

CONCEIVING AN INTERNATIONAL INSTRUMENT ON LIMITATIONS AND EXCEPTIONS TO COPYRIGHT[†]

FINAL REPORT

March 06, 2008

P. Bernt Hugenholtz & Ruth L. Okediji***



Institute for Information Law
University of Amsterdam



University of Minnesota
Law School



This work is licensed under a Creative Commons Attribution-NonCommercial-No Derivative Works 3.0 Unported License, available at <http://creativecommons.org/licenses/by-nc-nd/3.0/>.

[†] This study was sponsored by the Open Society Institute (OSI). The authors would like to thank Vera Franz for her support and patience. The study reflects contributions from leading copyright and IP experts who participated at a workshop sponsored by the OSI and held at the Cardozo School of Law in New York on 16-18 December, 2007: Prof. Graeme B. Dinwoodie, Chicago-Kent College of Law; Prof. Rochelle C. Dreyfuss, New York University School of Law; Vera Franz, Open Society Institute; Prof. Daniel J. Gervais, Faculty of Law, University of Ottawa; Prof. Laurence R. Helfer, Vanderbilt University Law School; Prof. Reto M. Hilty, Max Planck Institute for Intellectual Property; Prof. Justin Hughes, Benjamin Cardozo School of Law; Sisule F. Musungu, Research Fellow, Information Society Project, Yale Law School; Prof. Jerome H. Reichman, Duke University School of Law; Dr. Manon A. Ress, Knowledge Ecology International; Prof. Pamela Samuelson, UC Berkeley School of Law; and Louis Villaruel, Ministry of Education, Chile.

* Professor of Intellectual Property Law & Director of the Institute for Information Law (IViR), University of Amsterdam.

** William L. Prosser Professor of Law & Solly Robins Distinguished Research Fellow, University of Minnesota Law School.

TABLE OF CONTENTS

EXECUTIVE SUMMARY	- 3 -
INTRODUCTION	- 6 -
I. RATIONALE FOR AN INTERNATIONAL INSTRUMENT ON LIMITATIONS AND EXCEPTIONS	- 9 -
II. IN SEARCH OF ‘WIGGLE ROOM’: FLEXIBILITIES IN THE INTERNATIONAL COPYRIGHT	
ACQUIS	- 11 -
A. Minimum Standards.....	- 12 -
1. <i>Limits to Protected Subject Matter</i>	- 12 -
2. <i>Limits to Economic Rights</i>	- 13 -
3. <i>Specific Limitations and Exceptions in the BC</i>	- 15 -
B. Three-step Test.....	- 16 -
1. <i>Scope and Function of the Three-step Test</i>	- 16 -
a. Introduction.....	- 16 -
b. What Are ‘Limitations and Exceptions’?	- 18 -
c. Scope of the the Three-step Test	- 19 -
2. <i>The Three Steps in Some Detail</i>	- 21 -
a. Step 1: Special Cases	- 22 -
b. Step 2: No Conflict with Normal Exploitation.....	- 23 -
c. Step 3: No Unreasonable Prejudice to Authors/Right Holders.....	- 24 -
C. Final Remarks	- 25 -
III. LOCALIZING AN INSTRUMENT ON L&E’S: INSIDE OR OUTSIDE THE INTERNATIONAL	
COPYRIGHT FRAMEWORK?	- 27 -
A. Copyright Framework.....	- 28 -
B. Alternative Frameworks.....	- 29 -
1. <i>Human Rights</i>	- 30 -
2. <i>Competition Law</i>	- 32 -
3. <i>Consumer Law</i>	- 33 -
C. Final Remarks	- 34 -
IV. THE CONTOURS OF AN INTERNATIONAL INSTRUMENT ON L&E’S	- 35 -
A. The Case for Multilateralism: Maintaining the Berne Bargain.....	- 35 -
B. Designing a Multilateral Response	- 38 -
1. <i>Institutional Considerations</i>	- 39 -
2. <i>Minimum Features</i>	- 41 -
a. Five Minimum Goals.....	- 41 -

b. Three Essential Features.....	- 42 -
c. Substantive Content.....	- 43 -
3. <i>Possible Modalities of an International Instrument on L&E's</i>	- 44 -
4. <i>Recommendations</i>	- 46 -
a. Multilateralism.....	- 46 -
b. Regional Experimentation	- 47 -
c. Placement and Scope	- 47 -
d. Soft Law Modality.....	- 49 -
CONCLUSION	- 50 -
APPENDIX A - LIMITATIONS AVAILABLE UNDER THE BERNE CONVENTION	- 51 -
APPENDIX B - MANDATORY LIMITATIONS IN EXISTING INTERNATIONAL IP INSTRUMENTS.	- 55 -

EXECUTIVE SUMMARY

The task of developing a global approach to limitations and exceptions (“L&E’s”) is one of the major challenges facing the international copyright system today. As mechanisms of access, L&E’s contribute to the dissemination of knowledge, which in turn is essential for a variety of human activities and values, including liberty, the exercise of political power, and economic, social and personal advancement. Appropriately designed L&E’s may alleviate the needs of people around the world who still lack access to books and other educational materials, and also open up rapid advances in information and communication technologies that are fundamentally transforming the processes of production, dissemination and storage of information. As new technologies challenge copyright’s internal balance, and as the costs of globalization heighten the vital need for innovation and knowledge dissemination, a multilateral instrument that can effectively harness various national practices with regard to L&E’s, and that can provide a framework for dynamic evaluation of how global copyright norms can be most effectively translated into a credible system that appropriately values author and user rights, is a necessity. This paper examines policy options and modalities for framing an international instrument on limitations and exceptions to copyright within the treaty obligations of the current international copyright system. We consider this international copyright *acquis* as our general starting point, and evaluate options for the design of such an instrument, including questions of political sustainability and institutional home.

Part I analyzes the structure of limitations and exceptions under the Berne Convention and sketches the rationale for a multilateral approach to the question of limitations and exceptions. In part II we explore flexibilities inside the international copyright *acquis*, review the three-step test and assess its import for the validity of a proposed international instrument on L&E’s, particularly given the expansion of the test in the TRIPS Agreement and the interpretive jurisprudence of the WTO dispute panels. Here we observe that since the conventional minimum rights are incomplete and imprecisely defined, while remaining largely immune to the application of the three-step test, contracting States are left with considerable flexibilities. Following a discussion of the limitations permitted under the Berne Convention, we then turn to the “three-step test” that governs L&E’s to the right of reproduction (BC) and other minimum rights in the TRIPS and WCT. As is demonstrated, this obstacle to limitations and exceptions is, perhaps, less insurmountable than is often believed. Limitations and exceptions that (1) are not overly broad, (2) do not rob right holders of a real or potential source of income that is substantive, and (3) do not do disproportional harm to the right holders, will pass the test. The test does not prescribe a template for any preferred system of national limitations and exceptions. The test most likely permits both discrete European-style limitations and broader fair-use-style exemptions, or possibly a combination of both.

In effect, despite over a century of international norm setting in the field of copyright, L&E’s have largely remained “unregulated space.” Nothing in the international *acquis* would prevent parties to the Berne Union, the WCT or the WTO from entering into a special agreement listing in an exhaustive or enumerative manner those copyright limitations that are permitted within the confines of the three-step test. One could imagine such an instrument as containing a preamble and a number of provisions, divided into several chapters, e.g.: (1) *Exclusions from protection* (excluding, for instance, facts, ideas, laws and government works); (2) *Limits to economic rights* (permitting, for instance, exhaustion and various non-public acts of communication); and (3) *Limitations and exceptions proper* (enumerating both

mandatory and optional L&E's). Only the norms listed in the latter part would have to comply with the three-step test. This could be guaranteed by including a general provision obligating contracting States to subject any transpositions of the L&E's listed in the instrument to the three-step test. A preamble might then offer guidance to the contracting States in interpreting the test.

In part III we briefly discuss the benefits and costs of alternative frameworks for a possible international instrument. The framework of human rights bears some promise for an instrument on limitations based, in particular, on core fundamental freedoms, such as freedom of speech and the right to privacy. The framework of competition law may provide the context for international norms on compulsory licensing concerning, for instance, software interoperability or to address other market failures. The framework of consumer law has obvious potential for protecting consumers against unfair terms in standard licensing agreements, and might contain norms that make private copying freedoms 'click-wrap resistant'. However, none of these regimes has the capacity to encompass the entire spectrum of L&E's associated with the mature copyright system. Neither of these legal domains would approach the balance sought by an international codification of L&E's in the same way, with the same broad scope or with the same outcome. We therefore believe that such an instrument should preferably be framed in copyright law. Nevertheless, these alternative regimes do deserve to be seriously explored, since there are clear strategic advantages to be gained from so-called "regime shifting".

Finally, in part IV we set out in preliminary fashion the basic contours of a multilateral instrument on L&E's. Considerations of feasibility, political sustainability, and normative priorities, among others, are briefly explored and then situated along a continuum of possible modalities for such an instrument. We then offer some preliminary recommendations on the way forward.

A new international instrument on L&E's offers a unique opportunity to coordinate, harmonize and balance the heightened (and new) standards of protection set forth in the successive Berne Convention Revisions, the TRIPS Agreement and the WIPO Internet Treaties. International harmonization of L&E's present in national copyright laws would diminish the reliance on national courts for the interpretation of multilateral accords, therefore augmenting the benefits of substantive rights harmonization. A global approach to L&E's would further help: i) to facilitate transborder trade, both online and in traditional media, by eliminating inconsistency and uncertainty and encouraging uniformity of standards of protection and transparency; ii) to alleviate institutional weakness of States who need diffusion most (DC's and LDC's); iii) to counteract the recent shift to bilateralism and regionalism in international copyright policymaking and; iv) to constrain unilateral ratcheting up of global standards. A new international instrument with a broad membership offers an opportunity to eliminate anticompetitive effects associated with differing levels of protection across national jurisdictions while also consolidating recent gains in integrating public interest goals in the international copyright system.

The minimum goals of an international approach to L&E's would include: i) elimination of barriers to trade, particularly in regard to activities of information service providers; ii) facilitation of access to tangible information products; iii) promotion of innovation and competition; iv) support of mechanisms to promote/reinforce fundamental freedoms; and v) provision of consistency and stability in the international copyright framework by the explicit promotion of the normative balance necessary to support

knowledge diffusion. Ideally, an international instrument on L&E's must: a) be flexible; b) leave some room for cultural autonomy of national states, allowing diverse local solutions; and c) be judicially manageable.

We believe that to restore balance to the international copyright regime, a multilateral solution – as opposed to bilateral approaches – is necessary. But at the same time regional experimentation allowing for incremental development of L&E's among like-minded countries should also be encouraged. We also note that since L&E's are inherently a component of any claim for enforcement, there may exist interesting opportunities to include within the scope of the instrument linkages to enforcement concerns that occupy most developed countries.

Finally, we recommend a global instrument on L&E's to be cast, at least initially, in soft law. Soft law agreements are easier to negotiate and adapt to future circumstances as the need arises. Moreover the norms of a soft law instrument might in the course of time evolve into a hard law treaty. We believe that a joint initiative between WIPO and the WTO could be an ideal and appropriate expression of a soft law modality with real impact for collective action on an international instrument on L&E's.

INTRODUCTION

It is a well-established principle of copyright doctrine that the qualified grant of proprietary rights over the fruits of creative enterprise is directed first and foremost at the promotion of the public interest. Many countries around the world explicitly recognize this vital goal as a foundational element of their copyright systems.¹ Indeed, from the very first formal copyright law, the British Statute of Anne (1710), the encouragement of learning and dissemination of knowledge as a means to enhance the general welfare have been chief objectives behind the grant of exclusive rights to authors.² For over one hundred years, this public-centered rationale of copyright protection has been recognized and clearly articulated in all major instruments for the global regulation of copyright.³ The currently preeminent global intellectual property (IP) treaty, the Agreement on Trade-Related Intellectual Property Rights⁴ (TRIPS Agreement) concluded under the auspices of the World Trade Organization (WTO) in 1994, recently reflected and reaffirmed this basic precept by describing the overarching objective of intellectual property protection under the Agreement as “the mutual advantage of producers and users of technological knowledge . . . conducive to social and economic welfare.”⁵

Despite a broad embrace of the welfare-promoting function of copyright protection, when European nations concluded the first international accord for the transborder regulation of copyright, the Berne Convention for the Protection of Literary and Artistic Works⁶ (1886), mandatory global limitations to preserve mechanisms directed at securing access to the product of intellectual enterprise were not included as part of the international system. To the extent that this initial multilateral copyright agreement reflected the framework of existing bilateral trade agreements among European States, its cornerstone principle was that of nondiscrimination and the major concern was thus to circumscribe the ability of member nations to protect works of its own nationals while exploiting the works of foreigners.⁷ As such, the Berne Convention was designed as a rights-centered instrument aimed primarily at the protection of creative works across international borders by minimizing differences among national criteria for the protection of copyrighted works and establishing a core set of basic standards to which all nations would be bound. Moreover, to secure the minimum-rights approach to multilateral protection, Article 20 of the Convention committed members to ever-increasing levels of protection by requiring that any special agreements among contracting States grant authors greater rights than those provided in the Berne Convention.⁸

¹ See, e.g., U.S. CONST., art. I, sec. 8, cl. 8; Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society, O.J. No. L 167, at 10 (2001) pmb. ¶3.

² See Statute of Anne, 8 Anne, c. 19 (1710), pmb. & art. I.

³ See Berne Convention for the Protection of Literary and Artistic Works, Sept. 9, 1886, as last revised July 24, 1971, 25 U.S.T. 1341, 828 U.N.T.S. 221 [*hereinafter* Berne Convention]; Universal Copyright Convention, as revised at Paris on July 24, 1971, 25 U.N.T.S. 1341 [*hereinafter* UCC]; World Intellectual Property Organization (WIPO) Copyright Treaty, Dec. 20, 1996, S. Treaty Doc. No. 105-17, 36 I.L.M. 65 [*hereinafter* WCT]; World Intellectual Property Organization Performances and Phonograms Treaty, Dec. 20, 1996, 36 I.L.M. 76 [*hereinafter* WPPT].

⁴ Agreement on Trade-Related Aspects of Intellectual Property Rights, April 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, 1869 U.N.T.S. 299, 33 I.L.M. 81 (1994) [*hereinafter* TRIPS Agreement].

⁵ TRIPS Agreement, *supra* n. 4, art. 7. See also *id.*, art 8.1.

⁶ Berne Convention, *supra* n. 3.

⁷ See generally SAM RICKETSON, THE BERNE CONVENTION FOR THE PROTECTION OF LITERARY AND ARTISTIC WORKS: 1886-1986 (Kluwer Law and Taxation, 1987).

⁸ Berne Convention, *supra* n. 3, art. 20.

As a result, the notion of the public interest in the international copyright regulatory framework has from its inception in 1886 focused almost exclusively on merely one aspect, namely the maximum protection of creative enterprise through the grant of exclusive rights to authors. The other component of the public interest, that of ensuring optimal access to creative works and stimulating broad dissemination of knowledge and downstream creativity, has been historically left to the discretion of individual States, thus producing a patchwork effect with respect to copyright limitations and exceptions. This rights-centered dominance in international copyright policymaking has recently been reinforced by the provisions of the TRIPS Agreement, as well as a host of bilateral and regional agreements between the U.S. and EU on the one side and a number of developing countries on the other.⁹

In the last decade, the delineation of the conditions of access to copyrighted works as well as the integration of viable access mechanisms into the international copyright regulatory framework have become one of the most controversial topics in international copyright law.¹⁰ The emergence of technological protection mechanisms (TPMs), often reinforced by one-sided contractual provisions, have enabled copyright owners to exercise an unprecedented level of control over both the access to and the utilization of creative works worldwide, occasioning what has been labeled by some as the “privatization” of copyright law.¹¹ In effect, while new technologies have spurred an extraordinary increase in creative activity and afforded owners of knowledge goods a myriad of novel opportunities to disseminate their works to the public, so also has it facilitated new access-inhibiting mechanisms recognized and protected by the international copyright system. The combined effects have provided copyright owners with near-absolute power over the contents of their works and hindered the welfare ideals recognized by both national and international copyright instruments.

Widespread concern by scholars, non-governmental organizations, public institutions as well as governments of developing (DC’s) and least-developed countries (LDC’s) has recently impelled reconsideration of the balancing principles within the international copyright framework, with proposals for reform ranging from calls for modification of the Berne/TRIPS “three-step test,”¹² which is commonly viewed as a constraint on the sovereign discretion of nations to provide flexibilities in their laws, to the incorporation of a general clause within the international framework akin to the fair use provision in U.S. copyright law.¹³ Most recently, a proposal for a “reverse notice and take down” regime that holds great

⁹ See generally DANIEL GERVAIS, *THE TRIPS AGREEMENT: DRAFTING HISTORY AND ANALYSIS* (Sweet & Maxwell, 1998); Ruth L. Okediji, *Back to Bilateralism? Pendulum Swings in International Intellectual Property Protection*, 1 *UNIV. OF OTTAWA TECH. L. J.* 125 (2003–2004).

¹⁰ See, e.g., GERVAIS, *supra* n. 9. See also generally Ruth L. Okediji, *Toward an International Fair Use Doctrine*, 39 *COLUM. J. TRANSNAT’L L.* 75 (2000).

¹¹ See, e.g., Stephen M. McJohn, *Fair Use and Privatization in Copyright*, 35 *SAN DIEGO L. REV.* 61 (1998); Charles R. McManis, *The Privatization (or “Shrink-Wrapping”) of American Copyright Law*, 87(1) *CAL. L. REVIEW* 173 (1999).

¹² See, e.g., Christophe Geiger, *Right to Copy v. Three-Step Test: The Future of the Private Copy Exception in the Digital Environment*, *CRi* (2005).

¹³ See, e.g., Okediji, *supra* n. 10; Ruth L. Okediji, *Public Welfare and the Role of the WTO: Reconsidering the TRIPS Agreement*, 17 *EMORY INT’L L. REV.* 819 (2003). An additional call for reform has focused on the revision of the Berne Convention Appendix. See Ruth Okediji, *Fostering Access to Education, Research and Dissemination of Knowledge Through Copyright*, UNCTAD-ICSTD Dialogue on Moving the Pro-Development IP Agenda Forward: Preserving Public Goods in Health, Education and Learning (Bellagio, 29 November – 3 December, 2004), available at http://www.iprsonline.org/unctadictsd/bellagio/docs/Okideiji_Bellagio4.pdf (last visited Feb. 29, 2008).

promise in the digital arena has been advanced by leading copyright scholars to enable public interest uses of technically protected works.¹⁴

Increasing efforts in this area have been, however, directed at the delineation of a core set of explicit L&E's to be integrated within the current multilateral system which would counteract the ever-expanding panoply of proprietary rights of copyright owners.¹⁵ The activities of the key institution responsible for the development of substantive standards of international copyright law, the World Intellectual Property Organization (WIPO), which has recently commissioned several studies on limitations and exceptions, reflect some of these efforts. The WIPO Development Agenda, which seeks broadly to support a balanced international IP system with public interest considerations to bridge the knowledge and technology gap between wealthy and poor nations is also a promising achievement.¹⁶ Nonetheless, the importance of limitations and exceptions to the global public interest cannot be reduced to a question merely of geo-political significance, nor is it limited to any one subject matter of intellectual property. Limitations and exceptions to exclusive rights granted to encourage innovative endeavor are an indispensable part of the global economic system upon which the production of knowledge goods is predicated.

Presently, the task of developing of a comprehensive framework—both institutional and doctrinal—within the international copyright system to ensure that the continuous upgrading of authors' rights is balanced by an adequately defined and viable set of exceptions and limitations to copyright remains incomplete. Is a global instrument on limitations and exceptions the appropriate answer? And if so, is this the appropriate time?

This paper examines policy options and modalities for framing an international instrument on limitations and exceptions to copyright within the treaty obligations of the current international copyright system. We consider this international copyright *acquis* as our general starting point, and evaluate options for the design of such an instrument, including questions of political sustainability and institutional home. The paper is organized as follows: part I analyzes the structure of limitations and exceptions under the Berne

¹⁴ See Jerome H. Reichman, Graeme Dinwoodie & Pamela Samuelson, *A Reverse Notice and Takedown Regime to Enable Public Interest Uses of Technically Protected Copyrighted Works*, 22 BERKELEY J. L. & TECH. 981 (2007).

¹⁵ See, e.g., WIPO Standing Committee on Copyright and Related Rights, *WIPO Study on Limitations and Exceptions of Copyright and Related Rights in the Digital Environment*, 9th Session, June 23-27, 2003, WIPO Doc. SCCR/9/7 (April 5, 2003) [*hereinafter* WIPO Study]; ALAI Study Days—The Boundaries of Copyright: Its Proper Limitations and Exceptions (1999); Ruth L. Okediji, *The International Copyright System: Limitations, Exceptions and Public Interest Considerations for Developing Countries*, UNCTAD-ICTSD Project on IPRs and Sustainable Development T 13-14 (March, 2006), available at http://www.unctad.org/en/docs/iteipc200610_en.pdf (last visited Feb. 27, 2008). Note that other inter-governmental organizations (IGO's), such as the United Nations Educational, Scientific and Cultural Organization (UNESCO), have also undertaken important work in this area. See, e.g., Lucie Guibault, *The Nature and Scope of Limitations and Exceptions to Copyright and Neighbouring Rights with Regard to General Interest Missions for the Transmission of Knowledge: Prospects for Their Adaptation to the Digital Environment*, UNESCO e-Copyright Bulletin, October-December 2003, available at http://portal.unesco.org/culture/en/files/17316/108747977511_guibault_en.pdf/1_guibault_en.pdf (last visited Feb. 27, 2008).

¹⁶ See WIPO General Assembly, Proposal by Argentina and Brazil for the Establishment of a Development Agenda for WIPO, August 27, 2004, available at http://www.wipo.int/documents/en/document/govbody/wo_gb_ga/pdf/wo_ga_31_11.pdf (last visited Nov. 27, 2007) [*hereinafter* WIPO Development Agenda Proposal]; WIPO General Assembly, Decision on a Development Agenda, October 4, 2004, available at <http://www.cptech.org/ip/wipo/wipo10042004.html> (last visited Nov. 27, 2007).

Convention and sketches the rationale for a multilateral approach to the question of limitations and exceptions. In part II, we explore flexibilities inside the international copyright *acquis*, review the three-step test and assess its import for the validity of a proposed international instrument on L&E's, particularly given the expansion of the test in the TRIPS Agreement and the interpretive jurisprudence of the WTO dispute panels. In part III, we discuss the benefits and costs of alternative frameworks for a possible international instrument such as human rights law, competition law and consumer protection. We note the strengths and weaknesses of these extra-copyright frameworks in considering a multilateral approach to L&E's. Finally, in part IV, we set out in preliminary fashion the basic contours of a multilateral instrument on L&E's, highlighting possibilities for tradeoffs between substance and the design elements. Considerations of feasibility, political sustainability, and normative priorities, among others, are briefly explored and then situated along a continuum of possible modalities for such an instrument. We then offer some preliminary recommendations on the way forward.

I. RATIONALE FOR AN INTERNATIONAL INSTRUMENT ON LIMITATIONS AND EXCEPTIONS

The rights-access balance struck in the current revision of the Berne Convention, the Paris Act (1971) is largely reflective of the conditions that affected the outcome of negotiations on the initial iteration of the Berne Convention in 1886. Prior to the conclusion of negotiations, the copyright laws of individual European nation States each reflected a balance between the protection of authorial rights on the one hand and access to creative works on the other. To eliminate discriminatory practices commonly employed by national laws with respect to foreign works, the Berne Convention at its genesis sought to serve a coordinative function and correlate existing national norms into a set of minimum, baseline principles acceptable to a broad multilateral membership. Ensuring a successful negotiating outcome required that the Convention combine common elements and shared practices of existing national copyright laws of member States.¹⁷ Further, the compromises made by the negotiating parties over the scope of protection to be guaranteed by the Convention meant that many issues were excluded from its coverage and left to the discretion of individual member States.¹⁸ As a result, the outcome of the 1886 Berne negotiations was a rights-centered copyright agreement for at least two reasons. First, the motivating factor behind the Convention was the elimination of discrimination and the general strengthening of authors' rights across European States. Second, the success of the negotiations necessitated that members have policy space to decide the appropriate balance between the strength of proprietary rights on the one hand and the availability of access mechanisms on the other.¹⁹ This minimum rights approach, which allowed member States to provide limitations on authorial rights in their national legislation has been followed in later iterations of the Berne Convention, as well as in negotiations on the WTO TRIPS Agreement and the two 1996 WIPO Internet Treaties.

¹⁷ See RICKETSON, *supra* n. 7, at 78.

¹⁸ It is important to note that designing "gaps" in the text of an international treaty either by failing to address issues or by explicitly excluding issues is a familiar device of international cooperation. Indeed, one reason States choose incompleteness by design is because the costs of advanced specificity in a controversial area may jeopardize the successful conclusion of the treaty. This was clearly the situation with regard to L&E's in the Berne Convention. See Kamiel J. Koelman, *Fixing the Three-step Test*, 2006 E.I.P.R. 407; Christophe Geiger, *From Berne To National Law, via the Copyright Directive: The Dangerous Mutations of the Three-step Test*, 2007 E.I.P.R. 486.

¹⁹ See RICKETSON, *supra* n. 7, at 46-49, 56-60.

Aside from the notion that Berne member States are left with discretion to determine the appropriate rights-access balance within their domestic copyright systems, the Convention itself includes a number of provisions limiting exclusive authorial rights which are reflective of the public interest.²⁰ While neither the initial nor later iterations of the Berne Convention go to the lengths of delineating a comprehensive framework of access principles, the Convention does set forth a number of general limitations as well as specific exceptions to copyright which provide members the latitude of allowing access for certain predefined uses. Further, the Berne Convention rejects a universalist conception of copyright, which would require at a minimum a consensus on the overarching principle behind an author's natural right to property in her works. There is agreement, however, that copyright has an instrumental purpose, and despite differences in the locus of that purpose (author's rights or utilitarianism), the Berne Convention ultimately is directed at promoting the economic, social or cultural claims of States and their polity. As a Union, the Berne framework precludes any serious incursions into this foundational ethos.²¹

Today the vintage preoccupation with competing common and civil law rationalizations of IP protection and the expected gains of strong IP protection have given way to much larger considerations of the global effects of unlimited exclusive rights in knowledge goods.²² From public health to consumer protection, the high social costs of ever-expanding IP protection have compelled a demand from scholars, policy makers, international agencies and civil society groups for accountability in the IP system to the fundamental public purpose that private rewards for innovation and creative works are intended to advance.²³ In the transnational public sphere, these demands coalesced into two broad alliances for reform – the access to medicines and access to knowledge (A2K)²⁴ campaigns – each focused on pivotal legal and policy questions in their respective subjects (i.e., patents and copyright) regarding the integration of viable access mechanisms into the international IP framework. In both fields, efforts to address the structural imbalance in the TRIPS Agreement between the robust scope of rights granted to owners on the one hand, and the limited avenues to enhance competition, promote user interests and provide opportunities for bulk access to knowledge goods on the other, have been directed toward delineation of a policy sphere where the presumptive powers of rights holders must give way to identifiable national public goals.

As is widely recognized, the unlimited grant or exercise of rights by copyright holders without corresponding and appropriate L&E's has serious adverse long-term implications not only for development priorities, but indeed for the creative and innovation process itself. It is firmly established that most innovation occurs incrementally by building on preceding technologies or existing knowledge, which underscores the crucial role that access plays in the achievement of copyright's fundamental goals. On the same note, empirical evidence in some developed countries suggests that in regions where technological developments and know-how have been freely disseminated, there has been corresponding technological growth and innovation. As mechanisms of access, L&E's contribute to the dissemination of

²⁰ See Sam Ricketson, *U.S. Accession to the Berne Convention: An Outsider's Appreciation*, 8 INTELL. PROP. J. 87; Okediji, *supra* n. 10, at 147-148.

²¹ See, e.g., Berne Convention, *supra* n. 3, arts. 19 and 20. See also Okediji, *supra* n. 15.

²² Ruth L. Okediji, *Intellectual Property and Accountability in the Global Public Legal Order* (forthcoming, 2008).

²³ *Id.*

²⁴ See, e.g., Amy Kapczynski, *The Emerging Access to Knowledge Movement and the New Politics of Intellectual Property Law*, 117 YALE L.J. (forthcoming, 2008).

knowledge, which in turn is essential for a variety of human activities and values, including liberty, the exercise of political power, and economic, social and personal advancement. Finally, appropriately designed L&E's may alleviate the needs of people around the world who still lack access to books and other educational materials, and also open up rapid advances in information and communication technologies that are fundamentally transforming the processes of production, dissemination and storage of information.

A new international instrument on L&E's offers a unique opportunity to coordinate, harmonize and balance the heightened (and new) standards of protection set forth in the successive Berne Convention Revisions, the TRIPS Agreement and the WIPO Internet Treaties. International harmonization of L&E's present in national copyright laws would diminish the reliance on national courts for the interpretation of multilateral accords, therefore augmenting the benefits of substantive rights harmonization. For example, a new international instrument on L&E's could help to eliminate diverging interpretations of the three-step test across national jurisdictions and therefore provide coherence and predictability in an environment of dynamic innovation. A new international instrument would also offset the TRIPS constriction of three-step test as well as the nascent jurisprudence of WTO dispute panels which elevates economic benefits of control over economic benefits of diffusion. This jurisprudence, also fails to accommodate the dynamic nature of the creative enterprise.

A global approach to L&E's would further help: i) to facilitate transborder trade, both online and in traditional media, by eliminating inconsistency and uncertainty and encouraging uniformity of standards of protection and transparency; ii) to alleviate institutional weakness of States who need diffusion most (DC's and LDC's); iii) to counteract the recent shift to bilateralism and regionalism in international copyright policymaking and; iv) to constrain unilateral ratcheting up of global standards. Finally, a new international instrument with a broad membership offers an opportunity to eliminate anticompetitive effects associated with differing levels of protection across national jurisdictions while also consolidating recent gains in integrating public interest goals in the international copyright system, as seen notably in the Preamble to the TRIPS Agreement, the Preamble to the WIPO Copyright Treaty²⁵ (WCT) and its Agreed Statements.

II. IN SEARCH OF "WIGGLE ROOM": FLEXIBILITIES IN THE INTERNATIONAL COPYRIGHT ACQUIS

Ideally, a new international instrument on L&E's should be compatible with the standards set by the international copyright acquis, while optimally exploiting flexibilities that exist within the current multilateral framework. In search of these flexibilities, it is important to understand the mechanics of the copyright system. Statutory limitations and exceptions are but one, albeit very important, way of creating balance inside copyright. The tool-box of copyright law consists of several other balancing instruments as well, including, for example, the concept of a "work of authorship," which features a requirement of "originality";²⁶ the idea/expression dichotomy, which delineates the border between protected subject matter and the public domain; the delineation of economic rights of the right holder, such as the right of reproduction and the right of communication to the public; general limits

²⁵ See WCT, *supra* n. 3.

²⁶ See P.B. Hugenholtz, *Fierce Creatures. Copyright Exemptions: Towards Extinction?*, keynote speech, IFLA/IMPRIMATUR Conference, *Rights, Limitations and Exceptions: Striking a Proper Balance*, Amsterdam, 30-31 October 1997, available at <http://www.ivir.nl/publications/hugenholtz/PBH-FierceCreatures.doc> (last visited March 3, 2008).

to copyright, such as the exhaustion rule (first-sale doctrine) and the term of protection; and, finally, limitations and exceptions proper. In addition, outside the copyright tool-box, certain limits to copyright can be directly sourced in fundamental rights and freedoms, such as freedom of expression and the right to privacy, and others in competition law such as the use of compulsory licenses.

This part explores the “wobble room”²⁷ that the main multilateral conventions (BC, TRIPS and the WCT) leave to the contracting States to set limits to copyright and, by implication, to enter into special agreements codifying such limits, without undercutting the acquis. It assesses the latitude left by these Conventions to member States to limit exclusive rights of copyright right holders either by tailoring subject matter or economic rights or by way of limitations and exceptions. Once established, this latitude defines the breadth and scope of any limits to copyright that might form the content of an international instrument on L&E’s. As will be demonstrated in section A, since the conventional minimum rights are incomplete²⁸ and rarely precisely defined, while remaining largely immune to the application of the three-step test, this offers contracting States considerable flexibilities. This section goes on to discuss the handful of more precisely circumscribed limitations found in the Berne Convention which contracting Parties are free to implement. Section B then turns to the “three-step test,” which governs limitations and exceptions to the right of reproduction (BC) and to other minimum rights in the TRIPS and WCT. As we hope to demonstrate, this obstacle to limitations and exceptions too is, perhaps, less insurmountable than is often believed.

A. Minimum Standards

Characteristic of the international copyright regime is a structure of minimum standards, which qualified right holders may invoke before the national courts of the contracting States. These minimum standards need not apply in purely national contexts (BC art. 5.1). States have remained fully autonomous as regards works in their country of origin (BC art. 5.3). At least theoretically, this has left contracting States complete freedom to derogate from the conventional minimum rights as they see fit. Although such derogations do occasionally exist, as a rule, contracting States will shy away from discriminating against national right holders. Such autonomous space, however, can hardly form the basis of an instrument on L&E’s with transnational effect.

The main minimum standards set by the Berne Convention and other international agreements concern: (1) protected subject matter (‘works of authorship’); (2) economic (patrimonial) rights; and (3) limitations and exceptions subject to the “three-step test.” Each of these categories comes with certain limits, which shall be explored in the following section.

1. Limits to Protected Subject Matter

²⁷ The term is taken from J. H. Reichman, *From Free Riders to Fair Followers: Global Competition Under the TRIPS Agreement*, 29 N.Y.U. J. INT’L L. & POL. 11, 29 (1997).

²⁸ It is important to note that designing “gaps” in the text of an international treaty either by failing to address issues or by explicitly excluding issues is a familiar device of international cooperation. Indeed, one reason States choose incompleteness by design is because the costs of advanced specificity in a controversial area may jeopardize the successful conclusion of the treaty. This was clearly the situation with regard to L&E’s in the Berne Convention. *See supra* n. 18.

Inherent to the minimum rights prescribed by the Berne Convention, and incorporated by reference into TRIPS and the WCT, are certain general limits to copyright protection that could be exploited in an international instrument on L&E's, both as regards the subject matter of copyright ("works of authorship") and the economic rights defined and prescribed by the Conventions. The notion of a "work of authorship," codified in BC art. 2(1), includes an implicit requirement of "originality,"²⁹ which rules out, for instance, mere factual accounts. This is, in itself, an important instrument in delineating the borderline between protected creations and the public domain. This ground rule is illustrated by BC art. 2(8), which excludes from copyright protection "news of the day or miscellaneous facts having the character of mere items of press information." Similarly, TRIPS art. 10(2) and WCT art. 5 state that copyright in compilations of data "shall not extend to the data or material itself." A related balancing tool is the idea/expression (content/form) dichotomy, codified not in the BC, but in TRIPS art. 9(2) and in WCT art. 2. Accordingly, copyright protection extends "to expressions and not to ideas, procedures, methods of operation or mathematical concepts as such."³⁰

Note that BC art. 2(8), TRIPS arts. 9(2) and 10(2) and WCT arts. 2 and 5 are clearly phrased as mandatory exclusions from copyright protection. The reasons for these exclusions are, however, not clear from the historic record. Are these objects excluded from copyright protection as a matter of public policy, expressing principles of free speech or freedom of competition? Or are they simply reminders of the general rule that copyright protects original expression?³¹ If the former interpretation is correct, one could read into these exclusions an actual obligation upon contracting States not to protect these objects. If the latter is correct, the net effect of these exclusions would be more limited; for example, a Union "author" of news items could not invoke minimum protection in another Union country.³²

In addition, BC art. 2(4) permits States to exclude from copyright protection government works, an expression of freedom of information principles underlying any functioning democracy, and certainly a likely candidate for incorporation into any international instrument on L&E's.

2. *Limits to Economic Rights*

The definition of the economic rights in the Conventions offers additional "wobble room." The BC enumerates the minimum rights in a rather haphazard fashion, reflecting the history of the Convention; rights were added incrementally as new modes of exploitation became mainstream. Additional minimum standards are set by TRIPS and the WCT. But not all economic rights normally found in national laws have found their way into the international copyright acquis. A display right, for instance, is not recognized in any of the three main Conventions, while a right of commercial rental of films and software may not be required depending on market conditions (TRIPS art. 11 and WCT art. 7) and an artist's resale right has voluntary status only. (BC art. 14*ter*). Such unregulated or optional rights may therefore be subjected to unlimited limitations and exceptions.

²⁹ See SAM RICKETSON & JANE GINSBURG, *INTERNATIONAL COPYRIGHT AND NEIGHBORING RIGHTS: THE BERNE CONVENTION AND BEYOND* (Oxford University Press, 2006) 405.

³⁰ TRIPS Agreement, *supra* n. 4; WCT, *supra* n. 3.

³¹ See RICKETSON & GINSBURG, *supra* n. 29, at 498-501.

³² See RICKETSON & GINSBURG, *supra* n. 29, at 499.

But even a minimum right seemingly carved in stone, such as the right of reproduction, may leave contracting States latitude for limitation. While BC art. 9(1) prescribes the “exclusive right of authorizing the reproduction of ... works, in any manner or form,” and the Agreed Statements to the WCT confirm its application in the digital environment,³³ neither instrument defines the act of “reproduction” as such. Scholars have convincingly argued that reproduction is basically a normative, not a technical notion, and should therefore be interpreted in the light of its objective.³⁴ This line of reasoning leaves room, for instance, for a statutory *carve-out* permitting acts of economically insignificant temporary copying.³⁵ Arguably, such carve-outs need not be subjected to the three-step test.³⁶

Further flexibilities can be derived from the notion of “public,” which determines the scope of several other economic rights codified in the Berne Convention, some of which were eventually absorbed by the general right of communication to the public that was introduced in WCT art. 8.³⁷ Indeed, many countries have already taken advantage of such flexibilities by permitting certain *de minimis* acts of public performance or communication to the public by way of legally defining the contours of these acts around such minimal uses. Examples abound. For instance, many European countries define “public” in respect to the (non-harmonized) right of public performance in such a way as to rule out performances within a circle of family or friends. In some countries, carve-outs go considerably further. For example, art. 17(3)(b) of the Austrian Copyright Act permits retransmission of works over community antenna systems (small cable networks) reaching fewer than 500 households.³⁸

The Berne Convention also warrants an exclusive right to make transformative uses, in the form of translations (art. 8), adaptations, arrangements and other alterations (art. 12), and cinematographic adaptations (art. 14(1)). Again, in the absence of clear definitions, these

³³ See WCT, *supra* n. 3, Agreed statements concerning Article 1(4):

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.

³⁴ See Legal Advisory Board, *Reply to the Green Paper on Copyright and Related Rights in the Information Society*, Brussels, September 1995 (copy on file with the authors); see also generally P. Bernt Hugenholtz, *Adapting Copyright to the Information Superhighway*, in P. BERNT HUGENHOLTZ (ed), *THE FUTURE OF COPYRIGHT IN A DIGITAL ENVIRONMENT* (Kluwer Law International, 1996) 81-102.

³⁵ See, e.g., Dutch Copyright Act (as amended), art. 13, available at http://www.ivir.nl/legislation/nl/copyrightact1912_unofficial.pdf (last visited March 5, 2008) (unofficial translation by Ministry of Justice of the Netherlands):

The reproduction of a literary, scientific or artistic work will not include temporary reproduction of a passing or incidental nature and forming an essential part of a technical procedure whose sole purpose is to enable a) the passing on by an intermediary through a network between third parties, or b) a lawful use and if it contains no independent economic value.

³⁶ Note, however, that insofar as such carve-outs from the economic rights would fall under the diffuse rubric of “minor reservations,” they might still fall within the ambit of the three-step test. See discussion below.

³⁷ These rights include the right of public performance “by any means or process” (BC art. 11); the public recitation including the public communication of thereof (BC art. 11*ter*); the public performance of cinematographic adaptations (BC art. 14(1)); the rights of broadcasting, rebroadcasting, cable distribution, and public communication by loudspeaker (BC art. 11*bis*).

³⁸ See A.P. Groen, *De Minimis-Regelingen in het Auteursrecht*, Report to WODC (Ministry of Justice of the Netherlands) (2007).

provisions leave some room for de facto limitations, for instance by determining in national statutory law or case law the criteria for copyright infringement (i.e. the scope of the adaptation right).

The exhaustion rule (or first-sale doctrine) found in most national laws, and permitted under TRIPS art. 6 and WCT art. 6.2 is another boundary of copyright.³⁹ The same can be said of the limited term (duration) of copyright (BC art. 7). Note that although the minimum Berne term of 50 years p.m.a. (BC art. 7) is increasingly overrun by countries providing “life plus seventy,” the Berne minimum is in itself subject to several exceptions.⁴⁰

3. *Specific Limitations and Exceptions in the BC*

The Berne Convention recognizes two types of limitations: compensated limitations and uncompensated limitations. Uncompensated limitations usually mirror uses or practices that are not considered part of the legitimate scope of the author’s proprietary grant. Compensated limitations usually suggest that the copyright owner is not entitled to control whether the work is used, but is always entitled to remuneration as part of the copyright incentive scheme. The difference between the two categories is important especially in relation to the three-step test discussed below. Assuming for the moment that compensated limitations are not immune to three-step test scrutiny, the existence of a statutory compensation scheme may avoid causing “unreasonable prejudice” to authors or right holders and thereby makes it easier for limitations of the latter category to satisfy the third step of the test.⁴¹

Uncompensated limitations in the Berne Convention include provisions permitting public speeches (art. 2*bis*(2)), quotations (art. 10(1)), uses for teaching purposes (art. 10(2)), press usage (art. 10*bis*(1)), reporting of current events (art. 10*bis*(2)) and ephemeral recordings by broadcasting organizations (art. 11*bis*(3)).⁴² Many of these provisions simply state the purpose of the permitted use and leave a considerable measure of freedom to contracting States for implementation at the national level. In some cases (e.g., arts. 10(1) and 10(2)), the norms of the Berne Convention refer to “fair practice,” a notion which arguably leaves room for an interpretation that takes account of local conditions,⁴³ thus creating additional flexibilities.

Note that Berne Convention art. 10(1) is phrased as a *mandatory* user freedom: “It shall be permissible to make quotations. . . .” While mandatory limitations are not uncommon in international instruments in the general realm of IP (see Appendix B to this Report), this is the only instance of a mandatory limitation in an international copyright treaty.⁴⁴ The reason for this special status, most likely, again lies in the exception’s rationale:

³⁹ Note that neither the BC nor TRIPS prescribes a general right of distribution.

⁴⁰ The standard minimum term may be reduced to fifty years from first communication to the public or from creation for cinematographic works. Contracting States may also offer shorter terms of twenty-five years from creation for photographic works and works of applied art. However, art. 9 of the WCT reinstates the normal BC term for photographic works by ruling out the application of Berne art. 7(4). For works in which copyright is initially vested in a corporate entity, minimum terms expire fifty years from first publication or creation (TRIPS art. 12).

⁴¹ See discussion below.

⁴² See WIPO Study, *supra* n. 15, at 11-20. For a summary of these limitations, see Appendix A to this Report.

⁴³ WIPO Study, *supra* n. 15, at 13.

⁴⁴ Note that the BC, TRIPS and the WCT do provide for certain mandatory *exclusions* of protected subject matter. See discussion above.

freedom of expression. Moreover, a right to quote might be considered an essential prerogative for the authors, who traditionally occupy center stage in the Berne Convention.

In addition to the specific limitations enumerated in the Convention, art. 9(2) allows unspecified limitations to the right of reproduction, subject to the “three-step test,” which is discussed below. The TRIPS Agreement and the WCT do not contain any additional specific limitations to the rights newly introduced by these Conventions; both Treaties extend the rule of the “three-step test” to all rights covered by the respective treaties. Note however that the contracting parties to the WCT did expressly underscore the importance of retaining a balance in copyright, as is clear from its preamble,⁴⁵ which may serve as a guideline to interpretation of the norms of the WCT, and arguably the Berne Convention as well.

In addition to the limitations and exceptions discussed above, the Berne Convention allows, in a few well circumscribed situations, for statutory (compulsory) licensing, as in the case of the recording of musical works (art. 13(1)) and broadcasting and cable retransmission (art. 11bis(2)). In such cases, right holders have a right to equitable remuneration.

Moreover, as the record of the Stockholm Conference reveals, certain exceptions to particular rights, although not expressed in the international instruments, might be nevertheless implied.⁴⁶ These so-called *minor reservations* (or “minor exceptions”) fall into two categories: i) those in relation to performing, recitation, broadcasting, recording and cinematographic rights, and ii) those in relation to translations. As their name “minor reservations” indicates, these implied limitations usually concern *de minimis* uses, such as use of works during religious ceremonies, or use by military bands. During the Brussels and Stockholm Conferences on the Revision of the Berne Convention, the delegations invoked the “minor reservations” doctrine to justify the maintenance in their national laws of existing exceptions of minor importance.⁴⁷ Such minor reservations might be codified in a future instrument on L&E’s.

Finally, for developing nations, there exist additional flexibilities in the Berne Appendix. However, due to the complexity of its provisions and the administrative burden that it imposes on its users, the Appendix has largely remained unused.⁴⁸

B. Three-step Test

1. Scope and Function of the Three-step Test

a. Introduction

At the 1967 Stockholm Conference, the so-called three-step test of art. 9(2) was introduced in international copyright law as a companion to the formal recognition of the

⁴⁵ See Berne Convention, *supra* n. 3, pmb. ¶5 (“Recognizing the need to maintain a balance between the rights of authors and the larger public interest, particularly education, research and access to information, as reflected in the Berne Convention. . . .” [emphasis in original]).

⁴⁶ WIPO Study, *supra* n. 15, at 33; *see also* Report of the Panel, US – Section 110(5) Copyright Act, 15 June 2000, WTO Doc. WT/DS/160/R, § 6.33 et seq. [*hereinafter* US – Section 110(5) Report].

⁴⁷ M. SENFLEBEN, COPYRIGHT, LIMITATIONS AND THE THREE-STEP TEST (Kluwer Law International, 2004) 198-201.

⁴⁸ See R. L. Okediji, *Welfare and Digital Copyright in International Perspective*, in J. H. REICHMAN and K. MASKUS (eds), INTERNATIONAL PUBLIC GOODS AND TRANSFER OF TECHNOLOGY UNDER A GLOBALIZED INTELLECTUAL PROPERTY REGIME (Cambridge University Press, 2005).

general right of reproduction in art. 9(1) of the Berne Convention. The three-step test reappeared in TRIPS art. 13 and subsequently in WCT art. 10. Under art. 13 TRIPS, member states shall confine limitations and exceptions are (1) to “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”. Increasingly, variants of the test also appear in various regional instruments, such as the European harmonization directives, or in bilateral treaties, such as the US-Australia FTA (art. 17.4(10)).

The evolution of the three-step test into the overriding norm of international copyright law through its incorporation into the TRIPS Agreement, has attracted criticism from scholars and stakeholders alike⁴⁹ The three-step test apparently negates the balance between exclusivity and access that should be inherent in any mature copyright system. Its focus, as with the entire structure of minimum rights, is geared towards protecting rights of authors or, in the case of TRIPS, “right holders,” not the interests of society or the general public. Cumulative application of the three steps, as its wording requires, heavily tilts the balance in favour of the right holders. Through its incorporation into the TRIPS Agreement, what was essentially a norm of international copyright has morphed into a norm of international trade law. Thereby, it has lost much of its original normative content. Finally, the test fails to take into account the justified needs of developing nations. The authors of this paper share much of this criticism. However, as a political reality, the existing *acquis*, including the three-step test, can hardly be ignored. Fortunately, as the following analysis will reveal, despite its firm wording, the three-step test does still provide members with flexibilities, and leaves sufficient room for States to enter into an instrument on L&E’s with meaningful substantive content.

During its transformation from a norm of international copyright to a norm of international trade law, the focus of the test has shifted from the interests of *the author* to those of the *right holder*. This paradigm shift is not without consequences; it brings to the foreground the commercial interests of intermediaries (“right holders”), while downplaying the interests of the authors. But as Prof. Gervais has noted, the trade-law gloss that TRIPS has put on the three-step test may have actually created some extra space for limitations and exceptions. Whereas under the classic authors’ rights paradigm, “prejudice” (step 3) is likely to be measured in terms of “just reward,” reflecting notions of natural justice traditionally associated with authors’ rights; the same notion read through the lens of TRIPS is more likely to be assessed by application of the actual damage criterion usually associated with trade law.⁵⁰

The three-step test has found its way, via WCT art. 10, into art. 5(5) of the European Copyright (Information Society) Directive of 2001.⁵¹ Articles 6(3) of the EC Computer

⁴⁹ See, e.g., R. Cooper Dreyfuss, *TRIPS—Round II: Should Users Strike Back?*, 71 U. CHI. L. REV. 21 (2004); R. Cooper Dreyfuss & G. Dinwoodie, *TRIPS and the Dynamics of Intellectual Property Lawmaking*, 36 CASE W. RES. J. INT’L L. 95 (2004); Ruth Okediji, *TRIPS Dispute Settlement and the Sources of (International) Copyright Law*, 49 JCPS 585 (2001); South Centre, *The TRIPS Agreement: A Guide for the South* (Geneva, November 1997), available at <http://www.southcentre.org/publications/trips/tripsagreement.pdf> (last visited March 5, 2008).

⁵⁰ D. Gervais, *Making Copyright Whole: A Principle Approach to Copyright Exceptions and Limitations* (unpublished manuscript on file with the authors).

⁵¹ See Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society, OJ L 167, June 22, 2001, art. 5.5 [*hereinafter* Directive 2001/29/EC] (“The exceptions and limitations provided for in paragraphs 1, 2, 3 and 4 shall only be applied in certain special cases which do not conflict with a normal exploitation of the work or other subject-matter and do not unreasonably prejudice the legitimate interests of the rightholder.”).

Programs Directive, 10(3) of the EC Rental Right Directive and 6(3) of the EC Database Directive were already modeled on the three-step test. Thus, the three-step test has become a norm of Community law, qualifying it for interpretation by the European Court of Justice. Moreover, following its incorporation into the Information Society Directive, and despite general agreement among European scholars that the test is a norm addressed to the legislatures,⁵² not the citizens of the member States, several EU States⁵³ have seen fit to transpose the norm directly into their national laws. Thus, in these countries, the three-step test now constitutes a directly applicable rule of substantive law as regards the interpretation of limitations.⁵⁴ Note that China had incorporated the three-step into national legislation already in its copyright law of 2002.⁵⁵ More recently, following the US-Australia FTA, the Australian legislature has done the same.⁵⁶

The test is often portrayed as imposing a “limit to limitations.” This is indeed what the language suggests. In this vein, the WTO Panel in the *IMRO* case, which pitted the European Union against the United States in a conflict concerning the interpretation of the so-called “business exemption” (Section 110(5) of the US Copyright Act), notes at the outset of its opinion “that[TRIPS] Article 13 cannot have more than a narrow or limited operation. Its tenor, consistent as it is with the provisions of Article 9(2) of the Berne Convention (1971), discloses that it was not intended to provide for exceptions or limitations except for those of a limited nature.”⁵⁷ However, the history of the three-step test tells a somewhat different story. As the drafting history of the Stockholm Revision of the BC reveals, art. 9.2 is more akin to a “grandfathering” clause; a purposefully vague reflection of a compromise among States of different copyright traditions,⁵⁸ which confirms that the broad array of – frequently broadly worded – statutory limitations that existed at the national levels in 1967⁵⁹ is in conformity with BC minimum standards. The same might be said in respect of art. 13 of the TRIPS Agreement adopted in 1994.⁶⁰

b. What Are “Limitations and Exceptions”?

⁵² See S. Dusollier, *L’Encadrement des Exceptions au Droit d’Auteur par le Test des Trois Etapes*, [2005] IRDI 212; K. Koelman, *Fixing the Three-step Test*, 2006 E.I.P.R. 407; Ch. Geiger, *From Berne to National Law, via the Copyright Directive: the Dangerous Mutations of the Three-step Test*, 2007 E.I.P.R. 486.

⁵³ These States include: the Czech Republic, France, Greece, Hungary, Italy, Luxembourg, Malta, Poland, Portugal and Slovakia.

⁵⁴ Other member States, including Austria, Belgium, Finland, Germany, the Netherlands and the United Kingdom, have remained more faithful to the test’s original function as a meta-norm addressed to national legislatures. But even in member States where no transposition of the three-step test has occurred, national courts compelled to interpret national law in conformity with Community law, now regularly refer to the three-step test in their decisions. See, e.g., *De Nederlandse Dagbladders v. the Netherlands*, District Court of the Hague (Rechtbank ’s Gravenhage), 2 March 2005, [2005] Computerrecht 143 (State-operated electronic press clipping service for government officials not deemed to fall under news reporting exception because such use would conflict with normal exploitation of newspaper articles).

⁵⁵ See Copyright Act of China, art. 21; see also Geiger, *supra* n. 52, at n. 8. See also generally G. Shoukang, *New Chinese Copyright Act*, [2000] 31 IIC 526-530.

⁵⁶ See Australia Copyright Act (as amended), Act. No. 158, 2006, sec. 200AB.

⁵⁷ See US – Section 110(5) Report, *supra* n. 46, §6.97.

⁵⁸ Ch. Geiger, *The Role of the Three-step Test in the Adaptation of Copyright Law to the Information Society*, UNESCO e-Copyright Bulletin, January-March 2007, p. 3, available at <http://unesdoc.unesco.org/images/0015/001578/157848e.pdf> (last visited March 3, 2008).

⁵⁹ For an exemplary, see inventory of limitations and exception existing in national law in a number of contracting States (e.g., Germany, Netherlands, France, United Kingdom and India) prior to the 1967 Stockholm Conference. See also M. SENFTLEBEN, *supra* n. 47, at 52-81.

⁶⁰ See SENFTLEBEN, *supra* n. 47, at 87.

While BC art. 9(2), TRIPS art. 13 and WCT art. 10 expressly refer to “limitations and exceptions” as the object of the three-step test, surprisingly little has been written, even in the *IMRO* WTO Panel Report, on what actually constitutes “limitations and exceptions.” In all likelihood, the term applies first and foremost to statutory limitations that curtail the rights of right holders in specific circumstances to cater for the interests of certain user groups or the public at large. Given the structure of the three Conventions, the three-step test need not be applied to codifications of the subject matter of copyright or of the minimum rights as such. According to some scholars, the term also does not encompass provisions that restrict the *exercise* of economic rights, such as provisions mandating the collective exercise of rights found in a variety of European directives and national laws.⁶¹ An example is art. 9(1) of the EC Satellite and Cable Directive, which requires that rights of cable retransmission be exercised solely through collecting societies.⁶² Although the practical effect of such a rule is similar to that of a statutory or compulsory license (providing for a right of remuneration), it is technically not a limitation, since the exclusive economic right remains intact and can still be enforced on behalf of right holders by designated collecting societies.

Whether the compensated limitations permitted under the Berne Convention qualify as “limitations and exceptions” subject to the three-step test under TRIPS art. 13, is an unsettled question.⁶³ But even if they are, such compensated limitations are generally more likely to pass the test given the fact that prescribing compensation to authors or right holders is generally recognized as a crucial factor in assessing ‘unreasonable prejudice’ under the third step.

Surely, the term “limitations and exceptions” – and by implication the three-step test – cannot apply to exercises of State discretion that are done pursuant to public policy external to copyright issues, such as freedom of expression and competition law, since this would imply a hierarchy of copyright over other domains of law, which would effectively render the copyright system immune against such external sources. However, as case law from the highest courts reveals, such a hierarchy does not exist.⁶⁴

c. Scope of the Three-step Test

⁶¹ See, e.g., S. von Lewinski, *Mandatory Collective Administration of Exclusive Rights – A Case Study On Its Compatibility With International and EC Copyright Law*, UNESCO e-Copyright Bulletin, January-March 2004, p. 5, available at <http://unesdoc.unesco.org/images/0013/001396/139656e.pdf> (last visited March 3, 2008); Geiger, *supra* n. 58, at 9-12. Cf., e.g., 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 e-Copyright Bulletin, October-December 2003, p. 4, available at http://portal.unesco.org/culture/en/files/14935/10657988721Ficsor_Eng.pdf (last visited March 3, 2008).

⁶² See 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, OJ No. L 248/15, 6 October 1993, art. 9(1); see also P.B. Hugenholtz, *Copyright Without Frontiers: Is There a Future for the Satellite and Cable Directive?*, in *DIE ZUKUNFT DER FERNSEHRICHTLINIE/THE FUTURE OF THE ‘TELEVISION WITHOUT FRONTIERS’ DIRECTIVE* (Nomos Verlag, 2005), 65-73.

⁶³ Gervais, *supra* n. 50.

⁶⁴ See, e.g., P. Bernt Hugenholtz, *Copyright and Freedom of Expression in Europe*, in ROCHELLE C. DREYFUSS, DIANE L. ZIMMERMAN & HARRY FIRST (eds), *EXPANDING THE BOUNDARIES OF INTELLECTUAL PROPERTY. INNOVATION POLICY FOR THE KNOWLEDGE SOCIETY* (Oxford University Press, 2001) 343-363 (demonstrating that European courts regularly subject copyright claims to external freedom expression norms); L. Guibault, *General Report (ALAI 1998)*, 46-48 (external limiting of copyright by competition law well established in various national and supranational courts). See also *infra* part III.

The mother of all three-step tests, BC art. 9(2), applies only to the right of reproduction guaranteed in Berne art. 9(1). Other economic rights guaranteed under the Convention come either with corresponding specific limitations (e.g., quotation), or none at all. In the latter case, the “minor exceptions” doctrine may apply. Given the structure of the Berne Convention, the three-step test arguably does not extend to a State exercise of discretion pursuant to those articles where such discretion has explicitly been granted, such as articles 2*bis*, 10 and 10*bis*. Thus, States may freely enact legislation with respect to the subjects covered in these provisions without the restrictions of the three-step test.⁶⁵

TRIPS art. 13 takes the test an important step further. It now applies to all economic rights guaranteed by TRIPS as minimum standards. These include not only the rights newly recognized in TRIPS, such as the right of rental (TRIPS art. 11), but also the panoply of rights of the Berne *acquis* as incorporated into TRIPS (TRIPS art. 9(1)).⁶⁶ Likewise, TRIPS art. 13 most likely applies not only to express limitations but also to the “minor reservations” implied in the Berne Convention.⁶⁷

What is still unclear, however, is whether TRIPS art. 13 would permit three-step test compliant exceptions and limitations that are not allowed under the Berne Convention on account of Berne’s more limited “minor reservations” doctrine. This was one of several preliminary issues raised in the *IMRO* case. According to the European Community, this would effectively undermine the Berne *acquis* and therefore create a conflict with BC art. 20 and TRIPS art. 2(2) .⁶⁸ On the other hand, according to the United States, “[t]he text of Article 13 is straightforward and applies to ‘limitations or exceptions to exclusive rights’. Not *some* limitations, not limitations to *some* exclusive rights.”⁶⁹ In the end, the WTO Panel did not have to resolve the issue, because the contentious provision of the U.S. Copyright Act was judged by the Panel to be in direct conflict with TRIPS art. 13.⁷⁰

WCT art. 10 appears to be stricter and has a more pronounced dual function than TRIPS art. 13. WCT art. 10(1) concerns the rights newly granted in arts. 6, 7 and 8 of the WCT. Like BC art. 9(2), art. 10(1) of the WCT can therefore directly be invoked as a basis for national limitations. But art. WCT 10(2) serves a different function. It obligates States contracting to the WCT, which are bound to comply with the substantive provisions of the BC by virtue of art. 1(4), to subject any limitations thereto, arguably including the so-called “minor reservations,”⁷¹ to the three-step test. Thus, like TRIPS art. 13 , art. 10(2) of the WCT applies to limitations and exceptions to all the economic rights already recognised by Berne. The potential impact of WCT art. 10(2) on Berne limitations, however, is neutralized by the Agreed statements concerning art. 10:⁷²

It is understood that the provisions of Article 10 permit Contracting Parties to carry forward and appropriately extend into the digital environment limitations and exceptions in their national laws, which have been considered acceptable under the Berne Convention. Similarly, these provisions should be understood to permit Contracting Parties to devise new

⁶⁵ WIPO Study, *supra* n. 15, at 21; RICKETSON & GINSBURG, *supra* n. 29, at 763.

⁶⁶ US – Section 110(5) Report, *supra* n. 46, §6.80.

⁶⁷ US – Section 110(5) Report, *supra* n. 46, §6.81.

⁶⁸ US – Section 110(5) Report, *supra* n. 46, §§6.76-6.77. Cf. GERVAIS, *supra* n. 9, at 89 (arguing that TRIPS art. 13 “does not create new exceptions”).

⁶⁹ US – Section 110(5) Report, *supra* n. 46, §6.79.

⁷⁰ US – Section 110(5) Report, *supra* n. 46, §6.82.

⁷¹ US – Section 110(5) Report, *supra* n. 46, §6.69.

⁷² *Senfleben*, in Dreier/Hugenholtz, *Concise Copyright*, WCT, art. 10, n. 6(b).

exceptions and limitations that are appropriate in the digital networked environment. It is also understood that Article 10 (2) of the WCT neither reduces nor extends the scope of applicability of the limitations and exceptions permitted by the Berne Convention.⁷³

Following a literal reading of the test, as enshrined in various international treaties, the three steps of the test must apply cumulatively. This is indeed the general opinion of the WTO Panel in the *IMRO* decision: “Failure to comply with any one of the three conditions results in the Article 13 exception being disallowed.”⁷⁴ By necessity, such cumulative application implies that at least the first and second steps be applied in a liberal manner, so as to leave some relevance to the third and final step.⁷⁵ A narrow construction of these initial steps would otherwise rob the test of much of its meaning. For this reason, Dr. Geiger has advocated reading the test in reverse, i.e. starting with the third test and working backwards from there. Such a reading is likely to accentuate the normative considerations built into the third (then first) step of the test. Indeed, nothing in the wording of the three-step test would prevent a legislator, international court or a WTO panel from following this approach.⁷⁶

Another approach, which admittedly takes more liberties with the wording of the provision, would be to perceive the norms reflected in the three steps as a trio of factors to be taken into account by legislators or courts – much like the four factors of fair use in section 107 of the U.S. Copyright Act.⁷⁷ This approach has the obvious advantage of offering greater flexibility. A limitation might score low on, for instance, the first or second step, but could still be admitted by scoring high on the third test. Indeed, such a “holistic” approach would do more justice to the proportionality test that in essence underlies the three-step test.⁷⁸

2. *The Three Steps in Some Detail*

The WTO Panel Report in the *IMRO* case has inspired a voluminous literature, including one highly detailed monograph,⁷⁹ on the meaning of the individual steps of the three-step test. This literature need not be repeated here; in the context of this Report we shall limit ourselves to a few general observations.

No authoritative interpretation of the three-step test has ever been given under the Berne Convention.⁸⁰ However, national courts have applied, or at least referred to, the three-step test on many occasions, even before the incorporation of the test in European jurisdictions. The interpretation and application of the test by national courts varies considerably. For instance, while some European courts have judged statutory limitations that allow unauthorized digital “press clipping” to be compliant with the three-step test, others – in almost identical cases – have not.⁸¹

⁷³ WCT, *supra* n. 3, Agreed statements concerning Article 10.

⁷⁴ US – Section 110(5) Report, *supra* n. 46, §6.87.

⁷⁵ See, e.g., SENFTLEBEN, *supra* n. 47, at 244.

⁷⁶ Geiger, *supra* n. 58, at 18.

⁷⁷ K. J. Koelman, *Fixing the Three-Step Test*, 2006 E.I.P.R. 407; Geiger, *supra* n. 58 at 19.

⁷⁸ SENFTLEBEN, *supra* n. 47, at 243.

⁷⁹ SENFTLEBEN, *supra* n. 47.

⁸⁰ Such an interpretation could have been given only by the International Court of Justice. See Berne Convention, *supra* n. 3, art. 33; RICKETSON & GINSBURG, *supra* n. 29, at 1152.

⁸¹ See Geiger, *supra* n. 52, at 489, (discussing individual national cases).

In 2000, TRIPS art. 13 was interpreted in considerable detail in the *IMRO* case.⁸² Another Panel has interpreted the test's patent law corollary – TRIPS art. 30 – in similar detail.⁸³ While both Panel Reports contain valuable analyses of the three-step test and of its place and function in the international law of intellectual property, it should be borne in mind that the WTO Panels are not courts and that the legal framework within which they operate is the law of international trade, not of copyright. Thus, WTO Panels are likely to be relatively insensitive to arguments based on fundamental rights and freedoms or (other) non-economic (e.g. cultural or educational) public interests, even if art. 7 of the TRIPS Agreement mandates that the protection of intellectual property rights be “conducive to social and economic welfare, and to a balance of rights and obligations.”⁸⁴ Also, it is unlikely for a variety of reasons that decisions of WTO panels qualify as definitive interpretations of the relevant norms in question.⁸⁵ In sum, WTO panel decisions ought to have only limited precedent value for international courts, such as the International Court of Justice, which is competent to interpret the BC and the WCT, or national courts interpreting national norms of copyright law.

a. Step 1: Special Cases

Under the first prong of the three-step test, limitations and exceptions must be confined to “certain special cases.” Although one might argue that any purpose-specific limitation complies with this requirement almost by definition, making the first step basically superfluous,⁸⁶ the *IMRO* Panel Report does contain exhaustive discussion of this threshold criterion. The word “certain” implies, according to the Panel, that, as a matter of legal certainty, a limitation must be well-defined. However, this does not rule out broadly phrased limitations, such as the fair use exemption in the United States, as a matter of principle.⁸⁷

. . . there is no need to identify explicitly each and every possible situation to which the exception could apply, provided that the scope of the exception is known and particularised. This guarantees a sufficient degree of legal certainty.⁸⁸

The Panel subsequently interpreted the term “special” as meaning something akin to exceptional. “In other words, an exception or limitation should be narrow in quantitative as well as a qualitative sense.”⁸⁹ The Panel thus rejected the interpretation advanced by several scholars, that “special” has normative meaning (i.e., that the purpose of the exempted use be objectively justifiable).⁹⁰ However, according to the Panel, the term “special” does not imply

⁸² See US – Section 110(5) Report, *supra* n. 46.

⁸³ WTO Panel Report, WTO Panel Report, Canada-Patent Protection of Pharmaceutical Products, April 7, 2000, WTO Doc. WT/DS114/R. See also Panel Reports for the trademark-related cases WT/DS174/R and DS2890/R (US and Australia v. EU). For a comparison of all three panel decisions, see M. Senftleben, *Towards a Horizontal Standard for Limiting Intellectual Property Rights? – WTO Panel Reports Shed Light on the Three-Step Test in Copyright Law and Related Rights in Patent and Trademark Law*, IIC 2006/4, at 407.

⁸⁴ See Okediji, *supra* n. 10. See also Dreyfuss, *supra* n. 49, at 22.

⁸⁵ SENFTLEBEN, *supra* n. 47, at 107-108.

⁸⁶ Daniel J. Gervais, *Towards a New Core International Copyright Norm: The Reverse Three-Step Test*, 9 MARQ. INTELL. PROP. L. REV. 1 (2005).

⁸⁷ Several scholars have questioned whether the fair use doctrine complies with (the first part of) the three-step test. See, e.g., WIPO Study, *supra* n. 15, at 68-769; Okediji, *supra* n. 10, at 148; SENFTLEBEN, *supra* n. 47, at 162.

⁸⁸ US – Section 110(5) Report, *supra* n. 46, §6.108.

⁸⁹ US – Section 110(5) Report, *supra* n. 46, §6.109.

⁹⁰ WIPO Study, *supra* n. 15; SENFTLEBEN, *supra* n. 47, at 137 et seq.

that policy objectives pursued by the limitation or exception at issue need to be objectively justified, as was argued by the EC in the case.

In our view, the first condition of Article 13 requires that a limitation or exception in national legislation should be clearly defined and should be narrow in its scope and reach. On the other hand, a limitation or exception may be compatible with the first condition even if it pursues a special purpose whose underlying legitimacy in a normative sense cannot be discerned. The wording of Article 13's first condition does not imply passing a judgment on the legitimacy of the exceptions in dispute.⁹¹

In other words, it is left to the discretion of WTO members to determine the need for and the objectives of exceptions and limitations as they see fit.

b. Step 2: No Conflict with Normal Exploitation

The second step is arguably more critical, and the WTO Panel's interpretation thereof certainly more controversial. The Panel's reading of "normal exploitation: is essentially economical, and consequently restrictive:

We believe that an exception or limitation to an exclusive right in domestic legislation rises to the level of a conflict with a normal exploitation of the work (i.e., the copyright or rather the whole bundle of exclusive rights conferred by the ownership of the copyright), if uses, that in principle are covered by that right but exempted under the exception or limitation, enter into economic competition with the ways that right holders normally extract economic value from that right to the work (i.e., the copyright) and thereby deprive them of significant or tangible commercial gains.⁹²

According to the Panel, the term "normal" has two connotations (§6.166). Normal exploitation is, firstly, all what a right holder may – empirically – expect from exploiting the work. This interpretation obviously suffers from a certain circularity, as right holders will not expect income from rights that are subjected to exceptions. Accordingly, normal exploitation also relates to "those forms of exploitation which, with a certain degree of likelihood and plausibility, could acquire considerable economic or practical importance" (§ 6.180). In other words, normal exploitation is also by reference to what right holders *may* expect from potential or future markets (§6.184). But yet again, there is an element of circularity in this interpretation. As more refined ways of exercising economic rights on a micro-level become economically feasible,⁹³ the field of "normal exploitation" increases, and the discretion of States to introduce or maintain limitations is gradually whittled away. Fortunately, the Panel does admit that right holders are not protected in their expectation in that they may exploit their economic rights to their full extent, i.e., to the very last drop. Or else, no limitations would survive the test and the three-step test would become an empty shell (§ 6.167).

To avoid a circularity of reasoning that would effectively eclipse exceptions and limitations, Dr. Senftleben has proposed to revisit the preparatory works of the Stockholm Conference. According to the Conference record, normal exploitation would encompass "all forms of exploiting a work, which have, or are likely to acquire, considerable economic or

⁹¹ US – Section 110(5) Report, *supra* n. 46, §6.112.

⁹² US – Section 110(5) Report, *supra* n. 46, §6.183.

⁹³ US – Section 110(5) Report, *supra* n. 46, § 6.187 ("What is a normal exploitation in the market-place may evolve as a result of technological developments or changing consumer preferences.")

practical importance.”⁹⁴ The WTO Panel appears to subscribe to this historic reading by opining:

Thus it appears that one way of measuring the normative connotation of normal exploitation is to consider, in addition to those forms of exploitation that currently generate significant or tangible revenue, those forms of exploitation which, with a certain degree of likelihood and plausibility, could acquire considerable economic or practical importance.⁹⁵

In other words, there is a conflict with the second step if the exempted use would rob the right holder of a real or potential source of income that is substantive.

Although the Panel refers to this second connotation as “normative,” it does not factor in any truly normative considerations in this second step. In this respect, the Panel decision differs markedly from the Panel decision in the Canadian patent term case. In its analysis of the criterion of normal exploitation in TRIPS art. 30, the WTO Patent Panel standardized right holders’ expectations by reference to the policy objectives underlying patent protection. Exploitation of patents is normal only insofar as it is “essential to the achievement of the goals of patent policy.”⁹⁶

c. Step 3: No Unreasonable Prejudice to Authors/Right Holders

In contrast to the second step, the third step seems to leave legislatures considerable flexibility. This is amplified by the absence of a WTO panel precedent. What the *IMRO* Panel has opined on the third step repeats much of its dictum on the second step; it appears the Panel has confused the final two steps.⁹⁷ There appears to be considerable “wobble room” in the terms “prejudice,” “unreasonable” and “legitimate.” As to “prejudice,” the Panel opined:

... a certain amount of “prejudice” has to be presumed justified as “not unreasonable”. In our 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.⁹⁸

At the 1967 Stockholm Conference, a principle was established that the payment of *equitable remuneration* could be taken into account in the context of the third criterion.⁹⁹ In other words, the third step (further) restricts the availability of *uncompensated* exceptions.¹⁰⁰ Note, however, that the wording of the third step in TRIPS art. 13 departs from art. 9(2) of Berne and art. 10 of the WCT by referring to the interests of the “right holder,” not of the “author.” The different wording is not without consequences. While, arguably, a relatively far-reaching limitation may be compatible with BC art. 9(2) or WCT art. 10 by combining it with a statutory scheme promising compensation to authors (e.g., by way of levies), such a solution might fall short of TRIPS art. 13, since right holders might have more to gain from keeping their economic rights intact than from receiving compensation.

⁹⁴ SENFTLEBEN, *supra* n. 47, at 177 et seq.; Dusollier, *supra* n. 52, at 219.

⁹⁵ US – Section 110(5) Report, *supra* n. 46, §6.180.

⁹⁶ Senftleben, *supra* n. 83, at 424.

⁹⁷ Gervais, *supra* n. 50.

⁹⁸ US – Section 110(5) Report, *supra* n. 46, §6.229.

⁹⁹ SENFTLEBEN, *supra* n. 47, at 237.

¹⁰⁰ Gervais, *supra* n. 50.

The terms “legitimate” and “reasonable” at last inject a measure of normative meaning into the three-step test.¹⁰¹ Both terms allow an, in principle infinite, variety of public interests to be factored into the three-step equation.¹⁰² By the same token, these terms allow fundamental rights and freedoms, such as the right to privacy (which might, e.g., justify a freedom to make private copies) or freedom of expression (which could justify an entire spectrum of excepted uses), to be factored into the three-step test.

C. Final Remarks

Scholars tend to read different meanings into the three-step test. While classic doctrine underscores its function as imposing limits on the “erosion” of copyright by limitations and exceptions, more progressive scholars perceive the three-step test as no more than a “proportionality test” allowing national legislatures a relatively broad measure of discretion in codifying limitations and exceptions while balancing the interests of right holders against those of users and society at large.¹⁰³ Read in a constructive and dynamic fashion, the three-step test becomes a clause not merely limiting limitations, but empowering contracting States to enact them, subject to the proportionality test that forms its core and that fully takes into account, *inter alia*, fundamental rights and freedoms and the general public interest.¹⁰⁴ According to Dr. Senftleben:

The three-step test thus is both a limiting and enabling clause alike. It is a proportionality test which enables the weighing of the different interests involved at the national level so as to strike a proper balance between rights and limitations.¹⁰⁵

Further “wobble room” could be created by identifying current State practices in respect of limitations and exceptions, which might serve as a valuable aid in interpreting TRIPS art. 13 in a dynamic way.¹⁰⁶ For example, if a considerable number of WTO members considers limitation X to be compliant with the test, then such consensus can hardly be ignored by a WTO panel. Similarly, official language in preambles, agreed statements and the like accompanying post-TRIPS agreements, such as the WCT, could retroactively infuse meaning into the norms of the BC as incorporated into TRIPS and the three-step test. In this context, the importance of the Agreed statements concerning art. 10 of the WCT (which codifies the three-step test) can hardly be overstated.¹⁰⁷

From the preceding analysis we can conclude that limitations and exceptions that (1) are not overly broad, (2) do not rob right holders of a real or potential source of income that is substantive, and (3) do not do disproportional harm to the right holders, will pass the test. The

¹⁰¹ Gervais, *supra* n. 86, at 17.

¹⁰² Note that the WTO Panels in the corresponding patent and trademark law cases expressly referred to the interests of “third parties,” as a factor in determining legitimacy.

¹⁰³ At a workshop organized jointly organized by the Max Planck Institute and Queen Mary University, a group of copyright scholars from France, Germany, United Kingdom, Belgium and the Netherlands agreed that the three-step test ought not to be mechanically applied as an instrument to reign in existing or future limitations. At a workshop titled “Rethinking the Three-Step Test”, jointly organized by the Max Planck Institute for Intellectual Property Law and Queen Mary University in London, Paris, ULIP, 16 February 2007, participants agreed to work on a declaration on the three-step test, expressing the consensus opinion that the test should be applied in a liberal, holistic and dynamic manner.

¹⁰⁴ See, e.g., Geiger, *supra* n. 52, at 490-491.

¹⁰⁵ Senftleben, *supra* n. 72.

¹⁰⁶ See Vienna Convention on the Law of Treaties, May 23, 1969, 1155 U.N.T.S. 331, art. 31(3) [*hereinafter* Vienna Convention]; SENFTLEBEN, *supra* n. 47, at 101.

¹⁰⁷ Dusollier, *supra* n. 52, at 214.

test does not prescribe a template for any preferred system of national limitations and exceptions. The test most likely permits both discrete European-style limitations and broader fair-use-style exemptions, or possibly a combination of both.¹⁰⁸

In conclusion, despite an unmistakable “ratcheting up” of levels of copyright protection at the international, regional and bilateral levels, enough “wobble room” appears to be left to the parties to the main copyright Conventions to make framing an international instrument on L&E’s within the confines of the international *acquis* a worthwhile exercise. Despite over a century of international norm setting in the field of copyright, limitations and exceptions have largely remained “unregulated space.”¹⁰⁹ This is not to say, of course, that the international *acquis* is inherently balanced. What it does mean is that there is ample scope for rebalancing without having to deviate from the current *acquis*.

Indeed, nothing in the international *acquis* would prevent parties to the Berne Union, the WCT or the WTO from entering into a special agreement listing in an exhaustive or enumerative manner those copyright limitations that are permitted within the confines of the three-step test. One could imagine such an instrument as containing a preamble and a number of provisions, divided into several chapters, e.g.: (1) *Exclusions from protection* (excluding, for instance, facts, ideas, laws and government works); (2) *Limits to economic rights* (permitting, for instance, exhaustion and various non-public acts of communication); and (3) *Limitations and exceptions proper*. As concluded earlier, only the norms listed in the latter part would have to comply with the three-step test. As to that chapter, the EU Information Society Directive of 2001¹¹⁰ inspires a pragmatic, albeit not very elegant solution. Like the Directive, the instrument on L&E’s could provide a list of (mandatory and optional) limitations, and conclude with a general obligation upon contracting States to subject any transpositions thereof to the three-step test.¹¹¹ A preamble might then offer guidance to the contracting States in interpreting the test.¹¹²

For an exemplary catalogue of limitations and exceptions that are presumably compliant with the international *acquis*, one need to look no further than the large number of limitations and exceptions enumerated in the Information Society Directive. The Directive introduces an exhaustive list containing a single mandatory limitation (permitting transient copying incidental to digital communications, including caching and browsing) and twenty-one optional limitations, all subject to the “three-step-test.”¹¹³ The limitations officially authorized by the EC legislature concern not only such generally accepted uses as reprography, private copying (subject to “fair compensation”), archival and ephemeral copying, educational uses, use in news reporting and quotation, but also more esoteric uses, such as use in religious celebrations, use for the purpose of “caricature, parody or pastiche,” “use in connection with the demonstration or repair of equipment,” etc. Interestingly, and in

¹⁰⁸ M. Senftleben, *Beperkingen à la Carte: Waarom de Auteursrechtlijn Ruimte Laat voor Fair Use*, AMI 2003/1, at 10 (arguing that the EU Copyright Directive, despite its positivist provenance, permits a broadly worded, fair-use style limitation within the confines of the three-step test).

¹⁰⁹ Gervais, *supra* n. 50.

¹¹⁰ Directive 2001/29/EC, *supra* n. 51, art. 5.

¹¹¹ See Directive 2001/29/EC, *supra* n. 51, art. 5.5 (“The exceptions and limitations provided for . . . shall only be applied in certain special cases which do not conflict with a normal exploitation of the work or other subject-matter and do not unreasonably prejudice the legitimate interests of the rightholder.”).

¹¹² In following this approach, however, care should be taken to avoid a proliferation of the test into the norms of national law. See Geiger, *supra* n. 52.

¹¹³ Directive 2001/29/EC, *supra* n. 51, art. 5.

deviation from the European style of precisely circumscribed limitations, the list also permits a open-worded limitation allowing the “incidental inclusion of work . . . in other material.”¹¹⁴

As recent European experience with the Directive shows, codification of a catalogue of exceptions in a supranational instrument may help national States to reassess their national needs and priorities in terms of copyright limitations. Despite the optional character of nearly all of the L&E’s codified in the Directive, during the process of national transposition, many Member States have added exceptions from the list to their national repertoire.¹¹⁵ Thus the Directive’s enumeration has effectively served as a confidence-building measure at the national levels. The Directive’s chapter on limitations and exceptions is, however, also proof of the draw-back of an *optional* approach towards L&E’s. Of the 27 Member States of the European Union, not a single one has seen fit to implement *all* the limitations and exceptions permitted under the Directive.¹¹⁶ In fact, the actual harmonizing effect of the Directive has remained quite limited. Most States have stuck to their national traditions – some allowing multiple and broad limitations, others only relatively few and narrow. This has left Europe with a patchwork of incompatible limitations and exceptions, causing legal uncertainty to the detriment of commercial providers of cross-border services, such as online music stores, and of cultural institutions, such as libraries, archives and public broadcasters, offering content across European borders.¹¹⁷

III. LOCALIZING AN INSTRUMENT ON L&E’S: INSIDE OR OUTSIDE THE INTERNATIONAL COPYRIGHT FRAMEWORK?

The structure of the international copyright Conventions, based on minimum rights and maximum limitations subject to the three-step test, suggests a closed legal system allowing no additional limits from the outside. Although copyright lobbyists tend to espouse this view, the legal and political reality is quite different. The norms of international or national copyright law operate not in a legal vacuum, but in an environment where legal norms compete, and a specific legal system cannot automatically impose its hierarchy upon other competing regimes. In other words, various *de facto* limits to copyright may exist, and will exist, well outside the traditional copyright framework. Such competing regimes come in various forms and are based on a variety of competing rationales. Freedom of expression may protect speech against overbroad exclusive rights. Competition law may require compulsory licensing by dominant right holders. Consumer protection law may protect end-users against overreaching “digital rights management” (DRM).

Admittedly, these competing regimes have already found their partial expression in the law of copyright in many different ways. For instance, the idea/expression dichotomy reflects the ground rule of freedom of expression and information that ideas are “free as the air for common use.” Private copying exceptions have their foundations in a variety of

¹¹⁴ Directive 2001/29/EC, *supra* n. 51, art. 5(3)(i).

¹¹⁵ See L. Guibault, G. Westkamp, T. Rieber-Mohn, et al., *Study on the Implementation and Effect in Member States’ Laws of Directive 2001/29/EC on the Harmonisation of Certain Aspects of Copyright and Related Rights in the Information Society*, Report to the European Commission, DG Internal Market, February 2007, available at http://www.ivir.nl/publications/guibault/Infosoc_report_2007.pdf (last visited March 3, 2008). See in particular Part II: G. Westkamp, *The Implementation of Directive 2001/29/EC in the Member States*, available at http://www.ivir.nl/publications/guibault/InfoSoc_Study_2007.pdf (last visited March 3, 2008).

¹¹⁶ Guibault et al., *supra* n. 115.

¹¹⁷ Guibault et al., *supra* n. 115, at 63.

concurring principles, including privacy and consumer protection.¹¹⁸ The exhaustion rule (first-sale doctrine) is a reflection of competition policies or, as in the case of the European Community, internal-market freedoms. Rules on reverse engineering are essentially special norms of competition law internalized into the law of copyright.

Notwithstanding this process of – as yet incomplete – internalization, these competing regimes in turn have the potential of internalizing and absorbing by themselves certain freedoms traditionally associated with the laws of copyright. Following a brief assessment of some of the weaknesses of the framework of copyright, this part examines three of such non-copyright regimes (human rights, competition law and consumer law), assesses their respective benefits and drawbacks and queries whether any of these regimes might actually offer a more suitable framework for an international instrument on L&E's.

A. Copyright Framework

Prima facie, the obvious place for any instrument on limitations and exceptions is within the framework of international copyright law. The instrument could for instance be shaped as a protocol to the Berne Convention or the WCT, as a stand-alone agreement under the aegis of WIPO, or perhaps as an amendment to part II, section 1 of TRIPS (copyright and related rights). Soft(er) versions of the instrument could be framed as a resolution, declaration, guideline or model law carrying the imprimatur of WIPO, the WTO or both. Dealing with limitations and exceptions inside the existing international framework of copyright has several clear advantages,¹¹⁹ which will be elaborated in part IV. But the international copyright framework also comes with drawbacks, some of which are of political or strategic nature, others more legal or technical. A major political risk of framing an instrument on limitations and exceptions within the law of copyright is that those primarily benefiting from such an instrument, i.e. institutional users and consumers, are traditionally underrepresented at the international forums that generate copyright norms. This political risk is exacerbated by the dominant discourse of copyright. Both in national and international forums copyright is traditionally conceived as a property right, as are its structure and its discourse. Exclusive rights are the rule, while freedoms are framed as “exceptions” that must be narrowly construed, especially in the authors’ rights tradition that dominates large parts of the world. Due to copyright law’s systemic pro right-holder bias, as reflected in the property model, achieving a proper balance between protecting the interests of copyright holders and the interests of users will always be an uphill struggle for user groups.

With this political vulnerability come various technical problems and weaknesses of the law of copyright as a system to adequately protect the interests of users. A substantive weakness of copyright is its vulnerability to contractual overrides, which increasingly occur in a digital marketplace governed by “click-wrap” licenses.¹²⁰ The copyright model of a set

¹¹⁸ See Hugenholtz, *supra* n. 26; Th. Dreier, *Balancing proprietary and public domain interests: inside or outside proprietary rights?*, in ROCHELLE C. DREYFUSS, DIANE L. ZIMMERMAN & HARRY FIRST (EDS), *EXPANDING THE BOUNDARIES OF INTELLECTUAL PROPERTY. INNOVATION POLICY FOR THE KNOWLEDGE SOCIETY* (Oxford University Press, 2001) 303-309; N. Helberger & P.B. Hugenholtz, *No Place Like Home for Making a Copy: Private Copying in European Copyright Law and Consumer Law*, 22(3) *BERKELEY TECH. L. J.* 1061 (2007).

¹¹⁹ Dreier, *supra* n. 118, at 311 (naming as advantages of a copyright approach towards limitations notably the balancing of opposed interests through a single political process leading to a single legislative instrument, and the enhanced transparency (user-friendliness) of norms).

¹²⁰ See generally L. GUIBAULT, *COPYRIGHT LIMITATIONS AND CONTRACTS - AN ANALYSIS OF THE CONTRACTUAL OVERRIDABILITY OF LIMITATIONS ON COPYRIGHT* (Kluwer Law International, 2002).

of rights against the world does not easily accommodate a structure of user “rights” (freedoms) that are immune against such private ordering. For this reason, contractually enforceable user rights have remained exceptional in national laws.¹²¹ Concomitantly, it will be difficult to conceptualize an international instrument on L&E’s having such imperative powers.

Another technical problem derives from the current structure of international copyright law. Qualified right holders may invoke their (minimum) rights directly before national courts in those countries where multilateral copyright Conventions are self-executing (i.e., have direct effect). Indeed, the ambit of the Conventions is rather limited, their direct beneficiaries being foreign authors and right holders that qualify for protection under the rules of application of the Agreements. In purely national situations, the norms of the BC, TRIPS or the WCT do not apply. This combined structure of minimum rights and national treatment combines reasonably well with a set of optional (maximum) limitations. But introducing into this system a structure of *mandatory* limitations (i.e., guaranteed user freedoms) to the benefit of *local* (not foreign) users poses a technical challenge, if such minimum freedoms are to become self-executing.¹²² At the very least, the new instrument or amended convention would need to be supplemented by rules of application designating the users that might invoke these freedoms. Would only users residing in or nationals from contracting States qualify? Or would a treaty on limitations and exceptions, in contrast to the existing international instruments, apply universally? Admittedly, the existing Conventions do contain a few examples of mandatory limitations, most notably in BC art. 10(1), but these freedoms have to our knowledge never been applied directly before the courts in situations where contracting States failed to guarantee them under national law.¹²³

Arguably, the most straightforward way to weave a set of guaranteed user freedoms into the fabric of international copyright law would be to abandon the national treatment plus minimum rights based structure of the *acquis* altogether and replace it by a structure of *uniform* norms of global copyright that would apply directly, or indirectly following transposition, in all contracting States.¹²⁴ Such an instrument might ideally create uniform norms regarding all the main features of a mature copyright system: subject matter, economic rights, limitations and exceptions, ownership, et cetera; and leave limited room for deviation – either upwards or downwards – at the national levels.¹²⁵ Needless to say, the prospects of such a “World Copyright Treaty” are very distant at best.

B. Alternative Frameworks

¹²¹ See Helberger & Hugenholtz, *supra* n. 118, at 1074-1075 (giving examples of mandatory limitations in EU directives and national laws of EU Member States).

¹²² On the other hand, if the minimum user freedoms would be framed merely as norms addressed to States, as is the case in those countries where the international conventions lack direct effect, this technical problem does not occur. States would simply be committed to guarantee these freedoms, by transposing them into national law.

¹²³ Note that none of the standard treatises on international copyright flag this technical issue.

¹²⁴ Modest examples of this approach in the realm of intellectual property are the uniform laws of trademarks and designs that the Benelux countries (Belgium, the Netherlands and Luxembourg) entered into by way of trilateral treaties in the 1970’s. The treaty norms preempt the national laws in the Benelux countries and thereby guarantee complete uniformity throughout the region.

¹²⁵ Similar arguments can be made in favor of a unified EU Copyright Code. See IViR, *The Recasting of Copyright & Related Rights for the Knowledge Economy*, Report to the European Commission, November 2006, available at http://www.ivir.nl/publications/other/IViR_Recast_Final_Report_2006.pdf (last visited March 5, 2008).

In the following discussion, we briefly examine three alternative frameworks for an instrument on L&E's: human rights, competition law and consumer law. In each case, we identify the advantages and disadvantages of each model, from a normative, political and technical perspective.

1. *Human Rights*

There is abundance of literature about the complex interplay between copyright norms and human rights.¹²⁶ This will not be repeated here. Suffice it to say that the ideal copyright system, and its structure of limitations and exceptions in particular, reflects many of the rationales and interests traditionally associated with human rights: protection of property, freedom of speech, right to privacy, right to education and even religious freedoms. An approach that is being strongly promoted by UN bodies today is to further infuse the law of international intellectual property with the norms of human rights.¹²⁷ This approach, which is in line with what Prof. Drahos has advocated,¹²⁸ would keep more or less intact a coherent framework of international IP law, while making intellectual property “subservient” to (the higher objectives of) human rights.¹²⁹ In doing so, the law of international copyright would immediately reflect the general public interest – as an overriding norm, not as an afterthought in the final part of a three-step test.

But one could go even a step further and imagine an international instrument codifying user freedoms expressed not in the language of copyright, but in terms of fundamental (human) rights and freedoms proper.¹³⁰ Such an instrument might find its direct doctrinal basis and moral imperative in a wide variety of international, regional and national codifications of human rights and freedoms.¹³¹ Its institutional home might be with such IGO's as the UN specialized agencies, or, at the European level, the Council of Europe that administers the European Convention on Human Rights.¹³² Indeed, several human rights bodies of the UN are showing increasing interest in intellectual property developments

¹²⁶ See, e.g., Ruth L. Okediji, *Securing Intellectual Property Objectives: New Approaches to Human Rights Considerations*, in MARGOT E. SALOMON, ARNE TOSTENSEN AND WOUTER VANDENHOLE (eds), *CASTING THE NET WIDER: HUMAN RIGHTS, DEVELOPMENT AND NEW DUTY-BEARERS* (Intersentia, 2007).

¹²⁷ L. Helfer, *Regime Shifting: the TRIPS Agreement and New Dynamics of International Intellectual Property Lawmaking*, 29 *YALE J. INT'L L.* 1, 49-50 (2004).

¹²⁸ P. Drahos, *An Alternative Framework for the Global Regulation of Intellectual Property Rights*, 21(4) *JOURNAL FÜR ENTWICKLUNGSPOLITIK* 44 (2005).

¹²⁹ P. Drahos, *Intellectual Property and Human Rights*, 3 *I.P.Q.* 349, 367 (1999).

¹³⁰ Although its preamble does not specifically refer to human rights, but states an amalgam of objectives, the draft “Access to Knowledge Treaty,” available at http://www.cptech.org/a2k/a2k_treaty_may9.pdf, could be seen as an example of an international instrument based on fundamental rights and freedoms.

¹³¹ The main instruments include the Universal Declaration of Human Rights (1948), the European Convention on Human Rights and Fundamental Freedoms (1950), the European Social Charter (1961), the International Covenant on Civil and Political Rights (1966), the International Covenant on Economic, Social and Cultural Rights (1966), the African Charter on Human and Peoples' Rights (1981), and the Charter of Fundamental Rights of the European Union (2000).

¹³² In the past, the Council of Europe has produced several instruments that express its human rights mandate in special norms relating particularly to the media. An example of such an instrument is the European Convention on Transfrontier Television, concluded in Strasbourg on May 5, 1989. Art. 9 of this Convention asks the contracting States to introduce “a right to short reporting on events of high interest for the public to avoid the right of the public to information being undermined due to the exercise by a broadcaster within its jurisdiction of exclusive rights for the transmission or retransmission.”

affecting human rights and have recently adopted a variety of declarations, guidelines and other forms of soft law on distinct IP-related issues.¹³³

The norms of such a freedoms-based international instrument – say, a “Treaty on User Freedoms” – might include user freedoms reflecting the “hard core” of fundamental rights and freedoms (notably freedom of expression and information and protection of privacy) as well as softer “welfare rights,” such as cultural freedoms, right to education, etc. A major advantage of such a human rights-based instrument would be that it could define user freedoms not as (negative) “exceptions” to property rights, but in terms of positive “rights” or freedoms.

But the attractions of such a fundamental rights approach should not be overstated. In the first place, waiving the banner of human rights over user freedoms does not automatically immunize them against competing legal regimes. Like other rights, such as copyright, human rights are never absolute. Even “hard core” fundamental rights and freedoms will need to be balanced with competing rights and interests, including IP rights. While the law of international copyright subjects limitations and exceptions to a three-step test, the law of human rights usually imposes a similar test of proportionality upon restrictions to human rights, such as those found in copyright. While the three-step test takes the legitimate interests of the authors or right owners as a starting point of its weighing process, freedom of speech sees intellectual property rights as an exception to a ground rule of freedom, which requires objective justification under strict conditions.¹³⁴

Moreover, there is a clear normative risk associated with framing an international instrument on L&E’s within the paradigm of human rights. While free speech and privacy, and to a lesser degree education and science, all have a pedigree in human rights, the same is true for the right to intellectual property. Indeed, there is ample support in literature and case law that the intellectual property right that forms the traditional core of copyright law qualifies for human rights protection. For instance, the protection of proprietary rights in copyrighted works follows directly from art. 27 (2) of the Universal Declaration on Human Rights¹³⁵ (UDHR) or art. 15(1)(c) of the International Covenant on Economic, Social and Cultural Rights¹³⁶ (ICESCR), instruments that concomitantly guarantee the freedoms that make up the core of limitations and exceptions.¹³⁷ The qualification of copyright as a human

¹³³ Helfer, *supra* n. 127, at 46. For a recent example, see, IP Watch, *UN Committee Questions CAFTA’s IP Provisions on Human Rights Grounds*, 29 November 2007, available at <http://www.ip-watch.org/weblog/index.php?p=850> (last visited March 5, 2008) (UN Committee on Economic, Social and Cultural Rights expressing concerns about negative impact of IP provisions in CAFTA on inter alia agriculture, health, labour and social security).

¹³⁴ Thus, according to art. 10(2) of the European Convention on Human Rights “[t]he exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of . . . the protection of the . . . rights of others.”

¹³⁵ Universal Declaration of Human Rights, G.A. Res. 217A (III), art. 3, at 71, U.N. GAOR, 3d Sess. 1st plen. mtg., UN Doc. A/810 (Dec. 12, 1948) [*hereinafter* UDHR].

¹³⁶ International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, 993 U.N.T.S. 3; S. Exec. Doc. D, 95-2 (1978); 6 I.L.M. 368 (1967), available at http://www.unhchr.ch/html/menu3/b/a_ceschr.htm (last visited 13 July, 2007) [*hereinafter* ICESCR].

¹³⁷ Article 27 (2) of the UDHR reads: “Everyone has the right to protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author.” Article 15(1)(c) of the ICESCR reads: “The States Parties to the present Covenant recognize the right of everyone: [...] (c) To benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author.” See also F. Dessemontet, *Copyright and Human Rights*, in JAN J.C.

right “cuts in favour of the strongest version of intellectual property protection, directly contradicting the goal of involving human rights as a limitation on this subject matter.”¹³⁸ Thus, the potential political gains of framing limitations and exceptions in the context of human rights are modest at best. Elevating user freedoms to human rights status bears the risk that the very rights that these freedoms would curtail are given similar “sacred” status. In the end, a similar process of balancing as currently shapes the copyright system would have to be repeated at the higher level of human rights.

Another normative drawback of the human rights approach is that not all human rights are equally firm. Whereas freedom of expression could provide a solid foundation for essential user freedoms such as a quotation right and a right to news reporting, the “softer” welfare rights have far less bite. Indeed, in many cases, such welfare rights are no more than general expressions of the public interest – the political agenda of a welfare state. Yet another drawback of framing L&E’s in an instrument based on human rights principles, would be its limited scope. It will be difficult, if not impossible, to base *all* necessary limitations and exceptions on human rights values. Consider, for instance, a “right” to make back-up copies or a “right” to reverse engineer – freedoms based more in notions of consumer protection, and competition policy than anything else. Clearly, a human rights based instrument on L&E’s could never be all-encompassing.

2. Competition Law

Consider instead an international instrument phrased in the language of competition law. Art. 40(2) of TRIPS allows contracting States to specify in domestic legislation licensing practices or conditions that constitute abuses of intellectual property rights having an adverse effect on competition. Art. 40 complements the basic principle expressed in TRIPS art. 8(2), which allows States to adopt measures to curb abuses of intellectual property rights.¹³⁹ Read in conjunction, TRIPS arts. 8 and 40(2) would permit States to codify rules aimed at preventing or restricting such anti-competitive practices. The TRIPS rules on competition would, for instance, allow a scheme of compulsory or statutory licensing compelling dominant software manufacturers to license IP-protected interfaces in order to promote interoperability, and thus foster competition.¹⁴⁰ Collective licensing is another area where special rules based on curbing anti-competitive IP practices are in order. Indeed, many countries have adopted measures of control of these activities, often in special legislation. In such countries, tariffs set by collective societies are subject to review by an administrative body (e.g., a copyright board or tribunal). Usually, but not always, collecting societies thus regulated have reprieve from liability under the general rules of competition law.¹⁴¹

But the drawbacks of such a competition law-based approach are also patent. By its very nature, the norms of competition law are case-oriented and not easily applied *ex ante*, as

KABEL & GERARD J.H.M. MOM (eds), *INTELLECTUAL PROPERTY AND INFORMATION LAW - ESSAYS IN HONOUR OF HERMAN COHEN JEHO RAM* (Kluwer Law International, 1998) 113; M. Vivant, *Le Droit d’Auteur, un Droit de l’Homme*, [1997] 174 RIDA 60; A. Kéréver, *Authors’ Rights Are Human Rights*, 32 Copyright Bulletin 18 (1999).

¹³⁸ Okediji, *supra* n. 126, at 223.

¹³⁹ GERVAIS, *supra* n. 9, at 191- 192.

¹⁴⁰ Note that art. 6 of the EC Software Directive has internalized such a rule in the system of European copyright; even so, this may not be enough to curb abusive practices by dominant software manufacturers. *See Microsoft Corp. v Commission of the European Communities*, Judgment of the Court of First Instance, 17 September 2007, Case T-201/04.

¹⁴¹ Guibault, *supra* n. 64.

are IP rights and limitations. Moreover, although at an abstract level competition law and copyright law have converging goals of promoting innovation and facilitating markets for information goods and services, the core principles of competition law are hard to translate into clear and predictable norms that cater for the myriad of interests that underlie the copyright equation. As Prof. Dreier has concluded, competition law may be “too ‘heavy-handed’ to achieve the fine-tuning of interests that can be accomplished in intellectual property law.”¹⁴² Moreover, the ambit of competition law, and TRIPS arts. 8 and 40(2) in particular, is far too narrow to accommodate even a small portion of the user freedoms that deserve recognition in an international instrument.¹⁴³ By definition, the norms of competition law apply only in competitive relations, i.e., between market players competing in the market place. What, however, typifies many traditional limitations found in copyright is that they concern uses of copyrighted works, such as quotation, private copying and parody, that do not compete with the right owners’ market activities.

3. Consumer Law

Consider instead an international instrument codifying the rights of the consumer, containing, *inter alia*, specific norms on the rights of consumers of information products and services. Two distinct rationales underlie consumer law: i) to empower consumers as independent market actors and ii) to protect consumers as the structurally weaker party in commercial dealings with suppliers.¹⁴⁴ The catalogue of consumer rights in such an international instrument might for instance include a right to make private copies of content from legitimately acquired media, which can not be overridden by standard contract terms. Consumer rights might also forbid other unfair licensing practices, following the model of the European Unfair Terms Directive,¹⁴⁵ or restrict the application of DRMs.¹⁴⁶ The strategic advantages of framing limitations in terms of consumer rights are potentially large and evident. The paradigm of consumer protection is by definition more conducive to the interests of consumers, and legislators are concomitantly more sympathetic. In consumer law, consumers will always be playing a “home game.”

Framing consumer-oriented limitations in an instrument on consumer protection has technical and normative advantages as well. In contrast to copyright law, the system of consumer law, which is basically an amalgam of specific rules on contract and unfair trade practices, is quite comfortable with a market place that is increasingly ruled by standard contract terms. Indeed, many of the norms of consumer law are specifically aimed at invalidating standard terms considered unfair to the consumers. Unlike copyright law, consumer law specifically targets the commercial relationship between consumers and producers of goods and services. Thus, an instrument framed in consumer law could, for instance, give real effect to consumers’ interests in private copying.¹⁴⁷

However, existing consumer law also has its normative weaknesses. Although consumer law norms generally apply to the supply of goods and services, they have not been

¹⁴² Dreier, *supra* n. 118, at 312.

¹⁴³ See Okediji, *supra* n. 15 (arguing that in the absence of a competitive relationship art. 40 TRIPS cannot provide a solid basis for limitations favoring (users in) developing nations).

¹⁴⁴ Helberger & Hugenholtz, *supra* n. 118, at 1080.

¹⁴⁵ Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts, O.J.E.C. No. L-095, 21/04/1993, p. 29-34.

¹⁴⁶ See Helberger & Hugenholtz, *supra* n. 118, at 1087-1088.

¹⁴⁷ Helberger & Hugenholtz, *supra* n. 118, at 1093.

currently designed with consumers of digital content in mind. Particularly troublesome is the test of “reasonable consumer expectations” that is a core criterion in various norms of consumer law.¹⁴⁸ This notion is informed by a variety of dynamic exogenous factors, including the state of the law of copyright and evolving business practices, which makes the test basically a moving target, as copyright laws change and business practices evolve, and consumers accommodate their expectations accordingly. What may be a consumer’s reasonable expectation to make a private copy one day, may be wishful thinking another day.¹⁴⁹

The normative limits of a consumer law approach are also clear. Consumer law protects consumers, not the professional or institutional users that traditionally occupy center stage in the realm of limitations and exceptions.¹⁵⁰

C. Final Remarks

To sum up, several alternative legal regimes deserve serious consideration as a framework for certain limitations and exceptions. The framework of human rights bears some promise for an instrument on limitations based, in particular, on core fundamental freedoms, such as freedom of speech and right to privacy. The framework of competition law may provide the context for international norms on compulsory licensing concerning, for instance, software interoperability. The framework of consumer law has obvious potential for protecting consumers against unfair terms in standard licensing agreements and might contain norms that make private copying freedoms “click-wrap resistant.”

However, none of these regimes has the capacity to encompass the entire spectrum of L&E’s associated with a mature copyright system. Similar problems of scope come with other possible regimes. For example, public broadcasting regulation may require news reporting exceptions in favor of public broadcasters, prohibit ownership of exclusive broadcasting rights in important public events or mandate cable retransmission of “must carry” television programs. Legislation on public libraries might mandate the deposit of copies of published works in public libraries. Such specific rules may perhaps protect the interests of broadcasting organizations and libraries, and by implication the interests of the general public, but only to the extent of the very limited goals of the norms at issue. Assuming it is desirable to codify limitations and exceptions in a more general consolidated instrument, a more coherent and general legal framework is certainly required.

Nevertheless, these alternative regimes certainly deserve to be seriously explored. As Prof. Helfer has convincingly argued, there are clear strategic advantages to be gained from so-called “regime shifting.”¹⁵¹ Moreover, a certain amount of inter-regime or inter-institution competition may ultimately enhance the development of an international instrument that deals with L&E’s across the board.

In sum, any instrument aspiring to deal with the entire range of L&E’s would, by necessity, need to be grounded in the law of copyright. Indeed, one could argue that in the light of copyright law’s overarching rationale to promote the production and dissemination of cultural goods, limitations and exceptions are an integral part of the copyright equation as a

¹⁴⁸ Helberger & Hugenholtz, *supra* n. 118, at 1084-1085.

¹⁴⁹ Helberger & Hugenholtz, *supra* n. 118, at 1097.

¹⁵⁰ Helberger & Hugenholtz, *supra* n. 118, at 1079.

¹⁵¹ Helfer, *supra* n. 127.

matter of principle, and therefore best internalized within the framework of (international) copyright. This principle will be more fully developed in the following, final part of this Report.

IV. THE CONTOURS OF AN INTERNATIONAL INSTRUMENT ON L&E'S

A. The Case for Multilateralism: Maintaining the Berne Bargain

States resort to international agreements for several reasons, principal of which is the ineffectiveness of unilateral action to resolve a problem efficiently and sustainably.¹⁵² The failures of unilateralism often suggest that the problem at issue is closely linked to externalities created by political, economic or other forms of interdependence. In other words, when behavior by one State negatively impacts the welfare of another, the potential for conflict increases and with it, risks of disruptions in the general framework of international relations. In an era of intense globalization, interdependence is a governing reality of the international sphere and as such, the risks of recurrent conflict among many actors are ever present. International agreements help States coordinate their expectations of each other in a given subject area by establishing norms of behavior to govern relations in that field.¹⁵³ When the benefits of mutual cooperation outweigh the privileges associated with sovereign discretion, or when the transaction costs of ad hoc, individual responses to conflict in an area are high, States will generally seek, and respond favorably to, multilateral solutions.¹⁵⁴ Thus, international agreements typically offer benefits that in the aggregate are considered welfare-improving for members over the alternative of an unregulated domain.¹⁵⁵

The Berne Convention is a classic example of the perceived gains of collective action to address a problem that was unfeasible to resolve any other way. The development of international copyright relations was aimed principally at addressing the widespread problem of international "piracy."¹⁵⁶ While States could enjoin infringing activity within their domestic territories, the diffuseness of geographical boundaries due to increased trade between European nations made unilateral responses to counterfeit imports largely ineffective.¹⁵⁷ In addition, national copyright laws typically protected only works of citizens, leaving foreign works available to be copied freely by the public unless a bilateral treaty offered protections on conditions of reciprocity.¹⁵⁸ This discriminatory treatment of foreign works was a source of persistent consternation in relations among States with high productivity rates of literary works and those with lower levels of copyright protection, who also tended to be net importers of such works.¹⁵⁹ The vastly uneven nature and scope of copyright protection afforded to creative works in different countries meant that any

¹⁵² There is an extensive body of literature on the rationale for international arrangements mainly by international relations scholars. For a leading work see Robert O. Keohane, *The Demand for International Regimes*, 36 INT'L ORG. 325 (1982). On the specific point, see also Barbara Koremenos, Charles Lipson and Duncan Snidal, *The Rational Design of International Institutions*, 55 INT'L ORG. 761, 762 (2001); William E. Holder, *International Organizations: Accountability and Responsibility*, 97 AM. SOC'Y INT'L L. PROC. 231, 231 (2003).

¹⁵³ Keohane, *supra* n. 152, at 335, 338. See also Duncan B. Hollis, *Why States Need an International Law for Information Operations*, 11 LEWIS & CLARK L. REV. 1023 (2007).

¹⁵⁴ Keohane, *supra* n. 152, at 334; Holder, *supra* n. 152, at 231.

¹⁵⁵ Keohane, *supra* n. 152.

¹⁵⁶ RICKETSON, *supra* n. 7, at 19.

¹⁵⁷ RICKETSON, *supra* n. 7, at 19-25.

¹⁵⁸ RICKETSON, *supra* n. 7, at 19-25; 27.

¹⁵⁹ RICKETSON, *supra* n. 7, at 27-30.

possibility for reciprocal protection on equal terms would require negotiations on a State-by-State basis, occasioning great uncertainty for authors.¹⁶⁰ As a result, States turned to a multilateral process that culminated in the Berne Convention as the solution. Similarly, the failed unilateralism of the U.S. throughout the 1980's in the protection and enforcement of intellectual property rights in global markets led to efforts to integrate intellectual property into the multilateral trade system.¹⁶¹ The trade-intellectual property linkage was a deliberate mechanism to address persistent problems with enforcement of intellectual property rights by using the broader linkages to coerce participation and sanction non-compliance.¹⁶² This new multilateralism, led by the U.S. and the EU, facilitated by side-payments to developing countries through new deals on agriculture and textiles, culminated in the TRIPS Agreement with its enforcement mechanism pursuant to the Dispute Settlement Understanding (DSU).¹⁶³

The classic justifications for international cooperation apply with equal, if not greater force to L&E's. As outlined in parts I and II, L&E's are already built into the current international copyright framework, so incipient "patchwork" multilateralism on this subject already exists. The vagaries of national implementation of L&E's however, reintroduce uncertainty, complexity and high transaction costs to international copyright in the very areas that are indispensable in facilitating copyright's basic welfare-producing function.¹⁶⁴ Unlike the rights protected under multilateral copyright agreements, L&E's are for the most part not mandatory.¹⁶⁵ In other words, States have some discretion to determine whether and how to implement the limited number of L&E's included in the Berne Convention. Just like the pre-Berne national practice with respect to authors' rights, there is significant variation in State practice, with some States implementing very few of these L&E's in their domestic legislation, and other States implementing them only selectively, as seen in part II. The uncertainty, complexity and costs associated with disparate levels of protection for *authors'* rights prior to the Berne Convention thus were not eliminated entirely by the turn to multilateralism via the Berne Convention. Instead, these costs were internalized and transferred to *users*. To the extent L&E's are important for accomplishing the goals of copyright regulation, the benefits associated with multilateralism, especially predictability and certainty, should be restored as an explicit feature of the post-TRIPS global framework. It should be noted, however, that there are costs to seeking such an explicit bargain, including

¹⁶⁰ RICKETSON, *supra* n. 7, at 22-37. See also S.P. LADAS, THE INTERNATIONAL PROTECTION OF LITERARY AND ARTISTIC PROPERTY, 66 (1938).

¹⁶¹ See Marshall A. Leaffer, *Protecting United States Intellectual Property Abroad: Toward a New Multilateralism*, 76 IOWA L. REV. 273 (1991); Frederick M. Abbott, *Protecting First World Assets in the Third World: Intellectual Property Negotiations in the GATT Multilateral Framework*, 22 VAND. J. TRANSNAT'L L. 689 (1989); Reichman, *supra* n. 27.

¹⁶² See Ronald B. Mitchell and Patricia M. Keilbach, *Situation Structure and Institutional Design: Reciprocity, Coercion and Exchange*, 55 INT'L ORG. 891 (2001).

¹⁶³ See Understanding on Rules and Procedures Governing the Settlement of Disputes, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, Legal Instruments—Results of the Uruguay Round, 33 I.L.M. 1125 (1994). See also Rochelle Cooper Dreyfus & Andreas L. Lowenfeld, *Two Achievements of the Uruguay Round: Putting TRIPS and Dispute Settlement Together*, 37 VA. J. INT'L L. 275 (1997); Ruth L. Okediji, *TRIPS Dispute Settlement and the Sources of (International) Copyright Law*, 49 J. COPYRIGHT SOC'Y U.S.A. 585, 585-600, (2001) (describing the link between TRIPS and dispute settlement in the context of public international law).

¹⁶⁴ See Keith Maskus, *Regulatory Standards in the WTO: Comparing Intellectual Property Rights with Competition Policy, Environmental Protection, and Core Labor Standards*, 1 WORLD TRADE REV. 135 (2002); Frederick M. Abbott and Jerome H. Reichman, *The Doha Round's Public Health Legacy: Strategies for the Production and Diffusion of Patented Medicines Under the Amended TRIPS Provisions*, 10 JIEL 921, 922 (2007).

¹⁶⁵ See Okediji, *supra* n. 15.

the possibility that a bargain may result in shrinking the domain for L&E's as countries invariably confront tradeoffs in the process of negotiations.

There are good historical reasons for the imbalanced treatment of L&E's in the international copyright *acquis*. Since L&E's reflect specific domestic welfare interests ranging from freedom of expression to cultural development, global mandatory obligations in this regard would unduly impose uniformity in a sphere that, at the time of the Convention's negotiation, was uniquely designed to accomplish wholly domestic goals. Further, as a strategic matter, it can be argued that the presumed self-interest of a State in promoting domestic welfare obviated any need to require mandatory global L&E's on the ground that States were sure to enact them as needed over time; no incentive was necessary for States to act in their own interest.

Finally, an important structural point should be made. While a global approach to protection ensured a mutually beneficial return for authors' rights, the same could not be said for L&E's that were directed to the public good. L&E's enacted in one country are intended to address interests, needs and conditions uniquely beneficial to that country and reflective of that country's markets. The benefits of exercising L&E's in the domestic market, unlike the benefits of reciprocal rights protection, are thus perceived to be of less direct benefit to States. This may explain why an international approach to L&E's has historically never been pursued by developed countries that championed multilateralism in copyright relations; since the distribution effects of gains from global access are not neutral or even, domestic L&E's are sufficient and preferred to an international mandatory approach, for unilateral action in this regard can be successful without any corresponding domestic public loss.¹⁶⁶

Put in simpler terms, countries that are net producers of technology benefit the most from maximum global rules of protection. The corresponding myth/assumption is that these same net exporters of technology, by virtue of their larger ownership stake in knowledge products, stand to lose more from an international approach to L&E's.¹⁶⁷ For this reason, leading exporters of copyrighted products resisted efforts to incorporate robust L&E's into the core provisions of the Berne Convention.¹⁶⁸ Indeed, the first round of Berne negotiations and subsequent Revision exercises were strained by intractable debates over the nature and scope of L&E's to be included in its minimum terms.¹⁶⁹ Ultimately, resolution of the conflicting interests at stake took the form of devising a mechanism to delineate the scope of sovereign discretion to enact domestic L&E's, in addition to identifying selected L&E's that could be extended universally.¹⁷⁰ This compromise is reflected in the (in)famous three-step test of the Berne Convention, as modified by the TRIPS Agreement and extended to the WCT/WPPT.

Today, new technologies have greatly altered the scope and scale of public benefits attributable to L&E's. Digital networks ensure that creative works and knowledge goods are

¹⁶⁶ See Mitchell & Keilbach, *supra* n. 162, at 892.

¹⁶⁷ This is reflected in the inability to resolve questions about the appropriate nature, scope and number of L&E's to be incorporated in the Berne Convention. See Koelman, *supra* n. 18; Geiger, *supra* n. 18. Resistance to the incorporation of broader L&E's by major producers of copyrighted works suggests a presumption that L&E's would undermine net gains from multilateral protection. The expansion of the three-step test in the TRIPS Agreement, which further limits the ability of member States to enact domestic L&E's is also consistent with this presumption.

¹⁶⁸ RICKETSON, *supra* n. 7, ch. 9.

¹⁶⁹ RICKETSON, *supra* n. 7, at 33-34, 64-65, 75.

¹⁷⁰ See Koelman, *supra* n. 18, at 407; Geiger *supra* n. 18, at 487.

more easily, rapidly and efficiently distributed to diverse and large populations world-wide, assuring that welfare benefits from access and use of knowledge goods in one market will undoubtedly have important (and at times immediate) bearing on the value of other users in distant markets. In this regard, knowledge goods are not just public goods, but they are global public goods.¹⁷¹ They reflect the agreement among States to adopt similar systems of IP protection, resulting in an international system that comprises the “sum of national public goods plus international cooperation.”¹⁷² Globalization has enhanced State vulnerability to spillovers (and externalities) from other territories, and nowhere is this more evident than in the dramatic rise and penetration of digital networks.

For copyright doctrine, the import of new communication technologies is at least as significant as the architecture that effectuates access to finished creative products. Digital networks *as goods* in their own right have altered traditional production patterns for creative works and placed tremendous pressure on artificially constructed but nonetheless legal distinctions between authors and users.¹⁷³ The TRIPS Agreement and its progeny recognize the economic and social contributions of users in the currency of the global knowledge economy and the corresponding significance for competition and innovation of assuring access to upstream knowledge goods.¹⁷⁴ The tension generated by synergies between technology and social practices (such as in the case of user-generated content (UGC)), which could be addressed in common law traditions through distinct exceptions such as the fair use doctrine or “fair dealing,” or in civil law jurisdictions through consumer oriented regimes such as competition law or fundamental freedoms, increasingly demands a far more expansive and intricate allocation of space within the international copyright framework.¹⁷⁵ In other words, as new technologies increasingly pervade the social and cultural life of global consumers, and as the ubiquitousness of digital networks ensure unprecedented capacity for interdependence among users, it seems to us inevitable that a multilateral framework for L&E’s is an appropriate and necessary way forward. Such L&E’s must also confront the use of contract law to inhibit socially beneficial uses of knowledge goods.

B. Designing a Multilateral Response

With respect to the possibility of an international agreement on L&E’s, important questions point to design elements that affect the feasibility of such an endeavor. Despite gains made possible through a multilateral approach, particular design features may vary how appealing an international agreement is to States and how effectively the agreement will accomplish the stated goals. For example, the breadth of membership could be a significant factor in determining the extent of positive gains that could be realized; if only a few countries join, it could imperil the legitimacy and credibility of the international solution. A

¹⁷¹ See Inge Kaul, et al., *Why Do Global Public Goods Matter Today*, in PROVIDING GLOBAL PUBLIC GOODS: MANAGING GLOBALIZATION (Inge Kaul, Pedro Conceicao, Katell Le Goulven and Ronald U. Mendoza eds., 2002) 2.

¹⁷² *Id.* at 10 (or as globalized national public goods).

¹⁷³ See Jessica Litman, *The Public Domain*, 39 EMORY L.J. 965, 967 (1990); see also Joseph P. Liu, *Copyright Law’s Theory of the Consumer*, 44 B.C. L. REV. 397 (2003).

¹⁷⁴ See generally Keith E. Maskus and Jerome H. Reichman, *The Globalization of Private Knowledge Goods and the Privatization of Global Public Goods*, in INTERNATIONAL PUBLIC GOODS & TRANSFER OF TECHNOLOGY UNDER A GLOBALIZED INTELLECTUAL PROPERTY REGIME (Keith Maskus and Jerome Reichman, eds., 2005).

¹⁷⁵ See, e.g., Reichman et al., *supra* n.14; Rochelle C. Dreyfus, *TRIPS-Round II: Should Users Strike Back?*, 71 U. CHI. L. R. 21 (2004); Graeme B. Dinwoodie and Rochelle Cooper Dreyfuss, *WTO Dispute Resolution and the Preservation of the Public Domain of Science under International Law*, in INTERNATIONAL PUBLIC GOODS AND TRANSFER OF TECHNOLOGY UNDER A GLOBALIZED INTELLECTUAL PROPERTY REGIME, *supra* n. 174, at 861-83.

treaty that reflects membership only of developing countries is less likely to sufficiently reduce the uncertainty faced, for example, by Internet Service Providers (ISPs) in terms of liability for user behavior with respect to copyright, or by innovators of new technology who need legal stability on a global basis, and in particular in the developed countries. Some important questions include: What should be the modalities of such an instrument? Would such an instrument merely permit States to recognize limits to copyright or would it impose obligations on States to facilitate access to knowledge goods? Should articulated public interests be universally shared? Should they be mandatory? Finally, should an instrument on limitations and exceptions be linked with specific institutional mandates? In the following sections, we offer a preliminary approach to these important questions.

1. *Institutional Considerations*

The objectives and activities of WIPO and the WTO are central to cooperation and coordination in the realm of international intellectual property law. The WTO in particular occupies a distinct role in the oversight of IP harmonization through the activities of the TRIPS Council, which is chiefly responsible for facilitating compliance with the TRIPS Agreement and is therefore deeply involved in the normative design of the current multilateral copyright framework.¹⁷⁶ The activities of the TRIPS Council constitute an important medium for generating and spreading copyright norms among WTO member States and for securing at least formal compliance with TRIPS obligations. Indeed, the activities of the WTO generally are of the most immediate import in how member States construe their obligations under the TRIPS Agreement.¹⁷⁷ Between its general oversight and interpretive/compliance functions, it is easy to see why the WTO might offer an appealing institutional home for an instrument intended to promote innovation by restoring balance to the normative fabric of the international copyright system. There are, however, offsetting considerations to be taken into account which indicate the propriety of using a multiple-forum approach (at least initially) towards the design and placement of the new instrument on L&E's.

First of all, the WTO is primarily a *trade* regime. It does not have the primary responsibility for the development of IP norms *qua* IP norms; instead, IP protection is viewed through its impact on free trade, which provides a distinct gloss on the interpretation of TRIPS obligations that often disregards cultural and other relevant criteria central to both national and international copyright systems.¹⁷⁸ Secondly, the WTO lacks the important

¹⁷⁶ See Ruth L. Okediji, *Institutional Design and Institutional Deficit: Norms and Conflict in the WTO-WIPO Agreement*, in THE NETHERLANDS YEARBOOK OF INTERNATIONAL LAW (forthcoming, 2008).

¹⁷⁷ The WTO Secretariat in its Trade Policy Reviews (TPR) also plays an important role in communicating norms to member States. For a review of TPRs reflecting somewhat the view of the WTO with respect to IP issues, see www.wto.org. The TRIPS Council has also taken important actions affecting the uneven costs of harmonization. For example, the WTO TRIPS Council agreed in 2005 to grant LDCs an extension of time—until July 1, 2013, to implement the entire TRIPS Agreement, with the possibility of further extension. This came after the 2001 Doha Declaration on TRIPS and Public Health that extended implementation of TRIPS provisions on granted on pharmaceuticals products and related provisions on exclusive marketing rights until 2016. See Doha WTO Ministerial 2001, Declaration on the TRIPS Agreement and Public Health, Nov. 14, 2001, WTO Doc. WT/MIN(01)/DEC/2, available at http://www.wto.org/English/thewto_e/minist_e/min01_e/mindecl_trips_e.htm (last visited Feb. 24, 2008). The WTO Secretariat in its Trade Policy Reviews (TPR) also plays an important role in communicating norms to member States. For a review of TPRs reflecting somewhat the view of the WTO with respect to IP issues, see www.wto.org.

¹⁷⁸ See, e.g., India - Patent Protection for Pharmaceutical and Agricultural Chemical Products, Panel Report, ¶5.21, WTO Doc. WT/DS50/R (Sept. 5, 1997). See also generally Neil Netanel, *The Next*

historical context and technical considerations to evaluate the need for an international instrument on L&E's and to analyze the nature and scope of what might be contained in such an instrument. Indeed, the agreements that the WTO is charged to enforce originate from WIPO¹⁷⁹ and are equally subject to WIPO's oversight.¹⁸⁰ Thus, the WIPO-WTO Agreement creates a partnership in which WIPO can support the efforts of the WTO in interpretation of the various WIPO Conventions.¹⁸¹ WTO TRIPS dispute panels have sought information/advice from WIPO on matters arising from the interpretation of WIPO treaties, suggesting deference to WIPO's expertise, although the legal implications of WIPO's role in WTO matters, and vice versa, remain largely unexplored.¹⁸² Finally, given its founding Agreement, it is unlikely that the WTO can initiate a new international instrument exclusively for IP, much less a stand-alone one for copyright.¹⁸³

As the historical site for generating norms for international copyright harmonization, we believe that WIPO offers unique advantages as an agency with the necessary experience, expertise and mandate suitable for the proposed multilateral exercise.¹⁸⁴ In carrying out its objectives, WIPO is charged with, *inter alia*, (i) promoting the development of measures designed to facilitate the efficient protection of intellectual property throughout the world and to harmonize national legislation in this field; (ii) performing the administrative tasks of the . . . [of] the Berne Union; (iii) encouraging the conclusion of international agreements designed to promote the protection of intellectual property; (v) offering its cooperation to States requesting legal–technical assistance in the field of intellectual property; and (vi) assembling and disseminating information concerning the protection of intellectual property, carrying out and promoting studies in this field, and publishing the results of such studies.¹⁸⁵ Already, WIPO has commissioned three major studies on L&E's¹⁸⁶ that could serve as a first

Round: The Impact of the WIPO Copyright Treaty on TRIPS Dispute Settlement, 37 VA. J. INT'L L. 441 (1997).

¹⁷⁹ See TRIPS Agreement, *supra* n. 4, art. 2(2) (“Nothing in Parts I to IV of this Agreement shall derogate from existing obligations that Members may have to each other under the Paris Convention, the Berne Convention, the Rome Convention and the Treaty on Intellectual Property in Respect of Integrated Circuits.”). See also TRIPS Agreement, *supra* n. 4, art. 5 (excluding “agreements concluded under the auspices of WIPO relating to the acquisition or maintenance of intellectual property rights”).

¹⁸⁰ Accordingly, the TRIPS Agreement calls for a “mutually supportive relationship between the WTO and the World Intellectual Property Organization.” See TRIPS Agreement, *supra* n. 4, pmb1.

¹⁸¹ See Agreement Between the World Intellectual Property Organization and the World Trade Organization, Dec. 22, 1995, 35 I.L.M. 754 (1996) [*hereinafter* WIPO-WTO Agreement].

¹⁸² Okediji, *supra* n. 176.

¹⁸³ For the objectives and functions of the WTO, see Marrakesh Agreement Establishing the World Trade Organization, Apr. 15, 1994, THE LEGAL TEXTS – THE RESULTS OF THE URUGUAY ROUND OF MULTILATERAL TRADE NEGOTIATIONS 4 (1999), 1867 U.N.T.S. 154, 33 I.L.M. 1144 (1994) [*hereinafter* Marrakesh Agreement or WTO Agreement].

¹⁸⁴ It should be noted that the positions of the incoming WIPO Director General, who is expected to replace the current WIPO chief Dr. Kamil Idris in 2009, will undoubtedly be an important factor to the success of the proposed international instrument on L&E's. See generally Sisule Musungu, *The WIPO Development Agenda: Why WIPO Leadership Matters in Implementation*, Sept. 30, 2007, available at <http://thoughtsincolours.blogspot.com/2007/09/wipo-development-agenda-why-wipo.html> (last visited Feb. 29, 2008).

¹⁸⁵ Convention Establishing the World Intellectual Property Organization, 848 U.N.T.S. 3 (July 14, 1967), art 4, available at http://www.wipo.int/treaties/en/convention/pdf/trtdocs_wo029.pdf (last visited Feb. 24, 2008) [*hereinafter* WIPO Convention]. Article 3 of the WIPO Convention states that WIPO's objectives are: “(i) to promote the protection of intellectual property throughout the world through cooperation among States and, where appropriate, in collaboration with any other international organizations; (ii) to ensure administrative cooperation among the Unions.”

¹⁸⁶ See WIPO Study, *supra* note 15; Judith Sullivan, *Study on Copyright Limitations and Exceptions for the Visually Impaired*, WIPO Doc. SCCR/15/7, Feb. 20, 2007. Both Reports are available on the website of WIPO

step in identifying the nature and scope of current concerns by member States in this regard. Also relevant for the proposed multilateral exercise is the fact that WIPO, as a United Nations (U.N.) specialized body, is bound by the U.N. Charter, which obligates it to a larger set of norms reflected in an array of international agreements concluded under the auspices of the U.N.

As with the WTO, there are, however, factors presenting a potential challenge towards using WIPO as the exclusive institutional home of the new instrument on L&E's, most important of which is the non-existence of a suitable enforcement framework ensuring the successful implementation of the instrument as well as the fact that WIPO's efforts to produce a treaty in the field of copyright and related rights have failed twice in recent years. As a final note, we underscore the suitability of using multiple international institutions for the development of the new multilateral framework on L&E's, as such an approach may benefit from norm competition across different fora as well as from inter-agency competition and collaboration. International settings which could be used in this manner do not have to be limited to the WTO and WIPO, but could include, among others, the United Nations Educational, Scientific and Cultural Organization (UNESCO), the International Labour Organization (ILO), and the International Chamber of Commerce (ICC).

2. *Minimum Features*

Among the principal motivations for an international instrument on L&E's is the need to recognize limitations to copyright as internal to the copyright system and core to its effective functioning. Further, such an instrument will provide States with a coherent framework within which the principle of maximum protection might otherwise constrain unilateral efforts that undermine copyright's foundational commitment to the public good. With these principles in mind, we first identify the minimum goals. In addition, below, we suggest some elements that could constitute part of the substantive content.

a. Five Minimum Goals

Even when States acknowledge the importance of a multilateral solution for any given problem, various features of the chosen instrument may attract or deter membership in the new regime. The wide variation in the way international regimes are designed reflects deliberate choices about how States want to accomplish stated objectives and the degree to which States are willing to relinquish domestic regulatory control.¹⁸⁷ First, we identify the minimum goals of an international approach to L&E's to include: i) elimination of barriers to trade, particularly in regard to activities of information service providers; ii) facilitation of access to tangible information products; iii) promotion of innovation and competition; iv) support of mechanisms to promote/reinforce fundamental freedoms; and v) provision of consistency and stability in the international copyright framework by the explicit promotion of the normative balance necessary to support knowledge diffusion. Although an international instrument on L&E's can embody additional goals, we consider these five as a core minimum with direct effect for the existing ideals of the international copyright system. Each of the five goals is specifically referenced in one or more multilateral intellectual

(www.wipo.org). A third report focusing on L&E's for libraries written by Professor Ken Crews is expected this year.

¹⁸⁷ See Barbara Koremenos, Charles Lipson and Duncan Snidal, *Rational Design: Looking Back to Move Forward*, 55 INT'L ORG., 1051, 1052 (2001); Andrea Kupfer Schneider, *Getting Along: The Evolution of Dispute Resolution Regimes in International Trade Organizations*, 20 MICH. J. INT'L L. 697, 729 (1999).

property agreements.¹⁸⁸ They also collectively reflect the important role of public goods in enhancing human welfare. As such, these goals should be explicitly reflected in the preambular provision of the new international instrument on L&E's.

b. Three Essential Features

We further identify three vital attributes which should be reflected in an international instrument on L&E's – the instrument must: a) be flexible; b) be judicially manageable; and iii) leave ample space for national cultural autonomy. The first two of these three features in particular are critical contributors to managing the variables that most often determine the success of failure of international approaches.¹⁸⁹

a) *Flexibility*: International institutions and the agreements they manage function with great variety when it comes to flexibility. An international instrument on L&E's must retain flexibility on several levels. First, it must contain principles that are sufficiently flexible to accommodate technological change that invariably requires a re-calibration of the copyright balance. Relatedly, this flexibility must also facilitate new dimensions/definitions of the “public interest” to reflect changes and gains in technology. In other words, it must be clear that not all surplus from technological developments automatically accrues to rights owners. Second, the instrument must be designed to accommodate exceptional circumstances that warrant adaptation or modification of the rules. Escape clauses in trade agreements are key examples of such “adaptive” flexibility,¹⁹⁰ as perhaps are so-called “safeguard” clauses in the GATT. Third, the instrument must accommodate differentiated market structures between rich and poor nations, thus allowing for specific provisions to address unique but persistent problems of concentrated market power and other forms of market failure in the global economy. Finally, the instrument must include a mechanism enabling periodic review and possible revision.

b) *Judicial manageability*: The clarity of copyright doctrine has always been hostage to the vagaries of technological change and unwieldy compromises produced by competing industry interests.¹⁹¹ In both the U.S. and the EU, the increasing density and complexity of copyright law has been a source of significant concern to scholars, policymakers and judges, as courts grapple with practical application of the law simultaneously to new uses, new users and new technologies. Because national courts will remain important actors in enforcing national and international copyright law, an instrument on L&E's must be written in a way that provides clear guidance with respect to how best competing interests might be resolved to reflect copyright's commitment to the protection of and access to creative goods. Most importantly, the preambular section of the new instrument should include a well-articulated statement of the purposes of copyright protection that should be reflective of the dynamic nature of the creative enterprise.

c) *Space for national cultural autonomy*: We recognize that there is inherent tension between the call for international harmonization of L&E's and the

¹⁸⁸ See e.g., TRIPS Agreement, *supra* n. 4, pmb.; WCT, *supra* n. 3, pmb.; WPPT, *supra* n. 3, pmb.

¹⁸⁹ The variables most often cited are: 1) enforcement and distribution problems; 2) number of actors involved; and 3) uncertainty. See Koremenos et al., *supra* n. 187, at 1052.

¹⁹⁰ Koremenos et al., *supra* n. 152, at 773.

¹⁹¹ See Jessica Litman, *Copyright, Compromise, and Legislative History*, 72 CORNELL L. REV. 857, 879 (1987).

preservation of cultural autonomy of individual member States. We therefore recommend explicit recognition, in the new instrument, of a principle of State autonomy over discrete areas/events necessary to address unique national conditions and culture-specific needs. An example would be regulations promulgated by a State dealing with use of copyrighted materials in conjunction with national cultural/religious ceremonies or other episodic national events/circumstances as well as well as sovereignty to allow translation of works into (official) minority languages.

c. Substantive Content

Having outlined minimum overarching goals and principles, we now turn to substantive elements. To begin, several categories or clusters of L&E's are possible.¹⁹² For example, one cluster could address L&E's necessary for the promotion of innovation, such as, for example, a reverse-engineering exception for interoperability. Another cluster could be directed at L&E's necessary to facilitate the exercise of fundamental freedoms, such as freedom of speech. Another could address needs of discrete, vulnerable members of society, such as those who are visually impaired. Yet another cluster of L&E's could safeguard the role of institutions charged with the provision of public goods, such as educational institutions and libraries. Obviously, these clusters share some overlap and are not intended to be mutually exclusive. For organizational purposes, however, it is helpful to identify typologies of L&E's, both to more precisely tailor L&E's to deal with specific problems and to provide a metric for assessing explicit public interest objectives and concerns that have been accounted for in the system.

Within each cluster, the stated L&E's could be mandatory, permissive, or general. Globally mandated L&E's are those which generate positive spillovers to benefit global welfare. For example, education and freedom of speech are generally considered important features of stable and vibrant societies, as are competition and optimal levels of innovation. As such, L&E's aimed at facilitating production of global public goods should be mandatory. Permissive L&E's, which feature harmonization of principle rather than substance, are presumptively legitimate and States may choose further to treat them as liability rules by requiring compensation to authors. Such L&E's reserve autonomy of States for dealing with unique national conditions and culture-specific needs (e.g., library exceptions) and may generate net gains limited to specific national markets. Finally, omnibus principles that give States room to adopt or adapt L&E's to new and/or exceptional national circumstances should be recognized. These might include national security concerns, new technological developments, etc. Such omnibus L&E's could be reinforced by resort to the residual powers of States as recognized under general principles of international law.

Putting these elements together, it is possible to develop a matrix setting forth examples of L&E's within each identified cluster:

Cluster	Type of L&E	Examples of Specific L&E's
Innovation Promoting	mandatory	private study; no protection for unoriginal compilations; incidental copying; reverse engineering
	permissive	ISP storage; time, space and format shifting of works

¹⁹² See Hugenholtz, *supra* n. 26.

Fundamental Freedoms	mandatory	no protection for news of the day and official texts; quotation right; parody; private copying
	permissive	-
Vulnerable Groups	mandatory	disability-related exceptions; personal use exceptions
	permissive	important public purpose-promoting exceptions
Protecting Institutions	mandatory	nonprofit teaching & educational use exceptions now permitted under the Berne C.
	permissive	government use exceptions; library, public archive and public broadcasting exceptions
Provisions for Exceptional Circumstances	mandatory	national security exceptions; exceptions for administration of justice
	permissive	exceptions implementing TRIPS art. 8, TRIPS art. 40, and GATT art. XX(d)

NOTE: This matrix was developed based on a presentation by Prof. Pam Samuelson during a workshop sponsored by the OSI and held at the Cardozo School of Law in New York on 16-18 December, 2007.

3. Possible Modalities of an International Instrument on L&E's

As observed earlier, the range and complexity of international relations has greatly expanded over the years, producing a dense and intricate network of obligations between and among States of different political, cultural, economic and technological strengths. In particular, the complexity of issues associated with the provision of global public goods such as public health, education and environmental protection has resulted not only in a proliferation of international instruments, but also in a wide variety of forms of international cooperation.¹⁹³ At one end of the spectrum are “hard law” options represented most usually by treaties which have entered into force. These are termed “hard law” because they are always binding. If an international agreement reflects the parties’ intent to be bound, then in principle such an agreement could also constitute hard law even if technically it is not labeled as a treaty.¹⁹⁴

Soft law, on the other hand, is usually viewed as comprising non-binding international obligations which nevertheless have significant normative influence and may in some cases reflect existing law based on State practice, or constitute early attempts to create new customary law.¹⁹⁵ Different forms and legal effects exist for soft law, and it is possible for hard-law instruments to share certain features of soft law and vice versa.¹⁹⁶ For example,

¹⁹³ See Christopher J. Borgen, *Resolving Treaty Conflicts*, 37 GEO. WASH. INT’L L. REV. 57 (2005) (observing that there are over 50,000 treaties registered in the UN system); PAUL SCHIFF BERMAN, *THE GLOBALIZATION OF INTERNATIONAL LAW* (2005).

¹⁹⁴ UN Security Council Resolutions adopted pursuant to Article 25 of the Charter are a prime example. See Alan Boyle, *Soft Law in International Law-Making*, in *INTERNATIONAL LAW* (Malcolm D. Evans, 2nd ed.) 141, 142 (2006).

¹⁹⁵ *Id.* at 142.

¹⁹⁶ Janet Koven Levit, *Bottom-Up International Lawmaking: Reflections on the New Haven School of International Law*, 32 YALE J. INT’L L. 393, 413-14 (2007) (“While instruments such as the Global Compact, the Voluntary Principles, and the General Understanding are admittedly ‘soft,’ the norms embedded in such instruments often become ‘hard.’”).

treaties cast in open-ended standards are functionally “soft” in effect,¹⁹⁷ while declarations or understandings may reflect norms that are firmly entrenched in State practices.¹⁹⁸ Further, a soft-law instrument that interacts with existing treaties may over time achieve a “harder” status, as its very existence in the same subject area compels tribunals to include its substantive terms in considerations of treaty obligations.¹⁹⁹ The important point is that soft-law instruments embody a good faith commitment and, in their normative force, serve as part of a law-making process even when they are not formally deemed to constitute law per se.

An international instrument on L&E’s cast in a soft-law model has much merit. First, soft-law instruments have been quite influential in international economic law and, given the TRIPS Agreement, this option would fit well within the current institutional cooperation between WIPO and the WTO.²⁰⁰ Second, a soft instrument would have the same force of law for purposes of TRIPS interpretation pursuant to extant rules of international law²⁰¹ and it may even gradually evolve into a formal hard-law international instrument.²⁰² Third, it is often easier to reach agreements using soft law because while such instruments are carefully negotiated and crafted, the limited effects of non-compliance often encourage States to be more willing to negotiate in detail and precision.²⁰³ Fourth, soft-law agreements avoid the national ratification processes that in any event may weaken robust commitments made during treaty negotiations. The political costs of treaty ratification often make States less willing to engage in the treaty process, or to agree to meaningful terms.²⁰⁴ Fifth, and quite important for an international instrument on L&E’s, soft-law instruments have a higher degree of flexibility in that they are easier to upgrade, amend or replace.²⁰⁵ In an area where technological changes will require substantive flexibility, flexibility of institutional form is an important added value.

Soft law options can take many different forms, including resolutions, understandings, declarations, guidelines, model laws, codes of conduct and others. Further, within a single organization, different forms of soft law may exist. The legal effect of these forms is not consistent and, accordingly, thought must be given to the efficacies of a particular form. A code of conduct negotiated by content providers and owners could specify behavior by rights owners that constitute impermissible intrusions on the legitimate exercise of proprietary rights over copyrighted works, while also declaring that signatory States commit to allow imports of works created by or reflective of the exercise of L&E’s embodied in national laws of any WIPO or WTO member. This form of soft law would undoubtedly have hard-law effects both because of its reciprocal (rather than harmonized) basis and its affirmative action in facilitating a market in downstream innovative products that may otherwise have been blocked from entry under the terms of the TRIPS Agreement. A commitment by States to

¹⁹⁷ See Christine Chinkin, *Normative Development in the International Legal System*, in COMMITMENT AND COMPLIANCE: THE ROLE OF NON-BINDING NORMS IN THE INTERNATIONAL LEGAL SYSTEM (Dinah Shelton ed., 2000) 21, 30 (providing six definitions of soft law, including vague or imprecise terms).

¹⁹⁸ Levit, *supra* n. 196.

¹⁹⁹ See Vienna Convention, *supra* n. 106, art. 31(3). See also generally Susy Frankel, *WTO Application of “the Customary Rules of Interpretation of Public International Law” to Intellectual Property*, 46 VA. J. INT’L L. 365 (2006); JOOST PAUWELYN, CONFLICT OF NORMS IN PUBLIC INTERNATIONAL LAW, 25 - 29 (2003).

²⁰⁰ See Christine Chinkin, *The Challenge of Soft Law: Development and Change in International Law* (1989) 38 I.C.L.Q. 850; see also *supra* text accompanying notes 179-182.

²⁰¹ See Vienna Convention, *supra* n. 106, art. 31(3).

²⁰² See generally Boyle, *supra* n. 194.

²⁰³ Boyle, *supra* n. 194, at 143-144.

²⁰⁴ Boyle, *supra* n. 194, at 143-144.

²⁰⁵ Boyle, *supra* n. 194, at 143-144.

participate in what would be akin to an “L&E compliant zone” would have dramatic consequences in the structure and coordination of enforcement activities required by national and international copyright laws.²⁰⁶

Another possibility on the soft-law end of the spectrum is a declaration by WIPO member States identifying a list of L&E’s that are already reflected in national laws and thus presumptively valid under the TRIPS Agreement. Such a declaration would reflect existing law, but could also establish guidelines or recommendations that affect member obligations as interpreted by the WTO. The new instrument could also employ a “constellation approach” by compelling inter-regime and/or intra-regime cooperation and allowing public interests to permeate international IP framework at different “points.” Finally, under a “subsidiarity approach,” a new instrument could leave L&E’s mostly unregulated and recognize States as the best locus for action on a variety of cultural, educational and other public interests that underlie L&E’s. This type of instrument could also incorporate “hard” mechanisms such as a covenant not to sue.

Whatever the form of soft law, what is important is that for a new law-making exercise, particularly in the digital realm, it can more effectively facilitate consistent State practices and afford States a credible defense against threats in response to any challenges to behavior consistent with the codified norms. State practice would also strengthening the normative force and appeal of the instrument through its relationship to Berne Convention provisions. Further, soft-law instruments can reflect agreements between State and non-State actors. Given the strong role of industry actors in international copyright law, this particular feature of soft law options is an important consideration in thinking about the various actors that need to be engaged in the process of developing an international instrument for L&E’s.

4. *Recommendations*

As a final note, we should mention some tactical considerations relevant to the proposed international instrument on L&E’s:

a. Multilateralism

We believe that to restore balance to the international economic regime, and in particular to ensure that the benefits for which intellectual property rights are granted are effectively harnessed for the public good, a multilateral solution is necessary.²⁰⁷ While we acknowledge the possible benefits of bilateral corrective actions, we do not recommend, as a first-order preference, defensive approaches such as a “user-free zone” as optimal solutions. We also place lower on a list of preferences any options that exclude policy space in which positive norms that are consistent with copyright’s overarching rationales can be fostered. Thus, for example, while the strategic utility and relative simplicity of options such as a moratorium on the further expansion of IP rights,²⁰⁸ or an agreement by developed countries not to sanction (or threaten to sanction) developing countries who employ existing access mechanisms, are useful, we feel strongly that in the digital age, welfare gains from dynamic

²⁰⁶ For example, technical assistance programs that have focused chiefly on piracy would have to apply L&E’s to determine that the goods are in fact infringing. At the very least, there will reduced pressure on a presumption of infringement.

²⁰⁷ See generally Kaul et al., *supra* n. 171.

²⁰⁸ See Maskus & Reichman, *supra* n. 174.

competition and diffusion of information goods require positive access norms as integral features of an effective international copyright system.

Multilateralism in the area of L&E's will have important functional, facilitative and normative advantages. As a functional matter, multilateralism invariably fosters centralization which is a key factor in promoting international cooperation, particularly when there is a desire for broad-based membership in the regime.²⁰⁹ Centralization does not necessarily or invariably imply formalization or bureaucratic administration. Indeed, one of the remarkable developments of international law in the last quarter century is the proliferation of bilateral treaties that typically lack any formal organizational structure, and the evolution of informal cooperative efforts that effectively utilize technological platforms to facilitate communication and coordinate interests among members.²¹⁰ Nevertheless, States do tend to codify most relationships in formal legal arrangements, whether such arrangements are strictly binding as are most treaties or merely hortatory as are some soft-law instruments.²¹¹ A multilateral accord offers protection against "forum-shopping" by owners of proprietary rights who may be willing to sacrifice long-term dynamic gains of access for short term monopoly gains from rent payments. In other words, in the absence of a multilateral approach to L&E's, rights holders can continue to limit competitive entry by maintaining a stronghold on the building blocks of knowledge and by precluding downstream creative activity that could supply additional goods and services to the market.

b. Regional Experimentation

While we underscore the value of multilateralism, regional experimentation during the early stages of the multilateral exercise²¹² is an important step in beginning the work toward a coherent global framework for L&E's. Regional incubators for harmonized, minimum L&E's offer the advantage of incremental development of L&E's among like-minded countries. A string of regional successes with such experimentation over time will undoubtedly pave the way for a more general multilateral instrument. Further, regional experimentation would be appropriate for the concept of a user free zone, where minimum user rights and freedoms are recognized as important components of a robust market in knowledge goods. Such regional zones, with or without regional L&E's instruments, could host industry actors and provide an empirical basis for assessments of how innovation and competition flourish in a balanced information economy. The promise of regional experimentation must be weighed against the costs to industry actors who are key to facilitating access to information products and whose legal vulnerability arising from user behavior is not limited to a single country or region.

c. Placement and Scope

Despite the appeal of a broad treaty framework incorporating/reflecting principles from external bodies of law, we believe that a copyright approach is warranted in regard to an international instrument on L&E's. First, it is clear from current State practices that extra-

²⁰⁹ Koremenos et al., *supra* n. 187, at 1054.

²¹⁰ Koremenos et al., *supra* n. 187, at 1054.

²¹¹ A notable example is the international competition network (ICN). *See* www.internationalcompetitionnetwork.org.

²¹² As noted by copyright experts, at present, the primary candidates for experimentation at the regional level appear to be the Southern Common Market (MERCOSUR) and the Association of Southeast Asian Nations (ASEAN).

copyright principles already flow in and within copyright's framework with some degree of regularity. The most prominent example, of course, is the protection and exercise of freedom of expression, which is strongly recognized in U.S. and EU copyright jurisprudence and which already has a recognized place in the mandatory L&E's listed in the Berne Convention.²¹³ Human rights considerations have increasingly made their way into some assessments of IP obligations and human rights courts increasingly are called upon to navigate the intersection between the human right to property and the human right to partake in technological and cultural developments.²¹⁴ Further, IP rights are sometimes cast as agents of human-rights ends; accordingly, the tension between how IP rights might further human welfare will remain a strong source of influence on the copyright scheme.²¹⁵ We nonetheless believe that an intra-copyright approach best serves the principal objectives of an international instrument on L&E's, which is to balance *copyright* doctrine and thus effectuate more meaningfully copyright's core purposes. While it is well and good that support for balance in the application of copyright law is evident in other regimes—from consumer law to human rights—we believe such additional sources should reinforce, but not displace, copyright's internal balancing mandate that is critical to its mission of promoting creative enterprise,²¹⁶ diluting or distorting copyright in the process.

In addition, we believe that a copyright approach is superior for pragmatic reasons. In the complex of global regimes all loosely designed to promote “public welfare,” resorting to a general treaty creates difficulty in choosing which particular source of welfare mechanisms should be utilized. Human rights, consumer law, competition law and the law of contracts all have potential value for addressing copyright imbalance. Neither of these subjects would approach such balance in the same way or with the same outcome.²¹⁷ An omnibus approach runs into the challenge of having to coordinate the various welfare orientations of different regimes and perhaps diluting copyright doctrine in the process.

Finally, it is important to note that although a “narrow” international instrument on L&E's may be ideal, it could encourage stronger participation by a wider spectrum of countries over the long term if its scope were to be broadened. As stated earlier, the global gains from L&E's may be less appealing to developed countries, for example, whose domestic policies and institutions are mature enough (even if not always willing) to utilize policy levers internal and external to copyright to accomplish balance on the domestic innovation front. Since L&E's are inherently a component of any claim for enforcement, it is possible to include within the scope of the instrument linkages to enforcement concerns/challenges that occupy most developed countries. Such positive linkages, carefully managed, will likely yield a robust set of options that are attractive to a wide number of countries. Nevertheless, it should not be forgotten that when the Berne Convention was concluded only a handful of European countries joined the Union. Over time, this situation, of course, changed. Nonetheless, a similar “minority approach” to an international

²¹³ See Berne Convention, *supra* n. 3., art. 2(8) (no protection of news of the day), art. 10(1) (mandatory quotation right).

²¹⁴ See Hugenholtz, *supra* n. 64, at 343-363; Laurence R. Helfer, *The New Innovation Frontier? Intellectual Property and the European Court of Human Rights*, 49 HARV. INT'L L. J. 1 (2008). See also Laurence R. Helfer, *Toward a Human Rights Framework for Intellectual Property*, 40 U.C. DAVIS L. REV. 971 (2007).

²¹⁵ See Okediji, *supra* n. 126, at 211.

²¹⁶ See Okediji, *supra* n. 126.

²¹⁷ See *e.g.*, MOX Plant case, Request for Provisional Measures Order (Ireland v. United Kingdom) 3 December 2001 International Tribunal for the Law of the Sea, ILR vol. 126 (2005) p. 273-274, para. 50-51 (holding that application of the same rules from different institutions could be different due to the “differences in the respective context, object and purpose, and subsequent practice of the parties and travaux préparatoires.”).

instrument on L&E's should not be discounted in light of this major precedent in international copyright law.

d. Soft Law Modality

We believe that a joint initiative between WIPO and the WTO could be an ideal and appropriate expression of a soft-law modality with real impact for collective action on an international instrument on L&E's. Notable examples of such a soft law initiatives within WIPO include the Joint Recommendation on Internet Use developed by the WIPO Standing Committee on Trademarks (SCT) and adopted by the WIPO General Assemblies and the Paris Union in 2001,²¹⁸ and the WIPO Joint Recommendation Concerning Provisions on the Protection of Well-Known Marks.²¹⁹ Neither are binding instruments, but the latter clearly is evolving into an international legal standard through its incorporation by the U.S. into several bilateral agreements. It was also recently cited by a U.S. federal court as a potential source of guiding principles for the famous marks doctrine.²²⁰

A Joint Recommendation by the WIPO Standing Committee on Copyright and Related Rights (SCCR) could similarly be an important contribution to developing coherence in the international law of L&E's. It might involve coordination between the SCCR and the TRIPS Council, particularly through the latter's activities in the implementation of the TRIPS Agreement. Even a Recommendation solely authored by the SCCR could be used by the TRIPS Council to evaluate both rights implementation and user freedoms when assessing national copyright laws for compliance with the international copyright framework. Whatever its form, we reiterate the benefits, as an initial matter, of a soft-law-type cast for a prospective global instrument on L&E's. Reasons for this have already been discussed above. They include the fact that soft-law mechanisms are fairly common in the realm of international economic regulation, an important element given the import of the TRIPS Agreement as a major source of global copyright relations. Further, as a political matter, it is generally the case that soft-law agreements are easier to negotiate and adapt to future circumstances as the need arises. The adoption of a soft-law instrument may over time result in the development of broadly acceptable norms paving the way for a "hard" law global framework on L&E's. Finally, at a minimum, a soft law instrument could have a great political calming effect on international copyright relations, much like the Doha Declaration had on the international patent framework.²²¹ While its practical effect on the problems that gave rise to the Declaration may be questioned, the normative weight of the Declaration has undoubtedly been of great significance.

²¹⁸ WIPO, Joint Recommendation Concerning Provisions on the Protection of Marks, and Other Industrial Property Rights in Signs, on the Internet, *adopted by* Assembly of the Paris Union for the Protection of Industrial Property *and* General Assembly of the World Intellectual Property Organization, WIPO Doc. 845(E), pmb. (Oct. 2001) (setting forth provisions intended to apply when determining whether "use of a sign on the Internet has contributed to the acquisition, maintenance or infringement of a mark or other industrial property right in the sign, or whether such use constitutes an act of unfair competition").

²¹⁹ WIPO, Joint Recommendation Concerning Provisions on the Protection of Well-Known Marks *adopted by* Assembly of the Paris Union for the Protection of Industrial Property *and* General Assembly of the World Intellectual Property Organization, WIPO Doc. 833(E) (Sept. 1999), *available at* http://www.wipo.int/about-ip/en/development_iplaw/pub833.htm (last visited March 5, 2008). *See also* Graeme Dinwoodie, *The Architecture of the International Intellectual Property System*, 77 CHIC.-KENT L. REV. 993 (2002).

²²⁰ *See ITC Limited v. Punchgini, Inc.*, 482 F. 3d 135 (2d Cir. 2007).

²²¹ *See Abbott & Reichman, supra* n. 164.

CONCLUSION

The task of developing a global approach to limitations and exceptions is one of the major challenges facing the international copyright system today. At risk are fundamental elements of the copyright system which were historically designed to require accountability to goals and purposes far beyond individual economic gain. As new technologies challenge copyright's internal balance, and as the costs of globalization heighten the vital need for innovation and knowledge dissemination, a multilateral instrument that can effectively harness various national practices with regard to L&E's, and that can provide a framework for dynamic evaluation of how global copyright norms can be most effectively translated into a credible system that appropriately values author and user rights is a necessity. This paper has not answered all the questions, but we hope it has provided some direction on a way forward.

APPENDIX A

Limitations Available under the Berne Convention

The Berne Convention recognizes two types of limitations: compensated limitations and uncompensated limitations. Uncompensated limitations usually reflect uses or practices that are not considered part of the legitimate scope of the author's proprietary grant. Compensated limitations usually suggest that the copyright owner is not entitled to control whether the work is used, but is always entitled to remuneration as part of the copyright incentive scheme. Compensated limitations are a form of compulsory licensing.

A. *Uncompensated Limitations*

1. Article 10(1) of the Berne Convention uses mandatory language to confer an exception to copyrighted works. Under this provision, quotations can be made from a work that is already lawfully available to the public. Use of this exception must be compatible with "fair practice" and consistent with the purpose for which the quotation is necessary. Book reviews, criticism and news commentary would be examples of works where quotations are likely to be utilized liberally. The beauty of this exception is that, unlike other limitations in the Berne Convention, Article 10(1) is not limited by prescribed uses—quotations may be made for any purpose so long as they are done within the stipulated context.²²²
2. Article 10(2) of the Berne Convention permits countries to enact legislation allowing the use of copyrighted works by way of illustration in publications, broadcasts or sound or visual recordings for teaching purposes. The permitted use must be compatible with "fair practice." Such legislation should also require that the source and the name of the author be mentioned when the work is being utilized.²²³ Under the prior rendition of Article 10(2),²²⁴ the word "extracts" was used. By removing this word in the Paris Revision, the scope of Article 10(2) was actually broadened. Currently, so long as the use is for teaching purposes and compatible with fair practice, domestic legislation may limit the author's rights to exclude others from using his/her work in this manner.
3. Article 10*bis*(1) of the Berne Convention permits countries to enact legislation allowing reproduction by the press, broadcasting or communication to the public of articles published in newspapers or periodicals on current economic, political or religious works, and of broadcast works so long as the author does not expressly reserve the right to reproduce, broadcast or otherwise communicate the work. In any event, such reproduction must always indicate the source of the work. It is clear that Article 10*bis*(1), like 2*bis*(2), is directed at the utilization of technology to disseminate information, particularly information that is either by its nature intended for the public(10*bis*(1)) or which the author herself has injected into the public sphere

²²² In fact, "[i]t is possible, therefore, that Article 10(1) could cover as much of the grounds that is covered by "fair use" provisions in such national laws as that of the United States of America (USA)." WIPO Study, *supra* n. 15, at 13.

²²³ Berne Convention, *supra* n. 3., art.10 (3).

²²⁴ See Berne Convention for the Protection of Literary and Artistic Works, September 9, 1886, as revised at Stockholm on July 14, 1967, 828 U.N.T.S. 222 [*hereinafter* Stockholm Act].

(2*bis*(2)).²²⁵ Unlike 2*bis*(2), however, Article 10*bis*(1) has an overtly political context reflecting the powerful if implicit relationship between copyright and freedom of speech.²²⁶ In the United States, where First Amendment jurisprudence has a material effect on copyright doctrine,²²⁷ it is not clear that an author's reservation under Article 10*bis*(1) would survive judicial scrutiny.

4. Article 10*bis*(2) continues the emphasis on news reporting by permitting States to determine conditions under which literary or artistic works seen or heard in the course of reporting on current events through photography, cinematography, broadcasting or communication to the public by wire may be reproduced and made available to the public. This provision attempts to balance the need of reporters to provide ample coverage of current events by taking pictures or recording such events, and the interests of authors whose works may be captured incidentally by such recording. Article 10*bis*(2) requires that such reproduction be justified by the information purpose underlying the news report, similar to requirement in Article 2*bis*(2). The combined effect of Articles 10*bis*(1) and 10*bis*(2) is that States have the discretion to permit reproduction of copyrighted works for the purposes specified, and to establish conditions under which the reproduction would be deemed consistent with the character of the purposes identified. Arguably, States may enact domestic legislation consistent with the scope of Article 10*bis*(2) *without* enacting any conditions, thus giving reporters broad latitude in reporting current events. Of course, this latitude would be tempered by the general presumption permeating 10*bis*(1) and 10*bis*(2) that the reproduction must take place in the context of legitimate news reporting.²²⁸
5. The final category of permissive uncompensated use is found in the infamous standard established by the three-step test. Article 9(2) of the Berne Convention establishes an omnibus, general rule applicable to any limitations imposed on the reproduction right.²²⁹ Any exercise of sovereign discretion that introduces a limitation or exception to the reproduction right is automatically subject to appraisal under the three-step test. As I described it elsewhere, “[t]he three-step test is not a public interest limitation to exclusive rights. . . . [W]hat appears to be a limitation to copyright, is actually a limit on the discretion and means by which member States can constrain the exercise of exclusive rights.”²³⁰

²²⁵ See WIPO Study, *supra* n. 15, at 17.

²²⁶ Neil Weinstock Netanel, *Locating Copyright within the First Amendment Skein*, 54 STAN. L. REV. 1, 7 (2001) (“Copyright’s speech encumbrance cuts a wide swath, chilling core political speech such as news reporting and political commentary, as well as church dissent, historical scholarship, cultural critique, artistic expression, and quotidian entertainment.”) (footnotes omitted); Neil Weinstock Netanel, *Asserting Copyright’s Democratic Principles in the Global Arena*, 51 VAND. L. REV. 217, 220 & passim (1998) (arguing that “copyright law serves fundamentally to underwrite a democratic culture”).

²²⁷ See Netanel, *supra* n. 226, at 47 (“[C]opyright law ought to conform to the sorts of procedural and substantive constraints that the First Amendment has been held to impose on other bodies of law. . . .”). See also Eric Allen Engle, *When Is Fair Use Fair?: A Comparison of E.U. and U.S. Intellectual Property Law*, 15 TRANSNAT’L LAW. 187, 209 (2002) (describing tension between First Amendment to the U.S. Constitution and copyright law); Melville Nimmer, *Does Copyright Abridge the First Amendment Guarantees of Free Speech and Press?*, 17 UCLA L. REV. 1180 (1970) (same).

²²⁸ See WIPO Study, *supra* n. 15, at 19 (noting that the use of the work “must be justified by the informatory purpose.” and “does not allow *carte blanche* for the reproduction of whole works under the guise of reporting current events”).

²²⁹ WIPO Study, *supra* n. 15, at 21.

²³⁰ Okediji, *supra* n. 13.

To be consistent with the Berne Convention, a limitation or exception to the reproduction right must 1) be limited to certain special cases; 2) not conflict with a normal exploitation of the work; and 3) not unreasonably prejudice the legitimate interests of the author. The test applies cumulatively, requiring that a particular limitation satisfy all three prongs of the test. Article 13 of the TRIPS Agreement incorporates the principle of the three-step test but arguably has further restricted its scope. Article 13 states that “Members shall *confine*. . .” limitations and exceptions to the same three elements outlined above, i.e., certain special cases that do not conflict with a normal exploitation of the work and that do not unreasonably prejudice the legitimate interests of the author. In the only definitive interpretation of the Berne three-step test and TRIPS Article 13, a WTO panel resolved that both tests required essentially the same analysis.²³¹ Two important observations should be made about the reach of the three-step test. First, given the structure of the Berne Convention, the three-step test arguably does not extend to a State exercise of discretion pursuant to those Articles where such discretion has explicitly been granted, such as Articles 2*bis*, 10, and 10*bis*.²³² Thus, States may freely enact legislation with respect to the subjects covered in these Articles without the restrictions of the three-step test. Second, the three-step test cannot apply to exercises of State discretion that are done pursuant to public policy external to copyright issues such as, for example, competition law. In essence, measures enacted pursuant to Article 40 of the TRIPS Agreement would arguably not be subject to a three-step test scrutiny because these cannot be properly deemed as limitations/exceptions to protection but rather as disciplinary controls necessitated by the copyright owner’s actions.

B. *Compensated Limitations*

1. Article 11*bis*(1) of the Berne Convention grants authors of literary and artistic works the exclusive right to authorize broadcasting and public communication by wireless diffusion of signs, sounds or images. This provision includes a secondary right to authorize the rebroadcasting of the work to the public by wire if the communication is made by an organization different from the first broadcaster. Finally, the author of the work has the exclusive right to authorize public communication of the work by broadcast through a loudspeaker or other analogous instrument (e.g., a television). Under Article 11*bis*(2), States have the discretion to determine the conditions under which the broadcasting rights may be exercised. However, these conditions cannot be prejudicial to the moral rights of the author or to the right to equitable remuneration. There must be a competent authority to establish the rates of such equitable remuneration, in the absence of an agreement between the parties. Importantly, Article 11*bis*(3) makes clear that the right to broadcast a work is quite distinct from the right to record the work being broadcast. The terms and conditions surrounding when a broadcast may be recorded, otherwise known as ephemeral recordings, are left up to the State.²³³

²³¹ See United States - Section 110(5) of the US Copyright Act, Panel Report, Attachment 2.3, WTO Doc. WT/DS160/R (June 15, 2000).

²³² See WIPO Study, *supra* n. 15, at 21 (“Article 9(2) makes no reference to . . . provisions such as Articles 10, 10*bis*, and 2*bis*(2) . . . that were modified and maintained at the same time. . . . Nonetheless, it seems clear that the operation of these provisions within their specific sphere is unaffected by the more general provision in Article 9(2), and that the uses allowed under them are therefore excluded from its scope.”).

²³³ Berne Convention, *supra* n. 3, art. 11*bis*(3).

2. Article 13 of the Berne Convention allows each country to reserve conditions on the rights granted to an author of musical works and an author of the words to authorize sound recordings of the musical work, including the words, so long as there already exists a recording of the words and music together. However, the authors must receive equitable remuneration for the recording of the musical work. In essence, Article 13 sets up a compulsory license system for recording musical works and any accompanying words. This allows recording companies to reproduce the work without prior consent but subject to an obligation to pay for such use.²³⁴

²³⁴ The amount of equitable remuneration is a matter of national legislation. WIPO Study, *supra* n. 15, at 30.

APPENDIX B

Mandatory Limitations in Existing International IP Instruments

Berne Convention

Art. 2(8): no protection of news of the day etc.

Art. 10(1): mandatory quotation right

Paris Convention:

Art. 5ter: mandatory limitation of patent law for use of patented devices in planes, boats, etc. that are in transit

Art. 6bis: States must invalidate marks reproducing well-known marks

Art. 6ter: States must invalidate marks containing flags, State emblems, etc.

Nairobi Treaty

Art. 1: States must invalidate marks containing Olympic symbol

Washington Treaty (protection of IC lay-outs)

Art. 6 (2): mandatory limitation for private copying, analysis and reverse engineering; no right against independently created identical design

TRIPs

Art. 9(2): no protection of ideas, methods, etc.

Art. 10(2): no protection of data per se

Art. 37: mandatory immunity for innocent infringer of IC design rights

WCT

Art. 2: no protection of ideas, methods, etc.

Art. 5: no protection of data

European Patent Convention

Art. 52-53: mandatory exclusions from protection and exceptions to patentability

EU Directives

Art. 5-6 Software Directive (various mandatory exceptions)

Art. 6 Database Directive (id.)

Art. 5(1) Copyright Directive (mandatory transient copying exception)