but also because they are more productive. A workforce that is more skilled and has more knowledge also contributes to higher economic growth. Private returns to education are not confined to higher wages and incomes. Independent of their household income, mothers with primary education have better access to the information they need to help keep their children healthy. Education, particularly girls' education, has social returns to society at large as well, since society captures some of the benefits of improved health, lower fertility, and the at-home education that educated mothers transfer to their children. Women with limited education become mothers at a young age and are unable to space their births appropriately, and lack awareness of good nutrition and child nurturing practices. They have a high risk of giving birth to babies with low birth weights, perpetuating a vicious circle of malnourishment down the generations. More education, particularly of women, is strongly associated with better family health and improved capacity to plan and time births. Education that is broadly shared ensures that growth itself will be broadly shared. Education that reaches the poor, women, and marginalized ethnic groups, brings private benefits to them, as well as benefits to society as whole by reducing inequality, diminishing discrimination, and creating more cohesion in the long run.

This view is, however, not uncontested. On the contrary, many commentators argue that, ultimately, strong copyright protection regimes also benefit developing countries.⁶⁴⁴

In South Africa, the South African Print Industries Cluster Council and the Publishers' Association of South Africa took this position. They argued that strong copyright protection regimes contribute to the economic, cultural and educational strength of a country. This, in turn, eventually results in lower prices for consumers.⁶⁴⁵ The underlying logic of this argument is that strong legal protection of intellectual goods not only stimulates innovation but also attracts foreign investment, resulting in significant transfers of knowledge and technology from developed countries to developing countries.

No empirical proof has, however, been presented to demonstrate that strong copyright protection is benefiting developing countries apart from the fact that trade sanctions may be avoided. By contrast, history provides various examples of how less stringent copyright protection regimes can help achieving countries' developmental objectives and eventually foster the creation of significant markets for copyright protected works. It is these markets in which copyright holders can ultimately generate substantial income from their works. The strategy of copying to jump-start an industry is also referred to as an economic-development strategy.⁶⁴⁶

Two of the most developed countries, for example, the U.S. and Japan, initially applied this strategy: In the nineteenth century, when the United States was still a developing country, it was notorious for

⁶⁴⁴. See, for instance, S Sell *Power and ideas: North-South politics of intellectual property and antitrust* (1998) 221. For a general overview see R Rapp and R Rozek 'Benefits and costs of intellectual property protection' (1990) 24 *Journal of World Trade* 75.

⁶⁴⁵. E Gray and M Seeber *supra* note 549 at 9 and 11.

⁶⁴⁶. S Lohr 'New economy; the intellectual property debate takes a page from 19th-century America' (14 October 2002) *New York Times*, available at <http://query.nytimes.com/gst/fullpage.html?res=9C07E4D8103AF937A25753C1A9649C8B63> [accessed on 25 January 2009].

having widespread copyright piracy.⁶⁴⁷ New York City was the piracy capital of the world and unauthorised versions of, for example, Charles Dickens' *Christmas Carol* were on offer for as little as 6 cents (which cost in England the equivalent of 2,50 U.S. dollars).⁶⁴⁸ Japan's continuing success in the field of high-tech products is beyond dispute built on the initial copying of European as well as U.S. electronic inventions (like the transistor radio) or inventions in the car industry.

Eventually, the availability and affordability of material from other, more developed countries resulted in raised standards of education and overall development in the U.S. and Japan. It also created a consumption culture in these countries which was essential for the emergence of a viable future market for intellectual goods. The result was an increased demand for such goods which led, for printed goods, to larger print-runs and thus to decreasing prices – which again ratcheted up the demand. Eventually, this cycle yielded a degree of overall development which enabled the countries to commit substantial resources to research and further development.⁶⁴⁹ It was only when the United States and Japan had passed this threshold of overall development that their own citizens started to create substantially.

These historical experiences suggest that advocating strict and comprehensive copyright protection in developing countries in order to achieve developmental goals is putting the cart before the horse. It could be argued, of course, that times and social circumstances have changed significantly since the 19th century and that, in an increasingly capitalistic world, authors and creators depend more than ever on a financial return from their works. However, creators are unlikely to derive considerable income from sales or licences in developing countries because most people in developing countries can arguably not afford these products. It is hard to see why changed social circumstances should affect the

⁶⁴⁷. B Z Khan *supra note Error! Bookmark not defined.* at 258-9.

⁶⁴⁸. C Mann 'Who will own your next idea?' (September 1998) *The Atlantic Monthly* at 62.

⁶⁴⁹. J Allison and L Lin 'The evolution of Chinese attitudes toward property rights invention and discovery (1999) 20 *University of Pennsylvania Journal of International Economic Law* 735 at 775.

underlying logic of the economic-development strategy which worked well for the United States and other countries. In the end, it appears contradictory and even hypocritical to expect current developing countries to adhere to a much stricter copyright regime than current developed countries were willing to accept when they were still in a developmental phase.

It follows that a copyright protection regime that works satisfactorily in a developed country is not necessarily going to be a sound policy in the developing world. A one-size-fits-all approach of strong copyright protection is ill-conceived. The lesson to be learned from history is that while stringent copyright protection regimes are in the interest of developed countries, a far less strict protection regime is needed in developing countries.

This conclusion is neither new nor revolutionary. In fact, numerous international legislative and policy efforts in the past were based on this belief as is briefly shown below. In recent years, however, developed countries have begun to disregard the specific needs of developing countries in the realm of copyright law by calling for, and pushing through, uniform and strong copyright protection. One could argue that this is an inexorable process since developed countries simply have more pull in this debate because of their sheer economic might. Their economic power enables them to force less affluent countries into copyright protectionist agreements to avoid economically painful trade sanctions.

In the longer run however, it must not be ignored that the population of developing countries considerably outnumbers the population of developed countries and that this population is an important potential market for copyright works in particular. To create demand in these countries, developed countries arguably have to back down from some of their current demands in the field of copyright law. It is also worth noting that history – especially in South Africa – has shown

that legislation which goes against the interests of the majority will eventually cause uproar and fail. Therefore, the search for fair compromises, which take the colliding interest sufficiently into account, is indeed worthwhile.

6.3. International recognition of needs of developing countries

The 1971 Berne Appendix as well as certain TRIPS provisions and the 2007 Development Agenda for WIPO show that numerous international legislative and policy efforts in the past dealing with the exceptional situation of developing countries were based on the belief that less restrictive copyright protection regimes are beneficial for developing countries.

6.3.1. The 1971 Berne Appendix

Following an era of decolonisation between the late 1940s and the early 1960s, the Appendix of the Berne Convention was formulated and adopted as part of the 1971 Paris Act of the Berne Convention.⁶⁵⁰ The Appendix aimed at integrating former colonies into the international copyright system. Originally, former colonies had been bound by the international copyright agreements which their former colonial powers had entered into, but it was soon realised that the newly independent countries had very specific needs regarding access to copyright protected material which the traditional copyright exceptions and limitations contained in international copyright treaties and agreements did not take into account.⁶⁵¹ Thus, a representative from the UK rightly noted during the negotiation process for the Berne Appendix that '[t]he Berne

⁶⁵⁰. Article 21(2) of the Berne Convention stipulates that '[s]ubject to the provisions of Article 28(1)(b), the Appendix forms an integral part of this Act'. The Berne Appendix was later incorporated into both the TRIPS Agreement and the WIPO Copyright Treaty (Art 9(1) TRIPS and Art 1(4) of the WCT).

⁶⁵¹. A Story supra note 12 at 48.

Convention is an instrument primarily designed to meet the needs of countries which have reached a certain stage of development.⁶⁵²

In short, the Berne Appendix provides, subject to the compensation of the rights holder, for a system of non-exclusive and non-transferable, non-voluntary licences in developing countries regarding

- (1) the translation of works for the purposes of teaching, scholarship or research, and for use in connection with systematic instructional activities⁶⁵³, and
- (2) the reproduction of literary and artistic works protected under the Berne Convention.⁶⁵⁴

Developing countries have so far expressed little interest in the licence scheme. Therefore, the Berne Appendix is largely considered a failure.⁶⁵⁵ The reasons for the lack of interest are manifold. In essence, the complexity of the relevant provisions and the limited scope of the provisions have been stated as the main disadvantages of the Berne Appendix.⁶⁵⁶ In addition, the Berne Appendix does not address the important issue of traditional knowledge/ folklore. Lastly, Article III of the Berne Appendix (“Limitation on the Right of Reproduction”) is outdated in that it does not take into account the fundamental changes brought about by digital technologies.

⁶⁵². Cited in C F Johnson ‘The Origins of the Stockholm Protocol’ (1970) 18 *Bulletin of the Copyright Society of the USA* 91.

⁶⁵³. Article II of the Appendix to the Berne Convention.

⁶⁵⁴. Article III of the Appendix to the Berne Convention.

⁶⁵⁵. R Okediji supra note 203 at 15.

⁶⁵⁶. For more information on this issue see R Okediji ‘Fostering access to education, research, and dissemination of knowledge through copyright’ (draft) (2004), at 9 et seq, UNCTAD-ICTSD dialogue on moving the pro-development IP agenda forward: preserving public goods in health, education and learning, available at

http://www.iprsonline.org/unctadictsd/bellagio/docs/Okideiji_Bellagio4.pdf [accessed on 25 January 2009].

6.3.2. The 1994 TRIPS provisions for developing countries

As a WTO agreement, TRIPS automatically applies equally to all WTO member states. However, the drafters of the TRIPS Agreement considered the special interests and needs of developing countries by granting them additional time to implement the applicable changes into their laws.⁶⁵⁷ Generally, the changes required by TRIPS result in more stringent national copyright laws. While the transition period for developing countries expired in 2005, the transition period for least developed countries has been extended by the WTO's Council for TRIPS until 1 July 2013.⁶⁵⁸

6.3.3. The 2007 Development Agenda for WIPO

The adoption of a Development Agenda for WIPO in 2007 is the most recent international effort for considering specific needs of developing countries in the context of intellectual property. The Development Agenda came about as a reaction to an uncritical promotion of ever-stronger IP regimes which was considered detrimental to the interests of developing countries.

Negotiations about the WIPO Development Agenda began in 2004 with a proposal by Argentina and Brazil, from which also a Draft Access to Knowledge Treaty emerged.⁶⁵⁹ Bolivia, Cuba, the Dominican Republic, Ecuador, the Islamic Republic of Iran, Kenya, Sierra Leone,

⁶⁵⁷. See Articles 65 and 66 of TRIPS.

⁶⁵⁸. Initially, the transition period was due to expire on 1 January 2006 - 11 years after the TRIPS Agreement came into force. (The transition period for least-developed countries regarding patents for pharmaceutical products only expires in 2016.) As of December 2007, 51 countries are classified as least-developed, mainly in Africa and Asia.

⁶⁵⁹. The *Draft Access to Knowledge Treaty* (2005) deals, inter alia, with (1) provisions regarding limitations and exceptions to copyright and related rights; (2) the expansion and enhancing of the knowledge commons; (3) the promotion of open standards; and (4) the transfer of technology to developing countries. A text of the *Draft Access to Knowledge Treaty* can be found at http://www.cptech.org/a2k/a2k_treaty_may9.pdf [accessed on 25 January 2009].

South Africa, the Republic of Tanzania and Venezuela supported the proposal.⁶⁶⁰

The version of the Development Agenda that was eventually adopted contains 45 proposals and recommendations for development-oriented reforms. These pertain to the following areas: technical assistance and capacity building; norm-setting, flexibilities, public policy and public knowledge; technology transfer, information and communication technology (ICT) and access to knowledge; assessments, evaluation and impact studies; institutional matters including mandate and governance. As a result of the Development Agenda, a development dimension is henceforth integrated into WIPO's activities. It replaces WIPO's previous mission to merely promote IP protection around the world.

Member states have agreed to establish a Committee on Development and Intellectual Property (CDIP) which is tasked with implementing the 45 recommendations; the first meeting of the CDIP took place in March 2008.

6.4. Copyright exceptions and limitations for educational purposes

This subchapter deals with the category of copyright exceptions and limitations most relevant for developing countries in their efforts to overcome developmental challenges: copyright exceptions and limitations concerning educational material. Education systems in many developing countries, particularly in Africa, are failing to meet the needs of many of their citizens. Overly restricted access to educational materials by way of copyright law is one cause for this failure.

⁶⁶⁰. For more information on the background of the Development Agenda (including a summary of development activities from 2000 to 2005) see the WIPO website, available at <http://www.wipo.int/ip-development/en/agenda/> [accessed on 25 January 2009].

In 2002, the UK Commission on Intellectual Property Rights aptly summarised the relevance for developing countries of striking a fair balance between copyright protection and access to knowledge material⁶⁶¹:

The crucial issue for developing countries is getting the right balance between protecting copyright and ensuring adequate access to knowledge and knowledge-based products. It is the cost of access, and the interpretation of “fair use” or “fair dealing” exemptions that are particularly critical for developing countries, made more so by the extension of copyright to software and to digital material. These issues need to be addressed to ensure developing countries have access to important knowledge-based products as they seek to bring education to all, facilitate research, improve competitiveness, protect their cultural expressions and reduce poverty.

From this statement two things can be inferred. First, widespread access to educational material is important for the economic, social and political development in developing countries. Secondly, a fairly balanced copyright regime requires both the protection of the legitimate interests of the rights holders of educational material and the existence of an effective system of access-enabling copyright exceptions and limitations for educational purposes.

More than ever, developing countries introduce comprehensive copyright protection for all sorts of works, including educational material. This generally increases the costs of accessing and often impedes the use of such materials. At the same time, however, domestic legislation does not deal with copyright exceptions and limitations for educational uses adequately and these therefore often remain vague and fragmentary. This is especially in relation to uses made possible by newer technologies. The leeway granted for national copyright exceptions and limitations by the relevant international treaties and

⁶⁶¹. Commission on Intellectual Property Rights *Integrating Intellectual Property Rights and Development Policy* (2002) report, at 96, available at http://www.iprcommission.org/graphic/documents/final_report.htm [accessed on 25 January 2009].

agreements, as described in the previous chapters, is seldom fully exploited. As a result, an ideal balance supportive of development can regularly not be reached.

As an example, we will look at South African copyright law. In comparison with some developing countries, South Africa has a fairly detailed copyright law. Yet, even here, the extent to which educational material may be accessed and used without the authorisation of the rights holder is largely unclear. In the following, it is attempted to briefly summarise the current legal situation in relation to some of the most significant educational uses in South Africa.

Whether or not educators are allowed to make and distribute copies of learning material to students under the fair dealing provision of sec 12(1)(a) is unclear.⁶⁶² It is submitted that sec 12(1)(a) does not allow copying in such cases. This is because the wording of the provision refers to the reproduction *by* (not *for*) the person whose research or private study is concerned and not to the person or institution providing the education. This interpretation is supported by the fact that copying for teaching purposes is specifically regulated in sec 12(4) of the South African Copyright Act. In addition, the issue of multiple copying by educational institutions as well as libraries is expressly addressed in the Copyright Regulations to sec 13 of the South African Copyright Act.

Section 12(4) of the South African Copyright Act permits the use of a work 'to the extent justified by the purpose, by way of illustration in any publication, broadcast or sound or visual record for teaching: Provided that such use shall be compatible with fair practice [...]'.⁶⁶³ It has been suggested that the requirement of being 'compatible with fair

⁶⁶². W Baude et al supra note 357 at 82.

⁶⁶³. For an explanation of the meaning of the different media mentioned in sec 12(4) see D J Pienaar supra note 550 at 87 et seq. Copeling argues that the phrase 'by way of illustration' prohibits the use of a work as the sole or primary means of instruction (A J C Copeling *Copyright and the Act of 1978* (1978) at 43).

practice' ought to be assessed by the same criteria as fair dealing.⁶⁶⁴ If this is, however, the case, the other requirement contained in sec 12(4) of the South African Copyright Act, that is 'to the extent justified by the purpose', appears redundant. For an excessive use can hardly ever qualify as being fair.

As far as the use of protected material for the purpose of teaching is concerned, both sec 12(4) and sec 13 (and the regulations made thereunder) apply. However, the scope of sec 12(4) in this respect is wider since the provision is, unlike the copyright regulation to sec 13, not confined to a narrowly defined group of teachers.⁶⁶⁵ Moreover, the Copyright Regulations based on sec 13 of the South African Copyright Act only permit reproducing selected literary works; that is short poems, articles, stories and essays.⁶⁶⁶

Section 13 of the South African Copyright Act is, however, of crucial importance because it does not only pertain to the purpose of teaching but also to other important uses. Section 13 states that copyright in a work is not infringed by the reproduction of a work if such reproduction is permitted by regulations, provided the reproduction is not in conflict with a normal exploitation of the work and is not unreasonably prejudicial to the legitimate interests of the copyright holder. This way, the South African Copyright Act incorporates the internationally recognised three-step test which was discussed in detail in chapter 4. Chapter 1 of the Copyright Regulations of 1978 (as amended) is of relevance here. Chapter 1, regulation 2 contains a basic rule for reproductions. This provision allows a reproduction if not more than one copy of a reasonable portion of the work is made and if the cumulative effect of the reproduction does not conflict with the normal

⁶⁶⁴. O H Dean supra note 38 at 1-54. Baude et al suspect semantical reasoning behind the change of language and explain that 'one expression is used as a noun and the other as a verb'. W Baude et al supra note 357 at 86.

⁶⁶⁵. In the relevant Copyright Regulations, 'teacher' is defined in reg 1(iv) as 'any person giving instruction or doing research at any school, university or any other educational institution, by whatever name he may be called'.

⁶⁶⁶. See regulations 2 and 1(iii)(a) of the Copyright Regulations of 1978.

exploitation of the work to the unreasonable prejudice of the legal interest and residuary rights of the author.

It is not entirely clear, however, what a 'reasonable portion' is, but the term arguably refers to both the quantity and quality of the portion used in relation to the original work.⁶⁶⁷ Apart from the basic rule in regulation 2, chapter 1 of the Copyright Regulations of 1978 (as amended) contains several specific exceptions and limitations for libraries, archives, and educational institutions/ teachers.⁶⁶⁸ Some of the requirements contained in these exceptions and limitations are overly restrictive and their general usefulness has hence been doubted.⁶⁶⁹

Other important issues such as copying for the purpose of distance education or certain uses for the benefit of sensory disabled persons are not specifically dealt with and, therefore, often remain in a legal grey area.

Legal vagueness of this sort frustrates both rights holders and users of educational material alike. For neither group can presently determine the exact reach of their respective rights. One obvious result of this situation is the startling scarcity of relevant case law in South Africa. It appears that stakeholders are unwilling to take the risk of costly yet, in terms of success probability, highly uncertain litigation.⁶⁷⁰ After all, such legal uncertainty severely complicates any discussion as to whether or not the current copyright law promotes a fair copyright balance that takes the special educational needs of developing countries sufficiently into account.

⁶⁶⁷ E Gray and M Seeber supra note 549 at 71.

⁶⁶⁸ For an instructive summary of the requirements for (multiple) copying by teachers as contained in the Copyright Regulations of 1978 see D J Pienaar supra note 550 at 95-97.

⁶⁶⁹ Ibid at 99.

⁶⁷⁰ In order to reduce litigation risks, however, clients could enter into contingency fees agreements with their lawyers.

6.5. Flexibilities for national lawmakers other than copyright exceptions and limitations

The preceding chapters indicated that international copyright treaties and agreements contain various flexibilities that national lawmakers in developing countries may use to support their developmental needs. It was argued that copyright exceptions and limitations were the single most important such flexibility. The previous chapters, therefore, examined copyright exceptions and limitations in detail. It was, however, mentioned in the introduction to this thesis that there are important flexibilities other than copyright exceptions and limitations available to national lawmakers that allow lawmakers to develop country-specific copyright legislation. Of course, these flexibilities also play an important role for achieving a fair copyright balance. This subsection now looks briefly at these other flexibilities.

Apart from the degree to which permitted copyright exceptions and limitations are employed, national legislators have essentially two other categories of flexibilities at their disposal. These are

- (1) the determination of the scope of copyright protection regarding
 - (a) the kinds of works protected and
 - (b) the rights which are granted; and
- (2) the determination of the duration of copyright protection.

As with copyright exceptions and limitations, the precise extent of these flexibilities depends essentially on by which international treaties a country is bound.⁶⁷¹

⁶⁷¹. A 2006 study by Consumers International contains an instructive list of flexibilities that are available to developing countries under the different international treaties (Consumers International

If one accepts the view expressed in this chapter that less stringent standards of copyright protection are beneficial for developing countries, both the scope and duration of copyright protection should obviously be as narrow and short respectively as possible. It is, therefore, important to highlight the minimum scope and the minimum duration of copyright protection prescribed by the relevant international treaties and agreements.

6.5.1. The minimum scope of copyright protection

6.5.1.1. Protection only for works and limited other subject matter

The Berne Convention requires in broad terms the protection of literary and artistic works. Article 2(1) of the Berne Convention stipulates that this expression encompasses

every production in the literary, scientific and artistic domain, whatever may be the mode or form of its expression, such as books, pamphlets and other writings; lectures, addresses, sermons and other works of the same nature; dramatic or dramatico-musical works; choreographic works and entertainments in dumb show; musical compositions with or without words; cinematographic works to which are assimilated works expressed by a process analogous to cinematography; works of drawing, painting, architecture, sculpture, engraving and lithography; photographic works to which are assimilated works expressed by a process analogous to photography; works of applied art; illustrations, maps, plans, sketches and three-dimensional works relative to geography, topography, architecture or science.

In addition, the Berne Convention expressly protects translations, adaptations, arrangements of music and other alterations of

literary or artistic works as well as collections of literary or artistic works such as encyclopaedias and anthologies.⁶⁷²

By incorporating Articles 1 to 21 of the Berne Convention (1971) and the Berne Appendix, the TRIPS agreement confirms the protection of literary and artistic work as provided for under the Berne Convention.⁶⁷³ Furthermore, TRIPS states that computer programs must be protected as literary works under the Berne Convention.⁶⁷⁴ In addition, TRIPS determines that compilations of data or other material 'which by reason of the selection or arrangement of their contents constitute intellectual creations shall be protected as such'.⁶⁷⁵ This protection does, however, not extend to the data or material itself.⁶⁷⁶

Like TRIPS, the WCT incorporates Article 1 to 21 of the Berne Convention as well as the Berne Appendix.⁶⁷⁷ It also specifically requires copyright protection for computer programs⁶⁷⁸ and databases.⁶⁷⁹

The Rome Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations as well as TRIPS⁶⁸⁰ prescribes minimum standards for the protection of performances, phonograms and broadcasts; the WPPT only addresses performances and phonograms.

6.5.1.2. Exclusive rights granted

The Berne Convention grants the following exclusive rights to copyright holders:

⁶⁷². Article 2(3) and 2(5) of the Berne Convention.

⁶⁷³. Article 9(1) of TRIPS.

⁶⁷⁴. Article 10(1) of TRIPS.

⁶⁷⁵. Article 10(2) of TRIPS. Moreover, the TRIPS agreement provides for the protection of the rights of performers, producers of phonograms and broadcasting organisations (see Article 14 of TRIPS).

⁶⁷⁶. Ibid.

⁶⁷⁷. Article 1(4) of the WCT.

⁶⁷⁸. Article 4 of the WCT.

⁶⁷⁹. Article 5 of the WCT.

⁶⁸⁰. Article 14 of TRIPS.

- (1) In respect of literary and artistic works:
 - (a) making and authorising a translation of a work⁶⁸¹;
 - (b) authorising a reproduction of a work, in any manner or form⁶⁸²;
 - (c) authorising the broadcasting of a work or the communication thereof to the public by any other means of wireless diffusion of signs, sounds or images⁶⁸³;
 - (d) authorising any communication to the public by wire or by rebroadcast of the broadcast of a work, when this communication is made by an organisation other than the original one⁶⁸⁴;
 - (e) authorising the public communication by loudspeaker or any other analogous instrument transmitting, by signs, sounds or images, the broadcast of a work⁶⁸⁵;
 - (f) authorising adaptations, arrangements and other alterations of a work⁶⁸⁶;
 - (g) authorising the cinematographic adaptation and reproduction of works, and the distribution of the works thus adapted or reproduced⁶⁸⁷;
 - (h) authorising the public performance and communication to the public by wire of works thus adapted or reproduced⁶⁸⁸;
 - (i) adaptation into any other artistic form of a cinematographic production derived from literary or artistic works⁶⁸⁹;
- (2) in respect of dramatic, dramatico-musical and musical works:
 - (a) authorising the public performance of a work⁶⁹⁰;
 - (b) authorising any communication to the public of the performance of a work⁶⁹¹;
- (3) in respect of literary works:
 - (a) authorising the public recitation of a work⁶⁹²;

⁶⁸¹. Article 8 of the Berne Convention.

⁶⁸². Article 9(1) of the Berne Convention.

⁶⁸³. Article 11*bis*(1)(i) of the Berne Convention. However, contracting states may provide for a mere right to equitable remuneration instead of a right of authorisation, see Article 11*bis*(2) of the Berne Convention.

⁶⁸⁴. Article 11*bis*(1)(ii) of the Berne Convention. However, contracting states can provide for a mere right to equitable remuneration instead of a right of authorisation, see Article 11*bis*(2) of the Berne Convention.

⁶⁸⁵. Article 11*bis*(1)(iii) of the Berne Convention. However, contracting states can provide for a mere right to equitable remuneration instead of a right of authorisation, see Article 11*bis*(2) of the Berne Convention.

⁶⁸⁶. Article 12 of the Berne Convention.

⁶⁸⁷. Article 14(1)(i) of the Berne Convention.

⁶⁸⁸. Article 14(1)(ii) of the Berne Convention.

⁶⁸⁹. Article 14(2) of the Berne Convention.

⁶⁹⁰. Article 11(1)(i) of the Berne Convention.

⁶⁹¹. Article 11(1)(ii) of the Berne Convention.

- (b) authorising any communication to the public of the recitation of a work⁶⁹³;
- (4) in respect of musical works and words recorded together with the musical work: to authorise the sound recording of that musical work, together with such words, if any⁶⁹⁴;
- (5) in respect of original works of art and original manuscripts of writers and composers: to enjoy the inalienable right to an interest in any sale of a work subsequent to the first transfer by the author of the work.⁶⁹⁵

Moreover, the Berne Convention protects moral rights. These rights concern the right 'to claim authorship of the work [right to paternity] and to object to any distortion, mutilation or other modification of, or other derogatory action in relation to, the said work, which would be prejudicial to his honor or reputation [right to integrity]'.⁶⁹⁶ As mentioned before in this chapter, legislators in developing countries may under the Berne Appendix, subject to certain conditions, introduce a system of non-exclusive and non-transferable non-voluntary licenses with regard to the right of translation and the right of reproduction.⁶⁹⁷

The TRIPS Agreement grants an additional rental right in respect of at least computer programs and cinematographic works.⁶⁹⁸

The WCT also provides in its Article 7 for a right of rental for authors of computer programs, cinematographic works and works embodied in phonograms. Furthermore it grants the rights of distribution⁶⁹⁹ and communication to the public⁷⁰⁰ to authors of literary and artistic works.⁷⁰¹

⁶⁹². Article 11*ter*(1)(i) of the Berne Convention.

⁶⁹³. Article 11*ter*(1)(ii) of the Berne Convention.

⁶⁹⁴. Article 13 of the Berne Convention.

⁶⁹⁵. Article 14*ter*(1)(ii) of the Berne Convention.

⁶⁹⁶. Article 6*bis* of the Berne Convention.

⁶⁹⁷. Article II and II of the Appendix to the Berne Convention.

⁶⁹⁸. Article 11 of TRIPS.

⁶⁹⁹. Article 6 of the WCT.

⁷⁰⁰. Including a making available right, see Article 8 of the WCT.

⁷⁰¹. The WPPT contains similar provisions for performers (Articles 8 – 10 WPPT) and producers of phonograms (Articles 12-14 WPPT).

With regard to neighbouring rights, the Rome Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations generally grants to performers, producers of phonograms and broadcasting organisations the following exclusive rights:

- (1) for performers⁷⁰²:
 - (a) the broadcasting and the communication to the public of their performance;
 - (b) the fixation of their unfixed performance; and
 - (c) the reproduction of a fixation of their performance.
- (2) for producers of phonograms: the right to authorise or prohibit the direct or indirect reproduction of their phonograms⁷⁰³;
- (3) for broadcasting organisations⁷⁰⁴:
 - (a) the rebroadcasting of their broadcasts;
 - (b) the fixation of their broadcasts; and
 - (c) the reproduction of their broadcasts.

TRIPS stipulates that, in respect of a fixation of their performance on a phonogram, performers may prevent the unauthorised fixation of their unfixed performance, the unauthorised reproduction of such fixation and the unauthorised broadcasting by wireless means and the communication to the public of their live performance.⁷⁰⁵ Producers of phonograms have the right to authorise or prohibit the direct or indirect reproduction of their phonograms.⁷⁰⁶ Lastly, broadcasting organizations have under TRIPS the right to prohibit the unauthorised fixation, the unauthorised reproduction of fixations, and the unauthorised rebroadcast by wireless means of broadcasts, as well as the unauthorised communication to the public of television broadcasts of the

⁷⁰². Article 7 of the Rome Convention.

⁷⁰³. Article 10 of the Rome Convention.

⁷⁰⁴. Article 13 of the Rome Convention.

⁷⁰⁵. Article 14(1) of TRIPS.

⁷⁰⁶. Article 14(2) of TRIPS.

same.⁷⁰⁷ If member states do not grant such rights to broadcasting organisations, “they shall provide owners of copyright in the subject matter of broadcasts with the possibility of preventing the above acts, subject to the provisions of the Berne Convention (1971)”.⁷⁰⁸

Finally, the WPPT grants performers and producers of phonograms the following exclusive economic rights:

- (1) the right of reproduction⁷⁰⁹;
- (2) the right of distribution⁷¹⁰;
- (3) the right of rental⁷¹¹; and
- (4) the right of making available⁷¹².

In its Article 15, the WPPT also contains a right to remuneration for broadcasting and communication to the public. Furthermore, Article 5 of the WPPT specifically protects the moral rights of performers.

6.5.2. Only for a limited duration

Under the Berne Convention, and by incorporation of the relevant Berne provisions also under TRIPS and the WCT, the minimum duration of copyright protection for most literary and artistic works is currently 50 years from the date of the author’s death.⁷¹³ For cinematographic works, however, member states may provide that the term of protection expires fifty years after the work has been made available to the public with the consent of the author. If a cinematograph work is not made available to

⁷⁰⁷. Article 14(3) of TRIPS.

⁷⁰⁸. Ibid.

⁷⁰⁹. Articles 7 and 11 of the WPPT.

⁷¹⁰. Articles 8 and 12 of the WPPT.

⁷¹¹. Articles 9 and 13 of the WPPT.

⁷¹². Articles 10 and 14 of the WPPT.

⁷¹³. Article 7(1) of the Berne Convention.

the public within fifty years from the making of this work the protection ends fifty years after the making.⁷¹⁴

In the case of anonymous or pseudonymous works, copyright protection generally expires 50 years after the work has been lawfully made available to the public.⁷¹⁵

In the case of a work of joint authorship, the copyright protection term is usually calculated from the death of the last surviving author.⁷¹⁶

The TRIPS agreement adds that “[w]henver the term of protection of a work, other than a photographic work or a work of applied art, is calculated on a basis other than the life of a natural person, such term shall be no less than 50 years from the end of the calendar year of authorized publication, or, failing such authorized publication within 50 years from the making of the work, 50 years from the end of the calendar year of making”.⁷¹⁷

Having said this, the minimum protection term for works of applied art which are protected as artistic works is, according to the relevant copyright treaties and agreements, 25 years. Under the Berne Convention⁷¹⁸ and TRIPS (but not under the WCT⁷¹⁹), the shorter protection term of 25 years also applies to photographic works.

The Universal Copyright Convention as revised at Paris on 24 July 1971 prescribes a minimum protection term for rights protected under the Convention of 25 years after the death of the author.⁷²⁰ However, the UCC allows for the following two alternatives:

⁷¹⁴. Article 7(2) of the Berne Convention.

⁷¹⁵. Article 7(3) of the Berne Convention.

⁷¹⁶. Article 7*bis* of the Berne Convention.

⁷¹⁷. Article 12 of TRIPS.

⁷¹⁸. Article 7(4) of the Berne Convention.

⁷¹⁹. Article 9 of the WCT specifically provides that “[i]n respect of photographic works, the Contracting Parties shall not apply the provision of Article 7(4) of the Berne Convention”.

⁷²⁰. Article IV(2)(a) of the UCC.

"[A]ny Contracting State which, on the effective date of this Convention in that State, has limited this term for certain classes of works to a period computed from the first publication of the work, shall be entitled to maintain these exceptions and to extend them to other classes of works. For all these classes the term of protection shall not be less than twenty-five years from the date of first publication."⁷²¹

"Any Contracting State which, upon the effective date of this Convention in that State, does not compute the term of protection upon the basis of the life of the author, shall be entitled to compute the term of protection from the date of the first publication of the work or from its registration prior to publication, as the case may be, provided the term of protection shall not be less than twenty-five years from the date of first publication or from its registration prior to publication, as the case may be."⁷²²

For neighbouring rights, Article 14 of the Rome Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations stipulates a minimum term of protection of 20 years from the end of the year in which,

- (1) for phonograms and for performances incorporated therein:
the fixation was made;
- (2) for performances not incorporated in phonograms: the
performance was made;
- (3) for broadcasts: the broadcast took place.

Article 14(5) of the TRIPS agreement states that the minimum term of protection for the rights of performers and producers of phonograms is 50 years from the end of the calendar year in which the fixation was made or the performance took place. The rights of broadcasting organisations are protected for 20 years from the end of the calendar year in which the broadcast took place.

⁷²¹. Ibid.

⁷²². Article IV(2)(b) of the UCC.

Under the WPPT, the minimum term of protection for performers is 50 years from the end of the year in which the performance was fixed in a phonogram. The minimum term of protection granted to producers of phonogram is 50 years from the end of the year in which the phonogram was published. If no publication takes place within 50 years from the fixation of the phonogram, the minimum protection term is 50 years from the end of the year in which the fixation was made.

6.6. Parallel importing

Many commentators suggest that permitting parallel importation of copyright protected goods could also benefit developing countries by improving access possibilities to knowledge material in these countries. It therefore appears apt to address this issue in the current context. In particular, it seems worth examining (1) whether the relevant international copyright treaties and agreements allow parallel importation and (2) to what extent national lawmakers have made use of this additional flexibility.

6.6.1. Parallel importing and rights exhaustion

The term “parallel importation” in the field of copyright law refers to the practice of importing copyright protected goods, which were legally acquired in one country, into another country without the consent of the copyright holder in the target country. That way, local domestic suppliers are bypassed. The imported goods are often referred to as grey-market goods.⁷²³ Parallel importation potentially creates disturbances in the markets of the target country, especially for copyright holders and licensed suppliers who offer essentially the same goods in the target

⁷²³. See, for example, C Mohr ‘Grey market goods and copyright law: An end run around *Kmart v. Cartier*’ (1996) 45 *Catholic University Law Review* 561.

country for a higher price. It needs to be stressed, however, that parallel imported goods are legitimately produced products and are, therefore, not to be confused with pirated goods.⁷²⁴

If parallel importation is not specifically addressed in a country, the question whether parallel importation is allowed depends on how the so-called concept of exhaustion of rights⁷²⁵ is defined in this particular country.

The concept of exhaustion of rights was originally developed by the German Reichsgericht (Imperial Court) at the beginning of the 20th century.⁷²⁶ It takes into account the competing interests of the intellectual property right holder on the one hand and the owner of a legally obtained copy of a product on the other. According to the concept of exhaustion of rights, commercial rights of copyright holders in a particular copyright protected work are, in principle, exhausted once the work is legally sold or otherwise transferred. However, in numerous countries such exhaustion of rights only applies domestically. This situation is referred to as national exhaustion. Thus, the copyright holder's consent remains necessary in cases where a domestically-marketed good crosses national borders. This means that (unauthorised) parallel importation as such is not permitted. If, on the other hand, international exhaustion is applied in the target country, parallel importation is permitted. This is because under the concept of international exhaustion, commercial rights of copyright holders cease not only domestically but worldwide after the first legal transfer.⁷²⁷

⁷²⁴. K M Rippel and R de Villiers 'Legalising parallel imports under intellectual property law' 2004 *Stellenbosch Law Journal* 550.

⁷²⁵. In English-speaking countries, the principle of exhaustion of rights is often referred to as the first-sale doctrine'.

⁷²⁶. See, for instance, the *Koenigs Kursbuch* decision (RGZ 63, 394 (1906)).

⁷²⁷. The advantages of both concepts have been summarised as follows (see L Longdin 'Copyright: The last trade barrier in a globalised world?' paper presented at the 2006 annual conference on new directions of copyright, University of London (27 – 28 June 2006), at 9, available at <http://www.copyright.bbk.ac.uk/contents/conferences/2006/cplongdin.pdf> [accessed on 25 January 2009]):

The upside of adopting a global exhaustion regime is commercial definiteness for subsequent purchasers of goods who can presume they are free to dispose of them in

6.6.2. The international framework regarding parallel importation

The international legal framework regarding the issue of parallel importation is best described as vague and fragmentary. What is clear, however, is that once a country chooses to apply either the international or national exhaustion regime, international requirements such as the most favoured nation treatment requirement in Article 4 of TRIPS necessitate a consistent application.⁷²⁸

The Berne Convention makes no mention of either parallel importation or the exhaustion of rights. The TRIPS Agreement expressly stipulates in its Article 6 that 'nothing in this Agreement shall be used to address the issue of the exhaustion of intellectual property rights.'⁷²⁹ The WCT deals in Article 6(2) ("Right of Distribution") with the issue by merely stating that '[n]othing in this Treaty shall affect the freedom of Contracting Parties to determine the conditions, if any, under which the exhaustion of the right in paragraph (1) applies after the first sale or other transfer of ownership of the original or a copy of the work with the authorization of the author'.⁷³⁰

It is because of the lack of international regulation that domestic laws regarding parallel importation and the rule of exhaustion differ so remarkably. After all, specific policy considerations in a country

whatever market(s) they wish. On the other hand, however, when a trading nation applies the rule of territorial exhaustion, copyright owners are advantaged because they can game differences in copyright regimes in isolated markets, subject of course to commercial realities such as transportation costs between markets, technical requirements and the increasing incidence of individual consumers making direct purchases over the Internet which could mean that parallel imports are less of a threat than price differences alone might indicate.

⁷²⁸. Ibid at 11.

⁷²⁹. TRIPS restricts, however, the importation of pirated copyright goods and defines such goods as (see note 14(b) to Article 51 of TRIPS):

[G]oods which are copies made without the consent of the right holder or person duly authorized by the right holder in the country of production and which are made directly or indirectly from an article where the making of that copy would have constituted an infringement of a copyright or a related right under the law of the country of importation.

⁷³⁰. See also, for the right of distribution of performers and producers of phonograms, Articles 8(2) and 12(2) of the WPPT.

significantly influence its stance on parallel importation. The following subchapters look at the legal situation regarding parallel importation in selected countries and regions, that is the U.S., Europe, Australia and South Africa.

6.6.3. Parallel importing in the U.S.

In the U.S., sec 602 of the U.S. Copyright Act appears to prohibit parallel importation of copyright protected goods. Section 602(a) provides as follows:

Importation into the United States, without the authority of the owner of copyright under this title, of copies or phonorecords of a work that have been acquired outside the United States is an infringement of the exclusive right to distribute copies or phonorecords under section 106, actionable under section 501. [...]

Section 602(a) however contains three explicit exceptions from the aforementioned prohibition: (1) importation of copies or phonorecords under the authority of, or for the use of, the United States, any state, or political subdivision of a state (but not including schools); (2) importation of one copy or phonorecord of any one work at any one time for personal use; and (3) importation by a scholarly, educational, or religious organisation not for private gain of no more than one copy of any audiovisual work for archival purposes, or no more than five copies or phonorecords of any other type of work for lending or archival purposes.

In addition, the U.S. Supreme Court has further reduced the scope of sec 602 in relation to reimported goods by ruling in *Quality King Distributors, Inc. v L'anza Research International, Inc.*⁷³¹ that sec 602 is limited by sec 109(a) of the U.S. Copyright Act which codifies the

⁷³¹. 523 US 135 (1998). In short, the case involved the unauthorised re-importation of L'anza's hair care products from Malta which had labels containing copyrightable subject matter affixed to the packaging.

important doctrine of first sale. Section 109(a) expressly permits the owner of a lawfully made copy to sell that copy '[n]otwithstanding the provisions of section 106(3)'.⁷³² One may argue the U.S. Supreme Court ruling calls into question the legitimacy of the prohibition on parallel importation. In fact, there is good reason to believe that the U.S. Supreme Court is indeed critical of rules prohibiting parallel trade in copyright protected goods.⁷³³ Caution is, however, advised since the U.S. Supreme Court has, strictly spoken, not addressed the issue of international exhaustion, that is the case that a product is manufactured abroad and then imported into the United States.⁷³⁴ It has been argued that such foreign goods are, after all, not 'lawfully made under this title' as required by sec 109(a) of the U.S. Copyright Act. Justice Ginsburg, for instance, indicated in her concurring opinion in *Quality King Distributors, Inc. v L'anza Research International, Inc.* that the general permission of parallel importation may in fact not cover the situation in which the copyright protected good in question was manufactured abroad.⁷³⁵

6.6.4. Parallel importing in Europe

In Europe, the hybrid doctrine of Community-wide exhaustion is widely being followed in relation to intellectual property goods within the borders of the European Economic Area (EEA⁷³⁶).⁷³⁷ As a result, parallel importation within the EEA is, in principle, permitted. Ultimately, the Community-wide exhaustion rule safeguards the principle of free

⁷³². Ibid. at 144 et seq.

⁷³³. F M Abbott 'Political economy of the U.S. parallel trade experience: Toward a more thoughtful policy' in T Cottier and P C Mavroidis (eds) *Intellectual Property – Trade, Competition and Sustainable Development* (2003) 177 at 181.

⁷³⁴. The only relevant (lower court) case appears to be *Columbia Broadcasting Systems Inc v Scorpio Music Distributors Inc*, 569 F. Supp. 47 (1983), affirmed 738 F.2d 424 (1984). In this case, the U.S. copyright holder successfully obtained an injunction against the sale of recordings which had been lawfully produced in the Philippines and subsequently imported into the U.S.

⁷³⁵. *Quality King Distributors, Inc. v L'anza Research International, Inc.*, 523 US 135, 154 (1998).

⁷³⁶. The EEA is composed of the EU member states as well as three of the four EFTA states, ie Iceland, Liechtenstein and Norway.

⁷³⁷. T Hays *Parallel importation under European Union law* (2004) 361.

movement of goods and services, including copyright protected goods⁷³⁸. The free movement principle is enshrined in Articles 28 – 30 and 49 of the EC Treaty in order to promote a single European market.⁷³⁹

In several decisions, the European Court of Justice (ECJ) established that the exhaustion rule applies to copyright.⁷⁴⁰ By now, European legislation also deals with the issue of rights exhaustion.⁷⁴¹ The EU Copyright Directive⁷⁴² addresses the issue of rights exhaustion in relation to the rights of communication to the public as well as making available to the public in its Article 3 and, most importantly, the distribution right in its Article 4. Article 3(3) of the EU Copyright Directive provides that the rights contained in Article 3 'shall not be exhausted by any act of communication to the public or making available to the public [...]'. Article 4 of the EU Copyright Directive, on the other hand, contains an exhaustion provision in paragraph 2. It provides that '[t]he distribution right shall not be exhausted within the Community in respect of the original or copies of the work, except where the first sale or other transfer of ownership in the Community of that object is made by the rightholder or with his consent'.

⁷³⁸. Performers' rights in a work were classified by the European Court of Justice as the provision of services, see *Coditel, SA v Cine-Vog Films, SA* (case 262/81) [1982] ECR 3381 para 11.

⁷³⁹. Articles 28 and 29 of the EC Treaty prohibit quantitative restrictions on imports, exports or goods in transit and all measures having equivalent effect. Member states are, however, allowed to derogate from the principle of free movement of goods and services if such derogation is justified on grounds of public morality, public policy or public security; the protection of health and life of humans, animals or plants; the protection of national treasures possessing artistic, historic or archaeological value; or the protection of industrial and commercial property (see Article 30 of the EC Treaty). In *Deutsche Grammophon GmbH v Metro-SB-Großmärkte GmbH und Co. KG*, the European Court of Justice explicitly stated that the free movement provisions apply to copyright protected goods ((case 78/70) [1971] ECR 487 para 13).

⁷⁴⁰. See especially *Deutsche Grammophon GmbH v Metro-SB-Großmärkte GmbH und Co. KG* ((case 78/70) [1971] ECR 487 para 32).

⁷⁴¹. See, for instance, Article 4(c) of the Computer Programs Directive (91/250/EEC). This provision stipulates that '[t]he first sale in the Community of a copy of a program by the rightholder or with his consent shall exhaust the distribution right within the Community of that copy, with the exception of the right to control further rental of the program or a copy thereof'. See also Articles 5(c) and 7(2)(b) of the EC Database Directive (96/9/EC) For more information see T Hays supra note 737 at 366-7.

⁷⁴². Directive 2001/29/EC.

It is noteworthy that exhaustion is limited to physical copies. Hence, non-tangible, that is digital copies of copyright protected works, are excluded from the scope of the exhaustion principle.⁷⁴³

Online transactions are considered an exercise of the right of communication (for which no exhaustion exists) rather than the right of distribution.⁷⁴⁴

It was long disputed whether a Community-wide exhaustion provision such as Article 4(2) of the EU Copyright Directive effectively prohibits the introduction of domestic provisions providing for a regime of international exhaustion.⁷⁴⁵ The ECJ answered this question in a recent decision. In *Laserdisken ApS v Kulturministeriet*⁷⁴⁶, the ECJ dealt with the question of international copyright exhaustion and discussed the validity of Article 4 of the EU Copyright Directive. In this case, Laserdisken sold copies of cinematographic works to individual buyers in Denmark. Some of the copies were imported from countries outside the EU. As a result of Article 4(2) of the EU Copyright Directive, the Danish lawmaker in 2002 amended the Danish law on copyright. While it previously contained an international exhaustion provision regarding the distribution right, a Community-wide exhaustion rule was introduced instead. At the beginning of 2003, Laserdisken brought legal proceedings against the Kulturministeriet claiming the amended section of the law on copyright did not apply. According to Laserdisken, the new provisions significantly impacted its imports and sales of DVDs which were lawfully marketed outside the EEA. In essence, the ECJ confirmed the validity of Article 4 of the EU Copyright Directive. It concluded that member states are, as a result, barred from retaining domestic laws containing the

⁷⁴³. E T T Tai 'Exhaustion and online delivery of digital works' (2003) 25 *E.I.P.R.* 207 (citing Recital 28 of the EU Copyright Directive, read in conjunction with Article 4(2)).

⁷⁴⁴. L Longdin supra note 727 at 14-5.

⁷⁴⁵. H Cohen Jehoram 'International exhaustion versus importation right: a murky area of intellectual property law' 1996 GRUR Int 280 at 283.

⁷⁴⁶. *Case C-479/04* [2006] ECR I-8089.

concept international copyright exhaustion.⁷⁴⁷ The ECJ expressly stated: 'It follows from the clear wording of Article 4(2) of Directive 2001/29, in conjunction with the twenty-eighth recital in the preamble to that directive, that that provision does not leave it open to the Member States to provide for a rule of exhaustion other than the Community-wide exhaustion rule'.⁷⁴⁸ The distinction between and different legal treatment of Community-wide exhaustion and international exhaustion has been described as a dual stance towards parallel importation in Europe.⁷⁴⁹

6.6.5. Parallel importing in Australia

Australian copyright legislation follows a concept of selective international exhaustion. This means that although the Australian Copyright Act contains a general ban on parallel importation of copyright protected material in sections 37 and 102⁷⁵⁰, the act expressly allows

⁷⁴⁷. Previously, the prevailing view in many countries, including Germany, was that international exhaustion applies if in both the export and import country the copyright is in the same hands (see P Geller supra note 264 at § 8 [1] [b]). If, however, the copyright holder splits his rights geographically, he was allowed to take action against parallel imports from countries in which he assigned or licensed his rights to a third party.

⁷⁴⁸. *Laserdisken ApS v Kulturministeriet* ((Case C-479/04) [2006] ECR I-8089 para 24). The 28th recital in the preamble of the EU Copyright Directive provides:

Copyright protection under this Directive includes the exclusive right to control distribution of the work incorporated in a tangible article. The first sale in the Community of the original of a work or copies thereof by the rightholder or with his consent exhausts the right to control resale of that object in the Community. This right should not be exhausted in respect of the original or of copies thereof sold by the rightholder or with his consent outside the Community. Rental and lending rights for authors have been established in Directive 92/100/EEC. The distribution right provided for in this Directive is without prejudice to the provisions relating to the rental and lending rights contained in Chapter I of that Directive.

⁷⁴⁹. C Barfield and M Groombridge 'Parallel Trade in the Pharmaceutical Industry: Implications for Innovation, Consumer Welfare, and Health Policy' (1999) 10 *Fordham Intellectual Property, Media & Entertainment Law Journal* 185 at 199.

⁷⁵⁰. Section 37 of the Australian Copyright Act provides:

- (1) [...] the copyright in a literary, dramatic, musical or artistic work is infringed by a person who, without the licence of the owner of the copyright, imports an article into Australia for the purpose of:
- (a) selling, letting for hire, or by way of trade offering or exposing for sale or hire, the article;
 - (b) distributing the article:
 - (i) for the purpose of trade; or

parallel importing of selected kinds of works. More precisely, the current Australian Copyright Act allows parallel importing of:

- (1) non-infringing⁷⁵¹ overseas books⁷⁵² (and under certain circumstances of books which were first published in Australia⁷⁵³);
- (2) non-infringing copies of sound recordings⁷⁵⁴;
- (3) non-infringing copies of computer programs⁷⁵⁵; and
- (4) non-infringing copies of electronic literary or music items⁷⁵⁶.

In addition, the Australian Copyright Act stipulates that '[t]he copyright in a work a copy of which is, or is on, or embodied in, a non-

(ii) for any other purpose to an extent that will affect prejudicially the owner of the copyright; or

(c) by way of trade exhibiting the article in public;

if the importer knew, or ought reasonably to have known, that the making of the article would, if the article had been made in Australia by the importer, have constituted an infringement of the copyright.

(2) In relation to an accessory to an article that is or includes a copy of a work, being a copy that was made without the licence of the owner of the copyright in the work in the country in which the copy was made, subsection (1) has effect as if the words "the importer knew, or ought reasonably to have known, that" were omitted.

Section 102 of the Australian Copyright Act contains a similar provision for other subject-matter.

⁷⁵¹. A non-infringing book is defined in sec 10(1) of the Australian Copyright Act as 'a book made (otherwise than under a compulsory licence) in a country specified in regulations made for the purposes of subsection 184(1), being a book whose making did not constitute an infringement of any copyright subsisting in a work, or in a published edition of a work, under a law of that country'.

⁷⁵². See sections 44A and 112A of the Australian Copyright Act. According to sec 44A(9) of the Australian Copyright Act, "overseas book" means a work:

(a) that was first published in a country other than Australia; and

(b) that was not published in Australia within 30 days after its first publication in that other country.

⁷⁵³. For details see sec 44A(2) of the Australian Copyright Act.

⁷⁵⁴. See sections 44D and 10AA of the Australian Copyright Act (see also sec 112D of the Australian Copyright Act).

⁷⁵⁵. See sections 44E and 10AB of the Australian Copyright Act.

⁷⁵⁶. See sections 44F and 112DA of the Australian Copyright Act. Section 10(1) defines "electronic literary or music item" as:

(a) a book in electronic form; or

(b) a periodical publication in electronic form; or

(c) sheet music in electronic form;

regardless of whether there is a printed form.

infringing accessory to an article is not infringed by importing the accessory with the article'.⁷⁵⁷ It is also worth mentioning that the Australian Copyright Act places the onus on parallel importers to prove the legitimacy of their imports.⁷⁵⁸

6.6.6. Parallel importing in South Africa

Lastly, in South Africa, parallel importing constitutes (secondary or indirect) copyright infringement if the requirements of sec 23(2)(a) of the South African Copyright Act are met. Section 23(2)(a) of the South African Copyright Act provides:

Without derogating from the generality of subsection (1), copyright shall be infringed by any person who, without the licence of the owner of the copyright and at a time when copyright subsists in a work-

(a) imports an article into the Republic for a purpose other than for his private and domestic use;

[...]

if to his knowledge the making of that article constituted an infringement of that copyright or would have constituted such an infringement if the article had been made in the Republic.

This provision is accompanied by sec 27(1)(d) of the South African Copyright Act which contains criminal sanctions for such unauthorised imports. As a result, the unauthorised importing of copyright protected material is allowed only for the purpose of private and domestic use. In all other situations, courts in South Africa are required under the Act to hypothesise the making of the parallel imported article in South Africa⁷⁵⁹ and to determine whether such

⁷⁵⁷. See sec 44C of the Australian Copyright Act (see also s 112C of the Australian Copyright Act); “accessory” is defined in subsection 10(1) of the Australian Copyright Act. See also sec 10AD for an expanded meaning of “accessory” in relation to certain imported articles.

⁷⁵⁸. See sec 130A of the Australian Copyright Act.

⁷⁵⁹. O H Dean ‘Copyright v Grey Goods in South Africa, Australia and Singapore’ (1994) 11 *South African Law Journal* 749.

making would have constituted a copyright infringement.⁷⁶⁰ If this is the case, the parallel imported article is an infringing copy⁷⁶¹ and any unauthorised trading in it constitutes copyright infringement; provided the infringers know that they are dealing with infringing copies ('guilty knowledge').⁷⁶²

Most prominently, the Appellate Division of the Supreme Court of South Africa addressed the issue of parallel importing in the realm of copyright law in *Frank & Hirsch (Pty) Ltd v A Roopanand Brothers (Pty) Ltd*.⁷⁶³ In this case, the subject matter of the parallel importation by the appellee was, among other things, art work on the packaging of cassette tapes which were produced by TDK in Japan. The appellant Frank & Hirsch was the authorised exclusive distributor of TDK blank cassette tapes in South Africa. The appellee Roopanand Brothers had imported into and sold within South Africa similar blank TDK cassette tapes which it had purchased from a source in Singapore. These tapes were legitimate TDK tapes manufactured by TDK in Japan and sold by them into the retail market. Prior to the appellant instituting action, TDK had

⁷⁶⁰. For more details see the South African leading case regarding parallel importation: *Frank & Hirsch (Pty) Ltd v A Roopanand Brothers (Pty) Ltd* 1993 (4) SA 279 (A). See also O H Dean 'A grey goods guide to South Africa' (2001) 106 *Managing Intellectual Property* 43 at 44-5.

⁷⁶¹. See also the definition of infringing copy in sec 1(1) of the South African Copyright Act:

'infringing copy', in relation to-

- (a) a literary, musical or artistic work or a published edition, means a copy thereof;
- (b) a sound recording, means a record embodying that recording;
- (c) a cinematograph film, means a copy of the film or a still photograph made therefrom;
- (d) a broadcast, means a cinematograph film of it or a copy of a cinematograph film of it or a sound recording of it or a record embodying a sound recording of it or a still photograph made therefrom; and
- (e) a computer program, means a copy of such computer program, being in any such case an article the making of which constituted an infringement of the copyright in the work, recording, cinematograph film, broadcast or computer program or, in the case of an imported article, would have constituted an infringement of that copyright if the article had been made in the Republic;

⁷⁶². O H Dean supra note 38 at 45. It is noteworthy that in order to protect consumers which purchase parallel goods, the South African Minister of Trade and Industry has issued in 2007 a General Notice (Notice 107 of 2007, Government Gazette No. 29600 of 09 February 2007) in terms of sec 12(6) of the Consumer Affairs (Unfair Business Practices) Act (Act No. 71 of 1988) according to which consumers are to be notified by the sellers of trade mark protected parallel goods that they are not authorised distributors of these goods, and that authorised distributors are not obliged to honour the warranties/guarantees given by the manufactures or to provide any after-sales support.

⁷⁶³. 1993 (4) SA 279 (A).

assigned the copyright in the art work in South Africa to the appellant. Frank & Hirsch subsequently informed Roopanand Brothers about this assignment. At first instance, the plaintiff's claim was dismissed. However, on appeal the Appellate Division of the Supreme Court of South Africa found for the appellant. The court held that if TDK had produced the packaging in South Africa it would have, hypothetically, infringed Frank & Hirsch's copyright because it held no longer the rights in the works in South Africa after assigning these rights to Frank & Hirsch. Thus, the parallel imported tapes were infringing copies under sec 23(2) of the South African Copyright Act. Roopanand Brothers also had the required guilty knowledge of the infringing nature of the packaging of the parallel imported TDK tapes because Frank & Hirsch had informed Roopanand Brothers about its rights⁷⁶⁴

This interpretation of sec 23(2)(a) by the Appellate Division of the Supreme Court of South Africa is not without its problems although the plain wording of sec 23(2)(a) of the South African Copyright Act arguably allows for such an interpretation. Firstly, it appears questionable whether the interpretation by the Appellate Division of the Supreme Court of South Africa is congruent with the lawmaker's intentions.⁷⁶⁵ But even if this was the case, it is, secondly, debatable whether such interpretation – which is by no means imperative⁷⁶⁶ – is in fact appropriate in the South African context from a policy point of view.⁷⁶⁷ As a result of the judgement, parallel importing of legally obtained legitimate products can easily be outlawed by way of a simple assignment of copyrights to a domestic distributor.

⁷⁶⁴. Ibid at 289.

⁷⁶⁵. K M Rippel and R de Villiers supra note 724 at 569.

⁷⁶⁶. Rippel and Villiers, for instance, suggest the following alternative interpretation: '[T]he state of affairs surrounding the reproduction of copyright goods in the country of production is to be judged by South African *law* in order to ascertain whether or not such a reproduction is infringing, and not whether such a reproduction would have amounted to an infringement had it occurred in South Africa in a *geographical* sense' (K M Rippel and R de Villiers supra note 724 at 570).

⁷⁶⁷. Section 39(2) of the South African Constitution reinforces the relevance of domestic considerations by stating that 'when interpreting any legislation [...], every court, tribunal or forum must promote the spirit purport and objects of the Bill of Rights.' Inter alia, the right to education contained in sec 29 of the Bill of Rights might be of importance in this context.

6.6.7. Concluding remarks regarding parallel importing

Allowing parallel importing prevents copyright holders from engaging in what economists call (geographic) market segmentation and price discriminations⁷⁶⁸ by charging different prices for basically the same product in different regions of the world.⁷⁶⁹

There are, however, several reasons which can be advanced in favour of restrictions regarding parallel importing. Some of these reasons go beyond the mere financial interest of copyright holders. For instance, warranty periods for parallel imported goods may well be shorter than the warranty period for a similar but domestically distributed good. Moreover, customer support for grey goods may not be as far-reaching. Hence, consumer deception is a possible risk when it comes to parallel importing.

It is, however, suggested that these risks for consumers do not suffice to justify a general ban of parallel imports in developing countries. This is because less restrictive measures are available such as an obligation to clearly mark grey goods and to inform about the aforementioned risks. This route has been chosen, for instance, by the South African lawmaker for parallel imported trade mark protected goods. Banning parallel importing undeniably benefits predominantly copyright holders and countries where these copyright holders reside. As net-exporters of copyright protected goods, developed countries are thus benefiting the most.⁷⁷⁰ In developing countries such as South Africa, parallel importing should therefore rather be permitted and stimulated

⁷⁶⁸. For more information on the general issue of price discrimination see W Fisher III 'When should we permit differential pricing of information?' (2007) 55 *UCLA Law Review* 1.

⁷⁶⁹. It goes beyond the scope of this thesis to provide an in-depth economic analysis regarding parallel importation. For more information in this respect see K Vautier 'The Economics of Parallel Imports' in C Heath and A K Sanders (eds) *Industrial Property in the Bio-Medical Age: Challenges for Asia* (2003) 185 at 185-6.

⁷⁷⁰. K E Maskus *Intellectual Property Rights in the Global Economy* (2000) 214.

than prohibited in order to reduce prices and to increase access to copyright protected material.

Interestingly, one of the main arguments of those lobbying against parallel importing is that price discrimination is necessary to account for existing income gaps around the world by charging higher prices in developed countries, where people can afford to pay more than consumers in developing countries.⁷⁷¹ This argument is reasonable and may indeed militate against the permissibility of parallel imports from poorer regions of the world into wealthier countries. This argument does, however, not speak against parallel importing into developing countries. On the contrary, the argument can even be used to advocate parallel importing into developing countries because it implies that intellectual property goods should usually be cheaper in poorer regions; at least when it comes to socially and culturally important material such as educational material.⁷⁷² Or to say it with the words of a 2006 study by Consumers International: 'Parallel import can be an important tool for developing countries to gain access to knowledge contained in copyright protected material. Parallel imports can be used to gain access to cheaper materials abroad'.⁷⁷³

⁷⁷¹. This argument was made (in the context of a discussion of parallel importation in the field of trademark law) by M Bains 'The search engine economy's Achilles heel? Addressing online parallel imports resulting from keyword and metatag misuse' 2006 *Stanford Technology Law Review* 6 at para 12.

⁷⁷². The following example shows that this is often not the case (as stated in A Rens et al supra note 34 at 6): While Nelson Mandela's biography *Long walk to freedom* is available in the U.S. for 11.60 U.S. dollars and in the UK for 16.30 U.S. dollars, the same book costs the equivalent of 23.70 U.S. dollars in South Africa. The price difference is aggravated by the fact that the South African average income per capita is only a fraction of those in the U.S. or the UK.

⁷⁷³. Consumers International study *Copyright and access to knowledge – policy recommendations on flexibilities in copyright laws* (2006) supra note 671 at 24.

6.7. Copyright protection for works of traditional knowledge

6.7.1. Introductory remarks

The modern concept of copyright protection seems in many aspects to be at odds with the protection of the typical traditional creative output of many developing countries, that is indigenous art, culture and knowledge.⁷⁷⁴ The Bellagio Declaration stated that

[c]ontemporary intellectual property law is constructed around the notion of the author, the individual, solitary and original creator [...]. Those who do not fit this model – custodians of tribal culture and medical; knowledge, collectives practicing artistic and music forms, or peasant cultivators of valuable seed varieties, for example – are denied intellectual property protection.⁷⁷⁵

The UN Special Rapporteur of the Commission on Human Rights, Sub-Commission on Prevention of Discrimination and Protection of Minorities, furthermore noted: '[I]t is clear that the existing forms of legal protection of cultural and intellectual property, such as copyright and patent, are not only inadequate for the protection of indigenous peoples' heritage but inherently unsuitable'⁷⁷⁶. Moreover, the International Bureau at WIPO stated in 1999 that the systems of

⁷⁷⁴. In the following, the term "traditional knowledge" is used as a generic term for all kinds of indigenous output. As to the difficulties regarding a uniform terminology see S Palethorpe and S Verhulst *Report on the International Protection of Expressions of Folklore under Intellectual Property Law, study commissioned by the European Commission's Internal Market Directorate-General* (2000), at 6, available at

http://www.colophon.be/images/Documents_pdf/FolkloreFinal_UE1.pdf [accessed on 25 January 2009]. The issue of traditional knowledge is approached here from a developing country perspective. Therefore, the examination does not address traditional knowledge that originates in developed countries, eg from the Sami people in Northern Europe. For a discussion regarding the level of protection within Europe see, for instance, H Olsson *Economic Exploitation of Expressions of Folklore: The European Experience* (1997) (WIPO doc UNESCO-WIPO/FOLK/PKT/97/16).

⁷⁷⁵. Bellagio Declaration, Statement of the Bellagio Conference - Cultural Agency/Cultural Authority: Politics and Poetics of Intellectual Property in the Post-Colonial Era (1993), available at <http://www.case.edu/affil/sce/BellagioDec.html> [accessed on 25 January 2009].

⁷⁷⁶. E-I Daes *Study on the protection of the cultural and intellectual property of indigenous people* (1993) UN Economic and Social Council – Commission on Human Rights, Sub-Commission on Prevention of Discrimination and Protection of Minorities (UN doc E/CN.4/Sub.2/1993/28) at 32, available at [http://www.unhchr.ch/Huridocda/Huridoca.nsf/\(Symbol\)/E.CN.4.Sub.2.1993.28.En?Opendocument](http://www.unhchr.ch/Huridocda/Huridoca.nsf/(Symbol)/E.CN.4.Sub.2.1993.28.En?Opendocument) [accessed on 25 January 2009].

intellectual property and traditional knowledge were 'like ships passing in the night, integral, highly-developed, effective within their own spheres of operation, but existing in virtual independence of each other'.⁷⁷⁷

It is not the purpose of this examination to contribute alternative theories to the existing literature on traditional knowledge.⁷⁷⁸ However, this thesis advocates a fair copyright balance and against the backdrop that many commentators lament a lack of fairness of current copyright regimes to the detriment of developing countries as far as the protection of traditional knowledge is concerned, it seems appropriate to mention this issue.⁷⁷⁹

As a starting point, it needs to be acknowledged that traditional knowledge is nowadays universally considered worthy of protection. Several international instruments can be cited upon which a general protection claim can be based, including Article 27 of the Universal Declaration of Human Rights.⁷⁸⁰ Article 31 of the UN Declaration on the Rights of Indigenous Peoples⁷⁸¹ expressly states:

⁷⁷⁷. World Intellectual Property Organization (WIPO) *Protection of traditional knowledge: a global intellectual property issue* (1999) Roundtable on Intellectual Property and Traditional Knowledge (WIPO doc WIPO/IPTK/RT/99/2), at 4, available at http://www.wipo.int/edocs/mdocs/tk/en/wipo_iptk_rt_99/wipo_iptk_rt_99_2.pdf [accessed on 25 January 2009].

⁷⁷⁸. See, for instance, M Blakeney 'The protection of traditional knowledge under intellectual property law' (2000) 22 *E.I.P.R.* 251; J Githaiga 'Intellectual property law and the protection of indigenous folklore and knowledge' (1998) 5 *Murdoch University Electronic Journal of Law*, available at <http://www.murdoch.edu.au/elaw/issues/v5n2/githaiga52.html> [accessed on 25 January 2009]; F Shyllon 'Conservation, preservation and the legal protection of folklore in Africa: A general survey' (1998) 32 *Copyright Bulletin* 37; J Wiener 'Protection of folklore: A political and legal challenge' (1987) 18 *International Review of Industrial Property and Copyright Law* 59; E-I Daes *Protection of the heritage of indigenous people* (1997); D Posey and G Dutfield *Beyond Intellectual Property: Toward Traditional Resource Rights for Indigenous Peoples and Local Communities* (1996).

⁷⁷⁹. In the South African context, the topic gains additional relevance from the fact that at the beginning of 2008 a draft bill for the protection of indigenous knowledge (Intellectual Property Laws Amendment Bill) was tabled which intends to amend several South African intellectual property statutes, including the South African Copyright Act, to award protection for traditional knowledge through the conventional intellectual property system. The draft bill can be accessed at <http://www.info.gov.za/view/DownloadFileAction?id=81111> [accessed on 25 January 2009]. In addition, the South African Department of Trade and Industry has issued a policy framework document regarding the protection of indigenous knowledge through the intellectual property system. This document is available at <http://www.thedti.gov.za/ccrd/ip/policy.pdf> [accessed on 25 January 2009].

⁷⁸⁰. Article 27 of the Universal Declaration of Human Rights provides:

Chapter 6: Copyright flexibilities for developing countries and the issue of
traditional knowledge

1. Indigenous peoples have the right to maintain, control, protect and develop their cultural heritage, traditional knowledge, traditional cultural expressions, as well as the manifestations of their sciences, technologies and cultures, including human and genetic resources, seeds, medicines, knowledge of the properties of fauna and flora, oral traditions, literatures, designs, sports and traditional games and visual and performing arts. They also have the right to maintain, control, protect and develop their intellectual property over such cultural heritage, traditional knowledge and traditional cultural expressions”

2. States shall take effective measures to recognize and protect the exercise of these rights.

Most commercial exploitation of traditional knowledge, however, is undertaken by corporations based in developed countries. As a result, developing countries increasingly start to explore ways to prevent misappropriation and exploitation by foreign corporations of knowledge which originated in their own indigenous communities.

Legal protection of traditional knowledge can be achieved by different means, for instance by classifying traditional knowledge protection as a collective human right which needs to be protected as such. Yet from a legal point of view, the neatest solution would perhaps be a sui generis protection of traditional knowledge – outside the existing framework of intellectual property protection. Several developing countries, including South Africa, have suggested such protection repeatedly at the level of WIPO and the WTO. However, developed countries have so far successfully opposed such a sui generis protection for traditional knowledge, for example at the Doha Round of WTO negotiations. Thus, the present examination focuses on the question of whether or not (and if so, to what extent) copyright law can provide protection for traditional knowledge.

(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.

⁷⁸¹. Adopted by the UN Human Rights Council on 29 June 2007.

The main problem is that traditional knowledge does usually not fulfil the most basic requirements for copyright protection.⁷⁸² This is because a single creator or a distinguishable group of creators can usually not be identified, the term of copyright protection is typically long expired, and, lastly, traditional knowledge is often expressed orally and not in a fixed manner. Yet, such a fixation is required in many countries for copyright protection. As a result, national legislation aiming at using copyright law to protect traditional knowledge is inevitably complex.

Having said this, the possibility of indirect copyright protection for indigenous knowledge does, of course, exist. For example, when traditional knowledge is recorded or photographed, these recordings or photographs are copyright protected. Furthermore, recent legislative developments have brought about copyright protection for collections of material⁷⁸³ which is, as such, not copyright protected. This results in collections of traditional knowledge being protected nowadays in many countries. The collected material itself remains, however, unprotected and the protection only extends to the arrangement and the selection of the material. Similarly, the performance of traditional knowledge is in many national laws protected these days. Most importantly, Article 2(a) of the WPPT provides for such protection on an international level.⁷⁸⁴ Yet again, the traditional knowledge itself remains unprotected.

In the following, the most relevant examples are presented of how the international community has so far addressed the issue of traditional knowledge.

⁷⁸². The extent to which intellectual property protection other than copyright protection can apply to folklore is not discussed here. For an in-depth discussion of this problem see M Brown *Who Owns Native Culture* (2003).

⁷⁸³. For example, in Europe, by way of granting a so-called database right, see the Directive 96/9/EC of the European Parliament and of the Council of 11 March 1996 on the legal protection of databases.

⁷⁸⁴. Article 2(a) of the WPPT reads:

“performers” are actors, singers, musicians, dancers, and other persons who act, sing, deliver, declaim, play in, interpret, or otherwise perform literary or artistic works or expressions of folklore.

6.7.2. Article 15(4) of the Berne Convention

At the 1967 Stockholm Revision Conference of the Berne Convention⁷⁸⁵, the international community made a first legislative attempt to grant direct copyright protection to traditional knowledge. This was done by introducing Article 15(4) into the Berne Convention which deals with unpublished works of unknown authors. Article 15(4) of the Berne Convention reads as follows:

(4)(a) In the case of unpublished works where the identity of the author is unknown, but where there is every ground to presume that he is a national of a country of the Union, it shall be a matter for legislation in that country to designate the competent authority which shall represent the author and shall be entitled to protect and enforce his rights in the countries of the Union.

(b) Countries of the Union which make such designation under the terms of this provision shall notify the Director General by means of a written declaration giving full information concerning the authority thus designated. The Director General shall at once communicate this declaration to all other countries of the Union.

Although Article 15(4) makes no mention of traditional knowledge as such, the Report of the Main Committee reveals that this issue was, in fact, considered the main field of application for the paragraph.⁷⁸⁶ However, Article 15(4) merely addressed one problem of many which arise in the context of copyright protection for traditional knowledge, that is the difficulty to identify a single author. Since other problematic features of traditional knowledge were not dealt with, Article 15(4) of the Berne Convention was in the end of little help and has consequently not been used widely.

⁷⁸⁵. See *Records of the Intellectual Property Conference of Stockholm (1967)* [vol II] (1971) 917-8.

⁷⁸⁶. *Ibid* at 1173.

6.7.3. The 1976 Tunis Model Law on Copyright for Developing Countries

Between the late 1960s and the mid 1970s, several countries started to tackle the issue of protection of traditional knowledge in their domestic copyright laws, including Tunisia (1967), Chile (1970), Morocco (1970), Algeria (1973), Senegal (1973), and Kenya (1975).⁷⁸⁷ Arguably as a result of these domestic efforts, UNESCO and WIPO formulated and issued in 1976 a model law for developing countries which was meant as a guide for drafting national copyright laws. The model law addressed, among other things, most of the problems which impede copyright protection of traditional knowledge. More precisely, the Tunis Model Law on Copyright for Developing Countries (Tunis Model Law), which employs the term folklore instead of traditional knowledge, determines that works of folklore⁷⁸⁸ as well as derivative works⁷⁸⁹ from national folklore are protected. Furthermore, the Tunis Model Law contains

- (1) a definition of the term folklore⁷⁹⁰ which – among other things - deals with the issue of authorship;
- (2) a waiver concerning the requirement of fixation for folklore⁷⁹¹; and
- (3) the stipulation that works of national folklore are protected without limitation in time⁷⁹².

⁷⁸⁷. See UNESCO and WIPO Model *Provisions for National Laws on the Protection of Expressions of Folklore Against Illicit Exploitation and other Prejudicial Actions* (1985) 4, available at http://www.wipo.int/tk/en/laws/pdf/unesco_wipo.pdf [accessed on 25 January 2009].

⁷⁸⁸. See sections 1(3), 6 of the Tunis Model Law.

⁷⁸⁹. See sec 2(1)(iii) of the Tunis Model Law.

⁷⁹⁰. Section 18(iv) of the Tunis Model Law stipulates:

‘folklore’ means all literary, artistic and scientific works created on national territory by authors presumed to be nationals of such countries or by ethnic communities, passed from generation to generation and constituting one of the basic elements of the traditional cultural heritage.

⁷⁹¹. See sec 1(5^{bis}) of the Tunis Model Law.

⁷⁹². See sec 6(2) of the Tunis Model Law.

The Tunis Model Law also states that both economic rights and moral rights are to be exercised by a competent authority consisting of persons appointed by the Government 'for the purpose of exercising jurisdiction [...] whenever a matter requires to be determined by such authority'.⁷⁹³

Numerous developing countries have used the Tunis Model Law as a basis for devising and adjusting their own national copyright laws. At the same time, however, the Tunis Model Law can be criticised as having an over-broad nature regarding the availability and scope of protection. Given the long time that has passed since the Tunis Model Law was drafted, the provisions seem also in many respects outdated by now.

6.7.4. The 1985 UNESCO/ WIPO Model Provisions

In 1985, UNESCO and WIPO published Model Provisions for National Laws on the Protection of Expressions of Folklore Against Illicit Exploitation and other Prejudicial Actions (UNESCO/ WIPO Model Provisions) in order to protect expressions of folklore against certain unauthorised uses and distortion. Basically, the UNESCO/ WIPO Model Provisions establish a system of prior authorisation for commercial uses of expressions of folklore outside their traditional or customary context.⁷⁹⁴ While the UNESCO/ WIPO Model Provisions do not contain a definition for the term "folklore", the term "expressions of folklore" is defined in sec 2 as 'productions consisting of characteristic elements of the traditional artistic heritage developed and maintained by a community [...] or by individuals reflecting the traditional artistic

⁷⁹³. See sections 6(1), 4, 5(1), 18(iii) of the Tunis Model Law.

⁷⁹⁴. Section 3 of the UNESCO/ WIPO Model Provisions determines that the following uses of expressions of folklore are, in general, subject to authorisation: (1) publication, reproduction and distribution of copies of expressions of folklore; (2) public recitation or performance, transmission and any other form of communication to the public, of expressions of folklore.

expectations of such a community'. The following expressions of folklore are explicitly listed in sec 2 of the UNESCO/ WIPO Model Provisions:

- (1) verbal expressions, such as folk tales, folk poetry and riddles;
- (2) musical expressions, such as folk songs and instrumental music;
- (3) expressions by action, such as folk dances, plays, artistic forms or rituals;
- (4) tangible expressions, such as:
 - (a) productions of folk art, in particular, drawings, paintings, carvings, sculptures, pottery, terracotta, mosaic, woodwork, metalwork, jewellery, basket weaving, needlework, textiles, carpets, costumes;
 - (b) musical instruments;
 - (c) architectural forms.

Section 4 of the UNESCO/ WIPO Model Provisions specifies four exceptions from the general requirement of prior authorisation, namely (1) use for educational purposes, (2) use by way of illustration, provided the extent of such use is compatible with fair practice, (3) borrowing for creating an original work, (4) incidental uses.

The UNESCO/ WIPO Model Provisions stipulate that the prior authorisation is to be administered by a competent authority⁷⁹⁵, which may fix the amount of and collect fees for the purpose of promoting or safeguarding national culture in general and national folklore in particular.⁷⁹⁶

⁷⁹⁵. See sections 3, 9 and 10(1) of the UNESCO/WIPO Model Provisions.

⁷⁹⁶. See sec 10(2) of the UNESCO/WIPO Model Provisions.

Several countries have used the UNESCO/ WIPO Model Provisions as a basis for the protection of their traditional knowledge. Moreover, attempts have been made to use the UNESCO/ WIPO Model Provisions as a foundation for an international treaty on the protection of expressions of traditional knowledge. However, such attempts have not been successful so far⁷⁹⁷, and future attempts should take technological developments during the past 20 years sufficiently into account.

6.7.5. Other initiatives regarding the protection of traditional knowledge

In spite of decade-long policy efforts, the issue of legal protection for traditional knowledge is still far from being settled, especially on the international level. By now, however, many national laws, including the law of several African countries contain provisions relating to traditional knowledge.⁷⁹⁸ In relation to the specific area of protection of traditional cultural expressions/ expressions of folklore, WIPO distinguishes three legislative approaches taken by national lawmakers: (1) special laws and measures which specifically address the protection of traditional cultural expressions/ expressions of folklore, sometimes referred to as *sui generis* laws, (2) copyright and related-rights laws which provide protection of a *sui generis* nature for traditional cultural expressions/ expressions of folklore, and (3) cultural heritage and other laws which provide intellectual property-type protection for traditional cultural expressions/ expressions of folklore.⁷⁹⁹ It appears that the majority of countries, including developing countries such as Ghana and Malawi,

⁷⁹⁷. In 1984, for example, the ‘Group of Experts on the International Protection of Expressions of Folklore by Intellectual Property’ stated a number of reasons for not adopting an international treaty based upon the UNESCO/ WIPO Model Provision [Draft Treaty for the Protection of Expressions of Folklore Against Illicit Exploitation and other Prejudicial Actions (1984)]. These reasons included the lack of appropriate sources for the identification of expressions of traditional knowledge as well as the lack of evidence regarding the success of protecting expressions of traditional knowledge at the national level (S Palethorpe and S Verhulst *supra* note 774 at 48).

⁷⁹⁸. An instructive overview can be found on the WIPO website, available at <http://www.wipo.int/tk/en/laws/index.html> [accessed on 25 January 2009].

⁷⁹⁹ *Ibid.*

follow the second approach. In Ghana, for instance, section 4 of the Copyright Act of 2005 (Act 690) specifically protects expressions of folklore as one category of copyright protected works and protection is vested in the President on behalf of and in trust for the people in Ghana. The term of protection for folklore in Ghana is perpetual⁸⁰⁰. In Malawi, section 4(b) of the Copyright Act of 1989 states that copyright exists in expressions of folklore developed and maintained in Malawi; and sec 6(c) of the Malawian Copyright Act further stipulates that even derivative works are copyright protected which are inspired by expressions of folklore. On the other hand, South Africa's National Heritage Resources Act of 1999 is one example of a law that falls into the third of WIPO's categories, ie cultural heritage and other laws which provide intellectual property-type protection for traditional cultural expressions/ expressions of folklore.

In addition to the aforementioned initiatives on the national level, there have been regional and international initiatives.⁸⁰¹ There have been indigenous declarations⁸⁰² and many international conferences - mostly organised by WIPO or UNESCO - on this topic.⁸⁰³ At the end of the last millennium, WIPO began fact-finding missions on traditional knowledge, innovations and culture⁸⁰⁴ to identify the intellectual property

⁸⁰⁰ Section 17 of the Ghanaian Copyright Act of 2005 (Act 690).

⁸⁰¹ . See, for instance, the 1989 *Recommendation on the Safeguarding of Traditional Cultures and Folklore* adopted by Conference of UNESCO in its 25th Session; the 1991 United Nations' *Draft Declaration of the Rights of the World's Indigenous Peoples*; the action plan adopted at the 1997 WIPO-UNESCO World Forum on the Protection of Folklore; the 1977 *Bangui Agreement on the Creation of an African Intellectual Property Organization (OAPI)* (as revised in 1999); the *Regional Framework for the Protection of Traditional Knowledge and Expressions of Culture* (also known as the Pacific Model Law) which was endorsed by the Secretariat of the Pacific Community in 2002, and the subsequently developed *Guidelines for developing national legislation for the protection of traditional knowledge and expressions of culture based on the Pacific Model Law 2002*; the *African Model Legislation for the Protection of the Rights of Local Communities, Farmers and Breeders, and for the Regulation of Access to Biological Resources of 2000* by the Organization of African Unity (OAU).

⁸⁰² . For instance the *Mataatua Declaration of 1993* and the *Julayinbul Statement on Indigenous Intellectual Property Rights of 1993*

⁸⁰³ . For instance, the 1993 First International Conference on the Cultural and Intellectual Property Rights of Indigenous Peoples in Aotearoa, New Zealand.

⁸⁰⁴ . A report on these fact-finding missions can be found at <http://www.wipo.int/tk/en/tk/ffm/report/index.html> [accessed on 25 January 2009].

needs and expectations with regard to traditional knowledge. WIPO also convened regional consultations on the protection of expressions of folklore as well as a Roundtable on Intellectual Property and Indigenous Peoples. In 2001, WIPO set up an Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (IGC-GRTKF)⁸⁰⁵ to discuss policy issues as well as legal issues regarding traditional knowledge. This committee has issued several reports and studies and its mandate was extended until 2009. Among other things, the committee is discussing Draft Provisions on Traditional Cultural Expressions/ Folklore and Traditional Knowledge.⁸⁰⁶

6.7.6. Concluding remarks regarding the protection of traditional knowledge

The call for better protection of traditional knowledge through stronger copyright laws is often voiced by legal commentators arguing for the interests of developing countries. This seems reasonable since these countries are particularly rich in indigenous knowledge resources. However, the examination in this chapter has shown that strong intellectual property protection regimes in general and strong copyright protection in particular are typically detrimental to the developmental goals of developing countries. Therefore, a less stringent standard of copyright protection was said to be in the interest of developing countries.

In this light, calls for better protection of traditional knowledge through stronger copyright laws are highly problematic since they manifest, after all, the same selfish protectionist attitude that developed countries are criticised for by developing countries. In consequence, such

⁸⁰⁵. The website of the WIPO Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore can be found at <http://www.wipo.int/tk/en/igc/> [accessed on 25 January 2009].

⁸⁰⁶. The *Draft Provisions on Traditional Cultural Expressions/Folklore and Traditional Knowledge* can be found at http://www.wipo.int/tk/en/consultations/draft_provisions/draft_provisions.html [accessed on 25 January 2009].

calls may weaken the credibility of developing countries which otherwise oppose calls for stronger copyright protection from developed countries as being self serving. It appears difficult to credibly argue on the one hand for less restrictive copyright protection regimes in areas where such protection is detrimental to the interests of developing countries, while calling, on the other hand, for stronger copyright protection where it serves interests of developing countries. Such an approach may be derided as illegitimate cherry-picking.

In addition, indigenous knowledge forms, if kept outside the scope of intellectual property protection, part of the public domain: Although the term “public domain” is not consistently defined, it essentially refers to all material which is not, or not any more, protected by intellectual property laws. The public domain is a crucial knowledge pool. Its importance for future creations cannot be underestimated. By awarding copyright protection to indigenous knowledge, this knowledge is effectively removed from the public domain. This would hinder further development as the source of inspiration provided by the public domain would be less accessible. In light of the cultural significance of (widely accessible) indigenous knowledge, it is submitted that a series of well-crafted copyright exceptions and limitations is necessary to counter, or balance, some of the prohibitive impacts of copyright protection on access to indigenous knowledge. These exceptions and limitations should, at the very least, pertain to educational uses, non-commercial uses, private uses, translations, uses by museums, archives and libraries, uses for the benefit of people with a disability, and uses during religious celebrations. They should also take recent technological developments sufficiently into account.

After all, however, it is suggested that the protection of traditional knowledge by other means than copyright law should rather be pursued.

Chapter 7: Digital technology, copyright and development

'Digital technology is detaching information from the physical plane, where property law of all sorts has always found definition.'

John Perry Barlow⁸⁰⁷

7.1 Introduction

In 2007 alone, 281 billion gigabytes (281 exabytes) of digital information were produced.⁸⁰⁸ This is enough digital information to fill roughly 20 stacks of books stretching from the earth to the sun⁸⁰⁹ and equals about 6 million times the information contained in all books ever written. Even more impressively, digital information production is expected to increase by the year 2011 to a staggering 1,800 exabyte.⁸¹⁰ It becomes apparent from these figures that humankind has left the industrial era behind and entered the so-called information age, in which most information is digital and – theoretically – only a mouse-click away.

Digital technologies have dramatically altered everyday life both in the workplace and at home, particularly in developed countries but increasingly also in developing countries. However, digital technology only started to affect the businesses of traditional content providers,

⁸⁰⁷. J P Barlow 'The economy of ideas: A framework for patents and copyrights in the digital age. (Everything you know about intellectual property is wrong.)' (March 1994) 2.03 *Wired*, available at <http://www.wired.com/wired/archive/2.03/economy.ideas.html> [accessed on 25 January 2009].

⁸⁰⁸. International Data Corporation (IDC) *The diverse and exploding digital universe – an updated forecast of worldwide information growth through 2011* (2008) White Paper, at 3, available at <http://www.emc.com/collateral/analyst-reports/diverse-exploding-digital-universe.pdf> [accessed on 25 January 2009].

⁸⁰⁹. Based on the calculation of a previous IDC White Paper. According to this paper, 161 exabyte of digital information fill twelve stacks of books stretching from the earth to the sun (International Data Corporation *The expanding digital universe - a forecast of worldwide information growth through 2010* (2007) White Paper, at 4, available at <http://www.emc.com/collateral/analyst-reports/expanding-digital-idc-white-paper.pdf> [accessed on 25 January 2009].

⁸¹⁰. IDC White Paper supra note 808 at 3.

such as the print, film and music industry, when powerful personal computers became affordable for private users. Eventually, the advent and success of the Internet⁸¹¹, combined with the introduction of the world-wide-web application in the early 1990s⁸¹², triggered the triumph of digital information.

Today, roughly 1.4 billion people worldwide use the Internet⁸¹³ - a most remarkable increase from only 45 million users in 1996. Consequently, the Internet has become a multi-trillion dollar marketplace. With its billions of pages it also represents the most important resource for materials in different forms which are at the heart of the copyright system, such as text, audio, video or photographs.⁸¹⁴ The functionality of the Internet has been described as follows⁸¹⁵:

The normal use of a World Wide Web pages is for that page to be requested by a user's Web browser for download. That information containing text and graphic files is then transmitted through Internet servers to the requesting user's computer. When that information reaches the requesting user's computer, it is stored in random access memory and also in an automatic temporary disc cache. The requesting user is then able to read and view the information.

It is evident from this definition that the core functionality of the Internet is based on incessant ephemeral copying of content. It is for that reason that the Internet has been repeatedly described as the world's biggest copy machine⁸¹⁶. Consequently, the Internet as well as the possibility of digitising copyright protected material have been characterised as the most significant technological advances in relation

⁸¹¹. For brief history of the Internet see J Cunard et al *WIPO study on current developments in the field of digital rights management* (2004) at 5 et seq.

⁸¹². P Menell 'Envisioning copyright law's digital future' (2002-3) *46 New York Law School Law Review* 63 at 66 and 98-9.

⁸¹³. As of May 2008, see Internet World Stats, available at <http://www.internetworldstats.com/stats.htm> [accessed on 25 January 2009].

⁸¹⁴. WIPO survey supra note 20 at 115.

⁸¹⁵. F Street and M Grant *Law of the Internet* (2001) § 5-5(d).

⁸¹⁶. D Burk as quoted in Anonymous 'It's the world's biggest copy machine' (27 January 1997) *14(4) PC Week* 109.

to copyright law since the invention of the printing press.⁸¹⁷ Moreover, digital technology has turned a great number of formerly passive users of (analogue and digital) media into active producers and publishers of digital media. As a result, the traditional legal distinction between authors and users – which forms the basis of our modern copyright laws – has to some extent become obsolete and artificial.⁸¹⁸ Adjusting traditional copyright laws to the changes brought about by the digital age is challenging in many ways. It is arguably even more challenging than it appears at the outset.

This assertion requires further explanation. At first glance, the relevant traditional copyright provisions seem to be reasonably suited to both the analogue and the digital world. For example, the definition of the reproduction right in Article 9(1) of the Berne Convention comprises reproductions “in any manner or form” and, therefore, covers analogue as well as digital copying.⁸¹⁹ This was expressly confirmed in the Agreed Statements to Article 1(4) of the WCT⁸²⁰ and is undisputed today. Furthermore, the adoption of the WCT itself (together with the WPPT) generally aimed at adjusting copyright laws to the new circumstances, especially by providing new exclusive rights and by regulating the use of technological protection measures. However, it appears that a broader interpretation of traditional terms (such as “reproduction”) and addressing a selection of the most pressing problems in new treaties alone are only quick fixes for a far more fundamental problem.

The fundamental problem is whether the traditional concept and understanding of copyright law is transferable (or ought to be

⁸¹⁷. K Davis ‘Fair use on the internet: A fine line between fair and foul’ (1999) 34 *University of San Francisco Law Review* 129 at 132.

⁸¹⁸. B Hugenholtz and R Okediji *supra* note 351 at 38.

⁸¹⁹. S von Lewinski ‘Certain legal problems related to the making available of literary and artistic works and other protected subject matter through digital networks’ *UNESCO e-Copyright Bulletin* (Jan-March 2005) at 5, available at <http://unesdoc.unesco.org/images/0013/001396/139644e.pdf> [accessed on 25 January 2009].

⁸²⁰. See also the agreed statements for Articles 7 and 11 of the WPPT (World Intellectual Property Organization (WIPO) *Agreed statements concerning the WIPO Performances and Phonograms Treaty* (1996) WIPO Doc. CRNR/DC/97, available at http://www.wipo.int/edocs/mdocs/diplconf/en/crn_r_dc/crn_r_dc_97.pdf [accessed on 25 January 2009]).

transferred) into the digital age. This is at least debatable since some of the basic conditions which existed when copyright was first introduced in the analogue world have changed or disappeared. One of the most striking changes is that the application of copyright law in relation to end-users has become increasingly important. Some argue, however, that, originally, copyright was exercised by and against professionals.⁸²¹ Another problem is that digital technology facilitates the creation of so-called multimedia works for which the traditional definitions of protected works, in both international copyright treaties and national copyright laws, are not always suited.

As a result of these and other difficulties, some commentators argue that digitising is jeopardising the entire system of traditional copyright protection.⁸²² This view can be traced back to John Perry Barlow who, in his famous 1994 essay 'The economy of ideas' presented the following reasoning: Copyright law is founded on the idea/expression dichotomy which, in essence, declares the idea itself unprotectable. Thus, copyright law is, metaphorically speaking, designed to protect the bottle and not the wine. Yet, in the digital age, this bottle has disappeared because of the dematerialisation of the material form inherent in digital technologies.⁸²³ In other words, copyright law, which was originally introduced for protecting tangible media, cannot be applied satisfactorily to media distributed through an intangible network such as the Internet.

This position is not uncontested. Many commentators argue that, given the unprecedented threat of copyright infringement in the digital world, the protection provided by copyright law is more important than ever.⁸²⁴ Hence, it is necessary to adjust and possibly even strengthen copyright to address the changes brought about by digital

⁸²¹. D Gervais supra note 21 at 7.

⁸²². See, for instance, S Vaidyanathan *Copyrights and copywrongs - the rise of intellectual property and how it threatens creativity* (2003) 149-84.

⁸²³. J P Barlow supra note 807.

⁸²⁴. See, for instance, M Jansen 'Protecting copyright on the internet' (2005) 12 *Juta's Business Law* 100.

technologies rather than do away with it.⁸²⁵ Gowers' widely anticipated 2006 Review of Intellectual Property came to a similar conclusion. It noted that while the current copyright system performs, by and large, satisfactorily, in many areas reform is necessary to improve the system for all its users.⁸²⁶

In spite of the disagreement about the future of copyright law in the digital age, it is uncontested that digitising and the Internet have intensified copyright disputes and that copyright infringement is a far greater threat in the digital age than it was before. In this respect copyright, of all forms of intellectual property is the most vulnerable to the changes brought about by digital technologies.⁸²⁷

Based on these general observations, this chapter examines how digital technologies affect the balance of interests in the realm of copyright law. In the search for a fair copyright balance, the disruptive changes of digital technologies concern, in the first instance, the balance of interests between copyright holders and users of copyright protected materials – regardless of the country they come from. But given the fact that copyright is mainly held by corporations and individuals in developed countries, the conflict between rights holders' and users' interests may at the same time be seen as a conflict between the interests of developed countries (as copyright holders) and developing countries (as users of copyright protected material).

More generally, digital technologies have the potential to upset the balance of interests between developed and developing countries by deepening current access disparities between developed and developing countries. This scenario is referred to as "digital divide".

⁸²⁵. S Stokes *Digital copyright* (2005) 16-7.

⁸²⁶. A Gowers *supra* note 147 at E.6.

⁸²⁷. L Lessig *Code and other laws of cyberspace* (2000) 124.

7.2 The digital divide between developed and developing countries

The advent and use of digital technologies arguably represent the most promising opportunities for developing countries to tackle and eventually overcome some of the most pressing problems that led to, or at least consolidated, their social and economic underdevelopment. One author noted that '[c]reating digital opportunities is not something that happens after addressing the 'core' development challenges; it is a key component of addressing those challenges in the 21st century'.⁸²⁸

Having said this, there is often concern that the advent of digital technologies has contributed to a worsening of the current situation by causing an additional digital divide between the have and have-nots. The UN General Assembly, for instance, noted in 2002 that '[t]he digital divide threatens to further marginalize the economies and peoples of many developing countries'.⁸²⁹

For the present purposes, the term "digital divide" is used in accordance with a definition used by the OECD in 2001 which referred to the gap 'between individuals, households, businesses and geographic areas at different socio-economic levels with regard to their opportunities to access information and communication technologies (ICTs) and to their use of the internet for a wide variety of activities'.⁸³⁰ The gap between geographic areas, especially between developing countries and developed countries, is of particular interest here.

A precise quantification of the existing digital divide between developing countries and developed countries requires a consideration of

⁸²⁸. Report of the G8 Digital Opportunity Task Force (DOT Force) *Digital Opportunities for All: Meeting the Challenge* (2001), at 7, available at <http://www.unige.ch/iued/wsis/DOC/042EN.PDF> [accessed on 25 January 2009].

⁸²⁹. United Nations General Assembly *Summary of the President of the General Assembly at the concluding plenary meeting* (17-18 June 2002) Meeting of the General Assembly devoted to Information and Communication Technologies for Development, available at <http://www.un.org/ga/president/56/speech/020618.htm> [accessed on 25 January 2009].

⁸³⁰. Organisation for Economic Co-operation and Development (OECD) *Understanding the Digital Divide* (2000) report, at 5, available at <http://www.oecd.org/dataoecd/38/57/1888451.pdf> [accessed on 25 January 2009].

several interrelated factors. An instructive 2003 study⁸³¹ approached the issue by introducing the notion of a country's so-called Infostate. In short, "Infostate" is defined as the aggregation of "Infodensity" (which refers to a country's stocks of ICT⁸³² capital and labour) and "Info-Use" (which refers to the uptake and consumption flows of ICTs, as well as their intensity of use).⁸³³ The study suggests that the relative difference between the countries' Infostates constitutes the digital divide. To illustrate the results, the study introduced a fictive country, Hypothetica, as a point of reference with values equal to the average of all countries (=100).⁸³⁴ The study determined the Infostate for 139 countries which account for 95 per cent of the world's population.⁸³⁵

Unsurprisingly, countries from Western Europe, North America and some countries from Asia top the list. Equally unsurprisingly, none of the examined African countries showed an above average performance, and only 8 African continents are among the top 100 countries.⁸³⁶ African countries occupy eight of the last ten positions - accompanied by Myanmar and Bangladesh -, with Chad being at the bottom of the table.⁸³⁷ Interestingly, the study observed that although decades of development do separate the haves from the have-nots, the digital divide is, in an overall sense, closing.⁸³⁸

Based on these rather abstract observations, a closer look at some of the indicators of the current digital divide between developed countries and developing countries seems advisable. The starting point

⁸³¹. G Sciadas 'Monitoring the Digital Divide ...and beyond' (2003), *orbicom study*, available at http://www.orbicom.ca/projects/ddi2002/2003_dd_pdf_en.pdf [accessed on 25 January 2009].

⁸³². ICT stands for Information Communication Technology and refers to all technologies used for the communication of information.

⁸³³. G Sciadas supra note 831 at 6.

⁸³⁴. Ibid at 26.

⁸³⁵. Ibid.

⁸³⁶. These are Mauritius (Infostate: 92.5 / rank: 47), South Africa (74.5/59), Namibia (53.7/77), Botswana (50.3/81), Tunisia (48.0/85), Egypt (40.4/91), Morocco (37.5/95) and Gabon (33.5/97).

⁸³⁷. Ibid at 31.

⁸³⁸. Ibid at 23 and 49. The Orbicom study also states, however, that this 'is happening at a very slow pace and is mostly attributed to relative progress by countries in the middle of the distribution. [...] Concerted action will be required by the international community to alleviate the problem and see that as we move on we do not leave substantial population masses behind, with all the negative consequences that this entails'. (G Sciadas supra note 831 at x-xi).

for this examination is the statement of the G8 Digital Opportunity Task Force (DOT Force) that '[t]he digital divide is, in effect, a reflection of existing broader socio-economic inequalities'.⁸³⁹ It follows from this statement that digital development varies as much between developing countries themselves as their overall development level does.

Africa as the second most-populous continent on earth accounts, in 2007, with over 900 million people for more than 14 per cent of the world's population. At the same time, however, it only accounts, with roughly 44 million Internet users, for about 3.4 per cent of the World's Internet usage.⁸⁴⁰ The Internet penetration in Africa is less than 5 per cent while the World's average Internet penetration is at 20 per cent. Internet penetration is just under 47 per cent in Europe, 56.4 per cent in Oceania/ Australia and 72.2 per cent in North America.⁸⁴¹ In several countries in Africa - such as Burkina Faso, Burundi, Chad, the Democratic Republic of Congo, Ethiopia, Malawi, Mali, Niger, Rwanda and Somalia - Internet penetration is still well below 1 per cent.⁸⁴² A clear link exists between the wealth of a country and the per capita income of its inhabitants on the one hand and the Internet penetration in the country on the other.⁸⁴³

Many countries in Africa lack sufficient network infrastructures such as landlines, wireless services and high-speed optic fibre cable connections.⁸⁴⁴ In addition, the cost of Internet access⁸⁴⁵ in Africa is

⁸³⁹. Report of the G8 Digital Opportunity Task Force (DOT Force) supra note 828 at 6.

⁸⁴⁰. As of December 2007, see Internet World Stats website *Internet Usage Statistics – The Big Picture, World Internet Users and Population Stats*, available at <http://www.internetworldstats.com/stats.htm> [accessed on 25 January 2009].

⁸⁴¹. Ibid.

⁸⁴². Internet World Stats website *Internet Usage Statistics for Africa*, available at <http://www.internetworldstats.com/stats1.htm> [accessed on 25 January 2009].

⁸⁴³. OECD *Understanding the Digital Divide* supra note 830 at 18. The Orbicom study (Sciadas supra note 831 at xi) confirms this assessment by stating that '[a] close correlation exists between Infostates and per capita GDP. Initial study reveals that for every point increase in Infodensity, per capita GDP increases anywhere between \$136 and \$164. There are notable exceptions, though. Countries with similar GDPs can have very different Infostates and vice versa. This speaks to the importance of national e-policies and e-strategies, implying that their design and implementation matter'.

⁸⁴⁴. It is noteworthy that a 9,900-km-long optical submarine cable between South African and the Sudan (the Nepad Broadband Infrastructure Network (NBIN [formerly: EASSy])) - which is funded by the World Bank and the Development Bank of Southern Africa - is supposed to be operational by

often prohibitively high. As a result, the poorest continent in the world has the highest Internet access costs. Worse even, data suggest that some countries with the lowest income per capita have some of the highest costs for Internet access.⁸⁴⁶ It has been argued that the average costs of Internet access in Africa can be up to 100 times higher than in developed countries.⁸⁴⁷ Yet, such figures should be treated cautiously. The wide variety of tariffs as well as differences in billing modalities in different countries (for example, per second or per minute billing, billing per amount of data up- and downloaded, and flatrate charging) makes a comparison difficult and error-prone.

The absence of competition as well as the lack of independent and effective regulation in most domestic telecommunication markets in Africa contributes to the unsatisfying situation. Potential Internet Service Providers (ISPs) have to deal with national telecom monopolists that not only charge excessive prices to ISPs but are also often reluctant to accept competition in the telecommunication sector.⁸⁴⁸ In South Africa, for instance, monopolist Telkom SA charges operators eight to ten times the price for accessing the global fibre optic network that operators in India with its liberalised telecommunications market have to pay.⁸⁴⁹ Some statistics suggest that international wholesale bandwidth prices are

the end of 2008. This cable is expected to cut Internet costs in Africa significantly. The construction process itself as well as the participation structure in the project has caused considerable tension in recent years, especially due to South Africa's alleged dominant position. For more information see L Gedye 'Not so EASSy' *Mail & Guardian Online* (19 March 2006), http://www.mg.co.za/articlePage.aspx?articleid=267024&area=/insight/insight_economy_business/ [accessed on 25 January 2009].

⁸⁴⁵. Internet access costs comprise both telecommunication costs and internet service provider (ISP) costs. Telecommunication costs often account for more than 60 per cent of the total Internet access costs.

⁸⁴⁶. Learning Information Networking Knowledge (LINK) Centre and Mike Jensen Consulting *Fair Access to Internet Report (FAIR)* (2004) study for the Open Society Initiative and International Development Research Centre (IDRC), at 13, available at <http://www.researchictafrica.net/images/upload/FAIR%2018.03.04%20v17.pdf> [accessed on 25 January 2009].

⁸⁴⁷. Ibid at 4.

⁸⁴⁸. OECD *Understanding the Digital Divide* supra note 830 at 10.

⁸⁴⁹. The World Bank analysis based on TRAI and Telegeography research as quoted in a World Bank Group briefing document *The Africa Regional Communications Infrastructure Program (RCIP)*, available at http://siteresources.worldbank.org/EXTAFRREGINICOO/Resources/RCIP_WSIS_Briefing_nov.pdf [accessed on 25 January 2009].

20 to 40 times higher in Africa than in the United States.⁸⁵⁰ However, whether there is always a big enough domestic market for an effective, cost-reducing competition to take place is another question.⁸⁵¹

South Africa's Internet penetration in 2007 is at roughly 10 per cent⁸⁵², which represents about one-tenth of all Internet users in Africa. Such a high Internet penetration figure for African standards, however, risks concealing a predicament that more affluent and progressive developing countries (such as South Africa, Brazil, India and China) increasingly face. This predicament has the potential to cause a severe internal problem. While a notable minority of the population – usually the existing upper-class – has access to the Internet and hence to unlimited knowledge material from all over the world, the majority has to cope with sub-standard and outdated knowledge and educational material. Material of such low quality is then often used in rural primary and secondary educational institutions. A domestic sub-divide like this inevitably leads to a consolidation of inequalities and injustices and creates societal tensions. It severely hampers efforts to approximate living standards in a country which is, in South Africa's case, already regarded as one of the most unequal societies in the world.

These remarks regarding empirical data confirming the existence of a digital divide both internationally and domestically point to a problem whose solution is surely not primarily copyright law-related. A solution will require infrastructural policy assessments and corresponding budget decisions as well as a related adjustment of domestic telecommunication laws. However, copyright protection and the digital divide are closely linked: there is, as shown, a strong correlation between the technical digital divide and the undersupply with knowledge

⁸⁵⁰. The World Bank *Addressing Africa's 'Missing Link'* (2007) The Africa Regional Communications Infrastructure Program (RCIP), available at <http://go.worldbank.org/4F7JVITEY0> [accessed on 25 January 2009].

⁸⁵¹. This issue is discussed by M Jensen 'Open access – lowering the costs of international bandwidth in Africa' (June 2006) *APC issue paper 2*, available at http://rights.apc.org/documents/open_access_EN.pdf [accessed on 25 January 2009].

⁸⁵². Internet World Stats website *Internet Usage Statistics for Africa*, available at <http://www.internetworldstats.com/stats1.htm> [accessed on 25 January 2009].

material in developing countries. The undersupply leads to educational deficiencies in developing countries which, in turn, are a main reason for the unequal output of new copyright protected material of value. And this is why copyright in particular is a right primarily held by corporations and individuals in developed countries.

The following subchapters discuss the most important copyright-relevant changes brought about by digital technologies.

7.3 What has changed in the digital age?

In order to assess the impact of digital technologies in the field of copyright law, it is useful to first determine how information in the digital age differs from pre-digital information. The main characteristics of digital information are:⁸⁵³

- (1) Digital information is intangible;
- (2) digital information can be copied indefinitely with no loss of quality;
- (3) digital information can be used by multiple users at the same time;
- (4) digital information can be easily combined, linked, altered, mixed, and manipulated;
- (5) digital information is relatively compact in comparison with information stored in analogue form;
- (6) digital information virtually has an indefinite life.

⁸⁵³. The following list is based on the findings of an intellectual property and technology conference in Cambridge, Massachusetts (USA) in 1993 as reported in: D Baron 'Digital technology and the implications for intellectual property' in: WIPO *WIPO Worldwide Symposium on the Impact of Digital Technology on Copyrights and Neighboring Rights* (1993) 29 at 31.

These characteristics of digital information should be seen in conjunction with the instant, low-cost distribution opportunities made possible by the Internet. They affect the important exclusive rights of copyright holders: the reproduction right, the adaptation right, the making available right, the distribution right and, if protected by the national law in question, moral rights because of the ease with which manipulation of existing works can nowadays be carried out.⁸⁵⁴ Understood in this way, they have the potential to jeopardise the entire copyright system.⁸⁵⁵

In addition, the widespread personal use of computers and Internet technology, at least in the developed world, results in copyright law becoming for the first time an everyday issue for private citizens. Moreover, the international implications of copyright law these days are unprecedented. And the architecture of the Internet provides the ideal foundation for an increasingly contractual and technological culture.⁸⁵⁶

It seems, therefore, appropriate to assert, that the possibility to digitise information, combined with the advent of the Internet, represent the most far-reaching technological developments the copyright system has ever been confronted with. The challenges for copyright law associated with the recent developments consequently exceed the challenges posed by inventions such as the printing press, photocopying machines and VCRs. A recent WIPO document summarised the relevant differences between past technical innovations and digital technologies as follows⁸⁵⁷:

Whereas earlier technologies such as photocopying and taping allow mechanical copying by individual consumers, they do so in limited

⁸⁵⁴. T Hoeren *Internetrecht* (2008) 128, available at http://www.uni-muenster.de/Jura.itm/hoeren/materialien/Skript/Skript_Maerz2008.pdf [accessed on 25 January 2009].

⁸⁵⁵. P Samuelson 'Digital media and the law' (1991) 34 *Communications of the ACM* 23 at 28.

⁸⁵⁶. B Hugenholtz 'Code as code, or the end of intellectual property as we know it' (1999) 6 (3) *Maastricht Journal of European and Comparative Law* 308, at 14, available at <http://www.ivir.nl/publications/hugenholtz/maastricht.doc> [accessed on 25 January 2009].

⁸⁵⁷. WIPO survey supra note 20 at 30. WIPO itself adopted in 1999 a so-called Digital Agenda. The WIPO Digital Agenda can be accessed at http://www.wipo.int/copyright/en/digital_agenda.htm [accessed on 25 January 2009].

quantities, requiring considerable time, and resulting in copies of lesser quality. Moreover, the copies are physically located in the same place as the person making the copy. On the Internet, by contrast, one can make an unlimited number of copies, virtually instantaneously, without perceptible degradation in quality. And these copies can be transmitted to locations around the world in a matter of minutes.

A closer look at the changes brought about by the digital age reveals that they do not one-sidedly benefit either users or copyright holders. Rather, digitisation and the Internet entail both advantages and disadvantages for each group.

The following subchapters highlight the advantages and disadvantages for users and creators of creative works. Users and creators of creative materials are, of course, not the only interested parties in this matter. Publishers' interests, for example, are also concerned. Yet, it is users' and creators' interests which form the basis for the most prevalent rationales for copyright protection as described in chapter 2 of this thesis. It is, therefore, appropriate to focus on these important stakeholder groups, especially because the interests of these two groups are nowadays often not as far apart as suggested. Creators of copyright protected works usually make use of works created by others whilst creating their own works. As a result, creators are not only familiar with the user perspective but have also a vital interest that user interests are sufficiently considered in copyright laws. In addition, in the digital age, it becomes increasingly difficult to draw a neat line between creators and users since many formerly passive users have morphed into active producers and publishers of digital media.

7.3.1 Advantages for creators of creative works brought about by digital technologies

History has shown that the advent of new technologies often disrupts old markets and established distribution mechanisms. It is, therefore, not surprising that spokespeople for established businesses are initially

critical or sometimes even hostile towards new technologies.⁸⁵⁸ Yet, it is obvious that digital technologies offer significant advantages for creators. These include more widespread advertising and the possibility to easily sample and share works - all of which stimulate demand for a work. Moreover, the distribution of information has become much quicker, easier and cheaper.⁸⁵⁹ As long as there is a telephone line or another network connection, digital information on the Internet is available to a vast audience around the world. Consequently, online sales of creative works are rising at a brisk pace.⁸⁶⁰

In the light of easier and cheaper distribution possibilities, creators become less dependent on intermediaries with the relevant financial as well as technical means for a wide distribution of creative works, such as multinational publishing houses. Previously, intermediaries often demanded the transfer of the copyrights in a work in return for their services, leaving the creator with either a once-off payment or with the vague prospect of a fairly low participation in potential profits. However, in the digital age, it is harder for intermediaries to push through their demands. As a result, creators are increasingly able to negotiate better terms and, if they wish, hold on to their copyrights.

⁸⁵⁸. The late Jack Valenti, long-time president of the Motion Picture Association of America, for instance, famously testified in 1982 to the U.S. Congress that '[t]he VCR is [to the movie industry] as the Boston strangler is to women home alone' (Home Recording of Copyrighted Works: Hearing on H.R. 4783, H.R. 4784, H.R. 4808, H.R. 5250, H.R. 5488, and H.R. 5705 Before the Subcommittee on Courts, Civil Liberties, and the Administration of Justice of the House Committee On the Judiciary, 97th Congress (1982).) Yet the fact that by 2003 sales of video cassettes and DVDs accounted for more than twice the revenue than box-office sales shows that such a negative attitude towards new technologies is often unfounded and in many instances short-sighted.

⁸⁵⁹. M Antezana 'The European Union Internet Copyright Directive as even more than it envisions: Toward a supra-EU harmonization of copyright policy and theory' (2003) 26 *Boston College International & Comparative Law Review* 415 at 439.

⁸⁶⁰. In 2007, digital music sales accounted for roughly 15 per cent of the global music market, while the share was only 11 per cent in 2006 and zero per cent in 2003. Digital music sales totalled almost 3 billion U.S. dollars around the world in 2007, which represents a 40 per cent increase since 2006. In some countries, such as South Korea, digital sales have already overtaken physical music sales. (International Federation of the Phonographic Industry (IFPI) *Digital music report 2008 – revolution, innovation, responsibility* (2008) at 5-6, available at <http://www.ifpi.org/content/library/DMR2008.pdf> [accessed on 25 January 2009]).

In this context, another feature of digital technologies comes into play for the benefit of creators. These technologies enable creators to conveniently license materials direct to end-users.⁸⁶¹ This can be done by using Digital Right Management systems (DRMs)⁸⁶² which, in essence, allow creators to monitor and control the access to as well as the use and distribution of their works. DRMs can also be used to process and ensure payment, and to protect the integrity of a work.⁸⁶³ DRMs are arguably one of the main reasons for licensing becoming so popular in recent years. They provided a lucrative way for dealing with copyright protected works.⁸⁶⁴ TPMs are a subcategory of DRMs through which creators can essentially lock up their information.

In addition to the above, the ease of combining digital works into new products, the compactness of works in digital form as well as new search and link capabilities of digital information also benefit creators when creating new works that are based on previous works. As mentioned, this scenario is the normal case since few works are completely new and original. It is for this reason that, in our creative efforts, we all ultimately 'stand on the shoulder of giants'.⁸⁶⁵

7.3.2 Threats for creators of creative works brought about by digital technologies

In spite of the substantial advantages for creators, digital technologies also pose a considerable threat to the interests of creators in their works - both from an economic and a moral point of view. The possibility to

⁸⁶¹. C Silberberg 'Preserving educational fair use in the twenty-first century' (2001) 74 *Southern California Law Review* 617 at 618.

⁸⁶². DRMs are also referred to as electronic copyright management systems (ECMS), electronic rights management systems (ERMS) or trusted systems (see J Fernández-Molina 'Laws against the circumvention of copyright technological protection' (2003) 59 *Journal of Documentation* 41 at 41-2).

⁸⁶³. Ibid at 44; Fernández-Molina describes a number of sub-categories for DRMs.

⁸⁶⁴. For a long time in IP history, the sale of physical copies of works was predominant. For an instructive discussion of the advantages and disadvantages of sales as compared to licensing, see the report of the Committee on Intellectual Property Rights in the Emerging Information Infrastructure and National Research Council supra note 207 at 100 et seq.

⁸⁶⁵. Although not invented by him, the metaphor was most famously used by scientist Isaac Newton in the 17th century ("Pigmaei gigantum humeris impositi plusquam ipsi gigantes vident").

create unauthorised, perfect and virtually costless copies⁸⁶⁶ or adaptations, combined with the option of immediate and worldwide distribution.⁸⁶⁷ Each perfect copy or adaptation may then be used as the basis for countless further copies or adaptations.⁸⁶⁸

The unauthorised use of copyright protected works is often referred to as piracy. The use of the term “piracy” in the context of copyright law has however been subjected to sustained criticism, especially from user activists.⁸⁶⁹ It is their belief that the use of the term piracy equates in a questionable manner the act of copyright infringement with violent acts of robbery on the high seas. Psychological effects triggered by certain language should not be underestimated, and there is little doubt that the term piracy is indeed used predominantly by copyright holders to portray the unauthorised use of copyright protected material as condemnable. Having said this, it should be noted that the term piracy has already been employed for centuries to describe the act of copyright infringement. In fact, the use of the term piracy in this context pre-dates the world’s first piece of copyright legislation, the UK’s Statute of Anne of 1710.⁸⁷⁰ While the use of the term piracy for such a

⁸⁶⁶ Regarding the costs of digitisation, Palm has, however, published an interesting paper claiming that the total costs of digitising and the subsequent storage of such information are usually greatly underestimated; see J Palm *The digital black hole*, available at http://www.tape-online.net/docs/Palm_Black_Hole.pdf [accessed on 25 January 2009].

⁸⁶⁷ C Correa *Fair Use in the Digital Era*, available at http://webworld.unesco.org/infoethics2000/documents/paper_correa.rtf [accessed on 25 January 2009].

⁸⁶⁸ R Davis ‘The digital dilemma: How intellectual property laws might embrace the apparently paradoxical goals of motivating individual creation and preserving the ultimate benefits of that creation for the common good’ (2001) 44 (2) *Communications of the ACM* 77 at 78.

⁸⁶⁹ Stallman, for instance, stated: ‘If you don’t believe that illegal copying is just like kidnapping and murder, you might prefer not to use the word “piracy” to describe it. Neutral terms such as “prohibited copying” or “unauthorized copying” are available for use instead’ (R Stallman ‘Some Confusing or Loaded Words and Phrases that are Worth Avoiding’, available at <http://www.gnu.org/philosophy/words-to-avoid.html> [accessed on 25 January 2009]). Some scholars have called for a more differentiated approach to piracy. Lessig, for example, has suggested to distinguish two forms of piracy; the wrongful commercial “Piracy I”, which describes unauthorised copying by businesses ‘that do nothing else but take other people’s copyrighted content, copy it, and sell it’, and another form of ‘not-so-wrong piracy’ which Lessig calls “taking” or “Piracy II”. Piracy II basically refers to file-sharing over the Internet. (L Lessig supra note 16 at 62 et seq).

⁸⁷⁰ Dekker spoke as early as 1603 of so-called “word-pirates” (T Dekker and E D Pendry (ed) *Thomas Dekker – The wonderful year; the gull’s horn-book; penny-wise, pound-foolish; English villainies discovered by lantern and candlelight; and selected writing* (1968) 29). In 1706, Defoe addressed in the preface to his book *Jure divino* the ‘Gentleman-Booksellers, that threatned to Pyrate

long time does not make the term acceptable, it appears futile to keep on lamenting its use. Even courts have readily adopted the term.⁸⁷¹ Because of the popularity of the term piracy, the term is occasionally used in this thesis, albeit hesitantly since less biased terms are available, such as copyright infringement, copyright violation or unauthorised use.

Online copyright infringement is widespread.⁸⁷² The following statement by a Hong Kong magistrate aptly summarises the reasons for this:⁸⁷³

The use of the Internet to distribute infringing copies is insidious. It is unseen, difficult to detect and virtually impossible to prevent in a free society. An illicit factory or warehouse can be closed. Infringing DVDs can be destroyed. The Internet cannot be shut down: its very essence is the free distribution of material.

For obvious reasons, less affluent users in developing countries are particularly interested in such inexpensive copies. Having said this, online copyright infringement occurs worldwide. Some countries, however, such as China and Russia, continuously have copyright infringement rates that are significantly higher than in other countries. This gives rise to trade disputes involving these countries.⁸⁷⁴ Chapter 2.3 of this thesis suggested that often overlooked cultural

it, as they call it, viz. Reprint it, and Sell it For half a Crown [...]’ (D Defoe *Jure divino: A satyr in twelve books* (1706) xlii).

⁸⁷¹. See, for instance, *Dowling v United States*, 473 US 207, 222 (1985).

⁸⁷². From a legal point of view, Article 8 of the WCT - and national as well as regional laws based thereupon - provides important additional protection of copyright protected works against online piracy and unauthorised online transfer.⁸⁷²

⁸⁷³. Magistrate C Mackintosh in *HKSAR v Chan Nai Ming*, TMCC 1268/2005 (7 November 2005), at 15, available at http://legalref.judiciary.gov.hk/lrs/common/ju/ju_frame.jsp?DIS=46842&currpage=T [accessed on 25 January 2009].

⁸⁷⁴. For instance, the U.S. announced in April 2007 that it was lodging a case with the WTO on intellectual property rights protection and enforcement in China. On 25 September 2007 the WTO Dispute Settlement Body established a panel in this regard. However, findings from the inquiry are not expected until late 2008 (see press release from the Office of the United States Trade Representative (9 April 2007), available at http://www.ustr.gov/Document_Library/Press_Releases/2007/April/United_States_Files_WTO_Case_s_Against_China_Over_Deficiencies_in_Chinas_Intellectual_Property_Rights_Laws_Market_Access_Barr.html, [accessed on 25 January 2009] and a press release from the WTO (25 September 2007), available at http://www.wto.org/english/news_e/news07_e/dsb_25sep07_e.htm [accessed on 25 January 2009].

differences in relation to intellectual works can to some extent be invoked for explaining this phenomenon.

In addition to the often obvious financial savings for wrongdoers, the non-existence of territorial borders on the Internet is arguably one of the main driving forces behind such online infringements.⁸⁷⁵

While the actual forms of online copyright infringement are diverse and new forms emerge constantly, illegal file-sharing activities on the Internet cause a notable degree of such infringement. File-sharing in itself is, however, not illegal and is one of the oldest, most-used and most efficient features of the Internet.⁸⁷⁶

P2P file-sharing usually comprises three copyright-relevant activities: first, copying content onto a storage device of one of the computers connected to the network; second, offering the content to the other participants on the network and; third, copying the content to another computer. The first and the third step qualify as reproductions while the second step arguably constitutes a making available as protected in Article 8 of the WCT (and Articles 10 and 14 of the WPPT).⁸⁷⁷

However, the fact that a work is shared without authorisation of the rights holder on a P2P network does not necessarily mean that the conduct is illegal. Possibly, the sharing fulfils the requirements of an accepted national copyright exception or limitation⁸⁷⁸ and is therefore justified. This needs to be examined separately for each of the three steps of a P2P transaction. If a national law contains, for instance, a private or personal use exception, the first and the third step may be justified on this basis. In addition, the making available activity (the

⁸⁷⁵. H Wollgast 'IP infringements on the internet – some legal considerations' 2007 (1) *WIPO Magazine* 12.

⁸⁷⁶. L Lessig supra note 16 at 17.

⁸⁷⁷. S von Lewinski supra note 819 at 5-6.

⁸⁷⁸. See chapter 5 of this thesis.

second step) could, for instance, fall under a limitation or exception for educational purposes.

Tremendous amounts of files are downloaded around the globe every year. Exact figures are almost impossible to produce, but we know that in 2006, approximately five billion files were downloaded via P2P technology in the U.S. alone⁸⁷⁹, and tens of billions of songs are illegally downloaded globally every year.⁸⁸⁰

It is beyond the scope of this thesis to dwell on the interesting and controversially discussed legal question regarding the liability of P2P end-users and P2P tool developers.⁸⁸¹ What is important, however, when discussing a possible disturbance of the previous balance of interests in the copyright arena, is an assessment of the financial impact of copyright infringement.

Some figures mentioned earlier in this chapter highlighted the unprecedented amount of mostly private copying on the Internet at present. It was concluded that copying of such magnitude poses a significant (potential) threat to copyright holders. Industry associations have put forward statistics to display economic losses. For instance, a study commissioned by the Motion Picture Association of America (MPAA) in 2005 estimated the global loss caused by movie piracy at 7.1 billion

⁸⁷⁹. D Britton and S McGonegal *The digital economy fact book* (2007) 106, available at http://www.pff.org/issues-pubs/books/factbook_2007.pdf [accessed on 25 January 2009].

⁸⁸⁰. The International Federation of the Phonographic Industry (IFPI) estimated that, based on research in 10 music markets, 20 billion songs were illegally downloaded in 2005. (International Federation of the Phonographic Industry (IFPI) *The Recording Industry 2006 Piracy Report – Protecting Creativity in Music* (2006) 4, available at <http://www.ifpi.org/content/library/piracy-report2006.pdf> [accessed on 25 January 2009].

⁸⁸¹. For more information see R Piasentin 'A comparative analysis of the potential legal liability facing P2P end-users in the United States, United Kingdom and Canada' (2006) 14 *International Journal of Law and Information Technology* 195; N Elkin-Koren 'Making technology visible: Liability of Internet Service Providers for peer-to-peer-traffic' (2006) 9 *New York University Journal of Legislation and Public Policy* 15; C Waelde and L Edwards *Online intermediaries and liability for copyright infringement* (2005) WIPO Doc. WIPO/IIS/05/1, available at http://www.wipo.int/export/sites/www/meetings/en/2005/wipo_iis/presentations/doc/wipo_iis_05_ledwards_cwaelde.doc [accessed on 25 January 2009]; J Ginsburg and S Ricketson 'Inducers and authorisers: a comparison of the U.S. Supreme Court's *Grokster* decision and the Australian Federal Court's *Kazaa* ruling' (2006), *University of Melbourne Legal Studies Research Paper No 144*, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=888928 [accessed on 25 January 2009]; G Pratt 'The next generation of file sharing arrives' (2005) 148 *Managing Intellectual Property* 28.

U.S. dollars.⁸⁸² Such figures should, however, be treated with great caution. Internet piracy and associated losses in anonymous networks are particularly hard to quantify. In addition, it remains highly disputed if and to what extent the unauthorised reproductions of digital works in general and by means of the Internet (and other networks) displace actual sales.⁸⁸³

At the end of 2006, a draft report by the Australian Institute of Criminology concluded that industry statistics concerning financial losses due to piracy are 'unverified and epistemologically unreliable'.⁸⁸⁴ A 2006 study, commissioned by the Canadian Recording Industry Association, stated that only 'one quarter (25%) of those who have shared music online have never purchased an album or song after having listened to a downloaded track'⁸⁸⁵ - that leaves 75 per cent as future buyers. Oberholzer-Gee and Strumpf published another relevant study in 2007 (often referred to as the Harvard study). The authors argue that the effect of music piracy on recording industry revenue is statistically not distinguishable from zero.⁸⁸⁶ The study suggests that 'while downloads

⁸⁸². Motion Picture Association and L.E.K. Consulting *The cost of movie piracy* (2006), at 9, available at <http://www.mpa.org/leksummaryMPA%20revised.pdf> [accessed on 25 January 2009]. According to the study, the total loss including hard good piracy equates to approximately 18.2 billion U.S. dollars world wide. A 2007 OECD report (Organisation for Economic Co-operation and Development (OECD) *The Economic Impact of Counterfeiting and Piracy* (2007) report (DSTI/IND(2007)9/PART4/REV1), available at <http://www.oecd.org/dataoecd/11/38/38704571.pdf> [accessed on 25 January 2009]) addressed the current overall dimension of international trade in counterfeit and pirated products and noted (at 2):

Analysis carried out in this report indicates that international trade in counterfeit and pirated products could have been up to USD 200 billion in 2005. This total does not include domestically produced and consumed counterfeit and pirated products and the significant volume of pirated digital products being distributed via the Internet. If these items were added, the total magnitude of counterfeiting and piracy worldwide could well be several hundred billion dollars more.

⁸⁸³. In 2005, the OECD and WIPO organised an expert meeting to examine methods and techniques which could be used to measure the magnitude, scope and effects of counterfeiting and piracy. More information regarding the meeting are available at http://www.oecd.org/document/21/0,2340,en_2649_201185_35647829_1_1_1_1,00.html [accessed on 25 January 2009].

⁸⁸⁴. AIC draft report as cited in S Hayes 'Piracy stats don't add up' (7 November 2006) *The Australian*, available at <http://www.australianit.news.com.au/story/0,24897,20713160-15306,00.html> [accessed on 25 January 2009].

⁸⁸⁵. D McKie *CRIA Consumer Study of Radio and Music Survey Results* (2006) 54, available at http://www.billboard.com/images/pdf/cria_pollara_research.pdf [accessed on 25 January 2009].

⁸⁸⁶. F Oberholzer-Gee and K Strumpf 'The effect of file sharing on record sales: an empirical analysis' (2007) 115 *Journal of Political Economy* 1 at 3.

occur on a vast scale, most users are likely individuals who in the absence of file sharing would not have bought the music they downloaded'.⁸⁸⁷ The Harvard study has been criticised as inconsistent and unsound, especially with regard to the underlying methodology.⁸⁸⁸ It is also noteworthy, that, apart from this study, all other empirical studies on this topic have found at least some degree of a negative impact on sales caused by illegal file-sharing.⁸⁸⁹ However, Oberholzer-Gee and Strumpf have pointed out the main weakness of many figures stating financial losses resulting from P2P activities. This is the presumption that someone who downloads an illegal copy of a work would buy a legal version of the product if the illegal version was not available. Often, the number of illegal downloads is then multiplied with the average retail price for music when downloaded legally from online stores such as Apple's iTunes and the result is presented as the industry loss.⁸⁹⁰

In light of the undeniable difficulties one faces when trying to quantify the relationship between piracy and hypothetical purchasing behaviour, such approach is obviously misleading. It is imperative to consider at least two major criteria which show that the amount of pirated copies cannot be so easily equated with lost sales. First, in many

⁸⁸⁷. Ibid at 4.

⁸⁸⁸. See, for instance, S Liebowitz 'Economists examine file-sharing and music sales' in G Illing and M Peitz (eds) *Industrial organization and the digital economy* (2006), available at <http://www.utdallas.edu/~liebowit/intprop/MIT.pdf>, at 24 [accessed on 25 January 2009].

⁸⁸⁹. I Png 'Copyright: a plea for empirical research' (2006) 3(2) *Review of Economic Research on Copyright Issues* 3 at 8; see also: M Peitz and P Waelbroeck 'The effect of internet piracy on music sales: cross-section evidence' (2004) 1 *Review of Economic Research on Copyright Issues* 78; S Hong *The effect of Napster on recorded music sales: evidence from the consumer expenditure survey* (2004) (Stanford Institute For Economic Policy Research Paper No. 03-18) at 28; R Rob and J Waldfogel 'Piracy on the high c's: music downloading, sales displacement, and social welfare in a sample of college students' (2006) 49 *The Journal of Law and Economics* 60; A Zentner 'Measuring the effect of file sharing on music purchases' (2006) 49 *The Journal of Law and Economics* 87; F Rochelandet and F Le Guel 'P2P music-sharing networks: why legal fight against copiers may be inefficient' (2005) at 5, available at <http://ssrn.com/abstract=810124> [accessed on 25 January 2009]; N Michel 'The impact of digital file sharing on the music industry: an empirical analysis' (2006) 6 *Topics in Economic Analysis & Policy*, available at <http://www.bepress.com/bejeap/topics/vol6/iss1/art18/> [accessed on 25 January 2009].

⁸⁹⁰. As a matter of fact, this approach is not limited to figures which state the losses caused by P2P file-sharing. Rather, it is employed for all sorts of figures stating the loss caused by piracy (in general and for particular fields). See, for instance, the findings of the *Fourth Annual Global Software Piracy Study* by the Business Software Alliance (2007), available at <http://w3.bsa.org/globalstudy/upload/2007-Global-Piracy-Study-EN.pdf> [accessed on 25 January 2009].

developing countries the original copies are often considerably more expensive than in affluent developed countries. This situation is aggravated by the fact that the purchasing power of potential buyers is generally much lower in developing countries. The English Encyclopaedia Britannica 2007, for instance, costs about 650 UK£ in the UK (Amazon UK).⁸⁹¹ South African retailers (Exclusive Books), however, charge more than 1,500 UK£⁸⁹². Even former South Africa president Nelson Mandela's autobiography costs much more in South Africa (19 UK£)⁸⁹³ than in the UK (8,60 UK£).⁸⁹⁴ On the basis that the per capita GDP (PPP) in the UK (35,300 U.S. dollars⁸⁹⁵) is almost 3.5 times higher than the South African per capita GDP (PPP) (10,600 U.S. dollars⁸⁹⁶), a comparable price of 66,50 UK£ for Nelson Mandela's autobiography and 5250 UK£ for the English Encyclopaedia Britannica 2007 in South Africa can be projected. Many South Africans can simply not afford such material and would, therefore, not buy legitimate copies in the first place. Second, the illegal P2P copy may in some places be the only available copy, as even large online-stores do not operate in every country or do not deliver their product everywhere. Particularly the inadequate infrastructure in many developing countries prevents reliable deliveries into these countries.

Having said this, against the background of the findings of most of the relevant empirical studies, it is after all likely that illegal P2P activity does displace sales to a certain extent; albeit not in the dimension copyright holders often allege.⁸⁹⁷

⁸⁹¹. On 30 May 2008.

⁸⁹². R 22,596.00 (on 30 May 2008).

⁸⁹³. Exclusive Books (on 30 May 2008).

⁸⁹⁴. Amazon UK (on 30 May 2008).

⁸⁹⁵. Estimated for 2007, CIA – *The World Factbook* (2008), available at <https://www.cia.gov/library/publications/the-world-factbook/geos/uk.html> [accessed on 25 January 2009].

⁸⁹⁶. Estimated for 2007, CIA – *The World Factbook* (2008), available at <https://www.cia.gov/library/publications/the-world-factbook/geos/sf.html> [accessed on 25 January 2009].

⁸⁹⁷. S von Lewinski noted that the following conceivable alternatives for legislative action have been suggested in the context of P2P file-sharing to tackle the problem by way of legalising such activities and ensure, at the same time, the equitable remuneration of the rights holders: 'a legal license with or without a statutory remuneration right, voluntary collective administration of the relevant exclusive rights, mandatory collective administration thereof, the application of the Scandinavian model of

In addition, piracy is also market-orientated. A work has to achieve some popularity before it is pirated on a large scale.⁸⁹⁸ This disproves the often produced allegation that piracy deprives needy creators of their income. Despite the fact that copyrights are often held by heeled multinational companies, for example publishers, and not by the original creator, creators of successful works who retain the copyrights in their works are seldom needy any more.⁸⁹⁹

7.3.3 Advantages for users brought about by digital technologies

The core advantage for users of creative material brought about by digital technologies is obvious. Never before have there been such vast opportunities, at least theoretically, for accessing and using creative works of any kind from around the world.⁹⁰⁰ This is of particular importance for developing countries, where citizens lack access opportunities, chiefly for infrastructural reasons. Libraries in developing countries, for instance, are rare and usually not as well-funded as their counterparts in developed countries.

The Internet contains more than 50 billion web pages⁹⁰¹ with content ranging from text and photos to music, videos and a huge variety of other audio-visual items. Recently commenced digitising projects – most notably the Google Books Library Project and similar projects carried out by Yahoo and Amazon – aim to create a comprehensive and searchable online catalogue of all books in all

extended collective licensing, or even a combination of some of such proposals' (S von Lewinski supra note 819 at 13) Yet, no such legislative action has been taken at this point (although voluntary collective management is already available in some countries), arguably because the compliance of some of the above proposals would not comply with the three-step test (see the discussion of the three-step test in chapter 4 of this thesis).

⁸⁹⁸ L Liang et al supra note 144.

⁸⁹⁹ Ibid.

⁹⁰⁰ C Waelde 'The quest for access in the digital era: Copyright and the internet' 2001 (1) *The Journal of Information, Law and Technology*, available at http://www2.warwick.ac.uk/fac/soc/law/elj/jilt/2001_1/waelde/ [accessed on 25 January 2009].

⁹⁰¹ According to Worldwidewebsite.com, available at <http://www.worldwidewebsite.com> [accessed on 25 January 2009].

languages.⁹⁰² Online search tools, including Google and Yahoo, help organise the content and find even little-known material. In addition, advanced copying as well as storage technologies enable users to easily copy and archive accessed material.⁹⁰³

By enabling access to such enormous resources of diverse information, digital technologies facilitate, among other things, the creation of new works and knowledge transfer in many unprecedented ways. All this will eventually result in an increased participation of formerly passive users in culture creation.⁹⁰⁴

7.3.4 Threats for users brought about by digital technologies

From the perspective of users of creative works, the main disadvantage associated with digital technology is a result of the possibility for rights holders to manage and essentially lock away their content by using DRMs and TPMs. These technologies could eventually create a so-called pay-per-view society in which each access to creative material is only granted in exchange for money – regardless of whether or not traditional copyright exceptions or limitations apply. As a result, access to such protected material would often be confined to a small group of affluent people, chiefly domiciled in developed countries.

Essentially, we are facing a paradox: while digital technology has the potential to significantly increase access possibilities for users around the world, especially in developing countries, it at the same time potentially hampers access to creative material. Given the importance of copyright exceptions and limitations for achieving and maintaining a just copyright balance, this is a major concern which warrants closer examination. Hence, the issue of TPMs, and their legal protection, is discussed in the next subchapter.

⁹⁰². Google Books Library Project website, available at <http://books.google.com/googlebooks/library.html> [accessed on 25 January 2009].

⁹⁰³. C Waelde supra note 900.

⁹⁰⁴. J Rowbottom 'Media freedom and political debate in the digital era' (2006) 69 *The Modern Law Review* 489 at 498.

7.4 TPMs and the future of copyright exceptions and limitations

The dramatic increase of illegal use of digital copyright protected material, especially but not exclusively over the Internet, and enforcement difficulties have made rights holders seek for alternative means of protection for their works. Following Clark's famous observation that 'the answer to the machine is in the machine'⁹⁰⁵, copyright holders began to use TPMs to protect their works. As a result, some commentators started predicting the beginning of a new "pay-per-use" era.⁹⁰⁶

Undisputedly, TPMs are a proper tool to reduce digital piracy; at least temporarily until someone circulates the first hacked version of a work. However, apart from being effective tools against piracy in the digital age from a factual point of view, TPMs and their legal protection are at the same time problematic from a legal perspective. For they potentially jeopardise long-established copyright exceptions and limitation which are considered crucial for a fair balance of copyright law, for example fair use and fair dealing. This subchapter deals with this problem.

7.4.1 The technical situation regarding TPMs

It appears that, from a factual point of view, digital rights management systems in general and TPMs in particular are on the retreat since they have triggered many complaints by customers the industry could no longer ignore. For instance, some TPM protected CDs and DVDs could not properly be played on some play back devices, and legally acquired songs could not be transferred between different (mobile) devices of the buyers. As a result, both Microsoft and Apple announced in April 2007 to

⁹⁰⁵. C Clark 'The Answer to the machine is in the machine' in B Hugenholtz (ed) *The Future of Copyright in a Digital Environment* (1996) 139.

⁹⁰⁶. J Litman *Digital Copyright: Protecting Intellectual Property on the Internet* (2001) 27.

offer (at least alternatively) unprotected copyright material in their market-dominating online shops (Zune Marketplace and iTunes).⁹⁰⁷ In addition, several major music labels renounced protection measures over the last few years.⁹⁰⁸ Hence, factual market mechanisms in the form of vigorous resistance by consumers - rather than legal concerns - seem to hamper a further spread of TPMs in a way comparable to the considerable consumer boycott which prevented the market success of copy-protected software in the 1980s.⁹⁰⁹

7.4.2 The legal situation regarding TPMs

It is important to acknowledge that hackers can circumvent TPMs. Even the supposedly perfect multilayer encryption scheme for the next generation format for high-definition video on disk, Blu-ray, has already been unlocked.⁹¹⁰ Once a protection system is cracked, all systems using the same code are vulnerable.⁹¹¹ It is for this reason that copyright holders have long called for anti-circumvention provisions for TPMs.⁹¹²

⁹⁰⁷. G Sandoval 'Will music industry dance again to Apple's tune?' (31 May 2007) *cnet*, available at http://marketwatch-cnet.com.com/Will+music+industry+dance+again+to+Apples+tune/2100-1027_3-6187666.html [accessed on 25 January 2009].

⁹⁰⁸. On 9 August 2007, the Universal Music Group announced that it would sell a significant portion of its catalogue without the customary copy protection software for a trial period. On 17 November 2004, Sony Music Entertainment (Japan) stopped using technical copy-protection mechanisms for audio CDs which it sells in Japan. Sony justified its move by saying that Japanese consumers have learned important issues about piracy and legality of music copying. Moreover, Japan's legislation would be tougher now pertaining to piracy than it was when the copy protection mechanisms were introduced. In the United States, Sony BMG agreed to pay more than 1.5 million U.S. dollars at the end of 2006 after it had added copy prevention software, a so-called rootkit, to some of its CDs. This software was designed for being secretly installed on PCs when a CDs was played on the computers. However, once loaded onto a computer, hackers could easily gain and maintain access to the computer system.

⁹⁰⁹. B Hugenholtz supra note 856 at 12.

⁹¹⁰. X Jardin, 'Gadgets as tyrants' (16 January 2007) *New York Times*, available at <http://www.nytimes.com/2007/01/16/opinion/16jardin.html?ex=1326603600&en=c7c1b2c808c32b9c&ei=5088&partner=rssnyt&emc=rss> [accessed on 25 January 2009].

⁹¹¹. S Stokes supra note 825 at 140. One of the best-known examples of a TPM system, for instance, is the so-called Content Scrambling System (CSS), which is used for access control and copy prevention of DVDs. In September 1999, CSS was hacked by Jon Johansen ("DVD Jon"), a teenager from Norway. DVD Jon developed the decrypting program DeCSS, which made possible the copying of digital content to computer hard drives in unencrypted form as well as their playback on non-compliant machines. Johansen created the software to enable him to watch DVDs, which he had legally purchased before, on a Linux computer. Eventually, Johansen was cleared of all charges and the competent Norwegian courts held that there was no evidence that what he did was aiding DVD

As a result, the WIPO Internet Treaties significantly strengthened TPMs by requiring that

[c]ontracting Parties shall provide adequate legal protection and effective legal remedies against the circumvention of effective technological measures that are used by [authors][performers or producers of phonograms] [...] and that restrict acts, in respect of their [works][performances or phonograms], which are not authorized by the [authors][performers or the producers of phonograms] concerned or permitted by law.⁹¹³

Hence, international lawmakers effectively introduced a third layer of copyright protection⁹¹⁴; the first layer being legal copyright protection for the content itself, the second layer being factual protection by means of TPMs and the third layer being the legal protection of TPMs.

The wording of the WIPO Internet Treaties is, however, remarkably open as they merely require member states to afford “adequate” legal protection and “effective” legal remedies to TPMs. The treaties neither define these terms nor provide any further guidance as to their meaning. This gives much leeway to member states as to how to implement these provisions. Consequently, national laws regarding the legal protection of TPMs that are based on the WIPO Internet Treaties differ significantly.⁹¹⁵ It is, therefore, instructive to briefly look at some of the approaches chosen by national lawmakers.

piracy and that it was not illegal to use the software tool to watch legally obtained DVD films. It needs to be noted, however, that Norway was (and is) not one of contracting parties to the 1996 WIPO Internet Treaties.

⁹¹². For a legislative and treaty history of anti-circumvention provisions see I Brown ‘The evolution of anti-circumvention law’ (2006) 20 *International Review of Law, Computers & Technology* 239.

⁹¹³. Article 11 WCT and Article 18 WPPT. For similar obligations concerning Rights Management Information see Article 12 WCT and Article 19 WPPT. The following discussion focuses on Article 11 WCT.

⁹¹⁴. B Hugenholtz supra note 856 at 8. Third-layer anti-circumvention provisions are also sometimes referred to as “paracopyright” provisions (see D Burk ‘Anti-circumvention misuse’ (2003) 50 *UCLA Law Review* 1095).

⁹¹⁵. See chapter 5 of this thesis regarding the situation in Europe, Australia, South Africa and the United States of America. For more information see: L Guibault and B Hugenholtz supra note 267 at 31 et seq; J Ginsburg ‘The pros and cons of strengthening intellectual property protection: technological protection measures and section 1201 of the U.S. copyright act’ (2007) *Information and Communications Technology Law* 191; U Gasser ‘Legal frameworks and technological protection of

The European approach (Article 6 of the European Copyright Directive⁹¹⁶) and the U.S. approach (sec 1201 of the U.S. Copyright Act) are the most influential legal anti-circumvention approaches worldwide. This is not least because both the European Union and the U.S. forcibly promote their regimes through Free Trade Agreements with other countries or regions⁹¹⁷. It is for this reason that the following discussion focuses on the anti-circumvention provisions contained in the European Copyright Directive and in the U.S. Copyright Act. Subsequently, the Australian legislation is summarised as another example for recently amended anti-circumvention legislation. Lastly, South Africa's legislation serves as an example for the ambiguity that can often be found in the laws of less developed countries with regard to the issue of anti-circumvention.

7.4.2.1 A comparison between the U.S. and EU anti-circumvention legislation

Both the European and the U.S. approach provide more clarity than the WIPO Internet Treaties in that some of the key terms are defined.⁹¹⁸ Both approaches go beyond the minimum requirements for protection as set out in the WIPO Internet Treaties. From its wording, for instance,

digital content: moving forward towards a best practice model' (2006) 17 *Fordham Intellectual Property, Media & Entertainment Law Journal* 39.

⁹¹⁶. Recitals 49 and 50 of the EU Copyright Directive clarify that the anti-circumvention provisions of the EU Copyright Directive neither affect national provisions 'which may prohibit the private possession of devices, products or components for the circumvention of technological measures' nor provisions on the protection of computer programs in the Directive on the Legal Protection of Computer Programs.

⁹¹⁷. The Australian-U.S. Free Trade Agreement of 2005, for instance, triggered subsequent Australian legislative action that approximated the Australian anti-circumvention provisions with the respective U.S. approach in section 1201 of the U.S. Copyright Act.

⁹¹⁸. See, for instance, the definition of "effective" in Article 6(3) of the EU Copyright Directive:

Technological measures shall be deemed "effective" where the use of a protected work or other subject-matter is controlled by the rightholders through application of an access control or protection process, such as encryption, scrambling or other transformation of the work or other subject-matter or a copy control mechanism, which achieves the protection objective

and sec 1201(b)(2)(B) of the U.S. Copyright Act:

a technological measure "effectively protects a right of a copyright owner under this title" if the measure, in the ordinary course of its operation, prevents, restricts, or otherwise limits the exercise of a right of a copyright owner under this title.

Article 11 WCT only requires the protection of TPMs 'that restrict acts [...] which are not authorized by the authors concerned or permitted by law.' Hence, the protection of TPMs which restrict acts that are permitted by law, for example by a copyright exception or limitation such as fair dealing, is not prescribed under that provision. Yet, both the European Copyright Directive and the DMCA provide protection for TPMs regardless of whether or not such TPMs restrict permitted acts. From a legal point of view, providing a higher degree of protection for TPMs is unproblematic since Article 11 WCT merely contains a minimum standard for protection which contracting parties may exceed.

While it is not intended here to provide an in-depth comparison between the European and the U.S. anti-circumvention provisions, it seems appropriate to briefly point out some of the most important differences.

Firstly, the DMCA distinguishes between so-called access control and copy control measures. The trafficking in both access control TPMs and copy control TPMs is prohibited under the DMCA.⁹¹⁹ However, circumvention is only prohibited for access control TPMs.⁹²⁰ In other words, the circumvention of copy control TPMs is not prohibited under the U.S. Copyright Act. The EU Copyright Directive on the other hand does not distinguish between access control and copy control TPMs and simply speaks of 'any effective technological measures'⁹²¹.

Secondly, the EU Copyright Directive requires that the circumvention of effective TPMs is carried out by a person 'in the knowledge, or with reasonable grounds to know, that he or she is pursuing that objective'.⁹²² The U.S. Copyright Act does not contain such a subjective element.

Arguably, the most substantial differences between the European and the U.S. approach exist in the area of exceptions and

⁹¹⁹. Section 1201(a)(2) and sec 1201(b)(1) of the U.S. Copyright Act.

⁹²⁰. Section 1201(a)(1)(A) of the U.S. Copyright Act.

⁹²¹. Article 6(1) of the EU Copyright Directive.

⁹²². Ibid.

limitations to the prohibition on anti-circumvention. Legislators on both sides of the Atlantic have recognised a tense relationship between copyright exceptions and limitations on the one hand and anti-circumvention rules on the other. As a result, both the European and the U.S. lawmaker have introduced certain limitations and exceptions to the general prohibition on circumvention. It is noteworthy that the WIPO Internet Treaties contain no such exceptions and limitations.

In essence, the U.S. introduced limitations and exceptions to the liability for acts of circumvention.⁹²³ It is noteworthy that in the U.S. - in addition to the narrowly defined exceptions contained in sec 1201(a) of the U.S. Copyright Act -, the Librarian of the Congress is required to engage in a rulemaking process every three years. During this process, the Librarian of the Congress identifies particular classes of works whose users are likely to be adversely affected by the prohibition in their ability to make non-infringing uses. On this basis, the Librarian of Congress suspends the application of the prohibition on the act of access control circumvention as to those works until the next rulemaking period.⁹²⁴ This process is a direct response to concerns that the U.S. anti-circumvention regime on access control would negatively affect traditional fair uses of copyright protected works.⁹²⁵ The current rulemaking⁹²⁶, issued by the Librarian of Congress on 20 November 2006, determined six such classes

⁹²³. Section 1201 of the U.S. Copyright Act contains the following exception for access controls (sec 1201(a)): subsection (d) non-profit libraries, archives, educational institutions for limited purposes; subsection (e) law enforcement; subsection (f) reverse engineering; subsection (g) encryption research; subsection (h) protection of minors; subsection (i) protection of personal identification information; subsection (j) security testing; subsection (k) analogue devices and technological measures.

Additionally, sec 1201(a)(1)(C),(D) allows an exception under 1201(a)(1)(A) for non-infringing uses by users adversely affected by this provision. It is noteworthy that the U.S. Congress decided not to introduce a general fair use exception to the anti-circumvention.

⁹²⁴. Section 1201(a)(1)(C) and (D) of the U.S. Copyright Act.

⁹²⁵. U Gasser supra note 915 at 83.

⁹²⁶. Library of Congress (Copyright Office) *Exemption to Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies* (2006) 37 CFR Part 201 [Docket No. RM 2005-11], available at http://www.copyright.gov/1201/docs/fedreg_notice.pdf [accessed on 25 January 2009].

of copyright protected works⁹²⁷ and introduced an additional definition for determining the term “class of work”.⁹²⁸

Article 6(4) of the EU Copyright Directive introduced ‘a unique legislative mechanism which foresees an ultimate responsibility on the rights holders to accommodate certain exceptions to copyright or related rights’.⁹²⁹ In short, Article 6(4)(1) of the EU Copyright Directive

⁹²⁷. Ibid at 32-3:

(1) Audiovisual works included in the educational library of a college or university’s film or media studies department, when circumvention is accomplished for the purpose of making compilations of portions of those works for educational use in the classroom by media studies or film professors.

(2) Computer programs and video games distributed in formats that have become obsolete and which require the original media or hardware as a condition of access, when circumvention is accomplished for the purpose of preservation or archival reproduction of published digital works by a library or archive. A format shall be considered obsolete if the machine or system necessary to render perceptible a work stored in that format is no longer manufactured or is no longer reasonably available in the commercial marketplace.

(3) Computer programs protected by dongles that prevent access due to malfunction or damage and which are obsolete. A dongle shall be considered obsolete if it is no longer manufactured or if a replacement or repair is no longer reasonably available in the commercial marketplace.

(4) Literary works distributed in ebook format when all existing ebook editions of the work (including digital text editions made available by authorized entities) contain access controls that prevent the enabling either of the book’s read-aloud function or of screen readers that render the text into a specialized format.

(5) Computer programs in the form of firmware that enable wireless telephone handsets to connect to a wireless telephone communication network, when circumvention is accomplished for the sole purpose of lawfully connecting to a wireless telephone communication network.

(6) Sound recordings, and audiovisual works associated with those sound recordings, distributed in compact disc format and protected by technological protection measures that control access to lawfully purchased works and create or exploit security flaws or vulnerabilities that compromise the security of personal computers, when circumvention is accomplished solely for the purpose of good faith testing, investigating, or correcting such security flaws or vulnerabilities.

⁹²⁸. Ibid at 6-7:

In the current proceeding, the Register has concluded that in certain circumstances, it will also be permissible to refine the description of a class of works by reference to the type of user who may take advantage of the exemption or by reference to the type of use of the work that may be made pursuant to the exemption.

⁹²⁹. N Braun ‘The interface between the protection of technological protection measures and the exercise of exceptions to copyright and related rights: comparing the situation in the United States and the European Community’ (2003) 25 E.I.P.R. 496 at 499.

Section 6(4) of the EU Copyright Directive provides:

Notwithstanding the legal protection provided for in paragraph 1, in the absence of voluntary measures taken by rightholders, including agreements between rightholders and other parties concerned, Member States shall take appropriate measures to ensure that rightholders make available to the beneficiary of an exception or limitation provided for in national law in accordance with Article 5(2)(a), (2)(c), (2)(d), (2)(e), (3)(a), (3)(b) or (3)(e) the means of benefiting from that exception or limitation, to the extent

determines that, with respect to various copyright exceptions and limitations⁹³⁰, 'Member States shall take appropriate measures to ensure that rightholders make available to the beneficiary of an exception or limitation [...] the means of benefiting from that exception or limitation [...]'. In addition, the EU Copyright Directive contains in its Article 6(4)(2) a similar, yet not mandatory ("may"), provision on reproductions by natural persons for non-commercial private uses.⁹³¹

7.4.2.2 Anti-circumvention legislation in Australia

In recent years, the Australian lawmaker considerably strengthened the legal protection of TPMs. Among other things, the Copyright Amendment Act 2006 implemented some of the changes required by the AUSFTA of 2005. Hence, the Australian provisions are similar, though not identical, to the respective provisions in the U.S. DMCA. At present, the Australian

necessary to benefit from that exception or limitation and where that beneficiary has legal access to the protected work or subject-matter concerned.

A Member State may also take such measures in respect of a beneficiary of an exception or limitation provided for in accordance with Article 5(2)(b), unless reproduction for private use has already been made possible by rightholders to the extent necessary to benefit from the exception or limitation concerned and in accordance with the provisions of Article 5(2)(b) and (5), without preventing rightholders from adopting adequate measures regarding the number of reproductions in accordance with these provisions.

[...]

⁹³⁰. Article 6(4) of the EU Copyright Directive refers to: limitations and exceptions (1) in respect of reproductions on paper or any similar medium, effected by the use of any kind of photographic technique or by some other process having similar effects; (2) in respect of specific acts of reproduction made by publicly accessible libraries, educational establishments or museums, or by non-commercial archives; (3) in respect of ephemeral recordings of works made by broadcasting organisations by means of their own facilities and for their own broadcast; (4) in respect of reproductions of broadcasts made by social institutions pursuing non-commercial purposes; (5) regarding uses for the sole purpose of illustration for teaching or scientific research; (6) regarding uses, for the benefit of people with a disability, which are directly related to the disability and of a non-commercial nature, to the extent required by the specific disability; and (7) regarding uses for the purpose of public security or to ensure the proper performance or reporting of administrative, parliamentary or judicial proceedings.

⁹³¹. It is left to the Member States of the EU whether they immediately take legislative action to enforce the task set by Article 6(4)(1) of the EU Copyright Directive or whether they, at first, merely observe the situation in order to determine the need for legislative action. Both approaches have so far been chosen by the different member states. European countries have been rather reluctant to take measures based upon Article 6(4)(2) of the EU Copyright Directive.

Copyright Act contains provisions regarding the protection of TPMs⁹³² in its part V, division 2A, subdivision A⁹³³ as well as in part V, division 5, subdivision E.⁹³⁴ A distinction is made between access control TPMs and other, that is copy control TPMs. Different rules for each category are provided.⁹³⁵ While access control TPMs are employed to prevent unauthorised access to material, copy control TPMs are utilised to prevent unauthorised copying.

In essence, the Australian Copyright Act prohibits the circumvention of access control TPMs.⁹³⁶ It also prohibits the manufacture, importation, distribution, provision, offering to the public or otherwise trafficking in circumvention devices for both access control and copy control TPMs.⁹³⁷ Furthermore, the provision as well as offering to the public of a circumvention service for TPMs is prohibited.⁹³⁸

The Australian lawmaker considered the conflict between the legal protection of TPMs and legitimate user interests as safeguarded by copyright exceptions and limitations such as fair dealing. Again, the starting point of this conflict is that it is not permitted to circumvent TPMs to copy or access material to give effect to copyright exceptions and limitations such as fair dealing and private use. As a result, sections 116AN – 116AP as well sections 132APC – 132APE of the Australian

⁹³². An interesting case regarding the interpretation of the provisions of the Copyright Act relating to the protection of technological protection measures – albeit being decided before the 2006/2007 amendments – is *Stevens v Kabushiki Kaisha Sony Computer Entertainment* ([2005] HCA 58).

⁹³³. Sections 116AK et seq the Australian Copyright Act.

⁹³⁴. Sections 132APA et seq the Australian Copyright Act.

⁹³⁵. The Australian Copyright Act defines in sec 10 “access control technological protection measures” and other “technological protection measures”. TPM controlling geographic market segmentation are explicitly excluded from the definition of access control TPM in sec 10 of the Australian Copyright Act with regard to cinematograph films and computer programs. Hence, both the circumvention of region coding TPM on legitimate DVDs acquired outside Australia and the use of region-free DVD players are permitted.

⁹³⁶. Sections 116AN and 132APC of the Australian Copyright Act. There is no equivalent action for circumvention of TPM other than access control TPM.

⁹³⁷. Sections 116AO and 132APD of the Australian Copyright Act. There is, however, no right of action if a person manufactures etc a circumvention device for his or her own use.

⁹³⁸. Sections 116AP and 132APE of the Australian Copyright Act.

Copyright Act contain the following exceptions and defences to the prohibitions contained in these sections⁹³⁹:

- (1) if the copyright holders or exclusive licensees gave their permission;
- (2) if there was no promoting, advertising or marketing of the capacity to circumvent;
- (3) if the circumvention is done for the purpose of achieving interoperability;
- (4) if the circumvention is done for computer security testing;
- (5) if the circumvention is done for encryption research;
- (6) if the circumvention is done for the purpose of online privacy;
- (7) if the circumvention is done for libraries etc;
- (8) if the circumvention is done for law enforcement and national security purposes;
- (9) if the circumvention is done to enable a person to do a prescribed act.⁹⁴⁰

The defendant bears the burden of establishing the matters referred to in these exceptions and defences. Additional situations are set out in the Australian Copyright Regulations 1969.

⁹³⁹. It should be noted, that not all of these exceptions and defences apply to all anti-circumvention provisions.

⁹⁴⁰. With regard to prescribed acts, a mechanism is provided for the creation of additional exceptions and defences for the circumvention of access control TPM in the Australian Copyright Regulation (see sections 116AN (9), 132 APC(9), 249 of the Australian Copyright Act).

7.4.2.3 Anti-circumvention legislation in South Africa

The present status of legal protection of TPMs in South Africa as well as the applicability of copyright exceptions and limitations in this context is arguably best described as unclear.⁹⁴¹ South Africa has yet to implement the WCT which it has only signed so far. As a result, the WCT's anti-circumvention provisions have not made their way into South African copyright law. South Africa's legislative reluctance is somewhat surprising in light of the country's substantial contributions during the drafting process of the WCT.⁹⁴² In addition, free trade negotiations between the United States and Southern African Customs Union (SACU) countries⁹⁴³ - which usually result in an obligation to provide strict protection of technological protection measures⁹⁴⁴ - have stalled for now.

Having said this, note should be taken of section 86 of the Electronic Communications and Transactions (ECT) Act 25 of 2002 which, by way of protecting data⁹⁴⁵, essentially, prohibits anti-circumvention of copyright protected works in digital form.⁹⁴⁶ The relevant subsections of section 86 of the Electronic Communications and Transactions (ECT) Act 25 of 2002 provide as follows:

⁹⁴¹. M Schlesinger *Overview of global implementation of TPMs: emerging global standards* (2006) paper presented before the Fordham University School of Law Fourteenth Annual Conference International Intellectual Property Law & Policy at 5-8 and 11, available at <http://www.s3law.com/PDFFiles/Fordham14thAnnualGlobalImplementationofTPMsPaperMNS040606final.pdf> [accessed on 25 January 2009].

⁹⁴². South Africa's contributions resulted in the accepted proposal for Article 11 of the WCT (see World Intellectual Property Organization (WIPO) *Records of the Diplomatic Conference on Certain Copyright and Neighbouring Rights Questions* (1996) WIPO publication No. 348 at (2) 710).

⁹⁴³. The five members of SACU are: South Africa, Lesotho, Botswana, Namibia and Swaziland.

⁹⁴⁴. C Visser 'Technological Protection Measures: South Africa Goes Overboard. Overboard.' *7 Southern African Journal of Information and Communication* (2006) 54 at 58.

⁹⁴⁵. 'Data' is defined in sec 1 of the Electronic Communications and Transactions (ECT) Act 25 of 2002 as 'electronic representations of information in any form'.

⁹⁴⁶. T Pistorius 'Developing countries and copyright in the information age – the functional equivalent implementation of the WCT' 2006 (2) *Potchefstroom electronic law journal* at 7, available at

http://www.puk.ac.za/opencms/export/PUK/html/fakulteite/regte/per/issues/2006_2_Pistorius_art.pdf [accessed on 25 January 2009]; M Conroy *A comparative study of technological protection measures in copyright law* (LL.D. thesis, University of South Africa) at 233-4 available at <http://etd.unisa.ac.za/ETD-db/theses/available/etd-09192007-091712/unrestricted/thesis.pdf> [accessed on 25 January 2009].

- (1) Subject to the Interception and Monitoring Prohibition Act, 1992 (Act No. 127 of 1992), a person who intentionally accesses or intercepts any data without authority or permission to do so, is guilty of an offence.
- (2) [...]
- (3) A person who unlawfully produces, sells, offers to sell, procures for use, designs, adapts for use, distributes or possesses any device, including a computer program or a component, which is designed primarily to overcome security measures for the protection of data, or performs any of those acts with regard to a password, access code or any other similar kind of data with the intent to unlawfully utilise such item to contravene this section, is guilty of an offence.
- (4) A person who utilises any device or computer program mentioned in subsection (3) in order to unlawfully overcome security measures designed to protect such data or access thereto, is guilty of an offence.
- (5) [...]

This protection is remarkably comprehensive and may ultimately even exceed the protection granted in most other countries. This is because no restrictions exist for safeguarding a proper balancing process for the opposing interests involved.

Lastly, it is worth mentioning that sec 23(1) of the SA Copyright Act provides that copyright is infringed by any person other than the copyright holder who, without consent, does *or causes any other person to do* any act which the copyright holder has the exclusive right to do or to authorise. On this basis, some commentators argue that the making available of a circumvention device fulfils the requirements of this section of the South African Copyright Act.⁹⁴⁷ However, it remains questionable whether the mere making available of a circumvention device is indeed sufficient to substantiate legal causality.⁹⁴⁸

⁹⁴⁷. V van Coppenhagen 'Copyright and the WIPO Copyright Treaty, with specific reference to the rights applicable in a digital environment and the protection of technological measures' (2002) 119 (2) *The South African Law Journal* 442 at 450.

⁹⁴⁸. Liability for contributory copyright infringement seems, however, possible (see M Conroy supra note 946 at 233).

7.4.3 The impact of TPMs on the traditional copyright balance and the future application of traditional copyright exceptions and limitations in the digital age

It was stated above that in light of dramatically increased levels of piracy in the digital age the use of TPMs by copyright holders as well as the additional (third layer) protection of such TPMs by law appears reasonable and legitimate. It comes, therefore, not as a surprise that many countries have introduced respective provisions into their laws. However, closer scrutiny reveals that a widespread use of TPMs, combined with an additional legal protection of such measures, potentially disrupts the delicate balance of interests in the copyright arena.⁹⁴⁹ This is because TPM systems essentially represent a privatised alternative to the protection traditionally provided by copyright law which lacks consideration of the purpose for which an individual may want to access or copy a copyright protected work.⁹⁵⁰ Technological protection of digital works makes impossible the use of copyright protected material without the (automated) authorisation of the rights holder even for purposes which are usually exempt under long-established national copyright exceptions and limitations. It is important to stress once again that exceptions and limitations to copyright infringement are not automatically also defences to anti-circumvention provisions.⁹⁵¹

⁹⁴⁹. Hugenholtz has critically noted that the potential of anti-circumvention provisions to severely hamper the dissemination of knowledge and culture within a society strongly militates against such provisions. This is because the promotion of knowledge and culture is one of the most important (utilitarian) copyright rationales (B Hugenholtz 'Copyright, contract and code: what will remain of the public domain' (2000) 26 *Brooklyn Journal of International Law* 77 at 86).

⁹⁵⁰. The digital lock-up issue has been dealt with extensively in legal circles and is therefore discussed here in brief. For further information on this topic see R Burrell and A Coleman *Copyright exceptions: the digital impact* (2005) 67 et seq.

⁹⁵¹. This fact is often overlooked and might even appear strange in light of the wording of some national copyright laws. Section 1201(c)(1) of the U.S. Copyright Act, for instance, specifically provides that the anti-circumvention regime does not affect rights, remedies, limitations or defences to copyright infringement, including fair use. Hence, it appears that a copyright exception like fair use would be a valid defence to anti-circumvention claims. However, the provision has been interpreted differently by the courts. In *Universal City Studios, Inc. v Corley*, the United States Court of Appeals held that the provision 'simply clarifies that the DMCA targets the *circumvention* of digital walls guarding copyrighted material (and trafficking in circumvention tools), but does not concern itself with the *use* of those materials after circumvention has occurred. Subsection 1201(c)(1) ensures that the DMCA is not read to prohibit the "fair use" of information just because that information was obtained in a manner made illegal by the DMCA' (273 F.3d 429, 443 (2d Cir. 2001)).

This thesis purports that copyright exceptions and limitations are crucial for achieving a fair copyright balance and for accomplishing as many of the different purposes of copyright law as possible. In this light, it can be argued that some of the rights granted to copyright holders in modern copyright laws would have not been phrased and awarded the same way if lawmakers had foreseen that users might not be able to make use of copyright exceptions and limitations, such as fair use, fair dealing, and certain private uses. For technical reasons, TPM systems can usually not distinguish between different kinds of uses. As a result, fair dealing, for instance, and piracy are viewed in the same light because TPMs are incapable of reflecting the complex issues involved in determining whether a certain use is fair.⁹⁵² Hence, the use of TPMs and the additional legal protection of these measures often force users into accepting restrictive licences although the use in question would otherwise fall within the scope of an accepted copyright exception and limitation.⁹⁵³ This phenomenon of computer code effectively bypassing and essentially overruling copyright exceptions and limitations has been described with the catchy phrase “code as law”.⁹⁵⁴

The described effect of TPMs is widely accepted. Therefore, the question arises whether the significant changes in technology justify the adverse impact for copyright exceptions and limitations. In fact, this question is part of the more general discussion about the future application of traditional copyright exceptions and limitations in the digital age. The main point at issue is whether “digital is different” enough to give reason for a different application and understanding of copyright exceptions and limitations.

⁹⁵². The possibility to generally allow certain quantities for copying (such as 10 percent of a book) is insufficient as, for example, a fair dealing cannot be generally quantified in such a way.

⁹⁵³. R McGreal ‘Stealing the Goose: Copyright and Learning’ (2004) 5 *International Review of Research in Open and Distance Learning*, at 4, available at <http://www.irrodl.org/index.php/irrodl/article/view/205/819> [accessed on 25 January 2009].

⁹⁵⁴. See, for instance, L Lessig’s book title: *Code and Other Laws of Cyberspace*.

7.4.3.1 The agreed statement concerning Article 10 of the WCT

The consensus reached at the expert committee meetings and the diplomatic conference leading to the adoption of the WIPO Internet Treaties provides a useful starting point for the discussion. In particular, the agreed statement to Article 10 of the WCT⁹⁵⁵ permits contracting parties to the treaty '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'. In addition, contracting parties are permitted 'to devise new exceptions and limitations that are appropriate in the digital network environment'.⁹⁵⁶

The language of the agreed statement concerning Article 10 of the WCT suggests that, as a general rule, digital is not different enough to justify a radical rethinking of the previous system of copyright exceptions and limitations. Having said this, the statement is of rather limited value beyond this general declaration. It leaves open how precisely exceptions and limitations are going to be carried forward and what actually constitutes an "appropriate" extension of existing limitations and exceptions or what represents an "appropriate" new exception or limitation. Arguably, the question regarding the appropriateness of exceptions and limitations provides just another battlefield for the same dispute about the future application of traditional copyright exceptions and limitations in the digital age.

⁹⁵⁵. The agreed statement concerning Article 16 WPPT states that the agreed statement concerning Article 10 of the WCT applies mutatis mutandis to Article 16 WPPT (World Intellectual Property Organization (WIPO) *Agreed statements concerning the WIPO Performances and Phonograms Treaty* (1996) supra note 820)

⁹⁵⁶. One rather obvious example for such a new limitation or exception regards some kind of mere temporary reproduction which occurs as a necessary technical step to enable a network transmission (see, for instance, Article 5(1) of the EU Copyright Directive).

7.4.3.2 The relevance of the three-step test

A recent WIPO survey summarised the debate about the future application of traditional copyright exceptions and limitations in the digital age as follows⁹⁵⁷:

A number of questions are raised about exceptions and limitations to rights in the digital environment. Are existing exceptions and limitations, written in language conceived for other circumstances, too broad or too narrow? Some exceptions, if applied literally in the digital environment, could eliminate large sectors of existing markets. Others may implement valid public policy goals, but be written too restrictively to apply to network transmissions. New circumstances may also call for new exceptions. These questions must be examined in light of the international standard established for the permissibility of exceptions and limitations to certain rights, known as the 'three-step test'.

The reference in the WIPO document to the three-step test is of utmost importance because the requirements of the test are often ignored when discussing the future application of copyright exceptions and limitations.⁹⁵⁸ Yet the three-step test is still the primary legal standard against which copyright exceptions and limitations are to be tested – both in what is left of the analogue world and in the digital age.

It is well beyond the scope of the examination to discuss in detail whether it is appropriate to transfer every exception and limitation into a digital environment. We are still at a point where more practical experience is needed to draw definite conclusions on this subject. However, the three-step test is expressed in a technologically neutral way and this implies that certain categories of exceptions and limitations deserve more attention than others. Chapter 3.2.3 of this thesis proposed a categorisation of copyright exceptions and limitations into certain formal and substantial categories. The effects of, for example, exceptions and limitations on public performance rights do not differ dramatically in both environments. Furthermore, there is arguably no

⁹⁵⁷. WIPO survey supra note 20 at 41-2.

⁹⁵⁸. The meaning of each step was addressed in chapter 4 of this thesis.

need to alter significantly the copyright exceptions and limitations that are based on public interest considerations, for example provisions addressing news reporting, criticism and review, judicial proceedings.⁹⁵⁹ There seems also to be little dispute about whether the exceptions and limitations for the purposes of quotations and parody as well as for the benefit of disabled people apply in a digital environment.⁹⁶⁰ By contrast, domestic exceptions and limitations on private copying (including fair use and fair dealing provisions which also cover such uses) require a closer examination.

In recent years, copyright exceptions and limitations on private copying have become an issue of fierce debate. Rights holders have repeatedly complained that existing copyright exceptions for certain private uses have nowadays the potential to deprive them of substantial income from their works. Most of these complaints have been based on the improved opportunities that digital technologies have provided for copyright holders to collect licence fees. These have come about because it is now feasible to license whole works or even small parts thereof to end-users. As a result, copyright holders claim that, in the digital age, copyright exceptions and limitations for private uses potentially conflict with the second step of the three-step test, which prohibits copyright exceptions and limitations that do conflict with the normal exploitation of the work.⁹⁶¹

It is, however, not the first time that private use exceptions and limitations have been challenged. On the contrary, the current situation brings to mind a similar discussion about private uses of copyright protected works which took place in the 1950s and later again in the late 1970s. In Europe, for instance, private copying was traditionally considered as being outside the scope of copyright protection. This view was later reconsidered because of technical

⁹⁵⁹ R Knights supra note 29 at 11.

⁹⁶⁰ L Guibault and B Hugenholtz supra note 267 at 21.

⁹⁶¹ Numerous commentators have, for example, suggested that the scope of fair use in the digital environment should be narrowed where new technologies create new markets (see L Guibault supra note 19 at 85-6 with further references).

developments in the fields of reprography and home-soundtaping during the 1950s and later at the end of the 1970s, when VCRs entered the mass-market. Most Continental European countries subsequently introduced a statutory right to equitable remuneration for private uses – often by way of levies on the relevant technical equipment.⁹⁶² In the U.S. such a levy for private uses was, at first, not imposed. However, with the enactment of the Audio Home Recording Act in 1992, a levy payment for digital audio recording devices and media was eventually also introduced in the U.S.

Nowadays, rights holders often argue that such general levy systems are obsolete⁹⁶³ because they were primarily introduced by states at a time when copyright holders could not control the private uses which took place. Today, however, digital technologies provide rights holders with new opportunities to exert such control, for example by means of DRM systems.

This argument has some initial plausibility. It must not be forgotten, however, that copyright protection regimes are not only designed to protect the financial interests of copyright holders. Rather, copyright law strives, as stressed repeatedly in this thesis, to achieve a fair balance between all relevant interests involved; and private use exceptions and limitations are – among other things - an important instrument to aid user interests. It appears that during the last decades the decision of lawmakers around the world has been to preserve private use exceptions and limitations, in spite of various relevant technological developments, in an attempt to maintain a fair copyright balance.

Having said this, it is still essential to address the current conflict between traditional private use exceptions and limitations and the second step of the three-step test, caused by improved market opportunities for copyright holders brought about by digital technologies.

⁹⁶². Ibid at 52.

⁹⁶³. See, for instance, R Knights *supra* note 29 at 11.

Commentators most familiar with the three-step test have submitted that general private use exceptions and limitations are, in the digital age, arguably impermissible under the second step of the three-step test.⁹⁶⁴ Some have, therefore, suggested that certain important elements of strictly private use should be extracted from the existing broad private use provisions and protected in new and narrower exceptions and limitations which are more likely to pass the test.⁹⁶⁵

Unfortunately, these suggestions give no further guidance as to how such narrower private use exceptions and limitations should exactly look if they are to pass the second step of the three-step test. Ultimately, the proposal appears to be a mere makeshift solution. It seems to overstate the financial interests of copyright holders and, at the same time, undervalues the socioeconomic importance of broad copyright exceptions and limitations for private uses. If, as a result of new marketing possibilities, the three-step test in its current wording does bar most private use exceptions and limitations in the digital age, it would be better to consider an amendment of the second step of three-step test, which was originally drafted in very different circumstances from those of today.

Admittedly, achieving international consensus in this respect is likely to be difficult since several developed countries have identified strong copyright protection as an instrument of macroeconomic wealth creation and wealth preservation. Yet while an amendment of the second step is, for reasons of legal certainty, the preferred way forward, it may not be the only way to achieve the desired result. It would be possible to achieve a similar result by applying a modified interpretation of the second step of the three-step test that takes into account technical developments and new market opportunities.

To some extent, the WTO Dispute Resolution Panel has opened the door for up-to-date interpretations of the second step by stating that

⁹⁶⁴. See, for instance, M Senftleben *supra* note 128 at 206.

⁹⁶⁵. *Ibid.*

the term “normal” is not only of empirical nature but also has a weighty normative connotation.⁹⁶⁶ This includes, among other things, a dynamic element capable of taking into account technological and market developments.⁹⁶⁷

Obviously, the WTO panel’s intention was to broaden the scope of the second step by extending the meaning of the term “normal”. This allowed for new, especially technical developments being considered as “normal”. Yet, it is argued here that such normative interpretation can, in some instances, also result in a more restrictive interpretation of the term “normal”: Since copyright was originally introduced as a right to be exercised by and against professionals⁹⁶⁸ and not end-users, one could argue that from a normative perspective, a “normal” exploitation only takes place in relation to professional users and not other end-users. This way, private use exceptions and limitations would never violate the second step of the three-step test.

At first glance, this result may appear out of touch with reality. It may also be conceived as one-sidedly disregarding valid pecuniary interest of rights holders. This is, however, not the case. The suggested approach does not entail that private use exceptions and limitations would in the future always pass the three-step test. Rather, it merely shifts the main focus of the examination about the permissibility of a private use exception and limitation under the three-step test, from the second to the third step. Such a shift is reasonable because unlike the second step, the third step contains, as concluded in chapter 4, an important proportionality test which requires that the (economic) harm

⁹⁶⁶ The WTO panel stated (United States – Section 110 (5) of the U.S. Copyright Act, document WT/DS160/R para. 6.166):

In our opinion, these definitions [of normal] appear to reflect two connotations: the first one appears to be of an empirical nature, i.e., what is regular, usual, typical or ordinary. The other one reflects a somewhat more normative, if not dynamic, approach, i.e., conforming to a type or standard. We do not feel compelled to pass a judgment on which one of these connotations could be more relevant. Based on Article 31 of the Vienna Convention, we will attempt to develop a harmonious interpretation which gives meaning and effect to both connotations of “normal”.

⁹⁶⁷ Ibid.

⁹⁶⁸ D Gervais, *supra* note 21 at 7.

caused to rights holders by a private use exception and limitation has to be reasonably related to the users' benefits.

7.5 Concluding remarks

This chapter has shown that some of the characteristics of digital technologies have the potential to disrupt the traditional balance of interests in the copyright arena. On the one hand, they make possible large-scale piracy of copyright protected material. On the other hand, they allow for the lock-up of copyright protected material by way of TPMs, regardless of established copyright balancing tools such as copyright exceptions and limitations. At the same time, digital technologies provide a wide range of benefits for both users and rights holders of copyright protected material. These include better access possibilities for users and improved dissemination opportunities for rights holders. Thus, risks and opportunities are fairly equally shared between the different interest groups.

The roughly equal distribution of risks and opportunities suggests that digital technologies do not, as some argue, disrupt the copyright balance so gravely and one-sidedly to the detriment of either users or rights holders that a radical reform or abolition of our concept of copyright protection is required. This does not, however mean that adjustments are unnecessary. On the contrary, it is obvious that, in many cases, the terminology currently used in national copyright laws and international copyright treaties and agreements is outdated. Often, new possibilities for the use of copyright protected material in the digital age are not sufficiently taken into account.

It is clear that something needs to be done about rampant copyright infringements over the Internet. While stricter and consistent third-party liability provisions may be part of a solution, it should not be overlooked that many problems in this area, such as inadequate enforcement and over-long durations of legal proceedings, are not

primarily problems of our substantive copyright laws. As for the problematic locking-up of copyright protected material by way of TPMs, it remains dubious why copyright exceptions and limitations, as accepted balancing tools, should not generally permit the circumvention of TPMs. This way, it will be possible to address concerns about the inability of TPMs to distinguish between certain permitted uses, such as fair use or fair dealing, and piracy.

It is important to recognise, however, that in the digital age certain important copyright exceptions and limitations are particularly imperilled. This is because digital technologies facilitate a range of new and unforeseen exploitation possibilities for rights holders, especially with end-users of copyright protected material. Hence, some existing copyright exceptions and limitations may nowadays violate the second step of the all-important three-step test. The second step of the test generally prohibits copyright exceptions and limitations that do conflict with the normal exploitation of a work. Obviously, this particularly affects copyright exceptions and limitations for private uses. It was argued in this chapter that this effect could not be anticipated by those who initially introduced the three-step test. A decision by the Swiss Supreme Court in 2007 may, as discussed in chapter 3, be of some help for users in that it expressly places the burden of proof with regard to the fulfilment of the requirements of the second step on the party invoking the test, ie usually the rights holder. Offering conclusive evidence in this respect may at times be difficult for the rights holder.

More fundamentally, this dissertation suggests a modified general interpretation of the second step of the three-step test. This modified interpretation would exclude private uses from the area of application of the second step and leave it to the third step of the test to determine whether a certain private use exception and limitation is permissible or not. This approach seems preferable because the third step contains, unlike the second step, an important proportionality test which requires that the (economic) harm caused to rights holders by a

private use exception and limitation has to be reasonably related to the users' benefits. Also, the prejudice required in the third step of the three-step test may not be unreasonable if the rights holder is, for instance, equitably remunerated through a system of non-voluntary licensing.⁹⁶⁹

It was one of the main objectives of this chapter to also stress that, in practice, neither the issue of piracy nor the problems related with the use of TPMs are as profound and serious as some commentators allege. In particular, the financial losses caused by online piracy are arguably not nearly as high as many statistics suggest, for the simple reason that not every pirated copy automatically displaces the sale of a legal version of the same product. This is especially true in developing countries where the legal version of copyright protected material is often either not available or unaffordable. TPMs, on the other hand, are increasingly cautiously employed by rights holders as a result of many complaints by customers. Therefore, most copyright protected materials remain unprotected in terms of TPMs. In addition, it needs to be acknowledged that hackers can eventually circumvent every technological protection measure, and once a protection system is hacked, all systems using the same code are vulnerable.

In light of the aforementioned, it appears the disadvantages caused by digital technologies for both rights holders and users are largely compensated by the advantages that digital technologies bring about.

For developing countries, digital technologies entail risks and opportunities that are similar to those faced generally by users of copyright protected material. This is because copyright is a right primarily held by corporations and individuals in developed countries. In addition, digital technologies are currently significantly less available in

⁹⁶⁹. United States – Section 110 (5) of the U.S. Copyright Act, document WT/DS160/R para. 6.229 FN 205. Prior to the WTO Panel decision, Ricketson had already taken this view (see S Ricketson *supra* note 353 at 9.8).

developing countries than in the developed world. This situation may, in the short term, result in a further widening of the knowledge gap between developing countries and developed countries. It was argued, however, that these negative consequences are only of transitional nature and do not jeopardise the positive overall impact of digital technologies for developing countries. Ultimately, an initial further widening of the knowledge gap will be far outweighed by the positive impacts of digital technologies for developing countries such as better access possibilities to knowledge and other copyright protected materials even in rural and remote areas. The current phenomenon is, therefore, arguably better described as a digital delay than a digital divide.

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Chapter 8: Summary, conclusions, recommendations

8.1. Summary

This thesis has addressed some of the most pressing challenges copyright law currently faces. Of particular concern were the challenges resulting from conflicting interests of developing and developed countries in this area as well as those challenges brought about by digital technologies. The leading question was how, in a dramatically changed world, to achieve and uphold a fair copyright balance which takes into account the interests and special needs of developing countries. The thesis placed special emphasis on the international aspects of copyright protection because multilateral treaties and agreements prescribe minimum standards of copyright protection which domestic legislatures are bound to follow. It was a primary concern of this thesis to show how the often vaguely-phrased international regulations have been transposed into selected national laws. This was done to point to the leeway that states have with regard to copyright exceptions and limitations. The main observations and findings of this thesis can be summarised as follows:

The thesis first observed that copyright protection is a relatively new phenomenon. The world's first fully-fledged copyright statute entered into force in England a mere three hundred years ago in 1710. Furthermore, the thesis noted that there are two main rationales for copyright protection. These are the utilitarian concept, which focuses on social benefit and welfare considerations, and the natural law concept, which argues that creators should have an inherent ownership right in their works. The thesis observed that the natural law approach aims at achieving the highest protection possible while the utilitarian approach aims towards the lowest protection necessary. The importance of being aware of the differing rationales for copyright protection was stressed because different rationales may provoke rather diverse stances

towards certain copyright-related problems. At the same time, however, the thesis cautioned against overstating the differences. This is because the copyright treaties and agreements, although based on different rationales, have brought about a harmonisation of national laws that were predominantly built upon one rationale or the other. The thesis also submitted that both the utilitarian concept and the natural law rationale have significant dogmatic and practical deficiencies.

Most importantly, it was stated at the beginning of this thesis that the Western concept of copyright protection conflicts with traditions and beliefs in many regions of the world. This fact is often overlooked when the attempt is made to explain high occurrences of copyright infringement in certain regions of the world, such as China. Essentially, it was colonisation that spread copyright protection regimes into non-Western regions. And it is now economic pressure applied by Western governments rather than a common belief in the underlying principles that makes the Western concept of copyright a universal one.

These general observations were followed by an in-depth examination of what was singled out as the most important tool for lawmakers for achieving a fair copyright balance and for realising other crucial policy goals: copyright exceptions and limitations. The thesis noted that limitations and exceptions in predominantly natural law based copyright regimes are usually less far-reaching or broad than exceptions and limitations in countries and regions with a utilitarian tradition of copyright protection. Thereafter, the thesis observed that the international treaties and agreements to which a country is a party, greatly influence and considerably restrict the scope of national copyright exceptions and limitations. The thesis, therefore, introduced the most relevant international copyright treaties and agreements. These are the Berne Convention for the Protection of Literary and Artistic Works (Berne Convention) of 1886, the Universal Copyright Convention (UCC) of 1952, the Agreement on Trade-related Aspects of Intellectual Property Rights (TRIPS) of 1994, and the WIPO Copyright Treaty (WCT) of 1996. Thereafter, the thesis specified the express copyright exceptions and

limitations contained in these international instruments. It was submitted that the so-called three-step test now sets a common international standard against which copyright exceptions and limitations are to be tested. The three-step test permits copyright exceptions and limitations:

- (1) in certain special cases;
- (2) that do not conflict with the normal exploitation of the work; and
- (3) do not unreasonably prejudice the legitimate interests of the author / rights holder.

Both the area of application of the three-step test and the precise meaning of each step are disputed. As regards the area of application, the thesis argued that the three-step test applies to all copyright exceptions and limitations. As to the meaning of the three steps, a WTO Dispute Resolution Panel decision of 2000, although it deals with the test mainly from an economic perspective, is a valuable practical source for guidance. In essence, the WTO panel held that, under the three-step test, copyright exceptions and limitations are permissible if they (1) are not unduly vague, (2) do not deprive the right holders of tangible income in areas in which right holders normally obtain such income from copyright, and (3) do not harm the interests of the right holders in a disproportional way. The findings of the WTO panel are, however, not uncontested, and the thesis addressed some of the most valid objections, including the fact that the WTO's economic reasoning undervalues other, non-economic public policy considerations.

After analysing the international legal framework concerning copyright exceptions and limitations, the thesis examined in detail how selected countries and regions (Europe, Germany, the UK, the U.S., Australia and South Africa) have domestically implemented the fairly vague international requirements. The thesis observed that in essence three approaches can be distinguished in copyright laws around the

world with regard to copyright exceptions and limitations: a 'general clause' approach, a 'specific provisions' approach and a so-called 'fair dealing approach'.

The 'general clause' approach refers to the U.S.-style fair use doctrine. The 'specific provisions' approach, as found, for example, in the European Copyright Directive and in Germany's domestic Copyright Act, is characterised by a well-defined and narrowly worded list of copyright exceptions and limitations. The fair dealing approach, followed for example in Australia, the UK and South Africa, generally allows the use of a protected work for specific purposes.

The thesis concluded that the internationally recognised three-step test favours the specific provisions approach because broadly phrased exceptions and limitations are more likely to violate the requirements in the first step of the three-step test.

Subsequently, the thesis analysed how a fair copyright balance, in general, and copyright exceptions and limitations, in particular, applied to a developing country. The thesis noted that, in many areas, economic and developmental differences between countries and regions result in strongly varying policy preferences. In addition, there is a huge gap in knowledge material production between developing countries and developed countries which causes an immense royalty flow from developing countries into the developed world. In light of the vast differences in knowledge material production, combined with a developing country's primary developmental policy objective of providing unhindered and affordable access to knowledge material to its citizens, the thesis submitted that developing countries should strive to adopt less stringent copyright protection regimes.

The thesis exposed views to the contrary as unfounded in theory and being contradictory to the historical experience of other countries such as the United States. The thesis suggested that the preferable way for realising a less stringent copyright regime is to make generous use of existing copyright flexibilities - of which copyright

exceptions and limitations are the most important ones. A brief analysis of previous efforts by the international community to accommodate developmental needs of developing countries revealed that the international community shares the view that less stringent copyright protection is normally in the interest of developing countries.

The thesis also briefly addressed the controversial issue of traditional knowledge. It presented the most relevant examples of how the issue of traditional knowledge has been addressed by the international community so far. In this context, the thesis generally cautioned against recent ambitions in South Africa and other countries to protect traditional knowledge by way of conventional copyright law.

In light of the essential finding that, from a developing country perspective, generous use should be made of existing copyright flexibilities, the thesis then examined copyright flexibilities other than copyright exceptions and limitations. These flexibilities pertain in particular to the scope of copyright protection and the duration of copyright protection. It was suggested that the scope and the duration of copyright protection should, from a developing country point of view, be as narrow and short respectively as possible.

In this context, the thesis also examined the important issue of parallel importing. After examining the legal implications of parallel importing, it provided a comparative overview of the law on this topic for the U.S., Europe, Australia and South Africa. Ultimately, the thesis submitted that a general ban of parallel imports is not in the interests of developing countries since parallel importation is an adequate tool for reducing prices of and increase access to copyright protected materials.

One of the main concerns of the thesis was to address the impact of digital technologies on the balance copyright law strives to strike between the interests of different stakeholders. Technological developments challenge some of the foundations upon which copyright protection systems were originally built. For instance, copyright was originally never intended to be applied towards end-users. Instead, it

was introduced as a right to be exercised by and against professionals. Moreover, copyright law was originally introduced for protecting tangible media. It is thus questionable if and to what extent it can be applied satisfactorily to media distributed through an intangible network such as the Internet. Digital technologies are also of particular interest for developing countries because these technologies bring about both great chances and considerable risks for access to copyright protected knowledge material.

The thesis discussed the digital divide between developed and developing countries. It noted that solutions for resolving the digital divide are not primarily copyright law-related. They can be found, rather, in target-oriented infrastructural policy and related budget decisions. The thesis also submitted that one should not overstate the negative effects of digital technologies for developing countries. While the knowledge gap has initially widened - and is arguably going to widen even further in the near future - these effects will be far outweighed by the positive impact of these technologies for developing countries in the long run. The thesis, therefore, suggested characterising the current phenomenon as a digital delay rather than a digital divide.

The thesis then assessed what precisely has changed in the digital age. It submitted that in their entirety, digital technologies have the potential for disrupting the copyright system. This is because digital technologies affect the most important exclusive rights of rights holders. These rights include the reproduction right, the adaptation right, the making available right, the distribution right and, if protected by the national law in question, moral rights. Having said this, the thesis pointed out that the changes brought about by digital technologies do not one-sidedly benefit or discriminate against either creators or users of copyright protected material. Rather, digital technologies bring many advantages and disadvantages for each group. The thesis looked in detail at the main disadvantages for users and creators respectively. These are, for creators, online copyright infringement through illegal P2P

file-sharing activities. For users they are the potential lock-up of information through TPMs.

The thesis addressed the highly controversial issue regarding the financial impact of online copyright infringements. It pointed to the most relevant empirical studies and concluded that while it is, after all, likely that illegal P2P activity does in fact displace sales, the related financial losses are not as high as copyright holders often allege. This is so because many people, particularly in developing countries, can only afford the often much cheaper illegal version of a work and would, therefore, never purchase the more expensive, legitimate work. Furthermore, in many areas, especially in developing countries, no legitimate version is available. The thesis also noted that piracy, as a market-orientated phenomenon, usually occurs in relation to already popular works. This assertion disproves the often produced allegation that piracy deprives needy creators of their income.

On the potential lock-up of information by using TPMs, the thesis firstly stressed that the problem should not be exaggerated. From a factual point of view, the use of TPMs is, as a result of significant user protests, on the decline. The legal examination of the issue revealed, however, that nowadays three layers of protection exist for copyright protected works. The first layer is the legal copyright protection for the content itself, the second layer is the factual protection of the content with TPMs, and the third layer is the legal protection of TPMs.

The international framework relating to the third layer of protection is broad. For that reason the thesis described the legal implementation of these requirements in selected countries.

In the end, the thesis argued that the widespread use of TPMs, combined with an additional legal protection of such measures, potentially disrupts the delicate balance of interests in the copyright arena. It makes it impossible to use copyright protected material, even for purposes which are usually exempt under long-established copyright exceptions and limitations, without the automated authorisation of the

rights holder. However, these copyright exceptions and limitations are crucial for a fair copyright balance. The potentially adverse impact of TPMs for long-established copyright exceptions and limitations is of particular concern for developing countries because some of these exceptions and limitations play a significant role for achieving developmental goals.

The thesis concluded that at least some of the rights granted to copyright holders in modern copyright laws would not have been phrased and awarded the same way if lawmakers had foreseen that users might not be able to make use of widely accepted copyright exceptions and limitations, such as fair use, fair dealing, and certain private uses.

The thesis then identified the question of whether the adverse impact of TPMs for copyright exceptions and limitations should be accepted because of the recent changes in technology as part of the controversially discussed question concerning the general future application of copyright exceptions and limitations in the digital age.

The agreed statement to Article 10 of the WCT suggests that lawmakers believe that a radical reconfiguration of the previous system of copyright exceptions is not required in the digital age.

In addition, the thesis submitted that the technologically neutrally formulated international three-step test is still the primary legal standard against which copyright exceptions and limitations are to be tested. This is the case both in what is left of the analogue world and in the digital age. Whether the three-step test itself should, however, be rephrased or, at least, be reinterpreted is yet another question. The thesis specifically discussed this issue for private copying exceptions and limitations. In the digital age, private use exceptions and limitations are, as a result of new exploitation possibilities, potentially in conflict with the second step of the three-step test. This step requires that copyright exceptions and limitations do not conflict with the normal exploitation of a work.

In light of the socio-economic importance of broad copyright exceptions and limitations for private uses, the thesis proposed an amendment of the second step three-step. However, due to the fact that international consensus in this respect is difficult to achieve, the thesis submitted that a similar result could be reached by simply applying a modified interpretation of the second step of the three-step test. Effectively, the thesis suggested an interpretation that would shift the focus of the examination of private use exceptions and limitations away from the second step to the third step of the three-step test. Such a shift is advisable because unlike the second step, the third step contains an important proportionality test which requires the (economic) harm caused to rights holders by a private use exception and limitation to be reasonably related to the users' benefits.

8.2. Conclusions

The analysis in this thesis yields several important conclusions. These conclusions can be categorised into two main groups: (1) conclusions which challenge the current concept of copyright protection as such, and (2) copyright-internal conclusions which aim at finding solutions within the current system for some of the problems discussed in this thesis.

For a start, it is clear that the present general concept of copyright protection is not as sacrosanct and set in stone as is commonly believed. The two main rationales for copyright protection are in one way or the other questionable.

The natural law concept is based on a romantic and often obsolete conception of the creative process as carried out by a single, identifiable and independent author. The utilitarian concept, on the other hand, is vulnerable because some of the world's greatest creative works were created long before any copyright protection regimes existed. In addition, the utilitarian concept, by overemphasising the incentivising character of financial rewards for creative activities, undervalues the

influence of alternative stimulating factors, such as the wish to educate others, to communicate and discuss ideas, or to gain reputation.

The lack of a persuasive theoretical underpinning for copyright protection is accompanied by an increasing awareness that copyright protection, as a product of Western culture, ignores developmental considerations in non-Western societies and is incompatible with many cultural beliefs around the world. In this light, it does not come as a surprise that strong copyright protection is viewed most sceptically in countries that are not considered to be Western (such as China, India, Russia) or at least not core Western (such as Brazil and South Africa). However, the combined population of China, Russia and India alone accounts for roughly 40 per cent of the world's population, and countries such as Brazil and South Africa are populous and leading nations on their respective continents.

One would expect these factors would result in a more fundamental challenge to the current concept of copyright protection. Yet, the economic power of the few countries that benefit from strong copyright protection regimes, the developed countries in Europe and North America, has so far impeded such general challenges. Instead, there have been isolated debates on selected copyright issues. Most of these were uncritical towards the present system as such. Effectively, ever stronger copyright protection regimes have been put in place during the past decades, both internationally and nationally.

There are signs, however, that this is changing. On the one hand, the influence of certain key developing countries (especially South Africa, China, India and Brazil) has significantly increased in recent years as a result of their strong economic performances. As a result, demands by developed countries for increased copyright protection, which would have been satisfied by developing countries without batting an eye a few years ago to avert trade reprisals, are not so readily met. The refusal of South Africa and its co-members of the Southern African Customs Union (SACU) to agree, mainly for IP-related matters, on a free trade

agreement with the U.S. is but one example for such a newly emerged confidence.

On the other hand, an increasing number of legal commentators even in the developed world argue that anywhere in the world, too much protectionism for creative goods is a significant threat to human culture as a whole. This is because our current copyright regimes have certainly led to a concentration of the rights in much of the world's more recent knowledge material in the hands of a few profit-orientated, multinational corporations. As a result of their business model, most of these corporations are still naturally reluctant to allow a remuneration-free use of their material, regardless of the intended use. Culture, however, is created by individuals who, by building on previous findings and materials of others, create new material. Today, this is truer than ever as digital technologies and the Internet are changing previously passive users into active creators of new material. While new technologies facilitate the creation of creative material at a much faster rate than ever before, the restrictive stance of corporate and other rights holders on any free use of their material inevitably hampers the dissemination and use of copyright protected works.

In response to these concerns, numerous movements have emerged worldwide and attracted considerable attention. An important example is the so-called access to knowledge (A2K) movement. Despite having different approaches, all these movements share the common goal of making creative material more accessible to enable the creation of new works which are based on older works. Yet, in spite of being critical of the current system of copyright protection, the solutions proposed by most social movements do not challenge the concept of copyright protection as such. Rather, most solutions use current copyright laws and strive to facilitate access possibilities with respect to copyright protected material. Creative Commons, for instance, simply offers a set of access-enabling licences which creators can attach to their works.

In the long run, a more fundamental scrutiny of the entire concept of copyright protection is inevitable. Dogmatically unsound laws that conflict with the beliefs and interests of the majority and serve, at the same time, the (economic) interests of a minority, are doomed to fail. South Africa's former apartheid laws are a striking example. This is not to say that rewarding creative efforts and protecting the results against unfair exploitation by others is fundamentally wrong. On the contrary, it is more likely than not that, without some protection, less material would be produced – to the detriment of our cultural development.

This thesis' principal aim is not to propose alternative protection regimes for creative works. It is clear, however, that substantial intervention is necessary because the current system

- (1) is essentially based on unsound and to some extent obsolete rationales;
- (2) is in conflict with many traditions and beliefs in populous and increasingly important regions of the world;
- (3) serves, in many respects, the interests of a small minority;
- (4) often protects corporate interests rather than promotes creative activity; and
- (5) is often out of touch with everyday realities and provides inadequate answers for many questions posed by the changes brought about by digital technologies.

One major conclusion that can be drawn from the analysis in this thesis is that even if the traditional concept of copyright protection is accepted, different countries require different levels of protection to best serve their specific needs. As a result, a copyright regime which safeguards a fair copyright balance in one country is not necessarily suitable for safeguarding a fair copyright balance in another country. In

particular, the thesis has shown that developing countries should strive to adopt less stringent copyright protection regimes to achieve their respective developmental objectives and to close developmental gaps. Most developed countries, on the other hand, are net exporters of creative material and will benefit the most from stricter copyright protection systems. For that reason, the one-size-fits-all approach towards copyright protection, even in the shape of a one-minimum-size imposed by the relevant international copyright treaties and agreements, is questionable. This is because the minimum standards provided for under the relevant international treaties and agreements exceed the level of protection needed by developing countries.

Having said this, developments in the area of copyright law during the past decades indicate that, in the short and medium term, neither a fundamental change in strategies by the international community in the prescribed manner nor a renunciation of the international one-(minimum)-size-fits-all approach can be expected. It was, therefore, the main concern of this thesis to determine, how a fair copyright balance can be achieved under the current international copyright regime. As repeatedly mentioned, the thesis identified the possibility for lawmakers to introduce copyright exceptions and limitations as the single most important balancing tool. In this context, the three-step test was recognised as a common international standard against which these domestic copyright exceptions and limitations have to be tested. It follows from this that developing countries must, while striving to include a multitude of copyright exceptions and limitations into their copyright laws, always take note of the requirements of the three-step test when introducing new exceptions and limitations.

Because of the lack of interpretations by other international bodies, the WTO dispute resolution panel decision from the year 2000 currently provides the only practical source of guidance for the meaning of the three steps. However, if the interpretation by the WTO panel is used as a source of guidance - as suggested here - it should not be overlooked that this panel, by interpreting the TRIPS three-step test,

focused on economic considerations. Considerations outside the economic sphere may, therefore, have played too small a role. Furthermore, it should be noted that the thesis suggested an amendment, or reinterpretation, of the three-step itself to adjust the test to the changes brought about by digital technologies and other recent technological developments.

As mentioned in this chapter, lawmakers follow three opposing approaches towards copyright exceptions and limitations: the specific provisions approach, the fair dealing approach and the U.S.-style fair use approach. At first glance, the general clause appears preferable since it offers greater flexibility in comparison to the first and the second approach. Such flexibility is, without doubt, useful in times where rapid technological developments facilitate, among other things, new uses which were not anticipated when the law was drafted.

This flexibility comes, however, at a high price. The vagueness of open-ended fair use provisions results in unacceptable legal uncertainty. Vagueness obviously allows different interpretations. If a provision can, by default, be interpreted in two or more ways, it becomes almost inevitable that courts will have to become involved in deciding cases concerning fair use. While this may be intended to attain fair decisions on a case-by-case basis, it can safely be assumed that nowadays many users will shy away from time-consuming and costly litigation and not be willing to test the limits of fair use. This will mean that a doctrine designed to facilitate the use of copyright material actually prevents uses in many cases. It is, therefore, problematic to make such a doctrine a country's legislative backbone for copyright exceptions and limitations. Moreover, it must not be overlooked that a possible conflict exists between the broad wording of the fair use doctrine and the first step of the three-step test. The first step of the three-step test requires that exceptions and limitations must be confined to certain special cases.

Inflexible specific provisions appear, however, to be an equally poor alternative. It became obvious in recent years that, in times of rapid technological developments, fixed lists of copyright exceptions and limitations are often inappropriate. For example, even in developed countries many now-popular activities such as time-shifting, space-shifting and reverse-engineering were, if at all, only addressed after considerable delay. This is because legislative amendment procedures could not keep up with the pace of development. This is likely to be even more true in developing countries. As a result, everyday activities such as copying music from legitimately purchased CDs onto a portable MP3 player remain, in principle, illegal in many countries.

The following solution is suggested which combines the advantages of the three approaches towards copyright exceptions and limitations. At the same time, it minimises the disadvantages the thesis has described. The proposed solution is that to achieve the highest possible degree of legal certainty, developing countries should, on the one hand, strive to include as many (inflexible) specific copyright exceptions and limitations as possible into their respective copyright laws. In certain areas, however, for instance for study and research purposes, more flexible fair dealing provisions may be of use. In addition, a fair use provision should be included as a subordinate catchall clause which only applies when no other copyright exception and limitation is available. The main application of this provision would be in areas where lawmakers have not yet been able to adjust the law to changed circumstances and technological realities, for instance by way of introducing new or amending existing copyright exceptions and limitations. Wherever possible, the adoption of clarifying, non-binding guidelines is advised to improve legal clarity and to minimise the conflict with the three-step test. Such guidelines can easier and faster be updated than legislation or regulations. They would provide a safe harbour and might fall under what in Commonwealth countries is known as quasi-legislation.

Despite the reservations expressed in this thesis against the multilateral one-size-fits-all approach towards copyright protection, it is suggested that, because this approach is currently followed, an international instrument stipulating minimum standards for copyright exceptions and limitations should, for reasons of legal certainty, be adopted. Such an instrument would be of particular help for developing countries, whose copyright laws are, in respect to copyright exceptions and limitations, in urgent need of reform. At the same time, treaty provisions for minimum exceptions and limitations, especially for educational purposes, could help in implementing WIPO's Development Agenda.⁹⁷⁰

Lastly, this thesis has also shown that digital technologies do not one-sidedly benefit either users or creators of copyright protected materials. This conclusion, however, must not be interpreted as a denial of a need for intervention. Without a doubt, digital technologies challenge the present-day copyright system in a way that is without precedent. The sudden and originally unintended application of copyright law to masses of end-users, the uncertain future of private use exceptions and limitations in the digital age, rampant piracy and the lock-up of content by way of TPMs are but a few of the many copyright issues raised by the advent of digital technologies and information networks.

Having said this, the fact that recent technical developments do not one-sidedly benefit either users or copyright holders, calls for solutions which go beyond ever-stronger copyright protection in the digital age. A thorough examination of the changes brought about by digital technologies highlights that the clear traditional distinction between creators of creative materials on the one hand and users of such material on the other has to some extent become obsolete. This is

⁹⁷⁰. A Rens *Implementing the WIPO Development Agenda: treaty provisions on minimum exceptions and limitations for education* (2008) Shuttleworth Foundation Working Paper on Intellectual Property, at 10, available at http://learn.creativecommons.org/wp-content/uploads/2008/11/shuttleworthfoundation_exceptions_working_paper_october_2008.pdf [accessed on 25 January 2009]

because digital technologies have turned a great number of formerly passive users into active producers and publishers of digital media. This observation leads to an interesting conclusion: Often the real copyright conflicts are nowadays not between creators and users but between users (including potential creators) on the one hand and rights holders other than creators, for example (multinational) publishers, on the other. New technologies often jeopardise the pre-digital business models of such rights holders other than creators. As a result, once-powerful intermediaries are increasingly fighting for their *raison d'être*. However, instead of adjusting their old business models to the changed circumstances, it increasingly appears that many of the main beneficiaries of the old system have chosen to fight the new circumstances. In spite of claims to the contrary, these fights are, therefore, chiefly fought in sheer self-interest and not in representation of, and for the benefit of, the actual creators of the works.

8.3. Recommendations

The analysis carried out in this thesis yields several recommendations for future legislative and policy efforts in developing countries. Essentially, these recommendations are based on three key conclusions:

- (1) the current general concept of copyright protection is disputable;
- (2) the extent to which copyright protection is afforded in a particular country should be a policy issue rather than just a legal issue; and
- (3) high standards of copyright protection regimes are usually not benefiting developing countries.

Based on these conclusions, this thesis recommends that developing countries follow a two-tier strategy. On the one hand, they should challenge the (Western) concept of copyright protection more vigorously at the international level. In particular, they should do this at international organisations such as WIPO and the WTO. This is a long-term undertaking which will doubtlessly be fiercely opposed by some of the most powerful developed countries. This first tier of the strategy will also require being able to offer alternative models for sustainable copyright protection. Only a few years ago such a strategy would have been thought altogether futile. However, for reasons mentioned in this thesis, the influence of certain key developing countries, including South Africa, has increased significantly in recent years. As a result, well-founded objections and criticism from these countries are nowadays more likely to be taken seriously.

This would be more likely to happen if key developing countries managed to join forces and speak with one voice. Regular consultations among these countries about copyright-related matters are as crucial a prerequisite for such a course of action as developing more expertise in this area. While improvements in both areas are noticeable, much more needs to be done. This thesis, therefore, recommends that developing countries should

- (1) establish an intergovernmental committee on copyright and related rights which
 - (a) is comprised of government representatives from key developing countries, most notably South Africa, Brazil, India, Russia and China; and
 - (b) meets regularly;
- (2) increase expertise through education and research activity, for example by making copyright law a compulsory subject for

undergraduate law students and by establishing well-funded intellectual property law research units.

The second tier of the strategy focuses on changes and improvements for the benefit of developing countries such as South Africa without challenging the current concept of copyright protection as such. The second tier may thus be called a copyright-internal approach. This approach can, in turn, be separated into two sub-strategies: a medium-term tactic and a short-term tactic. The medium-term tactic involves advocating for more substantial changes to the current legal framework of copyright protection. The short-term tactic essentially aims at making use of existing copyright flexibilities as well as making minor legal adjustments for which an international consensus can be reached more easily.

It is recommended that, as part of the medium-term tactic, the important issues of over-long and overbroad copyright protection as well as the possible introduction of a renewal requirement for copyright protection should be addressed at the international level. Countries with similar developmental interests should stress the view that even the current minimum duration of copyright protection in the relevant international copyright treaties and agreements considerably exceeds the needs for protection of average creators – at least as far as the commercial exploitation of their works is concerned.

This argument should be supported by as much empirical evidence as possible. It is clear, however, that, because of the high social costs for developing countries caused by the over-long copyright protection, these protection terms are no longer acceptable.

As to the issue of a renewal requirement for copyright protection, developing countries should stress that because few copyright holders benefit commercially from over-long copyright protection terms, a renewal requirement represents an adequate and fair means to release vast numbers of works earlier into the public domain

for the good of society at large. Again, this needs to be supported by empirical evidence. A few years back, such pleas from developing countries would have been ignored or rejected on the grounds of the country's obligations under the relevant international treaties and agreements to which developing countries are party. However, the increase in influence of some developing countries makes such a superficial response less likely.

If developed countries were aware of more radical ambitions of developing countries concerning the concept of copyright protection as described under the first tier of this two-tier strategy, they may be willing to accept a significant term reduction and/ or the introduction of a renewal requirement as a compromise. In any event, regular consultations among key developing countries as well as the joining of forces to speak with one voice on these matters would certainly increase the prospect of success.

The short-term tactic essentially aims at using existing copyright flexibilities as well as making minor legal adjustments. This thesis repeatedly suggested that the main focus should be on copyright exceptions and limitations as the most important tool for lawmakers to achieve a fair copyright balance and for realising other important policy goals. Ample use should be made of three-step test-compliant copyright exceptions and limitations to counter some of the derogatory effects of the international one-(minimum)-size-fits-all approach towards copyright protection.

Current plans in many developing countries, including South Africa, to revise their copyright laws present an opportunity to overhaul the entire domestic systems of copyright exceptions and limitations. Isolated adjustments are typically not enough because the current provisions are often outdated and unnecessarily vague. In South Africa's case, copyright law is, in addition, still markedly predicated on the false assertion by the former apartheid government that South Africa is not a developing country.

Based on the findings in this thesis, the following recommendations can be made for a revision of copyright exceptions and limitations in developing countries:

Copyright laws should in the future contain as comprehensive a list of specific copyright exceptions and limitations as possible. In some areas, for instance for study and research purposes, more flexible fair dealing provisions may be of use. In addition, a fair use provision (preferably accompanied by clarifying guidelines) should be included as a subordinate catchall clause. The following twenty-one copyright exceptions and limitations as contained in Art 5 of the Copyright Directive are a useful starting point for legislators in developing countries:

- (1) Transient or incidental temporary reproductions which are integral or essential parts of a technological process;
- (2) reproductions on paper (or similar media) carried out by the use of photographic or similar techniques;
- (3) reproductions for non-commercial private uses;
- (4) reproductions made by public libraries, educational establishments, museums or certain archives;
- (5) ephemeral recordings by broadcasting organisations and archiving of such recordings;
- (6) reproduction of broadcasts by social, non-commercial institutions such as hospitals and prisons;
- (7) illustrations for teaching or scientific research;
- (8) non-commercial uses for the benefit of disabled people;
- (9) reporting of current events;
- (10) quotations for purposes such as criticism or review;
- (11) uses for the purposes of public security and for the benefit of administrative, parliamentary or judicial proceedings;
- (12) uses of political speeches as well as extracts of public lectures etc;
- (13) uses in the course of religious celebrations or official celebrations organised by a public authority;
- (14) uses of works permanently located in public places;
- (15) incidental inclusions;
- (16) promotion of an public exhibition or sale of artistic works;

- (17) uses for caricature, parody or pastiche;
- (18) uses in connection with the demonstration or repair of equipment;
- (19) uses of models, drawings or plans of a building for the purpose of reconstructing a building;
- (20) communication or making available of works contained in the collections of public libraries, educational establishments, museums and certain archives by means of terminals situated on the premises of such establishments for the purpose of research or private study;
- (21) analogue uses of minor importance which are in compliance with existing domestic exceptions and limitations.

Model language for these exceptions and limitations can be found in the domestic laws of EU member states. For some of the above uses, such as private uses, it may be worth considering introducing levies to be paid to the copyright holders. Model language for fair dealing provisions may be found, for instance, in the UK CDPA or the Australian Copyright Act.

It is further recommended to introduce specific exceptions and limitations for widespread new (private) uses. In particular, private use exceptions and limitations should apply to activities such as time-shifting, format-shifting and space-shifting, and in relation to online materials. Format shifting appears particularly important for consumers and for the work of heritage institutions such as libraries and archives. The Australian Copyright Act contains useful model language for time-shifting, format-shifting and space-shifting exceptions and limitations in its sections 43C, 47J, 110AA; 111; 109A.

Given the heightened demand of developing countries for education to overcome developmental lags, emphasis must be on educational copyright exceptions and limitations. These must address key issues such as distance learning and the distribution of academic course packs. The U.S. Technology, Education and Copyright Harmonization (TEACH) Act of 2002 specifically addresses the issue of distance education and thus, provides a useful starting point for such legislation. However, local needs must be taken into account when

drafting copyright exceptions and limitations for educational purposes in developing countries. In South Africa, for example, it is recommended that because the South African Constitution recognises eleven official languages, express copyright exceptions and limitations for translations for educational purposes should be adopted.

In addition, copyright exceptions and limitations should be introduced to specifically allow transformative uses. This is because digital tinkering, sampling and remixing of copyright protected material has doubtlessly become one of the main sources for innovation, progress and, in more general terms, culture-creation. Lastly, specific exceptions and limitations are necessary to counter the problem of orphan works, provided a reasonable search for the copyright holder was carried out. It is, however, essential that there be clear guidance as to what constitutes a “reasonable search” in this context.

It is further recommended that developing countries, as part of the second tier of the proposed two-tier strategy, actively promote the drafting and adoption of a multilateral instrument on minimum copyright exceptions and limitations. In addition to being of help to national legislators, such an instrument would bring about some much needed clarifications regarding the issue of copyright exceptions and limitations. An important example would be whether a contractual term could override copyright exceptions and limitations.

To ensure that copyright exceptions and limitations can be used as intended, it is also recommended to avoid implementing more legal protection for technological protection measures than is prescribed by the WIPO Internet treaties. In particular, the protection of TPMs which restrict acts that are permitted by law, for example by copyright exceptions or limitations such as fair dealing, is not prescribed under these treaties. At the very least, copyright exceptions and limitations should be recognised as defences to anti-circumvention provisions.

Lastly, this thesis recommends that existing bans on parallel importation of copyright protected goods should be lifted. Parallel

importation can significantly help to reduce prices of and increase access to copyright protected material in developing countries.

This thesis aimed to address the most pressing challenges for a fair copyright balance from the perspective of developing countries. The thesis developed a basic two-tier strategy and made, based on the many conclusions it drew, various specific, practical recommendations. A major concern was, however, to also inspire a discussion that goes beyond the mere legal aspects of the issue by posing more fundamental challenges to the concept of copyright protection as we know it. This was done because it is only once we admit that copyright protection as such is not sacrosanct and set in stone, that we can go back to the drawing board and come up with a fair and balanced system that represents the interests of the majority while also protecting legitimate interests of minority groups.

So far, developed countries as the main beneficiaries of the current copyright protection regime successfully rejected fundamental challenges and any far-reaching adjustments to the current regime by exercising their economic power. However, over the last decades, the balance of powers has started to shift. As a result, the influence of developing countries such as South Africa, Brazil, China, India and Russia has increased considerably. Hence, concerted efforts by these countries aiming at more substantial copyright law changes can, in the long run, no longer be ignored. The time is ripe for a fundamental reassessment of the present system of copyright protection. It seems, though, that word of this has not yet reached many developing countries.

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