

Reform(aliz)ing Copyright BCLT, April 18-19, 2013

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**

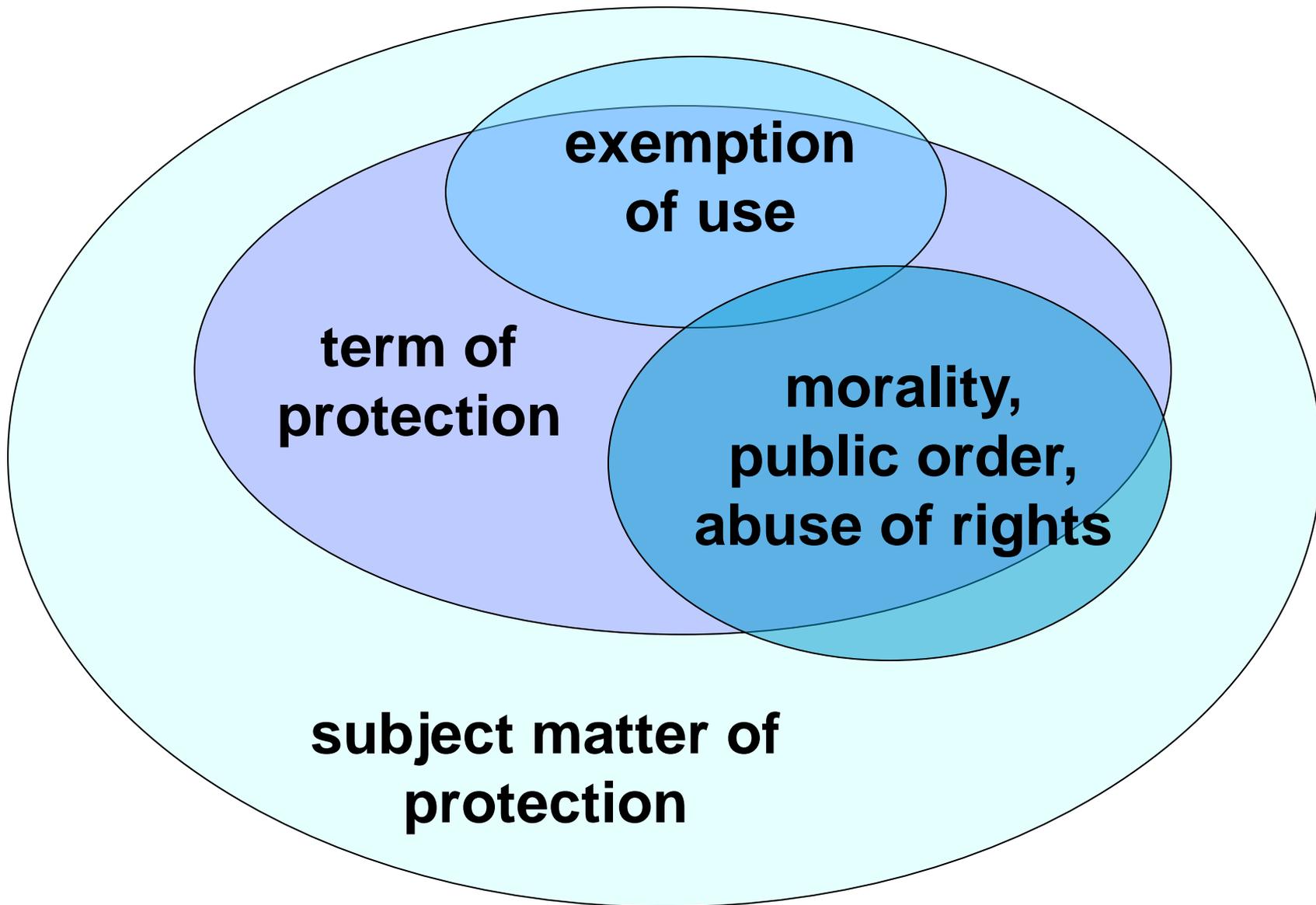
**extent, quality,
contents of protection**



Internal Conditions



Toolkit for reformalizing copyright



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)

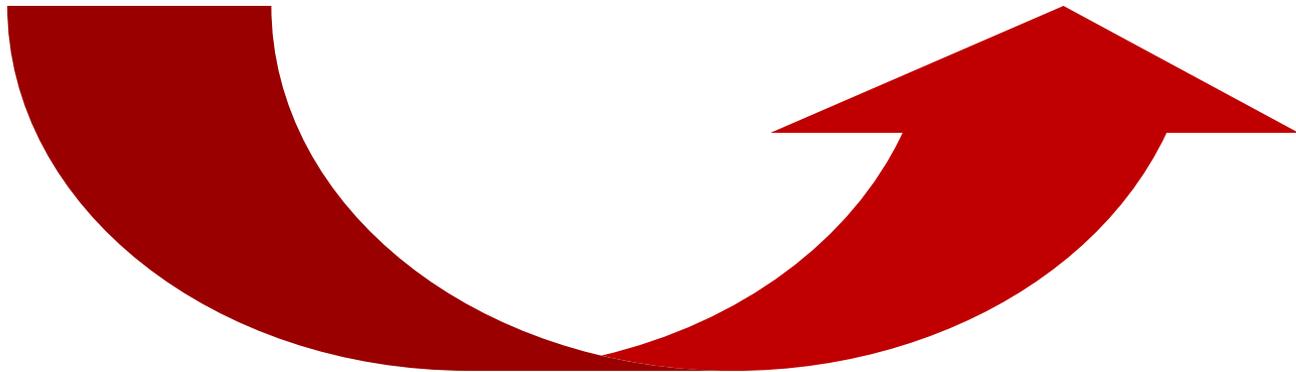
Three-Step Test



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

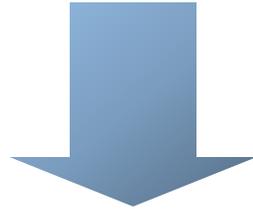
general
right of
reproduction

compliance
with Art. 9(2) BC

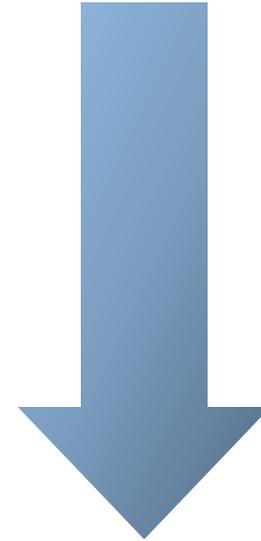


Family picture

Article 9(2) BC



Article 13 TRIPS



Article 10 WCT

Article 13 TRIPS

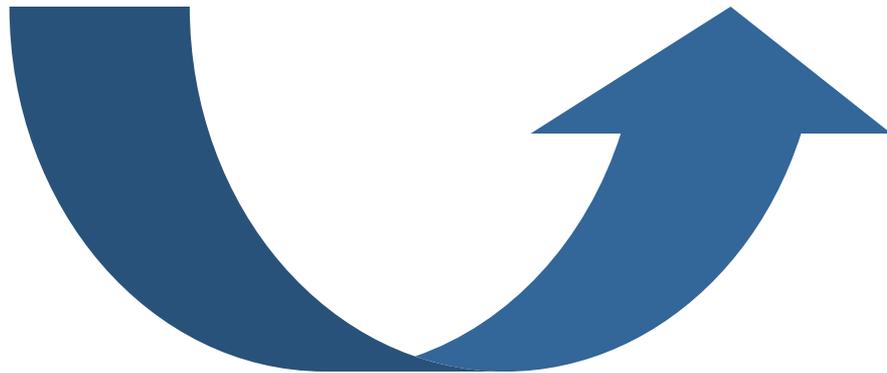
‘Members shall confine limitations or exceptions to exclusive rights to certain special cases which do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the right holder.’

= 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

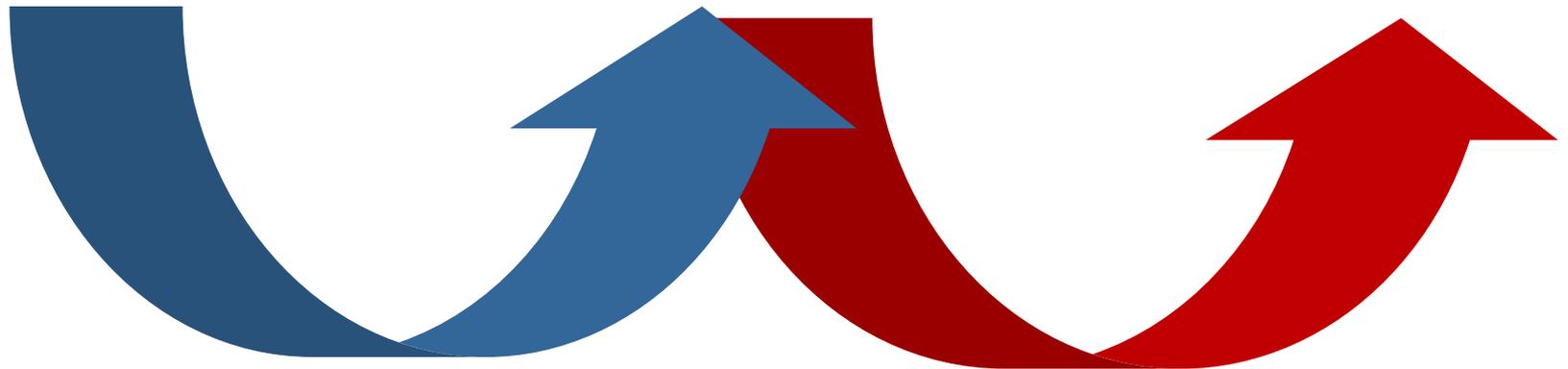


Additional control instrument (same function: Article 10(2) WCT)

Berne
Convention
rights

right of
quotation,
illustration for
teaching

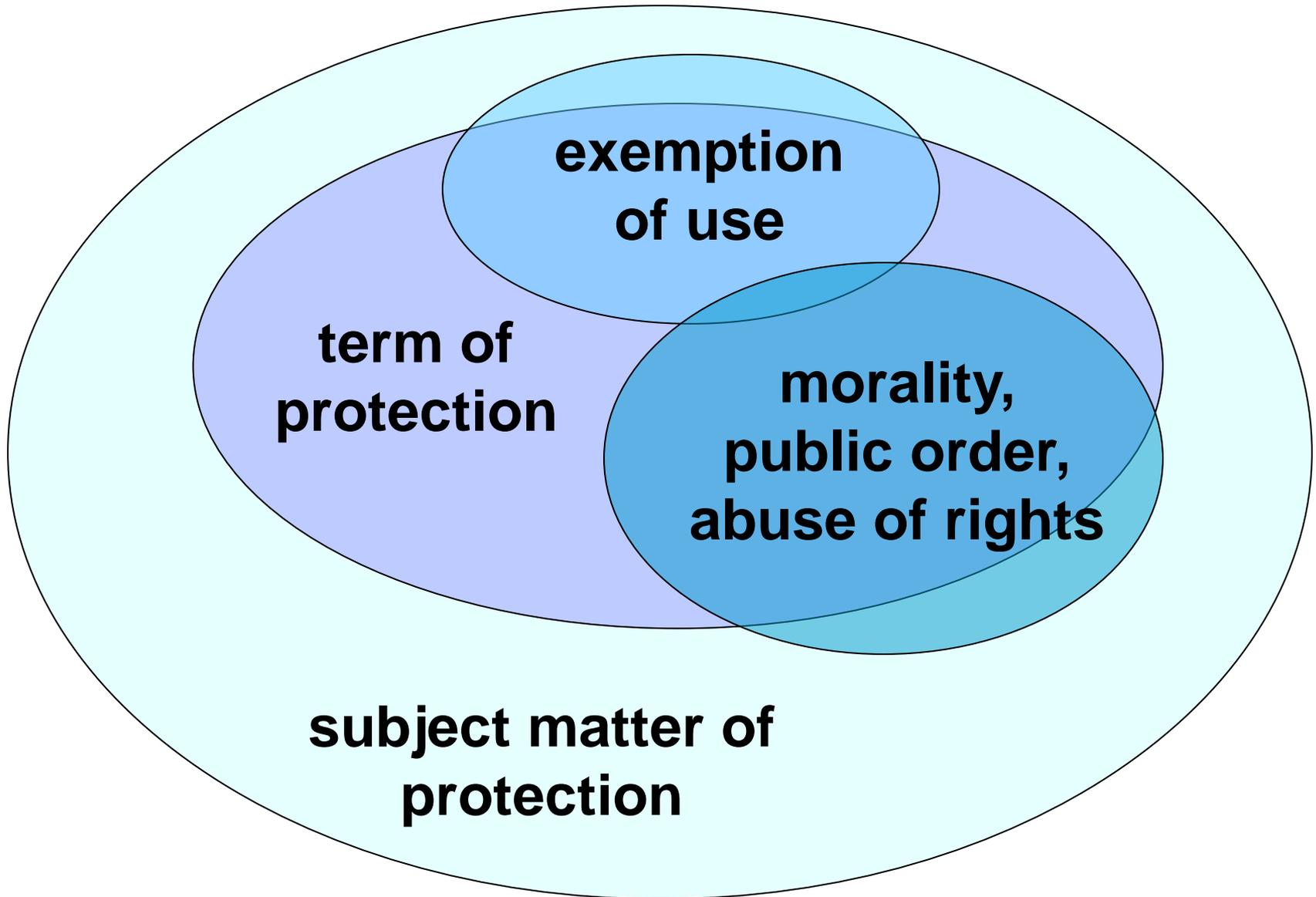
compliance
with Art. 13
TRIPS



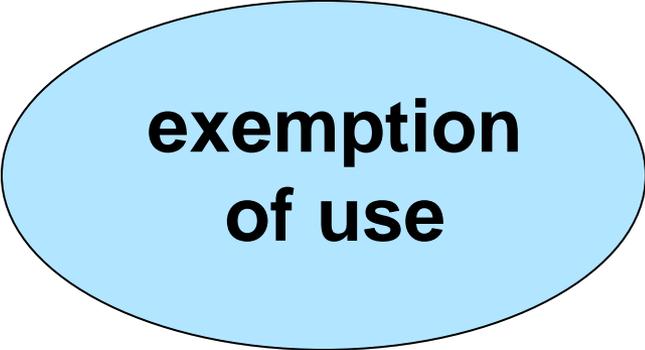
Field of Application



All of this covered?



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

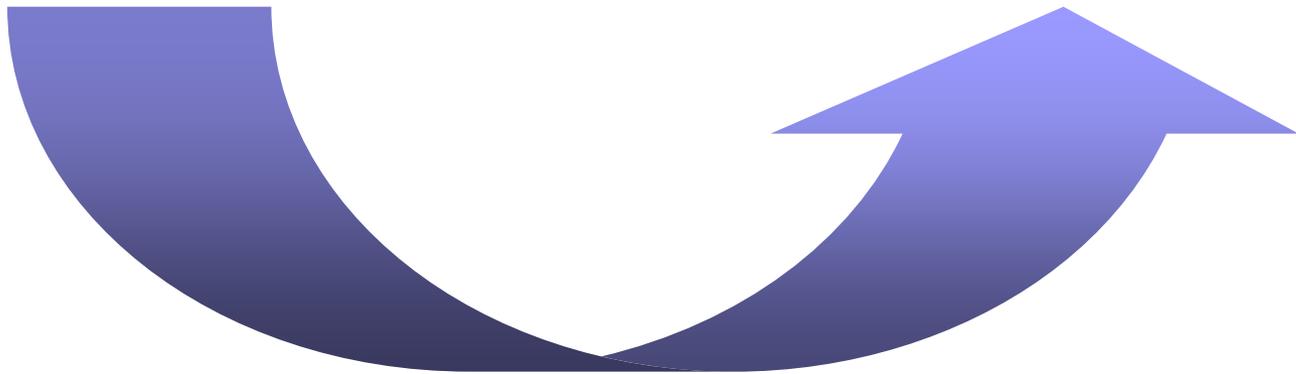
‘It shall be a matter for legislation in the countries of the Union to permit the reproduction by the press, the broadcasting or the communication to the public by wire of articles published in newspapers or periodicals on current economic, political or religious topics, and of broadcast works of the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

= opt-out model

No conflict with a normal exploitation?

**impacts on the core
business of news
providers**

**nonetheless
permissible because
of formality?**



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Beatrijs-manuscript



DOMINIO FIOREN- TINO



De Pool



Verzameling van afbeeldingen, lithografi...



Verzameling prenten betrekking hebbend o...



Gereconstrueerde Hollandse huizen in



Geologische schetskaart van Nederlandsch...



Dutch Literature



Gruuthuse-manuscript



COMITATUS HANNONIAE et



t Meerderdeel van t OOST-VRYE in



FLANDRIA GALLICA Contiens







Keenan Cahill Zoeken

Bladeren Uploaden Account maken Aanmelden

Down On Me(With Me And 50 Cent)

BeenerKeeKee19952 96 video's Abonneren



0:55 / 3:44 360p

Leuk Toevoegen aan Delen

31911146

Geüpload door BeenerKeeKee19952 op 8 nov 2010
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161600 stemmen voor leuk, 15680
Artiest: Jeremih & 50 Cent
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Jeremih - Down On Me ft. 50 Cent
door JeremihVEVO
32174278 keer VOLLEDIGE VERSIE

YouTube Mix for Jeremih
door YouTube
AFSPEELLIJST 26 video's



Ravi

Kam

Worah

9

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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