Reform(aliz)ing Copyright
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Three Steps Towards Formalities

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Prohibition of Formalities
Article 5(2) Berne Convention

‘The enjoyment and the exercise of these rights shall not be subject to any formality; such enjoyment and such exercise shall be independent of the existence of protection in the country of origin of the work.’

- enjoyment = coming into being
- exercise = enforcement of rights
Scope of the Prohibition

**external conditions**
- covered
- affecting protection
  - ‘as such’

**internal conditions**
- NOT covered
- extent, quality, contents of protection
Internal Conditions
Toolkit for reformalizing copyright

- exemption of use
- morality, public order, abuse of rights
- term of protection
- subject matter of protection
Exclusions from protection

• idea/expression dichotomy
• originality test NOT harmonized
• news of the day and miscellaneous facts having the character of mere items of press information (Art. 2(8) BC: mandatory)
• official texts of a legislative, administrative and legal nature, and official translations of such texts (Art. 2(4) BC: optional)
Exclusions from protection

- political speeches and speeches delivered in the course of legal proceedings (Art. 2bis(1) BC: optional)
- no protection unless fixed in some material form (Art. 2(2) BC: optional)
Term of protection (Art. 7 BC)

- ‘The term of protection [...] shall be the life of the author and fifty years after his death.’
  - in many countries: 70 years post mortem

- cinematographic works
  - making available + 50 years (optional)

- anonymous or pseudonymous works
  - making available + 50 years

- photographic works, works of applied art
  - making available + 25 years
  - but see Art. 9 WCT
Exemption of use

- quotations, press summaries (Art. 10(1) BC)
- articles on current topics (Art. 10bis(1) BC)
- lectures, addresses, works of the same nature delivered in public (Art. 2bis(2) BC)
- reporting of current events (Art. 10bis(2) BC)
- illustrations for teaching (Art. 10(2) BC)
Exemption of use

- compulsory licenses concerning broadcasting, and wireless or loudspeaker communications (Art. 11bis(2) BC)
- ephemeral recordings made by broadcasting organizations (Art. 11bis(3) BC)
Public order, morality, abuse of rights

‘The provisions of this Convention cannot in any way affect the right of the Government of each country of the Union to permit, to control, or to prohibit, by legislation or regulation, the circulation, presentation, or exhibition of any work or production in regard to which the competent authority may find it necessary to exercise that right.’ (Art. 17 BC)
Three-Step Test
Role of the three-step test

basis for further exclusions, exemptions etc.?  
restriction of existing exclusions, exemptions etc.?
Article 9(2) Berne Convention

‘It shall be a matter for legislation in the countries of the Union to permit the reproduction of [literary and artistic] 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.’

= first three-step test in international copyright law
Direct basis for national exemptions

- General right of reproduction
- Compliance with Art. 9(2) BC
Family picture

Article 9(2) BC

Article 13 TRIPS

Article 10 WCT
Article 13 TRIPS

‘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.’

= three-step test becomes general yardstick for the permissibility of limitations and exceptions
Direct basis for limitations and exceptions (same function: Article 10(1) WCT)

- rights newly granted in TRIPS
- compliance with Art. 13 TRIPS
Additional control instrument (same function: Article 10(2) WCT)

Berne Convention rights

right of quotation, illustration for teaching

compliance with Art. 13 TRIPS
Field of Application
All of this covered?

- exemption of use
- morality, public order, abuse of rights
- term of protection
- subject matter of protection
Or only this?

exemption of use
Would a broad field of application help?

• Article 13 TRIPS as an engine of reformalization?
• introduction of further exclusions?
  – If existing exclusions pass the three-step test, why not having further exclusions?
• more flexible approach to term of protection?
  – If a work is no longer offered on the market, why not putting an end to protection?
Art. 9(1) TRIPS, Art. 20 BC

‘The Governments of the countries of the Union reserve the right to enter into special agreements among themselves, in so far as such agreements grant to authors more extensive rights than those granted by the Convention, or contain other provisions not contrary to this Convention.’

= TRIPS a special agreement in this sense

• no derogation from protection standard reached in the Berne Convention
The better view

exemption of use
Breathing Space
Contents of the three-step test

• certain special case
  – specific form of use, limited number of beneficiaries
  – considering policy justification preferable

• no conflict with a normal exploitation
  – currently exploited and potential future markets
  – but only markets of considerable importance

• no unreasonable prejudice to legitimate interests
  – final part of the proportionality test
  – reduction to reasonable level by providing for the payment of equitable remuneration
Direct basis for national exemptions

- exclusive right recognized internationally
- compliance with the three-step test
- reproduction (Art. 9(1) BC)
- making available (Art. 8 WCT)
Berne provisions as prototypes

‘It shall be a matter for legislation in the countries of the Union to determine the conditions under which [broadcasting and related rights] may be exercised… They shall not in any circumstances be prejudicial to the moral rights of the author, nor to his right to obtain equitable remuneration which, in the absence of agreement, shall be fixed by competent authority.’ (Art. 11bis(2) BC)

= mandatory licensing model
Berne provisions as prototypes

‘It shall be a matter for legislation in the countries of the Union to permit the reproduction by the press, the broadcasting or the communication to the public by wire of articles published in newspapers or periodicals on current economic, political or religious topics, and of broadcast works of the same character, in cases in which the reproduction, broadcasting or such communication thereof is not expressly reserved.’ (Art. 10bis(1) BC)

= opt-out model
impacts on the core business of news providers nonetheless permissible because of formality?

No conflict with a normal exploitation?
Down On Me (With Me And 50 Cent)

BeenerKeeKee19952 96 video's  Abonneren

Get uploaded by BeenerKeeKee19952 op 8 nov 2010

Down On Me (With Me And 50 Cent)
Full Length Video Not Shown on Chelsea Lately Show

Watch the Jerimih Version Here:
Agreed Statement Concerning Art. 10 WCT

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

‘Similarly, these provisions should be understood to permit Contracting Parties to devise new exceptions and limitations that are appropriate in the digital network environment.’
The end.

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