

EU-China IP Academic Forum, 22 October 2019  
欧盟-中国知识产权学术论坛，2019年10月22日  
EU TDM LEGISLATION – A MODEL FOR CHINA?  
欧盟的新版文本与数据挖掘立法：中国的模板?  
Prof. Dr. Martin Sentleben 博士、教授



厦门大學 知识产权研究院

INTELLECTUAL PROPERTY RESEARCH INSTITUTE OF XIAMEN UNIVERSITY

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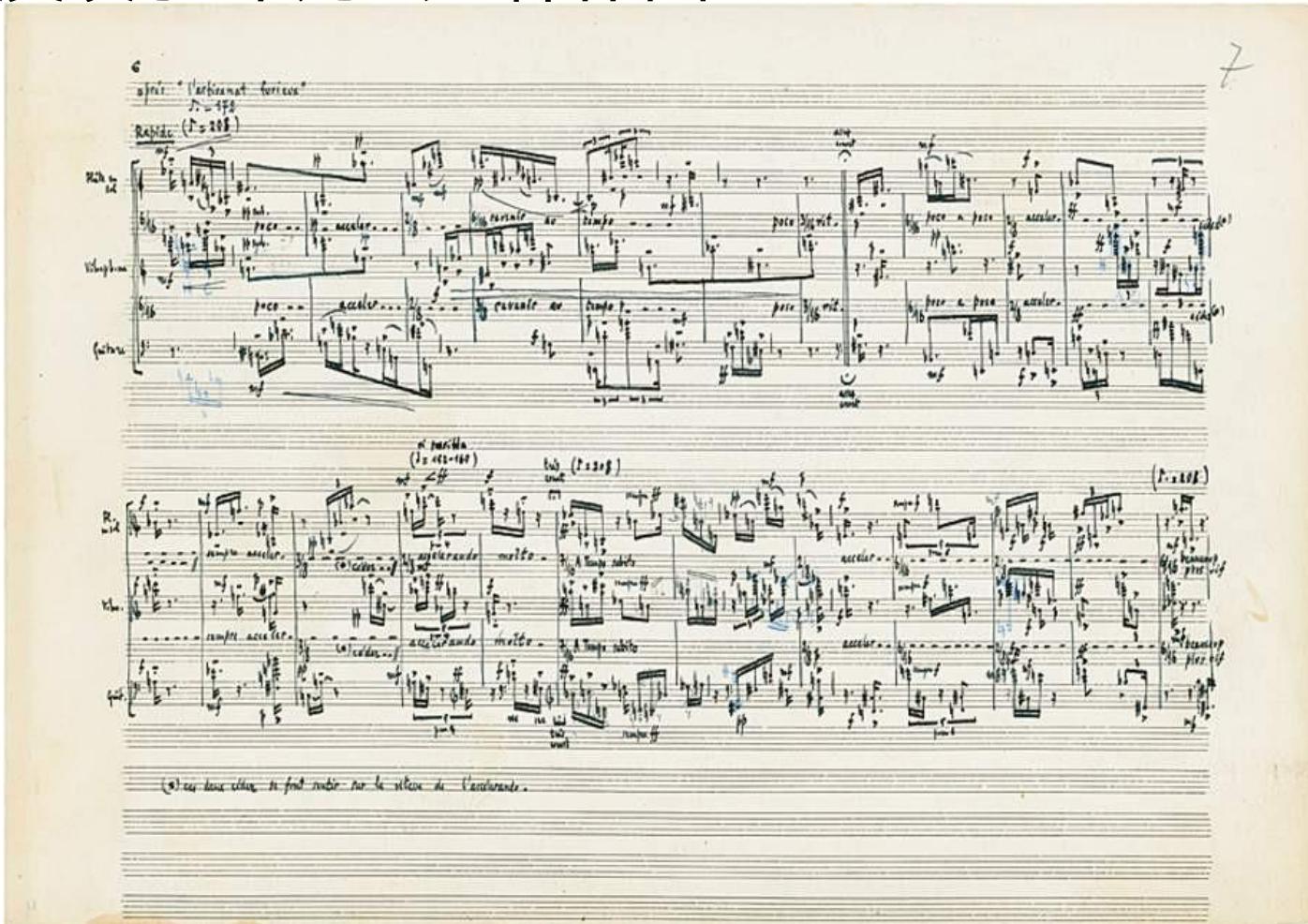
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# Painting like Jackson Pollock? 像杰克逊·波洛克一样绘画？



Jackson Pollock, Number 1 (1949)  
杰克逊·波洛克《第1号》（1949年）

# Composing like Pierre Boulez? 像皮埃尔·布列兹一样作曲?

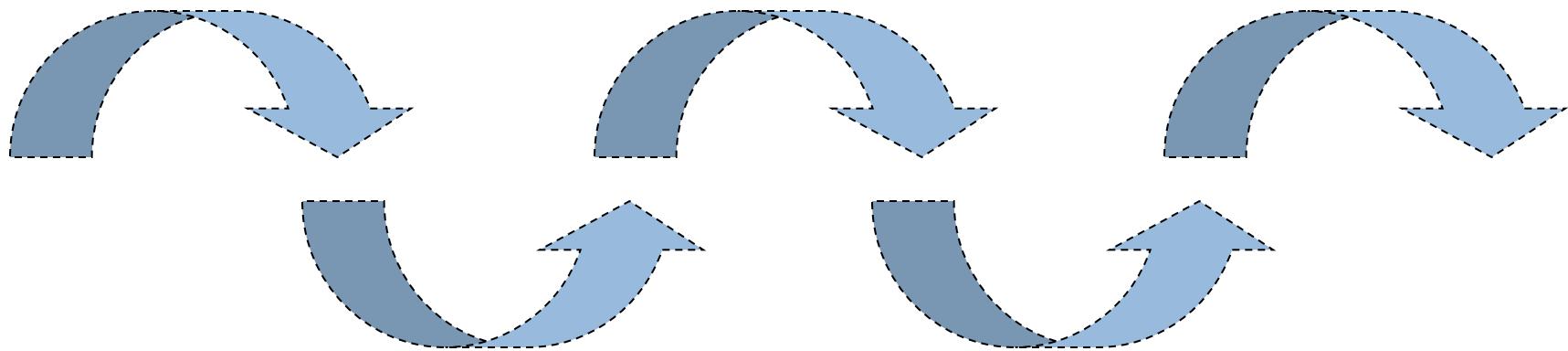


Pierre Boulez, Le marteau sans maître (1955)  
皮埃尔·布列兹《没有主人的锤子》(1955年)

# Peculiar remix dimension 奇怪的混编维度

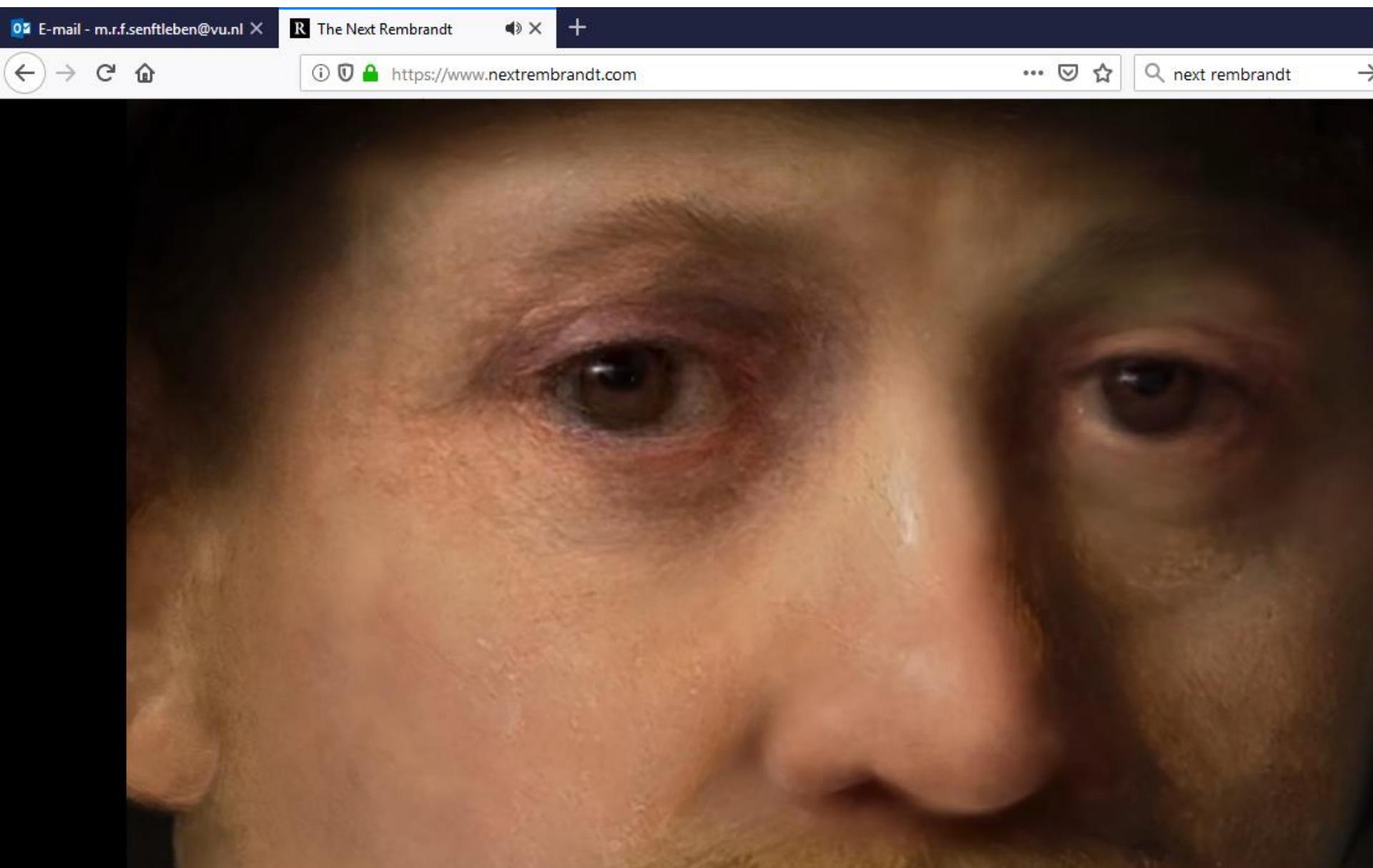
- robot incapable of creating works 机器人不能创作作品
- without access to human source material 无法获取人类素材
- crucial: use of existing works for training 关键：使用现有作品进行训练

**Human 人类**



**Robot 机器人**

# Not a mere theoretical question 不仅是个理论问题



# Not a mere theoretical question 不仅是个理论问题

The screenshot shows the homepage of the Musimap website. At the top, there is a browser header with a 'X' button, a '+' button, the URL 'https://www.musimap.net/home', a search bar containing 'musimap', and various icons for bookmarking and sharing. Below the header is the Musimap logo, which consists of a stylized 'M' icon made of blue and yellow lines, followed by the word 'musimap' and the tagline 'cognitive technologies'. A navigation menu below the logo includes links for VISION, TECHNOLOGY, MARKET, SOLUTIONS, ENGINE, TEAM, BLOG, and PRESS. The main content area features a large, semi-transparent blue and purple swoosh graphic. Overlaid on this graphic is the text '“Personal Music Advisor”' in white and yellow. At the bottom left, there are two circular arrows, one pointing left and one pointing right.

**Musimap's technology decodes the DNA of music, understands the listeners' contextual needs, and solves the complex problem of music discovery.**

**Our comprehensive set of APIs allows our clients to reach unprecedented personalized recommendation accuracy and—thanks to our API interface—achieve new, enhanced user experiences to answer the end-consumers needs**

# Digital challenges 数字化挑战

- broad right of reproduction recognized at international level
- 国际上对复制权的广泛认可
- Article 9(1) of the Berne Convention
- 《伯尔尼公约》第9条第1款

‘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.’

“受本公约保护的文学艺术作品的作者，享有授权以任何方式和采取任何形式复制这些作品的专有权利。”

## Article 1(4) WCT: Agreed Statement

### 《世界知识产权组织版权条约》第1(4)条：议定声明

- regulates the application of Berne Convention provisions to the digital environment

- 规定《伯尔尼公约》条款在数字环境中的适用性

'The reproduction right, as set out in Article 9 of the Berne Convention, and the exceptions permitted thereunder, fully apply in the digital environment, in particular to the use of works in digital form. It is understood that the **storage of a protected work in digital form in an electronic medium constitutes a reproduction** within the meaning of Article 9 of the Berne Convention.'

“《伯尔尼公约》第9条所规定的复制权及其允许的例外，完全适用于数字环境，尤其是以数字形式使用作品的情况。不言而喻，在电子媒体中以数字形式存储受保护的作品，构成《伯尔尼公约》第9条意义下的**复制**。”

# The analogue past... 模拟式的过去



# ...the digital present 数字式的今天



# Robot-related forms of copying

## 机器人相关的复制形式

source material  
in a format which  
robot can read  
directly

机器人可以直接  
读取的素材格式

source material  
which must first be  
brought into a format  
which robot can read

首先必须将素材转化  
成可机读格式



# Same challenge 同样的挑战

**not only  
in the EU  
不仅在欧  
盟**

**but also  
in China  
也出现在  
中国**



# CURRENT EU FRAMEWORK 欧盟当前的框架



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# Problem: restrictive EU legal framework 问题：欧盟的限制性法律框架

broad  
exclusive  
rights  
广泛的独占  
性权利

closed list of  
specific  
exceptions  
特定例外的封闭  
清单



# Traditional research exception 传统的研究例外规定

‘...use for the **sole purpose of illustration for teaching or scientific research**, as long as the source, including the author's name, is indicated, unless this turns out to be impossible and to the extent justified by the non-commercial purpose to be achieved;...’ (Art. 5(3)(a)

Copyright Directive 2001/29)

“...**仅用于教学科研解释的**，只要注明包括作者姓名在内的出处（除非无法注明）且在待实现的非商业目的所能合理解释的范围内； ...”  
( 2001/20号《版权指令》第5(3)(a)条)

# New Article 3(1) DSM Directive

## 新的《单一数字市场版权指令》第3(1)条

- continued focus on research community
- 继续关注科研界
- ‘Member States shall provide for an exception to [reproduction rights] for reproductions and extractions **made by research organisations and cultural heritage institutions** in order to carry out, for the purposes of scientific research, text and data mining of works or other subject matter to which they have lawful access.’
- “成员国应当规定，**科研机构和文化遗产机构为科学的研究目的进行文本和数据挖掘，对其合法获取的作品或其他内容进行复制与提取的行为**，属于 [复制权] 的例外。”

# New Article 3(1) DSM Directive

## 新的《单一数字市场版权指令》第3(1)条

- focus on research institutions problematic?
- 以科研机构为关注点有问题吗？
- a *contrario* argument with regard to commercial research?
- 关于商业研究存在相反论点?
  - apparently limitation of copyright deemed necessary to permit text-and-data mining
  - 明显限制了进行文本和数据挖掘所必需的版权
  - commercial text-and-data mining thus automatically infringing?
  - 商业性文本和数据挖掘因而自动构成侵权？

# New Article 4 DSM Directive

## 《单一数字市场版权指令》第4条（新）

- provides for general limitation of copyright  
规定了对版权的一般限制
- ‘...for reproductions and extractions of lawfully accessible works and other subject matter for the purposes of text and data mining.’  
(Article 4(1))  
“...以文本和数据挖掘为目的，对合法获取的作品或其他内容进行复制与提取的行为。”（第4(1)条）
- but: limitation only applies if use  
但是：只有符合下列条件的使用才适用限制规定
- ‘...has not been expressly reserved by their rightholders in an appropriate manner, such as machine-readable means in the case of content made publicly available online.’  
(Article 4(3))  
“权利人没有以适当方式明确保留... [其使用]，例如针对网上公开提供的内容采取机读方式 [进行使用]。”（第4(3)条）

# Need for ‘machine-readable’ means 需要 ‘机读’ 方式

- hope for evolution of shared technical standard of robot and content industry
  - 希望发展机器人和内容行业共通的技术标准
- obligation to comply with specific technical standard?
  - 有义务遵守具体技术标准?
- ‘The enjoyment and the exercise of [copyright] shall not be subject to any formality; ...’ (Article 5(2) BC)
  - ‘享受和行使 [版权] 不需履行任何手续; ...’ (《伯尔尼公约》第 5(2)条)
- non-compliance valid defence argument?
  - 不合规成为有效的辩护论点?
- need for robot industry to check mining entitlement case-by-case?
  - 需要机器人行业逐例审查是否具备挖掘权限?

# ALTERNATIVE SOLUTIONS? 替代解决方案?



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## Article 10 WCT: Agreed Statement

### 《世界知识产权组织版权条约》第10条：议定声明

‘It is understood that the provisions of Article 10 permit Contracting Parties to **carry forward and appropriately extend** into the digital environment limitations and exceptions in their national laws which have been considered acceptable under the Berne Convention.

“不言而喻， [《版权条约》] 第10条的规定允许缔约方将其国内法中依《伯尔尼公约》可接受的限制与例外沿用并适当延伸到数字环境。

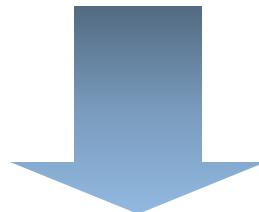
Similarly, these provisions should be understood to permit Contracting Parties to **devise new exceptions and limitations** that are appropriate in the digital network environment.’

同样，上述规定应被理解为允许缔约方**制定**适宜数字网络环境的新例外与限制。 ”

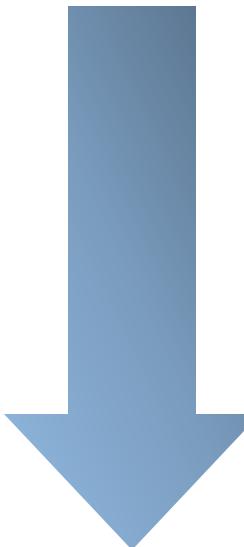
# Family picture: three-step test

## 全家福：三步检验法

Article 9(2) BC 《伯尔尼公约》第9(2)条



Article 13 TRIPS  
《知识产权协定》 第  
13条



Article 10 WCT  
《世界知识产权组织版  
权条约》第10条

# Highest impact factor 最高影响因子

- ‘Members shall confine limitations or exceptions to exclusive rights to certain special cases which do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the right holder.’ (Article 13 TRIPS)
- “各成员对专有权作出的任何限制或例外规定仅限于某些特殊情况，且与作品的正常利用不相冲突，也不得无理损害权利持有人的合法权益。”（《知识产权协定》第13条）
- potential basis for WTO dispute
- 引起世贸组织成员国间争端的潜在依据
- already tested in EU/U.S. case on Section 110(5) U.S. Copyright Act (WT/DS160/R)
- 已经在欧盟 / 美国涉及《美国版权法》第110(5)节有效性的案件中受到检验 (WT/DS160/R)

# Deriving new robot rules from the flexible three-step test

从灵活的三步检验法中产生新的机器人规则

broad  
exclusive  
rights

广泛的独占  
性权利

open-ended  
three-step  
test

开放式三步  
检验法



# Interpretation of test criteria 检验标准的解读

- certain special case 某些特殊情况
  - specific form of use, limited number of beneficiaries
  - 具体使用形式、有限的受益人数量
  - room for considering policy justification?
  - 政策合理性考虑的空间?
- no conflict with a normal exploitation 与正常利用不冲突
  - currently exploited and potential future markets
  - 目前已利用市场与潜在未来市场
  - room for normative considerations
  - 规范性考虑的空间
- no unreasonable prejudice to legitimate interests 不得无理损害合法权益
  - refined proportionality test 比例检验细化
  - reduction to reasonable level by providing for the payment of **equitable remuneration** 通过规定支付**合理报酬**, 将损害减少到合理水平

# Parallel with analogue past? 与模拟式的过去并行？



Inherent limit of copyright protection?  
版权保护的固有限制?

**use of a work**

**‘as a work’**

**将作品 ‘作为作品’ 进行使用**

# Issue falling under the three-step test? 三步检验法的问题？

- ‘Members shall confine **limitations or exceptions to exclusive rights** to certain special cases which do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the right holder.’ (Article 13 TRIPS)
- “各成员对**专有权**作出的任何**限制或例外规定**仅限于某些特殊情况，且与作品的正常利用不相冲突，也不得无理损害权利持有人的合法权益。”（《知识产权协定》第13条）
- inherent limit of non-consumptive use a limitation or exception in this sense?
- 非消耗性使用的内在限度，是否属于限制或例外？

THE END. THANK YOU! 谢谢!  
Contact 联系方式 [m.r.f.senftleben@vu.nl](mailto:m.r.f.senftleben@vu.nl)



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INTELLECTUAL PROPERTY RESEARCH INSTITUTE OF XIAMEN UNIVERSITY



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