Session 1: The importance of limitations and exceptions within the legal framework.

Presentation by Mr. Mihály Ficsor

President of the Hungarian Copyright
Experts Council
Hungary

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The importance of copyright exceptions and limitations in balancing of interests

Dr. Mihály Ficsor,
President, Hungarian Copyright Experts Council
former Assistant Director General of WIPO

I. INTRODUCTION

Basic features of a healthy copyright system (1)

- There is respect for it and it is well functioning because it is a **judicious system** duly taking into account all the legitimate interests.
  - **Due protection and balancing of interests (rights, exceptions and limitations).**
- There is respect for it and it is well functioning because **people understand and accept its objectives.**
  - **Awareness building.**
- There is respect for it and it is well functioning because copyright is **applied** and **exercised the way as „advertized**."
  - **Contractual system and collective management.**
- There is respect for it and it is well functioning because there is an **appropriate mechanism to guarantee respect for it.**
  - **Enforcement.**

Basic features of a healthy copyright system (2)

- There is respect for it and it is well functioning because it is a **judicious system** duly taking into account all the legitimate interests.
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- There is respect for it and it is well functioning because copyright is **applied** and **exercised the way as „advertized**."
  - **Contractual system and collective management.**
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  - **Enforcement.**

Exceptions and limitations – terminology (1)

- **The Berne Convention does not use the expressions** „exceptions" and „limitations" (or „to except/exempt" and „to limit") **although it allows**, in certain cases and under certain conditions, **both** free uses (=**exceptions**; see below) **and** compulsory licenses/conditions of excercising exclusive rights (=**limitations**; see below).
- Paragraph (1) of Article 15 of the **Rome Convention** refers to possible free uses listed in it as „**exceptions**" and its paragraph (2) uses the term „**limitations**" in a way that it seems to cover both exceptions and limitations.
- Article 13 of the **TRIPS Agreement**, Article 10 of the WIPO Internet Treaty (**WCT**) and Article 16 of the WIPO Performers and Phonograms Treaty (**WPPT**) on the „three-step test," in their titles and in their texts, use the expression „**limitations [of,] and exceptions [to]"** the rights concerned.

Exceptions and limitations – terminology (2)

- The expression „exceptions and limitations" implies that **exceptions ≠ limitations.** (We do not say that there are two categories: A and A; we can only say that there are two categories: A and B where A ≠ B.)
- **WIPO Glossary of Copyright and Related Rights Terms** (emphasis added):

"*Free uses"* mean cases where, in spite of some general provisions granting an *exclusive right* or a right to *remuneration*, there is no need for *authorization* and even for payment of *remuneration*, while the term "*non-voluntary licenses*" covers both *statutory licenses* and *compulsory licenses* –"*statutory license*" meaning a direct permission granted by the law, and "*compulsory license*" meaning an obligation of the *rights owners*, under the law, to grant *licenses*, both against payment. On this basis, ***free uses…*** **may be referred to as "exceptions,"** and **"*non-voluntary licenses,*" as well as** subjecting the *exercise* of rights to ***obligatory collective management,*** **may be called "limitations"** (since, in their case, *copyright* and *related rights* are "limited" to a mere right to *remuneration* or to a share from the *remuneration* collected by a *collective management organization*).

II. RELEVANT INTERNATIONAL NORMS

Three „layers" – and a half – of the international copyright and related rights norms

- **First „layer": Berne Convention** orginially adopted in 1886, regularly revised ; for the last time in 1971 (administered by WIPO) **and the Rome Convention** adopted in 1961 (jointly administered by WIPO, UNESCO and ILO).
- **Second „layer": TRIPS Agreement** adopted in 1994 (administered by WTO).
- **Third „layer": WIPO Copyright Treaty (WCT) and WIPO Performances and Phonograms Treaty (WPPT)** adopted in 1996.
- **The half layer: „guided development period"** (1975 to 1988)

Berne Convention (1)

The **Berne Convention** offers a **comprehensive regulation at a very high level of harmonization**, based on the principle of **national treatment** (with some minor exceptions) combined with provisions fixing the **minimum level of protection** (Article 5(1)).

It determines the **works to be protected** ("every production in the literary, scientific and artistic domain, whatever may be the mode or form of expression" with a non-exclusive list (Article 2(1)). It allows national laws to make **fixation** as a condition of protection (Article 2(2)), but forbids the prescription of **formalities** (such as registration, deposit or notice) as a condition (Article 5(2)).

The minimum **duration of protection** – as a general rule, during the life, and still 50 years after the death, of the author – is also fixed, with some exceptions (Article 7).

Berne Convention (2)

The **Berne Convention** provides for those **rights** which – as a minimum – should be granted in all member countries of the Berne Union; both **moral rights** (Article 6*bis)* and **economic rights**:

- the right of **reproduction** (Article 9), the right of **distribution** (explicitly only in the case of works adapted for cinemetographic works and for cinematographic works themselves; Articles 14 and 14*bis*),
- the right of **translation** (Article 8), the right of **adaptation** (Article 12 and, in respect of cinematographic adaptation, Article 14),
- the right of **public performance** (of certain categories of works; Article 11), the right of **public recitation** (of literary works; Article 11*ter*),
- the right of **broadcasting, rebroadcasting and cable retransmission** (Article 11*bis*), the right of **communication to the public by wire** (Articles 11, 11*bis,* 11*ter*, 14, 14*bis*), and
- a special right – for the recognition of which, in contrast with the other rights, there is no real obligation – in respect of the resale of original works of art and original manuscripts, the ***droit de suite*** (Article 14*ter*).

Berne Convention (3)

- **Specific exceptions and limitations:**
  - **Access to information**: free use official texts of a legislative, administrative and legal nature (Art. 2(4)), political speeches and speeches delivered in legal proceedings (Art. 2*bis*(1)), and – for informatory purposes – lectures and addresses delivered in public; free re-use of articles and broadcast works on current economic, political or religious topics (Art. 10*bis*(1)) and (Art.10*bis*(2)).
  - **Freedom of speech, research and criticism**: free quotation (Art. 10(1)).
  - **Educational purposes**: free use by way of illustration for teaching (Art. 10(2)),
  - So-called **minor „reservations" regarding performing rights** such as for official or religious ceremonies, non-profit educational purposes (agreed statement adopted concerning Arts. 11, 11*bis*, 11*ter*). (continues)

Berne Convention (4)

- **Specific exceptions and limitations** (continues)**:**
  - **Facilitating broadcasting and making and preservation of broadcast works:** compulsory licenses or mandatory collective management (Art. 11*bis* (2)) and exceptions (Art. 11*bis* (3)).
  - **Facilitating recording of music:** compulsory licenses or mandatory collective management (Art. 13(1)).
  - **Special treatment for developing economies** (Appendix; see below more in detail).
- **General criteria for exceptions and limitations: the three-step test** (concerning the right of reproduction) :
  - (i) only in certain special cases; (ii) only if there is no conflict with a normal exploitation of works; and (iii) only if there is no unreasonable prejudice the legitimate interests of authors (and other owners of rights); Article 9(2)) (see below more in detail).

Rome Convention

- **Out of date** (see the WIPO Performers and Phonograms Treaty adopted in Geneva in December 1996 and the WIPO Audiovisual Performers Treaty to be adopted in Beijing in June 2012).
- **Much lower level of protection than what is granted for authors under the Berne Convention.**
- The **exceptions and limitations** allowed under the Rome Convention (Article 15) are **similar to those which are permitted under the Berne Convention.** A **specific, sweeping exception applies to the rights of audiovisual performers:** once a performer has consented to the incorporation of his performance in a visual or audiovisual fixation, Article 7 on the rights of performers have no further application (Article 19).

„Guided development" period (1)

- **1975, Washington, Sub-Committee of the Executive Committee of the Berne Convention on reprographic reproduction**: the Resolution adopted stated the possibility of adopting **exceptions and limitations,** in accordance with the Convention, **for educational and social purposes** and otherwise recommended **collective management**.
- **1980 to 1982: Geneva and Paris, Committee of Governmental Experts on Use of Computers for Access to Works**: the Recommendations stated that **storage of works in computer memory is also reproduction**, but referred to the **exceptions and limitations available under the Berne Convention, including its Appendix concerning developing economies.**
- **1980 to 1982: Geneva and Paris, Working Group on Formulation of Guidelines on the Translation and Reproduction Licenses for Developing Countries**: **detailed Advisory Notes in 86 points** on the application of the Berne Appendix.

„Guided development" period (2)

- **1982, Paris: Working Group on Access by the Visually and Auditory Handicapped to Works Protected by Copyright: Model Provisions** concerning the by Handicapped People to Works Protected by Copyright.
- **1986 - 1988, Paris and Geneva, Committee of Governmental Experts on Audiovisual Works and Phonograms and the „Printed Word": Guiding principles** clarifying, *inter alia*, that **there is no such thing as right to make free private copies; the three-step test also applies for private reproduction.**
- **1989- 1990: WIPO Model Provisions for Legislation in the Field of Copyright: detailed provisions on exceptions and limitations** (the program was abandoned due to the preparatory work leading to the later adoption of the TRIPS Agreement and the WIPO „Internet Treaties").

The TRIPS Agreement

- The Agreement includes **seven parts**: **I. General Provisions and Basic Principles**; **II. Standards Concerning the Availability, Scope And Use of Intellectual Property Rights; III. Enforcement of Intellectual Property Rights;** IV. Acquisition of Intellectual Property Rights; **V. Dispute Prevention and Settlement ;** VI. Transitional Arrangements; VII. Institutional Arrangements; Final Provisions.
- From the viewpoint of the session of the Workshop where this presentation is to be made**, mainly Part I and Section 1 of Part II on Copyright and Related Rights are relevant.**
- However, the provisions on enforcement of intellectual property rights and on the dispute prevention and settlement system, which are applicable for all categories of intellectual property rights provided under the Agreement, are, of course, also important from the viewpoint of copyright and related rights.

The TRIPS Agreement – general provisions (1)

- **No derogation from existing obligations** that Member of WTO may have to each other **under the Berne Convention and the Rome Convention.** (Art. 2)
- **National treatment** in accordance with the Berne Convention and the Rome Convention. (Art. 3)
- **Most-favored nation treatment**. (Art. 4)
- For the purpose of dispute settlement, no application concerning the exhaustion of IP rights (practically, the right of distribution with the first sale of copies). (Art. 6)
- **Preamble-type provisions on „objectives and principles"** (Arts 7 and 8).

The TRIPS Agreement – general provisions (2)

Article 7. Objectives

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

Article 8. Principles

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

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

The TRIPS Agreement – provisions on copyright

- **Basic obligation: compliance with** the substantive provisions of **the Berne Convention** (Arts 1 to 21 and the Appendix) , except for those on moral rights (Art. 9.1).
- Certain **qualifications** of what also follows from the Berne Convention: **idea/expression dichotomy** (Art. 9.2), **copyright protection of computer programs and databases** (Art. 10), the **calculation of the 50-year term of protection** where it is not to be calculated from the authors' death (Art. 12).
- The **extension of the three-step test** for the application of exceptions and limitations (which under the Berne Convention only concerns the right of reproduction) **to all economic rights** (Art. 13).
- **The only truly new element** not contained in the Berne Convention: **provision on a right of rental** concerning computer programs and, under certain conditions, audiovisual works (Art. 11).

The TRIPS Agreement – provisions on related rights (1)

- **Performers rights**: in different manner, but ***de facto*** **more or less the same minimum rights as under the Rome Convention (**if also the availability of reservations to Art. 12 – by virtue of Art. 16 – of the Rome Convention are taken into account) : „possibility of preventing" (i) unauthorized broadcasting and communication to the public of their live performance; and (ii) as regards fixation on phonograms , unauthorized fixation of their live performance and the reproduction of such fixations) (see, from this viewpoint, the effect of Art. 19 of the Rome Convention on audiovisual fixation). (Art. 14.1)
- **Producers of phonograms: the same right as under the Rome Convention** (if also the availability of reservations to Art. 12 – by virtue of Art. 16 – of the Rome Convention are taken into account): exclusive right to authorize or prohibit the direct or indirect reproduction of their phonograms. (Art. 14.2)

The TRIPS Agreement – provisions on related rights (2)

- **Broadcasting organizations**: although **the first sentence of Art. 14.3 suggests more or less the same rights as under the Rome Convention, the second sentence raises doubts about it**:

Broadcasting organizations shall have the right to prohibit the following acts when undertaken without their authorization: the fixation, the reproduction of fixations, and the rebroadcasting by wireless means of broadcasts, as well as the communication to the public of television broadcasts of the same. **Where Members do not grant such rights t**o broadcasting organizations, they shall provide owners of copyright in the subject matter of broadcasts with the possibility of preventing the above acts, subject to the provisions of the Berne Convention (1971). (Emphasis added.)

- **Extension of the rules of the Rome Convention on „conditions, limitations, exceptions and reservations"** to the above-mentioned rights of preformers, producers of phonograms and broadcasting organizations as provided in the Agreement . (Art. 14.6, first sentence)

The TRIPS Agreement – provisions on related rights (3)

New elements in contrast with the Rome Convention:

- Exclusive **rental right for producers of phonograms** (Art. 14.4).
- **Extension of the term of protection of the rights of performers and producers of phonograms to 50 years** (with the term of protection of rights of broadcasting organizations remaining 20 years) (Art. 14.5).
- ***Mutatis mutandis* application for related rights of Article 18 of the Berne Convention** on the so-called „retroactive affect" of the protection of those rights (Art. 14.6, second sentence).

The WIPO „Internet Treaties"

- The **WIPO „Internet Treaties"** adopted in Geneva on December 21, 1996
  - **WIPO Copyright Treaty (WCT):**
    entered into force on **March 6, 2002;**
    number of **Contracting Parties** on March 20, 2012: **89**
    WIPO Performances and Phonograms Treaty (WPPT):
    entered into force on **May 20, 2002**
    number of **Contracting Parties** on March 20, 2012: **89**
  - The Treaties offer overall regulation on copyright and two categories of related rights, but their **main objective is to adapt those rights to the digital, networked environment, to the requirements of the information society**.
- **Implementation in the US: the 1998 Digital Millennium Copyright Act; in the EU: the 2001 Information Society (Copyright) Directive.**
- **Not all countries party to the Treaties have implemented them yet in full accordance with the obligations provided in them** (WIPO conventions and other treaties: no efficient dispute settlement system).

Historical and political background to the preparation of the WIPO "Internet Treaties"

- **No revision of the Berne Convention** since the Stockholm (1967)-Paris (1971) twin revisions, and **no revision of the Rome Convention** (1961) **in spite of the ever more numerous challenges raised by new technologies**.
- **Parallel preparatory work in the Uruguay Round GATT negotiations and in WIPO**, with slowing down the latter in order to avoid interference with the former.
- **April 1994**: adoption of the WCT package along with the **TRIPS Agreement**; the latter **only bringing about certain modest changes in the substantive copyright and related rights norms.**
- **Between the end of 1992** (the *de facto* closure of the TRIPS negotiations) **and 1994**: **spectacular development and growing use of the Internet**.
- **Serious and urgent questions** raised for the international copyright and related rights systems as a consequence of this.
- **No chance for reopening the negotiations in WCT**; **acceleration of the preparatory work in WIPO Committees** leading to the adoption of the two "Internet Treaties" within what may have seemed to be a very short time.

Three stages of the debates before the Diplomatic Conference

- **Thesis: copyright is dead** – and, if it is not yet, it should die.
- **Antithesis**: **no change is needed**; we may simply continue applying the existing international norms.
- **Synthesis: certain amendments are necessary but there is no need for fundamental changes.**

Main arguments by those who were declaring – or urging – the death of copyright (1)

Argument: **The cyberspace is, and should remain, the realm of complete freedom**; national laws and international treaties have nothing to do with it.

Response: **there is no "cyberspace"** outside the world we live; all the computers and telecommunication systems and all those who operate and use the global network may be found in this or that country; thus, national laws and international laws do have a lot to do with all this.

Main arguments by those who were declaring – or urging – the death of copyright (2)

Argument: It would be **impossible to control** the use of works and other protected materials **and exercise copyright and related rights** on the Internet.

Response: "**The answer to the machine is in the machine**" (Charles Clark (1933 – 2006)). That is, the application of technological protection measures and electronic rights management information is the solution.

Characterization of the WIPO „Internet Treaties"

- *Legally*: **no revisions of the Berne Convention and the Rome Convention, but "special agreements"** (under Berne Article 20 and Rome Article 22).
- *Concerning the level of protection*: „**Berne & Rome *plus* TRIPS *plus;"*** that is, what is provided in the **Berne and Rome Convention *plus*** what is provided in the substantive provisions of the **TRIPS Agreement *plus* what is still included on the basis of the "digital agenda" of the preparatory work.**
- *From the viewpoint of economic and legislative burdens*: **no real extension of the scope of protection; clarification** of the application of the existing norms and, in certain aspects, their **adaptation** to the new environment, and **new means of exercise and enforcement of rights**.
- *Politically*: the Treaties are **well-balanced, flexible and duly take into account the interests of the different groups of economies and stakeholders.**

The „digital agenda:" clarification, adaptation and new means of exercise and enforcement (1)

The so-called „plus" elements included in the WIPO Treaties – in contrast with the Berne Convention, the Rome Convention and the substantive provisions of the TRIPS Agreement – on the basis of the „digital agenda:"

- **clarification of the application of the *right of reproduction*** in the digital environment, in particular as regards the **storage** of works, performances and phonograms **in electronic memories** (agreed statements to WCT Art. 1(4) and to WPPT Arts 7 and 11);
- **recognition/clarification of the existence** – as an inevitable corollary to the right or reproduction **– of an exclusive *right of first distribution*** of copies of works, fixed performances and phonograms (WCT Art. 6; WPPT Arts 8 and 12);
- **through a combination and adaptation of existing rights, recognition of the *exclusive right of (interactive) making available*** of works, fixed performances and phonograms (WCT Art 8; WPPT Arts 10 and 14);

The „digital agenda:" clarification, adaptation and new means of exercise and enforcement (2)

The so-called „plus" elements included in the WIPO Treaties – in contrast with the Berne Convention, the Rome Convention and the substantive provisions of the TRIPS Agreement – on the basis of the „digital agenda" (continued)

- **extension of the three-step test** to all economic rights (WCT Art. 10; WPPT Art. 16) and **clarification of the application of *exceptions and limitations*** in the new environment (agreed statements to the provisions on the three-step test);

- obligations regarding the **protection of *technological measures and rights management information***, as means of exercising and enforcing rights (WCT Arts 11 and 12 and WPPT Arts 18 and 19).

III. THE THREE-STEP TEST – LEGENDS AND REALITY

Balancing of interests – the „three-step test" (1)

- „Invented" at the 1967 Stockholm revision conference ; **Art. 9(2) of the Berne Convention only regarding the right of reproduction**.
- Extended by the **TRIPS Agreement** to **all economic rights under copyright** (Art. 13) (but not to related rights; see Art. 14.6) and – with some wording differences – to **industrial design rights** (Art. 26.2) and **patent rights** (Art.30).
- Extended by the **WCT** to **all economic rights** under copyright (Art. 10) and by the **WPPT** to **all economic rights** of performers and producers of phonograms (Art. 16).

Balancing of interests – the „three-step test" (2)

- **The three „steps"**(three cumulative conditions that exceptions and limitations should fulfill to be applied step by step):
  - confined to **certain special cases** (copyright; related rights); **limited scope** (industrial design and patent rights);
  - **no conflict with a normal exploitation** (in the case of industrial design and patent rights: no unreasonable conflict);
  - **no unreasonable prejudice to the legitimate interests of the owners of rights** (in respect of industrial design and patent rights, it is added: „taking into account of the legitimate interests of third parties").
- Offering **sufficient flexibilities for a due balance of interests**, as also proved by **two WTO dispute settlement reports** interpreting the test as provided in Articles 13 and 30 of the TRIPS Agreement:
  - WT/DS114/R of 17 March 2000 (*Canada – Patents*);
  - WT/DS160/R of 15 June 2000 (*USA – Copyright*) .

Balancing of interests – exceptions and limitations in the digital online environment

- **Agreed statement concerning Article 10 of the WCT** (on the „three-step test" concerning copyright): „It is understood that the provisions of Article 10 permit Contacting Parties to **carry forward and appropriately extend into the digital environment limitations and exceptions in their national laws which have been considered applicable under the Berne Convention**. Similarly, these provisions should be understood to permit Contracting parties to **devise new exceptions and limitations that are appropriate in the digital network environment**.

  „It is also understood that Article 10(2) neither reduces nor extends the scope of applicability of the limitations and exceptions permitted by the Berne Convention."
- **Agreed statement concerning Article 16 of the WPPT** (on the „three-step test concerning the rights of performers and producers of phonograms)**:** The agreed statement concerning Article 10 (on Limitations and Exceptions) of the WIPO Copyright Treaty is **applicable *mutatis mutandis* also to Article 16** (on Limitations and Exceptions) of the WIPO Performances and Phonograms Treaty.

Theories on the three-step test and its interpretation; why the „Munich Declaration" is wrong

- The three-step test is the **basic foundation of exceptions to and limitations** of copyright and related rights **on the basis of which due balance may be established** between the public interest to adequately protect and enforce those rights and the other public interests.
- **In July 2008, a group of university professors and researchers tried to present a new theory – in the so-called „Munich Declaration" for the interpretation of the test** which is not in accordance with the meaning and the „preparatory work" of the relevant international norms.
- In the following slides the interpretation of the three-step test is discussed more in detail pointing out the **reasons for which the Munich Declaration is wrong and for which many highly respected copyright professors have not signed it**.

Structure of the test (1)

Key statement in the Munich Declaration:

„When correctly applied, **the Three-Step Test requires a comprehensive overall assessment, rather than the step-by-step application that its usual, but misleading, description implies**. No single step is to be prioritized. As a result, the Test does not undermine the necessary balancing of interests between different classes of rightholders or between rightholders and the larger general public. **Any contradictory results arising from the application of the individual steps of the test in a particular case must be accommodated within this comprehensive, overall assessment. The present formulation** of the Three-Step Test **does not preclude this understanding**. However, this approach has often been overlooked in decided cases." (Emphasis added.)

(Source: www.ip.mpg.de/shared/data/pdf/declaration_three_step_test.pdf)

Structure of the test (2)

Munich Declaration:

Examples of **incorrect interpretation** of the three-step test in a footnote :

„*See* for instance the **decision of the French Supreme Court**, 28 February 2006, 37 IIC 760 (2006). The same attitude is revealed the **WTO-Panel report** WT/DS114/R of 17 March 2000 (***Canada – Patents***), **where it is held that failure to meet the requirements of one of the three steps will necessarily result in a violation of Article 30 TRIPS.** Though not expressly endorsing the same attitude, the **subsequent Panel report** WT/DS160/R, 15 June 2000 (***USA – Copyright***), has not distanced itself from *Canada – Patents* in a manner that would help to rule out further misunderstandings."

Structure of the test (3)

What may be the basis for the suggested interpretation?

- **From the viewpoint of legal authority:**
  - **decisions of the Appellate Body** established by the WTO Dispute Settlement Body having changed the „erroneous" reports of the two dispute settlement panels mentioned by the Munich „declarers"?
  - **a decision of a court more supreme than the French Supreme Court** (*Cour de cassation*) specially set up for this purpose through a modification of the French Constitution in order to correct the Supreme Court's judgment in the *Mulholland Drive case*?
- **No. But then what?**

Structure of the test (4)

What may be the basis for the suggested interpretation?

Is there some basis for it in the text of the „mother of all provisions on the test"?

- **Berne Convention, Art. 9(2):**

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

- **No**. There is **one basic condition and two subsequent cumulative conditions**. See **Art. 31(1) of** the **Vienna Convention** on the Law of Treaties **and the principle of „effectiveness"** of treaty interpretation.

Structure of the test (5)

What may be the basis for the suggested interpretation?

May there be something in the way in which the TRIPS Agreement provides for the test?

- **Art. 13. of the TRIPS Agreement :**

  Members shall confine limitations or exceptions to exclusive rights to **certain special cases which do not** conflict with a normal exploitation of the work **and do not** unreasonably prejudice the legitimate interests of the right holder.

- **No,** this also speaks on three subsequently applicable criteria.

Structure of the test (6)

What may be the basis for the one-big-beer-mug interpretation?

Perhaps the WCT?

- **Art. 10 of the WCT**

  (1) Contracting Parties may, in their national legislation, provide for limitations and exceptions to the rights granted to authors of literary and artistic works under this Treaty **in certain special cases that do not** conflict with a normal exploitation of the work **and do not** unreasonably prejudice the legitimate interests of the author.

  (2) Contracting Parties shall, when applying the Berne Convention, confine any limitations or exceptions to rights provided for therein to **certain special cases that do not** conflict with a normal exploitation of the work **and do not** unreasonably prejudice the legitimate interests of the author. (Emphasis added.)

- **No**, no basis in the WCT.

Structure of the test (7)

What may be the basis for the suggested interpretation?

Or the WPPT?

- **Art. 16 of the WPPT:**

  (1) Contracting Parties may, in their national legislation, provide for **the same kinds of limitations and exceptions** with regard to the protection of performers and producers of phonograms **as** they provide for, in their national legislation, **in connection with the protection of copyright in literary and artistic works.**

  (2) Contacting Parties shall confine any limitations of or exceptions to rights provided for in this Treaty to **certain special cases which do not** conflict with a normal exploitation of the performance or phonogram **and do not** unreasonably prejudice the legitimate interests of the performer or of the producer of the phonogram. (Emphasis added.)

- **No, no, no and no.** All these provisions foresee **three cumulative conditions; if any of them is not fulfilled , the exception or limitation is not applicable.**

Structure of the test (8)

What may be the basis for the suggested interpretation?

- **Paragraph 85. of the Report of Main Commission No I of the 1967 Stockholm Diplomatic Conference:**

"**The Committee also adopted a proposal by the Drafting Committee** that the second condition should be placed before the first [meaning that the condition that exceptions or limitations must not conflict with a normal exploitation of works should be placed before the condition that they must not unreasonably prejudice the legitimate interest of authors], as this would afford a more logical order for the interpretation of the rule***. If it is considered that reproduction conflicts with the normal exploitation of the work, reproduction is not permitted at all. If it is considered that reproduction does not conflict with the normal exploitation of the work, the next step would be to consider whether it does not unreasonably prejudice the legitimate interests of the author.*** Only if such is not the case would it be possible in certain special cases to introduce a compulsory license, or to provide for use without payment." (Emphasis and comments in square brackets added.)

- This **rebuts the Munich Declaration**. Since these statements – as the Report indicates –has been explicitly adopted as a basis of the adoption of Article 9(2) of the Berne Convention, its interpretation value is higher than mere "preparatory work" under Article 32 of the Vienna Convention on the Law of Treaties since it corresponds to the criteria of an agreed statement under Article 31(2) of the Vienna Convention.

Structure of the test (9)

„Test questions" concerning the alledgedly „judicious" interpretation suggested by the Munich „declarers":

- **Is an exception or limitation acceptable if it is not limited to a special case? Can it be said that, if this is the case, there is no conflict with a normal exploitation of works or objects of related rights and no unreasonable prejudice to the legitimate interests of owners of rights?**
- **Is an exception or limitation acceptable if it conflicts with a normal explanation of works or objects of related rights? Can it be said that, if this is the case, there is no unreasonable prejudice to the legitimate interests of owners of rights?**
- **Is and exception or limitation acceptable if it unreasonably prejudices the legitimate interests of owners of rights)?**

The answer, on basis of the treaty provisions, is „No" to all these questions.

Structure of the test (10)

In spite of this, **the answer of the Munich „declarers" is still „yes."** Excerpt from a commentary by three key authors of the Declaration:

„The… **Declaration aims to restore [?!] the "three step test" to its original role [?!]** as a relatively flexible standard precluding clearly unreasonable encroachments upon an author's rights without interfering unduly with the ability of legislatures and courts to respond to the challenges presented by shifting commercial and technological contexts in a fair and balanced manner. **It emphasises that the ‚test' functions as an indivisible entity** and that, accordingly, **one particular ‚step' cannot function as a ‚show-stopper.' [??!!]"** (C. Geiger, J. Griffiths, R. Hilty: „Towards a balanced interpretation of the ‚three-step test' in copyright law.")

- That is**,** according to this surprising view, **even if one of the three conditions is not met, an exception or limitations is still applicable**.
- These views are obviously in **clear conflict with the international norms**.

The first „step" (1)

- **Berne Art. 9(2):** „**in certain special cases**."
- **TRIPS, art. 13**: [confined] „**to certain special cases**"
- **WCT Art. 10 (1): „ in certain special cases"**
- **WCT Art. 10(2):** [confined] „**to certain special cases**"
- **WPPT Art. 16(2):** confined] „**to certain special cases**"

The first „step" (2)

„Special" in two senses:

- **limited;** that is not generally applicable;
- **justified by some sound legal-political reason** (in particular by certain public interests to be balanced with the public interest of adequate protection of copyright and related rights).

- **Oxford Dictionary**: 1. "**having an individual or limited application or purpose**", 2. "containing details; precise, specific", 3."**exceptional in quality or degree; unusual; out of the ordinary**" 4. "**distinctive** in some way".
- Also reflected in the provisions of the **Berne Convention on specific exceptions** : Art. 10(1): „provided… their extent does not exceed that **justified by the purpose**" (of the quotation); Art. 10(2): „to the extent **justified by the purpose** (illustration for teaching); art. 10*bis* (2): „to the extent **justified by the** informatory **purpose**" (Emphasis added.)

The first „step" (3)

„Certain:"

- **„certain" is a synonym de „some"** (Oxford Dictionary: „some definitely, some at least, a restricted or limited number of");
- the **French version** shows clearly the **difference between „*certains cas spéciaux*" and „*cas certains et speciaux*;" the latter would truly refer to a special criterion of certainty** (but it was not the one which had been adopted).

The WTO panel in the copyright case (WT/DS160/R (*USA – Copyright*)), made an error by basing its interpretation on certain alternative definitions of the Oxford Dictionary that – contrary to the above-mentioned ones – are irrelevant from the viewpoint of the three-step test: „determined, fixed, settled; not variable or fluctuating."

It is another matter that, of course, the cases where exceptions and limitations may be applied **should be duly determined. However, the fair use and fair dealing system – with the organically developed body of case law – also correspond to this.**

The second „step" (1)

- **Berne, Art. 9(2):** „provided… **does not conflict with a normal exploitation** of the work…"
- **TRIPS, Art. 13**: „which **do not conflict with a normal exploitation** of the work…"
- „**WCT, Art. 10: (1)** „ that **do not conflict with a normal exploitation** of the work…"
  (2) „ that **do not conflict with a normal exploitation** of the work…"
- **WPPT, Art. 16(2):** which **do not conflict with a normal exploitation** of the performance or phonogram…

The second „step" (2)

„Normal exploitation"

- „**Exploitation**": quite clear: **activity by which the owner of rights extracts the value of rights.**
- „**Normal"**: it follows from the „preparatory work" and it is also reflected in the findings of the two WTO panels that this **refers to both an empirical and a normative (or at least a semi-normative) aspect** in the sense in which the documents of the 1967 Stockholm revisions conference of the Berne Convention indicate the understanding of the countries of the Berne Union. Extracts from the working group with the proposals of which the Committee of experts preparing the Basic Proposal was in agreement: (next slide)

The second „step" (3)

- "[T]he Study Group observed that… it was obvious that **all forms of exploiting a work which had, or were likely to acquire, considerable economic or practical importance** must in principle be reserved to the authors; exceptions that might restrict the possibilities open to authors in these respects were unacceptable." (Emphasis added).
- The annotations to the basic proposal quoted the text proposed by the Study Group in which the embryonic form of Article 9(2) appears as follows: "However, **it shall be a matter for legislation** in the countries of the Union, having regard to the provisions of this Convention, **to limit the recognition and the exercising of** (the right of reproduction) **for specified purposes and on the condition that these purposes should not enter into economic competition with these works"** (emphasis added,Records of the 1967 Stockholm conference, p. 112.;).

The second „step" (4)

- That is, an exception or limitation conflicts with a normal exploitation if it undermines the possibility of the owners of rights of exploiting their works or objects of related right in the market in an appropriate way. **It can hardly be alleged seriously that this requires a too high level of protection for copyright and related rights.**
- It is also to be noted that this is a criterion for the application of the principle of proportionality in a stage of the application of the test **when it has been already clarified that a „special case" is involved.**
- In this way, the consideration of the applicability of an exception or limitations **takes place already in the general context of a normativity (and, in the second, „step" the question is to what extent the interests linked to an adequate protection of copyright and related rights may be limited).**

The second „step" (5)

This means that an exception or limitation must not go so far as to undermine the chances of the owners of rights on the relevant markets.

As Martin Senftleben puts it:

„[A] conflict with a normal exploitation arises **if the authors are deprived of an actual or potential market of considerable economic or practical importance**… The circle of these actual or potential markets is solely formed by **those possibilities of marketing a work which tipically constitute a major source of income** and, consequently, **belong to the economic core of copyright**." (M. Senftleben: Copyright, Limitations and the Three-step Test, Kluwer Law International, 2004, pp. 184-189)

The second „step" (6)

It is submitted that adequate interpretation and application of the second „step" offers an appropriate basis also for solving the possible problems of the „grey" areas of balancing of interest, such as

- **misuse of copyright (*Lasercomb America v. Reynolds*, etc.) and competion considerations in general,**
- **public interests concerning access to information (*Ashdown v. Sunday Telegraph*),**
- **copyright protection and freedom of expression concerning the phenomenon of mixing, pasting and transforming in other ways protected works and objects of related rights** by online users (if such tranformations, due to their nature, enter into economic competition of the works concerned, they may not be allowed as exceptions to copyright. If, however, the transformations differ in a way that they do not replace the works concerned from the viewpoint of their normal economic exploitation, free use may be justified).

The thirds „step" (1)

- **Berne Art. 9(2):** „…provided that… **does not unreasonably prejudice the legitimate interests** of the author."
- **TRIPS Art. 13**: „…which… **do not unreasonably prejudice the legitimate interests** of the right holder."
- **WCT Art. 10:** (1) „…that… **do not unreasonably prejudice the legitimate interests** of the author."
  (2)"… that… **do not unreasonably prejudice the legitimate interests** of the author."
- **WPPT Art. 16(2):**"… which **do not unreasonably prejudice the legitimate interests** of the performer or of the producer of the phonogram."

The third „test" (2)

The concept of legitimate interests of owners of rights

- **Difference between the positions adopted by the two WTO panels** interpreting the three-step test in 2000. The copyright panel interpreted it in a **legal-positivist** manner, but the patent panel adopted a rather **normative** interpretation (TRIPS Art. 30 is an adapted version of the test also containing this concept):

  „to make sense of the term ‚legitimate interests'… that term must be defined in the way it is often used in legal discourse – as **a normative claim calling for the protection of interests that are ‚justifiiable'** in the sense that they are **supported by relevant public policies or other social norms**." (Emphasis added.)

- **The latter interpretation seems to be correct.**

The third „test" (3)

„Unreasonable prejudice"

- An expression of the **principle of proportionality** (along with the concept of „legitimate interests").
- There is substantial link between the first „step" and the third one. The fine **calibration of an adequate balance takes place in the third „step"** between the public interest of protecting the economic and moral interests of creators and other owners of rights, on the one hand, and other legitimate interests (in particular the interests of the general public) that justify the recognition of the existence of a „special case" in the sense of the first step.

Fair use and the three-step test

- **Article 107 of the US Copyright Act :**

Notwithstanding the provisions of sections 106 and 106A, the fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified by that section, for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright. In determining whether the use made of a work in any particular case is a fair use **the factors to be considered shall include—**

(1) **the purpose and character of the use**, including whether such use is of a commercial nature or is for nonprofit educational purposes;

(2) **the nature of the copyrighted work**;

(3) **the amount and substantiality of the portion used** in relation to the copyrighted work as a whole; and

(4) **the effect of the use upon the potential market for or value of the copyrighted work**.
(Emphasis added.)

- **This is not a „four-step test" but the adequate application of the four factors may – in the US, as the experience shows, does – result in exceptions and limitations that correspond to the three cumulative criteria of the three-step test.**

The three-step test and Articles 7 and 8 of the TRIPS Agreement (1)

WTO-Panel report WT/DS114/R of 17 March 2000 (***Canada – Patents***):

7.24…In the view of Canada, …. Article 7 above declares that **one of the key goals of the TRIPS Agreement was a balance between the intellectual property rights** created by the Agreement and other important socio-economic policies of WTO Member governments. Article 8 elaborates the socio-economic policies in question, with particular attention to health and nutritional policies. … Canada argued, **these purposes call for a liberal interpretation of the three conditions stated in Article 30 of the Agreement**, so that governments would have the necessary flexibility to adjust patent rights to maintain the desired balance with other important national policies. (Emphasis added.)

The three-step test and Articles 7 and 8 of the TRIPS Agreement (2)

WTO-Panel report WT/DS114/R of 17 March 2000 (***Canada – Patents***):

7.25 **The EC did not dispute the stated goal of achieving a balance** within the intellectual property rights system between important national policies. **But, in the view of the EC, Articles 7 and 8 are statements that describe the balancing of goals that had already taken place in negotiating the final texts of the TRIPS Agreement**. According to the EC, **to view Article 30 as an authorization for governments to "renegotiate" the overall balance of the Agreement would involve a double counting of such socio-economic policies**. In particular, the EC pointed to the last phrase of Article 8.1 requiring that government measures to protect important socio-economic policies be consistent with the obligations of the TRIPS Agreement. The EC **also referred to the provisions of first consideration of the Preamble and Article 1.1 as demonstrating that the basic purpose of the TRIPS Agreement was to lay down minimum requirements for the protection and enforcement of intellectual property rights.** (Emphasis added.)

The three-step test and Articles 7 and 8 of the TRIPS Agreement (3)

WTO-Panel report WT/DS114/R of 17 March 2000 (***Canada – Patents***):

7.26 **In the Panel's view, Article 30's very existence amounts to a recognition that** the definition of patent rights contained in Article 28 **would need certain adjustments**. **On the other hand, the three**

limiting conditions attached to Article 30 **testify strongly that the negotiators of the Agreement did not intend Article 30 to bring about what would be equivalent to a renegotiation of the basic balance of the Agreement**. Obviously, **the exact scope of Article 30's authority will depend on the specific meaning given to its limiting conditions**. The words of those conditions **must be examined with particular care on this point. Both the goals and the limitations stated in Articles 7 and 8.1 must obviously be borne in mind when doing so as well as those of other provisions of the TRIPS Agreement which indicate its object and purposes.** (Emphasis added.)

The three-step test and Articles 7 and 8 of the TRIPS Agreement (4)

- **Definition of flexibility**; Oxford Advanced Learner's Dictionary (2000 edition): 1. **ability to suit new conditions or situations**, 2. **ability to bend without breaking**.

- **The three-step test, if duly interpreted and applied, is able to adapt due balancing of interests to new conditions and situations. Its three conditions, however, also determine the limits – the breaking points – beyond which the binding of the norms of copyright protection cannot go.**

IV. DIGITAL RIGHTS MANAGEMENT AND BALANCING OF INTERESTS

Digital rights management (DRM)

- **The expression „digital rights management" (DRM)** has been introduced and used in professional (legal, technical) jargon, in the press and the media. However, it **does not appear in the texts of the provisions of the relevant international treaties** (the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT)) **in the EU Directives** (in particular, in the Information Society (Copyright) Directive) **and in the national laws implementing them**.
- **„Technological [protection] measures" (TPMs) and „rights management information" (RMI) are the relevant expressions** used in international treaties, EU Directives and national laws.
- **„DRM" usually means the combination of TPMs and RMI**, **although** in the professional and journalistic discourse **it is** frequently **used also as a reference just to TPMs**, **and** sometimes **just to RMI**.
- **The most intensive criticism in connection with the two WIPO Treaties and their implementation was directed against the application and protection of DRM – in particular TPMs.**

Debates about DRM – alleged „access rights" (1)

First claim: „DRM" (TPMs) and their protection introduces a new „access right"

- Contrary to such allegations, **no new „access right" emerges** as a result of application and protection of TPMs and RMI.
- **Access to works by users have always been controlled; it has been an indispensable part of the *broader* copyright paradigm. Without it, the copyright system simply could not have existed**. In book shops, record shops, one has had to pay for copies to get full access; in libraries, certain rules have had to be respected in order to receive copies in loan; in case of theatrical presentations, concerts, etc., buying tickets or other arrangements have been needed to the members of the public for getting access.

Debates about DRM – alleged „access rights" (2)

No „access" right

- **Even the beneficiaries of exceptions have not been able to get access to copies without any conditions whatsoever**. Walking into a bookshop, taking a book from the shelves and walking out without payment referring to educational and research exceptions?!
- In the digital online environment, what used to be (i) going to the video shop, (ii) buying a video recording on a cassette; (iii) bringing it home, (iv) putting into the player, (v) sitting down and (vi) pressing the „play" button – **has been replaced by a simple click on the keyboard. The use of TPMs** („DRM") **is the normal way of making access conditional** to the payment of a reasonable price or some other arrangement.

Debates about DRM – scope of protection (1)

Second claim: „even if TPMs are protected, **the protection must not cover ‚access-control' TPMs and should not extend to the prohibition of ‚preparatory acts'"**

- Such interpretation **would make the relevant provisions of the WCT and the WPPT unsuitable** to fulfill the obligation to provide adequate protection for TPMs.
- **The ordinary meaning of the text of the TPM provisions of the two Treaties and the documents of the preparatory work make it clear that such kind interpretation is not well founded** (for the interpretation rules, see Articles 31 and 32 of the Vienna Convention on the Law of Treaties).

Debates about DRM – scope of protection (2)

Obligations to protect „access control" and to prohibit „preparatory acts":

WCT Article 11 and WPPT Article 18:

„Contracting Parties **shall provide adequate legal protection and effective legal remedies against the circumvention of effective technological measures** that are used by [authors][performers or producers of phonograms] **in connection with the exercise of their rights** under [this Treaty or the Berne Convention][this Treaty] and **that restrict acts**, in respect of their [works][performances or phonograms] , **which are not authorized** by [the [authors][the performers or the producers of phonograms] concerned **or permitted by law**." (Emphasis added.)

Debates about DRM – scope of protection (3)

Obligations to protect „access control" and to prohibit „preparatory acts":Article 6 of the 2001 Information Society (Copyright) Directive:

1. Member States shall provide adequate legal **protection against the circumvention of any effective technological measures**, which the person concerned carries out in the knowledge, or with reasonable grounds to know, that he or she is pursuing that objective.

2. Member States shall provide adequate legal protection **against the manufacture, import, distribution, sale, rental, advertisement for sale or rental, or possession for commercial purposes of devices, products or components or the provision of services** which:

(a) are promoted, advertised or marketed for the purpose of circumvention of, or (b) have only a limited commercially significant purpose or use other than to circumvent, or (c) are primarily designed, produced, adapted or performed for the purpose of enabling or facilitating the circumvention of, any effective technological measures. (Emphasis added.)

Debates about DRM – scope of protection (4)

Obligations to protect „access control" and to prohibit „preparatory acts"
Article 6 of the 2001 Information Society (Copyright) Directive:

3. For the purposes of this Directive, the expression **'technological measures' means any technology, device or component that, in the normal course of its operation, is designed to prevent or restrict acts,** in respect of works or other subject matter**, which are not authorised by the rightholder** of any copyright or any right related to copyright as provided for by law or the *sui generis* right provided for in Chapter III of Directive 96/9/EC. Technological measures shall be deemed 'effective' **where the use of a protected work or other subject matter is controlled by the rightholders through application of an access control or protection process**, such as encryption, scrambling or other transformation of the work or other subject-matter or a copy control mechanism, which achieves the protection objective.

(Emphasis added.)

Debates about DRM – scope of protection (5)

Obligations to protect „access control" and to prohibit „preparatory acts"

- Such obligations follow not only from the text of the treaty provisions but it is **also confirmed by the documents of the negotiating history. The treaty language proposals submitted by the various delegations** (not only by the EC and the US, but, e.g., **also by Brazil, Argentina and other Latin American economies**) **covered all kinds of TPMs** (not only „access controls" or only „copy controls") **and also „preparatory acts"** (manufacturing and distributing TPM-defeating devices, such as decoders).
- Since actual circumvention of TPMs usually takes place in places where detection and counter-measures are unrealistic, **the obligation to grant „adequate protection" for TPMs may only be fulfilled if protection extends to the stage of „preparatory acts."**

Debates about DRM – exceptions and limitations (1)

Third claim: TPMs make the application of exceptions and limitations impossible.

Article 6 of the the Information Society (Copyright) Directive:

„Notwithstanding the legal protection provided for in paragraph 1**, in the absence of voluntary measures taken by rightholders**, including agreements between rightholders and other parties concerned, **Member States shall take appropriate measures to ensure that rightholders make available to the beneficiary of an exception or limitation** provided for in national law in accordance with Article 5(2)(a) [reprographic reproduction], (2)(c) [certain library and educational uses], (2)(d) [ephemeral recording by broadcasters], (2)(e) [copying of broadcasts in social institutions], (3)(a) [illustration for teaching; scientific research], (3)(b) [use by people with disability] or (3)(e) [public security; official procedures] **the means of benefiting from that exception or limitation, to the extent necessary** to benefit from that exception or limitation and **where that beneficiary has legal access to the protected work or subject-matter concerned**. (Emphasis added; continues.)

Debates about DRM – exceptions and limitations (2)

Article 6(4) of the Information Society (Copyright) Directive (contd.)

„Member State **may also take such measures** in respect of a beneficiary of an exception or limitation provided for in accordance with Article 5(2)(b) [private copying], **unless reproduction for private use has already been made possible by rightholders to the extent necessary to benefit from the exception or limitation** concerned and **in accordance with the provisions of Article 5(2)(b) and (5)** [Article 5(5) subjects the application of all exceptions and limitations to the „three-step test"], **without preventing rightholders from adopting adequate measures regarding the number of reproductions** in accordance with these provisions…

The provisions of the first and second subparagraphs [see the preceding slide and the first paragraph on this slide] **shall not apply to works or other subject-matter made available to the public on agreed contractual terms in such a way that members of the public may access them from a place and at a time individually chosen by them**." (Emphasis added.)

Debates about DRM – exceptions and limitations (3)

Implementation of Article 6(4) of the Directive

- **The majority Member States apply mediation-arbitration systems** as such intervention measures. In general, **the pessimistic forecasts** – according to which the application and protection of TPMs would not guarantee the applicability of important exceptions and limitations – **have turned out to be unjustified**.
- An example: **In Hungary, the intervention system also takes the form of mediation-arbitration**, for which the Copyright Experts Council is competent. The system **has been in force since May 1, 2004**, the day of Hungary's accession to the European Union.
- **The number of disputes brought in front of the Council during the more than seven years, from May 1, 2004 until March 20, 2012** (the date of completion of this ppt. presentation), because beneficiaries have been unable to get access to works and objects of related rights in order to take advantage of exceptions and limitations, is: **1.** The number of cases where complaints have turned out to be justified: **0**.

Debates about DRM – exceptions and limitations (4)

US Copyright Act (DMCA), Article 1201; **specific exception to the prohibition of circumvention of TPMs:**

- non-profit libraries, archives and educational institutions (good-faith determination for acquisition),
- law enforcement, intelligence and other government activities,
- reverse engineering,
- encryption research,
- protection of minors,
- protection of personal information,
- security testing.

Debates about DRM – exceptions and limitations (5)

US Copyright Act (DMCA), Article 1201; **triannual administrative rulemaking to identify possible exceptions justified to the prohibition of access-control TPMs** (concerning certain „classes of works"). The **criteria t**o be used:

(i) the **availability** for use of copyrighted works;

(ii) the **availability for use of works for nonprofit archival, preservation, and educational purposes**;

(iii) the **impact** that the prohibition on the circumvention of technological measures applied to copyrighted works has **on criticism, comment, news reporting, teaching, scholarship, or research;**

(iv) the **effect of circumvention** of technological measures **on the market for or value of copyrighted works**; and

(v) such other factors as the Librarian considers appropriate.

Debates about DRM – exceptions and limitations (6)

The current (2010) list of exceptions determined through administrative rulemaking under section 1201(a)(1)(B) to (E) (emphasis added)**:**

(1) Motion pictures on DVDs that are lawfully made and acquired and that are protected by the Content Scrambling System when circumvention is accomplished **solely in order to accomplish the incorporation of short portions of motion pictures into new works for the purpose of criticism or comment**, and where the person engaging in circumvention believes and has reasonable grounds for believing that circumvention is necessary **to fulfill the purpose of the use in the following instances:**
(i) Educational uses by college and university professors and by college and university film and media studies students;
(ii) Documentary filmmaking;
(iii) Noncommercial videos.

(2) Computer programs that enable wireless telephone handsets to execute software applications, where circumvention is accomplished for the sole purpose of **enabling interoperability** of such applications, when they have been lawfully obtained, with computer programs on the telephone handset.... (continues)

Debates about DRM – exceptions and limitations (7)

The current (2010) list of exceptions determined through adminstrative rulemaking under section 1201(a)(1)(B) to (E) (continued, emphasis added)**:**

(3) Computer programs, in the form of firmware or software, **that enable used wireless telephone handsets to connect to a wireless telecommunications network,** when circumvention is initiated **by the owner of the copy of the computer program solely in order to connect to a wireless telecommunications network and access to the network is authorized** by the operator of the network.

(4) Video games accessible on personal computers and protected by technological protection measures **that control access to lawfully obtained works**, when circumvention is accomplished **solely for the purpose of good faith testing** for, investigating, or correcting security flaws or vulnerabilities, **if**:
(i) The information derived from the security testing is **used primarily to promote the security of the owner or operator** of a computer, computer system, or computer network; **and**
(ii) The information derived from the security testing is **used or maintained in a manner that does not facilitate copyright infringement or a violation of applicable law**. (continues)

Debates about DRM – exceptions and limitations (8)

The current (2010) list of exceptions determined through administrative rulemaking under section 1201(a)(1)(B) to (E) (continued; emphasis added)**:**

(5) Computer programs protected by dongles that prevent access due to malfunction or damage and which are obsolete. A dongle shall be considered obsolete if it is no longer manufactured or if a replacement or repair is no longer reasonably available in the commercial marketplace; and

(6) Literary works distributed in ebook format when all existing ebook editions of the work (including digital text editions made available by authorized entities) **contain access controls that prevent the enabling either of the book's read-aloud function or of screen readers that render the text into a specialized format.**

V. SPECIAL PRINCIPLES AND RULES FOR DEVOLOPING ECONOMIES

Special treatment for developing economies, in particular for LDCs – TRIPS (1)

TRIPS Agreement

Article 65. Transitional Arrangements

1. Subject to the provisions of paragraphs 2, 3 and 4, **no Member shall be obliged to apply the provisions of this Agreement before the expiry of a general period of one year** following the date of entry into force of the WTO Agreement. (**January 1, 1995**)

2. **A developing country Member is entitled to delay for a further period of four years the date of application**, as defined in paragraph 1, of the provisions of this Agreement other than Articles 3, 4 and 5 (national treatment, MFN treatment; exception to WIPO treaties on acquisition and maintenance of IP rights)…

5. A Member availing itself of a transitional period under paragraphs 1, 2, 3 or 4 **shall ensure that any changes in its laws, regulations and practice made during that period do not result in a lesser degree of consistency with the provisions of this Agreement.** (Emphasis added.)

Special treatment for developing economies, in particular for LDCs – TRIPS (2)

TRIPS Agreement

Article 66. Least-Developed Country Members

… **In view of the special needs and requirements of least-developed country Members, their economic, financial and administrative constraints, and their need for flexibility to create a viable technological base**, such Members **shall not be required to apply the provisions of this Agreement, other than Articles 3, 4 and 5, for a period of 10 years from the date of application as defined under paragraph 1 of Article 65** (that is until 2006). **The Council for TRIPS shall, upon duly motivated request by a least-developed country Member, accord extensions of this period.**

At present, an extension is applied until 2013 (for pharmaceuticals, until 2016).

Article 67. Technical cooperation. Aid for Trade Initiative (AfT). Enhanced Integrated Framework (EIF).

Special treatment for developing economies, in particular LDCs – TRIPS (3)

Doha Declaration (November 2001)

3. **We recognize the particular vulnerability of the least-developed countries** and the special structural difficulties they face in the global economy. **We are committed to addressing the marginalization of least-developed** countries in international trade and to **improving their effective participation in the multilateral trading system…**

17. [Access to medicines]

18. [Geographical indications]

19. We instruct the Council for TRIPS, in pursuing its work programme … to examine, inter alia, the relationship between the TRIPS Agreement and the Convention on Biological Diversity, the protection of traditional knowledge and folklore, and **other relevant new developments raised by members pursuant to Article 71.1. In undertaking this work, the TRIPS Council shall be guided by the objectives and principles set out in Articles 7 and 8 of the TRIPS Agreement and shall take fully into account the development dimension.** (Emphasis added.)

Special treatment for developing economies, in particular for LDCs – WIPO (1)

WIPO Development Agenda (adopted by the September-October 2007 sessions of the General Assembly):

- **Cluster A: Technical assitance and capacity building**
- **Cluster B: Norm-setting, flexibilities, public policy and public domain**
- **Cluster C: Technology transfer, information and communication (ICT) and access to knowledge**
- **Cluster D: Assessment, evaluation and impact studies**
- **Cluster E: Institutional matters including mandate and governance**
- **Cluster F: Other issues**

Special treatment for developing economies, in particular for LDCs – WIPO (2)

WIPO Development Agenda

From Cluster B (emphasis added)**:**

17. In its activities, including norm-setting, WIPO **should take into account the flexibilities** in international intellectual property agreements, **especially those which are of interest to developing countries and LDCs**…

19. To initiate discussions on how, within WIPO's mandate, **to further facilitate access to knowledge and technology for developing countries and LDCs to foster creativity and innovation** and to strengthen such existing activities within WIPO…

23. To consider how to better **promote pro-competitive intellectual property licensing practices,** particularly **with a view to fostering creativity, innovation and the transfer and dissemination of technology** to interested countries, **in particular developing countries and LDCs.**

Special treatment for developing economies, in particular for LDCs – WIPO (3)

WIPO Development Agenda

From Cluster C (emphasis added)**:**

25. To explore **intellectual property -related policies and initiatives necessary to promote the transfer and dissemination of technology, to the benefit of developing countries** and to take appropriate measures **to enable developing countries to fully understand and benefit from different provisions, pertaining to flexibilities provided for in international agreements, as appropriate.**

27. **Facilitating intellectual property -related aspects of ICT for growth and development:** Provide for, in an appropriate WIPO body, discussions focused on the importance of intellectual property -related aspects of ICT, and its role in economic and cultural development….

28. **To explore supportive intellectual property -related policies and measures** Member States, especially developed countries, could adopt for **promoting transfer and dissemination of technology to developing countries**.

Appendix to the Berne Convention: out-of-date provisions – valid principles (1)

- **Berne Convention, Article 21:**

(1) Special provisions regarding developing countries are included in the Appendix.

(2) Subject to the provisions of Article 28(1)(b), **the Appendix forms an integral part of this Act.** (Emphasis added.)

- **TRIPS Agreement, Article 9.1:**

1. **Members shall comply with Articles 1 through 21 of the Berne Convention (1971) and the Appendix thereto**. However, Members shall not have rights or obligations under this Agreement in respect of the rights conferred under Article 6*bis* of that Convention or of the rights derived therefrom. (Emphasis added.)

- **WCT, Article 1(4):**

(4) Contracting Parties shall comply with Articles 1 to 21 and the Appendix of the Berne Convention.

Appendix to the Berne Convention: out-of-date provisions – valid principles (2)

Article I (1) **Any country regarded as a developing country in conformity with the established practice of the General Assembly of the United Nations which** ratifies or accedes to this Act,…and which, **having regard to its economic situation and its social or cultural needs, does not consider itself immediately in a position to make provision for the protection of all the rights as provided for in this Act**, **may,** by a notification deposited with the Director General at the time of depositing its instrument of ratification or accession or,…at any time thereafter, **declare that it will avail itself of the faculty provided for in Article II, or of the faculty provided for in Article III, or of both of those faculties.**

(2) (a) **Any declaration** under paragraph (1) **notified before the expiration of the period of ten years from the entry into force of Articles 1 to 21 and this Appendix…shall be effective until the expiration of the said period**. Any such declaration **may be renewed** in whole or in part for periods of ten years each by a notification deposited with the Director General not more than fifteen months and not less than three months before the expiration of the ten-year period then running.

(b) Any declaration under paragraph (1) **notified after the expiration of the period of ten years from the entry into force of Articles 1 to 21 and this Appendix…shall be effective until the expiration of the ten-year period then running.** Any such declaration may be renewed as provided for in the second sentence of subparagraph (a). (Emphasis added.)

Appendix to the Berne Convention: out-of-date provisions – valid principles (3)

Article II

- **Non-exclusive and non-transferable exclusive licenses my be granted by the competent authority for translation of works published in printed or analogous forms under the conditions set in the article** (paragraph (1)).
- The compulsory license, subject to paragraph (3), may be issued, **if, after the expiration of a period of three years commencing on the date of the first publication of the work, a translation of such work has not been published in a language in general use in that country** by the owner of the right of translation, or with his authorization. A license **may also be granted if all the editions of the translation published in the language concerned are out of print** (paragraph (2)).
- In the case of translations **into a language which is not in general use in one or more developed countries, a period of one year is substituted for the period of three years** referred to in paragraph (2).

Appendix to the Berne Convention: out-of-date provisions – valid principles (4)

Article II (contd.)

- **No license obtainable after three years may be granted until a further period of six months has elapsed, and no license obtainable after one year shall be granted under this Article until a further period of nine months has elapsed. If, during the said period , a translation** in the language in respect of which the application was made **is published** by the owner of the right of translation or with his authorization**, no license may be granted** (paragraph (4)).
- Any license may be granted **only for the purpose of teaching, scholarship or research** (paragraph (5)).
- **If a translation of a work is published by the owner of the right of translation or with his authorization at a price reasonably related to that normally charged in the country for comparable works, any license is terminated.** The copies already made before the license terminates may continue to be distributed until their stock is exhausted. (paragraph (6)).

Appendix to the Berne Convention: out-of-date provisions – valid principles (5)

Article III

- **Non-exclusive and non-transferable exclusive licenses** my be granted by the competent authority **for reproduction (reprint)** of works under the conditions set in the article **for systematic instructional activities** (paragraph (1)).
- Such licenses may be granted, in general, **after five years**, but in case of works of the natural and physical sciences, including matematics and of technology, **after three years** and, in case of works of fiction, poetry, drama and music, and for art books, **after seven years**, counted from the first publication of the particular dition of the work , if copies of such edition have not been distributed in that country to the general public or in connection with systematic instructional activities (or have not been in sale for more than six months) at a price reasonably related to that normally charged in the country for comparable works (paragraphs (2), (3) and (7)).

Appendix to the Berne Convention: out-of-date provisions – valid principles (6)

Article IV on further conditions of licenses granted under Articles II and III:

- A license **may be granted only if the applicant…establishes either that he has requested, and has been denied, authorization by the owner of the right** to make and publish the translation or to reproduce and publish the edition, as the case may be, **or that, after due diligence on his part, he was unable to find the owner of the right** (paragraph (1)).
- **No license extends to the export of copies (with certain limited exceptions)**, and **any license is valid only** for publication of the translation or of the reproduction **in the territory of the country concerned** (paragraph (4)).
- **Due provisions must be made for just compensation** „that is consistent with standards of royalties normally operating on licenses freely negotiated between persons in the two countries concerned" and for the payment and transmittal thereof (paragraph (6)).

Appendix to the Berne Convention: out-of-date provisions – valid principles (7)

Elements which seem to be out-of-date:

- **the compulsory licensing system is foreseen equally for all developing economies under UN standards;** since 1971, important differentiation has taken place (however, **it is beyond any doubt that the principles on which the Appendix is based continue being fully applicable at least for LDCs**);
- **in the case of the reprint (reproduction) licenses, the three- five- and seven-years period to be elapsed have become anachronistic** with the advent of reprographic and digital online technologies;
- the **administrative procedures** and the different **deadlines** make the system **unattractive and badly workable;**
- in the case of translation licenses**, the concept of „language general used in the country" does not seem to take into account the problems of small ethnic groups** (that may be found in different economies).

Appendix to the Berne Convention: out-of-date provisions – valid principles (8)

Valid principles:

- the Appendix is applicable for a country that „**having regard to its economic situation and its social or cultural needs, does not consider itself immediately in a position to make provision for the protection of all the rights as provided for in** [the Convention]" → see the special status of **LDCs** in the WTO (and the references to **LDCs** in point 17, 19 and 23 of the WIPO Development Agenda);
- **the special treatment** is mainly **justified for the purpose of teaching/systematic instructional activities, scolarship and research;**
- the compulsory license system **should not endanger the primary markets from where the works originate** (non-exclusive, non-transferable licenses, in general no export is allowed);
- **(in cases where otherwise no exception is applicable) some just compensation is to be paid** (however, the condition that it must be „consistent with standards of royalties normally operating on licenses freely negotiated between persons in the two countries concerned" requires flexible interpretation).

VI. CONCLUSIONS

Revisiting the features of a healthy copyright system (1)

- There is respect for it and it is well functioning because it is a **judicious system** duly taking into account all the legitimate interests.
  - **Due protection and balancing of interests (rights, exceptions and limitations).**
- There is respect for it and it is well functioning because **people understand and accept its objectives.**
  - **Awareness building.**
- There is respect for it and it is well functioning because copyright is **applied** and **exercised the way as „advertized**."
  - **Contractual system and collective management.**
- There is respect for it and it is well functioning because there is an **appropriate mechanism to guarantee respect for it.**
  - **Enforcement.**

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  - **Enforcement.**

Francis Gurry on the balancing of interests in the digital online environment

Francis Gurry, Director General of WIPO, about the future of copyright on the Internet at the „Blue Sky Conference" in Sidney in February 2011:

„It is a question that **implies a series of balances**: between **availability**, on the one hand, **and control of the distribution of works** as a means of extracting value, on the other hand; between **consumers and producers**; between **the interests of society and those of the individual creator**; and between the **short-term gratification of immediate consumption and the long-term process of providing economic incentives that reward creativity and foster a dynamic culture**."

„**Recognizing the limitation of law, and its inability to provide a comprehensive answer, should not mean that we abandon** it…I believe that **the question of… the responsibility of intermediaries is paramount.** The position of intermediaries is key."

THANK YOU FOR YOUR ATTENTION

ceeca@t-online.hu