The three-step test is not really something new. Nevertheless, there may be some urgency over “rethinking” this legal instrument and its role in future copyright legislation and litigation. Why suddenly so much excitement about a rule that has been around for quite some time? Let us start from the end and recall a short provision that was inserted by the recent law of August 1, 2006 in the French Intellectual Property Code (IPC), at the bottom of the list of exceptions: “The exceptions enumerated by the present article may neither conflict with a normal exploitation of the work nor unreasonably prejudice the legitimate interests of the author”. France has just followed the example of Italy, Greece, Luxembourg, Portugal and Spain, which recently incorporated such a sentence into their copyright legislation. Though this is less commonly known, China and Australia did the same in a recent legislative reform.

This small change seems at first view quite innocent. Nevertheless, the purpose of this article is to try to show that it might radically modify the understanding of exceptions to copyright in the future. In any case, the three-step test will undoubtedly be at the centre of most of the litigation concerning the limitations of copyright in the years to come. It is not certain whether the different national legislatures really appreciated the full extent of such an additional phrase. As a matter of fact, the objective was a simple implementation of the famous “three-step test” of Art.5.5 of the Directive of May 22, 2001 on the harmonisation of certain aspects of copyright and related rights in the information society (the Directive) in national law, whereby the exceptions and limitations provided in the Directive “shall only be applied in certain special cases, which do not conflict with a normal exploitation of the work or other subject-matter and do not unreasonably prejudice the legitimate interests of the rightholder”. If one knows that this text appears in a similar version in many international texts related to copyright and intellectual property like Art.9.2 of the Berne Convention (for the right of reproduction), Art.13 of the TRIPS Agreement (for all exclusive rights) and Arts 10 and 16 of the World Intellectual Property Organisation (WIPO) treaties for copyright (WCT) and the right of performers and producers of phonograms (WPPT), and that it has already been incorporated twice by previous directives (Art.9.3 of the Directive of 1991 on the legal protection of computer programs and Art.6.3 of the Directive of 1996 on the right of the Directive of 1996 on the right of *databases), an implementation in national law does not seem very revolutionary at first sight.

However, this appearance is more than deceptive because of slight changes in the wording and the comprehension of this legal instrument, the scope of which still remains, on the whole, very uncertain. Indeed, it is very probable that the integration of the three-step test into national law will have enormous consequences for the application of the exceptions and limitations to copyright in the near future. But even in countries that have chosen not to implement the test, one can imagine that the test will be in the centre of all the debates concerning the future of exceptions and limitations to copyright, as the courts have to interpret their legislation “in the light of” the Directive, which can lead them to use the test in cases submitted to them. However, before illustrating the consequences of the use of the three-step test in copyright litigation, it seems appropriate to go back to the slight changes the three-step test has undergone since its first appearance.

We have to remind ourselves that the three-step test appeared for the first time in 1967 during the Stockholm conference, which had as its objective the revision of the Berne Convention. Its principal aim was to establish the reproduction right, not recognised before this conference on an international level, although it already played a major role in many national laws. Therefore Art.9 was added to the international text, stating that “authors of literary and artistic works protected by this Convention shall have the exclusive right of authorizing the reproduction of these works, in any manner or form”. But because many countries already had a variety of exceptions to the reproduction right in their national laws and they refused to change this, a second paragraph was inserted in Art.9 that contained an indistinct and general criterion allowing the Member States to provide exceptions to the newly established right. In fact, Art.9.2 reserves the possibility for the legislatures of the...
Union countries to reproduce 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”. Thus this formulation is the result of a compromise and was wide enough to cover all the exceptions embodied in the legislation of the contracting countries, whether they were enumerated in a list or contained in a general clause of the fair use type or in a fair dealing exception.19

Moreover, it is especially its wide and less compelling formulation that was decisive for the success of the test within the negotiations of the later agreements related to intellectual property law, since it allowed international regulation of the extremely sensitive question of exceptions to exclusive rights by reference to an Article with a general and imprecise meaning that all countries—civil law as well as common law countries—could identify with.

Thus the test was again inserted in the TRIPS Agreement in 1994 and extended to all exclusive rights (Art.13). Because of the consensual character of this legal instrument, some sorts of “three-step tests” (though with some variation in their formulation) were also inserted in the Agreement without any debate for trademarks (Art.17), industrial designs (Art.26.2) and patents (Art.30). As a discreet, but by no means insignificant change, the third step of the test provided in the TRIPS Agreement is directed at the protection of legitimate interests of the “rightholder” and not of the author, as in the Berne Convention. This shows the slight and progressive transition from the protection of the author to the protection of the exploiter, who already had been indirectly referred to by the second criterion of a normal exploitation of the work. However, the next stage was not as easy. Indeed, the re-implementation of the three-step test in the WIPO Copyright Treaty of 1996 (WCT) was a bit more complicated. Certain countries feared that the incorporation of the test in the Treaty could lead to a reduction of exceptions and limitations in the digital environment, which would have been contrary to the objective of a just balance of interests underlined in the Preamble to the Treaty.14 Therefore, in order to ensure that the leeway of contracting parties related to the adoption of new exceptions in the digital network environment would not be reduced, the insertion of the three-step test was accompanied by a common declaration11 expressly specifying 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. Furthermore, these provisions have *488 to be interpreted as permitting the Contracting Parties to establish new exceptions and limitations which seem to be appropriate in the digital network environment”.

As the signatories clearly wanted to avoid giving the three-step test too great a binding significance, they chose a vague expression in order to solve the issue of exceptions to the digital network environment at a later date.

Other indications of a certain indifference towards this legal instrument were that it barely attracted the attention of the legal literature and was in fact hardly studied. Hence commentators woke up only when the United States was condemned by the Panel of the WTO for having adopted a law violating Art.13 TRIPS.14 This decision showed for the first time to the rest of the world that the three-step test had to be taken seriously and that the countries were not free to do whatever they wanted in the area of copyright exceptions. Other doctrinal analyses followed the year after the adoption of the Directive of 2001, which repeated the test in Art.5.5.17 However, this Directive, which had the goal of implementing the WIPO treaties in Community law, clearly exceeded its objective, since it attacked the delicate question of the future of exceptions by establishing an optional and limitative list of exceptions that national legislatures could implement in their legislation, a list that ends with a three-step test with a slightly different wording. In fact, Art.5.5 is aimed directly at the application of the exceptions, and Recital 44 additionally specifies that

“such exceptions and limitations may not be applied in a way that prejudices legitimate interests of the rightholder or which conflicts with the normal exploitation of his work or other subject matter”.18

As the person who is applying an exception is principally the judge, a controversy arose concerning the true addressee of the three-step test. Is it only the legislating body, when incorporating an exception into national law, or is it also the judge, when he interprets an exception in a case he is hearing?

The positions on this question are intensely divided, and even if the majority of scholars admit that the European legislature wanted the European Court of Justice (ECJ) to control the interpretation and implementation of the exceptions by the Member States,19 many voices refuse to admit that the national judges can use the test in cases that are submitted to them.20 It is true that one cannot find any clear explications in the preparatory works of the Directive. Because of this fact alone, one
can hold the view that if the European legislature had intended such a change concerning the meaning of the three-step test, it would have been more explicit. On the other hand, the European legislature is said to have applied the three-step test when it set up the exhaustive list of exceptions to Art.5. Why, then, did the authors of the Directive set out the test in a separate paragraph if all the exceptions set out in Art.5 were already supposed to be compatible with this Article?

It would go beyond the scope of this article to develop each argument that has been mentioned, and probably we will not know who the addressee of the test is until the ECJ has decided the issue, which might take some time. For the moment, it has to be concluded that the wording of the Directive is far from clear. In fact, the text has been understood in very different ways. While, for instance, Germany, Belgium, the United Kingdom and the Netherlands refused to include the test in their national legislation, taking the view that the legislature was the only addressee of the test, others, such as Greece, Italy, France, Luxembourg, Portugal and Spain, have implemented it. This solution has been upheld by the French Constitutional Council, which concluded that the Directive requires the application of the exceptions to be subordinated to the three-step test. According to the constitutional judges, France has given effect to a “clear and unconditional provision”, and so “it is not up to the Council to pronounce on it”. However, even in countries that have chosen not to implement the test, courts have since 2001 considered whether the application of an exception complies with the three-step test. Moreover, even in cases where the legislature had considered that the test need not be implemented, the motives of the law sometimes reveal that they still considered that the test could be used by the judiciary. For example, even though the Belgian legislature decided not to incorporate the test in its copyright law on the grounds that “the three-step test as contained in Article 5.5 of the Directive is addressed above all to the legislature”, it then adds that this “does not, however, prevent it serving as a guideline for the courts and tribunals when the law is applied”. Some similar considerations can be found in the motives of the draft of the second German implementation Bill (the “second basket”). It seems that the use of the test in copyright litigation can therefore not be avoided. This risks, however, having enormous consequences concerning the understanding of the exceptions and their application by the judge, which the author will briefly present in the following.

The consequences of the mutations of the three-step test

The principal consequence of this mutation of the three-step test is that a wide responsibility is bestowed upon the judge: he must interpret the exceptions with regard to the test and decide, on a case-by-case basis, whether their application respects its three criteria. A use covered a priori by the wording of an exception could afterwards be declared illicit by the judge on the grounds that it violated one of the steps in the test. Consequently, it will be hard for the user to predict whether the use of freedoms provided by the law in his favour is permitted or not. This legal insecurity may have a deterrent effect on the user. The danger of being considered an infringer could, on the one hand, discourage him from making an exempted use and, on the other hand, encourage him—in case of doubt—to seek systematically the authorisation of the right holder. This means that the exceptions, already often rendered “out of order” by technical measures, risk becoming very precarious.

In the case of such an evolution, one can assume that a situation that so strongly favours the interests of the right holders will not be easily accepted and will not facilitate the social acceptance of copyright, which might intensify the crisis of legitimacy it is facing at the moment. Above all, the judge who applies the test to an exception will have difficulties in evaluating the competing interests of the authors and the public. In fact, a balance of the competing interests is at present only possible while examining the third step of the test, where analysis addresses whether the use may cause an “unjustified” prejudice to the authors’ interests. This implies that there are some “prejudices” that are “justified” because their goal is the protection of interests considered superior to those of the right holders. In fact, this step, which allows the justification of the exception to be examined, can only be analysed by the judge once the second step is passed. In the second step, it must be established that the use does not conflict with the normal exploitation of the work. Thus the approach is strictly economic and the point of view is that of the exploiter. Other objectives, especially social and cultural ones, which underlie certain exceptions cannot in principle be considered at this stage, nor can the payment of equitable remuneration for a use falling within a statutory licence.

Moreover, an additional problem is that the concept of normal exploitation is very imprecise. Neither the Directive nor national legislation provides a definition. What must be understood by “normal” exploitation? Broad definitions have been proposed (especially by the WTO Panel), as have very restrictive definitions (especially by some scholars). And when is there a conflict with this exploitation? Difficult (and expensive) economic studies will have to be conducted, which can only be produced by the rare litigants who have the financial capacity. The judge does not have the resources to conduct a counter-investigation and has to trust assertions of fact that he cannot verify. Accordingly, he has to use a legal instrument that obviously was not created to be applied by national courts, and he has to take decisions that in principle belong to the political sphere, without the ability to guarantee a just balance of the different interests involved, which should be his task.
Indeed, one can assume that application of the test by the judge will be very difficult. The decision of February 28, 2006 of the French Supreme Court provides an outstanding example of the problems that can result from the judicial application of the three-step test.\(^3\) In this decision, which attracted a wealth of commentary, the Supreme Court applied for the first time Art.5.5 of the Directive in order to overcome the application of an exception in favour of a technical protection measure, arguing abstractly and generally that the private copy of a DVD conflicts with the normal exploitation of the work, but without providing a definition of this term at any stage.\(^3\) Moreover, it is in combination with technical protection measures, which are also prone to prevent the user from benefiting from the exceptions, that the three-step test could turn out to be particularly dangerous. In fact, as one can read in the recent decision of the French Constitutional Council already mentioned, the provisions concerning technical protection measures implemented in the new French law\(^4\)

“must be understood as permission to authors to rely upon technical protection measures limiting the benefit of an exception to a unique copy, or even to the prevention of any copying, in particular cases, when such a solution supports the necessity to ensure the normal exploitation of the work or to prevent any unjustified prejudice to their legitimate interests; indeed, any other interpretation would be evidently incompatible with respect for the three-step test”.\(^4\)

Consequently, the right holders can use technical protection measures, able to prevent the benefit of an exception, whenever they consider that its application risks conflicting with the normal exploitation of the work--and one can presume that this will often be the case. Undoubtedly, right holders will argue that they do not have to take voluntary measures to guarantee uses that they consider in violation of the three-step test, and are likely to rely on the test in opposition to any request by a user to a court or a regulatory authority for means of engaging in an exempted use. This could mean that from now on, the balance of copyright law will be left to the right holders’ charity.

As a conclusion, it can be argued that, from an originally vague diplomatic compromise, the three-step test, implemented in national law or not, has developed into a legal instrument capable of challenging the exceptions to copyright, to the detriment of its social function and of a just balance of the interests involved.\(^4\) However, the situation is perhaps not as bad as it seems. Indeed, it is very probable that judges will not be satisfied with the role the law seems to impose on them, which consists in supporting the pretensions of the right holders, and one can hope that they will arrive at more balanced interpretations of the test.\(^4\) It is the task of legal scholars to help the judges to find new readings of the test.\(^4\) In fact, establishing flexibility in the handling of the exceptions to copyright is surely something that should be encouraged,\(^4\) assuming that not only the right holders are to benefit from it.\(^4\) In any case, the acceptance of copyright by society could depend on a serious “rethinking” of the three-step test.\(^4\)

This article is based on a contribution to a workshop organised jointly by the Max Planck Institute for Intellectual Property and the Queen Mary University of London on the subject “Rethinking the Three-Step Test”, Paris, ULIP, February 16, 2007. The author would like to thank Prof. William R. Cornish for his valuable comments on earlier versions.

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Footnotes


2. Penultimate paragraph of Art.L.122-5 IPC. The same sentence has been inserted in Art.211-3 IPC and Art.342-3 IPC concerning, respectively, the limits to related rights and the limits to the right of producers of databases.

3. Art.71nonies and Art.71sexies(4) within the framework of the private copy exception (introduced into the Italian legislation when the Directive was implemented by the law dated April 9, 2003).

4. Art.28(c) of the Greek Copyright Act, introduced in implementation of the Directive by Law 3057/2002, JO


Art.40bis of the Spanish Copyright Act, introduced into Spanish law already in 1998, when the Database Directive of March 11, 1996 was implemented. Instead of implementing the test only for the exceptions related to databases (Art.6.3 of the Directive), the test was “expanded” to all copyright exceptions.

Art.21 of the Chinese law dated August 14, 2002: “Unauthorized use of published works permitted by the relative provisions in the Copyright Act shall not conflict with the normal exploitation of the work, and unreasonably prejudice the legitimate interests of the right holder”. Thus, it is more of a two-step test, since the Chinese test does not include the first step: s.200 AB of the Australian Copyright Act of 1968, introduced in Australian law by the Copyright Amendment Act 2006 (No.158, 2006), commenced on December 11, 2006: “The copyright in a work or other subject-matter is not infringed by a use of the work or other subject-matter if all the following conditions exist: (a) the circumstances of the use (including those described in paragraphs (b), (c) and (d)) amount to a special case; (b) the use is covered by subsection (2), (3) or (4); (c) the use does not conflict with a normal exploitation of the work or other subject-matter; (d) the use does not unreasonably prejudice the legitimate interests of the owner of the copyright”.


But not identical. The article will come back to this later.

The term “limitation” should be preferred to the more common term of “exception”, since the idea of “limits” appears more appropriate to take into account the true legal nature of the freedoms guaranteed by the law, which should not be considered as “exceptions” to a rule, but as tools to determine the scope of the exclusive rights (on this subject, see C. Geiger, “De la nature juridique des limites au droit d’auteur” (2004) 13 Propr. intell. 882 with further references).


The definitive formulation of the test developed within the Stockholm conference was proposed by the United Kingdom, a country that expresses its major exception in terms of fair dealing. Likewise, the United States has not modified its legislation since its accession to the Berne Convention in 1989. The thesis, vindicated by certain authors, whereby the exception of fair use violates the first step of the test, seems to ignore the diplomatic context of the adoption of this legal instrument, which, it may be noted, can also be found in Art.1705.5 and Art.1706.3 of the North American Free Trade Agreement (NAFTA) of 1994. But it is true that the wording of the first step, the need for a “special case”, seems in contradiction with an open-ended exemption clause. On the relationship of the test with fair use and fair dealing, see J. Griffiths, “The ‘Three-Step Test’--its Relationship with the Common Law Concepts of ‘Fairness’ and ‘Public Interest’”, Paper presented at the workshop “Rethinking the Three-Step Test”, organised jointly by the Max Planck Institute for Intellectual Property and the Queen Mary University of London, Paris, ULIP, February 16, 2007.

In fact, the Preamble to the WCT recognises “the need to maintain a balance between the rights of authors and the larger public interest, particularly education, research and access to information, as reflected in the Berne Convention”.

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Moreover, whereas Art.10 of the WIPO Treaty is again directed at the “author’s legitimate interests” in the third step of the test, the Directive itself is again directed at the “legitimate interest of the rightholder”.


However, in this case, it also would have risked facing strong opposition in the public opinion, which would have made the adoption of the text even more complicated.

See in this sense the IViR Study, *The Recasting of Copyright & Related Rights in the Knowledge Economy*, November 2006, p.71 (www.ivir.nl): “It is fair to say that the question of the true addressee of the three-step test remains uncertain and thereby, that the role of the three-step test either as a guideline for legislative action or as a rule of interpretation also remains undecided”. Therefore the study recommends that the European legislature should clarify the exact role of the test (p.75).


See “Consultation on UK Implementation of Directive 2001/29 on Copyright and Related Rights in the
Information Society: Analysis of Responses and Government Conclusions”, p.6, where the UK Government states that the “test is a matter to be taken into account with regard to the framing of exceptions in national law, rather than for direct incorporation into law, as is also understood to be the view of the Commission”.


26 Decision 2006-540 DC of July 27, 2006. See also the comment on the decision, stating that the observance of the three-step test must be checked by the judge in every particular case (Cahiers du Conseil Constitutionnel No.21). On this decision, see V.-L. Benabou, “Patatras! ÀPropos de la décision du Conseil constitutionnel du 27 juillet 2006” (2006) 20 Propr. intell. 240.

27 Obviously, it seems that the Constitutional Council did not notice the numerous debates concerning the more than difficult interpretation of Art.5.5, or the different solutions adopted in other countries of the European Union!

28 For a recent example, see the decision of the Brussels District Court, February 13, 2007, Google v Copiepresse (2007) 1-2 A. & M. 107, comment by D. Voorhoof. See also the ruling of the German Federal Supreme Court dated July 11, 2002 [2002] GRUR 963, according to which the extension of the limit permitting press services to summarise the press in electronic format for in-company purposes is compatible, under certain conditions, with the three-step test (the ruling, admittedly, precedes the German Implementation Act of September 10, 2003). More recently, in a decision of the Swiss Federal Court of June 26, 2007 (4c.73/2007/len)), the three-step test was used to validate the extension of the limitation for press review to digital press clipping (the electronic press reviews were even made by a commercial press-clipping service). It is interesting to note that a Dutch decision, in a similar case, came to the opposite conclusion (first instance court of The Hague (Rb. ‘sGravenhage) of March 2, 2005 [2005] Computerrecht 143, comment by K.J. Koelman; on this decision see also S. Dusollier, “L’encadrement des exceptions au droit d’auteur par le test des trois étapes” [2005] I.R.D.I. 217). It must thus be noted that the interpretation of the test by different national judges varies considerably. For a decision prior to the directive, see German Federal Supreme Court, February 25, 1999 [1999] GRUR 707 (applying Art.9.2 of the Berne Convention). On the court decisions applying the test, see S. Dusollier, “The Application of the Three-Step Test by the National Courts”, Paper presented at the workshop “Rethinking the Three-Step Test”, organised jointly by the Max Planck Institute for Intellectual Property and the Queen Mary University of London, Paris, ULIP, February 16, 2007.

29 Bill, statement of the grounds, Doc. Parl., Ch. Rep., sess. 2003-2004, No.51-1137/1, commentary on Art.4. In Germany, the preparatory works that led to the adoption of the Law of September 12, 2003 clearly establish that Germany was of the opinion that Art.5.5 of the Directive addresses the legislature (see for example the motivations of the Bill of November 6, 2002 (BT-Drs. 15/38, at 15). However, in the motives of the draft Bill of March 2006, it is added that the judges might use the test as well. See also S. Bechthold, in T. Dreier and P.B. Hugenholtz (eds), above fn.15, 382: “If a national court applies a national implementation of one of the limitations listed in Arts. 5.1. to 5.4, it should also interpret the implementation as applied in the particular case in the light of Art. 5.5”.

30 Draft Bill of March 22, 2006, 42.

31 This lack of clarity makes the social acceptance of the legal rule more and more difficult. But it is true that the movement towards “disorganisation of law” is not specific to copyright, and numerous doctrinal studies show the disorder related to an increase of legal insecurity in the different domains of law; see particularly on this subject, V. Lasserre-Kiesow, “L’ordre des sources ou le renouvellement des sources du droit” [2006] D. 2279, whereby “the legal disorder seems to characterise a new era, that of disorganisation and legal uncertainty”.

32 If the infringement leads to a penal sanction, one wonders if the constitutional principle of legality of penalties and crimes is respected. This seems to have been considered by the Constitutional Council, who refused to censure the statute for this reason. But this is far from clear and could in the future incite a litigant condemned in last instance for copyright infringement to appeal to the Court of Strasbourg in order to verify the conformity of
the solution with the European Convention of Human Rights.


This remuneration should in principle only be considered during the examination of the third step of the test. This at least seems obviously the opinion of the drafters of Art.9.2 of the Berne Convention; see M. Senftleben, above fn.12, 130. Nevertheless, the German Federal Supreme Court decided in its decision of February 25, 1999 ((1999) GRUR 707) that the payment of an equitable remuneration could keep a use from prejudicing the legitimate interests of the author and harming the normal exploitation of the work, mixing the second and the third step of the test. This means that for the judges of the Supreme Court, the payment of an equitable remuneration in compensation for the exempted use has to be taken into account already when examining the second step of the test.

See above fn.16.

See for example Senftleben, above fn.12, 193; Dusoulier, above fn.28, 220; Geiger, above fn.33, 12.


It is interesting to note that the Court of Appeal came to the exact opposite conclusion. For a comment see C. Geiger, “The Private Copy Exception, an Area of Freedom (Temporarily) Preserved in the Digital Environment” (2006) 37 I.I.C. 74.

Art.L.331-5 IPC.

Point No.37 of the decision, above fn.26.


In fact, in Germany and more recently in Switzerland (decision quoted above fn.28), the three-step test was also used to validate an extensive interpretation of a limitation. This was also sometimes the case in Spain (see for example, Provincial Audience of Barcelona (S.15), VEGAP v Editorial Barcanova and Provincial Audience of Madrid, December 23, 2003 VEGAP v Fundación Santamaría: extensive interpretation of the quotation exception; Juzgado Mercantil de Madrid, June 12, 2006: extensive interpretation of the press review exception to digital press-clippings). On these different cases, see R. Xalabarder, “Fair Use in Spain. The EUCD Aftermath”, Paper presented at the ATRIP conference “Intellectual Property and Market Power”, Buenos Aires, July 17, 2007 (proceedings to be published 2008), this author concluding that “Spanish case law proves that the test can be used by courts not to further ‘restrict’ the scope of a statutory exception but to provide for some well-needed room to ‘manoeuvre’ in applying the exceptions to specific cases and scenarios”.


45 See on this subject C. Geiger, Droit d’auteur et droit du public à l’information (Paris: Litec, 2004), pp.198 et seq.; and, by the same author, “Constitutionalising” Intellectual Property Law?, The Influence of Fundamental Rights on Intellectual Property in Europe” (2006) 37 I.I.C. 371, 398. See also the IViR Study, above fn.22, 75, and the IViR Study, above fn.44, 167, concluding that the EC legislature should strive to establish a more flexible and forward-looking regime of limitations on copyright and related rights, the second study advocating even the adoption of an open norm leaving Member States the freedom to provide for additional limitations.

46 To be clear, the three-step test could henceforth become the guarantor of an evolutionary legal system, instead of representing the symbol of a disorganisation detrimental to copyright. In fact, as P. Roubier estimates, “from the moment when the legal order presents gaps in comparison with the concrete, it is natural to search in the spontaneous social order, i.e. in the content brought by the experience of life and the necessities of new relationships, the elements which could bridge these gaps”: “L’ordre juridique et la théorie des sources du droit” in Le droit privé français au milieu du XXe siècle, %21 Etudes offertes à G. Ripert (LGDJ, 1950), p.19. But who else than the judge could ensure the adaptation of rights to the “spontaneous” mutations of society? The adaptation of copyright to the “information society” cannot only be the task of the legislature.

47 With this purpose, the Max Planck Institute for Intellectual Property and the Queen Mary University of London have put together a working group composed of experts from several European countries to issue some guidelines on how to understand and interpret the three-step test in more balanced way.

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E.I.P.R. 2007, 29(12), 486-491