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Protection of technological  
measures following the imple-  
mentation of the Infosoc Direc-  
tive in France and Sweden

- Emphasis on the exception for private  
copying

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20 points

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# Summary

The emergence of the Internet has created a new legal climate where borders have become increasingly diffused. A risk of unlawful use of material distributed on the Internet is more than a threat; today it is reality. The range of unlawful material is immense and copyright holders are missing out on important revenues. Consequently, the Directive on Copyright in the Information Society of 22 May 2001 discusses the way certain technological measures shall receive legal protection and thus any unlawful circumvention of such measures shall be sanctioned. The balance of interest between right holders of protected works and users of such works is a fiercely debated issue. A distortion in the balance is inevitable in the digital environment, where unlawful access to protected works has increased enormously using networks like peer-to-peer. In order to regain the balance between the two interest groups, a protection of technological measures, illegalising circumvention and preparatory acts to circumvention of such measures, was implemented in the Infosoc Directive. By transposing the Directive, Sweden and France joined the harmonised European position concerning technological measures. The ambiguity of the Directive results in divergences in the implementation process. Whereas Sweden chose not to protect access control after initial access, i.e. after a work has been lawfully acquired, France offers a protection for all access controls, thus making all circumvention of technological protection measures illegal. The possibility of making copies identical to the original creates a window of opportunity for extensive copying for private use. This risk actualises the discussion of where to set the boundaries when copies of a great commercial importance are reproduced. Some commentators consider a legal protection for technological protection measures a necessity in order to comply with the new digital climate. Others believe that the actual control of the right holder is strengthened through the application of technological protection measures, and thus a distortion of the balance of interest between right holders and users is at hand. At the creation of the Infosoc Directive, the question of private copying did not cause many polemics since it was a facultative exception left to the appreciation of the Member States. The exception was already present in French and Swedish law, but has been somewhat modified following the implementation of the Infosoc Directive. Whilst Sweden decided to exempt the exception for private copying in the presence of a technological protection measure, France inaugurated a Regulatory Authority, having as one of its purposes the guaranteeing of the benefit from the private copy exception. Thus, the future of the private copy exception in a digital environment is dubious.

# Preface

I would like to thank lawyers Annika Arvidsson and Ulrika Séguin in Paris for their support throughout the writing of this thesis.

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# Abbreviations

<b>CA</b>	Cour d'Appel
<b>C. Cass</b>	Cour de Cassation
<b>CD</b>	Compact Disc
<b>CD-ROM</b>	Compact Disc Read Only Memory
<b>Comm. com. électr</b>	Communication commerce électronique
<b>Cons. Const.</b>	Conseil constitutionnel
<b>CP</b>	Copie Prohibée
<b>CSS</b>	Content Scramble System
<b>DADVSI</b>	Droit d'Auteur et Droits Voisins dans la Société de l'Information
<b>DMCA</b>	Digital Millennium Copyright Act
<b>DRM</b>	Digital Rights Management
<b>DVD</b>	Digital Versatile Disc
<b>ECJ</b>	European Court of Justice
<b>EIPR</b>	European Intellectual Property Review
<b>EU</b>	European Union
<b>FIPR</b>	Foundation for Information Policy Research
<b>Infosoc Directive</b>	Directive 01/29/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
<b>JCP E</b>	La Semaine Juridique – Entreprise et Affaires
<b>JCP G</b>	La Semaine Juridique – Édition Générale
<b>NIR</b>	Nordiskt Immateriellt Rättsskydd
<b>NJA</b>	Nytt Juridiskt Arkiv
<b>P2P</b>	Peer-to-Peer
<b>RIDA</b>	Revue International du Droit d'Auteur
<b>SCMS</b>	Serial Copy Management System
<b>TGI</b>	Tribunal de Grande Instance
<b>TPM</b>	Technological Protection Measure
<b>TRIPS</b>	Trade-Related Aspects of Intellectual Property Rights
<b>URL</b>	Upphovsrättslagen (The Swedish Copyright Act)
<b>VCR</b>	Video Cassette Recorder
<b>VHS</b>	Video Home System
<b>WCT</b>	WIPO Copyright Treaty
<b>WPPT</b>	WIPO Performances and Phonograms Treaty
<b>WIPO</b>	World Intellectual Property Organisation

# 1 Introduction

## 1.1 Background

Since its birth, copyright has never been so powerful nor been the centre of such important financial interests. The arrival of the digital world brought change to copyright rules, as well as the creation of a new vocabulary. Digitalise, copy, download, share, access, distribute, peer-to-peer, are words today belonging to the language of the Internet. Moreover, they are not only words, but also actions that may damage the right holders' protection of their works. Copyright provides the author or creator with exclusive rights presenting them with a predetermined level of control to prevent against unauthorised copying of their work and remuneration from others for use of the work.

“Technological development has multiplied and diversified the vectors for creation, production and exploitation. While no new concepts for the protection of intellectual property are needed, the current law on copyright and related rights should be adapted and supplemented to respond adequately to economic realities such as new forms of exploitation”.<sup>1</sup>

Copyright law is seriously struggling to adapt to the perils of the information society. Traditional exploitation of the works, through an intermediary that exists between the author and the user, disappear and technological locks come to the rescue of the right holder, allowing the latter to create a direct link with the user. According to some, this conjunction may lead to an excess of protection. In a digital environment, one could say that the right holders guard their works with the same protection as a guardian of a library.

21<sup>st</sup> century copyright law answers to new technologies such as peer-to-peer and streaming with a technology. We have entered an Era where numerous consumers justify their illegal downloading by what some label the “Robin Hood” syndrome of copyright. “Poor” consumers profit from free downloading of works owned by rich copyright holders. Copyright has become very fragile because of these views; a large number of people no longer respect it. Technological measures are often used to manage access to protected works, and to control unauthorised copying. However, it is also possible to circumvent these technological measures with serious legal ramifications, e.g. increase in the risk of piracy. Thus, by ensuring legal protection for technological measures, the law allows the right holders to strike back at those who seek to infringe their rights by using the same measures. The answer to the technique is technique.

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<sup>1</sup> Infosoc Directive, recital 5.

The emergence of technical measures is not a new phenomenon. What is new is their legal protection, where the circumvention or manufacture of a technological measure is made unlawful. In the paper world, it is almost impossible to control the copying and spreading of a protected work by using technical devices. In a digital environment, the problem is more complex. On the one hand, the possibilities of accessing, copying and displaying works generally increases and thus poses a threat to right holders' revenue and business models. On the other hand, the possibilities of actual control of all types of information have increased over the last decade. Copyright does not provide an absolute legal control over information, but creates an exclusive right to a certain form in which the information has taken.

It is dangerous to challenge the balance of interests by letting the author draw the line between lawful and unlawful. Nevertheless, the digital era demands modification of laws that were created for a more technologically primitive society. The digital world results in increased infringement potential, since reproductions today are often identical to the original. These infringements are highly represented in the private use section. Many believe the recently achieved protection for technological measures offers far superior protection than the law would otherwise grant the copyright owner.

In France, copyright has been compared to North Korea or George Orwell's "Big brother". The implementation of the Infosoc Directive guarantees, for the first time, a legal protection of technological measures in French law.<sup>2</sup> In a country where the right holders' exclusive right to their works has always endured a very strong protection, it is not a surprise that consumers disagree with the fact that right holders will enjoy an even stronger protection of their rights.

The restriction on the author's exclusive rights through the exception for private copying has drastically faded following the implementation of the Infosoc Directive. In Sweden, the private copying exception has (almost) become but a memory in the digital world. In France, consumers are struggling to save their seemingly last chance of legal privilege over the right holders' monopoly. Perhaps there is no future for the private copy exception in a digital world due to the protection of technological measures. The conciliation between, on the one hand the copyright holders' interests and, on the other hand the consumers interests, has always caused controversy. It is easy to sympathise with both sides, thus perhaps Voltaire's philosophy has a point.

"When a question raises violently contradictory opinions, we can assure that it belongs to the domain of the faith and not to that of the knowledge"

Voltaire

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<sup>2</sup> The implementation of the Computer Program Directive criminalised preparatory acts to circumvention.



## **1.2 Purpose**

This thesis intends to analyse the introduction of a protection for technological measures in French and Swedish law, following their national implementations of the Infosoc Directive. Furthermore, it will analyse the difficult relationship between the private copy exemption and technical protection measures.

Consideration will be given as to whether the effect of implementation has caused a distorted balance between the right holders and the users, due to the enlarged scope of the right holder's monopoly, and whether the private copy exception will survive in the digital Era. Moreover, the legal certainty of the national implementations is analysed, as well as economical consequences of a loss of the private copy exception. Focus will be on the French transposition and the private copy exception.

## **1.3 Method and material**

This thesis provides a legal dogmatic method using sources such as legal texts, some case law, legal doctrine and an encounter with a Parisian lawyer who is specialised in the area. This study will also employ a comparative legal method. A comparison shall be drawn between Sweden and France who are member state countries both using a civil law system. Therefore it shall be of interest to examine how they have implemented the Infosoc Directive in a different way to each other. Some elements were implemented similarly in the countries, while others contradict each other.

The sources used have been partially in Swedish, partially in English and the majority in French, since a significant part of the thesis discusses the French perspective. The written language being English, the author has translated the material meticulously, in order to avoid misinterpretations. Misapprehensions are common in the legal language, since one term can be of a great importance and have different significations in different languages.

As it is a highly pressing topic in France, most sources date from 2006 and 2007 and consist of articles written by legal experts and prominent professors. The Swedish sources are somewhat older, since they were ahead of France with their implementation of the Directive.

## **1.4 Delimitations and disposition**

The analysis is conducted from a legal perspective, thus technological particularities will not be investigated in detail. The debate leading to the Infosoc Directive will not be discussed in detail, thus the Commission's reports, green papers etc. will not be set out in this thesis.

The French author's right (*droit d'auteur*) has two components: economical rights (or patrimonial rights) and moral rights. However, since moral rights remain outside the scope of the Directive, only patrimonial rights will be discussed.<sup>3</sup> Thus, the reference to copyright is made when discussing why the French "*droit d'auteur*" as well as the Swedish "*upphovsrätt*".

By first studying the Infosoc Directive's main features, the author aims at introducing the reader to its different complexities. Once acknowledged, these complexities will be studied in the Swedish implementation followed by the French implementation in order to investigate how they are dealt with in these legal systems. The disposition will follow a text-by-text scheme, introducing the two countries and their solutions to the problems. The final chapter will then highlight the differences found and draw conclusions following this.

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<sup>3</sup> Infosoc Directive recital 19.

## 2 The Infosoc Directive

The aspiration to harmonise copyright law within the European Union started already in the seventies. However, a couple of decades elapsed before the desire gradually became reality. The first implementation occurred in 1992, following the first green paper on copyright law from 1988. A new article 151 of the Community Directive was introduced, ensuring the place of copyright law in the European Union. The next phase of harmonisation followed the introduction of the second green paper, which concerned copyright law in the information society. Subsequent to these two green papers, numerous regulations emerged; the Computer program Directive<sup>4</sup>, Database Directive<sup>5</sup>, etc. The Directive of 22 May 2001<sup>6</sup> is, however, the only Directive realising a more ambitious harmonisation of copyrights, thus ensuring a mixture of legal traditions in the European Union to melt together. We have now entered the era of a Communitarian Copyright Law, which is strongly inspired by International Copyright Law.<sup>7</sup>

The purpose of the Infosoc Directive is to harmonise copyright within the European Union, in order for a functioning of the internal market to prevail.<sup>8</sup> Furthermore, a high level of copyright protection is believed to increase “substantial investment in creativity, innovation (...), and lead in turn to growth and competitiveness of European Industry”<sup>9</sup>. The author’s exclusive rights are adapted to the information society through article 3(1), which extends this right to e.g. making the work available on a website on the Internet. The same provision is accorded neighbouring rights. Moreover, it is clarified that these provisions do not exhaust the rights referred.<sup>10</sup>

### 2.1 Technological protection measures

A legal protection of technological measures already exists in the World Intellectual Property Organisation (WIPO) Copyright Treaty (article 11) and the WIPO Performances and Phonograms Treaty (article 18). The United States created a protection for technological protection measures in 1998 with the extensive Digital Copyright Millennium Act (DMCA).

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<sup>4</sup> Directive 91/250/EEC of 14 May 1991 on the legal protection of computer programs.

<sup>5</sup> Directive 96/9/EC of 11 March 1996 on the legal protection of databases.

<sup>6</sup> Directive 01/29/EC of the European Parliament and of the Council of 2 May 2001 on the harmonisation of certain aspects of copyright and related rights in the Information Society.

<sup>7</sup> See Caron, Christophe, *Droit d’auteur et droits voisins*, 2006, pp. 34-35.

<sup>8</sup> See recital 47 Infosoc Directive.

<sup>9</sup> Infosoc Directive, recitals 1 and 4.

<sup>10</sup> See article 3(1), 3(2), 3(3) Infosoc Directive.

## 2.1.1 Varieties of technological protection measures

The most popular technological protection measure is different forms of encryption. Encryption means making content unreadable, or subject to a decryption key. An example of encryption is CSS (Content Scramble System) which controls the access to the content of a DVD. The system used hampers the playing of DVD's on equipment that it is not meant to be played on. In other words, the mechanisms of the encryption make the content of the DVD readable only to a certain type of technological equipment. Producers of DVD players enter into a contract with the organisation handling the patents enforcing the CSS. In doing so; the producers get access to the necessary algorithms to play the content of the disc. In the agreement is also stated that the producer has to make sure that the content continues to be protected after having been decrypted, e.g. by making it possible to watch the DVD on a television but impossible to copy it to the computer. Thus, this protection enables the content to be played only in a safe environment.<sup>11</sup>

Serial Copy Management System (SCMS) renders it possible to make a copy of a work, but not to copy the copy. Nonetheless, hackers always find a way to circumvent a technological protection measure. Therefore, the need for legal sanctions of the circumvention of such a measure became a necessity.<sup>12</sup> Streaming is another copy protection in an online environment. A computer file is made available, for a charge or free, on the user's computer in real-time. In order to play a streamed file, a special program is needed. Acknowledged programs are granted access to the file, and can prevent the copying of the content. However, even though a safe environment is created, hackers will always find methods of using unauthorised programs deceiving the streamed files.<sup>13</sup>

Digital Rights Management (DRM) attempt to control or prevent access to or copying of copyright protected work on the Internet, as well as providing right holders with remuneration for their copyright protected works.<sup>14</sup> They endure the same protection as technological protection measures, but no limitations exist to the exclusive right of the right holder.<sup>15</sup> Some use DRM as an umbrella term for all technological protection measure, but in my opinion, this is somewhat misleading. TPM will be the umbrella term for all technological protection measures throughout this thesis. DRMs will thus not be further discussed on their own.

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<sup>11</sup> See Westman, Daniel, *Tekniska åtgärder. Nordiskt genomförande av artikel 6 i Infosoc-direktivet*, NIR 2003, pp. 561-562.

<sup>12</sup> Olsson, Henry, *Copyright, Svensk och Internationell upphovsrätt*, 2006, p. 390.

<sup>13</sup> See Westman, NIR 2003, p. 563.

<sup>14</sup> Olsson, 2006, pp. 389-390.

<sup>15</sup> For the exceptions, see article 6(4)(4) of the Directive providing that when there is an agreement between rightholders and other parties concerned, benefit from an exception or limitation is not possible. See also article 7 for the legal protection guaranteed.

## 2.1.2 Access control or copy control

Generally, one can discern two ways of enforcing a protection measure. On the one hand there are measures affecting the access to a work, “access control”, on the other hand there are measures restricting the possibility to make copies, “copy control”. The exclusive rights of copyright include the making available and reproduction of a work. Discussions have been ongoing about whether the new protection should be seen as a part of the copyright regime or as an independent form of protection. Recital 47 of the Directive promotes the former view; that the protection shall fall under the copyright protection.

A protection for technical solutions connected to the exclusive right would not be sufficient, since e.g. copying after the access to a work has been achieved thus would be difficult to prevent. However, to protect all technological measures is problematic. Actions that normally do not fall under the exclusive right of the right holder would be protected, and limitations to the exclusive right would be difficult to benefit from.<sup>16</sup> The final solution of the Directive indicates that it is unlawful to circumvent an access control, regardless of whether the access is subject to the exclusive right.

The protection of access control has thus led to vivid discussions, since in a non-digital environment; it would not fall under the exclusive right. However, a general view is that when entering into a digital environment, every access to a work will produce a few copies, thus falling under the exclusive right, since they constitute reproductions of the protected work. Consequently, every time a computer is used to listen to music, read a text or watch a movie, the access will fall under the exclusive right of the right holder.<sup>17</sup> If one supports this view, an access right could be distinguished in the computer world. Nevertheless, in an analogue environment, the protection is hard to justify.

Accordingly, the Directive seems to promote a protection of all access control, regardless of whether it is connected to the exclusive right. It is an indication that the copyright holders’ scope of protection is enlarged, by introducing in the exclusive right a new right of access. The fact that a limitation to the exclusive right exists, e.g. for a private copy, does not automatically mean that the access control can be lawfully circumvented. It is up to the Member States to ensure the effective benefit of limitations to the exclusive right.<sup>18</sup>

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<sup>16</sup> See Dusollier, Séverine, *Tipping the scale in favour of the right holders: the anti-circumvention provisions of the European Directive on Copyright and Information Society*, 2001, available at [http://www.sims.berkeley.edu/academics/courses/is235/f01/TM\\_art6\\_2001.doc](http://www.sims.berkeley.edu/academics/courses/is235/f01/TM_art6_2001.doc), p. 5 (accessed 15 April 2007).

<sup>17</sup> See Westman, Daniel, *Tekniska åtgärder - teknik, juridik och politik*, NIR 2002, p. 229.

<sup>18</sup> Westman, 2002, pp. 241-242.

### 2.1.3 Circumvention

According to article 6 (1) of the Directive, Member States are required to offer “adequate legal protection” against the deliberate circumvention of a technological measure, regardless of whether this act led to an infringement of copyright. The user must be aware of, or have reasonable grounds to be aware of, the act being committed, but the purpose for which it is done is irrelevant.

The article is difficult to interpret. Protection shall be offered “any technological measure” designed for this purpose. This indicates that a measure not protecting a copyright protected work should endure protection, and thus circumvention of such a measure would be unlawful. Nonetheless, protection is acquired against circumvention committed “without authority”, which indicates that it should be protecting a copyright.<sup>19</sup> This follows from the first part of article 6(3):

“For the purposes of this Directive, the expression “technological measures” means any technology, device or component that, in the normal course of its operation, is designed to prevent or restrict acts, in respect of works or other subject-matter, which are not authorised by the right holder of any copyright or any related right to copyright as provided for by law or the *sui generis* right provided for in Chapter III of Directive 96/9/EC”.

Article 6(2) expands the protection by outlawing “manufacture, import, distribution, sale, rental, advertisement for sale or rental, or possession for commercial purposes of devices, products or components or the provision of services” that is marketed or primarily designed to circumvent technical measures, or has only limited other commercial purposes. Once more, it is irrelevant whether the purpose is connected to a copyright infringement.<sup>20</sup> Through this article, it will be complicated to acquire devices for circumvention even if the purpose is to circumvent a technological measure in order to access non-copyright protected material.

Recital 48 of the Directive establishes the limitations to the protection.

“...Such legal protection implies no obligation to design devices, products, components or services to correspond to technological measures, so long as such device, product, component or service does not otherwise fall under the prohibition of Article 6. Such legal protection should respect *proportionality* and should not prohibit those devices or activities, which have a commercially significant purpose or use other than to circumvent the technical protection. In particular, this protection should not hinder research into cryptography”.

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<sup>19</sup> For further discussion, see e.g. Koelman, Kamiel, *A hard nut to crack: the protection of technological measures*, EIPR 2000.

<sup>20</sup> See Brown, Ian, *Implementing the EU Copyright Directive*, FIPR September 2003 available at <http://www.fipr.org/copyright/guide/eucd-guide.pdf>, p.16 (accessed 15 March 2007).

Thus, a device mainly constructed for another purpose, but also having the function of circumventing a TPM, would fall outside the scope of the article, in accordance with the principle of proportionality.

#### 2.1.4 The notion *effective*

The second part of article 6(3) entails an important provision. “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”. This definition of efficiency is rather tautological, and thus creates confusion as to its interpretation. Only *effective* measures are subject to protection by the Member States. To be considered *effective*, technological measures must meet their protection objective.<sup>21</sup> One could interpret an effective technological measure as not necessarily needing a protection since it is effective, and thus impossible to circumvent.

The criterium for effectiveness indicates that it is illegal to break any access control, even though the access is not subject to the exclusive rights of the copyright holder. A person who possesses a lawful copy of e.g. a DVD would thus commit an unlawful act if she were to circumvent the access control in order to watch the DVD on equipment not allowed by the access control.<sup>22</sup> The only way of lawfully committing such an act would instead be to use a circumvention device that is not mainly constructed for that purpose, in accordance with article 6(2). This is an interpretation of the Directive, the regulations in Member States differ as we shall see below.

#### 2.1.5 Exceptions and limitations

In reality, the terms exceptions and limitations do not have the same connotation. It would be more accurate to use *limitation* when considering a right to remuneration and *exception* when copyright and related rights no longer exist. However, in the international environment, the diversity of different laws and force of habit has led to the use of both terms without distinction when designating restrictions to the exclusive right.<sup>23</sup>

The most crucial part of the Directive is perhaps its article 6(4). It instructs Member States to take “appropriate measures” to ensure that right holders

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<sup>21</sup> See <http://www.euro-copyrights.org/index/13/52> (accessed 15 March 2007).

<sup>22</sup> See Westman, NIR 2002, p. 241.

<sup>23</sup> See Sirinelli, *Workshop on implementation issues of the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT)*, WIPO December 3, 1999 (accessed 27 April 2007) available at [http://www.wipo.int/documents/en/meetings/1999/wct\\_wppt/pdf/imp99\\_1.pdf](http://www.wipo.int/documents/en/meetings/1999/wct_wppt/pdf/imp99_1.pdf), p. 3.

make available means assuring the effective benefit of an exception or limitation to copyright, if the beneficiary has lawful access to the work.<sup>24</sup> The private copy exception, provided for in article 5(2)(b), does not figure amongst the six mandatory exceptions and limitations that compulsorily benefit from this article.<sup>25</sup> Thus, the Member States are free to implement provisions requiring right holders to enable the user to benefit from the private copy exception, even when a TPM prevents this.<sup>26</sup> If the objective of the Directive was to prevent digital reproductions, it does not achieve its purpose.

Since the new access right strengthens the right holders' exclusive right, a mandatory exception is provided in article 5(1). All other exceptions and limitations found in the Directive are facultative. Article 5(1) provides that "temporary acts of reproduction referred to in article 2 (...) shall be exempted from the reproduction right provided for in article 2". The purpose of this provision is to exempt e.g. web caching, lacking independent economic value.<sup>27</sup>

## 2.2 The three-step test and private copy exception

The first introduction of the test occurred in 1967 in article 9(2) of the Berne Convention as a general criterion for determining under which circumstances the right of reproduction may be constrained in national law. Negotiators have since kept falling back on the three-step test, which has proven to be unspecific enough for anyone to interpret it differently. Therefore, consensus would easily be reached. Consequently, the three-step test ended up in the TRIPs Agreement of 1994 and in the WIPO Treaties of 1996.<sup>28</sup>

The three-step test is said to be at the core of copyright law. Exemptions to copyright and neighbouring rights normally have to comply with this test. Whereas some countries, e.g. France, have inserted the test into their national laws, others, like Sweden, let judges apply the three-step test when in doubt whether exemptions are in conformity with EU law.

As the appellation implies, the test is constituted of three steps. In order for exceptions to be in compliance with the test, they have to:

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<sup>24</sup> Articles 5(2)(a), (2)(c), (2)(d), (2)(e), (3)(a), (3)(b), (3)(e).

<sup>25</sup> See article 6(4)(2) of the Directive.

<sup>26</sup> See <http://www.euro-copyrights.org/index/13/52> (accessed 15 March 2007).

<sup>27</sup> Westman, Daniel, NIR 2003, pp. 566-567.

<sup>28</sup> Koelman, Kamiel J. *Fixing the Three-step test*, EIPR August 2006, p. 407.



- be *special cases*, i.e. a limitation or exception in national legislation that should be clearly defined and should be narrow in its scope and reach.<sup>29</sup>
- that *do not conflict with a normal exploitation of the work*, i.e. the exception should not enter into economic competition with the right holder<sup>30</sup>, and
- that *do not unreasonably prejudice the legitimate interests of the rights holder*. “Interests” indicates the actual or potential economical advantage or detriment. A “legitimate interest” implies that it needs to be authorised or protected by law. The level of unreasonable damage is attained if an exception or limitation causes or has the potential to cause an unreasonable loss of income to the copyright owner.<sup>31</sup>

## 2.2.1 Three-step test in the Infosoc Directive

There is doubt as to whether Member States were to transpose the provisions of the three-step test. Many chose not to. However, even if their national law does not specifically state that they have to use the test, courts ought to apply it when in doubt whether an exemption is applicable.<sup>32</sup> The test as implemented in the Directive is believed to have a larger reach than in the Convention, since it does not merely approach the national legislator, but also the judge. Article 5(5) aims directly at the application of exceptions, instead of addressing itself to States. “The exceptions and limitations provided for in paragraphs 1, 2, 3 and 4 shall only apply in certain special cases which do not conflict with a normal exploitation of the work or other subject-matter and do not unreasonably prejudice the legitimate interests of the right holder.” Thus, the judge has to *in concreto* decide whether a limitation respects the three conditions of the test, regardless of the test’s implementation in national law.<sup>33</sup>

## 2.2.2 Criteria for exemption

The three-step test is considered to require that all three barriers be taken one-by-one in order for a use of a protected work to be exempted. This implies that if one of the steps cannot be surpassed, the right holder must be

<sup>29</sup> See Ginsburg, Jane C., *Toward supranational copyright law? The WTO Panel Decision and the “Three-Step Test” for Copyright Exceptions*, RIDA no 187, January 2001, pp. 13-15.

<sup>30</sup> Ginsburg, RIDA 2001, p. 21.

<sup>31</sup> Ginsburg, RIDA, 2001, pp. 27-29.

<sup>32</sup> Koelman, 2006, pp. 407-408, see also <http://www.senat.fr/rap/105-308/105-30824.html#toc231> (accessed 9 May 2007). Furthermore, see the example in France in the Mulholland Drive case below under 4.3.7.

<sup>33</sup> Geiger, Christophe, *L’exception de copie privée ne peut être mise hors d’usage par des mesures techniques*, JCP G September 2005 no 39, II 10126, p. 7.

granted the right to prohibit the use concerned. The main problem is caused by the second step, which indicates that a use may be exempted only if it “does not conflict with the normal exploitation” of protected subject matter. The commonly accepted interpretation is that if it were to cost the right holder too much to exempt the work, his exclusive right will remain over that use, no matter what public interest may be served by permitting it.<sup>34</sup>

The WTO Panel came up with a conception of “normal exploitation” that allows its range to change over time. Not only forms of exploitation that currently generate significant income, but also those that have the potential to do so are covered by the notion. According to some, this would result in the abolishment altogether of the exemptions. Right holders will be able to control any use by way of digital rights management systems and, thus, be in the position to demand payment for any use, and exploit it. The various perspectives may be found in the way that they determine the relevant harm to the right holders, but from all viewpoints, the economic loss is decisive.<sup>35</sup>

Another objection to the second criterion is that the judges do not have a right to, instead of prohibiting usage, compensate the right holders for their damages if the “normal exploitation” is undermined. A violation of the third step could be mended by compensation. The third step stipulates that use may “not unreasonably prejudice the legitimate interests” of the rights owners. It is believed that compensation can make the prejudice “reasonable”. However, it is common thought that a “conflict with the normal exploitation” cannot be resolved by indemnifying right holders.<sup>36</sup>

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<sup>34</sup> Koelman, EIPR 2006, p. 408. For an extensive analysis, see Senftleben, Martin, *Copyright, Limitations and the Three-Step Test*, Kluwer law International, The Hague, 2004.

<sup>35</sup> Koelman, EIPR 2006, pp. 408-409.

<sup>36</sup> Koelman, EIPR 2006, p. 409.

## 3 The Swedish implementation of the Infosoc Directive

The Infosoc Directive was ultimately implemented into Swedish law on 1 July 2005. The final date for implementation set out by the European Commission being 22 December 2002, Sweden was sanctioned for its delay by the European Court of Justice on 18 November 2004. At the time of the final votes on the adoption of the Government's proposition<sup>37</sup>, only between 20 and 30 parliamentarians out of 351 were present. However, the final draft of the proposition was preceded by intense debates, and numerous interest groups had given their point of view. No EU-directive is said to have caused such debates before, nor drawn so much money on getting the law in politically acceptable shape.<sup>38</sup> One thing is certain; the final legislation definitely favours right holders.

### 3.1 Protection of technological measures

The purpose of technological measures is to hinder unlawful use of a copyright protected work. As mentioned before, a harmonisation of rules within the European Union is necessary in order to ensure the functioning of the internal market. The implementation of the Infosoc Directive in these respects proved particularly problematic. Prior to the Swedish implementation of the Infosoc directive, a protection of technological measures for computer programs<sup>39</sup> existed, implemented into Swedish law in order to comply with the Computer Program Directive.

#### 3.1.1 A new legal protection

The Swedish government considered the creation of a new chapter 6(a) of the Swedish Copy Right Act necessary in order to assure the correct implementation of the stipulations of technological protection measures in the Infosoc Directive. Furthermore, the Government considered such rules a necessity to ensure the right holders a control of the use of a protected work or subject matter in a new digital environment.<sup>40</sup> It is not applicable to computer programs since, as mentioned above; such protection already exists separately.

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<sup>37</sup> Prop. 2004/05:110 *Upphovsrätten i informationssamhället* - genomförande av direktiv 2001/29/EG, m.m.

<sup>38</sup> Karnell, Gunnar, *The Swedish implementation of the European Infosoc-Directive*, RIDA no 206, October 2005, pp. 161-165.

<sup>39</sup> Former article 57(a) of the Swedish "Upphovsrättslagen" (URL).

<sup>40</sup> Prop. 2004:05:110, p. 289.

The main element offers a definition of a technological protection measure. The operative rules are constituted of two parts, consisting of a prohibition of the circumvention of a technological protection measure, and an interdiction of different measures involving device rendering the circumvention of a TPM possible. In the following articles, limitations to the main rules are listed.<sup>41</sup>

Despite the request from several organisations, decoding equipment does not fall within the scope of protection since it already endures protection under the Swedish Decoding Law<sup>42</sup>. Even though the Directive is applicable to all sorts of work, its article 1(2) states that areas already covered by other rules fall outside the scope of protection.<sup>43</sup>

### 3.1.2 Effective criterion

The Swedish implementation of the definition of a technological measure is somewhat clearer<sup>44</sup> than the definition in the Directive. Nevertheless, the content remains the same. Article 52 (b) (2) of the Swedish Copy Right act states:

“The expression “Technological measure” as used in this Chapter, means any *effective* technology, device or component designed to prevent or restrict, in the normal course of its operation, the reproduction or the making available to the public of a copyright-protected work without the consent of the author or his successor in title”. (My italicisation).

When analysing the article, one is inclined to consider that not every technological measure is covered.<sup>45</sup> A technological measure has to be *effective* in the sense that it must be aimed at preventing or limiting the use of a work protected by copyright. Thus, technologies that are easy to circumvent do not benefit from protection. Some critique has been aimed at this wording; since it is said that the scope of protection would be too narrow and not in line with the meaning of the Directive.<sup>46</sup> Nevertheless, the measure does not have to be impossible to circumvent, since such a technology almost certainly does not exist. The boundary of when there is protection is not clear as of today; it will be a question for Swedish case law and the European Court of Justice in the future.<sup>47</sup>

Furthermore, the technological measure shall have been designed for its purpose. Technical solutions that have not been designed to shield copyright

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<sup>41</sup> Olsson, 2006, p. 392.

<sup>42</sup> Lagen (2000:171) om förbud mot viss avkodningsutrustning.

<sup>43</sup> Prop. 2004/05:110, p. 295.

<sup>44</sup> Since it takes away “which achieves the protection objective”, which, according to me, constituted a tautology.

<sup>45</sup> Olsson, 2006, pp. 393-394.

<sup>46</sup> Prop. 2004/05:110, pp. 291-293.

<sup>47</sup> Prop. 2004/05:110, p. 294.

protected material will not endure protection, even though they may fill this function on the side. The measure has to be effective in the sense that it must prevent or reduce actions infringing the exclusive right, e.g. copying or rendering something public without the consent of the right holder.<sup>48</sup>

According to the Swedish government, a protection of all kinds of technological measures, without connection to a copyright protected work, would be far too wide.<sup>49</sup> Consequently, such wide protection would denote that any circumvention of technological measures would be unlawful, even though accessing the work is not a copyright relevant action. This would e.g. be the case with so-called regional codes used on DVDs to make it impossible to watch the DVD outside a specific area. A DVD containing such a TPM would thus not endure protection. In order to obtain protection, the part of the TPM containing the regional code would have to be removed, since partial circumvention of a TPM is not technically possible. The University of Stockholm has stated that all access of a work in a digital environment indicates a copyright relevant action, since when the work is accessed, a temporary copy is created, and such copies, according to the Directive, are encompassed in the right holder's exclusive right to exploit the work.<sup>50</sup>

### **3.1.3 Access control or control of access?**

It has been discussed whether the new protection also applies to technological measures preventing access.<sup>51</sup> If that were the case, a right holder would technically be able to control who is allowed access to her work and how such access is achieved, e.g. which equipment is used. Circumventions of these measures, as well as the use or production of devices aimed at circumventing these measures, are legally protected. In article 6 of the Directive, one finds no explicit exclusive right to control access, thus such rules are inexistent. The question is if the applicability of the exclusive right to reproduction and making the work available to the public, in some environments indirectly creates such legal possibilities of control. In an analogue environment, the reading of a book means accessing the work, but it does not mean that the right holders exclusive right is concerned. A right holder can, invoking his property right to the physical reproduction of the work, and using a restrictive politic of spreading the work, prevent access to its content. However, once a reproduction has been made available to someone, e.g. in a library, the possibilities of controlling it vanish. Consequently, the interests of the user and the copyright holder are satisfied.<sup>52</sup> On CDs or DVDs an access control could exist after initial access, i.e. after having purchased the work it is impossible to e.g.

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<sup>48</sup> Olsson, pp. 393-394.

<sup>49</sup> Even though this is how one may interpret the stipulations of the Directive, see above under 2.1.

<sup>50</sup> Prop. 2004/05:110, pp. 291-293.

<sup>51</sup> See above under 2.1.2.

<sup>52</sup> Westman, NIR 2003, p. 566.

play it in a computer. Such an access control does not endure protection in Swedish law.<sup>53</sup>

In a digital environment, the question is of a more complex nature. Normally, technological measures in a digital environment in the form of an access control also fall within the scope of protection if the protected material endures copyright protection. This would always be the case in a digital environment, according to the University of Stockholm, since a few copies are always created, even though they may be of a temporary character.<sup>54</sup> The Swedish government shared this view. Therefore, a protection for technological measures controlling the initial access to a work (on the Internet) endures protection under Swedish law.<sup>55</sup>

One may still argue that the access of the work does not fall within the exclusive right of the right holder and that TPMs are to protect actions falling within the ambit of copyright. However, all access controls seem to have achieved, if not direct, at least indirect protection through the Infosoc Directive. Thus, the Swedish solution differs from that of the Directive, by not allowing protection for measures controlling the access after initial access.

### **3.1.4 The act of circumvention**

The main rule is a prohibition of circumvention of a technological measure, found in article 52(d)(1):

“It is prohibited to circumvent, without the consent of the author or his successor in title, any digital or analogue lock which prevents or limits the making of copies of a work protected by copyright, to circumvent a technological process, such as encryption, that prevents or limits the making available to the public of a work protected by copyright, or to circumvent any other technological measure that prevents or limits such acts of making available”.

The wording of this article is clearer than that of the Directive, since it accentuates that it is prohibited to circumvent a technological measure shielding a work protected by copyright. Consequently, three types of methods are forbidden; to circumvent an analogue or digital lock, to decrypt encrypted material and any other circumvention of a technological measure. This only applies to copyright protected work; circumvention of a technological measure to watch, read or listen to non-protected works is never prohibited.<sup>56</sup>

The circumvention of the technological measures does not have to be complete, i.e. no result has to be attained. The objective circumvention of a mea-

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<sup>53</sup> Article 52 (d)(2) Swedish Copyright Act.

<sup>54</sup> Prop. 2004/05:110, p. 295.

<sup>55</sup> Article 52 (d)(1) Swedish Copyright Act.

<sup>56</sup> Olsson, 2006, pp. 396-397.

sure is enough for a copyright infringement to be at hand. The punishment for unlawfully circumventing a technological measure is fines. Nevertheless, the act shall have been committed wilfully or with gross negligence, which is stated in article 57(b)(2). Furthermore, a violation may be the subject of criminal action only if it is called for by public interest, article 59 of the Copyright Act.<sup>57</sup>

### 3.1.4.1 Lawful circumvention

The consumers' interest of being able to choose which equipment to use when playing a CD or DVD is limited when a TPM such as CSS<sup>58</sup> renders the content impossible to play.<sup>59</sup> Thus, if a technological measure renders a purchased CD impossible to listen to, a circumvention of the protection measure will be allowed. This is stated in article 52(d)(2):

“The provisions of the first Paragraph do not apply when someone, who in a lawful way has access to a copy of a work protected by copyright, circumvents a technological measure in order to be able to watch or listen to the work”.

There is no protection under Swedish law for a technological measure preventing access after the work has been purchased or downloaded. *Lawful* signifies that the right holder's authorisation is required. One has e.g. lawful access to a purchased work or due to an exception<sup>60</sup> to the exclusive right in the law. On the Internet, this exception only applies when someone has accessed the material lawfully, e.g. by paying for the access.<sup>61</sup>

Only users capable of circumvention due to their own abilities will be able to benefit from this provision. An appraisal of whether circumvention was allowed is made in every individual case.<sup>62</sup> The lawful circumvention does not entail the private copy exception. Thus, circumvention in order to make a private copy in accordance with article 12 of the Copyright Act is unlawful.<sup>63</sup>

The present article has produced discussions on the protection of access control. Access control shall endure protection for being an effective technological measure when it prevents or limits the use of a work protected by copyright. The protection shall also be connected to a use that touches the disposal of the right holder's exclusive rights. When circumventing a TPM in order to listen to a CD on a computer, temporary copies will be created. Accordingly, the copies temporarily created would normally fall within the ambit of the exclusive right, and the access control would be protecting co-

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<sup>57</sup> Olsson, 2006, p. 398.

<sup>58</sup> See discussion above under 2.1.1.

<sup>59</sup> See Westman, NIR 2003, p. 563.

<sup>60</sup> An exception in the second chapter of the Swedish Copyright act. Note that *lawful* is not to be confused with *legal* since one can have lawful access to a stolen work.

<sup>61</sup> Olsson, 2006, pp. 397-398.

<sup>62</sup> Commentary on article 52 (d)(2) of the Swedish Copyright Act, Karnov, p. 148.

<sup>63</sup> See discussion under 3.2.1.

pyrights. In that sense, the Swedish legislator's reasoning appears contradictory.

According to article 6(4) of the Directive, Member States are to establish rules concerning the access to protected works, when right holders have failed to do so. At the time of implementation of the Directive into Swedish law, different possibilities were discussed of how to make available material protected by a technological measure, to users benefiting from an exception to the exclusive right. A new second paragraph of article 52 (f) was incorporated. It states as follows:

“Where a technological measure prevents such a use, a Court may, at the request by a user entitled to that use, order, upon penalty of a fine, the author or his successor in title to make it possible for the user to exploit the work in the way prescribed in the provision referred to.”

The right holder should normally be obliged to make available a decrypted copy of the work, rather than a device for circumventing the technological protection measure.<sup>64</sup> Otherwise, the whole idea of technological protection measures would fall apart. The Court will decide whether there are circumstances allowing for a circumvention of a technological measure.<sup>65</sup> The authorised person is not allowed to circumvent the technological measure on his own, as opposed to the previous scenario. It is mandatory to go through the Court, who, if necessary, will order the right holder upon penalty of a fine.<sup>66</sup> Accordingly, an authorised user who circumvents a TPM in order to benefit from his lawful access to the work would indeed commit an unlawful act.

### **3.1.4.2 Devices enabling circumvention**

Prior to the implementation of the Infosoc Directive, no rules existed on devices enabling circumvention. The new rules are present in article 52(e) of the Copy Right Act.

“It is prohibited to manufacture, import, transfer, distribute by, for instance, sale or rental, or to possess for commercial purposes any devices, products or components, or to make available services, which

1. are promoted, advertised or marketed for the purpose of circumvention of a technological measure,
2. other than to circumvent a technological measure, have only a limited interest from a commercial point of view, or a limited scope of commercial use, or
3. are primarily designed, constructed, adapted or produced for the purpose of enabling or facilitating a circumvention of a technological measure.”

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<sup>64</sup> Prop. 2004/05:110, p. 317.

<sup>65</sup> Olsson, 2006, pp. 404-405.

<sup>66</sup> Commentary on article 52 (f) of the Swedish Copyright Act, Karnov, p. 149.



A device can be a computer program enabling the decryption of a decrypted television program. A service may be an advice of how to circumvent a measure given in a commercial situation. Public information of such circumvention is not prohibited. DVD and CD players are manufactured to play CDs and DVDs. If a technological measure renders this impossible, the manufacturer must be allowed to circumvent this measure in order for the equipment to work.

The punishment is found in article 57(b) and consists of fines or prison up to six months. The punishment is less important than for a normal copyright infringement, where prison up to two years is possible. However, if the circumvention of a technological measure is part of a copyright infringement, the punishment for the latter will apply.<sup>67</sup>

Concerning the relation between devices that have a lawful use and those who have an unlawful use, the “BBS” case<sup>68</sup> acts as a precedent in Sweden. The Court found that no one who supplies technical equipment for lawful purposes can be held legally responsible for any unlawful purpose its users might utilize the equipment.<sup>69</sup> Consequently, a measure developed for one purpose, which could also be efficient as a technological measure, does not endure protection. A similar case exists in the United States, namely the “Sony” case<sup>70</sup>. The question was whether video recorders that could be used also for unlawful copying should be prohibited. The High Court of Justice referred to the American “fair use” doctrine in stating that the lawful use was of a greater importance.

### 3.2 Private copy exception

An important exception to the copyright is the possibility to make copies of a protected work for private use. This exception to the right holders’ exclusive right has long existed in Swedish law, but was somewhat modified following the implementation of the Infosoc Directive on 1 July 2005. The conditions for when it is allowed to make a private copy were constricted and can hence be found in the new article 12 of the Swedish Copyright Act.<sup>71</sup> The main rule states that everyone for private use of protected works rendered public can make one or a few copies. Prior to the implementation of the Infosoc Directive, a *few* copies meant an upper limit of ten copies<sup>72</sup>. When drafting a new article 12, the legislator found it manifest that earlier legislation had to be more rigorous. Thus, today this upper limit will probably be smaller.

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<sup>67</sup> Olsson, 2006, pp. 399-401.

<sup>68</sup> NJA 1996 s. 79.

<sup>69</sup> Olsson, 2006, pp. 396-397.

<sup>70</sup> Sony Corp. of America v. Universal City Studios, Inc., 464 U.S. 417 (1984).

<sup>71</sup> Olsson, 2006, p. 189.

<sup>72</sup> NJA II 1961 s. 116.

Prior to the Infosoc Directive, the Swedish private copy exception used the term *personal* use instead of *private* use. *Personal* use could also include work colleagues and therefore a change of the terminology seemed necessary since the sphere of application was reduced.<sup>73</sup> A prohibition of copies of computer programs already existed, as well as copies in digital form of works in digital form and construction of works and architecture.<sup>74</sup> Article 11(a) of the Copyright Act allows temporary forms of copies, in accordance with article 5(5) of the Directive. The provisions do however not allow copies to be made of literary works in the form of computer programs or compilations.<sup>75</sup>

### 3.2.1 TPM vs. Private copy

Lawful circumvention of technological protection measures was discussed in the previous chapter.<sup>76</sup> Concerning other exceptions to copyright, the interests are not large enough to disintegrate the protection. The private copy exception is an excellent example of this in Swedish law. The Swedish legislator did not consider it motivated to circumvent a TPM put into place to protect the work from reproduction, in order to benefit from the private copy exception.<sup>77</sup>

The Infosoc Directive offers Member States the *possibility* to make appropriate rules allowing for a private copy.<sup>78</sup> However, the Swedish legislator considered the interest of the right holders to be stronger. The most effective way of impeding the spread of protected works on the Internet is to use encryption or other TPMs. According to the Swedish legislator, a right to break through these measures would render their existence senseless. It was also submitted that the law offers a *possibility* to make a private copy. However, it is but a possibility and not an absolute right; the rule is optional and can therefore be put aside. Nevertheless, it is of great importance that a work with a copy-control TPM is marked with a warning about this. Otherwise, it may be an infringement of the Marketing law.<sup>79</sup>

According to Swedish law, an absolute right to make a private copy is thus inexistent. The private copy exception is optional, and can be put aside by an agreement when e.g. purchasing or renting a reproduction of a work. The Swedish legislator considered it too extensive to introduce a possibility for everyone buying a CD with a copy control implemented, to pursue legal

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<sup>73</sup> Olsson, 2006, pp. 191-193.

<sup>74</sup> See article 12 (2) of the Swedish Copyright Act.

<sup>75</sup> Karnell, RIDA 2005, pp. 193-195.

<sup>76</sup> This is also the case, for instance, with archives and libraries rights to make and spread copies (article 16), or for persons with a handicap (article 17). The third exception concerns what is said in public debates and the making available of public documents (article 26 and 26 a). The fourth exception is found in article 26 e and concerns the right for radio- and television companies to record some broadcasted work, see Olsson, 2006, p. 403.

<sup>77</sup> Prop 2004/05:110, p. 414.

<sup>78</sup> See article 5(2)(b) Infosoc Directive.

<sup>79</sup> Olsson, 2006, p. 404.

actions towards the right holder.<sup>80</sup> The Swedish legislator is confident that the right holders will provide reasonable possibilities for consumers to make private copies even in the future. The Government will supervise the development during three years after the implementation of the new rules. At the end of this period, an evaluation of the consumers' possibility of making copies for private use will be made.<sup>81</sup> In my opinion, it is highly unlikely that private copying of their work is rendered possible, especially of work made available on the Internet. Swedes are adaptable people who will probably accept the constringency incurred to the private copy exception.

### 3.2.2 Lawful source

Following the implementation of the Infosoc Directive, a new prerequisite for the private copy was created. The new section 4 of article 12 states:

“This Article does not confer a right to make copies of a work when the copy that constitutes the real master copy has been prepared or has been made available to the public in violation of Article 2”.

A lawful copy is a reproduction made with the consent of the right holder, or in accordance with an exception to the law. The downloading of material put on the Internet without the consent of the right holder is according to this rule unlawful. This provision has caused wild discussions since it indicates that there is either consent by the author or his right holder to the making of the master copy or that the making of the master copy is based on a limitation to the exclusive right to exploit the work. In a digital world, it can be exceptionally difficult to know anything about the origins of the master copy, especially for an ordinary person. The Constitutional Committee considered it to be more important to, in general, keep people from downloading unlawful material, than to satisfy every case on its own. However, it did stipulate a special rule in article 54 (4), deliberating a person violating article 12 (4) from paying compensation, unless “the violation is carried out wilfully or with gross negligence”.<sup>82</sup> Only the copying act can be unlawful. To listen to or watch movies on the Internet is lawful, even if the material has been put there without the consent of the right holder.

### 3.2.3 Remuneration to right holders

The existing remuneration schemes providing some compensation for right holders are the only means of handling analogue home taping. Nevertheless, no levy system, however sophisticated, could compensate right holders adequately for digital copying in the world of the Internet.<sup>83</sup> New technology

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<sup>80</sup> The French legislator solved the problem through the institution of a Regulatory Authority. Discussion will follow under 4.2.1.

<sup>81</sup> Prop. 2004/05:110, pp. 317-318.

<sup>82</sup> Olsson, 2006, pp. 197-199, Karnell, RIDA 2005, pp. 195-199.

<sup>83</sup> See Davies, Gillian, *Technical devices as a solution to private copying*, 2000, p. 166.

has increased the number of private copies being made significantly. In order to compensate the right holders for this loss of income, the Swedish government is compelled to act. One solution is the protection of technological measures. Another solution, which could act as a complement to the TPMs, is a charge on “blank” material used for recording. This charge is then divided between right holders. In the eighties, a special tax was levied on blank and full tapes and video cassettes, but it was abolished in the early nineties. However, only a small part of this tax was distributed amongst the right holders. Provisions about reasonable compensation to authors, performers and phonogram and film producers for their losses following the private copying have existed in the Swedish Copy Right Act since January 1 1999, with the so-called “cassette compensation”. This compensation was somewhat changed with the Infosoc Directive, much due to demand of “fair compensation”<sup>84</sup>. The new article 26(k) of the Act stipulates:

“When a businessman, in the course of his professional activities, manufactures or imports into this country material supports on which sounds or moving images may be recorded and which are especially suitable for the making of copies of works for private purposes, the authors of such protected works, that have thereafter been broadcast by sound radio or television or have been published on material supports by means of which they can be reproduced, have a right to remuneration from the businessman”.<sup>85</sup>

Typical examples are virgin CDs, DVDs or recording equipment. Exceptions to the right to remuneration are found in article 26(k)(2), considering for example equipment that is to leave the country or is used for other purposes than making private copies, e.g. in a professional or teaching context. Furthermore, article 26(l) states the size of the remuneration. The organisation *Copyswede* represents most of the right holders and handles the collection and distribution of the remuneration to those entitled after deduction of a reasonable compensation for costs. However, according to article 26(m), right holders not represented by this organisation are to be treated equally to those who are. Following the implementation of the Infosoc Directive, foreign citizens also have a right in the cassette remuneration, due to the principle of reciprocity.<sup>86</sup>

There are no provisions in the Swedish law considering the correlation between the remuneration and the impossibility of making a private copy due to a TPM. If a right holder restricts the number of copies being made of his work, it would be proportionate that his entitlement to remuneration diminishes accordingly. The thought was however presented by the Swedish legislator. Thus, there is a possibility of reduction of the remuneration. However, this is primarily when blank media can also be used for other purposes, and the legislator did not discuss the scenario of diminishing the remunera-

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<sup>84</sup> Recital 35 of the Infosoc Directive.

<sup>85</sup> Olsson, 2006, pp. 200-201.

<sup>86</sup> Olsson, 2006, pp. 203-205.

tion right due to a deteriorating possibility of making private copies in some cases.<sup>87</sup>

### 3.2.4 Three-Step Test

The Swedish Government did not consider it necessary to implement a provision corresponding to the Directive's article 5(5). On the contrary, it considers the three-step test a rule of interpretation, which not necessarily has to be transposed into national law. However, the Stockholm District Court opposed to this, instead regarding the wording of article 5(5) as more than a rule of interpretation. A Member State is not obliged to transpose rules of a Directive that are already satisfied through national law, which the Swedish legislator considered in the present case.<sup>88</sup>

The Berne convention and the TRIPS agreement have been signed by Sweden and the Computer program Directive has been implemented. However, when Sweden adhered to these Conventions and Directive, the three-step test, present in all three, was considered a rule of interpretation. Sweden thus maintains this viewpoint when implementing the Infosoc Directive, even though the three-step test in the Directive has been considered more exhaustive.<sup>89</sup> Moreover, the Swedish legislator feared that an implementation of the test would produce an extent interpretation of the latter, thus supporting use not meant for in the Directive. Alternatively, the legislator considers that the test could function as a limitation of the exceptions and limitations to the exclusive right, but the test does not fulfil the criteria of predictability and restrictiveness.<sup>90</sup> It will be interesting to see if the Swedish judges will use the three-step test as a rule of interpretation in the future. As we will see ahead, the French judges used the test as a rule of interpretation in a few cases, even before implementing it into French law when transposing the Infosoc Directive.

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<sup>87</sup> Prop. 2004/05:110, pp. 397-398.

<sup>88</sup> There is also the discussion about whether the three-step test was mandatory for Member states, see discussion above under 2.2.2.

<sup>89</sup> See 2.2.2.

<sup>90</sup> Prop. 2004/05:110, pp. 83-84.

## 4 The French implementation of the Infosoc directive

The French law of 1 August 2006<sup>91</sup>, known as the DADVSI<sup>92</sup> law, transposes the Directive of 22 May 2001. In accordance with the French traditional approach to copyright law, the very firm and cautious bill passed definitely favours right holders.<sup>93</sup> Some consider that the French legislator took the opportunity to do a big cleaning of the French Copyright law.<sup>94</sup> However, the result was perhaps not a success. A number of difficulties and incoherencies emerged when the rules were to be transposed into the French Intellectual Property Code (IPC).<sup>95</sup>

The French were even later than the Swedes in their implementation; in fact, they were second last of the 25 European Union Member States. The ECJ punished them for the delay on 27 January 2005. Due to the lateness, the parliamentary debates were harmed. As the implementation was not to be postponed any longer, the Government examined the bill under an emergency procedure, involving a single reading by the National Assembly and the Senate and then consideration by a joint committee consisting of an equal number of representatives of the two houses to reconcile their standpoints in the event of differences between them. Subsequent to a constitutional challenge, the law was finally enacted on 1 August 2006.<sup>96</sup> Due to the haste, the Government was suspected of deliberately avoiding a proper parliamentary debate on a major public issue.<sup>97</sup> On the other hand, intense debates were ongoing in France since 2003 when the first draft of a proposal from the legislator was presented. The final measures may have been impetuous, but the precedent debates and pre-examinations of the new law were perceived in an adequate way. A parallel could be drawn to Sweden where 20-30 out of 365 parliamentarians were present for the final vote.<sup>98</sup>

The new protection for technological measures caused heavy debates, mainly because of their incompatibility with the private copy exception. However, what caused an even more intense debate was the question of how to handle file sharing through peer-to-peer. On the one hand, right holders

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<sup>91</sup> LOI n° 2006-961 du 1er août 2006 relative au droit d'auteur et aux droits voisins dans la société de l'information, Journal Officiel 3 août 2006, available at <http://www.legifrance.gouv.fr/WAspad/UnTexteDeJorf?numjo=MCCX0300082L>, (accessed 15 February 2007).

<sup>92</sup> Droit d'Auteur et Droits Voisins dans la Société de l'Information.

<sup>93</sup> However, as we shall see further on, it is perhaps not as favourable as the Swedish.

<sup>94</sup> See e.g. Granchet, Agnès, Derieux, Emmanuel, *Droit d'auteur et droits voisins dans la société de l'information. Loi no 2006-961 du 1<sup>er</sup> août 2006 relative au droit d'auteur et aux droits voisins dans la société de l'information*, JCP E no 35, 2006, pp. 1405-1406.

<sup>95</sup> Caron, 2006, p. 29.

<sup>96</sup> See Caron, Christophe, *La nouvelle loi sous les fourches caudines du Conseil Constitutionnel*, Comm. électr. no 10, Oct. 2006, comm. 140, p. 34.

<sup>97</sup> Desurmont, RIDA 2006, pp. 111-113.

<sup>98</sup> See above under 3.

wanted to enforce their protection, on the other hand consumers wished to maintain their possibility to have an easy, cheap access to protected works.<sup>99</sup>

## 4.1 Protection of technological measures

When technological measures were to achieve protection in France, polemics were unavoidable. On the one hand, the right holders have the possibility of protecting their works from infringement, through effectively controlling the access to, or use of, their work. On the other hand, users consider these measures to be libertine. A technological protection measure either forbids or restrains the access to, or use of, a work. It resembles to the lock of a door. However, the technological measure must not be confused with what makes it possible to realise it. Consequently, a protocol, a formation, or a method enabling encryption or transformation does not constitute technological measures protected by law.<sup>100</sup>

Article 6(1) of the Directive requires “Member States to provide adequate legal protection against the circumvention of any *effective* technological measure” where such circumvention is deliberate. An intense, heated debate followed when these provisions were to pass through the French Parliament. Right holders orated about the importance of technological measures as a protection tool in the digital world. Consumer protection organisations, amongst others, feared that such measures were ineffective at the best of times and that they function as an unjustified impediment to accessing cultural goods, and that they stifle technological innovation. These issues were mainly discussed in relation to the issue of interoperability<sup>101</sup> and that of private copying.<sup>102</sup>

### 4.1.1 A new legal protection

Before the arrival of the DADVSI bill, acts of circumvention of a TPM could constitute an infringement of copyright. However, it would be the act of infringing the author’s right and not the act of circumvention in itself that would be reprimanded.<sup>103</sup> The legal protection for technological measures as implemented into French law encloses a plurality of crimes and sanctions. However, the purpose is not to protect technological measures per se,

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<sup>99</sup> Desurmont, Thierry, *La transposition en France de la Directive 2001/29/CE sur l’harmonisation de certains aspects du droit d’auteur et des droits voisins dans la société de l’information*, RIDA no 210, October 2006, p. 114.

<sup>100</sup> Caron, 2006, pp. 260-261.

<sup>101</sup> Interoperability is the ability of two or more systems or components to exchange information and to use the information that has been exchanged.

<sup>102</sup> Desurmont, RIDA 2006, p. 142.

<sup>103</sup> Caron, 2006, p. 386.

but merely to protect their role as a guarantor for copyrights and neighbouring rights.<sup>104</sup>

The legal protection could take three forms. Member states could reprimand either the act of circumvention, or the preparatory acts to circumvention, or both of them. The Infosoc Directive uses the somewhat general term of *circumvention*, whereas the French legislator, when rendering unlawful the act of circumvention, uses the term *damage* (porter atteinte) in order to create one specific crime comprising all forms of imaginable damage. It is doubtful if the expression *damage* is adequate in apprehending the notion of *circumvention*, which precisely seems to cover acts that do not in strict sense damage the technological measure.<sup>105</sup> The unfortunate wording is probably due to the will of reusing the wording of the former article L. 323-1 of the Penal Code, criminalising acts of damaging data processing. However, *damaging* and *circumventing* do not seem to be equivalent notions,<sup>106</sup> and thus may have as a result another interpretation than that provided for in the Directive.

Following the new legislation, article L.335-3-1 states that it is illegal to, for other reasons than research, “wilfully *damage* an efficient technological measure through decoding, decrypting or any other personal intervention aimed at circumventing, neutralising or removing a protection or control measure”. Furthermore, protection from the invasion of devices allowing the circumvention of TPMs is assured in article L. 335-3-1-2 IPC. Prison or fines is ordered to anyone who “(...)wittingly procures or proposes devices made or specially adapted for damaging an efficient technological measure(...)” The act does not necessarily have to be completed, as long as it was committed wilfully, as opposed to a normal copyright crime where the good will lacks importance. Thus, even an incomplete act constitutes a completed infraction and not only an attempt. The Computer Program Directive only sanctions preparatory acts to circumvention, such as the fabrication and spreading of devices enabling the neutralisation of technological protection measures. Accordingly, the protection of the software does not enclose the use of it after the circumvention of a TPM.<sup>107</sup>

## 4.1.2 Effective criterion

The effective criterion easily generates misinterpretations. In effect, it can be considered a contradiction. An efficient TPM that is circumvented would

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<sup>104</sup> Caprioli, Èric A., *Mesures techniques de protection et d'information des droits d'auteur*, Comm. com. électr. no 11, Nov. 2006, p. 29.

<sup>105</sup> See Maillard, Thierry, *La réception des mesures techniques de protection des oeuvres en droit français : Commentaire du projet de loi relatif au droit d'auteur et aux droits voisins dans la société de l'information*, Légipresse 2004, no 208, p. 11.

<sup>106</sup> See Lorrain, Catherine, Maillard, Thierry, *An overview on the protection of technical measures in France*, January 2004, p. 3, available at [www.Euro-copyrights.com](http://www.Euro-copyrights.com) (accessed on 15 March 2007).

<sup>107</sup> Dusollier, Séverine, *Droit d'auteur et protection des oeuvres dans l'univers numérique*, 2005, pp. 141-142.



not be efficient. Nevertheless, such an interpretation would not make any sense, since such technological measures do not exist. In accordance with the Swedish view, the intention of the French legislator is not to protect TPMs that are too easily circumvented, nor those planted only in order to achieve protection. Where to draw the line remains a mystery until the courts have ruled on it though.

The French legislator has implemented word by word the presumption in the Directive's article 6(3):

“...shall be deemed effective(...)any technology (...) controlled by the right holder through 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”.<sup>108</sup>

Two separate functions can be distinguished, the access control and the limitation of use of a program. These functions, if they originate from the same technology, protect different rights of the copyright holder.<sup>109</sup> The wording of the present article implies the acceptance of an access right by the French legislator.<sup>110</sup> The new provisions apply to technical measures blocking the reproduction or communication, but also to the measures preventing or restricting any act (e.g. accessing a work) not authorised by right holders. Thus, even if a user is a legitimate beneficiary of a copyright exception, circumvention of a technological measure will be unlawful.<sup>111</sup>

A technological measure is only effective if the right holder himself controls the function of protecting the copyright.<sup>112</sup> Such an interpretation signifies that effective technological measures, according to French law, are only measures deliberately employed by the right holder for protecting his copyright. This indicates that the French law allows the protection of any effective technological measures, under the condition that they are under the control of the right holder, whereas the Swedish legislator limited the scope of protection to measures created for this aim.<sup>113</sup> In that case, it would no longer be important whether the circumvention is easy or not.

### **4.1.3 Access control or control of access?**

A normal exploitation of a protected work would consist of reading a book, listening to a CD, watching a DVD and copy it if necessary, elements normally falling outside the relevant ambit of the author's exclusive rights. The right of access, created by the Infosoc Directive, is not comparable to other exclusive rights. It parts even more essentially from the exclusive rights

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<sup>108</sup> Article L. 331-5-2 IPC.

<sup>109</sup> Caprioli, *Comm. com. élect. 2006*, p. 27.

<sup>110</sup> Compare to the Swedish wording above under 3.1.2.

<sup>111</sup> Discussion of how to benefit from an exception will follow under 4.2.

<sup>112</sup> See Caprioli, *Comm. com. élect. 2006*, p. 30.

<sup>113</sup> See discussion above under 3.1.2.

since it is only recognised to authors by means of a TPM.<sup>114</sup> By limiting or controlling this use, the technological measure protects the right holder's entitlement to the exploitation of the work, i.e. representation and reproduction rights. Technological measures can therefore be said to be the permission given by the right holder to access her work.<sup>115</sup>

The French legislator does not formally recognise the protection of an access control. The access control of a work is instead considered a prerogative that ensures right holders a control of the access of their work. According to Caron<sup>116</sup>, even if the French law protects technological measures, it does not explicitly establish such a right of access, which would be part of the monopoly of exploitation. Thus, a right to prevent or limit the access to the work for private use is not a relevant copyright. However, the consecration of technological measures brings about the emergence of an access right; therefore, it will be accepted as such.<sup>117</sup> The author is thus accorded the right to control the access of his work, even though this does not explicitly fall within the exclusive rights.<sup>118</sup> The French have thus adopted the view of the Infosoc Directive, that every access control shall endure protection, initial access control as well as access control after initial access. Nonetheless, with the implicit reservation that it does not normally fall within the ambit of the exclusive right.

In France, the control of access after initial access is derogated by the creation of a right to interoperability.<sup>119</sup> A Regulatory Authority, which will be further presented below, is to ensure interoperability. However, consumers may not seize the Authority in order to obtain interoperability, when a lawfully acquired work is non-playable on certain equipment. Professionals can use the provision in order to ensure a just competition. France is the only Member State having implemented such a provision, even though it was encouraged in recital 54 of the Infosoc Directive, "compatibility and interoperability of the different systems should be encouraged".

The French legislator was not content with only protecting the interests of users within the limits set out in the Directive's article 6(4). Thus, following some case law, the novelties of the IPC also include a necessity of information to the consumer of the restrictions of use because of the existence of a

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<sup>114</sup> Dusollier, 2005, p. 142.

<sup>115</sup> See Caprioli, *Comm. com. électr.* 2006, p. 27.

<sup>116</sup> Christophe Caron is a professor at the law faculty of the University Paris XII, and a Paris lawyer.

<sup>117</sup> Caron, 2006, p. 260.

<sup>118</sup> Dusollier, 2005, p. 150. This view can be compared to Koelman's who talks about developing towards a "granting of an exclusive right of access", see *A hard nut to crack: The protection of technological measures*, EIPR June 2000.

<sup>119</sup> For further reading about interoperability, see Bruguière, Jean-Michel, *Le droit à l'interopérabilité*, *Comm. com. électr.* February 2007, pp. 8-13, Caprioli, Éric A., *Le jugement du TGI de Nanterre du 15 décembre 2006 et la question de l'interopérabilité*, *Comm. com. électr.* April 2007, pp. 45-46, and TGI Nanterre, 6<sup>e</sup> ch., 15 December 2006.

TPM.<sup>120</sup> The normal use of the medium has been guaranteed through the doctrine of hidden defect.<sup>121</sup> However, as we shall see below, article L. 331-5-6 promotes that the TPMs respect the “free use of the work”. By this, one is inclined to understand the need to guarantee a normal exploitation of the work, without having to fall back on the doctrine of hidden defects.<sup>122</sup> Thus, a consumer or consumer organisation should be able to invoke this provision before a regular court in order to obtain playability of a work.

## 4.2 Benefit from exceptions

A technological measure that prevents the reproduction or communication of a work, in whatever context, cannot dissociate between acts forbidden by law or the right holder and acts permitted due to an exception to the exclusive right. Since the coercion exercised by the TPM in some cases prevents the beneficiary of an exception from making use of this, the preservation of this liberty calls for regulatory measures. This is stated in article 6(4) of the Directive. Consequently, the exceptions gain importance.

The European interdiction of circumvention does not permit any limitations based on the exceptions to copyright. According to some interpretations, the act of circumvention is unlawful in itself according to the Infosoc Directive, whatever its purpose may be, and even if it does not constitute a violation of copyright.<sup>123</sup> This may seem a bit disproportionate, since the justifications for the anti-circumvention provisions are only based on the necessity to protect copyright. Understandable is that the commercialisation of devices enabling circumvention endures an absolute protection, even if the reverse argument has been presented justified by situations where circumvention is necessary to achieve lawful access.<sup>124</sup>

Right holders are authorised to insert TPMs in their works preventing the benefit of exceptions, under condition that they adopt solutions in order to save the exceptions under article 6(4) of the Directive. The TPMs thus prevail blatantly over the exceptions to the exclusive right. Similar provisions are found in the French legislation, which only provides a secondary position for the exceptions in front of TPMs. In order for a technological measure to function with an exception, a new article L. 331-5 of the IPC declares that such a measure may not paralyse an exception. However, this is easy to aim at in theory. In practice, it will be complicated to apply.<sup>125</sup> Neverthe-

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<sup>120</sup> Article L. 331-12 IPC states “access control (...) and limitations potentially deriving from the benefit of the private copy exception ... by the insertion of a TPM should be made known to the user” (article L. 331-16).

<sup>121</sup> See TGI Nanterre, 6e ch., 2 sept. 2003 and TGI Paris, 4e ch., 2e sect., 2 oct. 2003.

<sup>122</sup> See Dusollier, Séverine, *L'introuvable interface entre exceptions au droit d'auteur et mesures techniques de protection*, Comm. com. électr. no 11, novembre 2006, p. 23.

<sup>123</sup> See e.g. Dusollier, Comm. com. électr. 2006, p. 23. However, I disagree with this interpretation, since the technological measure should protect a copyright in order to achieve legal protection, see above under 2.1.2.1.

<sup>124</sup> Dusollier, Comm. com. électr. 2006, p. 23.

<sup>125</sup> Caron, 2006, pp. 275-276.

less, article L. 331-8 of the IPC envisages conciliation between a technological measure and new exceptions implemented with the law of 1 August 2006, or exceptions affected by this new law. The exceptions may only regain the first place in front of the Regulatory Authority.

Article L. 331-5-6 IPC provides that TPMs may not prevent “the free use of the work within the limits of the rights specified in the present code (...) or accorded by the right holders”. This wording may incline one to sense certain preponderance of the exceptions over the TPMs, since the TPMs may not oppose to the free use of the work assured by law. However, this interpretation is faulty since the preparatory work clearly states that this provision aims at the situation where a TPM prevents the playability of a work. Free use means a normal use of the work by its acquirer. Nevertheless, in order to obtain the free use, a consumer would be obliged to go to court.<sup>126</sup> Circumvention of a TPM remains unlawful, even though the purpose does not constitute an infringement.

## 4.2.1 Effective benefit through a new Authority

In order to guarantee the possibility to benefit from an exception to the exclusive right, France has by decree of 4 April 2007<sup>127</sup>, instituted a TPM Regulatory Authority, handling all claims concerning this problem. The Authority shall have a kind of surveillance function over TPMs. It shall preserve the exceptions to the right holders’ exclusive rights and ensure interoperability of technological measures. It shall also, according to article L. 331-8-3 determine the modalities of the functioning of the exceptions, e.g. by deciding the minimum<sup>128</sup> number of copies allowed to be made. Thus, the Authority exercises a real power over the technological measures present on the French market.<sup>129</sup>

According to article L. 331-8-1 IPC, the Authority shall ensure that the implementation of technological protection measures does not have the effect of preventing the beneficiaries of the exception for private copying from exercising it.<sup>130</sup> As stated in article L. 331-13 IPC, every beneficiary of a private copy exception or every moral person representing it, e.g. a consumer protection association, may seize the Authority. The latter can then either conciliate the parties, or in the case where this is not possible, render a decision constraining the other party under penalty of fines. Private persons may thus complain about not being able to benefit from the exception for private copying, but they do not have the same right concerning interopera-

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<sup>126</sup> See Dusollier, *Comm. com. électr.* 2006, p. 21 and discussion above under 4.1.3. Compare to the Swedish view under 3.1.4.1.

<sup>127</sup> Décret n° 2007-510 du 4 avril 2007 relatif à l’Autorité de régulation des mesures techniques instituée par l’article L. 331-17 du code de la propriété intellectuelle.

<sup>128</sup> Note that it is the minimum number that is to be decided. Probably a response to the right holder’s possibility of limiting the number of copies permitted, see article L. 331-9 IPC.

<sup>129</sup> Dusollier, *Comm. com. électr.* 2006, p. 22.

<sup>130</sup> Desurmont, *RIDA* 2006, pp. 160-162.

bility. The Constitutional Council defended its decision of 27 July 2006 by simply stating that consumers always have a right to lodge a complaint about interoperability with a competent court.<sup>131</sup>

The French system has an advantage, when comparing legal procedures, of concentrating conflicts to one body, thus allowing a preventive and general intercession, which confines to the intervention of this body a real, regulatory character, alone in decelerating technical appliances.<sup>132</sup> The Authority is thus to intervene in the field of copyright in order to preserve the rights of users, which would give exceptions a positive value, the extent and development will have to be surveyed. As of today, it is not yet known whether this system will be effective, especially as a consumer will probably hesitate before initiating a long procedure in order to benefit from the private copy exception. Consumer protection associations will probably play a more important role.<sup>133</sup>

The Authority was installed on 6 April 2007. Its six members consist of experts from the Supreme Court as well as renowned professors. The Authority will play a fundamental role in finding equilibrium of the copyright. Since technologies are rapidly changing and evolving, the Authority will play an important role in constantly adapting to new prerogatives and conditions, in order to preserve on the one hand copyright, on the other hand the exception for private copying and interoperability.<sup>134</sup>

### 4.3 Private copy exception

The private copy is at present going through a crisis because of the digital irruption. It constitutes a threat to the exploitation of works in a digital environment, even though it is accompanied by remuneration to the right holders. The exception has also been characterised as a resistance symbol towards the ascendancy of a usually detested copyright. The protection for private copying in France dates back to a law enacted on 11 March 1957. The law of 1 August 2006 attempts to conciliate the private copy exception with the protection of technological measures, through a complex mechanism voted in conformity with the Constitution, after the Constitutional Council had dismissed its unsuitableness. The National Assembly presented a legislative proposal in 2003, which would have outlawed TPMs that prevented the realisation of a private copy. It also identified the private copy

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<sup>131</sup> Conseil constitutionnel 27 juillet 2006, recital 44.

<sup>132</sup> Dusollier, *Comm. com. électr.* 2006, pp. 22-23.

<sup>133</sup> Caron, 2006, p. 284.

<sup>134</sup> Speech on 6 April 2007 by Renaud Donnedieu de Vabres, cultural minister of the former government, *Installation de l'Autorité de régulation des mesures techniques*, available at <http://www.culture.gouv.fr/culture/actualites/conferen/donnedieu/armt07.html> (accessed on 9 May, 2007).

exception as a *right*.<sup>135</sup> As we shall see, the final law adopted differs significantly from this view. Accordingly, some classify the private copy exception as a subjective *right*, since French consumers traditionally have had<sup>136</sup> the possibility of claiming their *right* to a private copy.<sup>137</sup> Furthermore, in the prior absence of specific legislation, French courts have held that downloading of copyright protected works through a peer-to-peer system falls within the private copying exception.<sup>138</sup>

The delicate question of finding equilibrium between TPMs inserted in the form of copy control or access control, and the consumers' claimed subjective *right* to make a private copy has given rise to immense doctrinal discussion as well as jurisprudence in both directions. A deep attachment to the exception for the private copy was shown by the Parliament in both the National Assembly and the Senate. It confirmed its desire to guarantee the exception's effective exercise in a concern to counterbalance the consequences of the legal consecration of technological protection measures. Far from denying or challenging the existence of the exception for private copying, these measures have had, on the contrary, the effect of strengthening its legitimacy as the guarantee of a sphere of freedom that could not be denied consumers.<sup>139</sup> Some consider that the private copy exception has gone from being a mere tolerance to being a guaranteed and protected juridical faculty.<sup>140</sup> This was the desire of the French legislator, to find an appropriate balance between the interests of the opposing parties. The reality seems to have taken another turn though, where the balance is weighing slightly in favour for the right holders.

### 4.3.1 TPM vs. Private copy

The exception for private copying has traditionally been seen as a limitation of the exploitation monopoly granted to the authors. Nevertheless, the general feeling in the French society, which has been that the exception for private copying is a prerogative that consumers are legitimately entitled to claim, naturally led to this conception's validity being questioned. Today, technological protection measures demand a reassessment of the exception for private copying. It should henceforth be perceived, not only as the inevitable consequence of an inescapable reality that has to be endured, but also as an opportunity. However, this opportunity, offered to them voluntarily,

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<sup>135</sup> Assemblée Nationale *Proposition de loi*, 4 November 2003, available at <http://www.assemblee-nationale.fr/12/pdf/propositions/pion1173.pdf> (accessed 9 May, 2007).

<sup>136</sup> I deliberately use past tense due to recent case law. See discussion further ahead.

<sup>137</sup> Caron, 2006, p. 279.

<sup>138</sup> See the decision of the Cour d'Appel de Montpellier, 10 March 2005, which was later quashed by the Cour de Cassation on May 30 2006, see below under 4.3.3.

<sup>139</sup> Desurmont, RIDA 2006, pp. 152-154.

<sup>140</sup> See Desurmont, Thierry, *Le régime de la copie privée*, Comm. com. électr. November 2006, no 11, p.18.

can be denied users within limits to be determined based on the prevailing conception of the balance between their interests and the creator's rights.<sup>141</sup>

The Directive did not question the exception for private copying. Article 5(2)(b) offers the Member States the possibility of guaranteeing its effective exercise through article 6(4)(2) by allowing them, notwithstanding the legal protection granted to technological measures, to take appropriate steps, when such measures are implemented, to ensure that the beneficiaries of the exception may benefit from it.

The views on technological protection measures' interaction with the private copy exception vary. Caron stated prior to the Directive's implementation that article 6(4) allows right holders to prevent the number of authorised copies of their work. Only if a right holder prevents all copying of her work may the State intervene.<sup>142</sup> There is a great risk that a technological protection measure de facto will restrain the possibility to make a private copy. Article 6(4) of the Directive has tried to conciliate the efficiency of the private copy with that of technological measures. However, it remains difficult to conciliate the incompatible! The Directive thus permits each Member State to intervene according to the modalities it considers appropriate. Even before the transposition of the Directive, the French case law was affronted with this question. It concerned a matter of knowing whether, in order for a technical protection measure to be legitimised, the private copy exception was in conformity with the three-step test.

After numerous delays due to the changes made to the proposed law, a final article L. 331-8 of the IPC was created, assigning the Regulatory Authority the right to intervene. Notwithstanding, this is only a subsidiary right. It is initially up to the right holder to determine the number of copies that should be allowed, according to article L. 331-9 of the IPC. Only after a certain delay, may the Authority intervene and reprimand the right holder.<sup>143</sup>

The wording finally adopted in article L. 331-8 of the IPC intends to guarantee the "effective benefit of the exception for private copying". Article L. 331-8 IPC double-guarantees the exception for private copy, since article L. 122-5 of the same Code already assures this benefice.<sup>144</sup> However, article L. 122-5 merely provisions that an exception for private copying exists, whereas article 331-8 assures the effective benefit from the latter. Even if it is a protected entitlement according to article 331-8, the three-step test, which has been introduced in a second paragraph of article L. 122-5, can always overrule the exception.

Furthermore, the second paragraph of article 331-8 states that the Regulatory Authority can decide the number of *minimal* copies allowed of a work,

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<sup>141</sup> Desurmont, RIDA 2006, pp. 150-152.

<sup>142</sup> Caron, *La copie privée d'un DVD n'est pas de droit et viole le test des trois étapes*, Comm. com électr. July 2004, p. 24.

<sup>143</sup> Caron, 2006, p. 284.

<sup>144</sup> Caron, 2006, p. 282.

depending on the type of work, the means of communication to the public and possibilities offered by the present protection measures. Moreover, article L. 331-9 of the IPC allows the right holder to use a TPM in order to limit the number of copies being made. The Constitutional Council clarified that right holders can, due to technological measures, limit the authorised number of private copies.<sup>145</sup> The motivation was that if a person were to realise a large number of copies, it leaves suspicions on where these copies may end up. The inner family circle would not demand a large amount of copies. Moreover, if the private copy exception in a specific case does not comply with the three-step test, the Council accentuates that the right holder may prohibit all copies.<sup>146</sup>

During the preparatory work, the National Assembly wanted to introduce a provision stating that the minimal amount of copies could never be inferior to one. However, this provision was finally rejected due to its incompatibility with the three-step test.<sup>147</sup> Nevertheless, the limitations have to be known and clear to the consumers, including when a technical measure limits the playing or reading of a work. This provision is a repetition of article L. 111-1 of the Consumer Code.<sup>148</sup> The law encourages a spontaneous conciliation between the private copy and technological measures.

Finally, article L. 331-10 of the IPC states that technological measures may prevent all private copying of works having been made public according to the contractual dispositions between the parties, in a way that anyone can access the work at any time. This is e.g. the case of contractual access of works reproduced on an Internet site. That way, the work can be protected through devices preventing copying, which does not hinder access whenever the contractual modalities are respected.<sup>149</sup> Article 331-11 of the IPC prohibits producers and distributors of television services from using technological measures “which would have the effect of depriving the public of the benefit of the exception for private copying”. This would be compatible with the Directive, since article 6(4) clearly states that the aim is to ensure that the public is not prevented from benefiting from the exception for private copying.<sup>150</sup>

### 4.3.2 Lawful source

Can a private copy be made of an illicit source, e.g. after having neutralised a TPM preventing a DVD from reproduction, or from a file exchanged through peer-to-peer without the authorisation of the right holder? The law inaugurated on 1 August 2006 put an end to the controversy surrounding the

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<sup>145</sup> Conseil Constitutionnel, 27 July 2006, recital 37.

<sup>146</sup> Caron, *Comm. com. électr.* 2006, p. 35.

<sup>147</sup> See <http://www.senat.fr/rap/105-308/105-30870.html#toc489> (accessed 9 May 2007).

<sup>148</sup> Compare to the same provisions in the Swedish Marketing Law.

<sup>149</sup> Caron, 2006, pp. 282-284. DRMs will not be further discussed, since, as stated above under 2.1.1, they do not allow any benefit from exceptions.

<sup>150</sup> Desurmont, *RIDA* 2006, pp. 166-168.



question whether unauthorised downloading fell under the private copy exception, and thus escapes from the accuse of infringement. The new article 335-11 IPC clearly qualifies the non-authorized downloading as a copyright infringement.<sup>151</sup> Curiously enough, the French legislator did not make lawful access a condition in order to benefit from exceptions, but instead leaves the arrangements made by the right holders to ensure that lawful access is made a condition. Since this creates incertitude, the Constitutional Council was asked to elucidate the matter. However, the Council confirmed that the benefit from exceptions foremost and last would depend on the right holders, who are free to impose a TPM as an access control.<sup>152</sup> Thus, the lawfulness of the source will be technically and not legally determined.

Nonetheless, The French should feel compel from other European countries. Sweden, Belgium, Germany and Hungary have all pronounced the necessity of a lawful source. Nonetheless, comparison does not equal reason. That is why one has to search in French law for arguments in this direction. The lawful source sends back to the concept of legitimate user. Thus, only a legitimate user should be allowed to realise a private copy. The legitimate user is allowed to copy the work due to a licence contract authorising this act, or by purchasing a copy of the work. Finally, the user shall not have been prohibited to make a copy due to the presence of a lawful TPM preventing this. Accordingly, if the behaviour of the user is lawful, she has committed no act of infringement.<sup>153</sup>

Conversely, article 331-9-2 IPC provides that a technological measure may hinder all private copying if a lawful access does not exist, at least if the technique can establish this. In this hypothesis, it is not possible to imagine a private copy since this requires a licit source. The Constitutional Council clarified that it is not for the beneficiary of the exception to prove that the original was lawful.<sup>154</sup> Nevertheless, it would be difficult to invoke article L. 331-9-2 in order to achieve the non-appliance of the private copy exception. It is one thing to allow technological measures to prevent the copying when the source is unlawful; it is another thing to consider the exception non-applicable when the source is unlawful. On the contrary, article L. 331-9-2 inclines that the unlawfulness of the source does not limit the exception, since if this text authorises technological measures to “subordinate the effective benefit of the exception to a lawful access to the work”, it is because these exceptions are applicable. It would make no sense to authorise the deprivation of the effective benefit using TPMs to an exception that did not apply anyway.<sup>155</sup> Furthermore, if the exception does not comply with the three-step test, a technological measure preventing a private copy to be

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<sup>151</sup> Desurmont, Comm. com. électr. 2006, p. 18.

<sup>152</sup> Dusollier, Comm. com. électr 2006, p. 20.

<sup>153</sup> See Caron, Christophe, *La source de la copie privée doit-elle être licite?*, Comm. Com. électr. no 9, September 2006, pp. 28-29.

<sup>154</sup> Cons. Const., 2006, recital 51. Compare to the Swedish view above, under 3.2.1.

<sup>155</sup> See Desurmont, Comm. com. électr. 2006, p.18.

made is permitted. In this case, the Constitutional Council clarified that only one copy could be allowed, or even none.<sup>156</sup>

Moreover, a new second paragraph of article L. 122-5 IPC submits the private copy exception to the three-step test. Consequently, if the private copy were to exist independently of the lawful character of its source, it would no longer be a special case, since it could then be generalised. This in itself would justify the need for a lawful source, but also the fact that the normal exploitation of the work would be concerned. Moreover, the right holder would suffer an unjustified damage to his legitimate interests, since he would not only endure infringing acts, but also private copies carried out in the shadow of the latter. Concretely, reproductions publicly available, from which the calculation of the remuneration is normally determined, would be purchased neither by the infringer, nor by the user.<sup>157</sup>

Finally, the demand for a lawful source should be limited to cases concerning the private copy exception. It would be devastating if e.g. the exception for citation was subordinated such stipulation. The possible loss for right holders is not comparable to that in the case of private copying. Unfortunately, the new French law did not consider it judicious to submit the private copy exception to the prerequisite of a lawful access for a copier considered as a legitimate user, even though the question is introduced in the new article L. 331-9 IPC.<sup>158</sup> The Directive did not contemplate it. It is really a spoilt occasion; it would have been judicious to have this rule inserted into law. Both Christophe Caron and Pierre-Yves Gautier have expressed the view that a lawful copy cannot find its original in an unlawful medium.<sup>159</sup> Hence, it belongs to the jurisprudence, and more precisely the Court of Appeal as we shall see below, to fill in a whole the legislator left empty.

### 4.3.3 Recent case law concerning lawful source

A decision of the French Supreme Court (Cour de Cassation) on 30 May 2006 annulled a ruling of the appellate Court having acquitted the defendant charged with infringement on the ground that the copies made were solely for his private use<sup>160</sup>. The District Court cleared the defendant of charges of infringement for having burnt films on CD-ROMs, initially downloaded from the Internet or borrowed from friends. The charges were infringement because of publication or reproduction of a work in contempt of the author's rights. The District Court based its decision on the exception for private copying found in articles L. 122-3, L. 122-4 and L. 122-5 IPC. These articles state that when a work has been made available to the public, the author

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<sup>156</sup> Cons. Const., 2006, recital 50.

<sup>157</sup> See Caron, *Comm. Com. électr.* 2006, pp. 28-29.

<sup>158</sup> Caron, *Comm. com. électr.* September 2006, p. 29.

<sup>159</sup> Badets, Elodie, Hayat, Olivier, Jarrige, Dorothee, *La réforme du droit d'auteur, dits et non-dits*, *Compte rendu de la journée d'étude du CEJEM du 23 février 2006*, *Légipresse* no 231, May 2006, p. 58.

<sup>160</sup> Private use in French law indicates the inner family circle, including close friends.

cannot prohibit copies or reproductions strictly reserved for the private use of the copier and not intended for collective purposes. Since the accused declared having made the copies for a strictly private use and the contrary could not be demonstrated, the Court ruled in favour of the defendant.<sup>161</sup> The ruling was appealed, but the Court of Appeal reached the same decision as the District Court.

The public ministry and civil party plaintiffs thus appealed to the highest jurisdiction. They argued that these films had not been subject to a lawful exploitation on the Internet. Moreover, they believed that in order to benefit from the private copy exception in article L. 122-5 IPC, the source has to be lawful and not in any way violate the prerogatives of the right holders in the work concerned. In its ruling, the Supreme Court held that, since the Appellate Court merely stated that the defendant had exercised his *right* to make copies for private use, without answering to the submissions of the plaintiffs, it had failed to fulfil its obligation under article 593 of the Procedural Code.<sup>162</sup> Thus, the case was remanded to the Court of Appeal made up differently.

Hence, is it possible to benefit from the private copy exception, even though the latter has been realised from an unauthorised medium, since it is fraudulently obtained? The Court of Appeal provides no answer and nor does the Supreme Court, since the latter merely remanded the case to the Court of Appeal constituted differently. The question is not new, and has been widely discussed by French legal experts over the last years. Since article L. 122-5 offers no guidance, some draw parallels to article L. 122-6-1 IPC that states that only a person having the right to use the software can copy the software.<sup>163</sup> However, it is not very fortunate to enlarge the scope of copyright to solutions aimed at such particularities.

Consequently, if the private copy is concluded in the trail of an act of infringement, common sense calls for neutralisation of the latter. How can it be possible to admit that a lawful exception to the monopoly of the author consequently extends the effects of a pirated edition? Undoubtedly, it is possible to argue that the law does not provide answers on the subject. Nevertheless, the law does not always stipulate the evident and what follows from common sense. Some guidance is given by article L. 331-9 IPC, where it is stated that the possibility of making a copy can be subordinated to, if the technique allows it, a lawful access to the work. In other words, by using anti-copy TPMs, the right holder could prohibit the copy in the hypothesis of a non-authorised access to the work in order to copy it. The present case was rendered before this article was implemented in the IPC, thus the textual silence applies to it. Exceptions shall be applied restrictively, and the copyright does not escape from this rule. Thus, when there is doubt, it is appropriate to rule in favour of the monopoly of the author, which is probably what the Court of Cassation advises the Appellate Court to do when

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<sup>161</sup> TGI, 13 Oct. 2004.

<sup>162</sup> C.Cass; 30 May 2006.

<sup>163</sup> Caron, *Comm. com. élect.* 2006, p. 28.

remanding the case. The response is yet to come from the Cour d'Appel d'Aix-en-Provence.

#### 4.3.4 Remuneration to right holders

Following the emerge of new technology, French legislators in the seventies found it necessary to inaugurate a remuneration system for right holders, who were losing out on important income due to private copying. The arrival of the digital world changed the concept of remuneration. Accordingly, in a world where copies identical to the original are easily produced, remuneration for digital copies was instituted in article 15 of the law of 17 July 2001. Article 5(2)(b) of the Directive is in line with this, when stating that in order for a private copy exception to exist, "fair compensation" shall be assured the right holder. The compensation gives rise to intense debates in France today. Is it fair that right holders profit both from legal protection of their technological measures, and of a remuneration due to the private copy exception? Is it fair that everyone pays for copies made by a few?<sup>164</sup> With the establishment and protection of technical measures, arise the contestations of those asserting that the levy system no longer is justified where the copying possibilities are altered or diminished. French right holders cannot avoid the controversy.

The protection of technological measures has to be attended to when deciding the size of the remuneration. If a measure prevents the work from being copied, it is evident that the remuneration loses its justification. Nonetheless, this is only true in cases where a TPM actually prevents copying. Therefore, in a third paragraph of article L. 311-4 of the IPC, it follows that the amount of the remuneration for private copying "shall take account of the degree of use of technological protection measures...and their impact on users covered by the exception for private copying". Thus, the remuneration is smaller the harder it is to make private copies because of the existence of technological protection measures. Accordingly, it is the actual use of these measures, and their impact on consumers' private copying habits, that is to be taken into account.<sup>165</sup> Thus, the mere theoretical availability of technological protection systems, regardless of their use and their practical impact, shall not be taken into account. Moreover, the fact that the source of the copied work is unlawful does not denote that there will be no remuneration.<sup>166</sup>

If the Court of Appeal retains the Court of Cassation's suggestion in the case referred to above, one is inclined to wonder what consequences there would be for the remuneration for private copies. If copies made of an unlawful source are no longer lawful and private, the sphere of the private copy diminishes.<sup>167</sup> Should the remuneration diminish with it? This could

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<sup>164</sup> Caron, 2006, pp. 284-285.

<sup>165</sup> Desurmont, RIDA, 2006, pp.168-170.

<sup>166</sup> Caron, 2006, pp. 285-286.

<sup>167</sup> Caron, Comm. com. électr. 2006, p. 31.

have an absurd consequence. A person, who purchases equipment for registration in order to carry out infringing acts, would logically be in a position to ask to be deliberated from paying the remuneration for the private copy. However, this is only an imaginable scenario. It is not certain that the demand of a lawful source would result in the diminution of the remuneration for the private copy. It is no secret that the remuneration is disconnected from the actual use of the equipment. Numerous are those who purchase virgin recording supports and thus pay remuneration without ever realising private copies. On the other hand, recording means are being purchased for making private copies. Thus, the remuneration system has to prevail, independent of the actual number of private copies being made. Everyone pays for copies being made by a few. Article 5(3) of the Directive demands that the private copy is accompanied by a fair compensation. Thus, it is complicated to economise in this sense.

### **4.3.5 Three step test vs. Technological measures**

The exceptions to copyright are going through a crisis following the implementation of the Infosoc Directive. The villain is article 5 of the Directive, which contains a long list of facultative exceptions. However, the trouble does not lie in the exceptions. It is the mandatory submission to the three-step test set out in article 5(5) of the Directive that complicates matters. The maxim “exception est strictissimae interpretationis” applies to exceptions. It signifies that exceptions should endure a restrictive interpretation, and in case of doubt, the exception suffers defeat. According to the three-step test, implemented in the second part of article L. 122-5 IPC, the limitation of, or exception to, the author’s exclusive rights is confined to special cases<sup>168</sup> that do not conflict with a normal exploitation of the work and do not reasonably prejudice the legitimate interest of the author.<sup>169</sup>

The expression “three-step test” is doctrinal and nowhere to be found written in the law. The technique is hence found in articles L. 122-5, L. 211-3, L. 331-9 and L. 342-3 of the IPC. As to the burden of proof, it follows classical procedural rules. Primarily, the person invoking an exception has to prove that the necessary conditions are satisfied. If this is affirmed, the right holder has to prove that the exception causes an abnormal prejudice to the normal exploitation of the protected work. However, nothing encumbers the use of judicial presumptions. The behaviour of a single person does not necessarily cause the damage. Nevertheless, if many persons commit the same act, damage will appear. Thus, the reasoning considers the grand number, and not a single act when deciding whether unreasonable damage may arise.

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<sup>168</sup> A special case is, according to the French interpretation of the Directive, any exception present in the law. See <http://www.senat.fr/rap/105-308/105-30856.html#toc469> (accessed on 9 May).

<sup>169</sup> Caron, 2006, pp. 276-277.

However, this presumption is not irrefragable. A consumer or association of consumers may bring evidence showing the contrary.<sup>170</sup>

The three-step test thus constitutes the frame of legitimacy of exceptions that either the legislator or the judge, according to the interpretations of the test, has to consider when applying or adopting exceptions to copyright and neighbouring rights. This is where its role should end. However, the Constitutional Council goes further when it confirms the application of the test by the Court of Cassation in February 2006.<sup>171</sup> In this case, the three-step test is applied in order to determine the legitimacy of technological measures thwarting the benefit of the private copy, when the necessity of the normal exploitation of the work in a digital environment would justify any hamper to the exceptions. The Council believed that the provisions relative to technological measures should be interpreted as acknowledging authors or right holders the right to use TPMs limiting the benefit of the private copy exception, in cases where the normal exploitation of the work would be endangered. Furthermore, the Council adds that any other interpretation would be manifestly incompatible with the three-step test.<sup>172</sup>

Such a partnership between technological measures and the three-step test does not emanate from the source. The Infosoc Directive mentions regard of the test in the measures taken by the Member States in order to guarantee the benefit of a private copy, in spite of the presence of an anti-copy device. However, this does not indicate that the criteria of the normal exploitation of the work and the absence of harm to the interests of the author will determine the scope of the exclusive rights and prerogatives of the technique. In practice, these two criteria restrain the possibility of an exception, thus allowing the exercise of the exclusive rights to broaden in scope. In theory, it seems dangerous to use the three-step test in reverse, since in doing so, it would, instead of acting as a tool for determining the external or negative limits of the exception, act as a positive determination for the scope of the technical power at the right holders disposal, a power that could stretch beyond the exclusive rights. This very large definition given to the normal exploitation by the Court of Cassation and confirmed by the Constitutional Council, could give the test a disproportionate weapon and a carte blanche to the provisions for technological measures.<sup>173</sup>

Some were sceptical to the implementation of the three-step test into French law. The three conditions of the test can, no matter how many times they are re-read, end up in different sorts of analysis. The interpretation will depend on the country, the media, the market and the era. Such incertitude is not the dream scenario for a rule inserted into national legislation. One must not forget that the frontier between legal and illegal is to be determined, and

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<sup>170</sup> Gautier, Pierre-Yves, *L'élargissement des exceptions au droits exclusifs, contrebalancé par le test des trois étapes*, Comm. com. électr. November 2006, pp. 11-12, compare to discussion in Mulholland Drive case below.

<sup>171</sup> In the Mulholland Drive case, see the following discussion about the case.

<sup>172</sup> Cons. Const., 2006, recital 37.

<sup>173</sup> Dusollier, Comm. com. électr. 2006, p. 24.

legal sanctions are at stake.<sup>174</sup> Perhaps the Swedish legislator was right in leaving the three-step test as a rule of interpretation.

## 4.4 Mulholland drive case

The UFC Que Choisir, a French consumer union, filed the legal action in behalf of a customer, Monsieur Perquin, who tried unsuccessfully to convert the DVD film *Mulholland Drive* into regular VCR for his mother, who only had a VHS recorder. The consumer claimed it was an unreasonable limitation to the private copy exception, instigated by a technological measure. The debate that followed was mainly about the compatibility between the three-step test and the private copy exception. The District Court and the Supreme Court reached the same conclusion, that the private copy exception was overruled by the three-step test. However, the Court of Appeal assumed the contrary.

### 4.4.1 The District Court

On 30 April 2004, the judges of the District Court in Paris, for the first time, rendered a decision concerning the validity of technological protection measures in combination with the dispositions of articles L. 122-5 and L. 211-3 of the IPC concerning the private copy exception. Stéphane Perquin, a consumer, and the consumer union UFC Que Choisir, sued the company Films Alain Sarde, Universal pictures video France and Studio Canal because of the impossibility of making a copy of the DVD *Mulholland Drive* on to a video cassette due to technological protection measures incorporated in the medium. The plaintiffs argued that such measures impinged on the private copying right granted to users under articles L. 122-5 and L. 211-3 of the IPC. The plaintiffs also claimed that no information about the technological measure had been given, thus a violation of article L. 111-1 of the Consumer Code. The judges rejected the plaintiffs' arguments, with reference to the three-step test present in article 9(2) of the Berne Convention and article 5(5) of the Infosoc Directive (which at the time had not yet been transposed into French law). The argument that the remuneration received by the right holders gives the consumers a *right* to make a private copy was also rejected. Regarding the information of the existence of a protection measure, the judges responded that the possibility to make a private copy is not one of the essentials of a DVD.<sup>175</sup>

This decision was a serious setback to consumers who, up until now, had successfully condemned right holders for having imposed technical protection measures hindering a private copy. Consequently, in 2003 the District Court of Nanterre ruled against *EMI France* for lack of information and

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<sup>174</sup> See Lucas, André, *L'apposition d'une mesure technique de protection sur un DVD est légitime au regard de l'exception de copie privée*, JCP E, May 2006, p. 1067.

<sup>175</sup> TGI 30 April 2004.

deceit concerning a technological protection measure on a CD. However, this decision did not concern the private copy exception, which was at the centre of the *Mulholland Drive* case.<sup>176</sup>

#### 4.4.1.1 Private copy – A right or an exception

An interesting question discussed in the *Mulholland Drive* case is whether the private copy exception is a subjective *right* or simply *tolerated*. Can one say that the right to remuneration for private copies corresponds to a *right* to make private copies? In the case, the judges responded in the negative. They argued that the remuneration already perceived by the right holders could not be compared to, or decide, the scope of the private copy exception. Notwithstanding, article L. 311-1 IPC stipulates that the right to a remuneration is accorded to right holders for reproduction of their works in a way described in the articles concerning the private copy exception, namely articles L. 122-5 (copyright) and L. 211-3 (neighbouring rights) IPC.<sup>177</sup>

Conversely, in a digital environment this tolerance is not motivated, according to the right holders. A digital copy produces, in most cases, an identical copy. Thus, reproduction and distribution of protected works will take place at a larger scale, using Internet networks such as peer-to-peer. Nevertheless, the digital environment allows a compensation for this inconvenience, due to technological protection measures that either hinders or limits copies of protected works. In 1957, the lawmaker could impossibly predict the arrival of the digital era. Conversely, in 1985 the lawmaker did institute a system of remuneration to the right holders for private copies. The remuneration is due by producers and importers of virgin media. The law of 17 July 2001 extended the remuneration to all digital media.<sup>178</sup> At the end of the day, regardless of whether it constitutes a genuine right or a mere tolerance, the private copy is questioned by the arrival of technological protection measures, preventing their realisation

#### 4.4.1.2 Reference to the Three-Step Test

In order to determine the extent of the private copy exception, the Court referred to the Berne Convention's article 9(2) concerning the three-step test. As concluded above, a reproduction of a work is allowed as long as it does not harm the normal exploitation of the work or causes unjustified harm to the legitimate interests of the right holder. The harm is a reality as soon as the exception causes an unjustified loss of revenue. The District Court judges seem to have been inspired by this economist interpretation of the three-step test. They believed that, in the present case, the private copy exception harmed the DVD market, since the revenue loss could be impor-

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<sup>176</sup> For further discussion see Masset, Olivier, *L'exception à l'exception : quand les mesures techniques de protection interdisent la copie privée numérique*, July 2004, available at <http://www.juriscom.net/pro/visu.php?ID=559>, p. 2 (accessed 12 February, 2007).

<sup>177</sup> Masset, 2004, pp. 3-4.

<sup>178</sup> Masset, 2004, p. 3.



tant. Therefore, the normal exploitation of the work would be harmed, since the revenue is essential to ensure the production of DVDs.

#### 4.4.2 The Court of Appeal

On 22 April 2005, the Court of Appeal in Paris granted the plaintiffs' appeal. The Appellate Court considered that, in the absence of any reprehensible misuse by the copier, a copy for private use is not such as to conflict with a normal exploitation of the work in DVD form, which generates revenue needed to recoup the production costs. Moreover, the Court considered that, even though the private copying constitutes only a statutory exception to author's rights and not a *right* granted in an absolute manner to users, this exception could not be restricted when French law contains no provision to this effect.<sup>179</sup>

The Court of Appeal reached its decision by interpreting the private copy exception in the light of the Infosoc Directive and the Berne Convention. Its interpretation of the three-step test differed from that of the District Court. The Court held that, in order for an exception to be valid, the three cumulative levels of the test have to be fulfilled. Firstly, the copy for private use of the DVD was considered a special case, in accordance with article L.122-5 IPC, thus the first step was fulfilled. Secondly, the Court considered that no impediment to the normal exploitation of the work could be established. Finally, according to the Court, the copying did not cause damage to the right holder. Therefore, it was judged that the copying of a DVD on to a video cassette fulfilled the cumulative conditions of the three-step test, and the technological protection measure implemented caused damage to Mr Perquin and should thus be prohibited. Furthermore, the declaration "CP"<sup>180</sup> did not supply with the information duty due to consumers when implementing technological protection measures.<sup>181</sup>

#### 4.4.3 The Supreme Court

On 28 February 2006, the Cour de Cassation in Paris rendered its ruling in the now famous *Mulholland Drive* case. The Court reached the decision that "The exception for private copying cannot prevent technological protection measures designed to prohibit copying of the work from being incorporated in the digital medium where private copying would have the effect of conflicting with a normal exploitation of the work fixed in the DVD". Conflicting in this sense is, according to the Court, assessed in the light of the economic impact that such copying may have in the context of the digital environment. The Court of Cassation concluded that the Court of Appeal was in

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<sup>179</sup> CA 22 April 2005.

<sup>180</sup> Copie prohibée (copy forbidden).

<sup>181</sup> For a deeper analysis of the decision, see Amblard, Philippe, *La Cour d'appel de Paris confirme l'exception de copie privée sur support numérique*, available at <http://www.juriscom.net/actu/visu.php?ID=689>, pp. 1-2 (accessed 15 February, 2007).

violation of the texts. This was motivated by the fact that the private copy exception cannot prevent the insertion of anti-copy measures “when it would damage the normal exploitation of the work”. Furthermore, “the exception for private copying, must be assessed having regard to the risks inherent in the new digital environment as concerns the protection of authors’ rights and the economic importance that the work’s exploitation in DVD form represents in terms of recouping film production costs”. Thus, the Court of Cassation quashed and annulled the ruling handed down by the Court of Appeal and returned the case and the parties to the position they were in before that ruling and, so that justice may be dispensed, referred them to the Court of Appeal of Paris made up differently.<sup>182</sup>

#### 4.4.4 The aftermath of the Court’s decision

The case caused an enormous controversy. The question was simple. Should an acquirer of a DVD be deprived of the possibility to make a copy for private use, due to a technical protection measure? The District Court answered yes, the Court of Appeal no and the Court of Cassation yes. The case caused a big debate since the final decision was rendered only a few months before the new law was due. The decision of the Court of Appeal would probably have applied to all commercialised DVDs, thus prohibiting anti-copy measures on such. The manner in which the decision was presented indicates that it was meant to establish doctrine. The citation of the three-step test and the Directive, which had not yet been transposed, as source of doctrine is arguable. Normally, it is up to the legislature to decide how to apply such principles when making law, not to the courts.

The judges emphasised the economical impact of allowing an exception for private copying when ruling in the *Mulholland Drive* case. The case was returned to the Court of Appeal, because, according to the Court of Cassation, it had not adequately considered the normal exploitation of the work in relation to the private copy exception. The first affirmation is hard to grasp. One is inclined to understand that it seeks to emphasise that the digital copy jeopardises the normal exploitation more than an analogue copy. However, this statement does not suffice to establish that the normal exploitation is effectively jeopardised. Article 5(5) of the Directive identifies a *damage* and not a *risk*.<sup>183</sup> The Supreme Court took the opportunity to institute a precedent, acknowledging the risks of private copying in a digital environment.<sup>184</sup> The Court of Appeal confirmed all statements of the Supreme Court in its decision of 4 April 2007.<sup>185</sup>

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<sup>182</sup> C.Cass. 28 February 2006.

<sup>183</sup> Lucas, JCP E 2006, p. 1067.

<sup>184</sup> Benabou, Valérie-Laure, *Les dangers de l’application judiciaire du triple test à la copie privée*, April 2006, available at <http://www.juriscom.net/uni/visu.php?ID=817> (accessed 15 February 2007), pp. 4-5.

<sup>185</sup> CA 4 April 2007.

The second affirmation of the Court accentuates that a normal exploitation is one that allows the reimbursement of the film production costs. However, this does not give a satisfactory answer to the question if the private copy exception exerts a measurable impact on the exploitation type at cause, i.e. a DVD. Moreover, this argument would go for any sector. Surely the production costs for cinema are higher, could it also be traumatised by the generalisation of the private copy? The answer to these questions demands a profound study of the normal exploitation in relation to the three-step test, thus including all new types of exploitation and potential markets.<sup>186</sup>

Another controversy of the Court's decision is that the exception was considered not to be in conformity with the three-step test. Thus, the TPM could not be criticised. Even though the non-conformity was more attained than demonstrated, the reasoning was in itself relentless. If the user were no longer allowed to oppose an exception, there would be no other way for him to achieve the circumvention of a TPM in order to enjoy the benefit of an exception. The view of the Court of Appeal, that the exception was in conformity with the three-step test, could be defended by this discussion.

However, it is irrational to deduct the unlawfulness of the technological measure.<sup>187</sup> Such a solution contradicts article 6(3) of the Directive, which undoubtedly affirms the lawfulness of technological measures preventing acts not authorised by the right holder. Article 6(4) does offer Member States a possibility to act appropriately in order to guarantee the private copy. However, this provision is optional. It is thus a manifest misinterpretation to state that French law, in the light of the Directive, prohibits any technological measure preventing the effective benefit from the private copy exception. A better way of stating it would be to allow circumvention in every special case, or as today, the Authority will order the producer or the right holder under penalty of fines to supply a copy without a TPM. The truth is that the legislator would be perfectly legitimate in withdrawing this exception, or allowing right holders to paralyse its functioning, since article 5(2)(b) is facultative. In that case, the legislator could not be reproached for having transposed the Directive incorrectly.<sup>188</sup>

By overruling the decision of the Court of Appeal, the Higher jurisdiction somewhat took the position of the defender of the cinematographic industry in the digital world. The consumer is deprived of the possibility of using an exception to the author's work. Question remains if it was the intention of the Court to prohibit private copies on all types of equipment, or only DVDs. The law does not distinguish between the different media when determining the exception. Therefore, in the present case, the Court could have stated that the copied work was not of a digital character, and was thus to be allowed. In addition, the economical risk, which was proven by using the three-step test, is not shown when it comes to copying on a VHS cassette.

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<sup>186</sup> See Lucas, May 2006, p. 5.

<sup>187</sup> For further discussion, see case law ahead.

<sup>188</sup> Lucas, May 2006, pp. 5-6.

The Court's decision is thus ambiguous.<sup>189</sup> If the case had concerned copying of a file downloaded from a peer-to-peer network, the outcome would probably have been identical. However, the decision would most certainly have been more comprehensible. Conclusion: the digital environment causes the loss of the private copy exception.

## 4.5 Other recent case law concerning the private copy exception

In a decision of the District Court of 10 January 2006, a consumer successfully invoked the exception for a private copy of Phil Collins CD *Testify*. A technological protection measure had been implemented on the CD, preventing the playing of the CD on a Macintosh, as well as its reproduction. The consumer organisation UFC Que Choisir complained about the non-sufficient statement about the technological protection measures on the CD, and the consumer complained about not being able to make a copy for private use. The judge refers to the three-step test in deciding whether the private copy exception had rightfully been set aside.

This judgement was rendered six months before the transposition of the Infosoc Directive into French law and only six weeks before the ruling in the *Mulholland Drive* case. The District Court renders its ruling in the light of the Directive's article 6(4), 5(2)(b) and 5(5). The first step of the test is considered fulfilled, since the national exception for private copying is reserved for copies made for private use by the copier. As for the second step, the Court considered whether the copying damages the normal exploitation of the work. According to the judges, the exploitation of a musical work on a compact disc is a normal exploitation of that same work. Furthermore, it is not shown that this exploitation is affected by the private copying made by the copier for private use. This argument is motivated by the fact that the impossibility for the copier to make a copy of the work would not mean the buying of a second CD by the same artist. The Court also mentions the law of 17 July 2001, ensuring remuneration to the right holders from every purchase of blank media. Therefore, benefit from the private copy exception should be allowed in this case, since the conditions imposed by article 5(5) are respected. Furthermore, the Court states that, as the defendants put forward, law does not forbid technical protection measures, but these measures must still be compatible with the exception for a private copy ensured by national law.<sup>190</sup> Since the purchased CD did not allow a single digital copy to be made, and this was not motivated, the producer of the disc caused harm to the consumer that must be repaired.<sup>191</sup>

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<sup>189</sup> See Mas, Séverine, *Copie privée: privé de copie!*, 2006, available at <http://www.juriscom.net/actu/visu.php?ID=798>, (accessed 12 February, 2007), pp. 1-2.

<sup>190</sup> The Court made reference to article 6(4) of the Directive.

<sup>191</sup> TGI 10 January 2006.

According to article L. 111-1 of the Consumer protection code, every professional seller must ensure that the consumer knows all essential characteristics of the good before buying it. In the present case, information existed stating that digital copies were impossible, but there was no statement about the impossibility to play the CD on Mac support. By not informing the consumer about the restrictions of playing the CD on CD-ROMs of computers, Warner music France and Fnac were condemned to pay indemnities to the consumer organisation.<sup>192</sup> Hence, an explicit obligation of interoperability exists in article L. 331-5 IPC.

The conclusion drawn from this judgement is that the Court correctly believed, before the implementation of the Infosoc Directive, that law did not forbid technical protection measures. However, they were not to be implemented in such a way that they hinder a consumer from making a copy for personal use. This judgement came after the Court of Appeal had approved the appeal by the consumer and consumer organisation in the *Mulholland drive* case, by prohibiting the TPM at question. Perhaps the judges were affected by this previous judgement, since numerous lines of arguments correspond exactly to the ones used by the Court of Appeal. However, the District Court's decision seems more correct, since it does not pronounce an interdiction of the TPM. Hitherto, the future for private copying of CDs is hard to predict, since the *Mulholland Drive* case concerned DVDs.

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<sup>192</sup> TGI 10 January 2006.

## 5 Comparative analysis

Sweden and France adhere to the Civil Law tradition. In civil law countries, the exception regime is generally *closed*, whereas common law countries normally adopt an *open* approach. However, the categorisation is not rigid, states are merely leaning more towards one approach. In the closed approach, the definition given of the scope of the creator's monopoly is synthetic, whereas the list of exceptions indicates them in a highly descriptive and limitative way. The list of exceptions claimable by users is restrictive and cannot be interpreted in such a way as to impair the interests of the creator.<sup>193</sup> Thus, the author possesses the most favourable and significant position. This corresponds with the approach of the Infosoc Directive, France and Sweden.

The implementation of the provisions of technological measures in French law should provide efficient protection of technological measures whilst preserving the balance of interests upon which the intellectual property is based on and legitimised by. The French legislator drafted a bill ensuring a high protection for the right holders, and at the same time guaranteeing an effective benefit from the exception for private copying. Recent case law may have influenced the legislator in the process, since the higher judges rendered their views on the interpretation of the protection of technological protection measures in a digital environment (see 4.4.4). Remuneration to right holders is limited in cases where TPMs restrict private copying.

Neither France nor Sweden has adopted special provisions concerning the private copy exception in the digital environment. In France, discussions have been ongoing on whether or not the user has a legally granted *right* to make a private copy of a work (see e.g. 4.4.1.1). Moreover, there has been uncertainty as to whether or not the source of the copy has to be lawful and whether downloaded works from e.g. a P2P network benefits from the private copy exception.

In Sweden, discussions arose about the extension of the scope of the right holder's monopoly when TPMs were to gain legal protection when protecting all access controls. According to the Swedish legislator, access control after initial access does not fall within the ambit of the exclusive rights, and thus shall not endure copyright protection. Furthermore, the Swedish legislator chose not to implement an enforcement provision relating to the exception for private use. Hence, the presence of a TPM equals an exemption from the benefit of the exception, thus creating a lock-up of the private copy exception. The Swedish legislator has not implemented a corresponding decrease in the remuneration to the right holders.

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<sup>193</sup> Sirinelli, Workshop on implementation issues of the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT), WIPO December 3, 1999 (accessed March 30, 2006) available at [http://www.wipo.int/documents/en/meetings/1999/wct\\_wppt/pdf/imp99\\_1.pdf](http://www.wipo.int/documents/en/meetings/1999/wct_wppt/pdf/imp99_1.pdf), p. 17.

## 5.1 Justified protection of an extended copyright?

The extension of copyright is a reaction to the new threats in the digital environment. Access control is a new phenomenon hence falling within the ambit of copyright (see 2.1.2). The Swedish legislator was however sceptical to this extension. The Swedish implementation offers a protection for technological measures preventing initial access, but measures preventing access after the initial access do not endure protection, since they also prevent an action that does not endure copyright protection (see 3.1.3). This reservation signifies that users are allowed to circumvent a TPM in order to be able to watch or listen to a work.<sup>194</sup> In my opinion, this reasoning is counter productive. The Swedish legislator wished to maintain the balance of interests by not ensuring too great a protection for TPMs. However, the outcome is that a user could, due to his own ability, lawfully circumvent a TPM on a DVD or CD, then copy it to a digital form, and distribute it on the Internet. The aim of the provision is to exempt use not falling under the copyright protection. Ironically, after the circumvention the use may very well fall under the copyright protection. Nevertheless, this argument is legally set aside through the provision in article 2 of the Swedish Copyright Act. A user who makes available a work protected by copyright commits an unlawful act. However, in theory, the scenario would be possible.

Whereas the Swedish legislator thus offers an exception for circumvention of “regional codes”, the French law offers no such exception. Therefore, a Swedish consumer purchasing a work protected by a regional code in France, who circumvents this for example in order to be able to watch the work in Sweden, would carry out a lawful act. However, if the scenario were the reverse, i.e. a French consumer circumventing a TPM in order to watch a work protected by a regional code in France, such an action would be unlawful. Under these circumstances, one can legally circumvent a TPM in Sweden but not in France. The ambiguity of the Directive thus leads to different national interpretations. In this sense, the French solution is more favourable to the right holder than the Swedish is.

There is no provision in the Directive supporting the Swedish interpretation of the protection of access control. On the contrary, all technologies constituting an access control are to achieve legal protection (see 2.1.2). The French legislator probably considered a longer perspective: lawful circumvention can lead to unlawful copying, which in turn may lead to unlawful spreading of the work, but it can be prevented by protecting an access control. However, this is not a common behaviour of all users, only a minority would probably exploit the work in violation with the right holder’s exclusive rights.

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<sup>194</sup> See article 52 (d) (2) of the Swedish Copyright Act.

By explicitly referring to access control technology (see 4.1.2), the French legislator clarified that the access controls are qualified as technologies aimed at preventing the infringement of copyright. Whilst the Swedish legislator could be said to adopt a somewhat minimalist approach, the French have adopted a comprehensive approach by explicitly stipulating that access control technology falls within the scope of protection.

Whereas Sweden merely exonerates users circumventing TPMs in order to watch or listen to a lawfully acquired or accessed work, France implemented a right of interoperability. However, this right can only be claimed by producers etc., and not by the consumers or right holders (see 4.1.3). Thus, it is no solution for the individual consumer encountering such a problem. A French consumer could instead fall back on the doctrine of hidden defect or the provision of “free use” in article 331-5-6 IPC (see 4.1.3). Nevertheless, the act of circumvention would never be lawful.

In an encounter with Olivier Hayat<sup>195</sup>, he pointed out that legal remedies concerning TPMs probably came a bit early and are likely to cause legal insecurity. On the other hand, if one wanted to prohibit technological protection measures all together, these discussions should have occurred when the WIPO treaties inserted a protection of TPMs back in 1996. Today, it is instead a question of conciliating them with the balance of interest between right holders and users.

## 5.2 Legal and political perspective

The three-step test is supposed to restrict the extent of exceptions and limitations to the copyright of both analogue and digital excepted use. Sweden did not implement the three-step test due to its deficiency of predictability and restrictiveness (see 3.2.3). In the absence of such implementation, the right holders cannot have full confidence in the test to back them up in a court dispute. Sweden is a civil law country and thus an implementation of the test would have been mandatory in order to *guarantee* its efficient application. However, this does not mean the judges cannot apply it, since it is already present in other international conventions. Nevertheless, the civil law tradition may cause the judges to forget its existence. Since Sweden does not allow benefit from the private copy exception in front of a TPM, the three-step test would only be important concerning other limitations or exceptions to the exclusive rights.

One may argue that the French judges applied the three-step test before its implementation in a couple of cases discussed above. Nevertheless, that was when there were numerous discussions flourishing about the Infosoc Directive’s implementation. A couple of years from now, it may be forgotten. On the other hand, legal uncertainty is definitely at hand in France due to the

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<sup>195</sup> Paris lawyer, specialised in the area.



implementation of the test. A former, very ambiguous, rule of interpretation has thus been granted positive legal status.

Sweden implemented a provision demanding the lawfulness of the master copy, thereby increasing the right holders' protection (see 3.2.1). However, the balance of interest is upheld, since the risk of infringement in a digital environment had to be vouched for. In my opinion, the French legislator, made a mistake by not implementing clear provisions concerning the lawfulness of the master copy (see 4.3.2). Legal uncertainty is the result of the French legislator's failure.

### **5.3 Economical perspective**

When ruling in the *Mulholland Drive* case, the French judges lacked legal regulation to base its decision on. Thus, it indulged in a complicated economical analysis, trying to apprehend the risks in a digital environment (see 4.4.4). As was demonstrated above, this could end up in too great a divergence between interpretations and a regrettable legal insecurity. Thus, the French legislator has a point in creating the Regulatory Authority. This way, the interpretations will probably (hopefully) be coherent and left to experts in the area of assessing the economical risk present in the digital environment. On the other hand, Sweden has already acknowledged the inherent economical risks by not guaranteeing the effective benefit of the exception for private copying in the presence of a TPM, and the judges would not have to return to an interpretation of the three-step test.

In France, some consider that the right to remuneration equals a right to private copying. Thus, when limiting the possibilities of making a private copy, the remuneration should diminish accordingly (see 4.3.3). The remuneration for private copying finances creation and vivid spectacles in France, as well as contributes to the diffusion of cultural works. Therefore, were the remuneration to diminish, this would cause economical damage, and not only a loss of comfort for the consumer. The Swedish legislator increased the cassette compensation in order to adapt to the digital environment, not regarding the outcome of the reduced possibility of making private copies. As a result, the public interest may suffer economically since they pay more and benefit less from what they are paying for.

### **5.4 Disappearance of the private copy exception in the digital world?**

The Swedish view seems to have allowed near extinction of the private copy in the digital world. The observation that the loss would be too big for the right holders dominates over the accordance of a possibility for users to use and reproduce for the family circle copyright protected works. By not exempting private use from the protection for technological measures, the

Swedish legislator is trying to balance the interests of the right holders and the users. It is a delicate line, but the Swedish view seems to be that the right holders' interest of not suffering from infringement in the digital environment is greater than the users' interest of making private copies.

The French debate has gone from wanting to extend the private copy exception to copies realised when downloading from the Internet, to adapting a more restrictive approach through the implementation of the three-step test. The *Mulholland Drive* case represents the danger of introducing the three-step test into national law. All three instances reached rather different conclusions based on an interpretation of the three-step test. Its ambiguity renders it somewhat unsuitable as positive law. The future for the private copy exception in France is thus uncertain since it will depend firstly on the Regulatory Authority, and secondly on the courts' interpretations of the three-step test. It is of my opinion that the Swedish legislator did right in leaving the three-step test as a rule of interpretation.

## 5.5 Conclusions

The French and the Swedish legislator both considered a legal protection for TPMs a necessity. However, France endeavoured perhaps more than Sweden in order to align the balance of interest between right holders and users. The French legislator tries to uphold the balance of interest in every individual case, which causes legal uncertainty and probably costs for the society. Nevertheless, the creation of a Regulatory Authority may generate coherent decisions, but they can always be appealed at the Court of Appeal, which may conclude different interpretations.

When French citizens are deprived of a previous *right*, they are sure to make noise. The private copy exception is no exception. That is why a large number of case law has emerged over the past few years, providing different directives of interpretation. *Mulholland drive* may be the most recent case in the area, but it will definitely not be the last. Hence, the Regulatory Authority is to *guarantee* the private copy exception. I am positive the Regulatory Authority will never be bored.

The remuneration for private copying in France will diminish accordingly with the loss of the possibility of making them, whereas in Sweden it will remain intact although the private copying is annulled by the presence of a TPM. It is hard to say where the public interest suffers most. In France, where financing of creation and diffusion of cultural works will lose out on important revenue or in Sweden where consumers will pay for copies not being made?

Legal certainty is coveted. Sweden fulfils this aim in a better way than France does, by imposing clear provisions concerning the lawfulness of the source and the possibility of making a private copy. Sweden upholds the balance of interest between users and right holders by not guaranteeing the

effective benefit from the private copy exception in front of a TPM. In a way, the Swedish legislator uses the same argument present in the three-step test when concluding that the inherent economical risks are too great in a digital environment in order for a guarantee for private copying to be justified. Thus, the Swedish legislator re-balances the weight.

The French love to complicate matters. The lawfulness of the source is technically and not legally determined (see 4.3.2). Instead of supplying clear directives, like the Swedish legislator, the French guarantees the right of private copy, even in a digital environment, as long as it complies with the three-step test. As recent French case law has shown, this will seldom be the case. Perhaps the French legislator managed to satisfy both sides in this way, right holders will not have to fear the degeneration of their works when distributed in a digital environment. Consumers will feel they have a “protection” towards the locks surrounding copyright protected works, through the possibility of lodging a complaint with the Regulatory Authority. Thus, there is *potential* for a better maintenance of the balance than in Sweden.

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