RECEPTION OF BRITISH 'FAIR DEALING' IN THE FRENCH CLOSED SYSTEM OF EXCEPTIONS

A PLEA IN FAVOUR OF 'FAIR DEALING' À *LA FRANÇAISE* USING REVIVIFICATION OF COPYRIGHT STANDARDS (AND THE REVELATION OF THE PHILOSOPHY OF THE 'REASONABLE')[1]

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It was long believed that the most urgent need in private law is stability and everything was sacrificed to that. Now, it is beginning to be recognised that stability

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is a chimaera; it cannot resist transformations in life and it is another need, more imperious and harder to achieve, that must be satisfied: the need for adaptability. (A.A. Al-Sanhoury, "Le standard juridique", Revue internationale de droit comparé, 1970, volume 22, p. 144)

1. Difficulties in adapting copyright to new cultural and technological practices. Copyright today is being challenged on all sides. In the cultural field, the appropriationist movement claims the right to borrow pictorial or photographic works without their authors' permission for the purpose of producing new works.[2] In music, some artists pursue the same ends with sampling.[3] In the area of new technologies, in countless situations works are transformed into elements of information. Thus, regarding Google Books,[4] an American judge observed that this contentious process had transformed the content of books into data for research purposes, including through data mining and text mining. A similar observation could be made

2. See the following cases in the United States: Jeff Koons and Richard Prince. Rogers v. Koons, 960 F.2d 301 (2d Cir. 1992). Blanch v. Koons, 467 F.3d 244, 253 (2d Cir. 2006). Cariou v. Prince 714 F. 3d 694 714 (2d Cir. 2013). For a presentation of these decisions, see J.-M Bruguière "Le droit du *copyright* anglo-américain," Dalloz Connaissances du droit. 2017 p.203*ff.* For France, see the Klasen decision of the Court of Cassation Cass. 1re civ, 15 May 2015 and comm. by M. Vivant "La balance des intérêts... enfin," 2015 Com. com. électr. 2015 Etude 17 A. Lucas and J.-M. Bruguière: *Propr. intell.* 2015, no. 56, p. 280 and p. 285. and more recently the Jeff Koons decision. TGI Paris 9 March 2017 *Propr. Intell.* 2017 no. 64 p. 69 obs. Bruguière. And on reference CA Versailles 16 March 2018 RG no. 15/06029 and our note JCP G 2018, in press.

3. BverfG (Constitutional Court of Germany), 31 May 2016 decision no. 1 BvR 1585/13 Metall auf Metall *Propr. Intell.* 2017 no. 61 p. 457 obs. Lucas. See also, for the the problem, the prejudicial question asked in case C-476-17. The first question is worded: "Is there infringement of the exclusive right of phonogram producers to reproduction of their phonograms according to Article 2 under c) of Directive 2001/29 when minute audio snippets are excerpted from the phonogram for transfer to another?

4. District Court, Southern District of New York, 14 November 2013 The Authors Guild, Inc. and others c/ Google Inc. 05 Civ.8136 (DC) *Propr. intell.* 2014, no. 50, p. 82, obs. Lucas

for the aggregation of press content by some search engines.[5] Many observers share this acknowledgment of "the growing divergence between copyright and the emergence of social norms in Europe."[6]

2. Concrete illustrations. Some concrete (and intentionally very different) examples drawn from case law and our (small) practice help raise awareness to these difficulties in adapting French authors' rights. Take a television channel wishing to broadcast a programme around flagship products over the past fifty years. Can representations of *Smart* and *DS* cars or *Bic* ball-points be shown like this without permission from the people holding rights to drawings and models?[7] By focusing here solely on copyright/authors' rights, we can only note that no legal exception covers showing such products within a programme. Under French law, short quotation cannot apply in the presence of full representation of the product.[8] Nor can the broadcast be justified by the exception for immediate information; this entertainment programme does not quite qualify as immediate information. Without being able to rely on any of the exceptions in Article L. 122-5 of the CPI (French Intellectual Property Code), should the right to information be brought into play? We will see below[9] that this is not necessary in particular if we accept to

5. See in this sense the justifications for the draft Directive on Copyright in the Single Digital Market.

6. See for example P. Bernt Hugenholtz "Flexibcopyright: can EU author's right accommodate fair use?" in P. Bernt Hugenholtz & Martin R. F. Senftleben, "Fair use in Europe. In search of flexibilities," November 2011, available at http://ssrn.com/abstract=1959554. Similarly, see A. Lucas and J. C. Ginsburg "Droit d'auteur, liberté d'expression et libre accès à l'information. Étude comparée de droit américain et européen," RIDA 2016 no. 249 p. 7.

7. The risks linked to the Trademark Law were excluded in the absence of use as a trademark, or at least of use in business life.

8. Cass. civ 1° 7 November 2006 *Propr. Intell.* 2007 no. 22 p. 91 obs. Bruguière.

9. See below, no. 65.

explore the functions of copyright as we do for Trademark Law. The second example we can adopt is drawn from the famous case presenting works by Utrillo in a television reportage and the decisions rendered. In our opinion, this case law clearly seems to attest to the judge's incapacity to exploit the resources of the standards in the Law of 11 March 1957 and aptitude to generate disorder by referring to basic rights and freedoms.[10] In 1996, the Museum of Lodève decided to prepare an exhibition of Utrillo's paintings. On 18 August 1997, the evening news on France 2 broadcast a 2-minute reportage on an exhibition at the Museum of Lodève with an interview of the curator, presentation of some ten works on display and a scene from Sacha Guitry's film *Si Paris m'*était conté. Some of the paintings were shown in whole in the context of this reportage. M. Fabris, who held half of the economic rights for these works, filed a complaint against the France 2 television channel before the TGI (Tribunal de Grande Instance) of Paris to copyright infringement. Unable to claim the exception for short quotations, to be discussed below,[11] the first judges emphasised that the public's right to know should be understood as both a 'right to know' and a 'right to see'. As a result, the presentation, of short duration, of the artist's work in the context of a television news programme, intended to illustrate the reportage, should be considered lawful, since its purpose was to inform the public briefly and 'appropriately'.[12] The Court of Appeal of Paris amended the decision. Besides the fact that Copyright is also protected by the European Convention (under

10. The judge is obviously positioned with respect to the parties' claims. But these claims are determined by case law adopted at the time (in particular the position stating that the short quotation exception cannot apply in the presence of representation of the unabridged artistic work).

11. *Cf.* below, no. 66.

12. TGI Paris, 23 Feb. 1999, *D.* 1999. Jur. 580, note Kamina; *RIDA* 2000, nº 184, p. 374, note Kéréver.

'Protection of property'), in the Court's opinion, the television channel had the means necessary to inform the public without broadcasting the infringing material on the screen.[13] The Court of Cassation confirmed this position: "The author's legal monopoly on his/her work is intangible property, guaranteed by any natural person or legal entity's right to respect for their property to which the legislator adds proportional limits, for the exceptions in Article L. 122-5 of the Intellectual Property Code as well as manifest abuse in Article L. 122-9 of the same Code (...). That the means drawn from violation of Article 10 of the European Convention on Human Rights is consequently inoperative."[14] The judgment was rendered on the basis of a rather dogmatic confrontation of copyright and the public's right to know. This could have been avoided with an intelligent interpretation of the analysis and short quotation exception.[15] Many other examples and questions could be formulated on the notion and the system of exceptions for press reviews, parody, etc.

3. Legislative and doctrinal reactions. In the face of these difficulties, there were many reactions from the legislator and academic or administrative doctrine.[16] Regarding doctrine, some emphasised that it was urgent to do

13. CA Paris, 4e ch., 30 May 2001, *D.* 2001. Jur. 2504, note Caron; *JCP* E 2003, chron. 278, nº 12, obs. Zollinger; *Propr. intell.* 2001, nº 1, p. 66, obs. A. Lucas; *Légipresse* 2001, nº 184, III, p. 137, note Varet.

14. Civ. 1re, 13 Nov. 2003, *D.* 2004. Jur. 200, note Bouche, *JCP* 2004. II. 10080, note Geiger; *JCP* E 2004, chron. 1898, §13, obs. Zollinger; *Propr. intell.* 2004, nº 10, p. 549, obs. A. Lucas; *RIDA* 2004, nº 200, p. 291, obs. A. Kéréver; *Propr. ind.* 2004, comm. 8, note Kamina; *RLDA* 2004, Feb., nº 4249, obs. Costes; *Légipresse* 2004, nº 209, III, 23, note Varet; *CCE* 2004, comm. nº 2, note Caron; *JurisData* nº 2003-020895. Jurisprudence confirmed by Civ. 1re, 2 oct. 2007, *Propr. intell.* 2008, nº 26, 112, obs. Bruguière; *RIDA* 2007, Oct., p. 339, obs. Sirinelli; *CCE* 2008, comm. 2, note Caron; *RTD com.* 2008. 78, obs. Pollaud-Dulian; *JurisData* nº 2007-040650.

15. For this discussion, see below, no. 66.

16. The practitioner's doctrine is more discreet, though often generating rights (Are decisions not rendered on the basis of the conclusions of the parties to the dispute?).

nothing. The Lescure report[17] had proposed expanding the finality of the quotation right for transformative and artistic purposes in particular. This proposal was deemed dangerous, however, by the Higher Council of Literary and Artistic Property[18] given the need to limit quotation to informative finalities. However, others proposed instituting in our system a mechanism identical to 'fair use':[19] 'fair use', that fiend maligned by Continental doctrine through the Utrillo and Klasen decisions. Regarding this last decision, our colleague Christophe Caron emphasises that the infringer "benefits in a way from 'fair use à la française' which, depending on the circumstances, could make it possible to make lawful use of other people's property without having obtained the owner's permission or paid the latter any remuneration."[20] In fact, such 'fair use à la française' entails referring to basic rights and freedoms, invited to do so by a given doctrine.[21] Freedom of expression, in particular, is often called upon to overtake or bypass exceptions deemed overly restrictive. For the legislator, the most common response is to introduce new exceptions in accordance with Directive 2001/29. In France, this was the case with the Law of 1 August 2006 and more recently with the Digital Republic Law.

4. Unsatisfactory nature of these reactions: setting 'fair use' aside. The legislator's recent actions regarding exceptions strike us, however, as not very

17. Lescure Report "Mission Acte II de l'exception culturelle. Contributions aux politiques culturelles à l'ère numérique" May 2013 and, for a brief commentary, see J.-M Bruguière and F. Dumont D. 2013 p. 1464).

18. Report by the Conseil Supérieur de la Propriété Littéraire et Artistique on transformative works (available on the CSPLA site).

19. See the works of Bernt Hugenholtz & Martin R. F. Senftleben (in particular the article mentioned above, note no. 6).

20. *Com. com. électr.* 2015 comm. 55.

21. See in particular Ch Geiger "Droit d'auteur et droit du public à l'information," IRPI, 2004, T. 25 Pref. M. Vivant

satisfactory. These reactions were made on a case-by-case basis, according to lobbying,[22] without any broader reflection of the possible general architecture of the limitation of exclusive rights with the spread of new technologies and cultural practices. Moreover, all this is taking place in the straitjacket of the closed system of exceptions of Directive 2001/29.[23] The exceptions introduced are often useless as attested by several provisions in the Digital Republic Bill.[24] The flexibility which is sought all around should certainly be pursued more from the judge.[25] It seems that the idea of instituting a 'fair use' mechanism in our law should be rejected from the outset.[26] American 'fair use' (since this is generally what is being considered) is based on a very specific philosophy of law tending in particular to grant much greater importance to the public or users than in the Continental authors' rights system.[27] Shifting with the introduction of 'fair use' from a model centred on the public to one that focuses on authors is not realistic. The introduction of 'fair use' in our law would also require long years of adaptation, creating strong legal insecurity for authors and operators as noted by André Lucas and Jane C. Ginsburg.[28]

22. On promoting of such lobbying, see M. Vivant, "La loi expression de l'intérêt général, Petite musique à propos de la Dadvsi," Mélanges M. Miaille: Le droit figure du politique, Univ. Montpellier I, 2009, p. 867.

23. We can recall that, according to Recital 32 of Directive 2001/29: "This Directive provides for an exhaustive enumeration of exceptions and limitations to the reproduction right and the right of communication to the public...".

24. See here our commentary on this law from the standpoint of exceptions, *Propr. Intell.* 2017 no. 62 p. 22.

25. The legislator obviously not being set aside, since Parliament created the instrument of flexibility provided to the judge.

26. It should be noted, however, that authors defending this view never do so on the basis of 'pure' importation of the 'fair use' model.

27. J.-M Bruguière "Le droit du *copyright* anglo-américain," above-mentioned spéc. p. 11*ff.* On the dangers of introducing 'fair use' in our system, see also M. Ficsor "*Fair use versus* triple test. La promotion agressive d'un droit d'auteur *a minima"* in Mélanges André Lucas, LexisNexis, 2014, spéc. p. 290 *in fine.*

28. Above-mentioned article: "This vagueness is unquestionably less than in the United States where legal experts may, on the basis of a body of case law built up over 175 years, hope to

5. Resources and limits of recourse to basic rights and freedoms. Referring to basic rights and freedoms that have existed for several years before the judges seems more realistic, although we must be able to measure its scope. Basic rights and freedoms are neither the insidious Trojan horse of 'fair use à la française', nor the radiant future of European authors' rights. In a system of closed exceptions which is one of the essential pillars of Continental authors' rights, it is preferable, first, to examine the fundamental nature of certain exceptions and then become aware that the judge may sometimes needlessly fundamentalise certain exceptions. For the first point, we must presume that the legislator integrated the basic values of the system of exceptions. Before soliciting basic rights and freedoms to develop the requisite solution in a copyright dispute, it is essential to check if this privative law does not already include these essential values. As could be observed for *Dialogue des Carmélites* by Édouard Treppoz:[29] "It is not certain, however, that the instrument of proportionality is appropriate here.[30] Proportionality based on basic rights should only exceptionally correct imbalance due to copyright solutions. Such external control tends to substitute a new balance for the internal balance of copyright." In truth, difficulties arise when the judge, invited to do so by inspired lawyers, short-circuit or exceed existing exceptions or, more basically (no pun intended) forget to refer to the standards devised by national legislators. The CJEU decision of 3 September 2014 concerning a parody of a comic strip provided a good example.[31] The

anticipate the legal response. But this would require waiting for a long time, and after how much trial and error, to see EU countries able to propose a reliable compass."

29. E. Treppoz "Retour sur la dénaturation contextuelle du Dialogue des Carmélites," Légipresse 2017 no. 352 p. 441.

30. E. Treppoz refers here to the principle of proportionality highlighted to decide on the measure forbidding publication of the contentious phonogram.

31. CJEU 3 Sept. 2014, aff. C-201/13, Johan Deckmyn & Vrijheidsfonds c/ Helena Vandersteen, D. 2014. 2097, note Galopin; *Légipresse* 2014, p. 604, note Blanc; *Propr. intell.*

Belgian law concerned in the decision of 3 September 2014 provides that the author cannot forbid any "caricature, parody or pastiche, given honest uses." In France, Article L. 122-5 4° emphasises that the author may not ban "parody, pastiche or caricature, given the rules of the genre." The Belgian judge could have considered that such 'honest uses' (or the French judge with the 'rules of the genre') include the idea that a comic strip cannot be used to convey a message of hate, especially when it is so popular. In other words, the parody exception already called on basic rights and freedoms intrinsically without needing to refer to the Charter of Fundamental Rights or European Convention on Human Rights.[32] If there is no exception or it does not contain any such standard, we find it legitimate, in view of the obstruction mentioned above, to refer to basic rights and freedoms and the principle of proportionality which inspires the balance between basic rights and freedoms before the European Court of Human Rights. All possibilities must be broached without dogma but it is very important to emphasise this here, in respecting the economy of Continental authors' rights.[33]

2014, no. 53, p. 393, obs. Bruguière; *CCE* 2014, comm. 82, note Caron; *RIDA* 2014, p. 387, obs. Sirinelli; *RTD com.* 2014. 815 obs. F. Pollaud-Dulian. We can recall that, according to the Court, those who used the work cannot invoke the parody exception and freedom of expression when such freedom of expression was overstepped in particular through a discriminatory political message.

32. True, at the time the CJEU decision was rendered, many EU countries did not recognise the parody exception. It is hard to reproach the Court of Justice for such fundamentalisation and harmonisation. Neither the Belgian judge nor the French judge, however, was very bold (see for example TGI Paris 15 June 2017 RG no. 16/00585 and our commentary *Propr. Intell.* 2017 no. 66 p.).

33. We take the liberty of quoting our conclusion to the commentary on the Klasen decision, *Propr. Intell.* 2015 no. 56 p. 287, "It is not a matter of posing the immobility of authors' rights as a rule by condemning without nuance this decision of 15 May 2015 (supposing again that it has the revolutionary scope attributed to it). It is a matter of enabling our authors' rights to survive while respect its economy." On the effects of this observation (in particular on the fact that the judge will not be able to create new exceptions), see below, no. 64.

6. Alternatives to basic rights and freedoms: Interpretation by analogy, interpretation taking full measure of the *raison d'être* of exceptions. It cannot all be reduced, nonetheless, to basic rights and freedoms. To offer the judge the flexibility necessary for interpreting our exceptions, we have been able to propose many solutions. Thus, Article 5-5 of the Wittem report[34] suggested defining an interpretation by analogy of exceptions full respecting the Three-Step Test rule.[35] In his thesis, Benoît Galopin proposed an interpretation of exceptions in the full extent of their *raison d'être*, relying for that, on the one hand, on a strict, non-restrictive interpretation (recourse to the legislator's intention) and, on the other hand, on basic rights and freedoms.[36] In the context of this article, it is not possible to discuss the relevance of each of these proposals. Let us be satisfied to observe that the solution suggested by the Wittem report leads to granting the judge the power to create new exceptions, which is not possible in the state of our positive law.[37] Benoît Galopin's proposal strikes us as more satisfying since it leads to granting a much more important place in our system to the rule of the 'reasonable'.[38] It is not always possible to discover the *ratio legis* for some exceptions by revealing the legislator's will (since it has not often been expressed). As for looking to

34. "*The Wittem project. European Copyright Code*," April 2010.

35. "Any other use that is comparable to the uses enumerated in art. 5.1 to 5.4(1) is permitted provided that the corresponding requirements of the relevant limitation are met and the use does not conflict with the normal exploitation of the work and does not unreasonably prejudice the legitimate interests of the author or rightholder, taking account of the legitimate interests of third parties."

36. B. Galopin "Les exceptions à usage public en droit d'auteur français," IRPI 2012 no. 41, §, Pref. P. Sirinelli.spéc. p. 358*ff.* It should be noted that the Court of Justice this form of interpretation in some of its decisions. For the first point, for example (interpretation of the exception in all its capacity), see CJEU 11 September 2014 aff. C-117/13 spéc. pt. 43.

37. On this discussion, see below, no. 64.

38. On revealing the 'reasonable', see below, no. 38*ff.*

basic rights and freedoms, there is a risk of transfiguring positive law rather than presenting it objectively.

7. Hypothetical inclusion of 'fair dealing' in the closed system of exceptions. The hypothesis we will consider in the context of this article entails examining possible inclusion of the British 'fair dealing' mechanism in our system of exceptions[39] in order to correct the rigidity of our copyright as briefly illustrated above. Several reasons justify this choice. Such a hypothesis of approximation has never been conducted systematically. Thus, like other authors before him, Benoît Galopin envisions possible filiation between 'fair dealing' and the Three-Step Test at the very end of his thesis.[40] Unfortunately, this link, which is essential, as we shall see, is not further developed. More recently, in her thesis dedicated to parody,[41] Sabine Jacques highlighted certain links between the notion of 'rules of the genre' and the mechanism of 'fair dealing'. We will examine at length these two notions which, in our opinion, are part of the same philosophy.

8. Justification for the hypothesis: the 'fair dealing' compromise. 'Fair dealing' is also midway between the open system of exceptions, represented by American 'fair use', and the closed system of exceptions adopted in Continental authors' rights. Looking back can help understand these differences. Defence differs fundamentally in Copyright countries and

39. First of all, for an outline of such a research hypothesis, see J.-M Bruguière and C. Bernault "Le *fair dealing* britannique et le système d'exception français du droit d'auteur. Débat autour de l'importation du modèle" dans "La propriété intellectuelle en dehors de ses frontières," CUERPI 2016 Colloquium, Larcier 2018, dir. A. Favreau.

40. B. Galopin, op. cit. §646 and 647.

41. S. Jacques "The right to parody? A comparative analysis," PhD Nottingham 2016.

Continental authors' rights countries. In systems of civil law tradition, defence relies on a set of closed exceptions that cannot be expanded *a priori* and are subject to strict interpretation. The judge must state whether the conditions of these exceptions as legally defined are fulfilled or not. The judge's creative power is limited *a priori*, very certainly in the name of the idea that the legislator has reached an equilibrium that should not be altered.[42] The United States defined, alongside certain exceptions, the general defence of 'fair use' enabling judges to maintain the exclusive right or not on the basis of certain factors. Between these two totally opposite mechanisms, the one adopted in the UK appears as a compromise: exceptions are legally enumerated but some are subject to the notion of 'fair dealing' or loyal use of works. The judge assesses such fair treatment of works on the basis of a certain number of criteria presented below. Thus, 'fair dealing' relies on the closed system of exceptions we do not intend to challenge in any way. Thus, the criticism usually levelled against 'fair use' is totally misplaced. Our approximation is based on British – not Canadian or Australian – 'fair dealing'. Canada is also adopting 'fair dealing' but the judge, in the Canadian Ltd. v. Law Society of Upper Canada (CCH) decision in particular, expanded the test to exceptions that should be subjected to it[43]. This

42. The authors defending respect for the legislator's balance regarding exceptions rarely explain why things should be so. On analysis, two explanations are possible. The first is based on the political legitimacy of the power of judges in Civil Law. As we know, judges are not democratically elected, as are other judges in certain Common Law countries (Canada, for example). Challenging property rights (since copyright exceptions boil down to that in our system) by judges or an administrative authority (like EPO, the European Patent Office for patent law) may thus be politically questioned. This applies all the more that — and this is a second reason — in our Constitution, Article 34 reserves (in particular) the property system to the field of the law. The copyright exception being a limit to property rights, this limit can only come under the area of law.

43. Canadian Ltd. v. Law Society of Upper Canada (CCH), 2004 SCC 13, [2004] 1 S.C.R. 339, 236 D.L.R. (4th) 395 [*CCH*]).Legal publishers filed a complaint against the Law Society of Upper Canada, which made photocopiers available to lawyers and magistrates to copy decisions, summaries and commentary, despite the fact that these legal experts' research and study was often used for commercial ends; some of them sell consultations thanks to these

is why we will not be considering this 'fair dealing', under the influence of 'fair use'.

9. Cultural obstacles to inclusion: convergence of rights, nonetheless. It is never simple to introduce a foreign institution into one's law (here, 'fair dealing').[44] The host system may indeed consider the new concept as a foreign body and reject it. This can be explained in large part by the culture attached to the institution — culture that, on the matter of the judges' assessment of a law, is viewed as fundamentally different in Civil Law (*Droit Civil*) compared with 'Common Law' countries. As has been clearly underscored, "English lawyers do not believe in the myth of complete orderly rational law anticipating solutions to all matters, since the legislator (no more than anyone else) cannot actually foresee everything beforehand. Thus, the law no longer has the concrete function of finding a solution to a dispute."[45] This opposition on how to make a decision – providing a solution to a dispute for the English judge, as opposed to enforcing the law for the French judge – is not as clear today since the mechanism of the Three-Step Test was introduced for copyright exceptions. This was clearly demonstrated in France with the famous Mulholland Drive decision.[46] As justly observed, the decision

documents, the Supreme Court of Canada would recognise 'fair dealing' though limited to private research of studies.

44. Yet, "the law is not static. It changes constantly. Its changes are due, for the most part, to imitations: a given model, born in a given country, spreads to another country." On the circulation of legal models, see R. Sacco, "Rapport de synthèse" in "La circulation du modèle juridique français," Travaux de l'Association Henri Capitant, Litec, 1993; E. Agostini, "La circulation des modèles juridiques" RIDC1990 no. 2 p. 461.

45. P. Deumier, "Introduction générale au droit," 2° ed. 2013 no. 187.

46. Civ. 1re, 28 Feb. 2006, *JCP* 2006, 10084, note Lucas; 2006. I. 162, §12, obs. Caron; *JCP* E 2006. 2178, §8, obs. Pignatari, and §11, obs. H.-J. Lucas; *D.* 2006. AJ. 784, obs. Daleau; *D.* 2006. Pan. 2996, obs. Sirinelli; *Propr. intell.* 2006, n° 19, p. 179, obs. Lucas; n° 24, p. 364, obs. Vivant; *RLDI* 2006, March, n° 405, p. 35, obs. Costes; *RIDA* 2006, 209, p. 323, obs.

"requires (...) the judge to step out of his natural function, which is to enforce the law (even if enforcing the law does not postulate confinement in the law) and switch to another function which is closer to regulation."[47] Moreover, today it is wrong to continue so fiercely opposing Copyright countries and Continental authors' rights countries. In the past, convergence set in with the construction of the law,[48] and, in the present, in the approximation of these mechanisms.[49] The internationalisation of copyright led to genuine modelling for certain issues.[50] Moreover, the convergence of rights is carried by different projects and recent reports. A draft global European Copyright Code[51] was envisioned along with the Communication of the European Commission of 24 May 2011.[52] This idea of codifying copyright also prospered in doctrine through the Wittem Project.[53] In both texts adopted here, the need to review of common copyright exceptions is greatly emphasised. We find it interesting now to consider, beyond revision of the list of exceptions provided by

Kéréver; *CCE* 2006, comm. 56, obs. Caron; *RTD com.* 2006. 370, obs. Pollaud-Dulian; 400, obs. Gaudrat; *JurisData* nº 2006-032368.

47. M. Vivant, "Des délices du raisonnement circulaire," *Propr. Intell.* 2007, nº 24, p. 369.

48. F. Rideau, La formation de la propriété littéraire en France et en Grande-Bretagne: une convergence oubliée, PUAM, 2004.

49. A. Strowel, "Droit d'auteur et copyright, Divergences et convergences," LGDJ, 1993 and more recently by the same author, "Droit d'auteur et copyright. Convergence des droits. Régulation différente des contrats" in Mélanges Lucas, LexisNexis 2014 p. 699. See also J.-M Bruguière, "Le droit du *copyright* anglo-américain," Dalloz, Connaissances du droit, 2017 spéc. p.22*ff.*

50. On this observation, concerning the protection of works using technical protection measures, see M. Vivant and J-M Bruguière, "Droit d'auteur et droits voisins" 3º ed. 2015 no. 39.

51. On the assessment of this project, see T. Azzi, V.-L Bénabou, A. Bensamoun, N. Martial-Braz, E. Treppoz, C. Zolynski "Que penser du projet de Code global européen du droit d'auteur?" Petites affiches, 29 June 2012, no. 130 p. 55.

52. "Vers un marché unique des droits de propriété intellectuelle. Doper la créativité et l'innovation pour permettre à l'Europe de créer de la croissance économique, des emplois de qualité et des produits et services de premier choix," Brussels, 24.5.2011 COM(2011) 287 final.

53. "The Wittem project. European Copyright Code." April 2010.

Directive 2001/29, a common method for their assessment, better adapted to the cultural, social and technological changes evoked above. The 'fair dealing' test, which has survived the test of time[54] and, in our opinion, is already discreetly practised by our judges for certain exceptions, should now receive special attention.

10. Method of analysis: follow-up plan. Concerning the method used, we should specify from the start that the definition of the extent of our copyright involves not only the set of exceptions, were it made more flexible thanks to a test like that of 'fair dealing' we will strive to identify in the French system. A reflection upstream on the functions of copyright, as is done for trademarks under the influence of the Court of Justice, should indeed be combined with analysis of the 'fair dealing' test for exceptions. In other words, it is only once copyright has been deemed to be legitimate[55] that you can examine the set of exceptions and their assessment. Moreover, it is not enough to cut and paste solutions of British case law by in our legislation. That would make no sense. It would be more appropriate to show

54. These times may seem somewhat suspended today with British leaving the European Union (Brexit). In other words, it is paradoxical to examine the reception of 'fair dealing' in our system when the British aspire to emancipating themselves from European Union law... The referendum of 24 June 2016 leading to the decision by a majority of British citizens to withdraw from the European Union in no way invalidates our research hypothesis. Indeed, in the context of this article, it is not a matter of questioning the possible exportation of a mechanism of Continental authors' rights in the British system (as was the case, for example, with the resale right). Quite the contrary, it is a matter of seeing to what extent 'fair dealing' is and could be received in our law. Supposing that our British neighbours decided to make copyright more flexible in instituting a 'fair use' mechanism intended to promote technological innovation (and defend the famous 'silicon roundabout'), that would in no way reduce the interest of studying the 'fair dealing' mechanism. On the consequences of Brexit, see L. Bentley, "Brexit and the future of copyright law in the United Kingdom: first thoughts," AMI, Authors, Media - & Informatierrecht 2016/4 p/ 93 and A. Strowell "Droits intellectuelles en mode post-Brexit: quo vadis Britannia?" in *Propr. Intell.* 2017 no. 64 p. 19.

55. *I.e.* not diverted from its social function as meant by Josserand.

how certain mechanisms in our laws ('short quotations,' 'rules of the genre', the 'three-step-test', etc.), despite differences in their historical background, comprise 'fair dealing' rationales that should be revealed or amplified to grant the flexibility necessary to our exceptions, without creating new ones.[56]

Before analysing the possibility of including 'fair dealing' in French law (II), it is necessary to have a good understanding of the test in British Copyright Law (I).

I. UNDERSTANDING 'FAIR DEALING' IN BRITISH COPYRIGHT LAW

Revealing mutations in the mechanism (A), the content of the criteria (B) and the philosophy of the system (C) helps understand what the 'fair dealing' test in British Copyright Law represents. This is an indispensable precondition for demonstrating how this institution could be (better) received in our legislation.

A. Mutations of the mechanism

11. History of a metamorphosis. The history of the 'fair dealing' concept is that of a metamorphosis involving cross-fertilisation with the concept of 'fair use' and, to a lesser extent, the Three-Step Test rule. From the first decision on 'Abridgment' in 1740 to the revision of the Berne Convention in 1967 having led to adoption of the Three-Step Test rule, the genealogy

56. On this discussion, see below, no. 64.

shows the extent to which the judge built an original mechanism by the stroke of a pen aiming to support certain cultural and technological developments.

12. At the beginning there was 'Fair Abridgment'. 'Fair dealing' probably first appeared in the 19th century, based on the concept of 'abridgment',[57] which allowed a second author to condense and publish another's work without this being qualified as counterfeiting. One of the first decisions on this matter was the Gyles v. Wilcox decision rendered in 1740[58] regarding the summary of a historical work. Lord Hardwicke then emphasised that 'fair abridgment' was not governed by the *Statute of Anne*. This decision was later confirmed many times.[59] The practice of abridging books was extremely widespread as attested by Daniel Defoe's hostile reaction: "An author prints a book ... if it be a large volume, it shall be immediately abridged by some mercenary bookseller, employing a hackney-writer, who shall give such contrary turn to the sense, such a false idea of the design ... the sale of a volume of twenty shillings is spoiled, by persuading people that the substance of the book is contained in the summary..."[60] Many summaries were registered with the *Stationer's Company Register.* This practice, so vehemently contested by the author of *Robinson Crusoe,* implied however the combination of several conditions. Thus, the summary was to be useful to the public, as was the case, for example, with the publication of summaries of

57. On this history, see I. Alexander, H. Tomas Gomez-Arostegui "Research handbook on the History of Copyright Law" EE Elgar 2016; A. Sims "Appellations of Piracy: Fair Dealing's prehistory," I.P.Q. 2011, 1, 3-27.

58. (1740) 2 Atk 141, 26 ER 489.

59. See In particular Tonson c. Walker, 3 Swans. 678 (1752); Dodsley c. Kinnersley, préc.; Millar c. Taylor, 4 Burr. 2310 (1769); Bell c. Walker, 1 Bro. C.C. 451 (1785).

60. Defoe, *Regulation of the Press,* 1704, p.20.

books printed abroad. The author of the summary had to prove there was an investment; it was not enough, for instance, to do no more than add footnotes to a 'borrowed' book.

13. Expansion of these practices: increasingly blurred criteria, confusion with 'fair use'. 'Fair use' in the area of books would later expand; English judges would consider that quotations, illustrations, criticisms and the publication of excerpts in periodicals could not be infringing in certain conditions. In the Bramwell v. Halcomb decision, made in 1836,[61] several criteria in particular are taken into account: the nature of the work, the extent of borrowing (it was not possible for a quotation to exceed 10% of the source work) and the defendant's loyalty (here, usage was called to the rescue). In the end, however, the judges retained two main elements: the work's substitutability (knowing whether the user was exempted or not from reading the original work) and the extent of borrowing;[62] two well-known factors in American 'fair use'.

14. The end of 'abridgment'. At the end of the 19th century, this favour for 'abridgment' would, however, disappear. Many judges highlight the harm suffered by authors rather than the advantage for the public.[63] The only reservation concerned hypotheses in which the borrowed work was transformed into something completely new as, for example, the dramatization of a novel. Innovative technologies leading to granting works a new status

61. (1836) 3 My & Cr 737, 40 ER 1110.

62. See the examples mentioned by A Sims, above-mentioned article.

63. See for example: Bohn v. Bogue (1847) 10 Jur 420, 421; Scott v. Stanfford (1866-67) LR 3 Eq 718, 723; Bradbury v. Hotten (1872) LR 8 Exch 1.

were treated similarly. Thus, people selling perforated cardboard intended for organ grinders were deemed not to be making counterfeit scores for the same music.[64] The judges and various parliamentary institutions in England decided, as has been clearly demonstrated,[65] to stop following the usage and customs of booksellers. Abridgement, after having been encouraged, became an undesirable practice. 'Fair dealing' is often presented as the concept having replaced 'fair abridgment', in particular after the Chatterton c. Cave decision.[66] Close analysis of this decision and the following ones shows that, in reality, rather than 'Fair dealing', the judge established 'fair use'.[67]

15. Legislative reactions in the face of 'fair use'. How did the 'legislator' react to this evolution of case law? In the 19th century, several draft laws strived to systematise the conditions for borrowing from works... in vain. Thus, at the end of the 1830s, Thomas Noon Talfourd, an English judge and political figure, launched a campaign to have it specified in the Copyright Law that counterfeiting included printing a book, in whole or in part; suggesting, too, the adoption of several exceptions, based on the good faith of the use of the works for purposes of criticism, debate, translation, etc. The draft was rejected.[68] In 1875, the lack of clarity of case law on the status of summaries led other political figures to request legislative intervention in this. The *Royal Copyright Commission* showed itself to be very reluctant in

64. Boosey v. Whight (1900) 1 Ch 122.

65. A. Sims, above-mentioned article, especially p. 11*ff.*

66. Chatterton v. Cave. (1878) 3 App. Cases 483. In this decision, the holder of the performing rights for a theatrical play over the entire British territory had filed a complaint for counterfeiting against an author who had used without permission two scenes which were performed in another play with the same title as the first.

67. See below, no. 16.

68. S. Ceville "Literary Copyright Reform in Early Victorian England" (CUP 1999) 238-247.

judging that "what is a fair use of the works of other authors was one that could only be decided by the courts."[69] Change would come with the Law of 1911; the legislator introducing 'fair dealing' in the Copyright Law for the first time. Authors finally had their right to control all or a substantial part of their works recognised.[70] It is interesting to observe that American law would adopt the same position in 1909 clearly emphasising that authors have the right to use other versions of their work, thereby reserving their right to control summaries (secondary market of the source work). But, unlike the Americans, the British would introduce the 'fair dealing' test. According to Article 1 of the Copyright Act: "Copyright in a work shall be deemed to be infringed by any person, without the consent of the owner of the Copyright (...) Provided that the following acts shall not constitute an infringement of copyright:— (i) Any fair dealing with any work for the purposes of private study, research, criticism, review, or newspaper summary."

16. 'Fair Dealing'? did you say fair dealing? The reasons why, in the law of 1911, the legislator referred to the notion of 'fair dealing' remain very mysterious. Preparatory work for the Law of 1911 clearly shows that this legislation was intended to reinforce existing law. Thus, the Board of Trade emphasised that "the provisions in the 1911 Bill substantially reproduced the existing law."[71] There is, however, no trace of 'fair dealing' in the law before 1911. There is actually something of 'fair use' in the decisions presented as successors to 'fair abridgment' and precursors of 'fair dealing'. Such is the case

69. "Royal Commission on Laws and Regulations relating to Home, Colonial and Foreign Copyrights" C (2nd ser) 2036 (1878) xv, xvi.

70. "For the purposes of this Act, 'copyright' means the sole right to produce or reproduce the work or any substantial part thereof." *Copyright Act* 1911, s 1(2).

71. BT 209/474.

in particular for the above-mentioned Chatterton c. Cave decision: "I think the effect of them is so very small on the total result of the play, and they form such an utterly unimportant part of the scenic representation as a whole, that the defendant's drama cannot be said to be taken in any material or substantial part from the plaintiffs'. The rest of the Court are also of opinion that the points taken are not sufficiently substantial to make it necessarily result, as a matter of law, that there was an infringement of copyright, and therefore the rule will be discharged." The solution includes no reference to 'fair dealing' endorsed a few years later.

So, why evoke the notion of 'fair dealing' in the Copyright Act of 1911? Let us attempt to provide some explanation. The first leads to considering that 'fair dealing' and 'fair use', despite a difference in terminology, refer to the same reality in the spirit of the judges, legislator and doctrine. Ronan Deazley writes of the Law of 1911 and 'fair dealing':[72] "The legislation allowed the use of insubstantial amounts of copyright Works, as well as attempting to codify the various incidents of fair use which have been developed by the judiciary throughout the eighteenth and nineteenth centuries. The most significant of these were set out in s. 2(1)(i) which provided that 'any fair dealing with any work for the purpose of private study, etc...' would not constitute an infringement of the copyright in the original work." 'Fair dealing' and 'fair use' are clearly assimilated here and this is certainly not a clerical error on the author's part. The second explanation is more political. The British adopted their law in 1911 following their membership in the Berne Convention in 1887 and integration of the last revisions made in Berlin in 1908. It is likely

72. R Deazley "Rethinking Copyright," EE Elgar, 2006, p. 145.

they wished, in their approximation with Continental Europe, to distance themselves from the notion of 'fair use', which sounded overly American. Words, even when referring here to a similar reality, have evocative power. Thus, the origin of the term 'fair dealing', for which, once again, we have found no trace in decisions made before 1911, may — and this is a third explanation — find its source in the Australian law of 1905. This law states that: "Copyright in a book shall not be infringed by a person making an abridgement or translation of the book for his private use (unless he uses it publicly or allows it to be used publicly by some other person), or by a person making fair extracts from or otherwise fairly dealing with the contents of the book for the purpose of a new work, or for the purposes of criticism, review, or refutation, or in the ordinary course of reporting scientific information."

17. 'Fair Dealing' and the Three-Step Test rule. 'Fair dealing', thus introduced in the Copyright Act of 1911, would later have a fabulous destiny with adoption of the so-called Three-Step Test rule. This test, introduced with the revision of the Berne Convention in 1967, is built entirely on the philosophy that inspires the 'fair dealing' rule. There is nothing surprising in this when it is remembered that the Three-Step Test rule is of British inspiration. As we will also see below,[73] some of the criteria used in 'fair dealing' are found directly in one of the tests required by Article 9.2 of the Berne Convention. For now, we can retrace the genealogy of what is considered a universal rule of copyright today.

At the Diplomatic Conference for the Revision of the Berne Convention in 1967, the signatory countries agreed to include in the international text

73. *Cf.* below, no. 62.

A general rule leading to grant authors a reproduction right. Until then, the text was made up only of special provisions. This was virtually unanimously accepted. Long discussions developed, however, to determine whether it was appropriate to introduce special exceptions to this reproduction right or a general clause providing the judge with more flexibility. A consensus emerged to adopt the following formula: "(1) Authors of literary and artistic works protected by this Convention shall have the exclusive right of authorizing the reproduction of these works, in any manner or form. (2) It shall be a matter for legislation in the countries of the Union to permit the reproduction of such works: a) for private use; b) for judicial or administrative purposes; c) in certain special cases, provided that such reproduction does not conflict with a normal exploitation of the work and does not unreasonably prejudice the legitimate interest of the author."[74] The UK vigorously challenged the limitations to private use and judicial or administrative purposes.[75] The following formula was proposed: "(1) Authors of literary and artistic works protected by this Convention shall have the exclusive right of authorizing the reproduction of these works, in any manner or form. (2) Is reserved for the legislation of the countries of the Union the capacity to allow the reproduction of these works, or any substantial part thereof, in certain special cases where such reproduction does not unreasonably prejudice the legitimate interests of their author and does not conflict with normal exploitation of the work."[76] This proposal was adopted with two important reservations. "The Working Group decided to adopt the amendment proposed by the United Kingdom with slight modifications to the English version (document S/109). It has been

74. Records of the Intellectual Property Conference of Stockholm, 1967, vol I p. 113.
75. Records of the Intellectual Property Conference of Stockholm, 1967, vol I p. 640.
76. Records of the Intellectual Property Conference of Stockholm, 1967, vol II p. 1151.

very difficult to find an appropriate French translation of the expression "does not unreasonably prejudice".[77] In the Commission, it was finally decided to use the expression: causes no 'unjustified prejudice". This first reservation is quite fundamental since it clearly shows that the philosophy inspiring the UK proposal was entirely built on the 'reasonable', and we will see[78] that it very much underlies that of 'fair dealing'. Moreover, contrary to what many authors assert, no compromise was found for any summary on exceptions between States favourable to lists of closed exceptions and those preferring general open clauses."[79] The bias of the general clause was clearly adopted. The second reservation is often ignored by doctrine, which strives to rewrite the history of the Three-Step Test. "The Committee also adopted a proposal by the Drafting Committee tending to place the second condition before the first to make the order more logical for the interpretation of the rule."[80] We will return to this discussion below.[81]

18. In summary. At the end of this brief history of the 'fair dealing' concept, what is important? The notion has undergone many metamorphoses. Built on 'fair abridgment', confused with 'fair use', 'fair dealing' subsequently

77. *Op. cit.* p. 1152.

78. *Cf.* below, no. 31.

79. B. Galopin, above-mentioned thesis p. 49.

80. The Article is now drafted as follows: "Authors of literary and artistic works protected by this Convention shall enjoy the exclusive right of making and of authorizing the translation of their works throughout the term of protection of their rights in the original works. Article 9 (1) Authors of literary and artistic works protected by this Convention shall have the exclusive right of authorizing the reproduction of these works, in any manner or form. (2) It shall be a matter for legislation in the countries of the Union to permit the reproduction of such works in certain special cases, provided that such reproduction does not conflict with a normal exploitation of the work and does not unreasonably prejudice the legitimate interests of the author."

81. *Cf.* below, no. 60.

inspired the Three-Step Test rule. Every time, the judge strove to highlight a general clause to support new cultural and technological practices. The legislator simply set the rules formulated by the judge not without sometimes adding some confusion (the 'fair dealing' concept remains mysterious). Today, it is not a matter of saying that 'fair dealing' and the Three-Step Test are equivalent, even if the British legislator thought so when transposing Directive 2001/29.[82] Certain exceptions subject to 'fair dealing' must certainly still undergo the Three-Step Test. It would be a serious error, however, to ignore the normative coincidence of these two texts and their common philosophical inspiration. This approximation has many effects.[83]

B) Content of the criteria

19. General rules. Before presenting each of the criteria in 'fair dealing', it is important to present the general rules governing them. First, we can recall that 'fair dealing' applies only for certain exceptions, that some relate, overly speedily perhaps in our opinion, to basic rights and freedoms:[84] private research and studies, criticism and press reviews, current affairs, education, parody and caricature. So, there are only a few uses for the works. In other words, you must be in the presence of one of the goals listed in the CDPA ('dealing') and this goal, this operation, must be 'fair'. It is not possible for the British judge to expand 'fair dealing' rules to other exceptions and this is an essential difference with the Canadian system mentioned above.[85]

82. So the three-step test rule has not been transposed into the Copyright Act.
83. *Cf.* below.
84. On this discussion, see below.
85. *Cf.* above, no. 8.

'Fair dealing' is often also presented for the judge as a 'question of degree and impression'.[86] Such judicial impressionism, which may well disconcert lawyers specialised in Continental authors' rights (which should not occur), is subject nonetheless to very specific rules. The criteria applied are in no way cumulative. According to each type, the judge is led to evaluate some, ignore others and even, as emphasised in the Hubbard v. Vosper decision,[87] add new ones. There is nothing mechanical in the application of criteria through the rule of precedence. As we will see, the casuistry is rather subtle. Finally, we can specify that, in evaluating the criteria, the judge sometimes resorts, on the one hand, to usage[88] and, on the other hand, to standards to determine whether the use is acceptable or not. "The courts have sometimes adopted the perspective of whether a fair-minded and honest person would regard the dealing as fair," as highlighted in the Hyde Park Residence decision.[89] As we will see, this approach is identical in all points to French authors' rights, even if it is not clearly expressed.

20. Content of the eight criteria. There are eight criteria used in 'fair dealing'. It is important to know the extent (quantitative, qualitative) of borrowing from the source work, the use made of the creation, the consequences of the use, whether or not there was prior publication of the work, the conditions in which the work was obtained, the user's motivations

86. This formula is attributed to Lord Denning in the Hubbard decision, see below, note no. 95.

87. Court of Appeal, Civil Division, 17, 18, 19 Nov. 1971.

88. See in this sense the Silitoe decision where the judge considers that, beyond a certain number of words copied (800 in this case), the user must obtain a licence. On this decision, see below, note no.

89. On this decision, see below, note no. 110.

and, finally, whether it was possible for the person suspected of counterfeiting to avoid using the work to achieve their ends.

21. Extent of borrowing. The first criterion envisaged by the judge entails measuring the extent of borrowing from the source work (and the number of repetitions[90]) to determine whether it is not of such nature as to threaten general exploitation of the creation and discourage creativity. Analysis of case law on this point reveals two trends. On principle, the defence of 'fair dealing' applies here only in the presence of borrowing part of a work and not the work in its entirety.[91] It is important, however, to note that, on several occasions, the judge has admitted that the user could borrow the entire work[92] when other factors are combined or the nature of the work so justifies.[93] Furthermore, the British judge very often accepts borrowing of very broad excerpts to facilitate analysis and criticism of works. For example, in the Hubbard decision,[94] the magistrates considered that extensive borrowing of excerpts of books and letters from the Church of Scientology was justified by the religious movement's critical finality. Similarly, a television channel borrowing 10% of Stanley Kubrick's film *Clockwork Orange* and 40% of the documentary dedicated to it was considered to be 'fair use' in the context of the exception for criticism and review.[95] Finally, in a Johnstone decision, substantial publication in a journal by a reader of a table intended by betters

90. Since the borrowed element may be short but repeated many times.

91. See here the many examples from case law in Laddie, Prescott and Vitoria's reference work "The modern law of copyright and designs," Third edition, 2011, Butterworths, p. 749*ff.*

92. See for example Silitoe v. McGraw Hill (1983) FSR 545; Associated Newspapers Groups v. News Group Newspapers (1986) RPC 515, 520.

93. For example, quotation of an epitaph.

94. Hubbard v. Vosper (1972) 2 *QB* 84.

95. Time Warner Entertainment Co v. Channel Four Television Corp Plc. (1994) EMLR 1.

(scientific betting system) was deemed fair, since it was inspired by a genuine critic will on the part of this reader with no intention of parasitism by the journal.[96]

22. Nature of use: re-contextualisation. The second criterion which should be checked by the judge is the nature of the use of the work. It may be used with no commentary or analysis for research purposes, for example. It is likelier, however, that the use is deemed to be fair when the work is re-contextualised as, for example, in the presence of a quotation or parody. Certain British authors do not hesitate to refer to this criterion as 'transformative' use.[97] Great caution must be taken with this term since it suggests that the factor of the transformative work, specific to American Copyright,[98] is also present in British case law. This strikes us as fundamentally flawed. To our knowledge, the British judge has never referred to a factor that could be likened to that of transformative use. At most, we can observe that a work used in another context is likelier to be given fair use.

23. Nature of use: commercial use. Conversely, the criterion of commerciality is totally accepted by the judges to determine the loyal nature of the use. This factor was largely imposed by EU law (Directive of 22 May 2001) which, in a way, misrepresents 'fair dealing'. For the exception for research and private studies, Article 29 now states: "Fair dealing with a work for the purposes of research for a non-commercial purpose does not infringe

96. Johnstone v. Bernard Jones Publications Ltd (1936-45) MCC 229.

97. L. Bently, B. Sherman "Intellectual Property Law," 4th edition, Oxford University Press, 2014 p. 225.

98. J.-M Bruguière, "Le droit du *copyright* anglo-américain," Dalloz. Connaissances du droit, 2017 p. 204.

any copyright in the work provided that it is accompanied by a sufficient acknowledgement." As Paul Torremans remarked: "Obviously, even in the 'fair dealing' system, cases in which the judge considered that use for commercial purposes was covered by the exception were rare, but there remained a margin of assessment. Today, the legislator has in a way defined the 'fair dealing' concept as non-commercial. The margin of assessment by the judge and the system's reputed flexibility suffered in the course of this operation, although the legislator is not able to provide a definition of the concept of non-commercial use."[99] The only circumstances in which commercial use of a work may be loyal concern the case where public interest prevails.[100] The importance of this factor should not be exaggerated. Indeed, it seems to result implicitly from the (following) criterion of the consequences of the use or, in the terminology of the Three-Step Test, conflict with normal exploitation of the work. It is hard, indeed, to admit conflict with normal exploitation of the work (or nefarious incidences of loyal use), other than commercial use.[101]

24. Consequences of use. As we gave just seen, the judge must also look into the consequences of use of the work in the initial market. On the pretext of analysis or criticism, the user may present the source work in its entirety, thereby sparing the public the need to acquire it.[102] This criterion, as we shall see,[103] shows closed ties with one of the factors of 'fair use' and one of the steps in the Three-Step Test.

99. P. Torremans "Lettre d'Angleterre," *Propri Intell* 2004 no. 11 p. 692.

100. Read what Chadwick LJ emphasises in the Newspaper Licensing Agency v. Marks & Spencer Plc decision (1999) EMLR 369, 380.

101. On this discussion, see below, no. 66.

102. See Hubbard v. Vosper (1972) 2 QB 84.

103. On this discussion, see below, no. 66.

25. Publication of the work. This is absolutely not the case for publication of the work. Indeed, the British judge may even go so far as to determine whether the work used and for which loyal use is in question has been published or not. In the context of the exception for criticism and analysis of the work the CDPA (30 (1) (1A) openly mentions this requirement. In other cases, the use of an unpublished work continues to play against the defendant[104] although it is certainly necessary to distinguish according to the nature of the work.[105]

26. Conditions of access to the work. 'Fair dealing' comprises another 'ethical' criterion: knowing in what conditions the person invoking the defence had access to the work. 'Fair Dealing' will never be applied to fraudulent access to the creation (*e.g.*, by using a stolen access code), manuscript theft, etc.[106] This criterion seems quite peculiar in the system of defence of fair use. Indeed, it concerns above all access to works, not their use. Moreover, there are very certainly other way of punishing unlawful access to creations, such as breach of confidence.

27. Motivation of the user of the work. The British judges also rely on a criterion that could be qualified as intentional and entails exploring the motivations of the user of the work. Is the latter acting for altruistic or interested reasons? Is the motivation the pursuit of a finality of analysis and

104. There are many decisions here: see for example Queensland v. TCN Channel NIne Pty Ltd (1993) 25 IPR 58 (dissemination of copies of recordings of sessions of hypnosis that had never been distributed).

105. The publication of unpublished private correspondence and of an official report of general interest is certainly not of the same nature.

106. Once again, there are many examples: see The Controller of Her Majesty's Stationery Office, Ordnance Survey v. Green Amps Ltd (2007) EWCH 2755 (Ch), 54.

criticism of the work or rather the intention to parasitize it under the baseless guise of seeking information? The Pro Sieben case[107] offers a perfect example: a television channel broadcast a television programme from a competing channel featuring the interview of a couple having agreed to carry a pregnancy with eight embryos to term. The couple participating in this interview had been paid by the producer of the programme and the channel having rebroadcast excerpts of the programme without permission clearly intended to denounce a form of complacent journalism. 'Fair dealing' was admitted in the context of the exception for criticism. In other decisions where the purpose of information and criticism had been instrumentalized, 'fair dealing' had quite logically been rejected.[108]

28. Appropriate use. British judges also resort to the criterion of appropriate use of the work. They may indeed have to determine whether the user had the possibility of a way that was less damageable to the copyright holder. In the Hyde Park Residence decision,[109] for example, the judges considered that it was not necessary to broadcast copyrighted images (snapshots of Princess Diana and Dodi Fayed) to illustrate information that had been communicated (the illegitimate couple's time of departure from Windsor Castle). In other words, the information could have been provided through other means, in particular in writing. This principle of relevance, necessity

107. Pro Sieben Media AG v. Carlton UK Television Ltd (1999) FSR 610. Solution to be compared to that adopted in the Fraser-Woodward decision presented above, no. 2.

108. See for example the Associated Newspaper Group Plc v. News Group Newspapers Ltd decision (1986) RPC 515. (Publication of the correspondence of the Duke of Windsor previously published elsewhere. The judge noted the will to parasitise the journal rather than defending freedom of information).

109. Hyde Park Residence v. Yelland (2000) RMLR 363.

and appropriate use is perfectly essential in the analysis of 'fair dealing'. There is every reason to believe the same would be true in French law.

C. Philosophy of the system

The 'fair dealing' system may be analysed first from its sources (1°), then its finality (2°).

1°) Sources

Should the roots of 'fair dealing' be sought in equity, loyalty or the reasonable? We will show that the 'reasonable' is the only rule that can account for the test which is the subject of this study.

29. 'Fair Dealing' and equity. The term 'fair dealing' is generally translated by the 'intellectualist' French doctrine as *utilisation équitable* (literally, fair use) of works.[110] For Civil Law specialists, this translation may refer, in their system, to the notion of *équité*[111] and of 'equity' in the English system. Yet 'fair dealing' is clearly not an institution drawn from 'equity'.[112]

110. See, for example, Dictionnaire de Droit de la propriété intellectuelle, Ellipses 2015 2° ed. by C. Bernault and J.-P Clavier; similarly "Dictionnaire comparé du droit d'auteur et du copyright," 2003, edited by M. Cornu, I. de Lamberterie, P. Sirinelli, C. Wallaert, CNRS ed. 2003. 'Fair trial', translated as *procès équitable* in French, very certainly influences this translation of 'fair dealing' as *utilisation equitable* (fair use).

111. Equity, which we know has a significant role in the area of literary and artistic property, like fair remuneration (*rémunération équitable*).

112. In Europe, equity is interpreted as recourse to the very principles of justice when there is disagreement with positive formal law. "In England, equity has come to refer to a system of applied law in a court of special competence, the Court of Chancery, previously separated from the common law courts" (L.A Sheridan "La notion d'*equity* en droit anglais contemporain," Les Cahiers de droit 102 (1969): 327–340.) Today, *equity* remains a separate (and marginal) source of law in the British system in particular in property law (and more specifically the

Judges generally emphasise this in their decisions, while here, this has never been the case. 'Fair dealing' is a mechanism in Common Law which refers to the idea of honest loyal use of works.[113] Thus, the origin of this construct is to be sought elsewhere, not in this institution.

30. 'Fair Dealing' and loyalty. Can it be found in the principle of loyalty? We do not believe so. It may indeed be tempting to think that 'fair dealing' has close ties with the notion of Fairness which pervades the contract. But we have to face the facts: the expressions Fairness or 'fair dealing' are very rarely used in English law. We are rather in the presence of terminology imposed by the European Union. To realise this, it is enough to read *The Unfair Terms in Consumer Contracts Regulations* adopted in 1994[114] or The *Unfair Terms in Consumer Contracts Regulations* endorsed in 1999.[115] Again, Similarly, Article 2 §1 of the *Proposal for a Regulation of the European Parliament and of the Council on a Common European Sales Law*,[116] relative to the obligation of good faith and loyalty, states that "Each party has a duty to act in accordance with good faith and fair dealing."[117] It seems highly unlikely, however, that so abstract a concept as that of good faith or loyalty could appeal to British lawyers. As was emphasised for contracts: "The homology

'trust' institution). On this notion of 'equity' that cannot be understood without the historical background, see L.A Sheridan, above-mentioned article.

113. As we have seen, with the criterion of commerciality imposed by EU law, we can wonder today if 'fair dealing' will not transform itself into a mechanism of Statute Law. How the law can distort (good) case law... An old quarrel in the UK.

114. http://www.legislation.gov.uk/uksi/1994/3159/made

115. http://www.legislation.gov.uk/uksi/1999/2083/contents/made

116. COM/2011/0635 final – 2011/0284 (COD).

117. There is a well-known reference in American law in the Restatement (Second) of Contracts, whose section 205 states: "Every contract imposes upon each party a duty of good faith and fair dealing in its performance and its enforcement."

of formulas is doomed to discordance since never will 'good faith' connote for a 'common-law lawyer' what *Treu und Glauben* evokes for a German *Rechtsanwalts*."[118] In the issue addressed here, the few authors having made an approximation between 'fair dealing' and 'good faith' quickly gave up: "Yet, if the previous remark suggests great proximity between fair dealing and good faith, the approximation is not very natural, since English law does not really recognise the notion of good faith at least when it is considered in its objective dimension, that is as a behavioural norm."[119]

31. 'Fair Dealing' and the 'Reasonable'. In fact, 'fair dealing' has its origins in the 'reasonable' very present in Anglo-American law. For a clear understanding of the situation, we should go back to the beginning. As already stated, regarding the opposition between the 'rational' (with pervades Continental systems) and the 'reasonable' (present in the Anglo-American system), "the answer may be found in the law's nature and *raison d'être*. In turn, its normative nature imposes the idea of a model and this idea acquires a double meaning. On one hand, it refers to rationality, since the model must be developed using processes of abstraction and generalisation; on the other hand, the model finds its substance in something concrete: social reality for which the norm is intended and on which it must act. The norm must correspond to what is concrete."[120] Similarly, E. Tunc emphasised that: "the reasoning that must orient the interpretation of Common Law is what leads to the

118. P. Legrand "La leçon d'Apollinaire" in "L'harmonisation du droit des contrats en Europe" Economica 2001 p. 37.

119. J. Groffre "La bonne foi en droit d'auteur," Institut Universitaire Varenne. Collection des thèses. 2015 Pref. A. Bensamoun no. 218.

120. G. Khairallah "Le raisonnable en droit privé français. Développements récents," RTD Civ 1984 p. 439 no. 26.

'reasonable', not what is based on logical reasoning."[121] The 'reasonable', which is the foundation of Common Law[122] does not refer to a vague feeling of justice. As noted: "The judge's main concern is to avoid the arbitrary and formulate consistent solutions. Confronted with a case for which he has neither a law, nor a precedent, the English judge refers to custom, doctrine, judicial decisions that are not binding, to discover the reasonable solution (...) Once the reasonable solution has been found, it belongs to Common Law, serves as a precedent and continues to prevail as long as it seems to comply with reason, even when, for a given type, another solution turns out to be more appropriate. It is true to say that the reasonable solution is the one that complies most with tradition."[123] The 'reasonable' is grounded in pragmatic solutions and experience and there is every reason to think that the 'reasonable' sustains 'fair dealing' in every way, as the judge sometimes emphasises.[124] But what is the finality?

2°) Finalities

32. Thesis. With the influence of basic rights and freedoms on intellectual property in general and copyright in particular being particularly

121. A and S Tunc "Le droit des États-Unis d'Amérique - Sources et techniques," Paris 1955 no. 75*ff.*

122. "English law, in its profound original conception, is entirely built on the notion of reason, 'reasonableness', on the requirement to be reasonable. Invoking experimental reason, reason that is the fruit of experience and observation, which compares phenomena from which it draws conclusions, is truly the 'lifeblood' of English law, its structuring and construction." H.A Schwarz-Liebermann Von Wahlendorg "Les notions de *right reason* et de *reasonable man* en droit anglais," Archives de Philosophie du Droit 1978, tome 23, p. 45.

123. G. Khairallah, above-mentioned article, no. 29.

124. Here, an American judge, since we found no English decision openly making this connection. See, for example, the Sony corp. Of Arm c/Universal City Studios Supreme Court decision 1984 464 US 417 448 where loyal use or 'fair dealing' is defined as an 'equitable rule of reason'.

strong today,[125] it will surprise no one to see that certain authors analyse 'fair dealing' in light of these rights.[126] Observing the fact that 'fair dealing' applies only to very specific exceptions: research and private studies, criticism and press reviews, current affairs, education, parody and caricature, it could be tempting to establish a link between 'fair dealing' and basic rights and freedoms. In this analysis, 'fair dealing' was developed to give users of the works greater flexibility to promote freedom of expression, communication and research.

33. Refutation of the thesis. This thesis, though appealing, is not convincing for us. Indeed, it reinterprets 'fair dealing' *a posteriori,* rather than undertaking rigorous analysis of the institution. First, 'fair dealing', like 'fair abridgment', may above all be viewed as a way for the judge to determine the split between two respective properties, as Jane Ginsburg has clearly shown for 'abridgment'.[127] Then, notwithstanding history, we can only note today that many other exceptions that could be viewed in light of basic rights and freedoms are not subject to 'fair dealing'. Such is the case, for example, with exceptions concerning persons with disabilities, libraries, archives or museums (access to culture), as well as data mining (access to research). Finally, it must be remembered that British Copyright Law has always shown reluctance with respect to basic rights and freedoms. This recalls the importance granted in

125. On authors' rights, see C. Geiger's thesis, "Droit d'auteur et droit du public à l'information. Approche de droit comparé," IRPI, no. 25, Litec 2004 pref. M. Vivant.

126. Such is the case, for example, with M. De Zwart "A historical analysis of the birth of fair dealing and fair use: lessons for the digital age," (2007) IPQ 60.

127. J. Ginsburg "Une chose publique? The author's domain and the public domain in early British, French and US copyright law," (2006) CLJ 636.

the CDPA to the Public's Right to Know,[128] which does not mean that basic rights and freedoms are overlooked in British Copyright Law. Both English and French judges very certainly analyse their exceptions in light of certain basic rights. We, however, would like to insist on the fact that basic rights and freedoms are not what drives 'fair dealing' mainly.

34. In summary: a rule for appropriate use of works based on the 'reasonable'. In conclusion to this first part, we can say that the 'fair dealing' rule is akin to a rule of proportionality, appropriate use of works grounded in the 'reasonable' and expressed through different criteria not unlike those established in 'fair use' or the Three-Step Test rule. This observation should be no surprise for those willing to remember the history of the construction of this concept. It remains to be seen how our system of exceptions accepts, or is likely to accept this notion.

II. ACCEPTANCE OF 'FAIR DEALING' IN FRENCH LAW

35. And what about the European Union? The reception we are considering in the context of this article is exclusively that which is likely to develop in French law. More exhaustive study could have promoted 'fair dealing' with other countries' systems. The Dutch Copyright Act, for example, emphasises for parody that it should be "in accordance with what the rules of social intercourse reasonably permit." Quotation must be

128. For the place of this right in the system of exceptions, see J.-M Bruguière, "Le droit du *copyright* anglo-américain," Dalloz. Connaissances du droit, 2017 p.193. According to the British judge (see in particular the Hyde Park Residence decision) statutory provisions are sufficient to ensure a place for the public's right to information.

proportional "with what might reasonably be accepted in accordance with social custom and the number and size of the quoted passages are justified by the purpose to be achieved." Finnish copyright law refers to the notion of 'proper usage' regarding quotation. On the judges' side, there are also many European references to 'fair dealing'. The most remarkable example can be found in Spanish law. The Court of Appeal of Zaragoza on 2 Dec. 1998,[129] at a time, it should be pointed out, when Spanish law had no reference to these criteria, decided:[130] "to determine whether the use of a work in a given case is loyal, and, consequently, represents a lawful exception to reproduction rights, it is necessary to take into consideration the four following factors: 1º The destination and nature of the use, namely the commercial nature of the use or its non-profit purpose; 2º The nature of the copyrighted work; 3º The volume and importance of the part used in relation to the complete copyrighted work; and 4º The influence of this use on the potential market of the copyrighted work or its value." All these examples attest to the acceptance of 'fair dealing' in European Union law.

36. Acceptance and action of 'fair dealing'. This being specified, we will show how 'fair dealing' is accepted in our system of exceptions (A) where it is already enshrined, almost unconsciously, and what action (B) it may have (or could be expected to have[131]) on our rules.

A. Acceptance of 'Fair Dealing' in our system of exceptions

129. Núm. 708/1998, rec. 136/1998.

130. The judge should here check whether reproductions for educational purpose in universities were 'loyal' or not.

131. Our analysis is one of positive law and prospective law. It is intended to show what exists and envisage what could be.

37. Philosophy of law, legal technique. Acceptance of 'fair dealing' in our system of exceptions is philosophically possible thanks to the influence of the 'reasonable' in French authors' rights (1°). Technically, it is expressed by the presence of fragments of the concept in Article L. 122-5 of the CPI (2°).[132]

1°) Influence of the 'reasonable' in French authors' rights

38. Disfavour of the 'reasonable' in French private law? Could the 'reasonable', one of the cornerstones of Common Law,[133] have a residual place in French general private law? Quick analysis of the provisions established in the *Code Civil* to such a notion as, for example, natural equity, could lead us to believe it. Except Articles 565[134] and 1135[135] (old), we find little room for this notion we feel can be reconciled with the 'reasonable'.[136]

39. Refutation of the thesis. Such a concept should, however, be outdated. First, as has been clearly shown,[137] the authors of the *Code Civil* did not feel the need to resort to a general 'rule of reason' since, in their opinion, the rules adopted were themselves the expression of such 'rules of reason'. Then,

132. The distinction between philosophy of law and legal technique can be compared with the distinction between policy and legislative technique made by Cornu. G. Cornu, *Droit civil. Introduction. Les personnes. Les biens,* Montchrestien, 13e ed., 2007, p. 100.

133. *Cf.* above, no. 31.

134. "Where the right of accession applies to two movable things belonging to two different masters, it depends entirely on the principles of natural equity. The following rules will serve as examples to the judge to make up his mind, in unforeseen situations, according to the circumstances of the case."

135. "Agreements are binding not only as to what is therein expressed, but also as to all the consequences which equity, usage or statute give to the obligation according to its nature."

136. In our view, a fair solution can only be reasonable; fair remuneration in copyright and neighbouring rights can only be reasonable.

137. G. Khairallah "Le raisonnable en droit privé français. Développements récents," abovementioned article no. 29*ff.*

the French legislator has never given up having recourse to the 'reasonable', as illustrated by two examples.[138] Article 1112 in the previous *Code Civil* stated: "That is violence which is of a nature to make an impression on a reasonable person." Today, after the reform of the Law of Obligations, Article 1188 states: "A contract is to be interpreted according to the common intention of the parties rather than stopping at the literal meaning of its terms. Where this intention cannot be discerned, a contract is to be interpreted in the sense which a reasonable person placed in the same situation would give to it." As we will see below, recourse to standards (here, the 'reasonable person') is a way the legislator provides to the judge to adapt law to facts.

40. Forms of the 'reasonable': measurement and normality. In French law, as masterfully demonstrated by an author,[139] the 'reasonable' has two forms: first measurement, then normality. "This expression contains two ideas, which are unquestionably complementary, but also quite distinct: measurement essentially expresses moderation, adaptation and proportionality – all notions rejecting excess; normality, for its part, is correspondence with a pre-established or improvised model, to which is compared the subject or object considered."[140] By virtue of the first criterion, the judge has the recognised possibility of modulating the rule of law and, to that end, taking into account several factual elements. Thus, for short quotation, we

138. Many other examples could be developed like that of abnormal neighbourhood disturbance. Abnormal neighbourhood disturbance is an unreasonable disruption.

139. G. Khairallah "Le raisonnable en droit privé français. Développements récents," RTD Civ 1984 p. 439 and speci. p. 445. For the place of the reasonable in French authors' rights (although the author does not develop the example of exceptions), see P. Sirinelli, "Brèves observations sur le 'raisonnable' en droit d'auteur," in Mélanges A. Françon, Paris, Dalloz, 1995, p. 397 seq.

140. G. Khairallah, above-mentioned article p. 445.

will see[141] that the judge takes into account the nature of the work or the extent of borrowing. By virtue of the second criterion, magistrates assess the normality of the use. In this assessment, reference is made more specifically to standards[142] as well as usage. "It is explained that the elements used to decide whether behaviour is reasonable may include usage or common practice."[143] CSA (French Media Regulatory Authority) for short videos of sporting events and the judge for short quotations from works, have done nothing different as we will see below.[144]

2°) The presence of fragments of 'fair dealing' in the system of exceptions

41. Fragments of 'fair dealing' in Article L. 122-5 of the CPI. Present in the philosophy of the 'reasonable' underlying certain standards of the Law of 11 March 1957, 'fair dealing' remains so 'technically' in certain conditions of implementation of exceptions in Article L. 122-5 of the CPI. Without distinguishing what relates to exceptions proper, and the internal limits of copyright,[145] many fragments of 'fair dealing' may be identified in Article L.122-5 before being analysed.

141. *Cf.* below, no. 48*ff.*

142. "Is reasonable what does not go against tradition, is reasonable what respects the standard," H.A Schwarz-Liebermann Von Wahlendorg "Les notions de *right reason* et de *reasonable man* en droit anglais," Archives de philosophie du droit, 1978, tome 23, p. 49-50.

143. G. Khairallah, above-mentioned article, p.453, quoting a decision of the Court of Cassation of 7 June 1967 having recourse to uses to assess a problem of responsibility.

144. *Cf.* below, no. 50.

145. On this essential distinction, see M. Vivant and J.-M Bruguière "Droit d'auteur et droits voisins," Précis Dalloz 3° ed. 2016 no. 590.

42. Identification of criteria. Thus, the author cannot object to "1° private showing free of charge exclusively in a family circle." The criterion of commerciality is thus clearly targeted, although we indicated it was not the essence of 'fair dealing'.[146] "2° Copies or reproductions" must be "reserved strictly for the copyist's private use and not intended for collective use." Here, the user's motivations are clearly taken into account. "3°) a) Analysis and short quotations" must be "justified by the nature – critical, polemic, educational, scientific or informative – of the work in which they are used." Here, the legislator is clearly referring, on one hand, to the extent of borrowing[147] and, on the other hand, to the appropriateness or relevance of the quotation in a given context. These two criteria are essential in 'fair dealing'. The author can still not object to "3°) b) Dissemination, even in their entirety (...) of speeches;" this holds true for "d) Reproductions, in whole or in part of graphic artworks" or "e) the presentation or reproduction of excerpts of works ... for educational purposes," such use of this representation or reproduction not being intended for "any commercial exploitation." The criteria of extent of borrowing and commerciality are targeted, once again. "4°) Parody, pastiche and caricature" must be exercised "given the rules of the genre." This curious formula, which we will examine below[148] implicitly takes into account the nature of the use and the motivation of the user. 6° of Article L. 122-5 also includes many references to the conditions for implementing 'fair dealing'. The author does not have the power to forbid "6° Temporary reproduction that is transitory or accessory in nature, when it is an integral or essential part of a technical process for the sole purpose of enabling lawful use of the work or its transmission between third parties via

146. *Cf.* above, no. 23.

147. For this criterion, see above, no. 21.

148. See below, no. 53*ff.*

a network requiring an intermediary; however, such temporary reproduction, which concerns only works other than software and databases, cannot have any economic value *per se*." The following criteria are thus successively targeted: extent of borrowing, appropriate use and consequences of the use. According to 7° of Article L. 122-5, the exception for disabled persons is subject to "strictly personal consultation of the work." "Reproduction" and "Representation are provided, for non-profit purposes and to the extent required by the disability, by the legal entities and establishments mentioned in this paragraph." The legislator takes into account the motivation of the user, the nature of the use, asserting that the use is indeed appropriate. Museums and archives may take advantage of the exception of 8° on condition the reproduction provides them no "economic or commercial advantage". Finally, for any remaining doubts as to the presence of these criteria for 'fair dealing' in Article L. 122-5, we can further mention 9°. The author cannot object to "The reproduction or representation, in whole or in part, of a work of graphic, visual or architectural art, through the printed, audiovisual or online press, for the sole purpose of immediate notification and in direct relation with the latter, on condition of clearly indicating the author's name (...) Reproductions or representations which, in particular in their number or format, would not be in strict proportion with the sole purpose of immediate information sought or would not be in direct relation with the latter must give rise to remuneration of authors on the basis of agreements or current tariffs in the professional sectors concerned." The judge is always guided by the extent of borrowing and appropriate use.

43. Analysis: twofold mode of integration of 'fair dealing'. Attentive reading of Article L. 122-5 of the CPI clearly shows that this provision perfectly

assimilates certain fragments of 'fair dealing'. Obviously such integration does not depend on our legislator's conscious will. We will not claim that the Law of 1957 or that of 2006 deliberately endorsed the provisions in sections 29 (1) and following of the CDPA in Article L. 122-5 of the CPI. The normative coincidence that we are striving to highlight, reveals an approximation of these two systems that doctrine generally strives to oppose. On analysis, approximation results from two movements: the French legislator either openly refers to criteria very close to those used by the British judge, or takes them into account within the standards. In the first case, the judge refers to user's motivation. This means ensuring that the use is clearly aligned with the finality sought and makes certain the borrowing is not too extensive and the use of the work has no harmful impact on the market. In the latter case, the legislator conceals 'fair dealing' in standards. The 'rules of the genre', as we will see, are an invitation (unfortunately forgotten) to examine the uses of parody in certain sectors. 'Short quotations', to be qualified as such, must undergo a measure and normality test developed below with the example of audiovisual excerpts.

44. Analysis: difference in approach with the CDPA; difficulties of combining with the Three-Step Test rule. Obviously, 'fair dealing' is not present in the Intellectual Property Code as it is in the CDPA. Indeed, we have seen that 'fair dealing' applied in the UK only for certain exceptions.[149] In France, 'fair dealing' is not a general rule with the vocation or not to apply in certain cases. 'Fair dealing à la française' is expressed rather through criteria interspersed inside Article L. 122-5. Once the existence of these fragments of

149. See above, no. 19.

'fair dealing' in French authors' rights is recognised, this raises the question of knowing whether these criteria should be retained, here and there, with no true concern for the organisation, or if a general ruled should be drawn out in the image of that developed by the British judge over 200 years. To answer this question,[150] the criterion of the Three-Step Test must necessarily be taken into account.

Our brief gloss of Article L. 122-5 of the CPI in light of 'fair dealing' was (intentionally) incomplete. Indeed, Article L. 122-5 of the CPI features a penultimate paragraph stating: "The exceptions listed in this Article cannot conflict with normal exploitation of the work or cause unjustified prejudice to the author's legitimate interests." There again, 'fair dealing' is clearly present in this provision. We have seen that the Three-Step Test is of British origin[151] and we will see that this rule has many points in common with the criteria used in 'fair dealing'.[152] At this point in our analysis, it is very important to note the difficulties of the twofold analysis suggested by Article 122-5 of the CPI. Practitioners and/or judges are indeed held to check the conditions proper to each exception; we have seen that these conditions often contribute to the 'fair dealing' rationale. Having made this analysis, practitioners and/or judges may (must?) still check that implementing the exception does not go against the Three-Step Test rule (in fact, the last two tests), which can be perfectly redundant. Temporary reproduction "with its own economic value" will necessarily conflict with normal exploitation of the work. The same holds true for museums which will draw 'economic advantage' from

150. For a closer look on this, see below, no. 63.
151. See above, no. 17.
152. See below, no. 62.

reproductions made. Parodies that do not comply with the 'rules of the genre' necessarily jeopardise 'authors' legitimate interests'.[153] Conversely, in other cases of double analysis: the conditions of the exception and of the Three-Step Test rule may seem legitimate. Not all the conditions in Article L. 122-5 of the CPI comprise fragments of 'fair dealing', so that evaluation by the Three-Step Test may become essential. Moreover, it may be considered that the analysis of 'fair dealing' in Article L. 122-5 and that of the Three-Step Test do not function on the same level. In the famous Mulholland Drive decision, private copying was certainly lawful in view of Article L. 122-5 2°. The judges considered, however, that, in the digital environment and amortisation of cinematographic production costs, legal private copying of DVDs jeopardised normal exploitation of the work. Therefore, despite respecting the conditions of an exception, the use of a work may still be deemed to be an infringement if it threatens normal exploitation of the work.[154]

The situation in the UK seems identical. The Three-Step Test has not been integrated in the CDPA (on the basis of the fact that 'fair dealing' offers an equivalent to the Three-Step Test[155]). This does not keep British judges from considering the Three-Step Test in the implementation of exceptions (this being a rule of international law). This is accomplished in rather subtly in two

153. It is true that we could object that, in case one of the conditions for these exceptions is not met, three-step test is irrelevant.

154. On this point, see the examples developed below concerning audiovisual excerpts, *cf.* below, no. 63.

155. Estelle Derclaye (E. Derclaye "La transposition de la directive droit d'auteur dans la société de l'information au Royaume Uni. Quelques aspects relatifs aux droits et aux exceptions," *Propriétés intellectuelles* 2004 no. 11 p. 602) emphasises: "But we can perhaps suggest that this notion of proper use (*bons usages*) is actually nothing other than a different way of expressing the three-step test provided for in Article 5 & 5 of the Directive." Reality is a little more complex as we will see below, *cf.* no. 62.

ways.[156] Exceptions not subject to 'fair dealing' are assessed directly in view of of the Three-Step Test rule. Those that must be assessed according to 'fair dealing' criteria will remain so, in theory, according to the Three-Step Test. In theory, since the criteria of the Three-Step Test largely coincide with those of 'fair dealing'. More specifically, the Three-Step Test rule may be considered as a rough translation of 'fair dealing'. Thus, the British test makes the Three-Step Test superfluous. Going back to the French situation, our analysis clearly shows that 'official' integration of 'fair dealing' in copyright must include the opportuneness of maintaining the general Three-Step Test rule alongside the special conditions imposed on certain exceptions. This discussion already related to the analysis of the impact of 'fair dealing' on our system of exceptions.

B. The action of 'Fair Dealing' in our system of exceptions

On analysis, the practice of 'fair dealing' in our system of exceptions reveals all the resources of the standards of the Law of 11 March 1957 (1°) and enriches the criteria of the Three-Step Test (2°): another, more contemporary standard...

1°) Promoting the resources of the standards of the Law of 11 March 1957

45. Definition and sources of the standard. The standard could simply be defined as "a general line of conduct, a general guideline for the

156. Paul Torremans alone alludes to this delicate balance in his work. P. Torremans "Intellectual property law," Oxford University Press, 8° ed. 2016 "The three-step test is not a separate requirement but it is clearly part of any determination of fairness."

judge."[157] This "word of the law" or "legal stamp to which the judge must give a normative practice"[158] did not lead "to the invariable solution provided by applying the rule, but to various concrete solutions, each adapted to the specifics of the facts in the case."[159] So, it is "the practical experience of the realities of life that inspire and guide the judge in the empirical application of the standard. Intuition and experience replace reasoning and logic."[160] Furthermore, Stéphane Rials[161] demonstrated that standards that make reference to normality could appear purely descriptive (what actually is, in a way) or normative (what should be). The norm is induced by behaviour (example of usage) or by a rule of reference (what is generally deduced from a model (like the 'good family man', the 'reasonable person'). Both these normalities will be referred to in our discussion, as we will see below.

46. Standards in intellectual property law. These elements of flexibility are found in all intellectual property. Literary and artistic property defines communication to the public through the notion of 'family circle', tolerates 'short quotations' from works, oversees 'press reviews' and contains parody within the limits of 'rules of the genre'.[162] At the same time, industrial property calls on the 'skilled worker' (*l'homme du métier*) in patent law, the

157. A.A. Al-Sanhoury "Le standard juridique" Revue internationale de droit comparé, 1970, volume 22 p. 145.

158. D. Mazeaud, "Sur les standards," in "Droit sans frontières. Les standards," Revue de droit d'Assas, Université Paris 2, 2014, no. 9 p. 35.

159. A.A. Al-Sanhoury, above-mentioned article, p.146.

160. A.A. Al-Sanhoury, above-mentioned article, p.146.

161. S. Rials, "Le juge administratif et la technique du standard. Essai sur le traitement juridictionnel de l'idée de normalité," Bibliothèque de droit public, t. CXXXV, Paris LGDJ, 1980.

162. C. Castets, "Notions à contenu variable et droit d'auteur," L'Harmattan, 2003. We consider here that standard and the notion of variable content are equivalent. The reality is certainly more complex.

'informed user' in Design and Model Law and the 'average consumer' in Trademark Law. Such notions are intended to satisfy the need for adaptability of the rule of law.

47. Standards in literary and artistic property: justifications in the Law of 11 March 1957. In copyright, our only focus here,[163] the presence of standards in the Law of 11 March 1957 is largely explained by a historical element. "The French legislator's choice to have recourse nonetheless to framework notions can be explained for historical reasons. The Law of 1957 was born from a debate on the very usefulness of legislation, with the option of letting case law prosper as it had on the basis of very succinct revolutionary decrees which had their supporters at the time. The choice of resorting to notions with open, flexible, variable content by offering a reassuring solution concerning the evolutivity of the norm led us to a consensus, in particular in the area of exceptions."[164] The preparatory work for the Law of 11 March 1957[165] shows how a lively debate arose around the matter of knowing whether to maintain the flexibility provided by case law since the 19th century or privilege the legal security of the law. The text of 11 March 1957 having been adopted, it is likely that the standards it included were endorsed to guarantee sustainable adaptability of the rule of law. Thus as we saw above,[166] the Law of 11 March 1957 refers to the 'press review', 'rules of the genre', 'short

163. On intellectual property in general, see "Les standards de la propriété intellectuelle," Dalloz, coll. "La propriété intellectuelle, autrement," dir. J.-M Bruguière, in press 2018.

164. B. Galopin, "Les exceptions à usage public en droit d'auteur," IRPI, LexisNexis 2012, no. 41, pref. P. Sirinelli, no. 234.

165. See the file of preparatory work for the Law of 11 March 1957 (law no. 57-298), IRPI.

166. See §42 and 43.

quotations', 'family circle'. All these standards can be expected to evolve.[167] This we will verify with the notion of 'short quotation', on one hand, and 'rules of the genre', on the other hand.

For the former, it is a matter of becoming aware of a perfect 'fair dealing' approach to our magistrates' work. For the latter, the 'rules of the genre' having been totally denatured, it is useful to go back to the beginning.

Short quotations

48. Short quotations: case law prior to the Law of 11 March 1957. Short quotations in Article L. 122-5 3°) a) very certainly represent one of the finest illustrations of the presence of 'fair dealing' in the Law of 11 March 1957. It is a matter for the judge to assess the extent of borrowing as well as having recourse to usage to measure normality. After recalling that this analysis was conducted in all times and places by the judge and the legislator, we will show very concretely how the 'reasonable' is expressed with quotations in the audiovisual field. Concerning the case law prior to the Law of 11 March 1957, the oldest decisions rely on usage both to justify quotation and to restrict it in just measure. On 1 December 1885,[168] the Court of Appeal of Paris ruled that, "if usage and the interest of literature itself authorise writers to borrow from each other; it is on this condition that such borrowing not exceed the length of simple quotations intended to serve as confirmation or

167. This is not the case, for example, for the notion of 'press review' whose definition was set, once and for all, by the Court of Cassation (Crim. 30 Jan. 1978, *D.* 1979. 583, note Le Calvez; *RTD com.* 1979. 456, obs. Françon). On the limits of this definition, see M. Vivant and J.-M Bruguière, *op. cit.* §646.

168. CA Paris, 1 December 1855 Ann. 1857, p. 243.

adornment for the personal work of the writer who makes them." Similarly, the Tribunal Civil de la Seine ruled that "the quotation right exists, confirmed by the most certain and most respectable practices." This justification of quotation by usage can also be found in other European countries.[169] It may lead to admitting quotation of a work in its entirety. Following a reform made in 2007, Article 51, paragraph 2, of the German law allows use (reproduction, distribution, communication to the public) of an entire work for scientific purposes.

49. Short quotations: case law after the Law of 11 March 1957, the example of excerpts in the audiovisual field. For concrete illustration of how the 'reasonable' is taken into account, we will rely on examples from case law relating to excerpts from audiovisual works. Case law on the legality of borrowing audiovisual excerpts is based in genuine casuistry we can nonetheless systematise on the basis of the two criteria we identified: measure and normality.

50. Normality of borrowing: mathematical proportionality. The quotations developing in the audiovisual field today raise the question of knowing in what conditions such excerpts can be considered to be brief[170] in the meaning of Article 122-5 3° a of the CPI. Four decisions may be

169. In particular to specify the conditions for quoting the author of the source work. Thus M. Bochurberg (L.Bochurberg, "Le droit de citation," Masson, 1994, p. 90) demonstrated that, for Scandinavian countries, "When a work is used in public, the source must be specified in compliance with usage." The Tribunal of Munich (Landgericht v. T. Munich 18 October 1983 A. Dietz Lettre d'Allemagne, Dr Auteur Feb 1990 no. 128 p. 92) deems, concerning the presentation of a complete photograph in a television broadcast, that mention of the author's name, customarily necessary, was not here for 'usual' television broadcasts".

170. On this requirement for brevity, see J.-M Bruguière "Les courtes citations" in "Les standards de la propriété intellectuelle," Dalloz, 2018 dir. J.-M Bruguière.

more specifically described. In the first decision, the TGI of Paris was able to consider that there could be no short quotation in the presence of excerpts of a film representing 10% per cent of the length of the quoting work which lasted only two minutes.[171] In the second decision, the same TGI of Paris emphasised that the quotation of excerpts lasting 4 minutes and 20 seconds in a DVD with an approximate total duration of 63 minutes was not short, the excerpts reproduced amounting in the end to more than 14% of the quoted work.[172] In a third decision, the TGI of Paris ruled again that the short quotation exception was not receivable in the presence of a short quotation in the case of an excerpt of a film only 17 minutes and 36 seconds long included in a 58-minute programme.[173] The last decision bolsters this case law by accepting the short quotation in the presence of excerpts from a programme representing only 6.3% of the total length of the reportage.[174] Without being able to draw a general rule from these four decisions, we can consider that the short quotation exception cannot apply beyond the limit of 10% of the length of the quoting work. This rule is set by the judge on the basis of usage by professionals in the sector as is also true for borrowing excerpts from sporting events.[175] Such usage itself is very often deduced from contractual practices arising in the area of the sale of excerpts from sporting events (since there is a market for excerpts from sporting events).

171. TGI Paris, 3e ch. 4e sect. 24 June 2010, Sté Capucine Films *et al.* c/ Sté TF1.

172. TGI Paris, 3e ch. 1e sect., 16 Dec. 2008 INA c/ Sté Warwick Media Distrbution *et al.*

173. TGI Paris, 14 Sept. 1994 unpublished.

174. TGI Nanterre, 1e ch. A., 21 Nov. 2001, SARL M Communication c/ Sté c. Communication *et al.*

175. On these uses, see M. Vivant and J.-M Bruguière "Droit d'auteur et droits voisins" Précis Dalloz 3° ed. 2016 no. 1395*ff.*

51. Normality of borrowing: non-mathematical proportionality. The proportionality applied is not restricted to mathematical proportionality of 5%, 7% or 11%. As emphasised in an excellent decision by the TGI (Tribunal de Grande Instance) of Paris on 10 May 1996:[176] "the brevity of quotations is a relative notion to be assessed quantitatively according to both the work from which they are drawn and their destination." In fact, the judge reconciles this factor with other mathematical factors, thereby exceeding, as we have shown, the simple criterion of brevity.[177] Thus, the magistrates took into account the works' genre. It is important to know if we are in the presence of a thesis, a poem, an informative work, a work of art, etc. Similarly, the judge takes into account the finality of the quotation. Thus, substantial borrowing (20%) from a work was deemed lawful for purposes of criticism to provide information.[178] The author's personality is not indifferent. In a decision by the Court of Appeal of Paris, the magistrates ruled that a journalist could lawfully quote the complete lyrics of a song for purposes of criticism on grounds that an overly short excerpt would have given a skewed idea of the song.[179]

52. Extent of borrowing. In order to rule that the use of excerpts from works is reasonable, the judge must also take into account the criterion of extent. In this assessment, it may at times be crucial to know in relation to what quoting work the condition of brevity can be evaluated. When the quoting work is a work for television (*e.g.*, audiovisual 'zapping' programmes), should the reasoning concern the entire television programme or only the

176. TGI Paris, 10 May 1996 RIDA 1996/4 p. 315.
177. J.-M Bruguière, "Les courtes citations," above-mentioned article.
178. TGI Paris, 10 May 1996, mentioned above.
179. CA Paris, 1 June 1977 D. 1978 p. 230 note (critique) by Desbois.

specific feature or reportage included in the television programme? A decision of the TGI of Paris supports the latter solution, which we find natural. In fact, the trial judges considered that brevity should be assessed, not with respect to the total length of the television news programme, but rather the specific duration of the reportage included in television news broadcast.[180] Once again, we find such detailed case-based reasoning to reflect perfectly the 'fair dealing' rationale in our system.

Parody and 'rules of the genre'

53. Approach. According to Article L. 122-5 4° of the CPI, authors cannot object to "parody, pastiche or caricature, given the rules of the genre." In our opinion, the 'fair dealing' rationale is clearly present in the standard of 'rules of the genre' regulating parody. This is why we must go back to the origins of the concept to measure it fully, since contemporary doctrine and case law have totally obscured this dimension in their own interpretation. To demonstrate this, we will look back, first, on the origin of this mysterious formula, 'rules of the genre', then on its meaning, and finally on the scope we should grant it to make the notion truly operative as an open standard.

54. Origin of the notion of 'rules of the genre'. Where did the notion of 'rules of the genre' used in Article L. 122-5 4° originate? Attentive study of the main 19th and 20th-century doctrinal works[181] shows that their authors make no reference to this concept. Nor did case law having preceded adoption

180. TGI Paris, 3e ch. 4e sect. 24 June 2010, Sté Capucine Films *et al.* c/ Sté TF1.
181. At least, for the 20th, those preceding adoption of the Law of 11 March 1957.

of the Law of 11 March 1957 foresee it either, in particular the important Carmen decision of 1934,[182] certainly the most complete decision on parody before adoption of the reform. The draft versions prior to the Law of 1957, the draft by Jean Zay[183] in particular, make no reference to it. On analysis, the concept of rules of the genre appears in the draft law of 1954 after the work of the Intellectual Property Committee chaired by Escarra between 1944 and 1954. Unfortunately, as we all know, no archive of this Committee has survived for this period, so we will never know who coined the term 'rules of the genre', although we can be virtually certain its origin is doctrinal and not jurisprudential.[184]

55. Meaning of the notion of 'rules of the genre': the genre of works. What meaning should be given to this notion of 'rules of the genre'? The concept of the 'genre' of works is discreetly present in the Law of 11 March 1957.[185] As we know, L. 112-1 marks the indifference of protection to the 'genre' of works. There remains the notion in paragraph 4 of Article L. 113-3 regarding the matter of each co-author's rights for his/her own contribution: "When the participation of each co-author relates to different genres, each one could exploit their own personal contribution separately, unless otherwise agreed..." Finally, Article L. 132-4 lists several conditions for the validity of a

182. Trib. Com. Seine 28 June 1934, GP 1934. 2. 594.

183. J.-M Bruguière "Le droit d'auteur au temps du front populaire. Le nouveau paradigme du travailleur intellectuel," Dalloz, Reprint.

184. We also considered the hypothesis that the notion had been endorsed in case law relative to the writer's civil responsibility in the 19th century. But we have found no trace if this filiation. On the links between communication rights and authors' rights, however, see below, note no. 183.

185. The concept was also present in the Law of 1793 referring to "authors of writing of all kinds."

preference pact in a publishing contract. This pact must, in particular, concern works whose 'genre' is well determined. Thus, the notion of 'genre' of works is not subject to discussion. The Law of 11 March 1957 aimed to define a specific system for each family of works.

56. Meaning of the notion of 'rules of the genre': the meaning of 'laws'. The notion of 'laws' is far more mysterious. Obviously, the term does not designate laws in the formal sense (incidentally, what would they be?). The expression should be taken in the sense of 'laws relative to trade' targeted in the former Article 1107 of the *Code Civil*.[186] "The rules specific to certain contracts are established under titles relative to each one; and rules specific to commercial transactions are established by laws relative to trade." Thus, in our opinion, the term 'laws' designates any abstract norm integrating usage as well as certain laws external to the subject of copyright and neighbouring rights. In a decision by the Court of Cassation of 13 January 1998, the first civil chamber deemed that, according to Article 9 of the *Code Civil*, "everyone has the right to refuse the reproduction of their image, and such reproduction in the form of a caricature is lawful, according to the rules of the genre, only to protect full exercise of freedom of expression."[187] Here, the communication right and personality rights borrow the concept of 'rules of the genre' to oversee caricature. In return, Copyright should be able to rely on laws external to the subject to define the parody regime[188] (non-discrimination, consideration of honour, respect for dignity, etc.).

186. On these very relevant approximations, see A. Boisson "Les lois du genre" in "Les standards de la propriété intellectuelle," Dalloz 2018 dir. J.-M Bruguière

187. Cass. civ 1° 13 January 1998 and the commentary by G. Loiseau JCP, G, 1998, 10082.

188. For an illustration of what has been a condemnation of a hateful parody by the judge based on a 'law' external to copyright, see TGI Paris 15 June 2017 (RG no. 16/00585 and our commentary *Propr. Intell.* 2017 no. 66 p. 51.

57. Current scope of the notion of 'rules of the genre'. Unfortunately, the current interpretation of Article L. 122-5 4° selected by doctrine and case law have stripped this notion of 'rules of the genre' of any useful effect. Following Françon's famous article,[189] the 'rules of the genre' for parody are defined on the basis of two elements, material (absence of confusion) and intentional (humorous intention). This presentation of things is virtually unanimously adopted by doctrine. Christophe Caron is certainly the one who adopted this definition with the most conviction. In issues no. 392 and 393 of his work, he presents the "first rule of the genre: finality of parody," and the "second law of the genre: absence of risk of confusion."[190] This quashed all interest in referring to the 'rules of the genre' since the laws are absorbed in the definition of parody. The Court of Cassation itself clearly distinguished, however, the laws proper to each genre of works, in particular in its famous decision of 12 January 1988[191] in which, as the text clearly suggested, it strove to dissociate parody, pastiche and caricature. This doctrine, which severely criticised this effort to make distinctions, omitted to emphasise that, behind this attempt, the first Civil Chamber tried to define the rules proper to each family of works. This will strike us as perfectly legitimate. There are rules proper to parody in the area of comics and specific laws for what is developing on television in satirical programmes. In the audiovisual field, humour cannot be appreciated in the same way with the *Collaro Show* in the 1980s and with today's *Les Guignols de l'Info*. The judge follows similar reasoning when ruling on a gastronomic critic's civil responsibility who had been a little harsh in an

189. A. Françon "Questions relatives aux parodies et productions similaires," Dr auteur 1988 p. 302.

190. Ch. Caron "Droit d'auteur et droits voisins," LexisNexis 2017 5° ed.

191. Cass. civ 1° 12 January 1988 D. 1988 somm. P. 207 obs. Colombet.

article.[192] Without going back to the distinction between parody, pastiche and caricature, our judges must continue considering the laws specific to each family of works rather than reason in an abstract and general way.

58. Need to go back to our roots to give the concept operative content. Even more specifically, we must go back to our roots to be able to distinguish the definition of parody and its legal regime. Parody is above all an expression of humour without our having to determine its finality (political, commercial, artistic, etc.) at this stage. Such parody respects a legal regime specifically defined in the 'rules of the genre' which, as we have emphasised, are norms reinforced by usage, as well as rules external to the matter of literary and artistic property: the absence of economic parasitism, non-discrimination, respect for dignity, etc. This 'new' frame of reference, which is no longer relevant, unfortunately, since the Court of Justice decision of 3 September 2014,[193] would help give the judge much greater flexibility, while also granting the possibility of not systematically looking to basic rights and freedoms. Reasonable parody, *i.e.*, respectful of 'rules of the genre', is parody that does not incite to racial hatred and enables the judge to integrate usage in a given sector or consider an abstract character to evaluate a caricature. This interpretation results once again from a 'fair dealing' rationale which has unfortunately lapsed in France with the trend towards reducing the parody

192. The gastronomy critic's private wrong (Article 1240 of the *Code Civil*) is established on the basis of usage of the profession. Very concretely, the magistrate will ask if the gastronomy critique has exceeded the limits of what is done at a given time in a given society in the field of gastronomic criticism.

193. CJEU 3 September 2014 aff. C-201/13 above-mentioned note no. 31, where the CJEU takes up the French frame of reference which absorbs everything in the definition of parody. The latter indeed implies humour. Humour is not hate. In other words, hateful parody cannot be defended in the context of an exception to copyright.

regime down to nothing or running everything through the basic rights and freedoms shredder. Our law harbours wonderful standards, which we must still keep alive.

2°) Enriching the Three-Step Test criteria

59. Approach. Since the Law of 1 August 2006, our legislation has integrated another – international – standard, the Three-Step Test.[194] According to Article L. 122-5 penultimate paragraph: "The exceptions listed in this Article cannot conflict with normal exploitation of the work, or cause unjustified prejudice to the author's legitimate interests." After recalling the Principles of evaluation of this concept, the coherence of its criteria, we will show the test's profound ties with 'fair dealing' or 'fair use'. This open standard, enriched by these approximations, can also turn out to be an admirable instrument of flexibility for the judge's benefit.

60. Principles of evaluation: the judge receiving the test (and respectful of the order of the steps). Following transposition of the Three-Step Test in our law, the question arose as to who was the recipient of this rule? Member States, with the integration of a new exception? The judge in person? Perhaps the parties themselves, in the context of the contractualisation of exceptions? There is no doubt that the judge today is the recipient of this rule. Besides the fact that many judges have appropriated the norm[195] to assess the

194. For the three-step test, see M. Senftleben's major study of "Copyright, Limitations and the Three-Step Test," Information Law Series-13, Kluwer, 2004.

195. For examples in Switzerland, the Netherlands, Spain or France, see: Trib fed. Switzerland, 26 June 2007 *Propr. Intell.* 2008 no. 29 p. 488 obs Geiger.; Rechtbank's-Gravenhage, 2 March 2005, LJN AS8778: *Informatierecht/AMI* 2005, no. 9, p.103, note J. Seignette, *Audiencia*

implementation of exceptions, suffice it to recall here that Article 5.5 of the Directive 2001/29 states that: "The exceptions and limitations provided for in paragraphs 1, 2, 3 and 4 apply only" in the conditions of the Three-Step Test. So, who other than the judge should apply these exceptions?

The other question which is subject to more debate is that of determining whether the judge is held to respect the order of the conditions or if they can be freely interpreted. Many authors have proposed this open understanding of the Three-Step Test. Thus, for example, you can read in the "Declaration on a Balanced Interpretation of the 'Three-Step Test'"[196] that the test is "an indivisible entirety" and "the three conditions must be examined together using an open global approach." We do not share this opinion which we find to be contrary to common sense and the history of the Three-Step Test. For the first point, as André Lucas expressed it so well: "The word step itself imposes (...) this interpretation. Has anyone ever seen cyclists in the Tour de France climb the Alps and the Pyrenees at the same time?"[197] Concerning the history of the Three-Step Test, it must be recalled that, during the *Intellectual Property* Conference of *Stockholm*, this order was debated and endorsed. We can say, indeed: "The Committee also adopted a proposal by the Drafting Committee that the second condition should be placed before the first, as this would afford a more logical order for the interpretation of the rule. If it is considered that reproduction conflicts with the normal exploitation

Provincial de Madrid, 6 July 2007, Sección 28ª: AC\2007\1146; Cass. civ 1° 28 February 2006 JCP 2006, 10084 note A. Lucas.

196. http://www.ip.mpg.de/shared/data/pdf/declaration_three_steps.pdf. Not in the same sense, see C. Geiger "Le rôle du test des trois étapes dans l'adaptation du droit d'auteur à la société de l'information," Bulletin du droit d'auteur, January-March 2017.

197. A. Lucas "Pour une interprétation raisonnable du triple test ou pourquoi il faut éviter du flou au flou," *Auteurs et Médias* 2009/3 p. 227*ff.*

of the work, reproduction is not permitted at all. If it is considered that reproduction does not conflict with the normal exploitation of the work, the next step would be to consider whether it does not unreasonably prejudice the legitimate interests of the author."[198] Thus, *a priori*, this history should be respected.[199]

61. Principles of evaluation: coherence of the tests. The Three-Step Test, as the name implies, is made up of three tests. In truth, the first concerns States, and postulates the exclusion of a generalised exemption. In other words, the exception must be clearly identified and based on a specific finality which, incidentally, raises the question of the compliance of 'fair use' with the Three-Step Test[200]. For the judge, in our opinion, this very certainly rejects the possibility of creating a new exception by looking to Three-Step Test. We cannot see how the judge could be allowed to do what is forbidden to the legislator. It happens that there are solid arguments in favour of this conclusion.[201]

Then, the Three-Step Test implies that the exceptions in Article L. 122-5 of the CPI do not conflict with normal exploitation of the work, or

198. Records of the Intellectual Property Conference of Stockholm, 11-14 June 1967, vol. II, Report on the Work of Main Committee I, Svante Bergström, Rapporteur, p.1152, no. 85.

199. Obviously, it is possible to ignore this historical interpretation, but that requires explanation, something authors do not do when they propose an open interpretation of the three-step test. We can also recall that, according to Gény, free interpretation of a text implies *a priori* that you cannot detect the 'legislator's' intention" but, here, this intention is perfectly clear.

200. S. Ricketson "WIPO Study on Limitations and Exceptions of Copyright and Related Rights in the Digital Environment," SCCR/9/7 April 2003 p. 76-77 which considers 'fair use' to be contrary to the three-step test (this is not the opinion of M. Senftleben, *op. cit.* p.164-167).

201. *Cf.* below, no. 64.

unjustifiably harm the author's legitimate interests. These two steps are clearly distinct (which explains why the above-mentioned Dutch decision[202] is so very criticable[203]) and they result from a very different philosophy. Indeed, the first is based on a purely economic rationale grounded essentially in the operators' interests. As has been duly noted,[204] the second is 'normative', built up mainly around authors' moral and material interests.[205] More precisely, conflict with normal exploitation of the work, which in all points evokes the fourth factor of 'fair use' in Article 107 of the Copyright Act, was defined in the WTO panel[206] on the basis of "forms of exploitation which, with a certain degree of likelihood and plausibility, could acquire considerable economic or practical importance." Thus, as emphasised in a dissident opinion in the famous American Betamax case,[207] the judge is held to reason, in particular in the presence of new technologies, now and in the future, to ascertain the impact of this use on the market. The exploitation that must be envisaged is exploitation that is normal, predictable and reasonable (reasonable again).

202. *Cf.* above, note no. 195.

203. According to the Dutch court, the contentious digital press review caused unjustified harm to the interests of newspaper publishers. Thus, the judge assimilates the authors' interests with normal exploitation of the work, thereby merging the last two tests which results from a very risky interpretation.

204. S Dussollier "L'encadrement des exceptions au droit d'auteur par le test des trois étapes" IRDO 2005 p. 213-223.

205. Although this point may be disputed. See for example A. Lucas, A. Lucas-Schloetter and C. Bernault, "Traité de la propriété littéraire et artistique," LexisNexis 5° ed. 2017 no. 375.

206. For commentary on the WTO report, see J.-C Ginsburg "Toward supranational copyright law? The WTO panel decision and the Three-Step Test for copyright exceptions," RIDA 2001/1 p. 3-65; Y. Gaubiac "Les exceptions au droit d'auteur: un nouvel avenir?" Com. com. électr. 2001 Etude 15'faur.

207. For a presentation of this case, see J.-M Bruguière, "Droit du *copyright* anglo-américain," Dalloz, Connaissance du droit, 2017 p. 201.

The third and last test, as mentioned by Séverine Dussollier,[208] is "a tool aiming to assess the proportionality between granting the exception and preserving the authors' interests. Consequently, the benefit of free use as granted by the law to certain users is not favourable to authors; it necessarily goes against their interests. It is only if the damage is unjustified or disproportionate that the exception should be considered illegitimate as regards the test." This raises once again the proportionality test proper to basic rights[209] this test seems absent in the second step). Legitimate interest very often rests on financial compensation to authors for use of their work. This again is one of the specific purposes of private law: authors' remuneration right.[210] It is a matter of knowing what powers the judge has to be certain to preserve authors' legitimate interests. Unlike the US, here it is not possible to suppress the exception or set up a compensation mechanism. Conversely, a mandatory licence with remuneration may certainly be granted as in the famous Magill case in competition law.[211]

62. 'Fair Dealing', 'Fair Use' and the Three-Step Test: a conceptual network that remains to be clarified. 'Fair dealing', 'fair use' and the Three-Step Test contribute to instituting a narrow conceptual network which deserves to be promoted if we wish one day to give the Three-Step Test truly operative legal content.[212] The factors listed in Article 107 of the Copyright Act, the

208. Article mentioned above.

209. On the approximation of proportionality and the test's third step, see Senftleben, mentioned above.

210. See for example TPICE 10 July 1991 *RTD com* 1992 p. 372 obs. A. Françon refers to remuneration for creative effort.

211. CJCE 6 April 1995 aff. C-241 P *RTD com* 1995 p. 606 obs. Françon.

212. We can say from the outset that the third test, unjustified prejudice to the author's legitimate interests, has no true equivalent in 'fair dealing' or 'fair use'.

amount and importance of what is used with respect to the entire copyrighted work and the effects of the use in the potential creative market, should thus be put in direct relation with the criterion of conflict with normal exploitation of the work.[213] Substantial borrowing from the work would certainly conflict with normal exploitation of that work. And the last criterion, as we have just seen, requires the judge to take into account the effects of use in the work's potential market. As we have seen, 'fair dealing' relies on the extent of use or its consequences, two conditions that perfectly comply with those in Article 107 or in the context of the second test. As for 'fair use', the commerciality of the use remains a sub-criterion of conflict with normal exploitation of the work. Appropriate use as in 'fair dealing' also seems to be a sub-criterion of the effects of use on the work's potential market. Indeed, if the user of the work had alternatives to exploitation of the work disputed as counterfeit, there would be no negative effects on the market. Other criteria are perfectly indifferent in 'fair dealing' and the Three-Step Test. The work's transformative nature, omnipresent today in 'fair use', is thus totally absent in the Three-Step Test and very discreet in 'fair dealing'. We will see that it contributes to a definition of the functions of copyright completely unknown today.[214] The criteria for access to the work and publication selected in the framework of 'fair dealing' are perfectly neutral in the Three-Step Test and 'fair use'. On analysis, they seem so irrelevant to us that there is no reason to enshrine them in our law. The ethical criterion, as we have

213. M. Senftleben, "L'application du triple test: vers un système de *fair use* européen," *Propr. Intell* 2007 no. 25 note 50 emphasises that: "The 'effect of the use upon the potential market for or value of the copyrighted work' factor in Article 107 of the United States Copyright Act, for example, resembles the prohibition of violation of normal exploitation of the work and thus, the second question in the three-step test." On the approximation of the three-step test, 'fair use' and 'fair dealing', see again, more recently M. Ficsor "*Fair use versus* triple test. La promotion agressive d'un droit d'auteur *a minima »* in Mélanges André Lucas, LexisNexis, 2014, p. 277.

214. *Cf.* below, no. 65.

called it, of the conditions of access to the work, does not logically concern the conditions of use of the work. Incidentally, the conditions of access to the work can be protected by other rights. The criterion of publication has no chance of being adopted in French law because of the presence of the right of disclosure. Publishing a work without permission conflicts with the right of disclosure, upstream, with no need to rule the use of the work to be unfair, downstream. At most, it could be considered that the first publication of a work without permission attenuates its economic value and consequently conflicts with its normal exploitation. Thus, the Three-Step Test does not include all the criteria of 'fair dealing' and does not correspond precisely with 'fair use', contrary to the groundless claims of those who raise the so-called threat of Article 107. The French judge may, however, perfectly take inspiration from British case law based on criteria intended to be integrated in the Three-Step Test. And, as we have seen, they are quite numerous.

63. ***Open points:*** **should the enhanced 'double layer' of 'fair dealing' be maintained?** At the end of this study, three important points remain to be specified and, obviously, further improved in the future. The first is to determine whether to maintain the double layer of 'fair dealing' we highlighted or rather prefer to establish a general rule. On analysis, we believe the *status quo* should prevail.[215] We have seen that the British 'fair dealing' test is present

215. Were we to choose affirmation of a general rule as for the CDPA, that would raise the issue of knowing whether our 'fair dealing' should also concern some or all exceptions? There is no reason to espouse the solutions adopted by our British neighbours. The application of 'fair dealing' to one exception or another has its own history, which we have no intention of detailing here. As we emphasised (*cf.* above, no. 33), we also believe that 'fair dealing' could very well be applied to other exceptions than those under consideration in the CDPA. There is no underlying rationale in these provisions, which would make it all the more absurd to limit our 'fair dealing' to certain exceptions.

on two levels in our Article L. 112-5. It appears as a general rule in the Three-Step Test, more specifically in the second step. Thus, such 'fair dealing', integrated in part in the Three-Step Test rule, which should not be surprising when one remembers its history,[216] applies here to all exceptions. The British test is also present in the form of fragments disseminated in Article L. 122-5, either through certain criteria provided for specific exceptions, or with the appearance of standards we more specifically highlighted (short quotations, rules of the genre). So, should these two layers of 'fair dealing' be maintained? We believe they should. First, we have to realise this position is exactly the same as what is developing in the UK as we saw above.[217] Then, there are obvious practical interests in questioning the conditions of application of a given exception, then conducting a general analysis using the Three-Step Test rule. Looking back at the example of short quotations. Beyond brevity (quantitative aspect), as we showed,[218] the judge could sometimes resort to a qualitative criterion, of 'substance' in a way. The audiovisual excerpts are short and so respect Article L. 122-5 3° a). However the user focused on the audiovisual work's essential elements. Thus, it may be deemed that this conflicted with normal exploitation of the work (since there is a market for audiovisual excerpts). The exception for a set of quotations in audiovisual excerpts ('zapping' programmes in particular) also raises the question of the diversity of excerpts. Assuming the short quotation exception applies, it is advisable not to make excessive use of certain quotations (thus, in France, Canal+ is more present in 'zapping' programmes than France Télévisions; M6

216. *Cf.* above, no. 17.

217. *Cf.* above, no. 44.

218. J.-M Bruguière "Les courtes citations" in "Les standards de la propriété intellectuelle," Dalloz 2018 (dir J.-M Bruguière).

than TF1). Abuse of this right could certainly be evoked. In our opinion, however, conflicting with normal exploitation of the work is a form of abuse in the market. Once again, this is why it is preferable to look to the Three-Step Test rule.

64. *Open points*: What can be done with this "double layer' of 'fair dealing'? 'Fair dealing à la française', as we have striven to highlight, would certainly not help create new copyright exceptions to satisfy a need for flexibility.[219] We know that authors who suggest introducing 'fair use' in our system also promote the power of creative interpretation for judges on the basis of the Three-Step Test rule.[220] In our opinion, this way of seeing things was disavowed by the Court of Justice in a decision of 10 April 2014.[221] The Court observed in points 24, 25 and 26: "It should also be noted that Article 5, paragraph 5, of this Directive requires that exceptions and limitations to reproduction rights be applicable only in certain specific cases that do not conflict with normal exploitation of the work or any other protected object or cause unjustified damage to the rights holder's legitimate interests. (...) Thus, Article 5, paragraph 5, of this Directive does not define the material content of the different exceptions and limitations listed in paragraph 2 of this Article, but applies only at the time of their application by Member States. Consequently, Article 5, paragraph 5, of Directive 2001/29 aims neither to

219. Nor would it be a way of reducing exceptions as is often deplored on the basis of certain decisions (Decision of the Court of Cassation of 2006 in particular). In favour of the idea that the judge could accept uses in cases similar to existing exceptions on the basis of a principle close to 'fair dealing', see. M. Senftleben "Bridging the differences between copyright's legal traditions. The emerging EC fair use doctrine," 57, J. Copyright Soc'y USA 521, 2010, of the idea that the judge could accept uses in cases similar to existing exceptions.

220. For this discussion, see M. Senftleben "Copyright, Limitations and the Three-Step Test," Information Law Series-13, Kluwer, 2004 p. 150*ff.*

221. CJEU 10 April 2014 aff. C435/12.

affect the material content of other provisions in Article 5, paragraph 2, of this Directive, nor, in particular, expand the scope of the different exceptions and restrictions provided there." To reinforce our demonstration, we can add that we did not rule out the application of 'fair use' at the start of our article only to reinstate it surreptitiously in disguised form (the Three-Step Test) at the end. Our purpose is to bring flexibility to what exists, not to create a new right.

65. ***Open points:*** **Should we risk expecting too much from the 'double layer' of 'fair dealing'?** Our 'fair dealing à la française' must be combined with reflection on the functions of copyright. Before examining the application of this test by the judge, it should be known whether a rights holder's request fully corresponds to the specific purpose or functions of copyright. Only after this analysis will it be possible to reason on exceptions and possible application of our test.

All intellectual property rights have an economic function or a specific purpose according to the Court of Justice of the European Union. This point gave rise to case law and abundant legal literature especially in Trademark Law[222]. Conversely, in copyright, there are few decisions and no doctrinal thought.[223] Yet Copyright has a specific purpose, too, and its monopoly is conceivable only when the work is shown as a work. For the first point, as

222. See J. Passa, "Droit de la propriété industrielle," Tome 1, 2009 2° ed. no. 25*ff.*

223. To our knowledge, notwithstanding the difference in the law, no author has analysed the functions of copyright in light of Trademark Law. In so rich an examination of the functions of the Trademark Law, however, see M. Vivant: "Touche pas à mon filtre! Droit de marque et liberté de création: de l'absolu et du relatif dans les droits de propriété intellectuelle." JCP E, 1993 no. 22. More recently, see M. Vivant: "Intellectual property rights and their functions determining their legitimate enclosure" in Kritika: Essays on Intellectual Property," Vol 2, p. 44.

has been very aptly emphasised, "the monopoly held by an author does not entitle authors *a priori* to refuse all use of their works, or exercise control over the entire market but only segments of market comprising exploitation of the work involving their exclusive rights."[224] All that exceeds the monopoly must thus be excluded from copyright. We can give a concrete example around showing on the Internet an architect's sketches and drawings which belonged to an architectural firm by virtue of the notion of collective work. The TGI of Paris decided[225] that, since "the reproduction of documents retracing the work of the Dorell Ghotmeh Tane firm on these 7 projects, including that of Valérie Mayer, had been done solely for informative purposes, no act of infringement had been committed. Concerning the representation of these documents accessible on the Calameo site, it should be said that putting these documents online in an act of representation is nothing more than the consequence of using the Internet as the necessary vehicle for information as recalled by the CJEU, such that there was no counterfeiting committed by Valérie Mayer." With this risky parallel with Trademark Law, the judge was led to consider such representation as falling outside the field of the author's monopoly.[226]

224. S. Dussollier "L'exploitation des œuvres: une notion centrale en droit d'auteur," Mélanges André Lucas, LexisNexis 2014 p. 271.

225. TGI Paris 20 June 2013 RG no. 11/15927 and commentary by C. Le Goffic. "Reconnaissance d'une exception aux droits d'auteur en faveur de la reproduction à but informatif: l'architecte et son portfolio," RLDI 2013 no. 99 p. 1.

226. To go further in this discussion and this decision, see J.-M Bruguière and G. Deglaire, "Du bon usage du *book* par le créateur. Du droit de l'entreprise d'en encadrer la diffusion," in "L'entreprise et la titularité des droits de propriété intellectuelle," Dalloz 2015 dir. J.-M Bruguière.

For the second point, it is equally important to know whether a work is still represented as a work[227] just as we may ask whether a trademark is still used as a distinctive sign.[228] Thus, in a Google Images case, the Court of Appeal of Paris decided not to consider counterfeiting because "displaying a mosaic of thumbnail images on a page of results where the references can be seen" simply corresponds to a necessary functionality of this specific tool and can therefore not be considered as going beyond the simple technical service adapted for exclusive search of images indexed on the Internet." Here, the technical service converted images into research data, so that they were longer represented as works, and copyright did not apply. Combining this analysis, upstream, with what we have just defended in the context of exceptions, downstream, the judge could thus more easily answer the questions.

66. Conclusion: Looking back on two examples developed in point 2. At the end of this study, as a conclusion, we can look back at the two examples developed in point 2. The first, in relation to a programme dedicated to flagship products of the past fifty years, does not require referring to our 'fair dealing à la française'. It is enough to observe that the works represented (*DS* or *Bic*) are not shown as works per se. In other words, sound analysis of the functions of copyright leads to the conclusion that it is not under threat, without having to reason in the context of exceptions and using standards we would like to revive. The second example, drawn from the Utrillo case, is surely more complex. This famous artist's works were well represented for themselves and, to avoid counterfeiting, it was preferable to reason in terms of exceptions. The defence

227. On this basic remark, see M. Vivant "Objet juridique, objet social. Réflexion sur la propriété intellectuelle," *Propr Intell* 2012 no. 43 p. 269.

228. On this requirement, see J. Passa, above-mentioned, no. 240*ff.*

may had attempted to do so by evoking short quotation. Unfortunately, the Court of Cassation's extremely restrictive case law, according to which short quotation could not apply in the presence of representation of a complete artistic work compelled the television channel to evoke (forcefully) the Public's Right to Know. By focusing on this question, judges (and litigants) forgot to evoke the standards of the Law of 11 March 1957 (and perhaps even the Law of 1 August 2006). How can the Court of Cassation adapt its position on this matter? It has been suggested that the notion of analysis (another standard, in our opinion) be made independent to be able to release the concept from the requirement of brevity.[229] There remains, nonetheless, the difficulty that the judge never clearly endorsed the autonomy of the notion with respect to quotation. But this obviously remains a path to be explored. The nature of the quoting work, an informative work as emphasised by the TGI of Paris, may also be taken into account. After all, representations of Utrillo's works in the channel's television reportage were shown for educational purposes or criticism as intended in Article L. 122-5 3° a) of the CPI. Such critical finality, like the nature of the work of information in the reportage, should have led the litigants and judges to overlook the requirement of brevity. That is what results from French (although there is little material) and British case law.[230] With completely different reasoning, it could be emphasised that what is at stake, in the presence of public communication of an artistic work in a

229. Concerning this proposal and its discussion, see B. Galopin, above-mentioned thesis p. 370*ff.*

230. See CA Paris 1 June 1977 D. 1978 p. 230 note Desbois, mentioned above, who accepts the quotation of an entire work for purposes of criticism. Similarly, see the very interesting Fraser-Woodward Limited c./ British Broadcasting Corporation decision of 23 March 2005 by Chancery Division (WHC 472 (Ch); [2005] EMLR 487; [2005] FSR 36; [2005] 28(6) IPD 11; The Times, 15 April 2005) although, there again, it concerns photographs, not artists' works. For this case, see J.-M Bruguière and C. Bernault, above-mentioned article.

broadcast, is knowing whether the presentation is long or short[231] or, more precisely, proportional if we refer to Article 10-1 of the Berne Convention[232] or Article 5 3°) d. of Directive 2001/29.[233] This having been asserted, the real issue could be addressed. Were Utrillo's works themselves represented proportionally? Following the analysis we have highlighted, there could be no doubt. The creations were communicated for two minutes in a 30-minute broadcast.[234] That represented only 6.6% of the length of the news programme and, in reality, far less, after subtracting the interview of the Curator and clip from the film included in the reportage. Without referring to the Public's Right to Know and ECHR (European Court of Human Rights), couldn't we have considered that a television channel communicating to the public some ten works by a painter in the context of a reportage (an informative work) to present an exhibition and evaluate it (critical finality) for a duration probably less than 5% of the total length of the news broadcast in which the reportage was included is reasonable use of the disputed creations?[235] Formulating such a question certainly means providing the answer. Before introducing

231. A short quotation from an artistic work is meaningless. In favour of assimilating brevity with the fugacity of the appearance of the artistic work on television; see note by J.-Ch Galloux, Civ. 1ère, 4 July 1995, *Fresque de Vuillard*, *JCP G* 1995, II, 22486, spéc. p. 342.

232. Article 10-1 specifies: "Quotations from a work (...) are lawful on condition they comply with proper use and to the extent justified by the purpose sought...). Thus, it is the principle of proportionality that is targeted here. In favour of its application, see J.-M Bruguière "Les courtes citations," above-mentioned article. We can also note that the text invites litigants to refer to usage, as done by the television channel arguing for the practice of free access to this type of representation (unsuccessfully, since the channel relied on the usage of an authors' society, SPADEM, which no longer existed).

233. Quotations must comply with proper use and to the extent justified by the purpose sought.

234. Although it is not certain time should be counted this way; see above, no. 52.

235. Reasonable because it is normal (it was not customary to have royalties paid for these types of communication, although proof of these uses was not reported; see above, note no. 229) and measured as we understand it (see above, no. 50*ff*.). For those who do not find this analysis convincing, it could still be emphasised, as the TGI of Paris did once again, that this representation did not conflict with normal exploitation of Utrillo's work.

'fair use' in our closed system of exceptions (or an equivalent instrument) before multiplying references to basic rights and freedoms in a disorderly way, we should begin by exploring the resources of our old standards stemming from the same philosophy and technique as British 'fair dealing' and we must remember "that, before venturing on new ground, wisdom advises us to make use of instruments already tried and tested, rather than taking the risk of experimenting with new ones."[236] A reasonable conclusion...

(English translation by ATTIC Traduction)

236. P. Huguney "De la responsabilité du tiers complice de la violation d'une obligation contractuelle," Thesis Dijon 1910 p. 14.