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An Overview of the International Treatment of Exceptions

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AN OVERVIEW OF THE INTERNATIONAL TREATMENT OF EXCEPTIONS

Eric J. Schwartz^{*}

ABSTRACT

This article is intended as a very brief overview and history of the international treatment of “fair use” or its equivalent — that is, a general summary of the treaty obligations and national law exceptions (in statute or by common law) to the exclusive rights of authors and owners of copyrights.

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I. INTRODUCTION

This article is intended as a very brief overview and history of the international treatment of “fair use” or its equivalent — that is, a general summary of the treaty obligations and national law exceptions (in statute or by common law) to the exclusive rights of authors and owners of copyrights.

“International copyright law” is not a body of law per se, but rather, consists of a multitude of bilateral and, more importantly, multilateral agreements and treaties, which set norms and minimum obligations for participating countries to adopt into their national laws. Thus, core principles such as authorship, ownership, duration, rights, exceptions, and remedies are treated at the national level, based upon and in order to comply with the obligations of the treaties and agreements. More specifically, the territoriality principles of international copyright law prevail, so that the details of implementation of the treaty obligations, and enforcement of rights, are found in and undertaken under the national laws of each treaty-member country.

The past half-century of treaty developments could best be described as a movement not only to secure protection of works in member states, but also to “harmonize” civil and common law copyright systems — to bridge the differences in the treatment of ownership, duration, and rights in national copyright laws. This international movement to “harmonize” copyright laws has also included the treatment of exceptions. As with all other aspects of copyright law, this has meant bridging (or at least, attempting to bridge) the differences in the laws of those countries that incorporate specific statutory exceptions (civil law systems) with those that provide for broad fair use/fair dealing provisions (common law systems).

The hallmark of the international treaty provisions and obligations — and the feature that both enables these treaties and makes them resistant to change — has been their flexibility across legal systems and technological developments. This flexibility has also been evident in, and proven to be a positive characteristic of, the exceptions permissible under national laws.

This broad description of how treaty obligations and national laws coalesce and co-exist does not mean to suggest that countries solely, or even in large measure, adopt domestic provisions for international treaty compliance. In many instances, treaty provisions merely reflect the existing law of the treaty members, or an international consensus on norms.

In the case of exceptions, the international treaty obligations set broad parameters (e.g., the so-called “three-step test”) for countries to adopt into their national systems. Civil law copyright systems generally meet the treaty obligations by including a litany of specific statutory exceptions into their code-based laws. Common law systems generally meet the treaty obligations with broad factors set out for courts to apply with some flexibility. Both types of systems adopt and revise their laws, to a degree, with an eye towards treaty compliance and implementation.

Despite the apparent divergence between civil and common law approaches, in reality, common law and civil law systems — at least in statutory appearance — may look quite similar in the particulars of the copyright laws. That is because common law systems, for political and/or public policy reasons, may include, alongside the broad fair use or fair dealing factors, specific exceptions aimed at particular uses or users (for example, education and research). And civil law systems often, but not always, add a “catch-all” re-iteration of the general treaty obligations on exceptions (such as the so-called “three-step test”) after the long litany of statutory exceptions. This “catch-all” language serves as a ceiling for courts and regulators to interpret the specific statutory exceptions, as well as a tool for ensuring treaty compliance, either in practice, or at least facially.

Nonetheless, the difference between the civil and common law approach has salience for owners and users of copyrighted works. The differences between common and civil law exception systems can best be seen by comparing the United States and continental European systems. In some ways, the two offer a stark contrast, in that the United States offers a broad set of “guidelines” (common law) and Europe includes a long list of statutory exceptions (civil law). The U.S. guidelines generally have more (judicial) flexibility than the more rigid statutory exceptions.

In the United States, four non-exclusive statutory factors are applied by the courts in a non-mathematical, fact-intensive (i.e., no “bright-line rules”), “case-by-case analysis,” to determine whether a particular use is or is not

fair.¹ This system has proven very elastic over almost two centuries. In addition to this general provision, however, the U.S. statutory law has fifteen separate sections containing specific and narrow exceptions that exclude from liability particular users — such as qualified libraries and archives — and/or particular types of activities — such as certain public performances, distributions, making copies, and cable and satellite re-transmissions.² Each of these provisions was incorporated into the law because Congress wanted to address a particular policy issue — such as the preservation of and access to materials at libraries and archives (section 108) — or to satisfy particular constituencies — such as social or community organizations whose performances are largely exempted from infringement liability under section 110 of the Copyright Act.³ The flexible common-law system in the United States therefore stands alongside fact-specific, detailed code.

In the civil law systems of Europe, very detailed statutory exceptions are incorporated into national copyright laws. The European Union Information-Society (Copyright) Directive of 2001, for example, includes one mandatory (reproduction) exception, and at least twenty other specific (albeit optional) statutory exceptions and limitations (for example, pegged to particular rights, such as reproduction and distribution), that EU member countries have incorporated into their national laws to comply with the Directive.⁴ In addition to the specific statutory exceptions — as a way to ensure treaty compliance — the Directive requires member countries to comply with a “catch-all” provision modeled on the Berne Convention’s Article 9(2) “three-step test,” which operates as a ceiling on all of the statutory exemptions.⁵ So, for example, the copyright law of France has a

¹ *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 577 (1994); 17 U.S.C. § 107 (2006). Since the courts have generally held that copyright treaty obligations are not self-executing, the U.S. law on exceptions is found in title 17, not, for example, in the Berne Convention at Article 9(2). *See, e.g., Elsevier B.V. v. UnitedHealth Group Inc.*, No. 09 Civ. 2124 (WHP), 2010 U.S. Dist LEXIS 3261, at *10 (S.D.N.Y. Jan. 14, 2010) (holding that the Berne Convention is not self-executing, citing the Berne Implementation Act of 1988).

² *See* 17 U.S.C. §§ 108–122 (2006).

³ *See id.* § 110. The exception provided in section 110(5)(B) — which exempts certain small restaurants and bars from performances made through “a single receiving apparatus of a kind commonly used in private homes” — has been found to violate the WTO/TRIPS Agreement Article 13 (and Berne Convention Article 9(2)). *See* WTO Dispute Panel Report on Section 110(5) of the U.S. Copyright Act, WT/DS160/R § 7.1, at 69 (June 15, 2000), available at http://www.wto.org/english/tratop_e/dispu_e/dispu_e.htm (including a separate panel damages award, for three years, of \$1.1 million per year as settlement).

⁴ *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 art. 5(1)–(4), 2001 O.J. (L 167) 16-17.

⁵ *Id.* art. 5(5); *see infra* text accompanying notes 35–48.

list of statutory exceptions to economic rights (for uses such as teaching, research, archives, and quotations), which “courts tend to construe . . . narrowly,” and which stands alongside the three-step test.⁶ Similarly, the copyright law of Germany has specific statutory exemptions tied to types of uses (reproduction, etc.) and works (“art catalogs,” “advertising auctions”), but it does not have any “concept as broad as fair use or dealing.”⁷

The difference, then, from U.S. fair use jurisprudence, is that the courts and administrative bodies in these European countries do not have nearly the latitude and flexibility to find uses fair or not, based on each new set of facts presented. The practical reality for copyright owners and users of copyright material is that a “flexible” system — for example, “fair use” in the United States — has its decided strengths and weaknesses. As one commentator (and noted practitioner) summarized “fair use”: “[i]ts imprecision allows for expansion and growth (a strength) as well as subjecting owners and users to uncertainty and risk (a weakness).”⁸ The less flexible civil law systems, of course, have their converse strengths and weaknesses.

⁶ Andre´ Lucas & Pascal Kamina, *France* § 8[2], in *INTERNATIONAL COPYRIGHT LAW AND PRACTICE* FRA-117 (Paul E. Geller and Melville B. Nimmer eds., 2009).

⁷ Adolf Dietz, *Germany* § 8[2], in *id.* GER-117, 128. Another example is the law of Russia, which adopted its first modern copyright law revision in 1993, in order to join international treaties including Berne (acceding in March 2005) and the Geneva Phonograms Treaty (acceding in March 2005), and to comply with a U.S.-Russia Bilateral Trade Agreement. See Eric J. Schwartz, *Recent Developments in the Copyright Regimes of the Soviet Union and Eastern Europe*, 38 *J. COPYRIGHT SOC’Y* 123, 213-18 (Spring 1991) (detailing the specific terms and obligations of the bilateral agreement of the Soviet Union, which was slightly revised and re-signed, in 1992, by Russia). Effective January 1, 2008, Russia revised its copyright law thoroughly as part of the major overhaul of its Civil Code, by the incorporation of a new copyright law in Part IV of the Civil Code. The 2008 Russian law includes exceptions in Articles 1273 to 1280, and 1306, and a modified Berne Article 9(2) three-part test in Article 1229(5). The law has raised questions both about whether the Article 1229 three-part test complies with Berne, and about the too-broad, or at least unclear nature of some of the particular exceptions. See *INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE, 2010 SPECIAL 301 REPORT ON COPYRIGHT PROTECTION AND ENFORCEMENT, RUSSIAN FEDERATION* 18 (2010), available at <http://www.iipa.com/rbc/2010/2010SPEC301RUSSIA.pdf>.

⁸ Richard Dannay, *Copyright Injunctions and Fair Use: Enter eBay – Four-Factor Fatigue or Four-Factor Freedom?*, 37th Annual Donald C. Brace Memorial Lecture (Nov. 14, 2007), 55 *J. COPYRIGHT SOC’Y* 451 (2008). Mr. Dannay notes the many other commentators in particular who have expressed frustration with fair use imprecision. See, e.g., David Nimmer, *“Fairest of Them All” and Other Fairy Tales of Fair Use*, 66 *LAW & CONTEMP. PROBS.* 263, 281 (2003) (concluding that judges first decide whether a use is fair or not, and then “align the four factors to fit that result as best they can”), and Alex Kozinski & Christopher Newman, *What’s So Fair About Fair Use?*, 29th Annual Donald C. Brace Memorial Lecture (Nov. 11, 1999), 46 *J. COPYRIGHT SOC’Y* 513 (1999) (Judge Kozinski, inter alia, commenting on Judge Pierre Leval’s Donald C. Brace Lecture and seminal article on fair use ten years earlier).

II. A BRIEF HISTORY OF TREATY RIGHTS AND EXCEPTIONS

Consideration of the “international” treatment of exceptions is best viewed through the lens of the international treaty obligations and the history of those provisions: the Berne Convention (“Berne”),⁹ the Universal Copyright Convention (“U.C.C.”),¹⁰ the World Trade Organization Agreement on Trade Related Aspects of Intellectual Property Rights (“WTO/TRIPs”),¹¹ and the “digital treaties” — the WIPO Copyright Treaty (“WCT”)¹² and the WIPO Performances and Phonograms Treaty (“WPPT”).¹³ The treaty provisions — on rights and exceptions — merely set “minima” requirements, and often in broad terms, for member states, who are otherwise free to adopt provisions that go beyond those obligations.¹⁴

A. *Early Treaties and Revisions*

The two most important copyright treaties of the last century — Berne and the U.C.C. — were adopted in 1886 and 1952 respectively, so almost all of the rights and obligations, including exceptions, were directed toward printed textual materials — books, journals, maps and the like. Both Berne and the U.C.C. were last revised in 1971; as a result, neither directly addresses “newer” works, rights, uses, and perhaps, exceptions (although the treaties have been flexible and technologically-neutral enough to adapt, albeit with some uncertainty).

⁹ Berne Convention for the Protection of Literary and Artistic Works, Sept. 9, 1886, revised at Paris July 24, 1971, 25 U.S.T. 1341, 828 U.N.T.S. 221.

¹⁰ Universal Copyright Convention, Sept. 6, 1952, 6 U.S.T. 2731, 216 U.N.T.S.

¹¹ Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPs), Apr. 15, 1994, 108 Stat. 4809, 33 I.L.M. 81.

¹² WIPO Copyright Treaty, Dec. 20, 1996, S. TREATY DOC. NO. 105–17, 36 I.L.M. 65 (1997).

¹³ WIPO Performances and Phonograms Treaty, Dec. 20, 1996, S. TREATY DOC. NO. 105–17, 36 I.L.M. 76 (1997).

¹⁴ The treatment of exceptions in other pure neighboring rights treaties, such as the Geneva Phonograms Convention or the Rome Convention, follow this general model, but are not covered in this article. *See, e.g.*, Convention for the Protection of Producers of Phonograms Against Unauthorized Duplication of Their Phonograms, Oct. 29, 1971, 25 U.S.T. 309, 866 U.N.T.S. 67. That Convention provides for exclusive rights in Article 2 — protecting producers of phonograms “against the making of duplicates without the consent of the producer and against the importation of such duplicates.” Additionally, it provides in Article 6 for “limitations on protection” — which permits “the same kinds of limitations as are permitted with respect to the protection of authors of literary and artistic works” and includes, under specific conditions, compulsory licenses (i.e., payment of “equitable remuneration”) for uses “solely for the purpose of teaching or scientific research.”

1. *The Berne Convention*

The history of exceptions (including fair use-style exceptions) to exclusive rights in the international copyright treaties is a relatively recent one.¹⁵ The modern treatment of exceptions begins in earnest in 1967, when the pre-eminent international treaty — the Berne Convention for the Protection of Literary and Artistic Works — was amended to add an explicit reproduction right and an accompanying exception to this right in Article 9.¹⁶

Before 1967, Berne explicitly required only an exclusive right of translation and exceptions thereto, although the original 1886 treaty certainly made implicit reference to protections against the copying of literary and artistic works. Thus, many of the basic exclusive rights, such as the reproduction right, were not clearly delineated in the early Berne acts, that is, until 1967; neither were the “exceptions” clearly pegged to any explicit right.

For example, the original Berne members of 1886¹⁷ all provided for a copying or reproduction right in their national laws, but they could not agree on the scope of the right for the international treaty, so the treaty was silent with regard to granting authors this explicit right. In lieu of granting authors an exclusive reproduction right, the Berne Convention beginning in 1886 (and until 1967), offered a hodge-podge of other rights, and exceptions thereto: it prohibited “unlawful reproductions” including “unauthorized indirect appropriations” of adaptations; it granted other rights (and exceptions), such as an exclusive right to composers against the making of adaptations of musical works “to instruments which can reproduce them mechanically” (later, with a compulsory license, now found in Article 13 of Berne); and for authors of literary and artistic works, it offered the right to authorize the “reproduction and public performance of their works by cinematography.”¹⁸ These latter two rights were adopted in

¹⁵ This is especially true in relation to the common law history of fair use in the United States, which dates back to 1841 and Justice Story’s opinion in *Folsom v. Marsh*, 9 F. Cas. 342, 348 (C.C.D. Mass. 1841) (No. 4901).

¹⁶ For detailed analysis of the Berne Convention, including analysis of its provisions, and a review of each of the revision conferences and new acts of Berne throughout its history, see SAM RICKETSON & JANE C. GINSBURG, *INTERNATIONAL COPYRIGHT AND NEIGHBOURING RIGHTS: THE BERNE CONVENTION AND BEYOND* (2d ed. 2006) (two volumes).

¹⁷ The United States was, of course, not an original member of Berne in 1886, instead, joining effective March 1, 1989.

¹⁸ Berne Convention of September 9, 1886, arts. 5, 10 [hereinafter Berne Convention]

the 1908 Berne revisions.

The September 9, 1886, version of Berne gave authors “the exclusive right of making or authorizing translation of their works” for a ten-year period beginning from the work’s first publication.¹⁹ The ten-year window was included because it had the advantage “of granting authors absolute protection” which was “extensive” and simpl[e]” in lieu of granting a right with accompanying exceptions.²⁰ The original Berne Convention did include narrow exceptions for the reproduction of “articles from newspapers and periodicals” — in original or translation — “unless the authors or publishers have expressly forbidden it,” but such prohibitions could not be applied to “articles of political discussion, or to the reproduction of news of the day or miscellaneous facts.”²¹ Article 8 also permitted the “right to include excerpts from literary or artistic works for use in publications for teaching or scientific purposes, or for chrestomathies”²² Governments were allowed “to permit, to control, or to prohibit . . . the circulation, presentation or exhibition of any work.”²³ Last, under Article 15, member countries could enter into special arrangements “provided . . . that such arrangements confer upon authors or their successors in title more extensive rights than those granted by the Union.”²⁴

At the 1967 Stockholm revision deliberations, the Berne countries adopted the reproduction right as an exclusive right in Article 9, to accompany the translation right in Article 8. Today, Berne, as last revised by the Paris Act of 1971, also explicitly provides for the right of public performance for dramatic, dramatico-musical and musical works (Article 11), the right of broadcasting (Article 11bis), the right of public recitation for literary works (Article 11ter), the right of adaptation (Article 12), and

(original text). On the “mechanical” license for musical composition adaptations, see *id.* art. 13; on copies by cinematography, see Berne Convention for the Protection of Literary and Artistic Works, Berlin Act, Nov. 13, 1908, art. 14.

¹⁹ *Id.* art. 5.

²⁰ *Berne Convention, Second Conference of Berne, 1885 – Report of the Committee* art. 5, in INTERNATIONAL BUREAU OF INTELLECTUAL PROPERTY, Geneva, BERNE CONVENTION CENTENARY (1886–1986) 120 [hereinafter *Second Conference of Berne, Report of the Committee*].

²¹ Berne Convention art. 7; see also discussion of Articles 5, 6 and 7, in *Second Conference of Berne, Report of the Committee, supra* note 20.

²² Berne Convention art. 8; see also discussion of Article 8 in *Second Conference of Berne, Report of the Committee, supra* note 20, at 121. (allowing for national legislation and/or “special arrangements” between Berne members to permit “lawful borrowings from literary or artistic works for publications intended for education or of scientific character, or for chrestomathies” [collections of literary passages]).

²³ Berne Convention art. 13.

²⁴ *Id.* art. 15.

cinematographic work rights (Article 14).²⁵ However, the Berne Convention is silent on the most critical of rights (and exceptions) in the digital era — the rights of distribution and/or communication to the public, including a making available right — all of which were considered, and added, in later treaties (notably the WIPO “digital” treaties in 1996).

The reproduction right in Article 9 is “the exclusive right of authorizing the reproduction of [literary and artistic] works, in any manner or form.” At the revision conference in 1967, along with the adoption of the reproduction right, the first explicit exception to that exclusive right was added — the so-called “three-step test” in Article 9, paragraph 2. This exception only applies to the right of reproduction, and does not now apply to the other exclusive rights — public performance, broadcasting, public recitation, adaptation, or the rights granted to producers of cinematographic works. In short, there are no exceptions — at least as provided for in the Berne Convention — to rights other than reproduction.

At the 1967 Berne revisions, the member states also adopted the Stockholm “Protocol Regarding Developing Countries.”²⁶ Under these provisions — revised in 1971 and now titled the “Appendix to the Paris Act of 1971” — translations may be undertaken in developing countries²⁷ without permission of the copyright authors (or publishers), under a compulsory license, if the translation is made for certain identified works, and for specific purposes, all within carefully managed timetables.²⁸ These provisions permit “certain Union countries, under the conditions specified therein, more latitude as regards the rights of translation and of reproduction than is normally permitted by the Convention proper.”²⁹ The provisions were advocated for by developing countries (who made up over one-third of the Berne member states in 1967 at the beginning of the Stockholm Revision Conference). They “argued that large publishing houses located in the developed nations charged high prices for the works they controlled, and had little or no interest in supplying proper translations to developing

²⁵ Berne Convention, revised at Paris July 24, 1971, art. 13, 25 U.S.T. 1341, 828 U.N.T.S. 221. Additionally, Article 13 provides for a “right of recording music works” which is the “mechanical license” — in essence a compulsory license for users to make sound recordings of previously released musical compositions upon payment of a fixed fee.

²⁶ Protocol Regarding Developing Countries to the Berne Convention for the Protection of Literary and Artistic Works, Sept. 9, 1886, revised at Stockholm July 14, 1967 (July 14, 1967).

²⁷ “Developing countries” is defined by the General Assembly of the United Nations.

²⁸ See RICKETSON & GINSBURG, *supra* note 16, at 120-33.

²⁹ CLAUDE MASOUYE, WORLD INTELLECTUAL PROPERTY ORGANIZATION, GUIDE TO THE BERNE CONVENTION FOR THE PROTECTION OF LITERARY AND ARTISTIC WORKS (PARIS ACT, 1971) 146, comment A.1 (Appendix) (1978).

nations.”³⁰ So, exceptions were permitted — only within these countries and under limited conditions — for the making of certain translations and related reproductions, and with further restrictions to ban the export of those compulsory-licensed translations to other countries.

2. *The Universal Copyright Convention*

The history of the U.C.C. and exclusive rights and exceptions somewhat mirrors Berne, even though the U.C.C. did not come into force until 1955. When the U.C.C. was adopted on September 6, 1952, it provided only one exclusive right that member nations had to incorporate into their national laws — the “exclusive right of the author to make, publish, and authorize the making and publication of translations of works protected.” The U.C.C. also included a limitation on that right, namely, a restriction that the right be used within a seven-year period, or lost to a compulsory license (with compensation paid to the author, if she could be identified).³¹ Like Berne, the U.C.C. implied protections against copying, even if an explicit and exclusive reproduction right was not granted at the outset of the treaty.

In 1971, revisions to the U.C.C. (Paris Act) added new required rights: “the basic rights ensuring the author’s economic interests, including the exclusive right to authorize reproduction by any means, public performance and broadcasting” as well as, by general reference, an adaptation right.³² The 1971 revisions then added broad language regarding exceptions to the exclusive rights: “any Contracting State may, by its domestic legislation, make exceptions that do not conflict with the spirit and provisions of this Convention” and further, “[a]ny State whose legislation so provides, shall nevertheless accord a reasonable degree of effective protection to each of the rights to which exception has been made.”³³

³⁰ See RICKETSON & GINSBURG, *supra* note 16, at 121, 129. In June 1967, there were fifty-eight Berne members; today (as of January 2010) there are 164. See Berne Convention, <http://www.wipo.int/treaties/en/ip/berne> (last visited May 19, 2010).

³¹ Universal Copyright Convention, Sept. 6, 1955, art. 5, paras. 1-2, United Nations Educational, Scientific and Cultural Organization (UNESCO).

³² Universal Copyright Convention, as revised at Paris on July 24, 1971, art. 4*bis*, para. 1, United Nations Educational, Scientific and Cultural Organization (UNESCO).

³³ *Id.* The 1971 revisions retained — almost intact — the 1952 “translation” right, and retained, but revised, the seven-year use-or-lose compulsory license. See *id.* art. 5, paras. 1 and 2. In 1967, later revised in 1971 (and consistent with similar provisions also made in 1967 and 1971 to the Berne Convention), extensive new provisions were added pertaining to compulsory licensing of translations for certain identified works, for specific purposes and under detailed timetables, but all limited to undertakings in “developing” countries (as defined by the General Assembly of the United Nations) — in Articles 5*bis*, 5*ter*, and 5*quater*.

3. A Brief History of the Three Step Test

The three-step test of Berne is now the international standard that governs — for treaty compliance purposes — the scope of fair use and any and all other exceptions to the exclusive rights of authors. Before the existing language was adopted in 1967, alternative versions were considered and rejected after — as even the official guidebook describes it — a “pro- longed debate.”³⁴ At the commencement of the conference in Stockholm in 1967, an initial draft of Article 9(2) would have permitted the reproduction of works in three cases: “(a) for private use; (b) for judicial or administrative purposes; and (c) in certain particular cases, provided (i) that reproduction is not contrary to the legitimate interests of the author, and (ii) that it does not conflict with the normal exploitation of the work.”³⁵ However, what emerged as the final 1967 draft was only the last clause — further re-ordered and revised. Once adopted in 1967, Berne Article 9 was never subsequently amended.

The Berne Article 9(2) three-step test reads as follows:

It shall be a matter for legislation in the countries of the Union to permit the reproduction of such works in certain special cases, provided that such reproduction does not conflict with a normal exploitation of the work and does not unreasonably prejudice the legitimate interests of the author.³⁶

The “interpretation” of what was finally adopted has “produce[d] much

³⁴ MASOUYE, *supra* note 29, at 55, comment 9.6.

³⁵ Discussion of Article 9(2) at the Berne Convention Conference in Stockholm, 1967 – Report of the Committee (Svante Bergstrom), in INTERNATIONAL BUREAU OF INTELLECTUAL PROPERTY, BERNE CONVENTION CENTENARY (1886–1986) 196, paras. 78–86 (1986). There were many difficulties, detailed in the 1967 report, coming to final agreement — some were policy decisions considered and revised, others were more practical considerations. For an example of the latter: “[i]t proved very difficult to find an adequate French translation for the expression ‘does not unreasonably prejudice.’ ” *Id.* para. 84. An example of the former is that the Committee adopted a proposal to place the second condition before the first (in subparagraph c).

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.

Id. para. 85. Paragraph 86 of the Report then noted how the “final” wording for paragraph 2 in Article 9 should and does, to this day, read.

³⁶ Berne Convention art. 9(2).

difference of opinion.”³⁷

Berne has been revised five times since its inception in 1886 — in 1908 (Berlin), 1928 (Rome), 1948 (Brussels), 1967 (Stockholm), and last in 1971 (Paris). The treaty revisions have a “legislative history” of sorts. It includes the history of the revisions (including conference deliberations and alternative amendments), as well as two “official” World Intellectual Property Organization (“WIPO”) guidebooks, both authored by long-time WIPO officials, that describe the revisions and legislative intent of the drafters.

The first guidebook was written in 1978 by Claude Masouye. The more recent guidebook was written by Dr. Mihaly Ficsor in 2003; it was meant to coincide with the two digital treaties entering into force in 2002, but also to provide a refreshed history of Berne and the other treaties administered by the WIPO. The guidebooks detail in short sections (referred to by numbered “comments”) each of the provisions of the Berne Convention. Since the three-step test was first adopted in 1967, and has never been amended, and since the other international treaties — notably, the WTO/TRIPs, WCT and the WPPT — have all adopted identical language to Berne Article 9(2), the explanations provided by the two guidebooks remain the only “legislative histories” and detailed quasi-official explanations of the three-step test, beyond the 1967 conference deliberations.

The Masouye and Ficsor commentaries each provide a description of the three-step test, with the 1974 Masouye guidebook providing a perspective roughly contemporaneous to the adoption of the 1967 Stockholm Act and the Paris Act of 1971, and the Ficsor guidebook providing much more depth, as well as an historic perspective, given new technological advances, thirty-six years after adoption of the 1967 exception.

The Masouye guidebook views the three parts of the three-step test as wholly interdependent: while the provision allows member countries to “cut down” the reproduction right and to permit works to be reproduced “in certain special cases,” the key phrases are to “apply cumulatively: the reproduction must not conflict with a normal exploitation of the work and must not unreasonably prejudice the legitimate interests of the author.”³⁸

Mousaye further notes that “[i]f the contemplated reproduction would be such as to conflict with a normal exploitation of the work it is not permitted at all,” “even if payment is made to the copyright owner” through a compulsory license or otherwise (using the example of compulsory li-

³⁷ MASOUYE, *supra* note 29, at 55, cmt. 9.6.

³⁸ *Id.*

censes to reproduce novels or schoolbooks as a barred activities).³⁹ It further explains how to read the three parts of the test together, describes how to parse the language (such as “prejudice”), and provides examples.⁴⁰

The Masouye guidebook focuses on the technology of the day, namely, on “reprographic reproduction” of textual material. In Comment 9.9, the guidebook acknowledges that “most countries allow a few photocopies to be made without payment especially for personal or scientific use” but then, in a follow-up, notes that such an exception “does not cover any collective use . . . and it assumes that the [permitted] reproduction is not done for profit.” The guidebook further discusses personal and private uses (including home taping) and “collective mechanisms,” while noting (in an understatement when read today) that any “limitation to private use becomes less effective when copies can be made privately in large numbers” and “with the arrival of new copyright techniques the situation changes.” The comment concludes by acknowledging that “copying on a large scale seriously damages the interests of the copyright owners” so that “[t]hese interests must therefore be reconciled with the need of users.”⁴¹

Finally, Masouye closes with an observation with which many a national legislator might both agree and disagree: “[t]he legislator’s task is not an easy one. This paragraph, [Article 9(2)] with its two conditions, provides him with certain guidelines.”⁴²

The Ficsor guidebook provides over twenty comments just on Article 9(2), parsing virtually every word in paragraph 2 on its meaning and intention — including an extensive review of the 1967 Stockholm deliberations and the preparatory meetings in 1964 and 1965 in advance of Stockholm.⁴³

As Dr. Ficsor notes, the original purpose and examples provided for in 1967 pertained to the technology of “reprographic reproduction,” but though the technologies have changed, “the way paragraph (2) should be applied continues to be valid . . . in respect of the indication of the structure of the test . . .”⁴⁴ In short, Dr. Ficsor agrees with the Masouye reading, noting that even though “special cases is mentioned at the end” of the

³⁹ *Id.* at 55, cmt. 9.7.

⁴⁰ *Id.* at 55-56, cmt. 9.8.

⁴¹ *Id.* at 56-57, cmts. 9.10–9.12.

⁴² *Id.* at 57, cmt. 9.13.

⁴³ DR. MIHALY FICSOR, WORLD INTELLECTUAL PROPERTY ORGANIZATION, GUIDE TO THE COPYRIGHT AND RELATED RIGHTS TREATIES ADMINISTERED BY WIPO AND GLOSSARY OF COPYRIGHT AND RELATED RIGHTS TERMS, 56-60, comments BC9.11–9.29 (2003). Dr. Ficsor is the former Assistant Director General of the WIPO in charge of the Copyright Sector.

⁴⁴ *Id.* at 56, cmt. BC-9.12.

provision, “in fact, it is the first condition to be checked.”⁴⁵ In referencing the Stockholm report, he repeats that, “if [a reproduction] conflicts with the normal exploitation of the work, [the] reproduction is not permitted at all.” According to Dr. Ficsor, “exploitation” means “any form of exploitation which has . . . so considerable importance that those who make use of it may enter into economic competition with the exercise of the author’s right in the work (in other words, which may undermine the exploitation of the work by the author . . . in the market).”⁴⁶ Last, regarding “unreasonable prejudice,” Dr. Ficsor notes that while “[n]o direct and explicit guidance” is found in the text of the Convention or the 1967 Stockholm revision conference materials, “[s]ince any exception to the right of reproduction must inevitably prejudice the author’s interests” the 1967 drafters qualified and limited this “prejudice by introducing the term . . . ‘unreasonable.’”⁴⁷

Although the Masouye guidebook — published right after the most recent (1971) revisions to Berne — focused on the technological issues present at that time, Masouye did contemplate the development of new technologies, and the future need to evaluate Article 9(2) in light of these innovations. As the Ficsor guidebook points out, however, even over twenty years later, despite the continuing advances in technology, Article 9(2) largely remains to be interpreted as it was at the time of the Stockholm and Paris revisions. The goal remains the same — that is, to “reconcile” the interests of copyright owners and users. While this becomes more challenging in light of rapid technological progressions, the structure and application of the three-step test as articulated by Masouye and Ficsor endures.

In short, if the overarching goal of copyright laws is to reconcile the interests of authors, owners and users, the function of the three-step test according to the commentators is to be flexible and technologically neutral, but overall, to narrow and limit the nature and scope of permissible exceptions to the rights of authors and owners, as articulated in national copyright laws.

B. The Exception in Treaties After Berne

Since Article 9(2) of Berne applies only to exceptions to the reproduction right, and is otherwise silent on exceptions for the other rights detailed in that convention, it was left to later agreements — notably the

⁴⁵ *Id.* at 57, cmt. BC-9.13.

⁴⁶ *Id.* at 57, cmt. BC-9.12, BC-9.21.

⁴⁷ *Id.* at 60, cmt. BC-9.21.

WTO TRIPs Agreement, and the WIPO “digital treaties” — to recognize other explicit rights and apply the same three-step test to these rights. Although revision to the 1971 Paris Act of Berne was contemplated in the 1980s, it was the international trade agreement — the General Agreement on Tariffs and Trade (“GATT”),⁴⁸ that implemented these changes through its intellectual property rights agreement (WTO/TRIPs), which was first adopted at the completion of the GATT Uruguay negotiations in 1994, and entered into force (in the U.S. and in the other original accession countries) on January 1, 1996.

The WTO TRIPs Agreement clarified the scope of existing protections, expanded rights (to include, for example, rental), and combined neighboring rights (for performers and sound recording producers) into a single agreement. It also added a panoply of enforcement provisions including civil, criminal, customs and other provisional measures as part of adoption of the “new” (mid-1990s) international norms.⁴⁹ The two digital treaties — the WCT and WPPT — were subsequently adopted in December 1996 (although they did not go into force until March and May 2002, respectively), adding rights and protections for the then-dawning digital era.

1. *WTO TRIPs Agreement*

The WTO TRIPs Agreement incorporated Berne and all of its rights and exceptions in Articles 1 through 21, and the Appendix, inclusive (with the exception of “moral rights” in Article 6bis).⁵⁰ The WTO TRIPs Agreement added a rental right for computer programs and cinematographic works, and rights for performers and producers of phonograms (including rental),⁵¹ as well as a panoply of enforcement rights (Articles 41 through 61).⁵²

Article 13 (“Limitations and Exceptions”) reads:

Members shall confine limitations or exceptions to exclusive rights to certain special cases which do not conflict with a normal

⁴⁸ General Agreement on Tariffs and Trade, Oct. 30, 1947, 61 Stat. A-3, 55 U.N.T.S. 187. GATT was adopted as Annex 1A of the WORLD TRADE ORGANIZATION CHARTER, 33 I.L.M. 1125, 1127 (1994); the World Trade Organization (WTO), which came into being in 1995, is the successor to the GATT.

⁴⁹ Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPs), arts. 9-14, 41-61, Apr. 1, 1994, 33 ILM 81.).

⁵⁰ *Id.* art. 9.

⁵¹ The rights of performers and producers included the right of reproduction — with exceptions permitted but limited to the Rome Convention’s “conditions, limitations, exceptions and reservations” rather than those in Berne.

⁵² Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPs), arts. 11, 14, Apr. 1, 1994, 33 ILM 81.

exploitation of the work and do not unreasonably prejudice the legitimate interests of the right holder.

Thus, in nearly identical language to Article 9(2) of Berne — and identical in all of the critical three steps — the WTO TRIPs Agreement applies the same exceptions to all of the exclusive rights of WTO TRIPs Agreement, and to all of the works explicitly identified in WTO TRIPs, such as computer programs and databases.⁵³ By its reference to Berne (Articles 1–21 and the Appendix), TRIPs applies these exceptions to all of the rights in the Berne Convention as well. Because the provision is identical to the substantive three-step test, and absent any official legislative history of this treaty, the Berne history and guidebooks should also govern the interpretation of the exceptions as applied under the trade agreement.

2. *The WIPO "Digital Treaties"*

In 1996, when the two WIPO “digital treaties” were adopted, similar language was incorporated into each of these treaties. The WCT, adopted on December 20, 1996, incorporates Berne Articles 1 to 21 and the Appendix directly.⁵⁴ The WCT additionally provides for a right of distribution (Article 6), a right of rental (the same as WTO/TRIPs) (Article 7), a right of communication to the public, including the making available right (Article 8), as well as “obligations concerning technological measures” (Article 11) and “obligations concerning rights management information” (Article 12).

Article 10 (“Limitations and Exceptions”) provides:

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

(2) Contracting Parties shall, when applying the Berne Convention, confine any limitations of or exceptions to rights provided for therein to certain special cases that do not conflict with a normal

⁵³ See also WCT Treaty “Agreed Statements” concerning (a) Article 4: “The scope of protection for computer programs under Article 4 of this Treaty, read with Article 2, is consistent with Article 2 of the Berne Convention and on a par with the relevant provisions of the TRIPs Agreement” and (b) Article 5: “The scope of protection for compilations of data (databases) under Article 5 of this Treaty, read with Article 2, is consistent with Article 2 of the Berne Convention and on a par with the relevant provisions of the TRIPs Agreement.”

⁵⁴ WIPO Copyright Treaty (WCT), art. 1(4), Dec. 20, 1996, 36 ILM 65. The treaty entered into force on March 6, 2002.

exploitation of the work and do not unreasonably prejudice the legitimate interests of the author.

Under the WCT article on exceptions, then, countries are not required to provide for limitations or exceptions (the “Parties may”). If they do have them, then any limitations or exceptions to the Berne Convention rights must fall (the “Parties shall”) under the ceiling of the three-step test of Article 9(2), as re-iterated in paragraph 2 of the WCT Article 10. For any new “rights granted to authors of literary and artistic works” under the WCT — meaning only the rights of distribution (Article 6), rental (Article 7), or communication to the public including making available (Article 8), the same rules apply. No exceptions are required, but if a country does provide limitations or exceptions, the same three-step test applies as a ceiling to any such exceptions.

Last, the WCT sets out “obligations concerning” technological protection measures and rights management information in Articles 11 and 12, respectively. Because these obligations are not “rights” under either the WCT or Berne, the obligations of Article 10(1) are irrelevant. In short, both the WCT and its companion WPPT are silent on exceptions to anti-circumvention prohibitions under member-state laws, which arguably means that it is permissible to have limitations and exceptions to anti-circumvention or rights management provisions. However, any such limitations and exceptions cannot undermine the obligations set out in Articles 11 and 12 of the WCT (and Articles 18 and 19 of the WPPT). This means for technological protection measures, the limitations and exceptions cannot undermine the required “adequate legal protection and effective legal remedies against the circumvention of effective technological measures that are used by authors in connection with the exercise of their rights under” the WCT.⁵⁵ For rights management information, any limitations or exceptions cannot undermine the required “adequate and effective legal remedies against any person knowingly performing any of the . . . [named] acts” covered by the WCT.⁵⁶

Further to the treaty obligations, in an agreed upon statement by the fifty-one signatories to the WCT, meant to accompany the new treaty, the parties agreed that the treaty obligations and exceptions in Article 10 would be read as follows:

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

⁵⁵ *Id.* art. 11.

⁵⁶ *Id.* art. 12.

have been considered acceptable under the Berne Convention. Similarly, these provisions should be understood to permit Contracting Parties to devise new exceptions and limitations that are appropriate in the digital network environment.

It is also understood that Article 10(2) neither reduces nor extends the scope of applicability of the limitations and exceptions permitted by the Berne Convention.⁵⁷

The treaty language and agreed statements are silent both on whether a country can implement the technological protection measure obligations without providing for any exceptions for access or copy controls, and on whether any exceptions to Berne exclusive rights (such as reproduction) may be applied to access or copy controls.⁵⁸ It is clear that exceptions to the prohibitions on circumvention — under Article 11 — are permissible, but only if as noted, they do not undermine “adequate and effective” remedies (and certain legal protections). Dr. Ficsor’s guidebook explains in detail the discussions and considerations in the digital treaty deliberations and the differences between “substantive exceptions” and “non-substantive exceptions” and the scope of and limits on permissible exceptions.⁵⁹

For neighboring rights — the rights of performers and producers of phonograms — the 1996 WIPO Performances and Phonograms Treaty (WPPT) provides language similar to the WCT Article 16, but with different points of reference.⁶⁰ It reads:

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

⁵⁷ *Id.* at Agreed Statement Concerning Article 10.

⁵⁸ The U.S. Congress clearly stated that anti-circumvention protections should not affect the application of defenses to copyright infringement. *See* 17 U.S.C. § 1201(c)(1) (2006) (“Nothing in this section shall affect rights, remedies, limitations, or defenses to copyright infringement, including fair use, under this title.”). U.S. access and copy control exceptions — implementing the technological protection measure obligations of Article 11 (and Article 18 of the WPPT) are included in sections 1201(d) through (k) with seven exceptions provided for access controls and two for copy controls. On the relationship under U.S. law of the DMCA technological protection measure exceptions and fair use (and other copyright exceptions), see *Universal City Studios, Inc. v. Reimerdes*, 82 F. Supp. 2d 211, 219 (S.D.N.Y. 2000) (“Universal I”) (precluding the “fair use” defense against action for anti-circumvention and reasoning that “[i]f Congress had meant for the fair use defense to apply to such actions it would have said so”).

⁵⁹ *See* FISCOR, *supra* note 43, at 218-20, comments BC-11.18–11.23.

⁶⁰ WIPO Performances and Phonograms Treaty (WPPT), art. 16, Dec. 20, 1996, 36 ILM 76, (effective May 20, 2002).

to rights provided for in this Treaty to certain special cases that 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 phonograms.

Limitations and exceptions are thus not required (paragraph 1), but if they are provided, such limitations on the rights of performers or producers of phonograms may (and perhaps, implicitly, should) be the “same kinds” as those provided for authors of other works.⁶¹ For the rights provided for under the WPPT, any limitations and exceptions must be “con- fine[d]” to the three-step test set out in paragraph 2 of Article 16.⁶² However, for the rights and exceptions in the WPPT, the Rome Convention (1961), as a neighboring rights treaty, is the “model” agreement.⁶³ The exclusive rights of fixation, reproduction, and permissible “secondary” uses, such as broadcasts, have Rome-like scope (and limitations), and in parallel, the scope of exceptions in Article 16 for neighboring rights is the same as those “in comparison with the Rome Convention.”⁶⁴

C. *Fair Use and Other Exceptions in the United States*

How countries comply with their treaty obligations is a matter of national legislation, and is typically based on national public policy considerations, rather than treaty “implementation” per se. Revisions to the United States Copyright Act provide a good illustration of this, as U.S. exceptions have relied principally on domestic policy considerations, and only (very) secondarily on foreign treaty compliance (as one of the exceptions proves).⁶⁵

⁶¹ An Agreed Statement Concerning Article 16 of the WPPT notes: “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.”

⁶² WIPO Performances and Phonograms Treaty (WPPT), art. 16, Dec. 20, 1996, 36 ILM 76.

⁶³ The Rome Convention focused on the basic rights of phonogram producers (such as reproduction) and performers (first fixation) consistent with the technologies and interests in the latter half of the last century; the treaty was signed in October 1961. These so-called “neighboring rights” — of phonogram producers, performers and broadcast organizations — are distinct from author’s rights and copyright, which is why neighboring rights treaties were adopted independent of the copyright treaties (Berne, U.C.C. etc.).

⁶⁴ See FISCOR, *supra* note 43, at 155, RC-15.1–15.3, 254–255, PPT-16.1–16.5 (WPPT).

⁶⁵ In 1998, Congress at the behest of restaurant and bar owners, expanded the scope of the public performance exception of section 110(5) of the Copyright Act by passing the Fairness in Music Licensing Act of 1998 (“FMLA”), Pub. L. No. 105-298, 112 Stat. 2830. The FMLA broadened an exception in section 110(5)(B), which exempts certain

Beginning in 1955, and continuing into the late 1980s with the Berne Implementation Act of 1988,⁶⁶ the United States engaged in a major transformation of its copyright regime in order to “harmonize” its system with international norms. The first major legislative push (from 1955 to 1976) led to the passage of the 1976 Copyright Act. With that Act, and continuing in the second wave of reform leading to Berne implementation in 1988 (effective March 1, 1989), the U.S. moved its law from a formality-based system of publication including notice, registration and renewal, to a formality-free system for Berne compatibility. These changes were undertaken for national purposes — to improve the copyright and trade relations for the export of U.S. works and sound recordings, and with an aim toward compliance with national obligations and norms. And although Berne accession was the eventual goal of the U.S. reforms beginning in the 1950s, there is little evidence that compliance with the three-step test was a major consideration.⁶⁷ Instead, there was an understanding that incorporation into the 1976 Act of a broad fair use doctrine (applying existing case law), and particular additional statutory exceptions, would and did comply with the treaty obligations.

establishments, such as bars, restaurants and retail businesses, from obtaining public performance licenses so long as the establishments do not charge a direct fee related to the performances, are smaller than a certain size, and utilize qualifying equipment. The passage of the FMLA resulted in a WTO dispute settlement case brought by the European Union, which the United States lost because the 110(5)(B) exception does not comply with the three-step test. See WTO Dispute Panel Report on Section 110(5) of the U.S. Copyright Act, WT/DS160 (June 15, 2000), *available at* http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds160_e.htm (concluding that the 110(5)(B) exception is not limited to “special cases” due to the large percentage of bars and restaurants that fit within the exception). After the opinion was issued, the case was submitted to a WTO arbitration panel. The United States indicated that it could not amend its law within the time-frame called for by the panel. Thus, the panel awarded the E.U. \$ 1,219,900 per year in royalties. Award of the Arbitrators: United States – Section 110(5) of the U.S. Copyright Act, WT/DS160/ARB25/1, para. 5.1 (Nov. 11, 2001), *available at* http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds160_e.htm. Nearly two years later, the U.S. still had not amended its law, and the parties negotiated a three-year settlement with payments of \$3,300,000. Notification of a Mutually Satisfactory Temporary Arrangement, WT/DS160/23 (June 26, 2003), *available at* http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds160_e.htm. Today, ten years after the dispute settlement panel determined that the U.S. law is not in compliance with WTO/TRIPs, the U.S. still has not amended its law.

⁶⁶ Berne Implementation Act of 1988, Pub. L. No. 100-568, 102 Stat. 2853.

⁶⁷ The U.S. State Department (with congressional and other agency support) did undertake a thorough review of U.S. law for compatibility with the Berne Convention, including permissible exceptions and exemptions. *See, e.g., Final Report of the Ad Hoc Working Group on U.S. Adherence to the Berne Convention: Hearings Before the Subcomm. on Patents, Copyrights and Trademarks of the Committee on the Judiciary, 99th Cong. (1985–86) (“Chapter II: Exemptions to the Rights of Public Performance and Display” reviewed in light of Berne Articles 10, 11, 11bis and 11ter).*

In the case of exceptions, the 1976 Act included, for the first time, an explicit fair use provision in section 107, which attempted to codify 150 years of case (common) law by adopting four enumerated, but non-exclusive, factors: the “purpose and character of the use;” “the nature of the copyrighted work;” “the amount and substantiality of the portion used in relation to the copyrighted work as a whole;” and, “the effect of the use on the potential market for or value of the copyrighted work.”⁶⁸ Additionally, the 1976 Act added other explicit statutory exceptions (now including sections 108 to 122) running the gamut from detailed educational exemptions, to special library and archive exemptions to promote preservation, security, and access for certain materials, among a long list.⁶⁹

In the Digital Millennium Copyright Act of 1998, enacted for compliance with the WCT and WPPT, the U.S. added anti-circumvention and management system provisions in a new Chapter 12, and along with them, exceptions.

Section 1201(a) prohibits the circumvention of access controls and trafficking in devices or services that circumvent technological protection measures that control access to works. Along with the protections provided rightsholders, there are six statutory exceptions that pertain to those engaged in acts of circumvention, including exceptions for: 1) libraries, 2) law enforcement, 3) reverse engineering, 4) encryption research, 5) personally identifying information (privacy), and 6) security testing.⁷⁰ A

⁶⁸ H.R. REP. NO. 94-1476, at 66 (1976) (“Section 107 is intended to restate the present judicial doctrine of fair use, not to change, narrow, or enlarge it in any way.”). Notwithstanding this firm congressional statement, some commentators have noted that section 107 did broaden existing doctrine, in addition to the new exceptions added by the 1976 Act. *See, e.g.*, 17 U.S.C. §§ 108–112, 117 (2006).

⁶⁹ One issue that has been perhaps “danced around” for the duration of “fair use” consideration in U.S. jurisprudence is the relationship, if any, of fair use and personal use. With the exception of the most obvious case, *Sony Corp. of America v. Universal City Studios, Inc.*, 464 U.S. 417 (1984) (finding “time shifting” of broadcast television programs constituted fair use, with a particular emphasis that there was no “librarying” of copies), it is safest to say that almost no court has taken this issue on directly, notwithstanding a general public perception and practice that many personal use activities — from time and perhaps format shifting (making personal iPod “libraries”), to back-up copying and “sharing with friends” — are fair. However, given that a separate chapter of U.S. law requires copy protections and a payment scheme in order to bar claims that a specific type of personal copying constitutes infringement, the Copyright Act appears to endorse the opposite view — that personal copying is not excepted absent a specific statutory provision. *See Recording Indus. Ass’n of Am. v. Diamond Multimedia Sys., Inc.*, 180 F.3d 1072 (9th Cir. 1999) (discussing the Audio Home Recording Act). *See also* H.R. REP. NO. 92-487 (1971) (discussing the Sound Recordings Act). The Masouye and Ficsor guidebooks both refer to any private copying (if not, personal use), as permissible only if the activity falls, as all exceptions must, within the confines of the three-step test — to comply with Berne (and now, WTO TRIPs, and the digital treaties).

⁷⁰ 17 U.S.C. § 1201(d), (e), (f), (g), (i), (j) (2006).

seventh exception provides for a triennial rulemaking of the Copyright Office, which may permit users to engage in certain acts of circumvention during a three-year window (until the next rulemaking *de novo* review).⁷¹

This provision only applies to certain categories of works deemed to qualify by law, and Copyright Office rulemaking, for such excepted access.⁷²

In addition, five statutory exceptions are applicable to those engaged in the trafficking of devices or services that circumvent technological protection measures that control access to works. These are exceptions for: 1) law enforcement, 2) reverse engineering, 3) encryption research, 4) protecting minors, and 5) security testing.⁷³

Section 1201(b) provides rightsholders with protections against those who would traffic in devices or services related to circumvention of technological protection measures that “effectively protect a right of a copyright owner” — such as technologies that prevent the making of unauthorized copies of works. These prohibitions pertain not to the “acts of” circumvention, but only to the activities pertaining to the trafficking (that is, the supplying of products or services). Section 1201(b) provides only two exceptions for those engaged in such “trafficking” activities: exceptions for reverse engineering and law enforcement officials.⁷⁴

Finally, section 1202 gives protection against the tampering or removal of copyright management (or rights management) information. Along with these protections, it provides two applicable exceptions — one for law enforcement activities (section 1202(d)), and another limiting liability (section 1202(e)) for certain analog and digital broadcast activities.

III. CONCLUSION

Dr. James H. Billington, the Librarian of Congress, has often noted that the United States is one of the only countries in the world whose constitution — in its first article — explicitly supports and promotes literature, the arts, and the creative process.⁷⁵ This goal is accomplished by giving Congress the power to grant rights to authors (interestingly, not to

⁷¹ See Rulemaking on Exemptions from Prohibition on Circumvention of Technological Measures That Control Access Copyrighted Works, <http://www.copyright.gov/1201> (last visited May 19, 2010).

⁷² 17 U.S.C. §§ 1201(a)(1)(C)–(D) (2006).

⁷³ *Id.* § 1201(e), (f), (g), (h), (j).

⁷⁴ *Id.* § 1201(e)–(f).

⁷⁵ See Opening Remarks of Dr. James H. Billington, National Recording Preservation Board Meeting, December 3, 2009, Washington, D.C. (referencing U.S. CONST., art. 1, cl. 8).

users) for a common public purpose and ultimate goal: the promotion of the arts (and science and knowledge).⁷⁶ Thus, the grant to authors has existed — from the outset — with built-in exceptions such as fair use, and exemptions for unoriginal works, processes, and ideas, as well as durational limits for the rights altogether. The United States has seen a heated debate over the past decade over exceptions both to copyright rights,⁷⁷ and in particular, to the circumvention and rights management provisions.⁷⁸

Not surprisingly, the debates and controversies percolating in the United States are not unlike those occurring in international fora. One example is the call for an extreme make-over of copyright law by the adoption of broad mandatory collective licensing schemes for on-line music (and other media) services — perhaps even cross-border services. The treaties are clear that compulsory licenses are rare exceptions, limited to specific uses and users (for example, the “mechanical license” permitting the reproduction and distribution of phonorecords of previously released musical compositions).⁷⁹ Thus, these broader notions of mandatory collective licensing are far afield of the treaty limitations and the confines of the three-step test (i.e., “special cases”).⁸⁰ Another example, is the push by libraries and archives, in the United States and in other countries, to digitize their

⁷⁶ U.S. CONST., art. 1, cl. 8.

⁷⁷ Non-profit organizations, such as Public Knowledge and the Electronic Frontier Foundation, have — through litigation and legislative proposals — championed a broader vision of fair use and/or the creation of collective licenses that would accommodate consumer desires to engage in activities such as “format shifting,” “space shifting” and “file sharing” notwithstanding the potential harm to creators and rightsholders. *See, e.g.*, Fred von Lohmann, *Fair Use as Innovation Policy*, 23 BERKELEY TECH. L.J. 1, 2 (2008) (“[F]air use, insofar as it represents legal tolerance for private copying, plays an important and underappreciated role in U.S. technology and innovation policy, particularly in that it draws investment to technologies that are complementary goods to copyrighted works.”). In addition, technology companies have increasingly advocated broad exceptions to copyright that would place policy concerns related to Internet growth and efficiency ahead of authors’, publishers’ and producers’ rights. For example, Google’s efforts to scan millions of books without authorization has been the focus of an extremely important debate over the scope of the fair use doctrine in the U.S. *See* Google Books Settlement, <http://www.googlebooksettlement.com> (last visited May 19, 2010) (chronicling filings of interest in litigation.).

⁷⁸ *See, e.g.*, Rulemaking on Exemptions from Prohibition on Circumvention of Technological Measures that Control Access to Copyrighted Works, *supra* note 71 (listing documents from four triennial DMCA rulemakings).

⁷⁹ Berne Convention, revised at Paris July 24, 1971, art. 13, 25 U.S.T. 1341, 828 U.N.T.S. 221.

⁸⁰ *See, e.g.*, Memorandum from Sam Ricketson on “The Compatibility with International Law of a ‘Global License’ for the Distribution of Content Online” to the International Federation of Phonographic Industry (Dec. 2009) (noting that neither a compulsory license either to replace or administer the making available right, or a broad private copying exception to cover unauthorized downloading is “justified under any of the relevant international conventions”).

“national” collections — as a matter of local cultural and public policy (and a matter that has spurred foreign government and rightsholder opposition to, for example, the Google Book Project).⁸¹

As another example, there are some countries within the WIPO (including Brazil, Ecuador and Paraguay) calling for broader exceptions, and perhaps even new treaties, for particular uses and users. WIPO in 2009 and continuing in 2010, has been meeting to consider exceptions and a possible new treaty for the “blind, visually impaired and other reading disabled persons.”⁸² The fact that some developing countries are now seeking such exceptions is unremarkable in the context of the history of

⁸¹ See, e.g., Memorandum of Law in Opposition to the Settlement Proposal on Behalf of the Federal Republic of Germany, Authors Guild, Inc. et al. v. Google, Inc., No. 05 Civ. 8136 (S.D.N.Y. Aug. 31, 2009); Declaration of Ministerialdirigient Dr. Johannes Christian Wichard in Opposition re: 179 Memorandum of Law in Opposition on Behalf of the Federal Republic of Germany, Authors Guild, Inc. et al. v. Google, Inc., No. 05 Civ. 8136 (S.D.N.Y. Aug. 31, 2009). See also Susan Decker & David Glovin, *German Government Opposes Google Books Settlement* (Update 2), BLOOMBERG.COM, Sept. 1, 2009, <http://www.bloomberg.com/apps/news?pid=20601087&sid=auCHp0Qhmcq4> (quoting German Justice Minister Brigitte Zypries’s opposition to Google Books: “We hope the New York court will reject the entire settlement or at least remove our German authors and publishers from the class. German rights holders can then decide on their own whether they want to give Google any rights.”); Foo Yun Chee, *France to File Objections to Google Online-Book Deal*, REUTERS, Sept. 7, 2009, <http://www.reuters.com/article/idUSL725081620090907> (citing Nicolas Georges, director for books and libraries at the French Cultural Ministry: “Google will have a monopoly digitalising European orphan works without permission.”). The Google Book Project has been premised in the United States on Google’s position — obviously opposed by authors and publishers

— that the intermediate copying (digitization) is permissible because the end use of snippets of any unauthorized digitized work is “fair.” The move to digitize national collections in the U.S. and in other countries raises many fundamental legal and public policy questions including those pertaining to the nature and scope of exceptions (such as fair use, or specific library and archival copying), who is undertaking the digitization (private libraries and archives or commercial enterprises, like Google), and the treatment of orphan works.

⁸² See WIPO Standing Committee on Copyright and Related Rights deliberations, Dec. 14, 2009 to Dec. 18, 2009, Geneva, Switzerland, *available at* http://www.wipo.int/meetings/en/details.jsp?meeting_id=17462. There are four proposals formally on the table at the WIPO (as of July 2010), two of which call for new treaties. See, the proposal by Brazil et. al. at http://www.wipo.int/edocs/mdocs/copyright/en/sccr_18/sccr_18_5.pdf, and a proposal from a group of African nations at http://www.wipo.int/edocs/mdocs/copyright/en/sccr_20/sccr_20_11.pdf. Individual countries, perhaps as many as fifty, already have national law exceptions for the visually impaired, but the push is not only for a harmonized international exception, but to permit uses across national borders. In addition to the push for exceptions for the visually impaired, the WIPO is also being asked to consider broader exceptions for library and archival uses, and for “educational” exceptions. Marybeth Peters, Register of Copyrights, U.S. Copyright Office, Address at The Copyright Office Speaks – D.C. Chapter Event with Honorable Marybeth Peters (Feb. 24, 2010).

Berne — such exceptions harken back to the Stockholm 1967 deliberations that led to the adoption of the Berne Appendix. However, the call for new — broad — exceptions, understandings among nations (such as “best practices” for fair use or fair dealing), or even a treaty, has raised serious and legitimate concerns for developed countries and rightsholders, given the ease of copying and the dissemination across borders of works in the digital era.

These questions and concerns include: the scope of such exceptions and their relationship to existing Berne and WTO/TRIPs provisions, especially the three-step test; whether such exemptions should be mandatory, rather than permissive options for national legislation; the transportation of excepted works prepared in one country into other countries (which the 1976 Stockholm Berne Appendix prohibited); and more generally, the political dynamics calling, not simply for exceptions limited to a relatively small group of users (such as blind and other disabled persons), but the movement — implicitly or explicitly — to recalibrate the long-standing, well-serving balance between creators and users as evidenced in the language of the Berne Convention, Article 9(2).⁸³ This formulation — albeit with minor revision during adoption of the “new” WTO/TRIPs and WIPO digital treaties — has resisted change and survived spectacular technological advancements because of, not in spite of, its flexibility. The call for new, specific, and broad-reaching exceptions threatens the existing formulation. In fact, it is this flexibility that has allowed the treaty exceptions to bridge differences across legal systems (civil and common law), and has enabled the Article 9(2) formulation to successfully ride the pendulum swings over time, between the interests of authors, producers, rightsholders and users, for close to a half century.⁸⁴

⁸³ See, e.g., Letter from Brad Huther, Senior Director, U.S. Chamber of Commerce, to Maria Pallante, Associate Register, Policy and International Affairs, U.S. Copyright Office (Oct. 13, 2009) (expressing concern that the treaty proposal Facilitating Access to Copyrighted Works for the Blind or Other Persons with Disabilities is “premature” and “counterproductive,” and recommending that the U.S. “not engage in pursuing a copyright-exemption based paradigm”).

⁸⁴ Background Paper by Brazil, Ecuador and Paraguay on a WIPO Treaty for Improved Access for Blind, Visually Impaired and other Reading Disabled Persons, *available at* http://www.wipo.int/meetings/en/doc_details.jsp?doc_id=130505 (last visited May 19, 2010).