



JÖNKÖPING INTERNATIONAL BUSINESS SCHOOL
Jönköping University

The Swedish Implementation of the InfoSoc Directive

Emphasis on the Exception for Private Use

Master's Thesis within Copyright Law

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Tutor: Edward Humphreys

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Den svenska implementeringen av InfoSoc-Direktivet

Särskilt om inskränkningen för privat bruk

Filosofie magisteruppsats inom upphovsrätt

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Abstract

Copyright has always been the subject of two conflicting interests, that of the copyright owner and that of the public. It is up to the legislator to maintain this balance in order to provide a solution somewhat satisfying for both parties. The constituent elements in the balancing act for this thesis are the copyright, the exceptions and limitations to the copyright, the Three-Step Test limiting the exceptions and limitations and the protection of technological measures. This last element is a reaction to the Information Society, where copyrighted work can be copied digitally and disseminated with minimal effort. An increasing amount of infringements, especially on the Internet, and the fact that the copy becomes identical in quality to the original have become typical for the Information Society. To combat piracy in the Information Society and to harmonise the discrepancies in the exceptions and limitations of the Member States' national laws, the InfoSoc Directive has been issued. Sweden implemented the Directive on July 1, 2005 and the purpose of this thesis is to examine whether the implementation has maintained or distorted the delicate balancing act. The Information Society has affected the exception for private use in particular, partly because digital infringements in this sector are hard to control since the users are anonymous and partly because of the inconvenience of encroaching on the private sphere of the users. As concluded in this thesis, the balance has been generally maintained, however there are specific effects that may have caused or are capable of causing a distorted balance. For instance, the Swedish legislator has restricted not only digital private use, but also analogue private use. Moreover, the Three-Step Test and its impact in national law may be dependent on national legal traditions. Furthermore, works subjected to beneficiaries of the exception for private use, risk a lock-up because of the protection of technological measures. This problem is related to the Swedish legislator's choice of not implementing an enforcement provision related to the exception for private use. As for this problem in general, its complexity prevents a solution at this stage.

Magisteruppsats inom upphovsrätt

Titel:	Den svenska implementeringen av InfoSoc-direktivet, särskilt om inskränkningen för privat bruk
Författare:	Kristin Friberg
Handledare:	Edward Humphreys
Datum:	2006-05-31
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Sammanfattning

Upphovsrätten har alltid varit föremål för två motstående intressen, dels upphovsrättsinnehavarens intresse, dels det allmännas intresse. Det är upp till lagstiftaren att bibehålla denna balans och samtidigt förse båda parter med tillfredställande lösningar. De enheter som interagerar i denna balansakt för den här uppsatsen är: upphovsrätten i sig, undantag till och inskränkningar i upphovsrätten, Trestegsregeln vilken skall reglera undantagen och inskränkningarna samt skyddet av tekniska åtgärder. Den sistnämnda enheten är en indirekt reaktion på informationssamhällets ankomst där upphovsrättsskyddade verk kan kopieras digitalt samt spridas med minimal ansträngning. Det som utmärker informationssamhället är ett ökat antal av digitala intrång, särskilt över Internet, samt det faktum att kopian av verket helt motsvarar originalets kvalitet. För att motarbeta piratkopiering i informationssamhället samt harmonisera medlemsstaternas olikheter gällande undantag till och begränsningar i upphovsrätten, har ett upphovsrättsdirektiv framarbetats. Sverige implementerade direktivet 1 juli, 2005 och syftet med den här uppsatsen är att undersöka huruvida implementeringen har upprätthållit eller förvrängt denna känsliga balansakt. Informationssamhällets ankomst har särskilt påverkat undantaget för privat bruk, dels p.g.a. att intrång från aktörer i denna sektor är svårkontrollerade, samt dels p.g.a. den olägenhet som ett intrång i användarnas privata sfär skulle utgöra. Utifrån det som behandlas i denna uppsats visar det sig att balansen har upprätthållits rent generellt, men att det även har uppstått särskilda effekter som kan orsaka, eller kan komma att orsaka en förvriden balans. Exempelvis har den svenska lagstiftaren intagit en mycket restriktiv ställning, inte bara gentemot digitalt privat bruk, utan även gentemot analog användning. Det framgår också att Trestegstestet och dess ställning i nationell lag kan vara beroende av lagstiftningstraditioner. Vidare riskerar verk som är föremål för förmånstagare av ett lagstiftat undantag till upphovsrätten, att läsas in p.g.a. skyddet av tekniska åtgärder. Problemet är relaterat till den svenska lagstiftarens val att inte implementera en bestämmelse för ett ikraftträdande av undantag för privat bruk. Generellt sett är detta problem mycket komplext vilket förhindrar en lösning på ett sådant här tidigt stadium.

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“Art is making something out of nothing and selling it.” (Zappa, F., 1940-1993)

Mullsjö, June 2006

Kristin Friberg

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List of Abbreviations

CD-R	Compact Disc Recordable
CD-ROM	Compact Disc Read Only Memory
CDPA	Copyright, Designs and Patents Act November 15, 1988 (British legislation on Intellectual Property)
DRM	Digital Rights Management
EC	European Community
EIPR	European Intellectual Property Review
EU	European Union
FIPR	Foundation for Information Policy Research
GATT	General Agreement of Tariffs and Trade
InfoSoc Directive	Directive 01/29/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
IIC	International Review of Intellectual Property and Competition Law
IViR	Instituut voor Informatierecht, Institute for Information Law
MD	Miniature Disc
NIR	Nordiskt Immateriellt Rättsskydd, Nordic Intellectual Property Law Review
NJA II	Nytt Juridiskt Arkiv, avdelning II (composed Swedish preparatory acts)
TRIPS	Trade-Related Aspects of Intellectual Property Rights
UK	United Kingdom
UN	United Nations
URL	Lagen (1960:729) om upphovsrätt till litterära och konstnärliga verk or Act on Copyright in Literary and Artistic Works (Act 1960:729, of December 30, 1960, as amended up to July 1, 2005) (The Swedish Copyright Act)
US	United States
WCT	WIPO Copyright Treaty
WIPO	World Intellectual Property Organization
WPPT	WIPO Performance and Phonograms Treaty
WTO	World Trade Organization

1 Introduction

1.1 Background

Copyright is the right to protection of creative works and belongs under the area of intellectual property law. As the name indicates, copyright along with patents, designs and trademark rights deals with intangible property. The term is in no way general though. The right exists only by virtue of national law providing for such right of protection.¹ Copyright has always been the subject of two conflicting interests namely that of the copyright owner and that of the public. However, it is important to note that these cannot always be divided into two completely unrelated groups. One interest can be found indirectly in the other one.² Legislation around this relationship has to regulate a balance between these interests in order to provide a somewhat satisfying solution for both parties. A copyright can be said to constitute a single monopoly, because the work copyrighted is a unique emanation from a person's creative mind. Although other people may come up with an identical creation ('double creations'), the right of copying this specific work still belongs to the copyright owner.³ This can be unfavourable to the public, because the creation might be something that is useful for more than one person. At the same time the copyright owner must have the right to protect what he has achieved through labour. It is a difficult task maintaining this delicate balance and its outcome depends on a large number of factors.

To take the European Community (EC) Directive on Copyright in the Information Society (commonly known as the 'InfoSoc' Directive) as an example, it is structured so that it firstly establishes the protection of copyright, namely the owners' sole right to disposal of their work.⁴ Then, the legislation turns to a list of exceptions and limitations to this protection in favour of the public interest. In some of those cases the copyright owner has the right to fair compensation, for instance remuneration. These restricting exceptions and limitations are in their turn constrained by a sort of minimum test (commonly referred to as the 'Three-Step Test') in order to ensure that the exceptions and limitations do not become too far-reaching.⁵ Being merely an overview of the traditional balancing act, this still offers a glance at what sort of questions we are dealing with.

¹ See for instance Sterling, *World Copyright Law*, Sweet & Maxwell 2003, p. 42.

² Like the concept of 'intergenerational equity' where the author is obliged to allow subsequent creators to use and enjoy the fruit of his labour in the same way as he was permitted to access already existing works, see Senftleben, *Copyright, Limitations and the Three-Step Test: An Analysis of the Three-Step Test in International and EC Copyright Law*, Kluwer Law International 2004, p. 38.

³ See Koktvedgaard, Levin, *Lärobok i immaterialrätt*, Norstedts Juridik 2004, p. 76 and 170 about the differences between double creations in copyright and in industrial rights.

⁴ Directive 01/29/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. Although it is not actually necessary for the understanding of the thesis, the reader might find it useful to take a look at the InfoSoc Directive, Official Journal of the European Communities 22 June, 2001 (accessed 30 March, 2006) http://europa.eu.int/eur-lex/pri/en/oj/dat/2001/l_167/l_16720010622en00100019.pdf

⁵ Art 5(5) InfoSoc Directive.

The InfoSoc Directive introduced a new legal system protecting technological measures.⁶ National borders have long since lost their meaning when it comes to circulation of copy protected work. In today's digital Information Society, copyright law is an international matter. Making copies and distributing them is no longer limited by paper, tapes or even wires. Copies are made whilst still maintaining the same quality as the original, and can be compressed into small easily-handled formats (e.g. mp3-files). The number of infringements is growing, and there are suggestions that it has to do with the nature of the Internet. Infringements on the Internet attract not only the user who is himself capable of infringements because of his knowledge and ability, but also the 'normal user'. This latter group consists of users who would not normally have the skills to hack their way through technological measures protecting copyrighted material. However, when users of the former group compose user-friendly programs, tools or devices and offer them (often for free over the Internet) to this latter group they may be tempted to infringe.⁷ As a reply, the copyright owners have been setting up technological measures in order to protect their work from unauthorised access or copying. The protection in the InfoSoc Directive consists of a prohibition against the circumvention of these measures as well as the commercial handling of devices enabling such circumvention.⁸ Even though this concept is not traditionally a part of the balancing act, it will still affect the act as this extra layer of protection might oppose the interest of the public in the digital age. Technological measures can also affect the public's prospects of benefiting from the exceptions and limitations established in law, especially regarding the exception for private use. How this is possible will be examined later in this thesis.

As well as introducing the protection of technological measures, the European Council also stressed the need to create a general and flexible legal framework at Community level in order to foster the development of the Information Society in Europe.⁹ The EC internal market demands a harmonisation within the area of copyright.¹⁰ In the Green Paper preceding the InfoSoc Directive it is stated that the Community has consistently favoured a high level of protection for intellectual property rightholders because it is one of the keys to creative works and innovations.¹¹ It stimulates the development and marketing of new products and services. Differences in this protection, i.e. provisions regulating what shall be and what shall not be protected, may actually hinder economies of scale for new products and services containing copyright and related rights.¹²

On 1 July 2005 Sweden implemented the InfoSoc Directive into its national legislation. The Swedish legislator, like other Member States, has chosen not to implement the Directive in its entirety. However, it has considered the aim of the Directive by sometimes interpreting the preamble in order to understand and fulfil its purpose. This method is in accordance with art. 249 of the Treaty Establishing the European Community (the EC Treaty),

⁶ Art. 6(1-2) InfoSoc Directive.

⁷ Westman, *Tekniska åtgärder – teknik, juridik och politik*, NIR 2002, p. 235.

⁸ Art. 6(1-2) InfoSoc Directive.

⁹ Recital 2 InfoSoc Directive.

¹⁰ Recital 1 InfoSoc Directive.

¹¹ Recital 4 COM 95/0382.

¹² Recital 6 InfoSoc Directive.

stating that a directive shall be binding, as to the result to be achieved, upon each Member State to which it is addressed, but shall leave to the national authorities the choice of form and method. This means that no ratification in the exact wording of the directive is necessary. The Member State may adapt provisions in order to fit them into national legislation. In some cases the implemented text will go further than the directive, and sometimes it will take a more restrictive position, the implementation is complete as long as the aim of the directive is fulfilled. In any case, an implemented directive becomes national legislation and shall have precedence over earlier national legislation.¹³ The last date of implementation for the InfoSoc Directive was 22 December 2002, but only Denmark and Greece were able to implement it before the time expired.¹⁴ The delay has been caused by intense discussions around the different issues of the Directive.

1.2 Purpose

The purpose of the thesis is to find out how the delicate balance between the interests of the copyright owner and the interest of the public has or has not been maintained through the Swedish implementation of the InfoSoc Directive. This shall include an aspect on the protection of technological measures and be especially investigated regarding provisions relating to the exception for private use. Consideration will be given as to whether the effect of implementation has caused a distorted balance with regard to the above mentioned interests.

1.3 Method

To fulfil the purpose of the thesis, the author has initially turned to the InfoSoc Directive itself. The ambition is to, as far as possible, follow the legal hierarchy in order to put the main focus on the primary legal sources. This includes Swedish legislation and sometimes also international agreements where they have shed some light on issues relating to the Directive. The proposal for the Swedish implementation is not actually a primary source of law, it still constitutes a significant contribution.¹⁵ Although it has been known to occur, it is only in exceptional cases that a proposal reaching this level is rejected.¹⁶ Therefore, when examining the amendments of the Swedish Copyright Act after the implementation, the author has in fact only by way of exception deviated from this source. This is also motivated by the late implementation and the consequential limited amount of, for instance, case law related to the Act post the amendments. It is also useful to look at the implementation in other Member States, since it is possible to compare the different possible methods weighing the pros and cons.

¹³ The Principle of Supremacy as established by the ECJ in case C-6/64 Costa Flaminio v ENEL.

¹⁴ Art 12(1) InfoSoc Directive.

¹⁵ Prop. 2004/05:110.

¹⁶ Like the case when there is a political election between the preparation of a proposal and the approval of it. A proposal prepared by a left-wing party government may not be approved by a parliament with a right-wing party majority. However, there has been no such change of political direction during the legislation process regarding the implementation of the InfoSoc Directive. See also Bernitz and others, *Finna rätt – Juristens källmaterial och arbetsmetoder*, Norstedts Juridik 2006, p. 111-112.

Intellectual Property including copyright is to a great extent an international area, which apart from EC measures is also influenced by treaties, conventions and agreements of international organizations. Therefore, statements on behalf of these organizations or with these organizations as a starting point are considered. Also, the law doctrine in general has been consulted for the understanding of the subject. This is an important source although not a primary one. In respect of the foremost referred books, *International Copyright and Neighbouring Rights: The Berne Convention and Beyond* by Australian lawyer Ricketson has been helpful on international questions. In Swedish Copyright law, Prof. Koktvedgaard's edited textbook on Intellectual Property has been consulted. As for the Three-Step Test the author has mainly turned to the comprehensive doctoral thesis *Copyright, Limitations and the Three-Step Test: An Analysis of the Three-Step Test in International and EC Copyright Law* by Senftleben. Finally, it must be added that the doctrine consists not only of books but also articles.

1.4 Delimitations

For several reasons some topics have been left outside the scope of this thesis.

Moral rights play an important part in the copyright law, especially related to the Three-Step Test. Hence, these must be briefly touched upon, but there will be no discussion since the InfoSoc Directive does not regulate these rights. Neither will there be any discussion around intellectual property's role in the EC Treaty. Copyright is not established in the EC Treaty and the closest connection is through the free movement of goods and the possible conflicts in this area. This is more related to EC competition law than intellectual property law as such.

Due to lack of space and time, and because the area can be separated without distorting the outline of this thesis, there will be no discussion around the 'digital rights management information' (DRM) provisions in art. 7 of the InfoSoc Directive. For the same reasons there will be limited discussions around related rights, mainly because the Swedish provisions are hard to grasp and contains complex terminology which demands profound and detailed studies within this area, for which there is no space in this thesis.

As for chapter 6.5 on implementation in other Member States than Sweden, it will not contain implementation details about every single Member State. The intention is not to provide an exhaustive description of possible implementation methods, rather to deal with examples of implementations.

1.5 Outline

The reader should be aware of several presumptions made in the course of this thesis. With regard to translation and general discussion around national law, the Swedish term 'upphovsrätt' is translated into 'copyright'. References to 'chapters' and 'sections', will refer to text in this thesis, whilst reference to the abbreviations 'ch.' and 's.' will refer to written law in national legislation. When referring to division in articles in legislation it is never a reference to Swedish law, in which divisions in sections and paragraphs are used. Also, for the purpose of this thesis, the 'Swedish legislator', although it is actually the Swedish Parliament that approves new legislation, means the Swedish Government as this is the body introducing the proposals for new legal acts. Finally, the term 'Information Society' refers to where acts are performed in a digital environment like the Internet.

The introduction chapter lays out the background, purpose and method of the thesis. Following the introduction are the chapters on the four elements in the balancing act (including the protection of technological measures). When referring to Swedish legislation, these chapters deal mainly with legal concepts that can be immediately identified in the InfoSoc Directive. Throughout the thesis a consistent outline of the balancing act will be followed, both in the inner and outer structure of the chapters: The rights, the exceptions and limitations (foremost the exception for private use), the Three-Step Test and the protection of technological measures (foremost the lock-up problems in relation to private use).

Chapter 2: Here, the concept of copyright is investigated. Before dealing with the concept as an element, 2.1 contains a historical analysis of the Information Society and the InfoSoc Directive, as this legal act will be constantly referred to throughout the thesis. It clarifies the key concepts of the Information Society and the international influence during the adoption process. Thereafter, 2.2, 2.3 and 2.4 seek to explain the concept of copyright mainly as an element in a legal context, to be precise the Directive and the Swedish Act on Copyright in Literary and Artistic Works – Act 1960:729, of December 30, 1960 (Swedish Copyright Act or URL).¹⁷

Chapter 3: This chapter deals with the second balancing element. Exceptions and limitations are identified respectively for the Directive and the Swedish Copyright Act in 3.2 and 3.3, whilst 3.4 deals specifically with the exception for private use.

Chapter 4: The Three-Step test is closely connected to the exceptions and limitations but will nevertheless be dealt with in its own chapter. Here, the test is investigated on both an international and an EC level. At the same time the Swedish legislator's reasoning around the implementation of the test is attended. The interpretation made by the Trade-Related Aspects of Intellectual Property Rights (TRIPS) Panel is examined and applied on the test as it functions in the InfoSoc Directive.

Chapter 5: The protection of technological measures can be separated from the first three elements. The focus lies on the lock-up problem and its consequences for the private use exception.

Chapter 6: In this chapter the Swedish implementation of the InfoSoc Directive is further investigated. These are aspects that Sweden has implemented beyond what is expressly stated in the Directive, or that have been implemented slightly differently. Here, the implementation around private use is more closely examined, especially the discussion around private copying in the sphere of professional work, the limited scope of private copying and the condition of a lawful real master copy. 6.3 contains aspects to consider on account of the Swedish choice of not incorporating the Three-Step Test. 6.4 deals with the effects on private use resulting from the protection of technological measures. The chapter ends with a general look at the implementation in other Member States in line with the purpose of this thesis.

Chapter 7: The final chapter presents conclusions drawn from the earlier chapters. The purpose of the thesis is revisited and analysed.

¹⁷ Lagen (1960:729) om upphovsrätt till litterära och konstnärliga verk.

2 Copyright

In order to analyse the balance referred to in the introduction chapter, it is necessary to understand the features of the elements in the balancing act. The first definition of importance is that of copyright itself. The other elements are exceptions and limitations, the Three-Step Test and the protection of technological measures, which will be dealt with as an element on its own. All of these elements can be found in the InfoSoc Directive and it is important that they are still identified after the implementation. Each chapter dealing with the definition of any of these elements will, at the same time, refer to the corresponding articles in the InfoSoc Directive and the Swedish Act on Copyright in Literary and Artistic Works – Act 1960:729, of December 30, 1960 (Swedish Copyright Act or URL which is the Swedish official abbreviation), where this is structurally convenient.¹⁸ The references to the Swedish Copyright Act in chapter 2-5 deal mainly with legal text that can be directly referred to articles in the InfoSoc Directive. Other implemented legal text will be presented in chapter 6. The reason for discussing certain implemented provisions in chapter 2-5, whilst detaining some of them until chapter 6, is that the latter ones demand an overall understanding and consideration of all elements in the balancing act. These latter provisions are the result of the Swedish legislator's interpretation of the Directive's aim, and thereby demonstrate the direct effects of the implementation.

The InfoSoc Directive will, as a starting point, indicate the set of provisions the Swedish legislator had to deal with during the implementation. In order to understand the structure and the purpose of the Directive, this first section will contain a glance at the underlying factors and key concepts behind the Information Society.

2.1 History of the Information Society

In July 1995 the Commission adopted the Green Paper on Copyright and Related Rights in the Information Society.¹⁹ The Green Paper examines a range of issues emerging from the impact of new technologies and the Information Society on copyright and related rights.²⁰ It is crucial that the Information Society brought several new concepts to the surface, which demanded solutions to problems posed by the technical development.²¹ The Green Paper was an initiative to assess the need for new EC-level measures, and deciding what areas the harmonisation should be focused on. Typical for the Information Society is that most works can be digitised and instantly communicated through networks. As the preamble of the InfoSoc Directive points out: "Technical development has multiplied and diversified the vectors for creation, production and exploitation."²² The digital format also makes it possible to create unlimited amount of copies of the same quality as the original.²³

¹⁸ Lagen (1960:729) om upphovsrätt till litterära och konstnärliga verk.

¹⁹ Green Paper on Copyright and Related Rights in the Information Society COM 95/0382.

²⁰ Para. 1 COM 95/0382.

²¹ Sterling, 2003, p. 862.

²² Recital 5 InfoSoc Directive.

²³ S. 1 COM 95/0382.

2.1.1 The Rights Established in the Preparatory Acts

The follow-up of the first Green Paper, a Communication Report, appeared in 1996 after almost two years of consultation.²⁴ It contains an outline of four priorities for legislative actions to eliminate distortions of competition between Member States and (or) significant barriers to trade in copyright goods and services. These are the reproduction right, the communication to the public right, the legal protection of anti-copying systems and the distribution right. The reproduction right has always been a priority within the area of copyright. Converted into electronic form and transmitted digitally, this right is much more vulnerable to exploitation through copying than in the past.²⁵ The Communication report also establishes the importance of harmonisation of exceptions and limitations to the reproduction right.²⁶ It is within these exceptions that the exception for private use is found.

2.1.2 A Harmonised International Approach

Several of the consulted parties stressed the importance of a functioning EC internal market. "The Single Market must, in particular, offer adequate and secure conditions for investment and legal security across the EU and not be fragmented by different sets of rules in different Member States."²⁷ By this time the negotiations around the World Intellectual Property Organization (WIPO) Copyright Treaty (WCT) and the WIPO Performance and Phonograms Treaty (WPPT) were in progress.²⁸ In fact, the adoption of the WIPO Treaties was only a month away. As much as a new EC-legislation measure had to achieve, throughout the European Union, a level playing field for copyright protection in the framework of the Single Market, it also had to respect the multilateral actions taken at a world level.²⁹

The report states:

*"An isolated response from the European Union will not be sufficient. As the Information Society has a global nature, it requires global answers, at least with respect to the most crucial points related to the digital environment."*³⁰

Thus, this Communication Report preceded the WIPO Diplomatic Conference on the possible conclusion of what would later be adopted as the WCT and the WPPT. Related to the quotation above, the Commission also pointed out the importance of a successful outcome of this Conference. The Commission described it as a "timely and unique opportunity for agreeing on international minimum standards of protection"³¹ and that it would "minimise the risks of divergent approaches in legislation and the creation of havens for pi-

²⁴ Follow-up to the Green Paper on Copyright and Related Rights in the Information Society COM 96/0568.

²⁵ Para. 4 COM 96/0568.

²⁶ Para. 6 COM 96/0568.

²⁷ Para. 18 COM 96/0568.

²⁸ WIPO Copyright Treaty (adopted in Geneva on December 20, 1996) and WIPO Performance and Phonograms Treaty (adopted in Geneva on December 20, 1996).

²⁹ Para. 1 COM 96/0568.

³⁰ Last para. (21) COM 96/0568.

³¹ Last para. (21) COM 96/0568.

racy.”³² These points are crucial to show how much weight of importance the Commission from the beginning attached to the WIPO Treaties and a harmonised international approach.³³ Because the WPPT applies on related rights, it will not be further attended in this thesis, although it can normally be mentioned alongside with the WCT when discussing this treaty in general.

Except for the single market and the international acts, measures that were to be taken at an EC-level also had to safeguard a fair balance of rights and interests between the different categories of rightholders and between rightholders and users.³⁴

2.2 The Copyright Element

By studying the structure of the InfoSoc Directive it is clear that a copyright work is one that has the right to protection against certain infringing acts. This is a brief and general explanation of the first element. As mentioned in the background section, the classification of the term ‘copyright’ is always according to its judicial nature in a particular system.³⁵ Whether the work is worth protecting or not will always depend on what legislation is applicable. This means that the definition may vary as soon as these rules are put into a real context. Therefore, when searching for definitions of and criteria for copyright, it has to be in the light of a legal act.

2.2.1 International Legal Sources

The impact of international copyright agreements has to be respected during an examination like this. Copyright is territorial in nature, which means that protection under a given copyright law is available only in the state where that law applies. In order to protect a work outside the national borders, the author has to rely on the state to conclude international agreements with the states where the work is used.³⁶ Hence, copyright is to a great extent an international area, and a definition can be traced to the wording of these international acts. For instance, Sweden has signed both the Berne Convention and the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement).³⁷ The Berne Convention contains minimum provisions, and the states ratifying or entering the convention constitute a Union for the protection of the rights of authors in their literary and artistic works.³⁸ The Berne Convention is administrated by WIPO, which is a so called

³² Last para. (21) COM 96/0568, see also recital 15 InfoSoc Directive.

³³ See also recital 44 InfoSoc Directive regarding international obligations.

³⁴ Para. 19 COM 96/0568 and recital 31 InfoSoc Directive.

³⁵ Sterling, 2003, p. 42.

³⁶ International Protection of Copyright and Related Rights, Document prepared by the International Bureau of WIPO (accessed March 30, 2006)
http://www.wipo.int/copyright/en/activities/pdf/international_protection.pdf p. 4, Recital 4.

³⁷ Berne Convention for the Protection for Literary and Artistic Works, last amended at Paris on September 28, 1979. Sweden signed on the 1 August 1904 and has adopted all the amendments of the Convention after that. Agreement on Trade-Related Aspects of Intellectual Property Rights signed in Marrakech, Morocco on 15 April 1994.

³⁸ An example of a minimum provision is the duration of time for the protection of works stated in art. 7. Art. 1 Berne Convention.

'Specialized Agency' under United Nations (UN). Since WIPO has a great amount of Member States (about 170) and because of tensions between industrial countries and development countries, the possibilities of bringing about improvements for the Berne Convention have been limited. This led to several members of the Union picking out and moving certain trade related intellectual property law questions to negotiations under General Agreement of Tariffs and Trade (GATT) instead. The negotiations resulted in the TRIPS Agreement while GATT was transformed into the World Trade Organization (WTO). The TRIPS Agreement has its foundation in the Berne Convention, but reaches much further.³⁹ For instance the TRIPS Agreement contains enforcement and dispute settlement provisions, which was also one of the reasons for turning from WIPO to GATT.⁴⁰

Proceeding to the WCT, this treaty is meant to fill the gaps left by the Berne Convention, as well as meeting the demands of the 'digital agenda'. Nothing shall derogate from existing obligations that contracting parties have to each other under the Berne Convention.⁴¹ At this stage, neither Sweden nor the EC as a body has signed the WCT. Nevertheless, its meaning is important for the interpretation of the InfoSoc Directive as the Directive emanates from the WCT.⁴² However, for the investigation of the first element, this thesis will focus on the InfoSoc Directive and the Swedish Copyright Act.

In all cases, no matter what legal act is applicable, there are at least two questions to be answered in order to define copyright. Therefore, the examination of the InfoSoc Directive and the Swedish Copyright Act will answer these two questions in chapter 2.3 and 2.4. 1) What is the subject-matter of the protection, that is, what can be protected? (Not to be confused with the Swedish terms often used in the doctrine, where the subject is the person behind the work, and the object is the work protected.⁴³) And 2) what kind of protection does the copyright provides for the copyright owner? It can be added that these two questions are related to the economic aspects of the copyright. In several legal systems including the Swedish Copyright Act, there is also a moral part of the copyright to consider. The moral part consists of a non-pecuniary right to something that goes beyond economic interests.⁴⁴ These are for instance, the author's right to be identified by name when his work is used and his right to object to prejudicial treatment of his work.⁴⁵ The InfoSoc Directive, on the other hand, does not contain any provisions on moral rights, leaving this area for the Member States to regulate as they wish, as long as the international agreements are respected.⁴⁶ Historically, the protection given to this right in different countries varied

³⁹ Koktvedgaard, Levin, *Lärobok i Immaterialrätt*, Norstedts Juridik 2004, p. 39-44. For more historical information see the web-sites of the organizations (both accessed 30 March, 2006) <http://www.wipo.int> and <http://www.wto.org>

⁴⁰ Ricketson, Ginsburg, *International Copyright and Neighbouring Rights: The Berne Convention and Beyond*, Oxford University Press 2006, p. 135.

⁴¹ Art. 1 WCT.

⁴² *How* important, is left for the European Court of Justice (ECJ) to decide in future case law. Recital 15 InfoSoc Directive.

⁴³ See for instance continuous references by Koktvedgaard, Levin, 2004.

⁴⁴ Bently, Sherman, *Intellectual Property Law*, Oxford University Press 2004, p. 321.

⁴⁵ 3§ 1-3 URL.

⁴⁶ Recital 19 InfoSoc Directive.

widely. The first attempt of bringing some cohesion to this concept on an international level was made in the amendments to the Berne Convention. As for the term ‘moral right’, it originates from the French term ‘droit moral’.⁴⁷

2.3 Copyright in the InfoSoc Directive

The Directive first establishes the rights of the copyright owners. The rights protected under the Directive are the reproduction right, the right of communication to the public and the distribution right.⁴⁸ The communication to the public also includes the making available to the public. These rights were all mentioned in the preparatory acts.

2.3.1 The Subject-Matter

Regarding the subject-matter of protection art. 10 states that the provisions of the InfoSoc Directive shall apply in respect of all works and other subject-matter referred to in the Directive which are, on 22 December, protected by the Member States’ legislation in the field of copyright and related rights, or which meet the criteria for protection under the provisions of this Directive.⁴⁹ Except for what is stated in art. 2-4, the Directive relies on the subject-matter to be further identified by the national law of the Member States. This is further reinforced by the fact that the Directive does not set up detailed criteria of what shall be protected, it presupposes the existence of copyright from the beginning.⁵⁰

The subject-matters of the reproduction right are works of authors, fixation of performers’ performances, phonograms of phonogram producers, films of producers and fixation of broadcast of broadcasting organizations.⁵¹ With regard to the right of communication to the public, the subject-matters are the same as for the reproduction right, except for works of authors.⁵² Regarding the distribution right, it aims at authors’ original works or copies thereof.⁵³

2.3.2 The Meaning of the Rights

The reproduction right means the exclusive right to authorise or prohibit direct or indirect, temporary or permanent reproduction by any means and in any form, in whole or in part.⁵⁴ The exclusive right to communication to the public, as well as the making available to the public, refers to communication or making available by both wire and wireless means.⁵⁵ It

⁴⁷ Davies, Garnett, Harbottle, Copinger and Skone James on Copyright, Sweet & Maxwell 2005, p. 625-626.

⁴⁸ Art. 2, 3 and 4 InfoSoc Directive.

⁴⁹ Art. 10(1) InfoSoc Directive.

⁵⁰ Art. 1(1) InfoSoc Directive.

⁵¹ Art. 2(a-e) InfoSoc Directive.

⁵² Art. 3(1-2) InfoSoc Directive.

⁵³ Art. 4(2) InfoSoc Directive.

⁵⁴ Art. 2 InfoSoc Directive.

⁵⁵ Art. 3(1) InfoSoc Directive.

includes the communication or making available of the work in such a way that members of the public may access them from a place and at a time individually chosen by them ('on-demand transmissions'⁵⁶). The right of distribution grants the author the exclusive right to authorise or prohibit any form of distribution to the public by sale or otherwise.⁵⁷

2.4 Swedish Copyright Legislation

The central Swedish act on copyright, is the already mentioned Swedish Act on Copyright in Literary and Artistic Works from 1960, latest amended to implement the InfoSoc Directive. The following sections seek to define the subject-matter and the rights stated after the implementation. Unless specifically mentioned, the reference to the Swedish Copyright Act will be aimed at the Act post implementation.

2.4.1 The Subject-Matter

According to s. 1 URL, work protected covers fictional or descriptive representation in writing or speech, computer programs, musical or dramatic work, cinematographic work, photographic work, or another work of fine arts, work of architecture or applied art or work expressed in some other manner. This last concept implies that this list is not exhaustive, merely exemplifying. What falls under the copyright is marked by a very open-minded approach. For instance, there are no demands on the works to have a certain amount of esthetical quality in order to be protected by the URL.⁵⁸

2.4.2 The Meaning of the Rights

The right granted by the URL consists of two so called 'exclusive rights' namely the reproduction right and the right of authorising communication to the public. S. 2 establishes the exclusive right to exploit the work by reproduction and communication to the public, be it in original or altered manner, in translation or adaptation, in another literary or artistic form or in another technical manner. Regarding the definition of authorisation of the work, s. 2 para. 2 URL is an implementation identical with art. 2 of the InfoSoc Directive (the reproduction right means the exclusive right to authorise or prohibit direct or indirect, temporary or permanent reproduction by any means and in any form, in whole or in part).

The right of communication to the public has been implemented in accordance with the Directive, however, the structure differs somewhat. Although s. 2 para. 1 URL corresponds to art. 3(1) and includes 'on-demand transmissions', the making available to the public consists of three concepts in the Swedish Copyright Act. The concepts are the public performance, the public exhibition and the public distribution.⁵⁹ The public performance mainly refers to performance by normal use of a technical device such as a CD-player at a club, a radio station at a restaurant etc.⁶⁰ The public exhibition refers to the viewing of fine art, such

⁵⁶ Recital 25 and art. 3(2) InfoSoc Directive.

⁵⁷ Art. 4(1) InfoSoc Directive.

⁵⁸ See further discussion in Koktvedgaard, Levin, 2004, p. 68-69.

⁵⁹ S. 2 para. 2, s. 2 para. 3 and s. 2 para. 4 URL.

⁶⁰ S. 2 para. 2 URL and Koktvedgaard, Levin, 2004, p. 129.

as the case where an artist exhibits his work by placing it in a gallery for the public to watch. If a technical device is used in this case, the exhibition will be regarded as a public performance instead.⁶¹ The criterion for these two concepts to count as communication to the public is that the public receiving the communication receive it at the same location as where the work is made available.⁶² As for the distribution right, this provision is more similar to the Directive in wording; it includes distribution by sale, rental, lending or otherwise.⁶³

2.5 Brief Summary of Chapter 2

To summarise this chapter on the definitions of copyright, it can be concluded that copyright is very comprehensive. Naturally, the copyright owners are the beneficiaries of these rights. The wording of the InfoSoc Directive, as well as the Swedish Copyright Act, shows especially great generosity as to the scope of protected subject-matter. There is no reference to any specific criteria for protection (e.g. originality or place of publication) in any of the two legal acts. Instead, definitions prevail rather than criteria. The legal acts provide definitions as examples of works that may be protected, but do not demand them being of any specific feature. However, once it is clear that the legal acts are applicable, exceptions and limitations will narrow the area of protection.

⁶¹ S. 2 para. 3 URL and Koktvedgaard, Levin, 2004, p. 129.

⁶² S. 2 para. 2 and s. 2 para. 3 URL.

⁶³ S. 2 para. 3 URL.

3 Exceptions and Limitations

Restrictions to copyright constitute the second element essential to the balance. In order to fulfil the purpose of this thesis, the specific exception for private use will be investigated later in this chapter, while the other listed exceptions in the InfoSoc Directive will only be given general attention for the understanding of the context. Copyright only protects against copying when the infringing person is aware of the existence of the original, and does not protect against the occurrence of an identical work as an act of coincidence.⁶⁴ Although not as fierce as in for instance the area of patent law, the copyright being an exclusive right still leads to the occurrence of a legalised monopoly. The need for some degree of restriction to this right is as old as the right itself.

Exceptions and limitations define the border between the ‘reservation zone’ and the free use of elements. In each piece of legislation where they are found they help determine to what extent intellectual property can be relied on against a third party.⁶⁵ They are necessary in order to keep the balance between the interest in rewarding the creators and the public interest in the spreading of their works, which is also the interest of the users of such works.⁶⁶ Hence, some acts that would normally constitute an infringement have to be allowed, justified by the interest of the public.

Without any restrictions the copyright system would, according to Koktvedgaard and Levin, become a curse and an intolerable burden for the society, both practically and principally.⁶⁷ For instance, in the case of exception for private use it is simply out of the question to enter a person’s private life in order to control possible uses.⁶⁸ Senftleben also mentions the freedom of expression and information, where the freedom of information includes the right to receive information.⁶⁹ Without restrictions to the copyright, the user would have to make single individual agreements with the authors in every specific case. This would almost certainly become a time-consuming and impractical task for both parties.

3.1 The ‘Closed’ and the ‘Open’ Approach

There are two main legislative traditions or approaches used for the regulation of exceptions and limitations: The ‘closed’ approach and the ‘open’ approach.⁷⁰ These are frequently referred to as Civil Law and Common Law respectively. Accordingly, Sweden is a Civil Law

⁶⁴ So called ‘Double Creations’, Koktvedgaard, Levin, 2004, p. 76 and 170.

⁶⁵ Sirinelli, Workshop on implementation issues of the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT), WIPO December 3, 1999 (accessed March 30, 2006) http://www.wipo.int/documents/en/meetings/1999/wct_wppt/pdf/imp99_1.pdf p. 2.

⁶⁶ Davies, Garnett, Harbottle, 2005, p. 469 and Stewart, International Copyright and Neighbouring Rights, Butterworths 1989, para. 4.50, quoted by Davies, Copyright and the Public Interest, Sweet & Maxwell 2002, p. 276.

⁶⁷ Koktvedgaard, Levin, 2004, p. 173.

⁶⁸ Sirinelli, 1999, p. 23.

⁶⁹ Senftleben, 2004, p. 24. See also Koktvedgaard, Levin, 2004, p. 129.

⁷⁰ Sirinelli, 1999, p. 17-18.

state providing legislation adhering to the ‘closed’ approach (which is the essential basis of this thesis). However, according to Burrell and Coleman this division does not always correspond.⁷¹ In their opinion the UK, for instance, leans heavily towards the ‘closed’ approach, but is nevertheless a typical Common Law state.⁷² Hence, in exceptional cases a Common Law state is not per definition a state adhering to an ‘open’ approach, neither does a Civil Law state in all cases adhere to a ‘closed’ approach (see for instance Germany in the next section).

Moreover, no state can be said to adhere rigidly to either approach, but some states lean towards one approach rather than the other.⁷³ Studying these two systems may shed some light on how the balance between the public interest and the copyright owner can be dealt with dependent on different legal traditions. The ‘closed’ approach provides a more predictable system whereas the ‘open’ one has the advantage of flexibility.

3.1.1 Civil Law and the ‘Closed’ Approach

In the Civil Law approach the scope of the author’s right is wide open whilst the list of exceptions which users can claim is restrictive and cannot be interpreted in such a way as to harm the interest of the creator.⁷⁴ It provides a large number of specific exceptions, surrounding carefully defined activities.⁷⁵ The ‘closed’ legal approach places the author in the most favourable and important position. Both the Swedish Copyright Act and the InfoSoc Directive can be categorised within this approach, partly concluded from chapter 2, partly confirmed later in this chapter. Apart from Sweden and the rest of Scandinavia, there are also for instance Germany, France, Greece and the Benelux States adhering to the Civil Law tradition states.⁷⁶ In addition, it can be mentioned that German law (like UK law and according to Burrell and Coleman) derogates from the pattern providing for a broad exception regarding private use.⁷⁷

3.1.2 Common Law and the ‘Open’ Approach

The ‘open’ Common Law approach on the other hand, provides a precise list of rights while the restrictions are less consistent when it comes to the restrictions. Instead, the Common Law approach provides a small number of generally worded exceptions not bounded to a specific situation.⁷⁸ This is relatively more favourable for the user than for the author, at least by comparison with the user’s status in the closed approach. For instance, the United States (US) refers to a general exception called ‘fair use’. In order to allow an

⁷¹ Burrell, Coleman, *Copyright Exceptions: The Digital Impact*, Cambridge University Press 2005, p. 4.

⁷² Burrell, Coleman, 2005, p. 4.

⁷³ Burrell, Coleman, 2005, p. 4.

⁷⁴ Sirinelli, 1999, p. 3.

⁷⁵ Burrell, Coleman, 2005, p. 4.

⁷⁶ *The New Encyclopædia Britannica*, Encyclopedia Britannica, Inc. 1986, ‘civil law’.

⁷⁷ S. 53 para. 1 Gesetz über Urheberrecht und verwandte Schutzrechte vom 9. September 1965. For discussion on UK copyright law vs. German copyright law, see also Burrell, Coleman, 2005, p. 205.

⁷⁸ Burrell, Coleman, 2005, p. 4.

exception to rights, judges usually take as a basis the purpose of the use, the length of the extract in relation to the original work, as well as any economic prejudice.⁷⁹ Another state within Europe, except for the UK, that adheres to the common law approach is Ireland.⁸⁰

3.2 The InfoSoc Exceptions and Limitations

Following the establishment of the rights presented in chapter 2 is a long list of specific exceptions and limitations. Initially, the draft Directive stipulated that the Member States limit their list of copyright exceptions and limitations to nine cases (including one mandatory exception).⁸¹ However, when it was finally adopted, the list had grown to 23 cases. There are reasons to believe that this was a result of heavy lobbying during the process,⁸² as well as the difficulties in agreeing on the list of exceptions and limitations. It is unlikely that any Member State would implement the entire list of these exceptions and limitations; however, there is nothing that states that they cannot.

The only mandatory exception in the InfoSoc Directive is stated in art. 5(1). It deals with so called 'temporary acts' that can be exempted under certain circumstances. This provision is followed by an extensive list of non-mandatory exceptions to the reproduction right and non-mandatory exceptions aimed at both the reproduction right and the right of communication to the public.⁸³ The enumeration is exhaustive, which means that any exception or limitation outside this list is not allowed.⁸⁴ Exhaustive, yet extensive, the list reveals the many variations of exceptions and limitations between the Member States. In order to cover as many as possible, as there might be exceptions that already exist under national law but still not mentioned in art. 5(3), there is also art. 5(3o) to consider. This is a so called 'grandfather clause' that allows exceptions not mentioned in the list, as long as they only concern analogue use and do not affect the free circulation of goods and services within the Community. Regarding future exceptions and limitations worth protecting that may arise in line with new technologies, it has been suggested that the fact that the list is exhaustive leaves no room for the development of defences for these.⁸⁵

3.3 Exceptions and Limitations in the Swedish Copyright Act

It is not necessary for the purpose of this thesis to give a detailed layout of the exceptions and limitations in the Swedish Copyright Act. This section will only mention some general

⁷⁹ 'Fair use' was first stated in section 107 of the United States Copyright Act of October 19, 1976. See also discussion by Sirinelli, 1999, p. 18.

⁸⁰ Merryman, Clark, Haley, *The Civil Law Tradition: Europe, Latin America, and East Asia, Cases and Materials*, The Michie Company 2000, p. 5.

⁸¹ Art. 5(1-3) Proposal for a European Parliament and Council Directive on the harmonization of certain aspects of copyright and related rights in the Information Society (98/C 108/03).

⁸² Rosén, *Upphovsrätten i med- och motvind* (Copyright in head- and tail-wind), NIR 2005, p. 375.

⁸³ Art. 5(2) and 5(3) InfoSoc Directive.

⁸⁴ Recital 32 InfoSoc Directive.

⁸⁵ Heide, *The Berne Three-Step Test and the Proposed Copyright Directive*, *European Intellectual Property Review* (EIPR) Vol. 21, Issue 3, March 1999, p. 105-109.

features of this concept, while the exception for private use will be closer dealt with in the next section.

Most exceptions in the URL are constructed so that they free the user from the need of seeking individual agreements with each and every copyright owner in advance.⁸⁶ The condition is that the work is not altered more than necessary and endowed with a stated source in accordance with the moral right.⁸⁷ As for the implementation, the mandatory exception in art. 5(1) can be found in s. 11a URL. Regarding the other exceptions prior to the implementation, the InfoSoc Directive already covered them, no doubt a result of the heavy lobbying already mentioned. The preamble of the Directive states that the existing exceptions and limitations to the rights, as set out by the Member States before the implementation, have to be reassessed in the light of the new electronic environment.⁸⁸ As far as analogue and non-private use goes, the Swedish exceptions and limitations survived the implementation save for a few formal amendments. The consequences for digital use become evident when dealing with the protection of technological measures in chapter 6, and the exception for private use will be examined in the next section.

3.4 The Development of Private Use

Not all Member States have an exception for private use in their national legislation. However, for those Member States who have, the private sphere has been important for the granting of such an exception. The fundamental right to privacy prevents copyright holders from exerting their exclusive rights in the intimacy of the private circle surrounding each individual. The personal use has also historically escaped the author's control on the condition that there was no profit motive.⁸⁹

For a long time it has been held that reproduction of a work by an individual for private use would not seriously affect the interests of the author. However, this concerned mainly copying by hand where the copy clearly does not reach the same quality level as the original (or the real master copy). The advent of first the photocopying machines, tape duplication and now digitalisation techniques has changed the situation. The technological development has made it even clearer that it is not practical to exercise control over all copying for private use, including dissemination, as this area as well as the number of users is growing tremendously. The preamble of the InfoSoc Directive stresses the development of private use. "Digital private copying is likely to be more widespread and have a greater economic impact. Due account should therefore be taken of the differences between digital and analogue private copying and a distinction should be made in certain respects between them."⁹⁰ Hence, the Information Society especially affects the exception for private use.

⁸⁶ Bernitz and others, *Immaterialrätt och otillbörlig konkurrens*, Handelsbolaget Immaterialt Rättsskydd i Stockholm 2005, p. 80.

⁸⁷ S. 11 URL.

⁸⁸ Recital 31 InfoSoc Directive.

⁸⁹ Guibault, *Contracts and Copyright Exemptions*, Kluwer Law 2000, p. 131-132, quoted by Senftleben, 2004, p. 32.

⁹⁰ Recital 38 InfoSoc Directive.

The exception for private use presupposes the developing of systems that afford the rightholder compensation.⁹¹ The InfoSoc Directive provides for fair compensation but it is up to the Member States to decide how this compensation is going to be carried out. In general, there are two means of legislative techniques for compensation. Either the legislator imposes sanctions on copying for private use under certain conditions, or imposes a general charge on the sale of recording machines and blank recording media (like CD-Rs or MDs). These charges will then be collected and distributed to the rightholders concerned. These two techniques can also be used in the same legislation.⁹²

3.4.1 The Exception for Private Use in the InfoSoc Directive

The exceptions listed in art. 5(2) are aimed at the reproduction right, and in case a Member State chooses to implement them it will have to be done under certain special conditions. For instance, several of the exceptions also provide for a fair compensation to the copyright owner. This is the case regarding the Directive's exception for private use, stated in art. 5(2b). However, it must be added that the Member States may also provide for fair compensation for exceptions and limitations even if the Directive does not specifically require them.⁹³ The conditions for the exception for private use are:

- The reproduction for private use has to be made by a natural person.
- The rightholder shall receive fair compensation.
- The ends of the use shall neither be directly, nor indirectly commercial.

The exception for private use and copying is seen as a particular failure of harmonisation, it being one of the principal original aims of the Directive to harmonise.⁹⁴ No effective consensus could be achieved, therefore the exception is non-mandatory.

3.4.2 The Exception for Private Use in the Swedish Copyright Act

The exception for private use could already be found in the Swedish Copyright Act before the implementation. As for the three conditions stated in art. 5(2b), reproduction or copying shall be for the purposes of private use according to s. 12 URL. The Swedish legislator held that the term 'for the purposes of private use' already establishes a reference to 'natural person', and has therefore not implemented the term.⁹⁵

The fair compensation granted to the author is found in the provision on so called 'cassette compensation' in s. 26k URL. Cassette compensation shall be paid as a sort of levy by the sellers whom in course of their professional activity manufacture or import certain devices, supporting recording and moving of images and sounds especially suitable for private use. The right to compensation is granted to the authors of copyrighted work, communicated and made available to the public after the manufacturing and importation of the supporting

⁹¹ Sterling, 2003, p. 435-436.

⁹² Sterling, 2003, p. 436.

⁹³ Recital 36 InfoSoc Directive.

⁹⁴ Davies, Garnett, Harbottle, 2005, p. 472.

⁹⁵ Prop. 2004/05:110 p. 106-107.

devices. The levy is collected by organizations representing the authors entitled to the compensation, and then distributed to the authors.⁹⁶ The problem with the ‘cassette compensation’ is its conventional nature of sometimes not fully compensating for the loss of the author, and sometimes not at all. Attending this problem, the legislator might either restrict the area of application for private use so that copying for this purpose becomes less extensive, or extend the system of levies so that the standard compensation is paid out in more cases.⁹⁷

As for the third condition on non-commercial use, there is no specific provision in the URL. The reference to ‘private use’ was regarded as being enough. The condition for the use being neither directly nor indirectly commercial was found unnecessary to implement since it was regarded merely as a reinforcement of the term ‘private use’ rather than a single condition.⁹⁸

3.5 Brief Summary of Chapter 3

It can be concluded from this chapter that the exceptions and limitations of the InfoSoc Directive taking due account of the different legal traditions in the Member States, whilst at the same time trying to ensure a functioning internal market, has led to an unsuccessful result.⁹⁹ The long list of non-mandatory exceptions and limitations promotes neither harmonisation, nor the internal market within the European Community.¹⁰⁰

At this stage, the development around private use is relatively undramatic in the context of exceptions to the reproduction right in the sense that the three conditions can still be identified after the implementation despite the formal deviation. However, the entering into the Information Society calls for the need of some interference in the private use area, as the economic interest of the author is more exposed than before. This will be further dealt with in chapter 5, and examined more closely in chapter 6 dealing with further measures that have been taken by the Swedish legislator.

⁹⁶ Prop. 2004/05:110 p. 127.

⁹⁷ Prop. 2004/05:110 p. 105.

⁹⁸ Prop. 2004/05:110 p. 109-110.

⁹⁹ Davies, Garnett, Harbottle, 2005, p. 472.

¹⁰⁰ See also joined opinions by for instance Davies, 2002, p. 280-280, Davies, Garnett, Harbottle, 2005, p. 471-473 and Hugenholtz, Why the Copyright Directive is Unimportant, and Possibly Invalid, *European Intellectual Property Review (EIPR)* Vol. 22, Issue 11, November 2000, p. 501-502.

4 The Three-Step Test

The Three-Step Test regulates the scope of exceptions and limitations. “Limitations on the author’s exclusive right may be imposed in order to facilitate the work’s contribution to the intellectual and cultural enrichment of the community. However, the limitations must not be such as to dampen the will to create and disseminate new works.”¹⁰¹ This is where the third element, the Three-Step Test, has its function preventing copyright limitations from encroaching upon authors’ rights.¹⁰² It can be traced back to the 1967 Stockholm Revision Conference of the Berne Convention. It is also found in the WCT as well as in the TRIPS Agreement. The test varies somewhat in wording between the legal acts, but the three steps can all be recognised and they fulfil the same purpose of not letting the exceptions and limitations become too far-reaching.¹⁰³ This chapter will examine the interpretation of the three criteria in the test examining its wording in the TRIPS Agreement. The reason for turning to the TRIPS Agreement at this point is that there has been no interpretation of significance in relation to the InfoSoc Directive, the WIPO Treaties and the Berne Convention. This interpretation is also frequently referred to in the law doctrine.

4.1 Interpretation of the Three-Step Test

For this thesis, the Three-Step Test will be only briefly examined.¹⁰⁴ It must also be stressed that this section only deals with interpretations in relation to the TRIPS Agreement and the Berne Convention. The TRIPS Panel is responsible for the most official attempt at interpreting the Three-Step Test, by looking at art. 13, the TRIPS Agreement.¹⁰⁵ The TRIPS Agreement is linked to membership of WTO, which is an organ under UN. In contrast to the Berne Convention it contains provisions about dispute settlements resulting in a central interpretation of the TRIPS Agreement. The TRIPS Panel is appointed under the TRIPS dispute settlement procedures and the interpretation of the test concerned a dispute between the European Union and the United States over an exception to copyright in US law.¹⁰⁶ The European Union argued that the exception was inconsistent with the obligations in Art. 13 TRIPS Agreement where the Three-Step Test is included.

¹⁰¹ Fabiani, *A Profile of Copyright in Today’s Society*, Copyright 1982: 154, quoted by Davies, 2002, p. 277.

¹⁰² Senftleben, 2004, p. 5.

¹⁰³ Art. 10(2) WCT, art. 9(1) Berne Convention and art. 13 TRIPS Agreement.

¹⁰⁴ For a profound analysis of the Three-Step Test and different methods of interpretation, the author refers to Senftleben, 2004.

¹⁰⁵ Art. 64 of the TRIPS Agreement brings the Agreement into the World Trade Organization dispute settlement procedure. Under this procedure, disputes concerning the conformity of a Member’s law to the obligations of the TRIPS Agreement may be brought before the Dispute Settlement Body, and, following a period of consultation, if a satisfactory solution is not reached, the Body may establish a Panel to report and make recommendations to the Body concerning the dispute. See Sterling, 2003, p. 441.

¹⁰⁶ Report of the Panel Established Under Art. 6 of the Dispute Settlement Understanding and Art. 64(1) of the TRIPS Agreement: United States-Section 110(5) of the US Copyright Act, circulated 15 June, 2000, ref. WT/DS/160R.

Art. 13 reads as follows:

“Limitations and Exceptions

Members shall confine limitations or exceptions to exclusive rights to certain special cases which do not conflict with normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the right holder.”¹⁰⁷

As the name suggests, it can be divided into three parts with one criterion in each part. However, for the Three-Step Test to be fulfilled, all three criteria have to be met.¹⁰⁸

4.1.1 Certain Special Cases

Regarding the term ‘certain’, the TRIPS Panel held that although an exception or a limitation does not have to be explicitly identified in each and every possible situation to which it could apply, it has to be clearly defined in national law.¹⁰⁹ Provided that the scope of the exception is known and particularised, this will guarantee a sufficient degree of legal certainty.¹¹⁰ Regarding the term ‘special’, the Panel continued stating that the exception or limitation has to be exceptional in its scope, which means narrow in its reach in a quantitative as well as a qualitative sense.¹¹¹ Thus, there shall be a limitation in its field of application.

Ricketson adds that use aimed at by the exception or the limitation should be of a ‘quite specific purpose’ and that there must be something ‘special’ about this purpose. ‘Special’ means being justified by some clear reason of public policy or some other exceptional nature, e.g. the composer’s need for texts or the interests of the blind.¹¹² To mention some further examples, the Berne Convention makes allowance for numerous socially valuable ends like the permission of the utilisation of works for teaching purposes, press privileges promoting free flow of information and reservations for religious ceremonies.¹¹³

4.1.2 No Conflict with Normal Exploitation

In this second step, the TRIPS Panel considered the meanings of ‘normal’ and ‘exploitation’. The Panel took the view that “an exception to a right rises to the level of a conflict with a normal exploitation of the work if uses, that in principle are covered by the right but exempted under the exception or limitation, enter into economic competition with the

¹⁰⁷ Art. 13 TRIPS Agreement.

¹⁰⁸ As understood by the sentence structure.

¹⁰⁹ Report of the Panel, 15 June 2000, WT/DS/160R, para. 6.112.

¹¹⁰ Report of the Panel, 15 June 2000, WT/DS/160R, para. 6.108. It might be questioned how this can be accomplished in an ‘open’ common law approach regarding the broad exception for ‘fair use’. However, it has to be kept in mind that ‘defined in national law’ does not exclude a definition in case law, if this is given the same legal status as a written statute.

¹¹¹ Report of the Panel, 15 June 2000, WT/DS/160R, para. 6.112.

¹¹² Ricketson, Ginsburg, 2006, p. 764.

¹¹³ Art. 10(2), 10*bis* and 2*bis*(2).

ways that right holders normally extract economic value from that right to the work (i.e., the copyright) and thereby deprive them of significant or tangible commercial gains.”¹¹⁴ Hence, ‘normal exploitation’ is where an author might reasonable being expected to exploit the work in the normal course of events. As Ricketson puts it, there will be kinds of use, which do not form part of the author’s normal mode of exploiting his work – that is, uses for which he would not ordinarily expect to receive a fee – even though they fall within the scope of his reproduction right.¹¹⁵ For instance, a blind user purchases a book because there are no other formats of that work. In order to make use of it the user has it reproduced into Braille. Now, the author actually owns the reproduction right, hence the reproduction made by the user falls within the scope of the author’s right. At the same time it will not fall within the area of his normal exploitation of work, since he could not normally expect to receive a fee from the user for a reproduction into a format that the rightholder does not provide.

It can be added, as for whether an exploitation qualifies as ‘normal’, that the Panel held that one must examine the way in which the work is in fact exploited and whether the nature if the exploitation is potential, permissible or desirable (i.e. the ‘normative’ connotation). Thus, it is the potential damage rather than the actual damage that is decisive for the definition of ‘normal exploitation’. Regarding ‘exploitation’, it can be added that the term refers to exploitations by the author rather than by the third party for whom an exception to liability is sought.¹¹⁶

4.1.3 Do Not Unreasonably Prejudice the Legitimate Interest of the Right Holder

The TRIPS Panel first performed an analysis to define the terms ‘unreasonable prejudice’ and ‘legitimate interest’. As for ‘legitimate interest’, the Panel stated that the term does not need to be limited to comprehend actual or potential economic advantage or detriment.¹¹⁷ It may comprise for instance of the author’s interest of a stated source in the reproduced work. Also, it does not refer to the rights of the rightholder but the interests, which suggests a wider approach. Still not each and every conceivable concern must be considered, only the ‘legitimate’ ones.¹¹⁸ ‘Legitimate’ primarily means conformity with and authorisation by law, which suggests all interests that can be defended by law.¹¹⁹ As for the term ‘unreasonable prejudice’ the Panel considered the degree or level of prejudice, which may be considered as unreasonable, being the crucial question in the third step. It took the view that prejudice to the legitimate interests of rightholders reaches an unreasonable level if an ex-

¹¹⁴ Report of the Panel, WT/DS/160R, 15 June, 2000, para. 6.183. See also Knights, Limitations and Exceptions Under the “Three-Step Test” and in National Legislation: Differences Between the Analog and Digital Environments, WIPO August 29, 2000 (accessed March 30, 2006) http://www.wipo.int/edocs/mdocs/copyright/en/wipo_da_mvd_00/wipo_da_mvd_00_4.pdf p. 5 para. 15.

¹¹⁵ Ricketson, *The Berne Convention for the Protection of Literary and Artistic Works*, Kluwer Law 1987 p. 483.

¹¹⁶ Ricketson, Ginsburg, 2006, p. 768.

¹¹⁷ Report of the Panel, 15 June, 2000, WT/DS/160R, para. 6.222.

¹¹⁸ Senftleben, 2004, p. 210 and p. 214.

¹¹⁹ Senftleben, 2004, p. 228.

ception or limitation causes, or has the potential of causing an unreasonable loss of income to the copyright owner.¹²⁰

An example of an unreasonable prejudice of a legitimate interest may be a television program broadcasted under an exception to the author's right, which becomes split up by commercial breaks to such an extent that a consumer ends up with a distorted look at the message of the movie as well as the author's credibility. This is not a flawless example, but it relates to both the economic and the moral interest of the author as the lack of credibility has the potential of causing loss of income.

4.2 The Three-Step Test in the InfoSoc Directive

In the InfoSoc Directive, the Three-Step Test is stated in art. 5(5) and has to be taken in account when applying the list of exceptions in art. 5.¹²¹ Apart from the phrase 'or other subject-matter' the wording is practically identical to the one interpreted by the TRIPS Panel. The first criterion sets out a basic rule, while the other two delimit it.¹²² Art. 5(5) states that exceptions and limitations provided for by the Directive shall only be applied:

- a) In certain special cases,
- b) which do not conflict with a normal exploitation of the work or other subject-matter,
- c) and do not unreasonably prejudice the legitimate interests of the rightholder.¹²³

The test is quite vague in its wording and open for interpretation. It must be stressed that although it might seem unpractical, its general formulation and flexibility of use is actually its strength.¹²⁴ The test itself is constant and will regulate the balance regardless of technical development and probably most future issues that will arise.¹²⁵ The most apparent example is how copying was looked upon by the time of the formulation of the Berne Convention (although the test only applied on the reproduction right) in contrast to the digital development behind the Information Society and the InfoSoc Directive.

Another way of generally looking upon and interpreting the Three-Step Test is that the Information Society narrows its scope although the wording remains. According to recital 44, the provisions of exceptions and limitations under the Three-Step Test "... should, in particular, duly reflect the increased economic impact that such exceptions or limitations may have in the context of the new electronic environment."¹²⁶ Hence, when considering the application of the Three-Step Test in an Internet-based or digital context (like the Information Society), the court must also be aware of the fact that technology in these fields paves the way for extensive reproduction and rapid dissemination. Consequently, the scope for

¹²⁰ Report of the Panel, 15 June, 2000, WT/DS/160R, para. 6.229.

¹²¹ Art. 5(1-4) InfoSoc Directive.

¹²² Senftleben, 2004, p. 311.

¹²³ Art. 5(5) InfoSoc Directive.

¹²⁴ Sirinelli, 1999, p. 5.

¹²⁵ Senftleben, 2004, p. 35.

¹²⁶ Recital 44 InfoSoc Directive.

economic harm will most certainly be greater in a digital context than in an analogue context.¹²⁷ The same recital further states: “Therefore, the scope of certain exceptions and limitations may have to be even more limited when it comes to certain new uses of copyright works and other subject-matter.”¹²⁸ Thus, the Three-Step Test, when it deals with pure digital matters like in the InfoSoc Directive, has to be interpreted so that it restricts the exceptions and limitations further than in the context of, for instance the Berne Convention and the TRIPS Agreement. In that way the scope of the exceptions and limitations will decrease in proportion to the increasing threat from the digital environment.

4.3 The Three-Step Test in Swedish Legislation

Sweden has chosen not to implement art. 5(5) of the InfoSoc Directive in its national legislation. The Swedish legislator held that art. 5(5) has always been a rule of interpretation no matter what international agreement it appears in. Sweden has already signed the Berne Convention and the TRIPS Agreement and implemented the Database Directive, without embracing the Three-Step Test.¹²⁹ As already mentioned, there is a slight variation in wording between these different legal acts, nevertheless according to the Swedish legislator this alone does not justify incorporation in the case of the InfoSoc Directive.¹³⁰ Regarding the signing of the Berne Convention, the exceptions and limitations were examined in order to make sure they were in compliance with the test as stated in the Berne Convention.¹³¹ This line has been consistently held regardless of the features of the legal act in question. It is also the Swedish legislator’s intention to keep this position regarding the InfoSoc Directive, thus taking the test into account designing the exceptions and limitations, whilst not incorporating it.¹³²

Another reason for this decision is the fear of the test being used as a basis for extensive interpretation of exceptions and limitations, supporting use that was not originally meant to fall within this area.¹³³ The Swedish legislator reasons that an initiation of the Three-Step Test could indeed be regarded as a limitation of the limitations in the Swedish Copyright Act, but that the general construction of the test does not fulfil the criteria of restrictiveness and predictability, being central to the concept of exceptions and limitations.¹³⁴

4.4 Effects on Private Use

Regarding the first step, there are doubts whether exceptions or limitations for private use of copyrighted material alone can be qualified as a ‘special case’. The TRIPS Panel’s refer-

¹²⁷ Tritton, *Intellectual Property in Europe*, Sweet & Maxwell 2002, p. 369.

¹²⁸ Recital 44 InfoSoc Directive.

¹²⁹ See for instance Prop. 1996/97:111 p. 23.

¹³⁰ Prop. 2004/05:110 p. 83.

¹³¹ Prop. 1973:15 p. 83.

¹³² Prop. 2004/05:110 p. 84.

¹³³ Prop. 2004/05:110 p. 84.

¹³⁴ Prop. 2004/05:110 p. 84.

ence to ‘exceptional in scope’,¹³⁵ and Ricketson’s reference to a ‘quite specific purpose’¹³⁶ indicates that a broadly defined exception for private or personal use in general would not comply with the Three-Step Test. This suggests that the Member States have to be more specific in their implementation, which art. 5(2b) of the InfoSoc Directive already indicates.¹³⁷

Regarding the second step, private use is one of the most striking of non-exploiting activities, at least when there is no further dissemination of the copy. As already mentioned in chapter 3.4, the Information Society has changed the way private use is looked upon today. Therefore, the scope of private use has grown and may, technically, comprise exploiting activities in the digital environment. The Member States have to make sure that these activities are stopped. It can also be added that an implementation that is identical in wording of art. 5(2b) of the Directive may not be sufficient in all Member States, since this will depend on how far the technical development has reached in each specific state.

The third step goes further than just considering the economic interests of the rightholder. The moral interest of the rightholder may also fall within the third step. However, in terms of the Three-Step Test as it appears in the InfoSoc Directive the moral right is excluded.¹³⁸ Therefore, the term ‘interest’ only embraces economic interests in this context.

4.5 Brief Summary of Chapter 4

The exceptions and limitations benefit the users while the Three-Step Test functions on behalf of the rightholders. Between these elements the complex balance of the interests is obvious. The vaguest component of the two is the Three-Step Test, and as concluded from chapter 4.3 it is up to the national legislator to conduct it and shape a nation’s copyright balance. The freedom national legislation enjoys pursuant to the test can be used to react adequately to a nation’s individual situation.¹³⁹

As for the interpretation of the Three-Step Test it is not implausible that this component will be the object of further interpretation in the future. It should be mentioned that an interpretation by the ECJ might diverge from the TRIPS Panel’s. The ECJ might reach a different conclusion, especially if it is interpreted with the digital environment in mind. There is nothing indicating that an interpretation by the TRIPS Panel has to be enforced upon the interpretation of the Three-Step Test as stated in the InfoSoc Directive.

¹³⁵ Report of the Panel, 15 June, 2000, WT/DS/160R, para. 6.112.

¹³⁶ Ricketson, Ginsburg, 2006, p. 764.

¹³⁷ On the other hand, some authors are of the opinion that private use in itself qualifies as a special case, referring to the 1967 Stockholm Revision Conference of the Berne Convention. However, this is of less importance in this thesis since the exception for private use in the InfoSoc Directive cannot be implemented as a general exception. Senftleben, 2004, p. 158.

¹³⁸ Recital 19 InfoSoc Directive.

¹³⁹ Senftleben, 2004, p. 212.

5 Protection of Technological Measures

The last element is the most recent of the four and a result of the copyright's entrance into the Information Society. It appeared for the first time in the WCT, and the importance of harmonisation of these rules is stressed in the Directive.¹⁴⁰ Through the InfoSoc Directive, it became Community Law providing an extra layer of protection in favour of the rightholders. To combat the piracy of protected material, rightholders have, over the recent years, developed and are still developing technological measures to prevent unauthorised access to or copying of their material.¹⁴¹ This suggests that the protection in the copyright laws is insufficient to such an extent that the rightholders have to act on their own.¹⁴² Foged speaks about a privatisation of the copyright in the digital age.¹⁴³

5.1 The InfoSoc Protection of Technological Measures

Art. 6 prohibits circumvention of any effective technological measures as well as the trafficking of devices enabling such circumvention.¹⁴⁴ In order to fulfil this, the InfoSoc Directive requires the Member States to provide adequate legal protection against these acts. The circumvention prohibition shall only apply to cases where the person concerned acts in the knowledge of, or with reasonable grounds to know, that he or she is pursuing that objective. Thus, there has to be a presence of an act in bad faith. The prohibition against trafficking of devices includes the “manufacture, import, distribution, sale, rental, advertisement for sale or rental, or possession for commercial purposes of devices, products or components or the provision of services which:

- a) are promoted, advertised or marketed for the purpose of circumvention of, or
- b) have only a limited commercially significant purpose or use other than to circumvent, or
- c) are primarily designed, produced, adapted or performed for the purpose of enabling or facilitating the circumvention of,

any effective technological measures.”¹⁴⁵

5.1.1 The Term ‘Technological Measure’

Following art. 6(2) is the definition of an ‘effective technological measure’. A technological measure means “any technology, device or component that, in the normal course of its operation is designed to prevent or restrict acts, in respect of works or other subject-matter,

¹⁴⁰ Recital 47 InfoSoc Directive.

¹⁴¹ Sterling, 2003, p. 873.

¹⁴² Foged, U.S. vs. EU Anti-Circumvention Legislation: Preserving the Public's Privileges in the Digital Age?, European Intellectual Property Review (EIPR) Vol. 24, Issue 11, November 2002, p. 527.

¹⁴³ Foged, 2002, p. 527.

¹⁴⁴ Art. 6(1) and. 6(2) InfoSoc Directive.

¹⁴⁵ Art. 6(2) InfoSoc Directive.

which are not authorised by the rightholder of any copyright or any right related to copyright as provided for by law or the *sui generis* right in the Database Directive”¹⁴⁶.

5.1.2 The Term ‘Effective’

By the term ‘effective’ the Directive means “where the use of protected work or other subject-matter is controlled by the rightholders through application of an access control or protection process, such as encryption, scrambling or other transformation of the work or other subject-matter or a copy control mechanism, which achieves the protection objective.”¹⁴⁷ Thus, it is the circumvention of the access control that is prohibited, despite the fact that it is not the access itself that is the subject-matter of the copyright.

5.1.3 The Lock-Up and its Effects on Private Use

The controversy surrounding the circumvention provisions was central during the adoption of the Directive. The intense discussions around the relationship between technological lock-ups and exceptions to copyright nearly blocked the whole Directive. The problem characterising this relationship is how the protection of effective technological measures complies with the exceptions and limitations to the copyright. A technological measure blocks all use of the work, both infringing and non-infringing use. Technology cannot recognise whether the act is performed to breach the effective measure for the purpose of benefiting from an exception (e.g. private use) provided for by law, or for sole illegal purposes.¹⁴⁸ For instance, a technical lock-up on a CD-ROM on the history of the United States, rightfully purchased by a teacher, could prevent the teacher from making any copies for use in the classroom. Or, in a similar way, a library could be restrained from making an archival copy of a database it has bought.¹⁴⁹ Unless the user possesses the technical ability to circumvent the technological measure himself, the work will be locked up. Instead, the user is dependent on circumvention devices provided by third parties through trafficking, which the InfoSoc Directive expressly prohibits.¹⁵⁰ In case the user does manage to circumvent after all, the question of how to avoid liability for such circumvention remains.

Art. 6(4)(1) provides a sort of solution to this problem. It states: “in the absence of voluntarily measures taken by rightholders and other parties concerned, Member States shall take appropriate measures to ensure that rightholders make available to the beneficiary of an exception of limitation provided for in national law”¹⁵¹. In case the rightholder does not vol-

¹⁴⁶ Art. 6(3) InfoSoc Directive. Directive 96/9/EC of the European Parliament and the Council of 11 March 1996 on the legal protection of databases.

¹⁴⁷ Art. 6(3) InfoSoc Directive.

¹⁴⁸ Koelman, The Protection of Technological Measures vs. the Copyright Limitations, Instituut voor Informatierecht (IViR) July 16, 2001 (accessed March 30, 2006) <http://www.ivir.nl/publications/koelman/alaiNY.html> p. 1.

¹⁴⁹ The examples are presented by Dusollier, Exceptions and Technological Measures in the European Copyright Directive of 2001 – An Empty Promise, *International Review of Intellectual Property and Competition Law* (IIC) 2003 34:1, p. 71.

¹⁵⁰ Art. 6(2) InfoSoc Directive.

¹⁵¹ Art. 6(4) InfoSoc Directive.

untarily unlock the technological measure protecting his work, the Member State shall intervene and make sure he does.¹⁵²

The solution in art. 6(4)(1) does not offer full-protection against lock-ups though. It is applicable (stating “shall take appropriate measures”¹⁵³) only to some exceptions and limitations, namely art. 5(2a) (reproductions on paper), 2(c) (reproduction made by libraries, educational establishments etc.), 2(d) (ephemeral recordings), 2(e) (reproductions of broadcasts made by social institutions), 3(a) (use for teaching and scientific research), 3(b) (uses for the benefit of people with disabilities) and 3(e) (use for the purposes of public security). Thus, it does not apply to the exception for private use. Unlike for the rest of the non-lock-up-protected exceptions, art. 6 contains a provision regulating private use.¹⁵⁴ However, it is not mandatory (stating “may also take such measures”¹⁵⁵) in contrast to art. 6(4)(1). Therefore, benefiting from the exception for private use in the case of a technological measure still carries the risk of the work being locked-up, and since the Directive offers no solution, the problem is passed over to the Member States.

The provision further presupposes that the rightholder has not already made possible the reproduction for private use to the extent necessary to benefit from the exceptions and limitations. If the Member State chooses to implement and adopt this system on ‘appropriate measures’ for private use, the rightholder keeps the right to the conditions stated in art. 5(2b) and 5 (use by a natural person, fair compensation and non-commercial use), he also has the right to decide the number of reproductions.¹⁵⁶ Additionally, the rightholder shall not be prevented from adopting adequate measures regarding the number of reproductions.¹⁵⁷

5.2 The Swedish Copyright Act

This section will only deal with limited parts of the implementation of the technological measures. Other issues around the lock-up risk for private use-exceptions will be examined in chapter 6.4.

The protection of technological measures is not new to the Swedish Copyright Act, however, the version before the InfoSoc Directive implementation only applies to computer programs.¹⁵⁸ The definitions of ‘effective’ and ‘technological measures’ have been combined in s. 52b para. 2 URL. The Swedish legislator considered ‘effective’ already being understood in the term ‘technological measures’ in this context, and that there was no need

¹⁵² However, ‘on-demand transmissions’ expressly fall outside this provision according to art. 6(4)(4) InfoSoc Directive.

¹⁵³ Art. 6(4)(1) InfoSoc Directive.

¹⁵⁴ Art. 6(4)(2) InfoSoc Directive.

¹⁵⁵ Art. 6(4)(2) InfoSoc Directive.

¹⁵⁶ Art. 6(4)(2) InfoSoc Directive.

¹⁵⁷ Art. 6(4)(2) InfoSoc Directive.

¹⁵⁸ S. 57a URL. The protection is a following of art. 7.1c in Council Directive 91/250/EEC of 14 May 1991 on the legal protection of computer programs.

for an explanation in the legislative act.¹⁵⁹ The Swedish legislator also made the point that the definition has to only comprise of a technological measure which purpose is to prevent or restrict acts that are relevant in the area of copyright protection. If s. 52b URL were to protect all technological measures, the protection would be too far-reaching and too hard to grasp.¹⁶⁰ As for the prerequisite on ‘bad faith’, it is implemented in s. 57b instead of directly in the section where the prohibition against circumvention is found.

5.3 Brief Summary of Chapter 5

The protection of technological measures in art. 6 (1-2) provides an extra layer of protection for the copyright owners who set up control devices to protect their works. In order to balance this up in favour of the users, there is art. 6(4) to prevent lock-ups. As stated, this does not necessary apply to the exception for private use, which might lead to serious consequences for the balancing act in this area. It is solely up to the implementing Member State to solve this, which in the case of Sweden will be examined in chapter 6.4.

¹⁵⁹ Prop. 2004/05:110 p. 290.

¹⁶⁰ Prop. 2004/05:110 p. 291 and 292. As an example of a technological measure that prevents actions that are not comprised by the copyright protection, the proposition mentions DVD regional codes. The issue was picked up again later in the proposition regarding s. 52d URL.

6 National Implementation

The balancing act, as put down in the InfoSoc Directive and examined in chapters 2-5, takes effect by establishing wide rights to authors, which become rightholders. Then, the area of copyright is narrowed by providing exceptions and limitations in the interest of the public. The legislator's choice of exceptions will affect the balance by deciding the scope of the copyright. In its turn, the Three-Step Test regulates the scope of the exceptions and limitations. The protection of Technological Measures contains a balancing act of its own against the anti-lock-up provisions.

In general, the existing balance of the InfoSoc Directive seems to be quite favourable to copyright owners (being a 'closed' approach), especially regarding the provisions of the protection of technological measures. However, this picture is not totally reliable, since directives are not aimed at being applied in their definite form. In reality they will be applied when implemented in national law. This means that the Member States have the possibility of modifying the balance once implementing the Directive. The amount of implemented exceptions as well as the choice of implementing the anti-lock-up concept for private use (art. 6(4)(2)) may turn things around. The following statements in chapter 6 emanate from this conclusion.

The thesis has already touched upon parts of the Swedish implementation, these are provisions directly recognised in the Directive. Using the Swedish proposal as the primary source as far as possible, this chapter presents provisions that Sweden has implemented beyond what is expressly stated in the Directive, or that have been implemented slightly differently. These provisions are interesting, as the Swedish legislator has had the potential of modifying or distorting the balance between the interest of the copyright owner and that of the public. The second part of this chapter, starting at section 6.5, will take a brief look at the national implementation in some of the other Member States. In order to place these provisions in its context this chapter first contains an overview of the wording of the Swedish Copyright Act prior to the implementation. The focus will be on the amended provisions that relate to the balancing act, since the purpose of this thesis is to examine the implementation and not Swedish copyright law as such.

6.1 The Swedish Copyright Act Prior to the Implementation

As explained in chapter 2 above, s. 1 of the Swedish Copyright Act establishes the subject-matter of the copyright. It enumerates examples of works that shall be protected by copyright and it was not amended by the implementation. S. 2 para. 2 faced an expansion of the term 'making of copies' which before the implementation only aimed at when a work is transferred to a device from which it can be reproduced. Also, para. 3 on the communication to the public has become more detailed. Before the implementation (of the on-demand transmission and the introduction of the three concepts mentioned in chapter 2.4.2), communication to the public occurred under the following vague circumstances: The work is publicly performed, the work is placed on sale, rental, lent or otherwise distributed to the public or the work is publicly exhibited.¹⁶¹ Now, these circumstances are still identified after the implementation even though the earlier wording did not provide any definitions. It is hard to conclude whether this has overall narrowed the scope of the rights

¹⁶¹ To compare the different wordings before and after the amendment of the provisions, see Prop. 2004/05:110 p. 9-34.

or extended it. The new wording might specify certain circumstances (such as on-demand transmissions) and at the same time exclude something else that will fall outside the narrow definition (such as the placing of a technical device in relation to the public). On the other hand, as far as the references to technical devices in the new wording are concerned, they appear to have as their main purpose determining whether a communication of a work is a public performance or a public exhibition, not affecting the scope as such.

Regarding the exception for private use, the Swedish Copyright Act had a relatively general wording before the implementation. S. 12 para. 1 stated that anybody is allowed to make a few copies for single use of works that have been made public, and that the copies must not be used for purposes other than single use. Thus, there was no further demand expressed in words regarding the nature of the real master copy. However, there were discussions as to whether s. 12 nevertheless could demand the real master copy to be lawful in order to use it for private use copying. Lawful means that the work has been communicated to the public with the author's consent or in compliance with s. 2 URL. It has been held in the doctrine that the exceptions and limitations relating to a real master copy provided for in ch. 2 of the URL are founded on the assumption that it can only apply if the real master copy as such is lawful.¹⁶² Since directly applicable case law is missing, this area of law was still obscure prior to the implementation.¹⁶³ The Swedish legislator held that most material accessible on the Internet, especially music and movies, are uploaded without support of law and consent from the author. Nonetheless, copying for private use was at this point probably still legal, at least it could not lead to sanctions and liability for the user.¹⁶⁴

As for the Three-Step Test that is supposed to regulate the exceptions and limitations, there is no earlier wording since the test has never previously been stated in Swedish legislation. Similarly this was also the case regarding the protection of technological measures, which were a new concept to the Swedish Copyright Act. Hence, the balancing act before the implementation was only affected by the rights and the exceptions as such.

6.2 Implementation of the Exception for Private Use

As mentioned in chapter 3.5 the implementation of the exception for private use in relation to the reproduction right as such and the three concepts in art. 5(2b) (reproduced by a natural person, fair compensation to the rightholder and neither directly, nor indirectly commercial ends of use, see chapter 3.4.1) has been relatively unaffected. However, there is nevertheless an unmistakable reduction of the applied area for this exception as a result of the implementation. The scope is shrinking, both in an analogue context and a digital context as the Swedish legislator has gone further than which has been stated in the Directive.

6.2.1 Private Copying in the Sphere of Professional Work

Before the implementation of the InfoSoc Directive, copying in the sphere of professional work for private use was, to a certain extent, allowable according to Swedish law. This ap-

¹⁶² Rosén, Ansvar för utnyttjanden av skyddade prestationer i nätverk: Noteringar i anslutning till Högsta domstolens prövning av länkning till MP3-filer., SvJT 2000, p. 820.

¹⁶³ Prop. 2004/05:110 p. 102.

¹⁶⁴ Prop. 2004/05:110 p. 119.

plied when an employee made a copy for himself as well as making a small number of copies for his colleagues.¹⁶⁵ The exception has been laid down in Swedish case law, hence there was no expressed statement in the Swedish Copyright Act, although the implementation nevertheless affected it. The Swedish legislator regarded private copying in the sphere of professional work as not being in compliance with the InfoSoc Directive. The Directive takes a more rigid position, requiring that the ends of the exception for private use shall be neither directly, nor indirectly commercial.¹⁶⁶ The purpose has to be of a strictly private nature, therefore copying for colleagues became prohibited post the implementation, while copying for personal use to the employee himself is still accepted. It can be added that it makes no difference if the professional workplace is of a non-commercial nature or not.¹⁶⁷ Since this is a principle established in case law, the Swedish legislator settled by replacing the term ‘single use’ with ‘private use’ in order to emphasize the importance of the private and non-commercial nature of this exception.¹⁶⁸

6.2.2 Limitation in Scope Regarding Literary Work

In compliance with the Three-Step Test, where the excepted use shall not conflict with normal exploitation of the work, the Swedish legislator has decreased the number of copies that are allowed for private use.¹⁶⁹ This is an adjustment to the digital environment, where copies are often identical with the original and more capable of conflicting with the normal exploitation than ever. S. 12 para. 1 URL no longer limits the amount to ‘a few copies’. Instead a more restrictive view has been taken, limiting the amount to ‘one or only a few copies’. In addition to the limitation of the amount of units, the Swedish legislator has also limited the scope of the copying regarding literary works. The reason, according to the proposal, is that student literature was being copied to such a large extent, that this affected the ability to produce new literature and new editions. Against this argument, some of the bodies to which the proposed measure was submitted for consideration, held that this would lead to seriously increased expenses impossible for students to bear. However, the purpose with the exception for private use has never been to facilitate students’ financing of their studies.¹⁷⁰ It was also argued that limitation in scope of this kind would not guarantee better compensation for the authors. Because the Swedish legislator wanted to avoid the problem of boundary fixations, the limitation in scope applies to all literary works. There was also an intention of preventing users from attempting evasion. It may be questioned if this is appropriate and not a distortion of the balancing act as a consequence of a far-reaching protection of the author’s rights.

Thus, looking back at chapter 3.4.2, the Swedish legislator has obviously chosen the first alternative of the two stated in relation to the term ‘fair compensation’ in art. 5(2b) in the InfoSoc Directive. Narrowing the area of the exception for private use instead of extending the copyright levy system is justified by several reasons. Firstly, this is more in line with the

¹⁶⁵ NJA II 1961 s. 115, 119 and 122.

¹⁶⁶ Art. 5(2b) InfoSoc Directive.

¹⁶⁷ Prop. 2004/05:110 p. 109.

¹⁶⁸ S. 12 para. 1 URL and Prop. 2004/05:110 p. 109-110.

¹⁶⁹ Prop. 2004/05:110 p. 110.

¹⁷⁰ Prop. 2004/05:110 p. 114.

Three-Step Test (not only regarding the second step), referring to ‘special cases’, than the extension of the ‘cassette compensation’, which would lead to a wide and general solution.¹⁷¹ Secondly, this is probably a consequence of the privatisation that is a distinctive trait in the Information Society.¹⁷² The copyright owners will have an increased possibility of individual rights management.¹⁷³ Making this standpoint, the Swedish legislator refers to recitals 35 and 39 in the Directive that can be said to encourage individual rights management.

6.2.3 Lawful Real Master Copy

The question about if the old wording in s. 12 URL nevertheless demands that the real master copy is lawful, was discussed during the implementation. Because copying for private use was possible irrespective of the lawful- or unlawfulness of the real master copy, the rightholders were not compensated (apart from the, in this matter, insignificant cassette compensation). The Swedish legislator questioned the reasonableness of the public being able to abuse illegal acts in order to quite freely copy music without the rightholders’ consent. Moreover, it was argued that even the allowance as such prejudices the respect for copyright, and the system will become inconsistent if this continued.¹⁷⁴ Therefore a provision demanding a lawful real master copy was adopted in s. 12 para. 4 URL. According to this paragraph, s. 12 does not confer a right to make copies of a work when the copy that constitutes the real master copy has been prepared or has been made available to the public in violation of s. 2.

6.3 The Absence of the Three-Step Test

It can be questioned if the Swedish approach really suffices in order to fulfil the aim of the Directive. The Swedish approach is not an isolated case, for instance the UK did not incorporate the Three-Step Test related to the Berne Convention. Like Sweden the test has in principle been taken into account when framing a number of the permitted act provisions (exceptions and limitations).¹⁷⁵ However, there might be reasons to question this approach since the InfoSoc Directive might have to be seen in a different light. Whereas the reasoning of the Swedish legislator was examined in chapter 4.3, these following sections will instead examine the arguments against the Swedish approach.

6.3.1 The Three-Step Test and its Function in the InfoSoc Directive

Several of the bodies to which the proposed measure was submitted for consideration opposed the absence of a Three-Step Test incorporation. Some of the considering bodies held that it might not be appropriate to take the same definite position towards the international agreements as towards the implementation of Community Directives. As for the absence of the test in the Database Directive, this act covers a narrow area of protected rights

¹⁷¹ Prop. 2004/05:110 p. 106.

¹⁷² Foged, 2002, p. 527.

¹⁷³ Prop. 2004/05:110 p. 106.

¹⁷⁴ Prop. 2004/05:110 p. 119.

¹⁷⁵ See Davies, Garnett, Harbottle, 2005, p. 469.

as opposed to the InfoSoc Directive, which is more general in this matter.¹⁷⁶ Therefore, the Three-Step Test might be an important balancing element in the Swedish Copyright Act, even if this has not been the case in earlier acts.

6.3.2 Who Should Practise the Test?

Arguments were also raised that a statute would give the court the authority of using the test in judgments.¹⁷⁷ This raises the question of to whom the task of bringing national copyright law into line with the Three-Step Test is assigned. Should the legislator designing the exceptions and limitations in wording interpret it, or should the courts in each case interpret it? The answer to this question would perhaps indicate whether Sweden has fulfilled the implementation of the test or not. Unfortunately, there is no clear answer. According to the Directive, the exceptions and limitations shall only be ‘applied’ in those cases falling within the test.¹⁷⁸ Seeking guidance in the wording (as there is no case law on this particular question) the term ‘apply’ in this context means to put to use; to employ, spend, dispose of, or to bring (a law, rule, test, principle, etc.) into contact with facts, to bring to bear practically, to put into practical operation.¹⁷⁹ For instance, ‘the exceptions and limitations should only be put to use, or be put into practical operation in those cases falling within the test’. When looking upon the wording from this aspect, it rather speaks for an extended consideration of the test on a case-by-case basis than a sole consideration whilst designing the exceptions and limitations.

In the law doctrine, Senftleben draws parallels to the two legal traditions mentioned in chapter 3.1. Within Civil Law tradition, the legislative decision about how to draw the conceptual contours of the restricted number of precisely delineated limitations forms the centre of gravity. In contrast, the Common Law tradition puts faith in the courts to draw the lines around the applicable areas.¹⁸⁰ Concluded from this, it is hardly probable that Swedish courts will ever consider the Three-Step Test. Partly because Sweden, as well as the Swedish Copyright Act, is faithful to Civil Law tradition, partly because the test is not written law, and only capable of being remotely traced via preparatory acts.

6.3.3 International Consideration

The Three-Step Test does not in any way exclude any of the legal traditions or approaches (the ‘closed’ and the ‘open’); its purpose is fulfilled in both legal traditions. Therefore, in the case of Sweden, this would indicate that the aimed result of the Directive has been achieved in respect of the test, although it has only been considered in the legislation process.¹⁸¹ If the exceptions and limitations have been adjusted so that they comply with the test, the result would be the same, at least for now. This raises the question of what obligations Sweden fulfils on an international level, and how much this is recognised under the

¹⁷⁶ Prop. 2004/05:110 p. 82.

¹⁷⁷ Prop. 2004/05:110 p. 82.

¹⁷⁸ Art. 5(5) InfoSoc Directive.

¹⁷⁹ The Oxford English Dictionary, Oxford University Press 2001, ‘Apply’.

¹⁸⁰ Senftleben, 2004, p. 279.

¹⁸¹ Art. 249 EC.

EC law. As stated in chapter 2.1.2, the European Community harmonisation of copyright has to respect the multilateral actions taken at a world level.¹⁸² There is also recital 44 stating: “When applying the exceptions and limitations provided for in this Directive, they should be exercised in accordance with international obligations.” This recital is immensely connected to the Three-Step Test and its international position,¹⁸³ for instance in the WIPO Treaties. Here, the test is the only regulator of exceptions and limitations in absence of a specific list. At the same time, a specific list does not mean that the test is less important. If allowance is made only for the more precisely delineated limitations, but not for the Three-Step Test, merely the walls of the building erected in international copyright law is considered but not the roof.¹⁸⁴ On the other hand, neither Senftleben, nor Brown, consider it convenient explicitly incorporating art. 5(5) in the national statute.¹⁸⁵ Although the Three-Step Test has become an international standard, its impact on national court decisions is uncertain.

6.4 Implementation Related to the Lock-Up Risk

This section examines its consequences for the exception for private use. The prohibitions against circumvention and the trafficking of technological measures are implemented in ss. 52d and 52e. Whereas the prohibition against trafficking is in general identical with art. 6(2) of the Directive, the protection against circumvention is formulated differently.

6.4.1 ‘Lawful Access’

According to the prohibition against circumvention, the user may not, as a principal rule, circumvent a technological measure unless the user has the consent of the copyright owner. However, notwithstanding this prohibition, the user may circumvent a technological measure protection if the user has ‘lawful access’ to the copy in question, and circumvents in order to watch or listen to the work.¹⁸⁶ Here, the Swedish legislator observed that a full protection without this exception would constitute a more far-reaching protection of technological measures than the corresponding copyright protection.¹⁸⁷ This has already been briefly touched upon in chapter 5.2. To mention an example drawn up in the proposition, there might be copy-locks on CD’s not only preventing copying, but also listening in certain devices (frequently, those devices are computers but occasionally also CD-players).¹⁸⁸ In that case, the circumvention of the protection hardly violates the copyright, or has anything to do with the interest of the copyright owner anymore. Therefore, protection in such a case is not desirable.

¹⁸² Para. 1 COM 96/0568.

¹⁸³ Brown, Implementing the EU Copyright Directive, Foundation for Information Policy Research (FIPR) September 8, 2003 (accessed March 30, 2006), <http://www.fipr.org/copyright/guide/eucd-guide.pdf> p. 15-16.

¹⁸⁴ Senftleben, 2004, p. 279.

¹⁸⁵ Brown, 2003, p. 20 and Senftleben, 2004, p. 279.

¹⁸⁶ S. 52d para. 2 URL.

¹⁸⁷ Prop. 2004/05:110 p. 303.

¹⁸⁸ Prop. 2004/05:110 p. 303.

‘Lawful access’ means that the copyright owner’s consent is required. This is for instance the case where the user has bought a copy of the work. ‘Lawful access’ also, as the wording suggests, refers to such access that is established in law, i.e. through the exceptions and limitations stated in the Swedish Copyright Act.¹⁸⁹ This way the Swedish legislator has solved the problem of how the user will avoid liability for such circumvention. The drawback is that s. 52d para. 2 URL will only benefit those users capable of circumventing due to their own ability.

6.4.2 Limitations in the Protection of Technological Measures

In accordance with art. 6(4)(1) InfoSoc Directive, the Swedish legislator has implemented special provisions regarding ss. 16, 17, 26, 26a and 26e in s. 52f URL. A user who is entitled to benefit from any of these exceptions has the right to use a copyrighted work, to which this person has permissible access, even if it is protected by a technological measure. If this technological measure denies such use, the user may turn to the court, which can accordingly fine the copyright owner unless access is granted.¹⁹⁰ The basis of this provision is that voluntarily agreements have not taken place within a reasonable time and therefore have to be enforced by fining the copyright owner.¹⁹¹

Sweden has not limited the protection of technological measures in means of exceptions for private use. The Swedish legislator pointed out that the exception for private use is optional and can be agreed to be set aside by sale and rental agreements. Therefore, there is no definite right for natural persons to copy for the purpose of private use. Moreover, the exception is not regarded as having a need of protection to the same extent as the other exceptions mentioned in s. 52 para. 1 URL.¹⁹² For instance, regarding the exception for people with disabilities, the Swedish legislator continues, it is often decisive that they can produce a digital copy of a work to be able to make use of it at all. A corresponding urgent need can hardly be found in the exception for private use.¹⁹³

The legislator also considers the growing digital environment which the Information Society has brought (also noted in chapter 3.4) and stated that it would be extremely far-reaching to implement a provision that entitled every single person that has bought a CD with a copy-lock to take legal measures against the copyright owner.¹⁹⁴

As concluded, the provisions around the protection of technological measures are complex, especially regarding private use. It has to be added in relation to chapter 6.4.1 and 6.4.2 that neither circumvention due to own ability, nor the Member State taking appropriate measures are actually desirable solutions to the lock-up problem. As the preamble states, Member States should, above all, promote voluntary measures.¹⁹⁵ However, accord-

¹⁸⁹ Prop. 2004/05:110 p. 305.

¹⁹⁰ In accordance with art. 6(4)(4) InfoSoc Directive, this does not apply on ‘on-demand transmissions’.

¹⁹¹ Prop. 2004/05: 110 p. 313.

¹⁹² Prop. 2004/05:110 p. 315.

¹⁹³ Prop. 2004/05:110 p. 315.

¹⁹⁴ Prop. 2004/05:110 p. 315.

¹⁹⁵ Recital 51 InfoSoc Directive.

ing to Brown this alone will hardly suffice because a system like this will only be effective if it is backed up with effective, proportionate and dissuasive sanctions for rightholders who do not provide a timely means to do so.¹⁹⁶ These ‘appropriate measures’ (fines in the case of Sweden) taken by the Member State, is only the next best solution. Regarding circumvention due to own ability, Rosén rejects such right as being too disadvantageous for the rightholders in the gigantic digital net market. This aims at both individual circumvention and circumvention through a third person.¹⁹⁷

6.4.3 Evaluation in Due Course of the Digital Development

Admitting the difficulties of predicting the development within this area, the Swedish legislator nevertheless presumed that copyright owners would take measures, which will impose reasonable possibilities for the continuation of private use of works protected. The development will be closely followed, especially as regards the consumers. Within three years (at the latest) after the coming into force of these provisions, there will be an evaluation of how the consumers’ possibilities of copying for private use has been affected by the new provisions. If it turns out that the situation for the consumers has become unreasonable, the Swedish legislator will reconsider implementing art. 6(4)(2) of the InfoSoc Directive.¹⁹⁸

At an EC level (which probably preceded this idea on a national level) “[...] the Commission shall submit to the European Parliament, the Council, and the Economic and Social Committee a report on the application of the InfoSoc Directive, in which *inter alia*, on the basis of specific information supplied by the Member States, it shall examine in particular the application of Articles 5, 6 and 8 in the light of the digital market.”¹⁹⁹ It was planned to be submitted on 22 December 2004 at the latest (and every three years thereafter) but has been quite delayed, as it is, at the time of writing, still not submitted.²⁰⁰

6.5 Implementation in Other Member States

The implementation in other Member States is interesting regarding the non-mandatory provisions, since these are most capable of affecting the balance in different ways in comparison with the Swedish implementation. This means the exception for private use, the implementation of the Three-Step Test and the dealing with the enforcement provision preventing lock-ups. Also, this remaining part of chapter 6 will focus on the consequences for the exception for private use in line with the purpose of this thesis. The examination in this second part will follow the same outline as the part on Swedish implementation above,

¹⁹⁶ Brown, 2003, p. 20.

¹⁹⁷ Rosén, Upphovsrätt och närstående rättigheter i informationssamhället – något om EG-direktivet 2001/29/EG, NIR 2001, p. 601.

¹⁹⁸ Prop. 2004/05:110 p. 316.

¹⁹⁹ Art. 12(1) InfoSoc Directive.

²⁰⁰ Art. 12(1) InfoSoc Directive. In response to this, Majer, Seconded National Expert and desk-officer of Unit D1 (Copyright and knowledge-based Economy) of the Commission stated through e-mail: The report is part of the work program for 2006 of DG Internal Market and Services. It will assess, if the Directive has fulfilled the objective of fostering investment and growth. It requires intensive research, and therefore an external contractor has been appointed to conduct a study on the topic. The report is expected to be published in November 2006 on the Commission’s web-site.

however this part will start off at the second balancing act, namely, the exceptions and limitations, especially for private use. As already mentioned (see chapter 1.4) no attempt is made to provide an exhaustive treatment of all Member States.

6.5.1 The Exception and Limitation for Private Use

As an aspect on the great harmonisation work, which is left within this area, there is a copyright levy reform included in the Commission Work Programme 2006. The Member States are now being consulted by the Commission on the scope of the private copying exception and existing systems or remuneration ('fair compensation' according to the second condition in art 5(2b)).²⁰¹ According to the roadmap of the project, the Commission is concerned that copyright levies are being applied to digital equipment and media without due account being given to the impact of new technologies and equipment. This especially concerns the availability and use of DRM technologies which can provide alternative means of compensation to the rightholders. This project as such will not be further attended to in this thesis. However, the answers from the Commission's questionnaire reflect the frequent implementation of an exception for private use in the Member States. The evaluation of systems of levies will also be interesting in the future development and harmonisation of the exception for private use.

It is hardly meaningful to mention anything general about private use since the traditions of this exception vary within the Community. While for instance France, Germany, the Netherlands, and Spain stresses the exception for private use, the UK Copyright, Designs and Patents Act (CDPA) distinguishes by providing an especially limited scope and application for this exception.²⁰² Relevant provisions are those covering a) 'fair dealing' for non-commercial research and private study, b) recording of broadcasts for 'time-shifting' purposes and c) making photographs in the home of broadcast images.²⁰³ Thus, private use seems to be exempted only regarding analogue use. As can be concluded, there are not only harmonisation difficulties in means of national levy systems. The frequent discrepancies might explain why the attempts of making art. 5(2b) a mandatory exception failed.

6.5.2 The Incorporation of the Three-Step Test

In any case, all exceptions and limitations have to comply with the Three-Step Test at the time of implementation. With this in common, the Member States have taken different standpoints regarding the incorporation for sole consideration of the test during the legislation process. To mention some; Belgium, France, Germany, Greece and Ireland were positive to an incorporation of the test in the legislation, whilst the UK (as already mentioned)

²⁰¹ Information about the content and timing of this project and its roadmap is available at the web-site of Copyright and Knowledge-Based Economy, Copyright Levy Reform, Unit D1 February 22, 2006 (accessed March 30, 2006) http://europa.eu.int/comm/internal_market/copyright/levy_reform/index_en.htm

²⁰² Copyright, Designs and Patents Act 1988 as amended.

²⁰³ 'Fair dealing' ss. 29, 38 and 39, 'time-shifting' s. 70, 'photographs in the home' s. 71. 'Time-shifting' is the recording of broadcasts solely for the purpose of enabling it to be viewed or listened to at a more convenient time, Davies, Garnett, Harbottle, 2005, p. 704.

Denmark and the Netherlands were of a different opinion. It shall also be added that outside Europe, the US also belongs to this latter group.²⁰⁴

The Dutch drafting process seems to have created the liveliest discussions about the Three-Step Test.²⁰⁵ According to the Copyright Committee and the Minister of Justice (the Minister), art. 5(5) addresses Member States' legislatures but can still be applied by civil courts in certain special cases. Thus, the test shall not be incorporated in the statute. The Council of State criticised this approach and wanted to see the test embedded in the actual text of the legislation. The Minister continued defending his opinion stating that the law shall be the end-result of the test, therefore all limitations should logically already have been subjected to the test by the legislator. Besides, the framework that the test constitutes, "offers the court some grip in interpreting a certain limitation and specifically on how it is to be applied in practise. Court rulings in this context may well be occasion for the legislator to adjust the provisions that are now proposed."²⁰⁶ Similar to the Swedish legislator, the Minister held that the logical consequence of incorporation would be that some very specific limitations would need to have a more open character to be corrected only by the Three-Step Test. Such a way of formulating the limitations would create great uncertainty about the validity of any appeal to the exceptions and limitations.²⁰⁷ The Dutch draft discussion around the Three-Step Test is interesting because it suggests that the test should be interpreted by the courts although not incorporated into the national statute. In contrast, according to the Swedish legislator, the test should neither have impact in the courts, nor be incorporated in the national statute.

6.5.3 Limitations in the Protection of Technological Measures

The term 'appropriate measures' which has to be taken by the Member States, in certain cases, for the exercising of some exceptions and limitations, has mostly been interpreted as a right for the beneficiary user to take legal measures against the copyright owner.²⁰⁸ However, some of the Member States, for instance Greece, has left it to other organs than the national courts to initially handle the enforcement. Greece has implemented the non-mandatory enforcement provision for private use in art. 6(4)(2) of the InfoSoc Directive. If the rightholder fails to take voluntarily measures, such as making an agreement with the user benefiting from the exception, the work, protected by a technological measure, becomes locked-up. Instead of turning to the court directly, the user, or the rightholder, may ask for the assistance of one or more mediators selected from a list set up by the 'Copyright Organization'. The mediators will then produce recommendations to the contending parties. If none of the parties object within one month from the forwarding of the recom-

²⁰⁴ See Brown, 2003, see also s. 69e para. 3 (regarding the exception for reproduction and translation of codes in computer programs) and s. 87b para. 1 (regarding the exception for reproduction of databases) Gesetz über Urheberrecht und verwandte Schutzrechte vom 9. September 1965. See also s. 168 para. 2b and s. 171 para. 4b (regarding permitted acts for licensing schemes) and s. 324 para. 3 (regarding repeated and systematic extraction or re-utilisation of insubstantial parts of the contents of a database) Copyright and Related Rights Act, 2000, number 28 of 2000.

²⁰⁵ See the Dutch contribution to Brown, 2003, p. 97-109.

²⁰⁶ The Minister of Justice quoted by Nas in the Dutch contribution to Brown, 2003, p. 101.

²⁰⁷ The Minister of Justice quoted by Nas in the Dutch contribution to Brown, 2003, p. 101.

²⁰⁸ See Brown, 2003.

mentation, the parties are deemed to have accepted it. Otherwise, the dispute can be submitted to the Court of Appeal of Athens for final settlement.²⁰⁹ In contrast to Sweden, Greece first offers an alternative to a court process. This way the user will not necessarily have to take legal measures.

6.6 Brief Summary of Chapter 6

The Swedish implementation narrows the exception for private use in comparison to the earlier wording of the Swedish Copyright Act, fairly undramatically in the sense of analogue use, more distinctly in the context of digital use. This latter restriction is manifested by the absence of a non-lock-up provision. However, in the case of the prohibition against private copying of literary works in general (not only student literature) it may be questioned as to whether this is not a distortion of the balancing act narrowing the private use too much. In spite of the fact that the digital environment calls for extended protection of the author's rights, the sole reason being the fear of measurements problems may be a doubtful justification. Regarding the lock-up risk, the Swedish legislator relies upon the authors and the users to reach individual agreements. The role of the Three-Step Test is not obvious when it comes to the question of incorporation or sole consideration during the legislation process. The Netherlands seem to support its impact in national courts in any case, however, this question seems to be closely related to national legal traditions (Common Law or Civil Law). As to the choice of not implementing an enforcement provision for the exception for private use, there is an obvious risk of locking up works in this category, unless individual agreements can be reached. The Swedish legislator defends this position by regarding private use a less important exception. There is also a fear of assaulting the courts with every single private use case. For this problem the Greek implementation may provide, if not some guidance, at least a second view.

²⁰⁹ Para. 5 s. 66A Greek law 2121/1993, quoted by Maroulis in the Greek contribution to Brown, 2003, p. 82-83.

7 Conclusions

This chapter contains conclusions built on and drawn from what has been stated in the earlier chapters. Where not specifically mentioned, the discussion applies on either Swedish law or EC law. The main question, as stated in chapter 1.2, is whether the delicate balance between the interests of the copyright owner and the interest of the public has or has not been maintained through the Swedish implementation of the InfoSoc Directive. Before assessing the possible outcomes, that is whether the effect of implementation has caused a distorted balance, there are certain circumstances that should be considered in an overall basis through this chapter. As mentioned, (see chapter 1.1) the Information Society has brought a new level of thinking into the traditional copyright balancing act (see also the studies of recital 44 in chapter 4.3). These conditions will be identified below.

Firstly, the Internet has opened up for an enhanced number of anonymous infringements. These are closely connected to private use since performed acts in this area are especially difficult to control. The reasons are partly the high frequency of infringing users and partly the inconvenience of encroaching on the private sphere (see chapter 3.4). Although this has led to reactions from rightholders (privatisation of the copyright by setting up technological measures as protection), this initial position resulting from the entrance of the Information Society should be kept in mind.

Secondly, there is a desire for harmonisation of the exceptions and limitations to the copyright at an EC level, especially regarding the reproduction right (see chapter 1.1 with reference to recital 1 of the preamble in the InfoSoc Directive and 2.1.1). It is also a fact that the InfoSoc Directive has not succeeded to the degree that was initially hoped. To summarise, the Information Society, including all its special features, as well as the urgent need of harmonisation within this area has to be considered whilst implementing the InfoSoc Directive and modifying the balancing act. These considerations are both related to the aim of the Directive as they are stressed both in the preparatory acts and the preamble.

7.1 The Elements

Before analysing the balancing act, its constituent elements ought to be considered once more. As concluded in chapter 2.2 the elements are not static, they are rather dependent on the applicable legislation, since copyright only exists by virtue of law. Therefore, it is more appropriate to first examine the consequences of the implementation for each element, and then proceed to an overview of the balancing act.

7.1.1 The Rights

As for the subject-matter of the rights examined in chapter 2, the scope of works protected is very comprehensive. The Directive entrusts the Member States to regulate this area which the Swedish Copyright Act answers by providing a wide incomplete list. As for the rights as such, the rightholders are guaranteed those established in the Directive, but the Member States are also free to legislate for additional rights beyond these. In the Swedish Copyright Act, there are no such additional rights to the ones guaranteed by the Directive. Instead, the formulation in the Swedish legislation has become more accurate after the implementation.

By including rights related to on-demand transmissions there has been a consideration of the special features of the Information Society in line with the Directive. However, it is un-

certain whether this has in fact decreased or increased the number of subject-matters (as mentioned in chapter 6.1). The implemented elucidating right to exclusive communication to the public regarding on-demand transmissions is perhaps the most dramatic step towards the Information Society. As for harmonisation, the rights established in the Directive were, as already mentioned, included in Swedish law before the implementation. Therefore, the emphasis of the questions around the harmonisation regarding the first balancing element has to be on what exceptions and limitations has been implemented. The scope of the rights depends on this second element.

7.1.2 The Exceptions and Limitations

Regarding the adaptation of the exceptions and limitations to the Information Society, there are two main conditions to keep in mind.

Firstly, there is recital 44 (see chapter 3.5), which points out that the provisions on exceptions and limitations are supposed to reflect the increased economic impact that they may have in the context of the new electronic environment. The exceptions and limitations may have to be more restrictive when they are related to the digital environment.

Secondly, there is a distinction between analogue and digital use that has to be respected, especially regarding private use. As stated in recital 38, digital private copying is likely to be more widespread and have a greater economic impact. Due account should therefore be taken of the differences between digital and analogue private copying and a distinction should be made in certain respects between them (see chapter 3.4).

As for harmonisation, the general result regarding exceptions and limitations has not quite reached the expected level (see chapter 3.5). Except for the exception for ‘temporary acts’ in art. 5(1) of the InfoSoc Directive, all other exceptions and limitations are non-mandatory. At this stage it is hard to see how this could sufficiently benefit the internal market.

There is a risk that the provided list in the Directive, due to its exhaustive nature, leaves no room for the development of defences for future exceptions and limitations that may arise in line with new technologies (see chapter 3.2). This might be regarded as a sort of harmonisation, although it is doubtful whether this is the main harmonisation effect aimed at by the Directive. Hence, it is rather an effect of the harmonisation than an act of harmonisation.

a) Restrictions on the Exception for Private Use

There is not much to conclude from the general implementation of the three conditions set out in art. 5(2b) in the InfoSoc Directive (reproduced by a natural person, fair compensation to the rightholder and neither directly, nor indirectly commercial ends of use, see chapter 3.4.1). The implementation seems to have resulted merely in formal amendments of the Swedish Copyright Act. Implementing, or applying, these conditions beyond the wording of the Directive, certain specific restrictions on the exception for private use have been made, both in analogue and digital use. In general, the amount of allowed copies has gone from ‘a few’ to ‘one or only a few’. Small difference in wording perhaps, but it establishes the standpoint of the Swedish legislator and the direction towards a more restrictive exception (see chapter 6.2.2).

b) Analogue and Digital Use

Regarding private copying in the sphere of professional work (see chapter 6.2.1) the Swedish legislator has paid attention to the third condition on non-commercial ends of use. Being a principle established in Swedish case law, the observation has only resulted in a change from the term ‘single use’ to ‘private use’ in the Swedish Copyright Act. However, the aim of this amendment, an emphasis on the importance of the private and non-commercial nature of the exception, is clearly stated in the proposal and will therefore hardly expose the court for any alarming general interpretation difficulties.

There have also been amendments specifically for copying of literary work for private use (see chapter 6.2.2). The scope has been limited, which means that a literary work cannot be copied in its entirety anymore. The underlying reason for this limitation has been to decrease the copying of student literature. As already mentioned, extending this limitation to literary works in general may be a too far-reaching protection of the authors’ rights. It is true that the digital environment calls for extended protection of the author’s rights, but in this case, the protection will affect analogue copying just as much. The occurrence of photocopying of literary works should not be diminished.

The reason behind the general formulation (literary works) is the wish for a preventing effect to occur, and to avoid problems of boundary fixations. Regarding the preventing effect, the bodies to which the proposal was submitted for consideration, argued that this restrictive measure does not guarantee better compensation for the authors. The author of this thesis considers this argument being well-founded. Hence, the fear of boundary fixation inconvenience is the mere justification for such a general restriction. Carrying these matters to the extreme, although the author of this thesis will not, there is nothing that guarantees that there will be problems of boundary fixations either.

It must also be observed that there is nothing to be gained from the Three-Step Test regarding this general formulation. The test acts on behalf of the rightholders, making sure that the exceptions are kept narrowed. The restriction covering literary works is not an exception to the copyright, but an exception to the exception to the copyright. Hence, it is the interest of the users that becomes exposed, and not the authors’. As well as characterizing the ‘closed’ approach, it also becomes evident that users in benefit of stated exceptions do not have any actual rights against authors possessing a copyright.

The new provision requiring a lawful master copy for private use copying is aimed at stopping the increasing abuse of private copying (see chapter 6.2.3). The author of this thesis would like to avoid a discussion around the effectiveness of this new provision, since this has not been dealt with in the thesis and would require an analysis of its own, only stating that the effects will be especially evident in the Information Society. Since unlawful copies are easily and rapidly disseminated in a digital environment, this provision will have special impact restricting the exception for private digital use.

7.1.3 The Three-Step Test

The consequences of not implementing the Three-Step Test into the Swedish Copyright Act, has to be seen in the light of the question: To who is the test addressed – the national legislator, the national courts, or both?

Starting off by looking at the wording of the test, the term ‘applied’ in art. 5(5) of the Info-Soc Directive suggests that the test should have its impact where the exceptions and limita-

tions are put into practical use (see chapter 6.3.2). The author of this thesis is inclined to think that practical use is more commonly performed by courts than by legislators of provisions interpreted by the court. At least, 'practical use' does not necessarily have to refer to the legislator alone. However, the term also has to be dealt with in a juridical context where there is no further guidance provided at this stage. Therefore, as already stated, there is no clear answer to this question. The continuous discussion will therefore emanate from certain assumptions based on the presented facts in this thesis.

Initially, it can be stated as fairly clear that Sweden has appointed the legislator as the addressee and that the test is regarded as a rule of interpretation no matter what international agreement it appears in (according to the opinion of the Swedish legislator in the proposal discussed in chapter 4.3). Thus, in contrast to the Dutch legislator (see chapter 6.5.2) the Swedish legislator does not want the test to have impact in the courts.

Sweden has considered the test during the implementation process, and this discussion deals with a possible future responsibility as a consequence. At this moment the test is most likely covered in Swedish law since the Swedish Copyright Act experienced a sort of update through the implementation and the exceptions and limitations were reassessed in the light of the new electronic environment (see chapter 3.3 on recital 31). As the Dutch Minister of Justice points out, the exceptions and limitations shall already have been subjected to the test (see chapter 6.5.2). It is when the exceptions and limitations are put into practice and brought to the courts for interpretation that a possible problem might occur. It is therefore interesting to look at the aspects surrounding the possibility of a national court addressee.

a) Special Features of the Information Society

Regarding the Swedish legislator's opinion that the test is a rule of interpretation for the legislator regardless of international agreement, it has already been held in this thesis that the Three-Step Test, as it appears in the InfoSoc Directive, cannot be compared to its appearance in earlier international acts (or even the Database Directive).

The Swedish legislator argues that the slight variation in wording between the tests in these different legal acts, does not alone justify incorporation in the case of the InfoSoc Directive. This argument has to be respected, however it is not the wording itself that makes the InfoSoc Three-Step Test different from earlier versions. Rather, it is the special context of the Information Society, including the rightholders exposed position. As discussed in chapter 4.2 and 6.6.3, recital 44 directly concerns the Three-Step Test. Founding its legislative approach on earlier implementation traditions is therefore a doubtful argument.

b) Obligations in a Developing Digital Environment

The Swedish legislator also argued that the general and vague wording of the Three-Step Test does not fulfil the criteria of restrictiveness and predictability, which has to mark the exceptions and limitations to the copyright in a 'closed' approach (see chapter 3.1.1). There was also a fear that the test would open up for extensive interpretation of exceptions and limitations, supporting use that was not originally meant to be accepted.

Analysing the test from another point of view, it can be argued that its flexibility and vagueness is its actual strength (see chapter 4.2). At the same time the three parts of the test are constant regardless of the digital development. In all probability, this will also be the case in the future and could prevent the Swedish Copyright Act from facing the digital de-

velopment unprepared. There might be new concepts of exceptions and limitations credible of being excepted from the copyright, whilst still falling outside the narrow exceptions of the Swedish Copyright Law. Unfortunately, this also shows that the Swedish legislator's fear is well-founded. Such a scenario might well harm the predictability and result in an extensive interpretation of the exceptions and limitations.

One can argue that the Three-Step Test should not reach beyond what falls within the stated exceptions in the first place, i.e. that the test cannot be applied to an exception that is not clearly defined in the legal text (see chapter 4.1.1). In these circumstances, the problem will instead be issued by the fact that exceptions and limitations in a 'closed' approach are designed to be detailed and narrow. In case the test is limited to the area of expressly stated exceptions, there will be no room for covering new concepts deriving from the digital development anyway. All of them will fall outside the application area of the test. Thus, if the test is not going to be interpreted extensively, reaching beyond the stated exceptions, the exceptions and limitations will have to be more vaguely designed, which will make them lose their restrictive nature (and be inconsistent with the first step, 'special cases'). On the other hand, *letting* the test reach beyond the stated exceptions and limitations, will instead harm the predictability (see the Dutch implementation in chapter 6.5.2).

Indeed, Sweden can still meet the digital development on a legislative level every time a new concept appears, legislating in due course, but this will most likely become, if not very complicated, at least unreasonably time-consuming. The Information Society is in constant change, moving rapidly, while the Swedish legislation process (or by all means, most of the Member States' legislation processes) regarding harmonisation of exceptions and limitations has been shown to move in a quite opposite tempo.

c) The Civil Law Tradition

Returning to the examination around the possibility of a court addressee, it might be asked if the test really has to be stated in the legal text to have an impact on the courts' decisions. The general answer is probably no, and that the test might be interpreted by the courts anyway but at the same time, there are legal traditions to consider.

If the test is only considered during the legislation process, thus is addressed to the Swedish legislator, there is probably less chance that the test will actually affect cases in reality. As mentioned in chapter 6.3.2, the Swedish legal tradition in Civil Law relies on legislative decisions to draw the conceptual contours of the exceptions and limitations. Therefore, with the absence of an implementation, the test is only capable of being remotely traced via preparatory acts (see chapter 6.3.2), and there is no obligation for a court taking it into consideration when a judgement is delivered.

The statement in the proposals that the test is a 'rule of interpretation' does not give the court any clear instructions that will guarantee the impact of the test. Hence, the Three-Step Test cannot definitely be interpreted by the court, but still has some undefined importance. There is an apparent risk that there will be problems of boundary fixations as a result.

In this context, it must be observed that other Civil Law states such as Belgium, Greece and France have implemented or been positive to an implementation of the Three-Step Test, or at least that the Common Law states US and UK, have chosen not to implement it (as mentioned earlier in chapter 6.5.2). The stressed question is if Sweden, due to its Civil Law tradition, must implement the test in order to bring national law in line with it. The

reason why a Member State like the UK has not implemented the test might be that its impact in national law and application is secured in a Common Law system anyway. There is no need for an expressed wording in the CDPA, since law is issued by the courts. It is possible to see a system standing out that would answer the question put in the paragraph above. Yes, if it is a Civil Law state, and no, if it is a Common Law state. The drawback is that this division is not absolutely constant since there are exceptions, for instance in Danish law on the Civil Law side and in Irish law on the Common Law side. Moreover, until it is absolutely clear to whom the test is addressed, there is no definite answer (it is possible that there will never be one). However, regardless of how the Three-Step Test has been dealt with throughout the Community, there is no doubt that the test actually *will* face considerable difficulties affecting Swedish courts' decisions.

d) Obligations to Harmonisation

Finally there is a general aspect relating to the harmonisation, which is one of the aims of the InfoSoc Directive. The fact that the exceptions and limitations throughout the Community did not quite reach the level of harmonisation intended, suggests that the implementation of the test might be specifically important. There are great variations among the exceptions and limitations of the Member States as well as an apparent unwillingness of letting any of them go.

In this context the Three-Step Test may constitute a common point of reference, embodied in a general provision. For instance, if a case is brought to the national court, and there is no obligation to take the test in consideration, it may result in that use in one Member State is being excepted, while the exact same use in another Member State will have a different result (even in a case regarding the mandatory exception for 'temporary acts' where the wording might be exactly the same). However, it has to be added that this particular aspect is merely speculations at this stage. The question about whether Member States might have certain obligations as a consequence of a slightly unsuccessful result of an issued Directive will not be dealt with in this thesis.

It must also be added that the fight against piracy in the Information Society is not only concerned with Community measures. Although Sweden may have fulfilled and achieved the aim of the Directive on an EC level, there are also international obligations *through* Community law. Multilateral actions taken at a world level have to be respected as the Information Society has a global nature and therefore requires global answers, at least with respect to the most crucial points related to the digital environment (see chapter 2.1.2). After all, the InfoSoc Directive derives from the international WIPO Copyright Treaty, although it is not signed by the EU. The question regarding international law contra EC law in this case, will most certainly be transferred to the ECJ deciding how much international influence will affect the interpretation of the Directive in the future.

7.1.4 The Protection of Technological Measures

With the establishing of the protection of technological measures in the InfoSoc Directive, we are heading towards a privatisation of the copyright. As the Swedish legislator has observed, the Directive accentuates voluntary measures through individual agreements as the first weapon against lock-ups (chapter 6.4.2). In second hand, the Member States shall take appropriate measures to ensure that rightholders make works available to the beneficiary of an exception of limitation provided for in national law (see chapter 5.1.3).

Since Sweden has not implemented a corresponding system on ‘appropriate measures’ regarding private use, users in benefit of this exception will face a lock-up of the work. As a justification, the Swedish legislator makes a distinction between the underlying needs for private use and for instance, use by disabled persons (see chapter 6.4.2). The private use is found to be less needy of protection by enforcement provisions. Besides, the legislator also considers the growing digital environment, which the Information Society has brought (see chapter 6.4.2). It is clear that the increasing amount of private use infringements, placing the rights of the authors in a vulnerable position, has been considered.

Moreover, providing for every single person that has ever bought a copy-locked CD to take legal measures against the copyright owner is regarded as intolerable. This aspect of the situation is understandable considering the expected overload that will most certainly fall upon the courts. If the Swedish legislator were to reconsider this view, a look at the Greek method might contribute to a solution (see chapter 6.5.3). Greece has passed these potential court disputes over to an independent body. The appointed mediator listed by this body will assist the disputants providing recommendations. The court would not need to take up every dispute for negotiation, and it is possible that the mediator could organize and join certain cases to a greater extent than the courts, since it would deal with lock-up disputes exclusively. On the other hand, such a dispute settlement system would require that the decisions are respected and reach a high status in the Information Society (which may in practise harm or enhance the reputation of the parties). If not, the disputants may try to force a court decision regardless of recommendations from the mediator.

Although there is no obligation whatsoever for Sweden to provide enforcement possibilities for private use, the author of this thesis finds the Swedish standpoint somewhat confusing. Sweden has to consider the impact of the Information Society and the vulnerable copyright that comes with that, but at the same time the private use is nevertheless stressed in Swedish copyright law. Establishing already restrictive exceptions for private use, which have been adapted for the Information Society, and still not following up by enforcing them seems inconsistent. If this point of view were taken by for instance the UK, where CDPA provides an especially limited scope and application for a private use exception, perhaps it would not have been so surprising (see chapter 6.5.1).

The condition on ‘lawful access’ in s. 52d para. 2 (see chapter 6.4.1) indirectly allows the possibility of circumventing due to own ability. Although the aim of the provision is to prevent the occurrence of a protection covering interests beyond the corresponding copyright protection, users circumventing by other reasons are likely to avoid liability under this provision as well. The condition for ‘lawful access’ requires the rightholders consent, or that the use is covered by one of the exceptions or limitations stated in the Swedish Copyright Act. This provision opens up for those private users who possess the technical skills to circumvent technological measures on their own. Hence, there *is* a possibility to avoid liability yet breaking a lock-up of a work in which use is excepted from the copyright.

7.2 The Balancing Act

As stated early in this thesis, measures that were to be taken at an EC-level also had to safeguard a fair balance of interests between rightholders and users (see chapter 2.1.2). Revisiting the introduction chapter and the purpose of this thesis, it shall now be examined how the balance has been affected by the implementation of the elements. Today the rightholders appear as the most favoured group from the beginning, partly because of the ‘closed’ approach which distinguishes the Swedish Copyright Act and partly because of the

restrictions that have been made to the exception for private use. It has already been stated that the Information Society makes the rightholders particularly exposed to infringements of their works, and that these infringements are highly represented in the private use section. It is important to distinguish between digital and analogue private use, since it is in fact the digital use that constitutes the most alarming threat of the two. It must also be added that the balance in the Swedish Copyright Act prior to the implementation was not optimised.

The first restrictions regarding private use, are copying in the sphere of professional work and the limitation in scope regarding copying of literary works. These restrictions will not only concern digital matters. In the case of the previously restricted area, the balance between the interest of rightholders in general and private users in particular, has not led to any distortion. The part of the use that is not private has been detached in line with the Directive provisions, leaving the private use as such intact.

Regarding the latter restriction concerning student literature, it is true that the authors are in fact an exposed group, and that an extra protection can be justified regardless of the impact of the Information Society. However, providing a prohibition that covers both analogue and digital copying of literary works in general may well constitute at least a slight distortion of the balance. At the same time the wish for a preventive effect must be acknowledged, especially since copying for private use is very hard to control. Problems of boundary fixation may also occur, but at this point, it is more of a fear than an actual disadvantage for the interest of the rightholders. The situation would probably have been quite different if the restriction, manifested by the prohibition of copying for literary works in general, would have only affected digital use. Now, the existence of an opposing threat from the public, which is balanced up on behalf of the rightholders, is hard to identify.

As for the implemented provision regarding the real master copy, it will considerably increase the weigh of the authors. This measure is an answer to the increasing digital infringements in the private use sector and more of a maintenance of the balance than a distortion.

The Three-Step Test is supposed to be a tool in favour of the authors restricting the exceptions to the copyright, both analogue and digital excepted use. As a result of the absence of an implementation, the rightholders cannot have full confidence in the test to back them up in a court dispute. Although this may not constitute a problem today, the conditions may change in the future as a consequence of technical development. Being prepared for what may become a distortion of the balance, the author of this thesis shares the Dutch view (see chapter 6.5.2) that the test should not, in general, be incorporated in national legislation, but ought to have an impact in the courts somehow. Unfortunately, this view becomes a great paradox in a Member State of Civil Law tradition. The problem remains unsolved.

The protection of technological measures can be said to concern only digital use and infringements. Since the private use is not exempted from the protection, it is the public interest which suffers. This can be compared with the provision allowing circumvention due to own ability. Some authors reject this idea as being too disadvantageous for the rightholders in the gigantic digital net market (see chapter 6.4.2). Thus, if this is such a far reaching measure in favour to the public interest, then perhaps the Swedish legislator is trying to balance things by not protecting the private use from technological measures. On the other hand, allowed circumvention due to own ability being too disadvantageous, is per-

haps an aspect that descends from a context where private use *is* enforced by law to break lock-ups.

The absence of a lock-up protection appears to be a fierce attack on the interest of the private use public although it may also be regarded as a maintenance of the balance in phase with the Information Society. Since the exception for private use is in fact the section where infringements are the most difficult to control at this stage, perhaps the legislator has chosen to take especially powerful measures. At the same time, there is a risk for inconsistency in the Swedish Copyright Act diminishing an exception initially provided for. It must be added that an enforcement provision against lock-ups does not encroach upon the rightholders interests. An enforcing of a lock-up shall only be issued if the rightholder does not act voluntarily, and it will only concern use that expressly falls under the exception for private use in the first place. Thus, an implementation of art. 6(4(2)) would hardly decrease the position of the rightholders interest in the balancing act.

7.3 Final Note

To summarise, the delicate balance between the interests of the copyright owner and the interest of the public has in general been maintained through the Swedish implementation of the InfoSoc Directive. However, there are effects of the implementation that may have caused or may cause a distorted balance. Firstly, the public interest embodied in the exception for private use may be suffering in the context of analogue use. A general exception to this exception regarding all literary works may even go beyond the interest of the rightholders. Secondly, the absence of a reliable Three-Step Test may reduce the possibilities for the rightholders to exercise their interests in the future. Thirdly, the effects of the non-lock-up protected exception for private use are hard to predict at this stage. As already mentioned, beneficiaries of an exception stated in law do not possess any similar right, such as the copyright, towards the author. There is an uncertainty regarding the future developments, and the author of this thesis awaits the submitting of the report from the Commission, in hope that it will bring further understanding within this area.

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