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On the production side, exclusive legal rights over these works are intended to permit and/or encourage authors or creators to invest the time, intellectual effort and money in the production of creative works and for the authors and creators to be identified with and ensure the integrity of their works. On the dissemination and access side, the first principles mandate that copyright only protects 'expressions but not ideas, procedures, methods of operations or mathematical concepts as such'⁴ and that a built-in⁵ system of limitations and exceptions ensures that (copyright protected) expressions are not constrained by undue restrictions.⁶

As many commentators have pointed out, the role of copyright in disseminating information can only be effectively realized when copyright law reflects a balance between the competing interests of protection

cultural rights. In particular, copyright laws and systems are an important part of governments' efforts to fulfil their human rights obligations under the Universal Declaration of Human Rights (UDHR) and the International Covenant of Economic, Social and Cultural Rights. These two instruments require states to ensure the right of all to freely participate in the cultural life of the community, to enjoy the arts and to share in scientific advancement and its benefits and the right to the protection of their moral and material interests resulting from any scientific, literary or artistic production that they author. These principles are reiterated in the European Convention on Human Rights, Convention for the Protection of Human Rights and Fundamental Freedoms signed in Rome 4 November 1950, entered into force 3 September 1953 UNTS 1-2889, as amended, and the Charter of Fundamental Rights of the European Union, [2010] OJ C83/2.

⁴ Article 9.2 of the TRIPS Agreement, *supra* note 3. See also Article 2 of the WIPO Copyright Treaty (WCT) adopted in Geneva, Switzerland 20 December 1996.

⁵ WIPO Workshop on Using Copyright to Promote Access to Information and Creative Content, WIPO document WIPO/CR/WK/GE/11/2, November 3 2011, Annex p. 7, 3, and S. Ricketson, The Boundaries of Copyright: Its Proper Limitations and Exceptions – International Conventions and Treaties, *Intell. Prop. L. Quarterly* 1999, No. 1, pp. 56–94.

⁶ In addition, outside the copyright toolbox, certain limits to copyright can be directly based on fundamental rights and freedoms, such as freedom of expression and the right to privacy, and others on competition law, such as the use of compulsory licences. See for example, P.B. Hugenholz, Limits, Limitations and Exceptions to Copyright under the TRIPS Agreement, in: C.M. Correa (ed.), *Research Handbook on the Protection of Intellectual Property under WTO Rules*, Cheltenham (UK)/Northampton, MA (USA), Edward Elgar, 2010, p. 321; P. Akester, The New Challenges of Striking the Right, Balance Between Copyright Protection and Access to Knowledge, Information and Culture, *European Intell. Prop. Rev.* 2010, Vol. 32, No. 8, pp. 372 et seq.

6. Exceptions, limitations and collective management of rights as vehicles for access to information¹

Johan Axhamn

1. INTRODUCTION

From a normative perspective, the primary role of the (international) copyright² system is to facilitate the production of creative works and their dissemination. At its very core the copyright system is therefore concerned with the production and availability of information and creative content for the benefit of society.³

¹ Paper selected from Young Scholars Competition, Bucerius Law School Conference 'Access Challenges of the 21st Century: Emerging Issues of Intellectual Property and Knowledge Governance', May 18–19, 2012.

² In this article, unless otherwise specified, the terms 'copyright' or 'work' also refer to so-called related or neighbouring rights.

³ See for example, U.S. CONST. art. I, § 8, cl. 8, which grants the US Congress the power to 'promote the progress of science and useful arts, by securing for limited times to authors ... the exclusive right to their respective writings.' At EU level, Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonization of certain aspects of copyright and related rights in the information society, [2001] OJ L 167/10, preamble (3), stresses that 'the proposed harmonization will help to implement the four freedoms of the internal market and relates to compliance with the fundamental principles of law and especially of property, including intellectual property, and freedom of expression and the public interest.' Similarly, the objectives of the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) include the protection of property under the Agreement for 'the mutual advantage of producers and users of technological knowledge ... in a manner conducive to social and economic welfare', Article 7, TRIPS, as set out in Annex 1C to the Marrakesh Agreement establishing the World Trade Organisation, adopted in Marrakesh 15 April 1994, entered into force 1 January 1995 [1994] OJ L336/214. From a human rights perspective, the copyright system, internationally and nationally, is an important part of efforts to fulfil socio-economic and

and access.⁷ However, it is often held that this balance has been disturbed by recent technological and related legal developments.⁸

Since the mid 1990s, advances in digital technology and global networks such as the internet have generated vast opportunities as well as enormous challenges for the copyright system. Geographical distance is no longer an obstacle to disseminating works, which can take place at virtually no cost. On the one hand this has provided creators and their commercial partners with new means of rights exploitation. On the other hand it has opened doors for new forms of infringement, some of which have proved difficult to combat.⁹

At the same time, the internet is becoming an ever more important part of everyday life. Members of the public nowadays use it for entertainment as well as for information or educational purposes. For example, access to information via digital libraries takes on a whole new dimension thanks to the possibilities offered by the internet.¹⁰ Also, consumers are increasingly becoming creators of content. So-called web 2.0 applications such as blogs, podcasts, wikis, and video sharing enable users to easily create and share text, videos or pictures, and to play a more active and collaborative role in content creation and knowledge dissemination.¹¹

⁷ P.B. Hugenholtz and R.L. Okediji, *Conceiving an International Instrument on Limitations and Exceptions to Copyright*, 6 March 2008. Final Report, Institute for Information Law, University of Amsterdam, available at: http://www.ivir.nl/publications/hughenoltz/limitations_exceptions_copyright.pdf.

⁸ Copyright and technology have long shared an intimate relationship and it is routine to describe copyright law as the product of technological change. See for example, R.L. Okediji, *Copyright in TRIPS and Beyond: The WIPO Internet Treaties*, in: C.M. Correa (ed.), *supra* note 6, p. 347.

⁹ See for example, C. Geiger, *The Future of Copyright in Europe: Striking a Fair Balance between Protection and Access to Information*, *Intell. Prop. L. Quarterly* 2010, No. 1, p. 4. Indeed, some years ago it was even suggested that copyright and the internet went together like 'fire and water' and that, as a result, copyright would soon lose its practical significance. See for example, D. Gervais, *Collective Management of Copyright and Neighbouring Rights in Canada: An International Perspective*, *CJLT* 2001, Vol. 1, No. 2, p. 21.

¹⁰ See for example, C. Geiger, *supra* note 9, p. 4; D. Gervais, *supra* note 9, p. 9.

¹¹ See for example, D. Gervais, *Individual and Collective Management of Rights Online*, in: J. Axhamn (ed.), *Copyright in a Borderless Online Environment*, Vällingby, Norstedts Juridik, 2012, p. 91. In an OECD study, user-created content was defined as 'content made publicly available over the Internet, which reflects a certain amount of creative effort, and which is created outside of professional routines and practices.' See Participative Web and User-Created Content, OECD Directorate for Science Technology and Industry Committee for

The international copyright framework was updated by the WCT¹² and the WIPO Performances and Phonograms Treaty against the background of the 'digital agenda'.¹³ However, it is commonly held that these instruments were mainly directed at updating the copyright framework to address the concerns of rights holders, by updating the level of minimum protection applicable to the online and borderless digital environment¹⁴ and introducing specific protection for technical protection measures¹⁵ and electronic rights management information.¹⁶ The interests of users and the greater public interest of access to information did not receive as much attention. For example, the possibility of introducing exceptions and limitations in national law was left to the discretion of WIPO member states within the boundaries set by the so-called three-step test.¹⁷ This test, which is also reflected in several regional instruments such as EU directives¹⁸ and free

Information, Computer and Communications Policy, Report of the Working Party on the Information Economy, 12 April 2007, DSTI/ICCP/IE(2006)7/Final, p. 9.
¹² See *supra* note 4.

¹³ WIPO Performances and Phonograms Treaty (WPPT), adopted in Geneva 20 December 1996. For the term 'digital agenda' see M. Ficsor, *The Law of Copyright and the Internet*. The 1996 WIPO Treaties, their Interpretation and Implementation, Oxford, Oxford University Press, 2002, § 1.46; S. Ricketson and J.C. Ginsburg, *International Copyright and Neighbouring Rights*. The Berne Convention and Beyond, Oxford, Oxford University Press, 2006, § 4.19.

¹⁴ An Agreed Statement of the Diplomatic Conference adopting the WCT relating to Article 1(4) recites 'the reproduction right, as set out in Article 9 of the Berne Convention, and the exceptions permitted thereunder, fully apply in the digital environment, in particular to the use of works in digital form. It is understood that the storage of a protected work in digital form in an electronic medium constitutes a reproduction within the meaning of Article 9 of the Berne Convention.' As regards the right of communication to the public, Article 8 of the WCT makes clear that the right includes 'any communication to the public of their works, by wire or wireless means, including the making available to the public of their works in such a way that members of the public may access these works from a place and at a time individually chosen by them.'

¹⁵ See Article 11 of the WCT, *supra* note 4.

¹⁶ See Article 12.1 of the WCT, *supra* note 4.

¹⁷ The test holds that member states may provide for limitations of or exceptions to the rights granted to authors of literary and artistic works 'in certain special cases' that 'do not conflict with a normal exploitation of the work' and 'do not unreasonably prejudice the legitimate interests of the author [or rights holder]'. The test is discussed further below.

¹⁸ See Directive 2006/115/EC of the European Parliament and of the Council of 12 December 2006 on rental right and lending right and on certain rights related to copyright in the field of intellectual property (codified version), [2006] OJ L376/6, Article 10.3, Directive 2009/24/EC of the European Parliament and

trade agreements (FTAs),¹⁹ is commonly held to constitute a 'limitation on limitations and exceptions' and thus reflect a strong authors' and right holders' bias.²⁰

That an authors' and right holders' bias is also reflected in the three-step test – ostensibly the 'balancing instrument' against which authors' and right holders' interests can be adjusted against competing public interests – is reinforced by the fact that Article 20 of the Berne Convention commits member states to an ever-increasing spiral of protection by permitting entry into special agreements among contracting

of the Council of 23 April 2009 on the legal protection of computer programs (codified version) [2009] OJ L111/16, Article 6 (3), Directive 96/9/EC of the European Parliament and of the Council of 11 March 1996 on the legal protection of databases, [1996] OJ L77/20 Article 6(3) and Directive 2001/29/EC, *supra* note 3, Article 5(5).

¹⁹ See for example, Article 17.4 (10) of the United States–Australia Free Trade Agreement, signed in Washington 18 May 2004, entered into force 1 January 2005 43 I.L.M. 1248, Article 16.4 (10) of the United States–Singapore Free Trade Agreement, signed Washington 6 May 2003, entered into force 1 January 2004, 42 I.L.M. 1026, and Article 10.11 of the Free Trade Agreement between the European Union and its Member States, of the one part, and the Republic of Korea, of the other part, signed at Brussels 10 June 2010 (pending) [2011] OJ L127/6.

²⁰ S. Ricketson, *The Boundaries of Copyright*, *supra* note 5, pp. 23 et seq.; H. Grosse Ruse-Khan, *Access to Knowledge under the International Copyright Regime*, the WIPO Development Agenda and the European Communities' New External Trade and IP policy, in: E. Derclaye, *Research Handbook on the Future of EU Copyright*, Cheltenham (UK)/Northampton, MA (USA), Edward Elgar, 2009, p. 611; S. Ricketson, *WIPO Study on Limitations and Exceptions of Copyright and Related Rights in the Digital Environment*, Report to the WIPO Standing Committee on Copyright and Related Rights, SCCR/9/7, 5 April 2003, p. 48; R. Dreyfuss, *TRIPS-Round II: Should Users Strike Back?*, *UCLR* 2004, Vol. 71, p. 21; P.B. Hugenoltz and R.L. Okediji, *supra* note 7, p. 7 with references; C. Geiger, *Promoting Creativity through Copyright Limitations: Reflections on the Concept of Exclusivity in Copyright Law*, *Vanderbilt J. of Ent. and Tech. L.* 2010, Vol. 12, pp. 515 et seq.; P. Akester, *supra* note 6, p. 372; A. Kapczynski, *The Access to Knowledge Mobilization and the New Politics of Intellectual Property*, *Yale L.J.* 2008, Vol. 117, No. 804, pp. 805, 821; D. Gervais, *Making Copyright Whole: A Principled Approach to Copyright Exceptions and Limitations*, University of Ottawa L. and Tech. J. 2008, Vol. 5, No. 1 & 2, pp. 3 et seq.; R.L. Okediji, *The International Copyright System: Limitations, Exceptions and Public Interest Considerations for Developing Countries*, ICTSD Issue Paper No. 15, p. ix, March 2006, available at: http://unctad.org/en/docs/iteip200610_en.pdf.

states which grant authors greater rights than those provided in the Berne Convention.²¹

Not only legal scholars but also governments and international non-governmental organizations have recognized that further amendments to the copyright system are necessary to better take into account the interest of access to information as well as the underlying public interest in access to creative works and the broad dissemination of information and downstream creativity – and thus establish a 'new equilibrium'.²² Several means to achieve this 'new equilibrium' have been proposed. Some stress the importance of a broader and more inclusive interpretation of the three-step test, which would permit to a greater extent the introduction of exceptions and limitations at national level.²³ Others propose that the

²¹ Article 20 of the Berne Convention states that '[t]he governments of the countries of the Union reserve the right to enter into special agreements among themselves, in so far as such agreements grant to authors more extensive rights than those granted by the Convention, or contain other provisions not contrary to this Convention. The provisions of existing agreements which satisfy these conditions shall remain applicable.' See Paris Act relating to the Berne Convention for the Protection of Literary and Artistic Works of 9 September 1886, completed at Paris 4 May 1896, revised at Berlin 13 November 1908, completed at Berne 20 March 1914, revised at Rome 2 June 1928, revised at Brussels 26 June 1948, and revised at Stockholm 14 July 1967 (with appendix), concluded at Paris 24 July 1971, 11161 UNT I-18338. It is recognized that this provision forecloses any possibility for restructuring international copyright as anything other than an ever-increasing strengthening of authors' rights. For a discussion see B. Hugenoltz and R.L. Okediji, *supra* note 7, p. 6; R.L. Okediji, *supra* note 8, pp. 353 et seq.

²² D. Gervais, *supra* note 20, pp. 11, 39; R.L. Okediji, *supra* note 20; P.B. Hugenoltz and R.L. Okediji, *supra* note 7; C. Geiger, *supra* note 9, p. 1; C. Geiger, *Copyright and Free Access to Information: For a Fair Balance of Interest in a Globalised World*, *EIPR* 2006, Vol. 28, No. 7, pp. 366, 369; P. Sirinelli, *Exceptions and Limits to Copyright and Neighboring Rights*, Report for Workshop on Implementation Issues of the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT), 3 December 1999, WCT-WPPT/IMP/1; R. Dreyfuss, *supra* note 20, pp. 21 et seq.; WIPO Workshop, *supra* note 5, Annex, p. 5; C. Geiger, *The Role of the Three-Step Test in the Adaptation of Copyright law to the Information Society*, UNESCO e-Copyright Bulletin 2007, p. 1, available at: http://portal.unesco.org/culture/en/ev.php-URL_ID=34481&URL_DO=DO_TOPIC&URL_SECTION=201.html; H. Grosse Ruse-Khan, *supra* note 20, p. 575; Communication from the Commission on Copyright in the Knowledge Economy COM(2009) 532 final 19 October 2009, p. 10.

²³ See for example, C. Geiger et al., *Declaration – A Balanced Interpretation Of The 'Three-Step Test' in Copyright Law*, *IIC* 2008, Vol. 39, No. 6, pp. 707 et

scope of certain exceptions and limitations be regulated at the international level, even to the point of making them mandatory.²⁴ A related proposal for reform includes an omnibus provision, akin to the fair use provision²⁵ of US copyright law, into the corpus of international copyright law.²⁶

seq.; P.B. Hugenoltz, *supra* note 6, p. 328; R. Dreyfuss, *supra* note 20, p. 24; A.F. Christie, *Maximising Permissible Exception to Intellectual Property Rights*, in: A. Kur and V. Mizaras (eds.), *The Structure Of Intellectual Property Law – Can One Size Fit All?*, Cheltenham (UK)/Northampton, MA (USA), Edward Elgar, 2011, p. 121; S. Ricketson, *supra* note 20, p. 65; R.L. Okediji, *supra* note 20, p. 34.

²⁴ C. Geiger, *supra* note 20, p. 517; P.B. Hugenoltz and R.L. Okediji, *supra* note 7, p. 8; D. Gervais, *supra* note 20, p. 3; P.B. Hugenoltz and M. Senftleben, *Fair Use in Europe: In Search of Flexibilities*, 14 November 2011, p. 10, available at: <http://ssrn.com/abstract=1959554> R.L. Okediji, *supra* note 20, p. 34.

²⁵ The doctrine of fair use existed in US common law until it was codified in the Copyright Act of 1976, 17 U.S.C. § 107. In essence, the provision holds that the fair use of a copyrighted work, for purposes such as criticism, comment, news reporting, teaching, scholarship, or research, is not an infringement of copyright. The US Supreme Court in *Eldred v. Ashcroft* held that the Fair Use Doctrine separates an idea's expression from its underlying facts and ideas and safeguards free speech under the First Amendment. See 537 U.S. 186, at 219, 221 (2003).

²⁶ R.L. Okediji, *supra* note 20, p. 34. Others stress the importance of Articles 7 and 8 of TRIPS and suggest that they be given more prominence in interpreting the three-step test, thus giving the latter a more 'inclusive' interpretation for access to knowledge issues. Article 7 TRIPS states: 'The protection and enforcement of intellectual property rights should contribute to the promotion of technological innovation and to the transfer and dissemination of technology, to the mutual advantage of producers and users of technological knowledge and in a manner conducive to social and economic welfare, and to a balance of rights and obligations.'

Article 8.1 states: 'Members may, in formulating or amending their laws and regulations, adopt measures necessary to protect public health and nutrition, and to promote the public interest in sectors of vital importance to their socioeconomic and technological development, provided that such measures are consistent with the provisions of this Agreement.'

According to these provisions intellectual property rights can – and/or must – be developed in such a way that they realize social goals. In particular, they must realize the goals of the agreement – promoting innovation in the interest of the general public – which a limitation-friendly approach would also ensure. For discussions of these issues, compare C. Geiger, *supra* note 20, p. 545, with H. Grosse Ruse-Khan, *supra* note 20, p. 579; R.L. Okediji, *supra* note 8, p. 353; R. Dreyfuss, *supra* note 20, pp. 22 et seq.

This article will describe, analyse and compare two means of improving the balance in the current copyright system in the interest of access to information in the online environment: (i) the introduction of broader exceptions and limitations, and (ii) stimulation of collective rights management by introducing statutory provisions on mandatory collective management or extended collective licensing of rights. The article will describe, analyse and compare the flexibility ('wiggle room') for these mechanisms in relation to international conventions on copyright.

The subject of this article is highly topical considering the ongoing discussions at international,²⁷ regional²⁸ and national²⁹ levels on the 'lack of balance' within the current copyright system. Although a great deal of scholarly research has already been carried out on exceptions and limitations in relation to the three-step test,³⁰ several scholars have called for more research on provisions on collective management and licensing of rights as vehicles for access to information.³¹

As the three-step test has been identified as a limitation on the possibility to introduce exceptions and limitations, the starting point for the rest of the article is a description and analysis of the test and its scope. This section will also consider whether the test also sets limitations on the possibility to introduce provisions on collective rights management. This is followed by a description and analysis of the two vehicles for access to information. A discussion comparing the different vehicles concludes the article.

2. THE THREE-STEP TEST

The three-step test was introduced at the 1967 Stockholm Conference on the revision of the Berne Convention as a complement to a formal

²⁷ See for example, the ongoing negotiations on certain limitations and exceptions in the WIPO Standing Committee on Copyright and Related Rights, available at: <http://www.wipo.int/copyright/en/>.

²⁸ See for example, the European Commission's Green Paper on copyright in the knowledge economy, COM(2008) 466/3, and the Commission's Communication on copyright in the knowledge economy, COM(2009) 532 final.

²⁹ See for example, Digital Opportunity A Review of Intellectual Property and Growth – An Independent Report by Professor Ian Hargreaves, May 2011, available at: <http://www.ipo.gov.uk/ipreview-finalreport.pdf>.

³⁰ See for example, *supra* notes 22 and 23.

³¹ M. Ficsor, Collective Administration of Copyright and Neighbouring Rights, Geneva, WIPO, 1990, p. 6; D. Gervais, *supra* note 20, p. 40; D. Gervais, *supra* note 9, pp. 82 et seq.

recognition of the general right of reproduction. The three-step test subsequently appeared in Article 13 of the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) and Article 10 of the WCT. Under Article 13 TRIPS, member states are to confine limitations and exceptions to (1) 'certain special cases', (2) 'which do not conflict with a normal exploitation of the work', and (3) 'do not unreasonably prejudice the legitimate interests of the right holder.' As previously noted, variants of this test also appear in a number of regional instruments, such as European harmonization directives, and FTAs.

2.1 The Scope of the Three-Step Test

While the three-step test expressly refers to 'limitations' and 'exceptions' as its object, given the major implications that such provisions have for dissemination and access to information, surprisingly little has been written on what 'limitations' and 'exceptions' actually constitute. This is strange considering that the issue is decisive for what types of rules are subject to the three-step test.³²

Senfleben views the parallel use of both terms as a deliberate choice made in order to encompass the two different copyright traditions, namely the natural rights-focused continental tradition (where 'exception' would be considered as the more appropriate term), and the utilitarian approach of common law (which would prefer 'limitation').³³ Reinbothe and von Lewinski suggest that 'an exception to the right should be understood to be the farthest-reaching restriction, as it indicates that the right no longer applies or exists in the particular case in question', whereas a 'limitation would restrict the right without depriving it of all

³² P.B. Hugenoltz and R.L. Okediji, *supra* note 7, p. 19. Article 13 TRIPS, uses the terms 'exceptions and (or) limitations' seemingly as synonymous terms. However the three-step test used in Articles 17, 26.2 and 30 TRIPS refers to '(limited) exceptions', thereby inviting the interpretation that 'exceptions' is the more appropriate term to employ with regard to provisions falling into its ambit. For a discussion, see A. Kur, *Of Oceans, Islands, and Inland Water – How Much Room for Exceptions and Limitations Under the Three-Step Test?*, 1 October 2008, Max Planck Institute for Intellectual Property, Competition & Tax Law Research Paper Series, No. 08-04, pp. 5 et seq.

³³ M. Senfleben, *Copyright, Limitations and the Three-Step Test*, Information Law Series Set, Vol. 13, The Hague, Kluwer Law International, 2004, p. 22.

its content'.³⁴ To the contrary, Ricketson suggests that the term 'exceptions' should be used for rules which 'grant immunity from infringement proceedings for particular kinds of use', whereas 'provisions that exclude, or allow for the exclusion of, particular categories of works' should be called 'limitations'.³⁵ Ricketson and Ginsburg make a distinction between 'subject matter limitations' and 'use limitation', with 'use limitations requiring compensation' being listed as a third category.³⁶

Notwithstanding the differences in interpretation regarding the relation and respective scope of the terms 'exceptions' and 'limitations', it seems clear that the predominant view is that these concepts – taken together – take aim at the exclusive right as such, in other words, its existence and scope within the copyright system. The terms – and by implication the three-step test – do not apply to exercises of state discretion pursuant to public policy external to copyright issues, such as freedom of expression and competition law.³⁷

Recognizing that exceptions and limitations take aim at the existence of the exclusive right implies that the terms do not encompass provisions regulating arrangements on the exercise or management of the said rights. Examples of such provisions, present in national legalization, include provisions on mandatory collective licensing of exclusive rights or extended collective licensing of such rights. In these cases, the existence of the right is kept intact and can still be enforced on behalf of rights holders by designated collecting societies, whereas its exercise is subject to some (presumptive) restrictions.³⁸ If it indeed is the case that

³⁴ J. Reinbothe and S. von Lewinski, *The WIPO Treaties* 1996, London, Butterworths Lexis Nexis, 2002, p. 128. For a similar account, see S. von Lewinski, *International Copyright Law and Policy*, Oxford, Oxford University Press, 2008, § 5.150; M. Ficsor, *The Law of Copyright and the Internet*. The 1996 WIPO Treaties, Their Interpretation and Implementation, Oxford, Oxford University Press, 2002, § 5.04; D. Gervais, *supra* note 20, p. 3 and footnote 2; C. Geiger, *supra* note 9, p. 10.

³⁵ S. Ricketson, *supra* note 20, p. 3. For a similar account, see A.F. Christie, *supra* note 23, p. 3.

³⁶ S. Ricketson and J.C. Ginsburg, *supra* note 12, § 13.01.

³⁷ P.B. Hugenoltz and R.L. Okediji, *supra* note 7, p. 19; P.B. Hugenoltz, *supra* note 6, pp. 331 et seq.

³⁸ This point has been stressed by several leading scholars. See for example, D. Gervais, *supra* note 20, p. 40; P.B. Hugenoltz, *supra* note 6, p. 331; C. Geiger, *supra* note 9, pp. 9, 11; S. von Lewinski, *Mandatory Collective Administration of Exclusive Rights – A Case Study on Its Compatibility with International and EC Copyright Law*, UNESCO Copyright Bulletin, No. 1, January-March 2004, p. 5; C. Geiger, *supra* note 20, p. 547 and footnote 14; A. Kur and

provisions on collective management of rights fall outside the three-step test, it follows that this should provide a major input into the current international discussion on how to stimulate access to information. This issue is further discussed below.

2.2 The Interpretation of the Three Steps

The meaning of the individual conditions of the three-step test in Article 13 TRIPS has been at the centre of a WTO dispute between the EU and the US regarding §110(5) of the US Copyright Act – the *Business Exception*³⁹ decision – while two other WTO disputes have dealt with the interpretation of the related tests in Articles 17⁴⁰ and 30⁴¹ TRIPS. This is not the place to address all the issues relating to various attempts at an appropriate interpretation of the three-step test – there is already a considerable amount of literature in the field.⁴² However, a short summary of the interpretation of the test by the WTO panel in the *Business Exception* decision will be provided.

The panel held that the first step, 'certain special cases', should not (contrary to the view of some scholars⁴³) be given a normative meaning. Rather, the requirement connotes that limitations and exceptions must be well defined and narrow in a quantitative as well as a qualitative sense.⁴⁴

The second step, 'no conflict with normal exploitation', is to be given an empirical as well as a normative interpretation. This refers to all forms of exploiting a work that have, or are likely to acquire, considerable economic or practical importance.⁴⁵ In other words, exempted use that

J. Schovsbo, *Expropriation or Fair Game for All? The Gradual Dismantling of the IP Exclusivity Paradigm?*, in: A. Kur and M. Levin (eds), *Intellectual Property Rights in a Fair World Trade System: Proposals for Reform of TRIPS*, Cheltenham (UK)/Northampton, MA (USA), Edward Elgar, 2011, p. 426; P.B. Hugenoltz and R.L. Okediji, *supra* note 7, p. 19.

³⁹ United States – Section 110(5) of the US Copyright Act, WT/DS160/R, 15 June 2000.

⁴⁰ European Communities – Protection of Trademarks and Geographical Indications for Agricultural Products and Foodstuffs, WT/DS179/R, 15 March 2005.

⁴¹ Canada – Patent Protection of Pharmaceutical Products, WT/DS114, 17 March 2000.

⁴² See *supra* note 23.

⁴³ S. Ricketson, *The Berne Convention for the Protection of Literary and Artistic Works 1886–1986*, London, Sweet & Maxwell, 1987, p. 482.

⁴⁴ US – Section 110(5) Report, *supra* note 39, § 6108.

⁴⁵ *Ibid.*, § 6180.

would rob the right holder of a substantial real or potential source of income is in conflict with the second step.⁴⁶

As regards the third step, it has been submitted that the terms 'legitimate' and 'reasonable' imply a measure of proportional normative meaning, allowing a variety of public interests – such as access to information – to be taken into account.⁴⁷ In the panel's view, 'prejudice to the legitimate interests of right holders' reaches an 'unreasonable' level if an exception or limitation causes or has the potential to cause an unreasonable loss of income to the copyright owner.⁴⁸ Thus, according to the panel, the third step takes aim at similar economic considerations as the second step.⁴⁹

However, from the records of the 1967 Stockholm Conference, it is apparent that the payment of equitable remuneration may be taken into account in the context of the third criterion. Hence, compulsory licenses or other schemes of remuneration – in other words, levies, statutory licensing, and so on – can compensate right holders to the extent that the use on the basis of a limitation or exception passes muster under the third step. However, a use that comes into conflict with a normal exploitation of the work cannot be 'cured' by such compensation.⁵⁰

From this it follows that it is possible to introduce limitations or exceptions in the interest of access to information, and that the scope of such provisions may be increased to some extent by introducing a remuneration scheme, but that the scope cannot encompass uses denying right holders real or potential sources of income that are substantial.

⁴⁶ P.B. Hugenoltz and R.L. Okediji, *supra* note 7, p. 25.

⁴⁷ S. von Lewinski, *supra* note 34, § 5.185; P.B. Hugenoltz and R.L. Okediji, *supra* note 7, p. 24.

⁴⁸ US – Section 110(5) Report, *supra* note 39, § 6.229.

⁴⁹ It has been rightly submitted by legal scholars that the WTO panel essentially conflated the second and third steps. For a discussion, see P.B. Hugenoltz and R.L. Okediji, *supra* note 7, p. 24.

⁵⁰ See the Records of the 1967 Stockholm Conference, p. 1145, s. 84. See also S. von Lewinski, *supra* note 34, § 5.185; P. Goldstein and P.B. Hugenoltz, *International Copyright. Principles, Law, and Practice*, Oxford, Oxford University Press, 2010, p. 366; S. Ricketson, *supra* note 5, p. 11; A. Kur, *supra* note 32, p. 11 and footnote 38, R.L. Okediji, *supra* note 20, p. 12; P.B. Hugenoltz and R.L. Okediji, *supra* note 7, p. 15; S. Ricketson, *WIPO Study on Limitations and Exceptions of Copyright and Related Rights in the Digital Environment*, *supra* note 20, p. 27.

3. EXCEPTIONS AND LIMITATIONS AS VEHICLES FOR ACCESS TO INFORMATION

As stated above, it is often held that the main mechanisms by which access to information might be enhanced within the copyright system are copyright exceptions or limitations. Indeed, it has long been recognized that exceptions or limitations upon authors' rights may be justified in particular cases. Thus, at the outset of the negotiations leading to the Berne Convention in 1884, the distinguished Swiss delegate Numa Droz stated that it should be remembered that 'limits to absolute protection are rightly set by the public interest'.⁵¹

However, interpreting the second step in the three-step test to also include forms of exploitation of a work which merely have the *potential* to acquire considerable economic importance for the right holders severely hampers the possibility of introducing such provisions. Many of the areas where access to information are most acute – such as library uses and user-generated content – will presumably fall outside of permitted exceptions and limitations. Many scholars have thus concluded that, given the interpretation of the three-step test in the *Business exception* decision, it is questionable whether the three-step test could permit exceptions and limitations for the identified need of access to information.⁵²

⁵¹ See Actes de la Conférence internationale pour la protection des droits d'auteur réunie à Berne du 8 au 19 septembre 1884, p. 67 (closing speech to the 1884 Conference).

⁵² See for example, the sources listed *supra* notes 22 and 23. However, some scholars have stressed that WTO Panels are not courts and that the legal framework within which they operate is the law of international trade, not of copyright. It has been submitted that WTO panel decisions ought to have only limited precedential value for international courts, such as the International Court of Justice, which are competent to interpret the Berne Convention and the WCT; or national courts interpreting national norms of copyright law. For a discussion, see P.B. Hugenholz and R.L. Okediji, *supra* note 7, p. 22; S. von Lewinski, *supra* note 34, § 5.161.

4. PROVISIONS ON COLLECTIVE MANAGEMENT OF RIGHTS AS VEHICLES FOR ACCESS TO INFORMATION

The starting point in international conventions on copyright is normally that authors are provided with individual exclusive rights to their works. However, in situations characterized by mass-use – in other words, situations where limited or no legal use can take place on the basis of individual licensing – collective licensing is often authorized. Collective licensing allows users to obtain a general (blanket) license to use a certain type of material without having to obtain an individual license from each right holder. Collectivization thus opens access to works which otherwise would have been inaccessible because of transaction costs. Collective licensing makes copyright function in areas where no market for individual licensing exists or can exist, or where such markets would be sub-optimal. This in turn transfers money to authors from users.⁵³

From a copyright standpoint, individual management of copyright is sometimes seen as more favourable for the author (than collective management) since the author maintains individual and direct control over the exploitation and dissemination of his work.⁵⁴ Hence collective licensing is considered a second-best option to individual transactions, to be used only where the individual exercise of rights is impossible or, at least, very cumbersome due to high transaction costs.⁵⁵ Indeed, in certain areas it is common for 'professional right holders' to require collective management to deal with certain types of uses which they are incapable of managing efficiently on their own. The distribution of musical works and sound recordings to thousands of radio stations throughout the world

⁵³ See for example, D. Gervais, *supra* note 11, pp. 89 et seq.; D. Gervais, *supra* note 9, pp. 7, 80 et seq.; M. Ficsor, Collective Management of Copyright and Related Rights at a Triple Crossroads: Should it Remain Voluntary or May it Be 'Extended' or Made Mandatory?, UNESCO Copyright Bulletin, October-December 2003, p. 1; J. Schovsbo, The Necessity to Collectivize Copyright – And Dangers Thereof, in: J. Rosén (ed.), Individualism and Collectiveness in Intellectual Property Law, Cheltenham (UK)/Northampton, MA (USA), Edward Elgar, 2012, p. 177; D. Gervais, Application of an Extended Collective Licensing Regime in Canada: Principles and Issues Related to Implementation (Study Prepared for the Department of Canadian Heritage, 2003), pp. 11, 22; C. Geiger, *supra* note 9, p. 10; D. Gervais, *supra* note 20, p. 40.

⁵⁴ M. Ficsor, *supra* note 53.

⁵⁵ J. Schovsbo, *supra* note 53, p. 173.

and the photocopying that takes place in schools and universities are prime examples.⁵⁶

It is also increasingly recognized that the collectivization of copyright might well benefit the author. This is because a collective management organization (CMO) may be in a stronger bargaining position vis-à-vis users than a 'normal' author, and the collected and distributed remuneration may often be higher than the remuneration obtained from a producer after a transfer of the exclusive rights.⁵⁷

That said, it is commonly recognized that increased dependence on collective management of rights will depend upon CMOs maintaining a sound structure of good governance and transparency.⁵⁸

In many cases, a CMO does not represent, either directly (in other words, through membership), or indirectly (in other words, through reciprocal agreements), all of the relevant rights. A user entering into agreement with the CMO thus cannot obtain sufficient legal certainty – in other words, limitation on liability – where a holder of a right not represented by the organization appears. Such rights holders are sometimes referred to as 'outsiders.' Some legislatures have introduced specific statutory mechanisms on collective management of rights to address this situation and provide the requisite level of legal certainty.

The following two sections will describe and analyse two such established mechanisms for collective management of rights and their permissibility under the three-step test: mandatory collective management of rights and extended collective licensing.

4.1 Mandatory Collective Management

Generally speaking, provisions on mandatory collective management have the following characteristics. The author may only exercise his rights via a collective management organization. The author himself can no longer prohibit certain forms of exploitation, only the collecting

⁵⁶ D. Gervais, *supra* note 53, p. 10.

⁵⁷ J. Schovsbo, *supra* note 53, pp. 177 et seq.; D. Gervais, *supra* note 53, pp. 7, 10; C. Geiger, *supra* note 9, p. 10.

⁵⁸ See for example, D. Gervais, *supra* note 11, pp. 89 et seq.; D. Gervais, *supra* note 53; D. Gervais, *supra* note 9, p. 10. Common EU rules and principles on good governance and transparency have recently (July 2012) been proposed by the European Commission, see Proposal for a Directive of the European Parliament and of the Council on collective management of copyright and related rights and multi-territorial licensing of rights in musical works for online uses in the internal market, COM(2012) 372 final.

society has the power to do so. He can no longer negotiate terms and conditions individually including licensing fees for the uses in question. Instead, the collecting society exercises the author's exclusive rights on his behalf and in his interest. Authors who are not members of the organization are to be treated in the same way as members and hence benefit from the same conditions and remuneration.⁵⁹

These rules and presumptions on mandatory collective management exist in a number of countries. This regime has been introduced in areas where individual licensing has been deemed to be impossible or highly unworkable. In Hungary, for example, provisions covering the rights of public performance, satellite broadcasting, and cable retransmissions are subject to such mandatory provisions.⁶⁰ In France such provisions are applied to reprographic reproductions and cable retransmissions.⁶¹

In addition, several EU directives authorize, or indeed impose, the use of mandatory collective management in certain cases. This is the case for cable retransmission,⁶² the right to obtain an equitable remuneration for rental,⁶³ as well as the *droit de suite*.⁶⁴

The compliance of the norms on mandatory collective management based on the EU directives with international law has never been

⁵⁹ S. von Lewinski, *supra* note 38, p. 6.

⁶⁰ *Ibid.*

⁶¹ C. Geiger, *supra* note 20, p. 11.

⁶² Council Directive 93/83/EEC of 27 September 1993 on the coordination of certain rules concerning copyright and rights related to copyright applicable to satellite broadcasting and cable retransmission [1993] OJ L 248/15, Article 9.1, entitled 'Exercise of the cable retransmission right': 'Member States shall ensure that the right of copyright owners and holders or related rights to grant or refuse authorization to a cable operator for a cable retransmission may be exercised only through a collecting society.'

⁶³ Directive 2006/115/EC of the European Parliament and of the Council of 12 December 2006 on rental right and lending right and on certain rights related to copyright in the field of intellectual property (Codified version) [2006] OJ L 376/28 Article 5.3: 'The administration of this right to obtain an equitable remuneration may be entrusted to collecting societies representing authors or performers.' Article 5.4 of the same directive holds: 'Member States may regulate whether and to what extent administration by collecting societies of the rights to obtain an equitable remuneration may be imposed, as well as the question from whom this remuneration may be claimed or collected.'

⁶⁴ Directive 2001/84/EC of the European Parliament and of the Council of 27 September 2001 on the resale right for the benefit of the author of an original work of art [2001] OJ L 272/32 Article 6.2: 'Member States may provide for compulsory or optional collective management of the royalty provided for under Article 1.'

questioned.⁶⁵ This might be due to the fact that some of the said rights emanating from the EU directives are remuneration rights and not pure exclusive rights.

The question has been raised, however, whether the national legislatures of members of the international conventions are free to introduce any provisions on mandatory collective management for *any exclusive right* within the scope of the said conventions. It could, of course, be argued that right holders in areas covered by statutory provisions on mandatory collective management clearly 'exercise' their rights, even though they are obliged to do so collectively. Thus, it is sometimes held that provisions on mandatory collective licensing are not limitations or exceptions to the exclusive right as the scope of the right is still intact. The argument put forward for this interpretation is that provisions on mandatory collective licensing do not deal with the relationship between authors and users, but rather with the relationship between the author and the CMO – or in other words, that such a provision would only concern the exercise (and not the scope) of the right.⁶⁶ Put differently, a provision on mandatory collective licensing alters the claim of remuneration from one directed against the user to one directed against the organization: right holders exercise the same copyright, whether or not they do so on an individual or collective basis.⁶⁷

Conversely, it could be argued that statutory provisions on mandatory collective licensing are limitations of the exclusive right. The international conventions grant authors individual exclusive rights to authorize the use of their work. These exclusive rights are granted in respect to the relationship between the author and the user; provisions stating that a right can only be exercised through a certain organization amount, for some commentators, to a restriction on this exclusive right.⁶⁸ If this

⁶⁵ C. Geiger, *supra* note 22, p. 11.

⁶⁶ See for example, S. von Lewinski, *supra* note 38; C. Geiger, *supra* note 22, pp. 9 et seq.

⁶⁷ T. Riis and J. Schovsbo, *Extended Collective Licenses and the Nordic Experience – It's a Hybrid but is it a Volvo or a Lemon?*, C.J.L.A. 2010, Vol. 33, No. 4, p. 485.

⁶⁸ See for example, M. Ficsor, *Collective Management of Copyright and Related Rights from the Viewpoint of International Norms and the Acquis Communautaire*, in: D. Gervais (ed.), *Collective Management of Copyright and Related Rights*, 2nd ed., Alphen aan den Rijn, Kluwer Law International, 2010, pp. 42 et seq.; J. Axham and L. Guibault, *Cross-Border Extended Collective Licensing: A Solution to Online Dissemination of Europe's Cultural Heritage*, Institute for Information Law Research Paper No. 2012-19, 2012, available at: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2001347; J. Axham and L.

interpretation is correct, provisions on mandatory collective management would fall under the auspices of the three-step test.

4.2 Extended Collective Licensing

A statutory provision on extended collective licensing (ECL) stipulates and has the legal effect that the contents of a freely negotiated collective agreement between a user of a work and a representative CMO pertaining to specific forms of exploitation of works are also extended to right holders who are not members of the organization. An agreement which is granted the 'extended' effect, is referred to as an ECL agreement. On the basis of an ECL agreement the user may use all the works covered by the agreement without running a risk of claims, either legal or financial, from non-members of the CMO ('outsiders'). A user who enters into an ECL agreement with a representative CMO is thus assured that the CMO will deal with all claims put forward by those affected by the extension. To safeguard their interests, outsiders have a right to individual remuneration and, in most cases, a right to opt out of the agreement. It is often held in legal doctrine that the requirement of representativeness of the eligible CMO makes it a legitimate model for managing outsiders' rights.⁶⁹

Guibault, *Solving European's Mass-Digitization Issues Through Extended Collective Licensing?*, NIPLR 2011, No. 6, pp. 509 et seq., available at: <http://ssrn.com/abstract=2083254>. The permissibility of provisions on mandatory collective management in relation to the right of communication to the public as set out in Article 3 of Directive 2001/29/EC, see *supra* note 3, was raised before the Court of Justice of the European Union in connection with case C-283/10, *Circul Globus București (Circ & Variete Globus București) v Uniunea Compozitorilor și Muzicologilor din România – Asociația pentru Drepturi de Autor (UCMR – ADA)*. The Court found that it was not necessary to provide an answer to that question, as the case at hand concerned the right public performance (which is not harmonized at EU level) and not the right of communication to the public.

⁶⁹ In some Nordic countries, governmental approval is necessary for a CMO to become eligible to conclude an ECL agreement even if the CMO fulfils the objective criteria for such an organization. The Nordic ECL model has been analysed mainly in the Nordic legal literature, but for English language contributions, see for example, J. Rosén, *The Nordic Extended Collective Licensing Model as a Mechanism for Simplified Rights Clearance for Legitimate Online Services*, in: J. Axham (ed.), *supra* note 11, pp. 65 et seq.; J. Axham and L. Guibault, *supra* note 68, pp. 509 et seq.; T. Koskinen-Olsson, *Collective Management in the Nordic Countries*, in D. Gervais (ed.), *Collective Management of Copyright and Related Rights*, *supra* note 68, pp. 283 et seq.; C. Rydning, *Extended Collective Licenses: The Compatibility of the Nordic Solution with the*

In the beginning of the 1960s the first statutory provisions on ECL were introduced in the copyright acts of the Nordic countries. With some differences between national legislations, the statutory provisions on ECLs (the 'ECL model') is currently in place in the copyright laws of the Nordic countries in several areas sharing several characteristics: primary broadcasting, photocopying for educational purposes, communication to the public of previously broadcast television programs in broadcasting organizations' own archives, certain forms of reproduction within certain organizations, communication to the public, and reproductions of works in the collections of archives, libraries and museums.⁷⁰

The underlying rationales for ECL provisions in new areas resemble those that triggered the introduction of the first ECL statutes: areas of *mass use*, related *high transaction costs* and a *legitimate need for legislative support* in an area of great public importance. An uncompensated exception/limitation has been perceived as too far reaching (to the detriment of the right holders), and in violation of international obligations (especially the three-step test). A remunerated exception/limitation (to be managed collectively) has been deemed detrimental to rights holders as it is not based on free negotiations. Thus the ECL model is seen as a middle ground between remuneration-based exceptions/limitations and fully voluntary collective management.⁷¹

Indeed, one of the major benefits of the ECL model for outsiders compared to a compulsory licence is often held to be its basis in free negotiations, which presuppose mutual consent of the CMO and the user. However, to resolve differences between the CMO and the users and to stimulate the conclusion of agreements, the Nordic ECL model is often supplemented with provisions on instituting mediation or arbitration

International Conventions and EC Law, Norwegian Research Center for Computers and Law, 2010; H.L. Christiansen, The Nordic Licensing System – Extended Collective Agreement Licensing, *Europ. Intell. Prop. L. Rev.* 1991, Vol. 13, pp. 346 et seq.; M. Kyst, The Extended Collective License – Quo Vadis?, *NIPLR* 2009, No. 1, pp. 24, 44; G. Karnell, Peculiar Features of Nordic Copyright Law, *NIPLR* 1991, No. 1, pp. 15 et seq.; G. Karnell, Outsiders' Rights: A Dilemma for Collective Administration of Authors' Rights in a Present and Enlarged European Community, *Europ. Intell. Prop. L. Rev.* 1991, Vol. 13, No. 9, pp. 431 et seq.; G. Karnell, Extended Collective License Systems, Provisions, Agreements and Clauses – A Nordic Copyright Invention with an International Future?, in: *Essays in Honor of George Koumantos*, Athens, Ant. N. Sakkoulas Publishers, 2004, pp. 391 et seq.; T. Riis and J. Schovsbo, *supra* note 67, p. 472; T. Riis and J. Schovsbo, *Extended Collective Licenses in Action* (forthcoming in IIC).

⁷⁰ See for example, J. Axhamn and L. Guibault, *supra* note 68, pp. 27 et seq.

⁷¹ *Ibid.* pp. 28 et seq.; T. Riis and J. Schovsbo, *supra* notes 67 and 69.

between the user and the CMO. The importance of the rights' use from a public interest point of view is often put forward as a reason for introducing these provisions.⁷²

In practice, ECL provisions are very similar to provisions on mandatory collective licensing. One major difference is that, pursuant to the provisions on mandatory collective licensing, right holders are deemed (or 'presumed') to be members of the eligible CMO and there is no possibility to opt out. The rules in an ECL provision that extends the agreement to outsiders and provides them with equal treatment vis-à-vis members of the CMO may in practice achieve the same effect as a statutory provision on mandatory collective licensing. However, the fact that ECL provisions do not hold that outsiders are presumed to be members and the possibility under some of the ECL provisions to opt out of the scheme are important features which make the ECL model (substantially) different from mandatory collective licensing.⁷³

The ECL provisions mentioned above are sectorial, as their respective scope is defined in their respective statutory ECL provision. However, technological developments tend to create more areas where ECL support is needed. To meet demand and to relieve the legislator of the burden of constantly amending the national copyright act with additional ECL provisions, the Danish government introduced a *general* ECL provision in 2008. Under this provision, contracting parties may define the specific use for which the provisions of law will accord an extension effect. A similar provision has recently been proposed by a Swedish government inquiry.⁷⁴

At EU level, an ECL system is reflected in the provisions of Articles 2 to 4 on satellite broadcasting in the Satellite and Cable Directive.⁷⁵ These

⁷² See for example, Swedish Government bill (proposition) 1979/80:132, pp. 14 et seq., 20. For a discussion, see J. Axhamn and L. Guibault, *supra* note 68, p. 39.

⁷³ J. Axhamn and L. Guibault, *supra* note 68, p. 48.

⁷⁴ Swedish Government Official Reports (SOU) 2010:24, pp. 272 et seq.

⁷⁵ Article 2 provides that 'Member States shall provide an exclusive right for the author to authorize the communication to the public by satellite of copyright works [...]', and Article 3.2 adds that 'Member States shall ensure that the authorization referred to in Article 2 may be acquired only by agreement' (that is, it must not be subject to a non-voluntary license system). Article 3.2 outlines what an extended collective management system is: 'A Member State may provide that a collective agreement between a collecting society and a broadcasting organization concerning a given category of works may be extended to rightholders of the same category who are not represented by the collecting society, provided that (i) the communication to the public by satellite simulcast a

provisions reflect the general features of the Nordic ECL system, such as an extended effect of a collective agreement based on free negotiations, provisions on equal treatment and the possibility to opt out.

One more directive refers to extended collective management, namely Directive 2001/29/EC, which, in Recital 18 states: 'This Directive is without prejudice to the arrangements in the Member States concerning the management of rights such as extended collective licenses.' This recital should be read in connection with Article 5 of the same directive, which contains a 'closed list' of exceptions and limitations to the exclusive rights of reproduction and communication to the public. Recital 18 appears to clarify that statutory ECL provisions that fulfil the general characteristics of ECL provisions in the meaning of the Satellite and Cable directive are not to be considered as limitations and exceptions in the meaning of Article 5 of Directive 2001/29/EC.⁷⁶

To sum up, a significant difference between the ECL model and provisions on mandatory collective licensing is that the former in most cases include a possibility to opt out. It has thus been argued by some scholars that the ECL model – in contrast to provisions on mandatory collective licensing – do not even impinge on the exercise of the right.⁷⁷ In other words, whereas provisions on mandatory collective management must probably be regarded as limitations to exclusive rights, this is not the case for provisions on ECL. This important feature makes the ECL model substantially different from mandatory collective licensing and thus more appealing as a policy alternative to pure exceptions and limitations (which are subject to the three-step test).⁷⁸

terrestrial broadcast by the same broadcaster, and (ii) the unrepresented right-holder shall, at any time, have the possibility of excluding the extension of the collective agreement to his works and of exercising his rights either individually or collectively.'

Article 3.3 states that the ECL provision does not apply to cinematographic works, including works created by a process analogous to cinematography.

⁷⁶ J. Axhann and L. Guibault, *supra* note 68, p. 303.

⁷⁷ G. Karnell, *Peculiar Features of Nordic Copyright Law*, *supra* note 69, p. 18; T. Riis and J. Schovsbo, *supra* note 67, pp. 485 et seq. Cf. for example, Swedish government bill (proposition) 1992/93:214, p. 43 and Norwegian Government bill (proposition) 2004-05:46, pp. 46 et seq.; J. Axhann and L. Guibault, *supra* note 68, pp. 48 et seq.

⁷⁸ To the extent that an ECL provision allows right holders to opt out of the system and enforce their copyrights against an exploiter, one could argue that this might contravene the prohibition in Article 5(2) of the BC because the opting out would constitute a 'formality' as to the exercise of copyright. However, such reasoning is based on the assumption that the ban on formalities presupposes that

5. DISCUSSION AND CONCLUSIONS

The preceding sections demonstrate that given the interpretation of the three-step test in the *Business exception* decision it is questionable whether a three-step test would permit the introduction of exceptions and limitations for the identified need of access to information, even if such provisions were combined with a remuneration scheme. Accordingly, other solutions should be considered, such as those based on collective licensing.

In contrast to exceptions and limitations, collective management of exclusive rights has the advantage of providing rights holders with remuneration based on free negotiations. Solutions based on collective management therefore provide a legislative solution in areas of mass-use characterized by high transaction costs, where limited or no legal use can occur on the basis of traditional individual and collective licensing. One could say that whereas collective management makes copyright work – for the mutual benefit of right holders, users, society at large and indeed the *legitimacy of the copyright system* – solutions based on exceptions or limitations could be characterized as representing a market failure of the copyright system and thus as a retreat. Indeed, one could even argue that solutions based on exceptions and limitations should be considered only after solutions based on collective management have failed – for example, if rights holders are obstructing dissemination or if the necessary and efficient organizations have not been put in place.

Hence, any solution based on collective licensing presupposes the existence of a representative CMO with a sound culture of good governance and transparency. Thus, it might be necessary to supplement

copyright must always be enjoyed as 'an exclusive right by individual exercise.' See for example, T. Riis and J. Schovsbo, *supra* notes 67 and 69, pp. 483 et seq. Conversely, it could be argued that outsiders covered by an ECL agreement clearly 'exercise' their rights, albeit collectively, even when they do not opt out. In other words, the 'opt out' is not a condition for the exercise of copyright as such. An ECL agreement merely reflects a specific mode of exploitation, and this mode is not prohibited by the ban on formalities. See J. Axhann and L. Guibault, *supra* note 68, p. 46. For a thorough interpretation of the prohibitions on formalities in relation to the 'opt out' requirement in some ECL provisions, see S. van Gompel, *Formalities in Copyright Law. An Analysis of Their History, Rationales and Possible Future*, Alphen aan den Rijn, Kluwer Law International, 2011, pp. 188 et seq.

any solutions based on collective management with statutory governance and transparency provisions.⁷⁹

Compared to mandatory collective licensing, the ECL model has the advantage of providing individuals with possibilities to opt out and to manage their rights voluntarily on an individual or collective basis. As stated above, this might well have implications for the possibility ('wiggle room') of introducing statutory provisions on mandatory collective management or ECL provisions in relation to obligations in international copyright treaties. If there is no possibility to opt out, the provision is more akin to a limitation on the exclusive right. For this reason, a provision based on ECL might be preferable if one is considering introducing a statutory provision on collective management. However, the ECL model is grounded on the existence of a representative collective management organization. Hence a solution based on mandatory collective management might constitute a first step to stimulate the emergence of collective management organizations in areas where there is need to intervene to provide better access to information.

To conclude, we have to move away from the traditional binary view of copyright: exclusive rights versus exceptions and limitations.⁸⁰ There is a very important and substantial middle ground comprising collective management. That middle ground is an essential part of what makes copyright work. We need to increase the scope and reach of this middle ground if we want to increase legitimate access to information, especially in the online environment.

⁷⁹ As has been rightly pointed out in the literature, the Nordic countries have a longstanding tradition of collective management, which has built a well-developed structure and culture into the activities of CMOs. Thus, the functioning and legitimacy of the ECL model in a context other than the Nordic countries may well be dependent on the existence of a well-developed structure and culture of collective management. See for example, J. Axhamn and L. Guitbault, *supra* note 68, p. 44; J. Rosén, *supra* note 11, pp. 84 et seq.; T. Riis and J. Schovsbo, *supra* notes 67 and 69.

⁸⁰ Cf. R. Merges, Contracting into Liability Rules: Intellectual Property Rights and Collective Rights Organizations, *Calif. L. Rev.* 1996, Vol. 84, No. 5, pp. 1293 et seq.; D. Gervais, *supra* note 11, pp. 89 et seq.; G. Calabresi and A.D. Melamed, Property Rules, Liability Rules and Inalienability: One View of the Cathedral, *Harvard L. Rev.* 1972, Vol. 85, No. 6, pp. 1089 et seq.; M.A. Lemley, Contracting Around Liability Rules, *Calif. L. Rev.*, Vol. 100, pp. 464 et seq.; T. Riis, Enerettigheder og vederlagsrettigheder. Håndhævelse af immaterialrettigheder i økonomisk perspektiv, Copenhagen, DØF Publishing, 2005; M. Lemley and P. Weiser, Should Property or Liability Rules Govern Information, *Texas L. Rev.* 2007, Vol. 85, p. 783.

PART III

Expanding the debate to include new stakeholders