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"European Copyright Code" – Back to First Principles (with Some Additional Detail)

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Abstract

The "Wittem Group" of copyright scholars has proposed a "European Copyright Code," to "serve as an important reference tool for future legislatures at the European and national levels." Because, notwithstanding twenty years of Directives and a growing ECJ caselaw, copyright law in EU Member States continues to lack uniformity, the Wittem Group's endeavor should be welcomed, at least as a starting point for reflection on the desirable design of an EU copyright regime. Whether or not the proposed Code succeeds in influencing national or Community legislation, it does offer an occasion to consider the nature of the rights that copyright secures, and of the goals that a copyright system should serve.

The following commentary will reproduce the provisions of the proposed Code, together with annotations of particular articles. The proposed Code contains five chapters: (1) Works; (2) Authorship and Ownership; (3) Moral Rights; (4) Economic Rights; (5) Limitations. The text provides neither for remedies, nor for voluntary formalities. It also does not address neighboring rights. The five chapters vary in ambition, from cautious synthesis to radical prescription. If some timidity characterizes the chapters addressing authors' rights, the hallmark of the chapter on limitations is its temerity, displaying an impetus to break through the rigidity of the current EU and national systems of copyright exceptions in order to favor EU-wide uses of copyrighted works in which, in the drafters' perception, the interests of third parties, including the public, outweigh those of the authors or copyright owners. Reaction to the Wittem endeavor may turn at least in part on one's assessment of whether the drafters have correctly stated and/or weighted the third party interests.

"European Copyright Code" – Back to first principles (with some additional detail)

Jane C. Ginsburg, Columbia University School of Law[^]

The "Wittem Group" of copyright scholars has proposed a "European Copyright Code," to "serve as an important reference tool for future legislatures at the European and national

[^] Thanks to Professors Lionel Bently, Bernt Hugenholtz, Alain Strowel and Raquel Xalabarder for responding to my queries about the Wittem Draft; while they have helped me understand some of its objectives, I in no way suggest that any of them would subscribe to my criticisms (if anything, I expect much of my analysis would provoke considerable disagreement).

levels."[*] Because, notwithstanding twenty years of Directives and a growing ECJ caselaw, copyright law in EU Member States continues to lack uniformity, the Wittem Group's endeavor should be welcomed, at least as a starting point for reflection on the desirable design of an EU copyright regime. This (American) writer, however, is not qualified to comment on the proposed Code from the point of view of the EU "acquis." Rather, I will address the proposed text from the perspectives both of international norms, particularly those set out in the Berne Convention, and of first principles (although I will occasionally refer to EU norms as well). Whether or not the proposed Code succeeds in influencing national or Community legislation, it does offer an occasion to consider the nature of the rights that copyright secures, and of the goals that a copyright system should serve.

The following commentary will reproduce the provisions of the proposed Code, together with annotations of particular articles. I will begin, however, with some general observations. The proposed Code contains five chapters: (1) Works; (2) Authorship and Ownership; (3) Moral Rights; (4) Economic Rights; (5) Limitations. The text provides neither for remedies, nor for voluntary formalities. It also does not address neighboring rights. The five chapters vary in ambition, from cautious synthesis to radical prescription. If some timidity characterizes the chapters addressing authors' rights, the hallmark of the chapter on limitations is its temerity. As a result, to this common law commentator, the text echoes the utilitarian premises of the common law tradition at least as much it reflects the author-based norms of the civilian heritage.

Any endeavor to meld civilian and common law approaches to copyright may inevitably dissatisfy all sides at least sometimes, and the drafters therefore deserve applause for persevering in an attempt some might consider quixotic and others (from both ends of the property rights/users' rights spectrum) might view with some suspicion. But the drafters are correct that the persistence of significant differences in national regimes mars the effective protection and dissemination of works of authorship within the EU. The founders of the US federal republic in 1787 recognized the need for uniform national law, precisely because the "States cannot separately make effectual provision" for works whose exploitation often if not always crosses internal borders (*Federalist* No. 43 [Madison]). But the U.S. Framers were writing on an almost-clean slate; the drafters of the Wittem Code are confronting three hundred years of separate national copyright development, each national regime reflecting its own legal traditions and cultural policies. Hence, perhaps, the caution that characterizes much of the draft. On the other hand, the bold approach of the last chapter suggests a different impetus, to break through the rigidity of the current EU and national systems of copyright exceptions in order to favor EU-wide uses of copyrighted works in which, in the drafters' perception, the interests of third parties, including the public, outweigh those of the authors or copyright owners. Reaction to the Wittem endeavor may turn at least in part on one's assessment of whether the drafters have correctly stated and/or weighted the third party interests.

Additional cause for concern (or quibble) might start with the title "European Copyright Code," whose adoption of the English locution might to some mask a sidelining of the author from her central place in Continental systems, whose laws generally are denominated (in their various languages) *authors'* rights. In fact, the proposed Code's ambivalences about copyright

[*] Preamble, "Believing . . ." The proposed Code, and its drafters' introductory comment, can be found at http://www.copyrightcode.eu/

seem more directed to its scope than to its subject. Relative to common law systems, the author's place may even be reinforced, though compared to some civil law regimes, some of the provisions on ownership may represent a loss of ground. With respect to the scope of copyright, the common law/civil law divide is displaced by another contrast, the tension between authors' rights and user rights, with the latter orientation appearing to prevail. Parts of the text also seem to betray a certain technological determinism. For example, the Preamble declares that a "fully functioning market for copyright protected works in the European Union" is "necessitated in particular by the Internet as *the primary means* of providing information and entertainment services across the Member States" (emphasis supplied). This is a revealing overstatement, for it suggests that the concerns of digital dissemination (a value whose achievement many in the academy and the "blogosphere" view copyright as impeding) not merely informed but predominantly influenced the drafting at least of parts of the proposed Code. But digital is not everything: other modes of exploitation remain, and a variety of copyright issues (including ones affecting cross-border commerce) both predate the digital era and persist notwithstanding it.

More fundamentally, while the rhetoric of "balance" imbues the text, on closer inspection "balance" often seems to resemble a coded version of "cutting back on exclusive rights" or, more baldly, "users' rights." Thus, for example, the Preamble continues:

> copyright law in the EU should reflect the core principles and values of European law, including freedom of expression and information as well as freedom of competition

Curiously, the cited "values" do not include the "right to property" enshrined in article 17 of the Charter of Fundamental Rights of the European Union, which further specifies that "Intellectual property shall be protected."[**] While the Charter does not specify how, or how much, intellectual property "shall be protected," its effective protection would nonetheless also seem a "core principle and value" deserving of recognition in the proposed Code's initial Considerations.

The next paragraph of the Preamble seems to send mixed messages:

> copyright protection in the European Union finds its justification and its limits in the need to protect the *moral* and economic *interests* of creators, while serving the public interest by promoting the production and dissemination of works in the field of literature, art and science by *granting* to creators limited exclusive rights for limited times in their works (emphases supplied)

On the one hand, the draft Code proposes the first EU-wide recognition of authors' moral rights, and to that extent constitutes an advance from the point of view of authors' rights (particularly for States, such as the UK, whose adoption of moral rights is both recent and reluctant). The moral rights the proposed Code provides (to be discussed in more detail regarding Chapter 3) are, moreover, inalienable (though they can be waived, including, it would seem, in a standard form contract). On the other hand, the drafters appear, consciously or not, to have rejected the

[**] Charter of Fundamental Rights of the European Union, art 17. OJEU C 303/01 (2007) http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2007:303:0001:0016:EN:PDF Article 11 covers the right to freedom of expression and art.

jus naturalis conception of copyright that animates many Continental European national laws (and that underlies moral rights). For example, the French Code of Intellectual Property, in its first article, pronounces: « L'auteur d'une oeuvre de l'esprit jouit sur cette oeuvre, du seul fait de sa création, d'un droit de propriété incorporelle exclusif et opposable à tous.»[***] The exclusive "right" arises "from the sole fact of the work's creation"; it is not "granted" by law. By demoting the claims of creators to the status of "interests" absent mediation by the State, the drafters have adopted a positivistic approach that may not be fully consistent with an important current of copyright law within Europe, or, for that matter, with some of the premises underlying the principle of automatic and independent protection consecrated by the Berne Convention ever since its 1908 Berlin revision. Indeed, even common law countries, notwithstanding their generally more positivistic outlook, are not immune to the appeal of the creation-centered basis of copyright, as an Irish judge recently recognized: "Copyright is a *universal entitlement* to be identified with and to sell, and therefore to enjoy, the fruits of creative work." (Emphasis supplied.)[****] I am not asserting that the proposed Code is necessarily "wrong" to part with this European copyright tradition, but the apparent shift is nonetheless striking. That said, much of the proposed Code reflects authorship-based norms (whatever their justification), including, in addition to moral rights, an authorial standard of originality, an open-ended conception of the work, and an author-centric rule of initial copyright ownership.

Finally, with respect to the Preamble, we find another soothing, but perhaps misleading, appeal to equilibrium:

> rapid technological development makes future modes of exploitation and use of copyright works unpredictable and therefore requires a system of *rights and limitations with some flexibility* (emphasis supplied)

As we will see, the proffered system of *limitations* is indeed designed with the "flexibility" to expand in response to technological developments and future modes of exploitation. It is not clear, however, that the *rights* the proposed Code articulates are consistently subject to concomitantly flexible growth. Indeed, the later chapters of the proposed Code betray the most marked departures from the traditional authorship-grounded concept of copyright.

European Copyright Code

Preamble

The Wittem Group

Considering

[***] CPI art. L. 1-111

[****] EMI Records & Ors -v- Eircom Ltd, [2010] IEHC 108 para 3. I cannot avoid pointing out that the "universality" of the "entitlement" could in fact be more widespread. In the US, for example, there is, most regrettably, no right to be identified with the fruits of one's creative work.

- that the establishment of a fully functioning market for copyright protected works in the European Union, as necessitated in particular by the Internet as the primary means of providing information and entertainment services across the Member States,
requires common rules on copyright in the EU that reflect and integrate both the civil and common law traditions of copyright and authors' right respectively;
- that twenty years of harmonization has brought only partial harmonization on certain aspects of the law of copyright in the Member States of the EU;
- that the consistency and transparency of the harmonized rules on copyright in the EU ought to be improved;
- that copyright law in the EU should reflect the core principles and values of European law, including freedom of expression and information as well as freedom of competition;

Recognizing

- that copyright protection in the European Union finds its justification and its limits in the need to protect the moral and economic interests of creators, while serving the public interest by promoting the production and dissemination of works in the field of literature, art and science by granting to creators limited exclusive rights for limited times in their works;
- that copyright legislation should achieve an optimal balance between protecting the interests of authors and right holders in their works and securing the freedom to access, build upon and use these works;
- that rapid technological development makes future modes of exploitation and use of copyright works unpredictable and therefore requires a system of rights and limitations with some flexibility;

Believing

- that the design of a European Copyright Code might serve as an important reference tool for future legislatures at the European and national levels;

Taking note

- of the norms of the main international treaties in the field of copyright that have been signed and ratified by the EU and its Member States, in particular the Berne Convention, the TRIPs Agreement and the WIPO Copyright Treaty, and of the harmonized standards set by the EC directives in the field of copyright and related rights;

Proposes the following European Copyright Code:

Chapter 1: Works

Art. 1.1 - Works

(1) Copyright subsists in a work[1], that is to say, any[2] expression[3] within the field of literature, art or science[4] in so far as it[5] constitutes its author's own[6] intellectual creation[7].

> **Comment:** This is a well-accepted definition, but, given the importance of the principle, the rejection of a criterion of literary or artistic worthiness or of form perhaps might have been emphasized in the text of the article rather than merely in footnote 2. There may also be some ambiguity regarding what constitutes the "author's own intellectual creation." The text echoes the norm of the various Directives, but footnote 7 muddies the waters a bit by stating *"For factual and functional works, the focus will be more on a certain level of skill (judgement) and labour, whereas for productions in the artistic field the focus will be more on personal expression."* Footnote 3, however, makes personal expression a necessary constituent of a "work"; in that event, there seems to be some contradiction if "skill and labour" suffice to meet the "own intellectual creation" standard.

(2) The following in particular are regarded[8] to be within the field of literature, art or science within the meaning of this article:

a. Written or spoken words,
b. Musical compositions
c. Plays and choreographies,
d. Paintings, graphics, photographs and sculptures,
e. Films,
f. Industrial and architectural designs,
g. Computer programs,
h. Collections, compilations and databases.

> **Comment:** The text does not specify the classification of composite works such as musical compositions with accompanying text, or plays with accompanying music. By

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[1] The term 'work' is used throughout this Code as a general term to denote subject matter protected by copyright as defined in this article. It does not cover subject matter protected by what is usually referred to as neighbouring or related rights.

[2] 'Any' denotes "whatever may be its mode or form of expression or its merit". There is no requirement of fixation. An adaptation of a work may qualify as a work itself.

[3] The term 'expression' indicates the traditional requirement that works be the result of the author's personal expression.

[4] The term 'literary, artistic or scientific expressions', which is inspired by art. 2(1)BC, circumscribes the domain of copyright, and serves as "Oberbegriff".

[5] 'In so far as' indicates that the requirement of constituting 'its author's own, intellectual creation' is not merely a condition for the existence of copyright, but also defines its limits.

[6] The Code does not use or define the term original, but in practice it might still be used to indicate that the production qualifies as a (protected) work.

[7] The term 'the author's own intellectual creation' is derived from the acquis (notably for computer programs, databases and photographs). It can be interpreted as the "average" European threshold, presuming it is set somewhat higher than skill and labour. This is possible if emphasis is put on the element of creation. For factual and functional works, the focus will be more on a certain level of skill (judgement) and labour, whereas for productions in the artistic field the focus will be more on personal expression.

[8] The categories listed here are merely examples and should not be taken to be exhaustive. The exemplary list indicates 'core' areas of copyright.

apparently leaving this matter to national legislation, the proposed Code allows for disuniformity in the authorship status of these works as joint works or as separate albeit conjoined works. Failure to propose a Europe-wide characterization introduces possible complexity when such works are differently classified in different countries, with resulting differences in their terms of protection, as well, perhaps, as the scope of transfer of rights.

The choice of the term "films" rather than "audiovisual works" also seems curiously tied to a particular (and obsolescing) medium of fixation, and unnecessarily narrower than the already well-recognized designation "audiovisual works." While footnote 8 makes clear that the list of works is not exhaustive, its designation of the listed works as within the "'core' areas of copyright" may leave some ambiguity regarding audiovisual works that would not be regarded as "films", such as videogames fixed in digital media.

Finally, the text does not incorporate the well-established principle (see, e.g., Berne Conv. art. 2.5) that any copyright in "collections, compilations and databases" is independent of and "without prejudice to" the copyright or public domain status of the pre-existing material incorporated in the work. On the other hand, because art 1.1(3) establishes that certain component materials, such as facts, are not "in themselves" the subject matter of copyright, it should be implicit that inclusion of those materials in a collection, compilation or database does not thereby endow them with copyright.

(3) The following are not, in themselves,[9] to be regarded as expressions within the field of literature, art or science within the meaning of this article:[10]

a. Facts, discoveries, news and data[11];
b. Ideas and theories;
c. Procedures, methods of operation and mathematical concepts.[12]

Art. 1.2 – Excluded works

The following works are not protected by copyright:

a. Official texts of a legislative, administrative and judicial nature, including international treaties, as well as official translations of such texts;
b. Official documents published[13] by the public authorities.[14]

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[9] The term 'as such' has built up a lot of jurisprudence under the EPC art 52, and is therefore avoided here.
[10] Whereas art. 1.1 (3) designates subject matter that as a matter of principle does not fall within the domain of copyright, art. 1.2 deals with works that do fall within the domain of copyright, but are excluded from copyright protection.
[11] Cf. art. 10(2) TRIPS: such protection shall not extend to the data or material itself; see also art. 3(2) Database Directive.
[12] Cf. art. 9(2) TRIPS.
[13] The term 'published' does not imply that a work must formally have been published in an Official Journal or equivalent. However, secret or confidential information can not be considered as 'published'.
[14] As to 'official' works by private authors, these will be protected until they become 'official'. Also, questions of moral rights could still arise despite the exclusion.

Comment: This text goes farther than (and, to this writer, improves on) Berne Convention art. 2.4, which leaves it to Member States to determine whether or not to extend copyright to official documents. The text does not, however, define "official document," and is problematic with respect to unpublished official documents, such as the notes of public officials. If, as footnote 13 establishes, only published documents are excluded from copyright, may public officials invoke the copyright law to protect unpublished texts from public disclosure? Copyright should not double as an Official Secrets Act; it might have been preferable to exclude all works of public officials created in the execution of their functions, and to look to other laws to preserve secrecy.

Chapter 2: Authorship and ownership

Art. 2.1 – Authorship

The author of a work is the natural person or group of natural persons who created it.[15]

Comment: Consistently with the civilian tradition, the text properly affirms the principle that an "author" is the (or a) actual human creator of a work, rather than the natural or juridical person who instigates or assumes the economic risk of its creation. Moreover, the proposed Code retains the human focus by vesting the human creator with moral and economic rights (articles 2.2 and 2.3(1)). That said, works with multiple contributors may present special problems. Footnote 15 adopts the Term Directive's simplification of the authorship status of audiovisual works, but thereby leaves ambiguous the status of other creative contributors, such as cinematographers. In the absence of other European rules determining authorship status in the case of a multiplicity of potential creative claimants, the proposed Code offers no guidance beyond the implicit instruction to ascertain whether the claimed contribution meets the "own intellectual creation" standard. That in turn would appear to leave it to member States (with concomitant risks of disuniformity) to determine whether there is some threshold of quantity (or quality?) of the contribution before it can be deemed sufficiently the contributor's "own" to make the contributor a joint author.

Art. 2.2 – Moral rights

(1) The author of the work has the moral rights.
(2) Moral rights cannot be assigned.

Comment: The non assignability of moral rights apparently would not preclude the designation of an agent to defend them, perhaps together with the moral rights of similarly situated authors.

[15] In case of films such co-authors include the director, the author of the screenplay and the author of the dialogue and the composer of music specifically created for use in the cinematographic or audiovisual work; see art. 2(2) Term Directive

Art. 2.3 – Economic rights

(1) The initial owner of the economic rights in a work is its author.
(2) Subject to the restrictions of article 2.4, the economic rights in a work may be assigned[16], licensed[17] and passed by inheritance, in whole or in part.
(3) If the author has assigned economic rights, he shall nonetheless have a right to an adequate part of the remuneration on the basis of the provisions in articles 5.2, 5.3, 5.4 and 5.5.
(4) An assignment is not valid unless it is made in writing.

> **Comment:** This article exposes the – to this writer – timidity of the proposed Code with respect to the rights of authors. The drafters have forgone the general guarantees of "proportional" or "adequate" remuneration for each mode of exploitation of the work familiar in French and German copyright laws. Article 2.3 does provide for "adequate remuneration" in certain instances, but those cases are limited to participation in compensation resulting from certain compulsory licenses instituted in connection with a variety of limitations on the scope of exclusive rights. There is no general principle of adequate or proportional remuneration flowing from the author's voluntary grant or license of exclusive rights.
>
> With respect to the remuneration rights, these pertain to a wide variety of uses "for the purposes of freedom of expression and information"; "to promote social, political and cultural objectives," to "enhance competition" and for "any other use that is comparable." The capaciousness of these exceptions will be examined in connection with Chapter 5 of the proposed Code. For present purposes a few remarks are in order. First, it appears that the author's share (however calculated) of the proceeds of these remuneration rights is intended to be inalienable. In providing "If the author has assigned economic rights, he shall nonetheless have a right to an adequate part of the remuneration" deriving from the compensated limitations on exclusive rights, one may infer that the various compulsory licenses authorized under Chapter 5 must set some part of the payments aside for authors notwithstanding the author's grant of economic rights. An ambiguity might nonetheless arise, however, regarding the characterization of these remuneration rights. If one contends that the remuneration rights are not "economic rights" in the sense of exclusive rights, because they flow from exemptions from (rather than exercise of) exclusive rights, then the assignment of economic rights would be irrelevant to the allocation of remuneration rights. If the remuneration rights are distinct, and vest in the author, perhaps they could nonetheless be the object of separate assignment. It might have been preferable had the text emulated the EU Rental Right Directive by explicitly providing for an "unwaivable right to equitable remuneration." (Directive 2006/115/EC of the European Parliament and of the Council of 12 December 2006 on rental right and lending right and on certain rights related to copyright in the field of intellectual property, art 5.)

[16] The term 'assignment' indicates a cession of economic rights; ownership of the rights is transferred to another person.
[17] The term 'license' indicates an act of authorisation (permission) to use the work.

Second, article 5.4 of the proposed Code introduces a user entitlement to "uses of news articles, scientific works, industrial designs, computer programs and databases [which] are permitted without authorisation, but only against payment of a negotiated remuneration." Footnote 54 specifies that "The term 'negotiated remuneration' means that the compulsory license fee is to be negotiated in individual cases, and therefore does not imply a role for collective rights management." It is not clear why the text bars collective management societies from negotiating the remuneration. One may fear that without collective representation authors' remuneration may be artificially low. Moreover, the individual transactions costs of negotiating the remuneration may discourage individual authors from enforcing their remuneration rights altogether. In effect, this provision may take away with one hand the compensation it proposes with the other.

Finally, and more fundamentally, regarding mandatory remuneration rights accompanying copyright exceptions, if authors are not assured proportionate or adequate remuneration for grants of economic rights, but are guaranteed payment from compensated limitations on exclusive rights, then the more compulsory licenses replace exclusive rights, the better off authors might be. This is a perverse outcome which could discredit copyright with the very constituency the property right arose to protect. The combination of the proposed Code's insufficient response to authors' unequal bargaining power in the grant of exclusive rights with the draft's provision for an "adequate" share of legally imposed licensing fees, while on the one hand better than no guarantee of remuneration at all, on the other hand could contribute to a weakening of exclusive rights. In the short term, if authors continue to depend on commercial intermediaries who drive leonine bargains in exchange for disseminating their work, a shift from exclusive rights to statutory remuneration rights may appear to authors' advantage. In the longer term, especially if reliable means of payment accompany the self-dissemination that digital media enable, authors could come to regret the Faustian exchange of exclusive rights for remuneration assurances.

Art. 2.4 – Limits

If the contract by which the author assigns or exclusively licenses the economic rights in his work does not adequately specify (a) the amount of the author's remuneration, (b) the geographical scope, (c) the mode of exploitation and (d) the duration of the grant[18], the extent of the grant shall be determined in accordance with the purpose envisaged in making the grant[19].

Comment: This provision laudably endeavors to offset the shortcomings of art. 2.3 with a combination of the German/Dutch purpose of the grant rule and the French rule of specificity. The provision appears designed to assure authors, at least as a starting point,

[18] The term 'grant' is used here as an overarching term encompassing both assignment and license.

[19] Art. 2.4 is meant to protect authors against overbroad grants of rights. It does so by giving a primary rule and a subsidiary (default) rule. The primary rule requires adequate specification in the granting contract of the core features of such a contract: remuneration, geographical scope, modes of exploitation and duration of the grant. Failure to comply with the rule of specificity will not however nullify the grant, but will result in the default rule becoming operational. Under the default rule any grant of copyright is to be interpreted in accordance with the grant's underlying purpose (purpose-of-grant rule).

retention of rights to modes of exploitation unknown or not commercially practiced at the time of the conclusion of the assignment or license. Footnote 19 further explains how the rules should operate to limit the scope of the grant. Nonetheless, a grant that complies with art. 2.4's specificity requirement would appear to escape a narrowing construction. For example, the following standard clause contains all the requisite elements regarding amount of the author's remuneration, geographical scope, mode of exploitation and duration: "For [specified amount] author grants all rights of reproduction and of communication to the public in all modes of exploitation for all media now known or later developed, for the full term of copyright and any renewals or extensions thereof, for the full territory, which shall be the Universe." If the "purpose of the grant" rule does not come into play unless the contract lacks specificity, then all-rights contracts, so long as sufficiently spelled-out, remain enforceable.

Art. 2.5 – Works made in the course of employment

Unless otherwise agreed, the economic rights in a work created by the author in the execution of his duties or following instructions given by his employer[20] are deemed to be assigned to the employer.

Comment: This provision initially appears akin to the U.S. "works made for hire" regime for works created by employees in pursuit of their employment. Unlike the U.S. copyright law, however, the proposed Code includes moral rights (Chapter 3), which the employee author retains. But because, as provided in footnote 21, the mandatory remuneration rights of art. 2.3, and the narrowing construction of art. 2.4 do not apply, employee authors are completely divested of all economic rights, "unless otherwise agreed." This is an important proviso: because art. 2.5 does not reach commissioned works (unlike the U.S. work for hire regime) but presupposes an actual labor contract, salaried authors who are beneficiaries of collective bargaining agreements may be able to restrict the scope of the rights granted.

Art. 2.6 – Works made on commission

Unless otherwise agreed, the use of a work by the commissioner of that work is authorized to the extent necessary to achieve the purposes for which the commission was evidently made.[21]

Comment: The default rule favors the commissioned author by imposing a narrowing construction, but the "unless otherwise agreed" clause allows for circumvention of this author protection, since it appears that the parties may agree to an all-rights transfer.

Chapter 3: Moral rights

[20] The scope of the assignment will therefore largely depend on the contract of employment between the author and the employer, as determined by applicable law. The general rules on assignment of art. 2.3 and 2.4 do not apply here.

[21] Such purposes must have been known to, or obvious to the author, for example, from the terms of the commissioning agreement.

Art. 3.1 – General
The moral rights in a work are the rights of divulgation, attribution and integrity, as provided for in articles 3.2, 3.3 and 3.4.

Art. 3.2 – Right of divulgation

(1) The right of divulgation is the right to decide whether, and how the work is disclosed for the first time.

> **Comment:** The text does not specify that the author's divulgation right also covers the author's determination *when* to disclose a work. The timing of divulgation is at least as important as the means, however. Nonetheless, this gap may be closed if "whether" to disclose a work is construed to cover "when" as well.

(2) This right shall last for the life of the author.[22]

> **Comment:** The proposed Code conceptualizes the divulgation right as exclusively personal to the author. Once the author has died, the heirs (unless they retain the economic rights) may not invoke moral rights to prevent the public dissemination of the work. Footnote 22 clarifies, however, that other third-party rights, particularly privacy, may nonetheless impede the public disclosure of a deceased author's work.

Art. 3.3 – Right of attribution

(1) The right of attribution comprises:
a. the right to be identified as the author,[23] including the right to choose the manner of identification,[24] and the right, if the author so decides, to remain unidentified.
b. the right to require that the name or title which the author has given to the work be indicated.

> **Comment:** Footnote 23 to art. 3.3(1)(a) properly rejects the perverse requirement contained in the UK CDPA sec. 78, that author "assert" her attribution right in order to be able to enforce it. Art 3.3(1)(b) introduces a new moral right to preserve and proclaim the author's chosen title for the work.

(2) This right shall last for the life of the author and until [...] years after his death.[25] The legal successor as defined by the laws on inheritance[26] is entitled to exercise the rights after the death of the author.

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[22] It was generally felt by the members of the group that not all moral rights merit the same term of protection, and that the right of divulgation might expire following the death of the author, whereas other moral rights could remain protected for a certain period post mortem. Note however that general rights of privacy might still prevent unauthorized publication post mortem of unpublished works.
[23] The existence of the right of attribution cannot depend on any condition, such as a claim or assertion by the author.
[24] The manner the author chooses to be identified should take into account the constraints resulting from the type of work involved and the customary practices regarding attribution in his field.

Comment: While neither with respect to attribution nor integrity rights (see below, art. 2.4(2)) could the drafters agree on a particular term of years *post-mortem auctoris*, it seems clear that in neither case was the right to be perpetual. The non specification of a *post-mortem* term leaves open the possibility of assigning different durations to the rights. Such a solution would make sense: the integrity right, like the divulgation right, may be most closely linked to the author's person. After her death, we may be more reluctant to allow her artistic vision – as interpreted by her heirs – to limit (over and above limitations imposed by economic rights) how authorized third parties present the work to the public. By contrast, with respect to attribution rights, there remains a public as well as a personal interest in ensuring that the author receives credit for the work she created.

Art. 3.4 – Right of integrity

(1) The right of integrity is the right to object to any distortion, mutilation or other modification, or other derogatory action in relation to the work, which would be prejudicial to the honour or reputation of the author.

Comment: Adoption of the Berne Convention's objective "honor or reputation" standard for violation of the integrity right rejects the subjective one such as in French law. Thus the standard may be less author-protective but more predictable and better-balanced with the reasonable interests of exploiters.

(2) This right shall last for the life of the author and until [...] years after his death. The legal successor as defined by the laws on inheritance[27] shall be entitled to exercise the right after the death of the author.

Comment: See comment to art. 3.3(2) above.

Art. 3.5 – Consent

The author can consent[28] not to exercise his moral rights.[29] Such consent must be limited in scope[30], unequivocal[31] and informed[32].[33]

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[25] See note 22.

[26] As determined by the laws of inheritance, either the heirs or a person especially appointed by the author can exercise these moral rights.

[27] Id.

[28] Consent by the author to waive his moral right must be certain. This consent can result from a written instrument or may be implied if no other interpretation of the author's will can be deduced from the written instrument or from the particular circumstances of the case.

[29] If the author consents not to exercise his moral rights, the action consented to will not constitute an infringement

[30] General waivers are not possible, but an author may consent to particular uses.

[31] Consent in writing should be regarded as evidence that the consent was unequivocal.

[32] Consent is only informed where full information is disclosed to the author (or a representative or agent thereof) as to the way in which the work will be used, including details of works which will be used in association with the work. The waiver may result from a collective negotiation by third parties representing the interests of the authors, such as an author's union.

Comment: While the text seeks to bar general waivers, it would permit specific renunciations of moral rights, see footnote 30. Neither the text nor the notes explicitly limit specific consent to authorizations granted specified co-contractants. The absence of a clear limitation to agreements *intuitu personae* leaves open the possibility that specific consent might extend to the whole world, for example to any user of a website on which a work is posted. The specificity requirement, moreover, may not preclude waivers in form contracts, so long as the circumstances under which the waiver would operate are sufficiently detailed. (Footnote 33 appears to acknowledge the possibility of valid "standard contracts" stipulating broad waivers.)

Suppose, for example, that an author makes her work available with a Creative Commons license and chooses to forgo (or neglects to affix) the ND (no derivatives) icon whose use would have made clear that the author did not permit alterations to her work. Does the resulting implied license to create derivative works also waive the integrity right? Arguably, given the proposed Code's requirement that any waiver be "limited in scope" an omnibus derivative works authorization lacks the requisite specificity, and therefore could not be construed as a waiver of moral rights along with the economic rights.

If the open-endedness of the waiver does not disqualify it, what of its irrevocability? The text does not address the question whether a specific consent must be revocable. While revocability would seem consonant with the concept and purpose of moral rights, the possible extension of permissible consent to website waivers may make revocation impossible. Is it appropriate to conclude that the CC-licensing author who does not prohibit the making of derivative works has properly consented to waive her moral right of integrity notwithstanding the practical impossibility of retracting her waiver of derivative work/integrity rights once the work is "virally" communicated from one user to another?

Art. 3.6 – Interests of third parties

(1) The moral rights recognised in article 3.1 will not be enforced in situations where to do so would harm the legitimate interests of third parties[34] to an extent which is manifestly disproportionate to the interests of the author[35].[36]

Comment: This is a curious provision apparently inserted to ensure that authors' most personal rights are appropriately "balanced" against the broader public interest, but on closer inspection, its assurances seem rather insubstantial. Consider the "legitimate interests of third parties," which footnote 34 tells us includes the general public's "interest in improving the access to the work." The only moral right that implicates access to the work is the right of divulgation. But art. 3.2(2) already limits the duration

[33] The condition of informed consent will weigh particularly heavy in cases of *standard contracts* stipulating a far reaching consent of the author not to exercise moral rights.

[34] The notion of 'interests of third parties' covers interests of any private party, such as a publisher, as well of the public in general which, for instance, has a legitimate interest in improving the access to the work.

[35] For example, particularly the integrity right would be attenuated in relation to works of low authorship.

[36] This 'abus de droit' principle also applies to economic rights. If it is specifically mentioned here, this is because, unlike the case of the economic rights, the principle is not already elabourated in a body of limitations.

of that right to the life of the author. So art. 3.6(1) would have no role to play where the public interest in access is at its strongest, after the author's death. Would art 3.6(1) apply while the author is living, when her interest in deciding whether and how to disclose her work not only is at its strongest but also is consonant with the general public interest in fostering an environment conducive to creativity (since authors who cannot control the disclosure of their work may be less inclined to create it in the first place)? One might imagine situations in which the author's invocation of her divulgation right is purely pretextual, not to protect her work, but to guard some secret that would not be protected by personal or data privacy laws. This exceptionally marginal situation could serve as a classic example of *abus de droit*, but that overarching civil law principle, which, if it applies, would apply equally to economic as well as moral rights (see footnote 36), exists alongside copyright law. If it requires articulation in a provision specially devoted to curtailing moral rights in the "Interests of third parties," one may infer that its inclusion reflects a perceived need to reassure third parties from common law countries.

Similarly, given the other articles in Chapter 3, under what circumstances would the author's interest in enforcing her integrity rights be "manifestly disproportionate" to legitimate third party interests? We know from art. 3.4(1) that there will be no violation of the integrity right unless the alteration to the work objectively harms the author's honor or reputation. In other words, the integrity right is already framed in a way that precludes unreasonable assertions of artistic purity. For art. 3.6(1) to have any effect, then, it would have to apply in situations in which deleterious alterations to the work admittedly compromise the author's good name, but there is some third party (exploiter or broader public) interest in dissemination of the thus-altered work that is so "legitimate" that it "manifestly" outweighs the author's reputation. Perhaps parody might fit that bill, but parody is a well-recognized exception to authors' rights even in strong moral rights systems (see, e.g., France, CPI L122-5 4°; see also Wittem draft art. 5.2(1)(e)), so it is not clear why a special additional provision benefitting third parties is required.

Finally, regarding the attribution right, footnote 24 to art. 3.3(2) already incorporates the reasonableness considerations that art 3.6 purports to advance. In other words, moral rights in the proposed Code are in the first instance so couched in the interests of third parties that it becomes difficult to imagine how authors' interests could become "manifestly disproportionate," much less require further belittlement in this article.

(2) After the author's death, the moral rights of attribution and integrity shall only be exercised in a manner that takes into account the interests in protecting the person of the deceased author, as well as the legitimate interests of third parties.

Comment: This is another variation on *abus de droit*, and prompts queries similar to those raised in connection with art. 3.6(1).

Chapter 4: Economic rights

Art. 4.1 – General

(1) The economic rights in a work are[37] the exclusive rights to authorise or prohibit the reproduction, distribution, rental,[38] communication to the public and adaptation of the work, in whole or in part,[39] as provided for in articles 4.2, 4.3, 4.4, 4.5 and 4.6.

> **Comment:** The proposed Code proffers a closed list of exclusive rights. (See footnote 37.) It eschews any residual right to control or benefit from the exploitation of the work. As a result, if a new mode of exploitation develops that cannot be fit within any of the enumerated rights, third parties may exploit the work with no pay to or permission from the author. Whether such a situation is likely to transpire depends on whether the enumerated rights are drafted sufficiently broadly. While the articulation of the right of communication to the public purports to be an "open concept" (also per note 37) the narrower expression of the other exclusive rights could in the future produce gaps in coverage.

(2) The economic rights expire [...] years[40] after the year of the author's death.

> **Comment:** While agreeing that the current EU term of 70 years *pma* is too long, the drafters could not agree on the length of a shorter term (see footnote 41), thus making no effective prescription for national laws.

Art. 4.2 – Right of reproduction

The right of reproduction is the right to reproduce the work in any manner or form, including temporary reproduction insofar[41] as it has independent[42] economic significance.[43]

> **Comment:** This concise provision masks several problems. The requirement that the reproduction have independent economic significance, which applies only to temporary reproductions (see footnote 41), purports to be consistent with art. 5(1) of the Information Society Directive (see footnote 43), but in fact departs from it in significant ways, as we will see. The text's understanding of "independent" also is troublesome. Footnote 42 defines "independent" as meaning independent from a use "permitted either by law or authorised by the right holder". This is problematic because it conflates exceptions and

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[37] This article comprises an exhaustive (closed) list of the economic rights. Note, however, that 'communication to the public' is an open concept, and art. 4.5 comprises a non-exhaustive (open) list of acts falling under that concept.

[38] As explained in the Introduction, the public lending right and the artists' resale right (droit de suite) are not included here, because these are remuneration rights that do not qualify as exclusive economic rights and as such remain outside the scope of the Code.

[39] The phrase 'in whole or in part' implies that the use of a part of a protected work constitutes a restricted act or, as the case may be, an infringement, if this part in and by itself qualifies for copyright protection.

[40] It was generally felt by the members of the Group that the current term of protection of the economic rights is too long. However views diverged as to the appropriate term.

[41] The phrase 'insofar as it has independent economic significance' only refers to temporary reproductions.

[42] The term 'independent' means independent from a permitted use (i.e. permitted either by law or authorised by the right holder).

[43] This carve-out absorbs the rule of art. 5(1) InfoSoc Directive.
Note that it does not determine the burden of proof whether or not the reproduction in question is or is not temporary and/or has no independent economic significance.

exclusive rights. In other words, when an author claims infringement, the first inquiry should be whether the act complained-of comes within the scope of exclusive rights; if so, then the second inquiry looks to applicable exceptions. Here however, the cart precedes the horse: if the economically significant act qualifies for an exception, then the reproduction right is not engaged. It makes more sense first to assess whether the temporary reproduction has value independent of the more permanent reproduction to which the temporary reproduction may lead; if the answer is "no," it is not even necessary then to determine whether the temporary reproduction nonetheless would be excused. There is, moreover, some incoherence in the class of temporary reproductions whose economic significance derives from an exempted use. After all, it is their economic *in*significance that most often underlies the exceptions for "permitted acts" (cf. Berne Conv. art. 9.2; but, as we will see regarding Chapter 5, the proposed Code substantially enlarges the scope of copyright exceptions, including in favor of commercial activities).

With respect to the correspondence between art. 5(1) of the Information Society Directive and Wittem draft art. 4.2, the proposed Code differs from the Directive not only in its initial approach, but in the nature of and conditions for exclusion of temporary reproductions. First, because temporary reproductions in the Directive are classified among the exceptions to copyright, it is clear that the reproductions as an initial matter come within the scope of copyright (there is no need to exempt an activity unless it would otherwise be subject to the copyright owner's exclusive rights). By contrast, the proposed Code initially truncates the reach of reproduction right; exceptions do not come into play (except in the convoluted inquiry into the independence of economic significance, as discussed above) because the right does not reach the activity in the first place. Second, where the Proposed Code addresses "temporary" reproductions without specifying the circumstances in which such reproductions may be created, the Directive confines its exception to "temporary acts of reproduction which are transient or incidental [and] an integral and essential part of a technological process . . ." The contrast suggests that the "temporary" reproductions that the proposed Code removes from the scope of exclusive rights may cover far less "transient" fixations than those exempted by the Directive. Third, because the question of transient reproductions comes within Directive's provisions on exceptions, it should fall to the defendant to prove compliance with the distinct and cumulative conditions of lawful use and absence of independent economic significance. By contrast, as footnote 43 points out, the proposed Code does not assign the burden of proof; logically, however, in the realm of rights assertion, the burden would fall on the claimant. Finally, where the application of the Directive's transitory copy exception must also conform to the "3-step test" (InfoSoc Directive art 5(5)), the proposed Code eludes that additional safeguard by characterizing the issue of temporary copies as one of initial scope of the reproduction right rather than as an exception to an otherwise applicable exclusive right.

Art. 4.3 – Right of distribution

(1) The right of distribution is the right to distribute to the public the original of the work or copies thereof.

(2) The right of distribution does not apply to the distribution of the original or any copy that has been put on the market by the holder of the copyright or with his consent.[44]

> **Comment:** Subsection (2) states a rule of exhaustion of the distribution right, but the scope of the rule is unclear. Read literally, "the market" is not limited to the market in the European Union. Thus, and contrary to current ECJ case-law [E.g., *Silhouette International Schmied GmbH v. Hartlauer Handelsgesellschaft mbH*, ECJ Case C-355/96 (16 July 1998)], sale of copies of the work anywhere in the world would cut off the distribution right, making the copies freely importable into the EU and of course re-sellable anywhere within the EU. If read against the background of current EU law, "the market" would be understood to mean "any member State of the European Union." Footnote 44's reference to the exhaustion of industrial property rights suggests that, for now at least, "the market" does mean the EU. As a general matter, the issue of "international exhaustion" is controversial, but neither the Berne Convention nor the TRIPs Accord bar a member State from limiting the author's right to control the distribution of physical copies to copies that she has not yet sold, on any national market. If the proposed Code is read literally, or if the referenced rule regarding exhaustion of industrial property rights changes, then the "closed list" nature of its exclusive rights would preclude any State that adopts the Code from revising the distribution right to include control over copies sold outside the national or regional market.

Art. 4.4 – Right of rental

(1) The right of rental is the right to make available the original of the work or copies thereof for use for a limited period of time for profit making purposes.
(2) The right of rental does not extend to the rental of buildings and works of applied art.

> **Comment:** If the exhaustion rule constrains the scope of the distribution right, the separately articulated "right of rental" would extend control over physical copies with respect to their commercial rental. The rental right does not reach not for profit uses, and therefore non commercial libraries, for example, would not be affected. The proposed Code also sensibly exempts buildings and works of applied art. By contrast, the for-profit rental of works of visual art, such as paintings and sculptures, would be subject to the authorization of the copyright owner, as would audiovisual works, such as motion pictures and videogames. (The rental of sound recordings falls outside the scope of the proposed Code, which does not address the subject matter of neighbouring rights, see art. 1.1, footnote 1.)

Art. 4.5 – Right of communication to the public

(1) The right of communication to the public is the right to communicate the work to the public, including but not limited to[45] public performance[46], broadcasting[47], and making available to the

[44] This rule of exhaustion has to be interpreted coherently with the same concept in the law of industrial property.
[45] The right of communication to the public is divided into three main categories, but the list is open-ended and non-exhaustive.

public of the work in such a way that members of the public may access it from a place and at a time individually chosen by them.

> **Comment:** The proposed Code offers an "open-ended and non-exhaustive" (footnote 45) communication right. The flexibility of the right should enable its adaptation to new conditions, both through expansive interpretation of its terms, and through inclusion of modes of public communication absent from the article's illustrative list. An example of the latter is the right of public display. Footnote 46 mentions "public display (i.e. on as screen)"; it is not clear whether the drafters contemplated public display of a physical copy of a work, such as the display of a sculpture, a painting, or a photograph in a place open to the public such as a restaurant or a gallery. But such a right could come within the scope of art. 4.5
>
> With respect to new modes of communication, the proposed Code adopts the language of the 1996 WIPO Copyright Treaty, art. 8, and the InfoSoc Directive, art. 3(1), covering the "making available" right. It should therefore be clear from the text that the author's exclusive right reaches not only traditional "push" technologies, such as broadcasting, but also individualized on-demand "pull" technologies such as digital streaming and downloading. The following subsection, however, may create some confusion regarding what constitutes a communication "to the public."

(2) A communication of a work shall be deemed to be to the public if it is intended for a plurality of persons, unless such persons are connected by personal relationship.

> **Comment:** The language "intended for a plurality of persons" should not be misunderstood to remove from the scope of the exclusive right the communication of works to one user at a time. Article 4.5(1) should establish that the relevant "intent" with respect to the concept of communication to the public does not focus on whether a particular communication of a work is intended to be received only by a single member of the public, but rather whether an offer to communicate the work was made to "a plurality of persons." To interpret *to the public* to require that a particular delivery or transmission of the work be simultaneously conveyed to a plurality of persons would substantially eviscerate the making available right.
>
> More problematically, however, the exclusion from "the public" of persons "connected by a personal relationship" seems exceedingly vague and potentially overbroad. What, in the digital era, is a "personal relationship"? For example, are Facebook "friends" "connected by a personal relationship"? The drafters' choice to go beyond traditional criteria like "family circle" or "circle of family and its social acquaintance" risks opening up the category of "non public" to an extent inconsistent with the author's limited monopoly over the public communication of her work.

Art. 4.6 – Right of adaptation

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[46] Public performance also includes public recitation, "public communication by loudspeaker or any other analogous instrument transmitting, by signs, sounds or images of the broadcast of the work" (art. 11bis (1)(iii) BC) and public display (i.e. on a screen).

[47] The term 'broadcasting' includes rebroadcasting and retransmitting, by wireless and wired (cable) means.

The right of adaptation is the right to adapt, translate, arrange or otherwise alter the work.

Chapter 5: Limitations[48]

Art. 5.1 Uses with minimal economic significance

The following uses with minimal economic significance are permitted without authorisation, and without remuneration:[49]

> **Comment:** The proposed Code appears to declare that the following uses are of minimal economic significance (even though they are not limited to non commercial uses). Such an automatic designation is problematic, for the apparent assumption may not always be true. If, instead, the phrasing is ambiguous, and minimal economic significance is a threshold condition which must be proved, then who bears the burden? Does the proposed code create a presumption that the uses have minimal economic significance, or (as would normally be the case with exceptions) must the precondition be proved by the defendant?

(1) the making of a back-up copy of a work by a person having a right to use it and insofar as it is necessary for that use;

> **Comment:** The text does not include an obligation to destroy the back-up copy if its maker ceases to have the right to use the work, for example, if she gives the initial copy to someone else. (Compare 17 USC sec 117.) But perhaps that duty is implicit; the use would not be of "minimal economic significance" if it fostered creation and retention of back-up copies replacing source copies put into recirculation.

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[48] For the sake of clarity, limitations have been brought together under several categories. The categories do not however prejudice as to the question, what interests do, or should, in a particular case or even in general, underlie the limitation. In practice, this might be a mixture of several of the interests indicated. The weakness in a particular case of the interest under which the applicable limitation has been categorized does not prejudice as to the (non-) applicability of the limitation.
However, the concrete examples enumerated under those categories do have a normative effect, since art. 5.5 extends the scope of the specifically enumerated limitations by permitting other uses that are similar to any of the uses enumerated, subject to the operation of the three-step test.
In this way, Chapter 5 reflects a combination of a common law style open-ended system of limitations and a civil law style exhaustive enumeration. On the one hand, the extension to similar uses provides the system with a flexibility which is indispensable in view of the fact that it is impossible to foresee all the situations in which a limitation could be justified. On the other hand, the possibility of flexibility is narrowed down in two ways. Firstly, the extension applies to uses 'similar' to the ones expressly enumerated. Thus, a certain normative effect is bestowed on these examples; the courts can only permit uses not expressly enumerated insofar as a certain analogy can be established with uses that are mentioned by the Code.
Secondly, such similar uses may not conflict with the normal exploitation of the work and not unreasonably prejudice the legitimate interests of the author or rightholder, taking account of the legitimate interests of third parties.

[49] With regard to the question, whether a limitation permits the use act in question or not, the Code does not distinguish between analogue and digital uses. However, a distinction might be made in respect of the amount of remuneration due for certain uses; see note 57.

(2) the incidental inclusion of a work in other material;

> **Comment:** It is not clear what "incidental inclusion" means. Accidental and unintentional incorporation of a copyrighted work when the including work's focus was on something else? The amount of the incorporated work was of minimal quantity or duration? Must the inclusion be all of accidental, unfocused and minimal? Moreover, the scope of the exception appears to be considerably broader than the conduct exempted in Berne Conv. art. 10bis(2), which permits reproduction and communication of literary or artistic works seen or heard in the course of an event which is the subject of news reporting, "to the extent justified by the informatory purpose."

(3) use in connection with the demonstration or repair of equipment, or the reconstruction of an original or a copy of a work.

> **Comment:** It is not clear what "reconstruction" means. The exception might cover copying for archival preservation, but the language in fact may not concern copying at all. That is, if "reconstruction" means restoring the original or a copy, for example, of a painting, then it is not apparent how any exclusive rights are implicated in the first place, because the "reconstruction" is occurring directly on the same physical medium. If there is no copying to start with, there is no need for this exception.

Art. 5.2 Uses for the purpose of freedom of expression and information

(1) The following uses for the purpose of freedom of expression and information are permitted without authorisation and without remuneration, to the extent justified by the purpose of the use

> **Comment:** It bears emphasizing that all of the following unremunerated uses can be for commercial purposes. Moreover, it would appear that all of the following uses could be of the work in its entirety. Finally, the purpose of many of the uses seems very open-ended. As a result each raises questions regarding its conformity with the three-step test. Only Wittem Draft art. 5.5 incorporates the three-step test (in part); the juxtaposition suggests the drafters assumed that article 5.2 (and 5.1, 5.3 and 5.4) conform to the requirements, notably, that the exempted uses be confined to "certain special cases," and that they neither "conflict with a normal exploitation of the work" nor "unreasonably prejudice the legitimate interests of the author." Examination of the scope of these exceptions suggests that assumption may not always be correct.

(a) use of a work for the purpose of the reporting of contemporary events;

> **Comment:** This exception is broader than the news reporting exceptions of Berne Conv. art. 10bis, which concern incidental incorporation of works or republication of news articles or broadcasts. Here the focus of the use may be the work of authorship, which can be of any kind, not merely a prior news source. The proposed Code does not, moreover, specify that the work used must itself be the subject of the event. Thus, while news coverage of an exhibition of artworks could, under this exception, show the artworks that are on exhibit, it would seem that the news coverage could also display artworks not on exhibit if they were somehow related to the news story.

(b) use of published articles on current economic, political or religious topics or of similar works broadcast by the media, provided that such use is not expressly reserved;

> **Comment:** The scope of this exception is somewhat constrained because the works subject to the exception are those "broadcast by the media". But "broadcasting" covers a much narrower scope of activity than "communicated" or even "transmitted." Berne Conv. art 10bis(1) appears to be the source of this technological limitation (as well as this subsection's allowance for express reservation). But this subsection omits art. 10bis(1)'s further condition that the source of the copied work "must always be clearly indicated." While art. 5.6(2) clarifies that the attribution right applies to art. 5.2 exceptions, the "source" of a copied work is broader than the name of the author, as it may also include the name of the publication in which the author's work appeared.

(c) use of works of architecture or sculpture, made to be located permanently in public places;

> **Comment:** This exception is somewhat perplexing, although, in fairness, the problem is not of the drafters' making; it derives from art. 5(3)(h) of the InfoSoc Directive, faithfully reproduced here. Nonetheless, since elsewhere the drafters have not been shy about "improving" on the Directive's exceptions, they might also have foregone its ambiguities. In this case, does "made to be located permanently in public places" require investigation of the subjective intent of artist in creating the work? How would the user who encounters a sculpture in a public place know whether the artist intended its placement there, or, for that matter, whatever the artist's intent, whether the sculpture will be located "permanently" in a public place? And what constitutes a "public place"? For example, how should one characterize private places that are open to the public, such as entrances to office buildings, interiors of restaurants and retail establishments, shopping malls . . .

(d) use by way of quotation of lawfully disclosed works[50];

> **Comment:** It is not clear whether this exception implies that the "quotation" (which footnote 50 tells us could be the entire work) must be incorporated in an independent work, or whether the "quotation" may be reiterated standing alone. Is it assumed that the preambular phrase "to the extent justified by the purpose of the use" subsumes the Berne Conv. requirement of consistency with fair practice?

(e) use for the purpose of caricature, parody or pastiche.

(2) The following uses for the purpose of freedom of expression and information are permitted without authorisation, but only against payment of remuneration and to the extent justified by the purpose of the use:

(a) use of single articles for purposes of internal reporting within an organisation;

[50] Although quotations normally will only imply partial use of a work, it may in certain cases be permitted to quote the entire work.

Comment: It is very unclear what "internal reporting within an organization" means. If the exception is meant to permit multiple reproductions of single articles for distribution within an organization, for example to convert one journal subscription into multiple copies of individual articles, it would most likely run afoul of the three-step test. If the exception is meant to concern clipping services, its phrasing does not correspond to the nature of the use, at least not to the extent that the clipping service is external to the organization that is the object of the news clippings.

(b) use for purposes of scientific research.

Comment: The proposed Code's failure to restrict the scope of this exception to non commercial, not for profit scientific research, its lack of definition of the nature of the "purposes of scientific research," as well as its absence of limitation as to the kinds of works subject to the exception, make the consistency of this exception with Berne Conv. art. 9(2) very problematic notwithstanding its requirement that the use be remunerated.

Art. 5.3 – Uses Permitted to Promote Social, Political and Cultural Objectives

(1) The following uses for the purpose of promoting social, political and cultural objectives are permitted without authorisation and without remuneration, and to the extent justified by the purpose of the use:

(a) use for the benefit of persons with a disability, which is directly related to the disability and of a non-commercial nature;
(b) use to ensure the proper performance of administrative, parliamentary or judicial proceedings or public security;[51]
(c) use for the purpose of non-commercial archiving by publicly accessible libraries, educational establishments or museums, and archives[52].

(2) The following uses for the purpose of promoting important social, political and cultural objectives are permitted without authorisation, but only against payment of remuneration, and to the extent justified by the purpose of the use:

(a) reproduction by a natural person for private use, provided that the source from which the reproduction is made is not an obviously infringing copy;

Comment: It is not clear whether the text assumes that private copying in fact promotes "social, political and cultural objectives," or whether the user bears the burden of proving such promotion. The latter may be a difficult task. On the other hand, if such promotion is not susceptible of proof, perhaps even compensated private copying is not justified, at least not under this rubric. Limitation of the exception to source copies that are not "obviously infringing" should ensure that unauthorized peer-to-peer copying is not

[51] The reporting of administrative, parliamentary or judicial proceedings is covered by art. 5.2 (1)(a).
[52] See art. 5 (2)(c) Information Society Directive. It is understood that the exception only covers reproductions made in order to preserve documents, but not any subsequent commercial exploitation of the works that have been archived.

sheltered under a private copying exemption (although illegal P2P services rarely compensate creators and therefore the copying would in any event not qualify for the exception).

(b) use for educational purposes.

Comment: The proposed Code's failure to restrict the scope of this exception to non commercial, not for profit educational purposes, its lack of definition of the nature of the "educational purpose," as well as its absence of limitation as to the kinds of works subject to the exception, make the consistency of this exception with Berne Conv. art. 9(2) very problematic notwithstanding its requirement that the use be remunerated.

Art. 5.4 –Uses for the purpose of enhancing competition

Comment: It is not at all clear what this provision covers. The two instances in (1) do not necessarily involve "competition." Moreover, there may be a fundamental incoherence in incorporating "competition" limitations into laws whose purpose is to endow authors with the competitive advantage that exclusive rights confer.

(1) The following uses for the purpose of enhancing competition are permitted without authorisation and without remuneration, to the extent justified by the purpose of the use:

(a) use for the purpose of advertising public exhibitions or sales of artistic works or goods which have been lawfully put on the market;[53]
(b) use for the purpose of reverse engineering in order to obtain access to information, by a person entitled to use the work.

Comment: Subsection (b) is missing a further element: the purpose of the information to which access is gained by reverse engineering. Compare the Software Directive, art. 6, which authorizes reverse engineering for the purpose of accessing information "necessary to achieve the interoperability of an independently created computer program with other programs."

(2) Uses of news articles, scientific works, industrial designs, computer programs and databases are permitted without authorisation, but only against payment of a negotiated remuneration,[54] and to the extent justified by the purpose of the use, provided that:

(i) the use is indispensable to compete on a derivative market;

Comment: It is unclear what "derivative market" means (and no footnotes clarify the term's meaning or scope). If it includes the market for derivative works then this

[53] The means of advertising as mentioned in art. 5.4 (1) should be normal and proportionate for the business.
[54] The term 'negotiated remuneration' means that the compulsory license fee is to be negotiated in individual cases, and therefore does not imply a role for collective rights management.

provision may be in some tension with the adaptation right set out at art. 4.6 (and mandated by Berne Conv. art. 12).

(ii) the owner of the copyright in the work has refused to license the use on reasonable terms, leading to the elimination of competition in the relevant market and

Comment: If the "relevant market" is the market for the work, then this exception is either incoherent or fundamentally at odds with an essential feature of copyright law, which is to vest the author with exclusive rights.

(iii) the use does not unreasonably prejudice the legitimate interests of the owner of the copyright in the work.

Comment: Why just Step 3 of the three-step test? Is the prior step - that the use will not conflict with a normal exploitation – simply assumed? The prior analysis, however, suggests the contrary determination.

Art. 5.5 – Further limitations

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.[55]

Comment: This provision is exceptionally open-ended, making it suspect under the (unmentioned) first step of the three-step test. The following hypothetical tests the breadth of this article. Consider the Google book-scanning project. Is the use analogous to art 5.2 uses for freedom of "information"? (Are books "information"? Is the content that Google would make available in "snippet" form "information"?) Are the snippets analogous to "quotations" under art. 5.2(1)(d)? Does it matter under art. 5.2(1)(d) that Google makes and retains a copy of the entire work in order to generate the "snippets"? Is the use analogous to art 5.3's category of social-cultural uses? One could contend that the book-scanning program expands public access to "culture" in the form of books in libraries. With respect to the criteria of 5.2(1) (non remunerated uses) – only (d) seems possible, and only if "quotation" permits incorporation of the whole work (in Google's database) and does not imply incorporation in a work of the person making the quotation ("snippets" are displayed as such, not as part of a larger expressive work). (By contrast, analogy to the criteria of 5.3(1) would not assist Google. Subsection (c)'s archiving purpose is limited to non commercial uses, but Google is for-profit.) Art 5.2(1) thus could be interpreted broadly enough to permit Google's book-scanning, storage and communication activities, though such an interpretation is rather aggressive. But given the Wittem Draft's invitation to interpret exceptions "flexibly" and the "legitimate interests of third parties" in "access to information" about books, particularly books whose rightholders may be hard to find, it is conceivable that Google's for-profit uses

[55] See note 48. Note that art. 5.5 does not allow new limitations by blending the criteria of articles 5.1 to 5.3.

could be privileged. Depending on where one stands on the "balance" between creators and entrepreneurial users, this "flexibility" either is necessary to advance the public interest, particularly in light of evolving technology, or is a dangerous erosion of authors' rights, undermining their ability to profit from new markets created by new technologies.

Art. 5.6 – Relation with moral rights

(1) Uses under this chapter are permitted without prejudice to the right of divulgation under article 3.2.[56]

(2) Uses pursuant to articles 5.2, 5.3, 5.4 and 5.5 are permitted without prejudice to the right of attribution under article 3.3, unless such attribution is not reasonably possible.

(3) Uses pursuant to articles 5.1, 5.2, 5.3 and 5.5, are permitted without prejudice to the right of integrity under article 3.4, unless the applicable limitation allows for such an alteration or the alteration is reasonably due to the technique of reproduction or communication applied by the use.

Comment: Subsection (2) appears to suspend the right of attribution (at least fails to preserve the right through a "without prejudice" guarantee) with respect to the article 5.1 exceptions, notably "incidental use" and use for "reconstruction." Subsection (3) suspends the right of integrity with respect to uses to promote competition, notably uses of news articles, scientific works, industrial designs, computer programs and databases necessary to competition in a "derivative market." It is not clear why beneficiaries of the art. 5.1 exceptions should be absolved of any duty to attribute authorship. If "incidental" use clearly were limited to fleeting and minimal incorporation of the work of authorship, one might acknowledge that adding authorship credit might in those circumstances be unreasonable. But subsection (2) already contains a general reasonableness limitation on the attribution right, so the exclusion of art. 5.1 uses must truncate the attribution right even further, without apparent justification. The suspension of the right of integrity with respect to news articles, scientific works, etc. necessary to competition in derivative markets also is puzzling and troublesome, for it suggests that "derivative markets" may include the making of derivative works (see comment to art. 5.4). If so, then not only would the derivative works not require authorization, they also would be dispensed from any obligation of fidelity to the underlying work.

Art. 5.7 – Amount and collection of remuneration

(1) Any remuneration provided for under this chapter shall be fair and adequate[57].

[56] This provision does not prejudice as to the direct application of the fundamental right of freedom of expression. It is however understood that only in highly exceptional cases, such as quotation in the press of important secret documents, there could be a ground for such a correction.

[57] While no distinction of analogue and digital use acts shall be made with regard to the question of the permission of the use act as such, it seems appropriate to differentiate the amount of remuneration due depending on the economic significance of the use act to the user. It should be noted that the use can be made by a third party on behalf of beneficiaries of these limitations, but that in such cases the remuneration to be paid may be higher than if it is made by the privileged individual itself.

(2) A claim for remuneration according to articles 5.2(2) and 5.3(2) can only be exercised by a collecting society.

> **Comment:** The requirement that collecting societies make the claims for remuneration for compulsorily-licensed private copying, scientific research and educational uses would seem to reduce the transactions costs associated with the implementation of the remuneration right. But why, then, does art 5.4(2) explicitly exclude collecting societies?

Art. 5.8 – Limitations prevailing over technical measures[58]

In cases where the use of copyright protected works is controlled by technical measures, the rightholder shall have an obligation to make available means of benefiting from the uses mentioned in articles 5.1 through 5.5 with the exception of art. 5.3(2)(a) [private copying], on condition that

(a) the beneficiary of the limitation has lawful access to the protected work,
(b) the use of the work is not possible to the extent necessary to benefit from the limitation concerned, and
(c) the rightholder is not prevented from adopting adequate measures regarding the number of reproductions that can be made.

> **Comment:** The exclusion of private copying from the rightholder's obligation to "make available means of benefiting from the uses mentioned in articles 5.1 through 5.5" appears to mean that the rightholder can technologically override the private copying exception. Whether this provision in effect neutralizes that exception depends on norms the Wittem Draft does not address, notably whether circumventing technological protections is prohibited. Under the InfoSoc Directive, art. 6, and the WIPO Copyright Treaty, art. 11, member States are obliged to protect against circumvention; assuming those norms prevail, it would seem that the effective subsistence of the private copying exception is left to the rightholder's choice whether or not to apply technological measures. But if the Wittem Draft is meant to coexist with EU norms, then art. 5.8 may be in some tension with InfoSoc Directive art. 6.4, which obliges rightholders to permit users to benefit from a variety of exceptions, including private copying, although rightholders may employ technical measures to limit the number of private copies.

[58] Note that the Code does not otherwise deal with the legal protection of technical protection measures.