Lord Beaverbrook went onto state that,

> *"The Bill does not and cannot cover every aspect of the law of copyright."*[73]

Thus the preceding statements indicate an intention on the part of the legislature to preserve and uphold a public interest exception to copyright within the English legal framework, which is designed to act as a mechanism by which to balance the competing interests of copyright holders and the public, where the statutory exceptions introduced for such purpose by the legislature are inadequate to achieve such a balance.

Therefore it is possible to argue that s.171(3) which constitutes a general statement enabling the judiciary to take into account considerations relating to the public interest in enforcing copyright was designed to ensure that the judiciary would remain free to develop a general public interest defense outside the bounds of the statute.[74] This argument is further supported by Lord Beaverbrook's statement that,

> *"[s. 171(3)] acknowledges the continuing effect of case law without attempting to codify it, thus leaving the law on this matter where it has always been, in the hands of the courts. "*[75]

Hence it may be concluded that s.171(3) of the CDPA clearly preserves the possibility of the introduction of a broad based public interest exception to copyright in English law.

B. France

The current legal framework on French Copyright law is based upon the 1957 Law on Literary and Artistic Property[76] as amended by the

73 *Id. Hansard* H.L. Vol.491 col.77.
74 *Id.*
75 *Id.*
76 Law No.57-298 of March 11, 1957, on the Literary and Artistic Property.

1985 Law on Author's Rights and the Rights of Performers.[77] Both copyright and author's rights have further been codified in the 1992 Intellectual Property Code.[78]

The legislative history preceding the enactment of both Laws carry indications as to the need to balance the rights of authors with that of the public interest.

During the Parliamentary debates which led to the adoption of the 1957 Law, Marcel Boutet Vice-President and Rapporteur of the Intellectual Property Committee of the Government described the 1957 legislation as carrying into effect,

> *"…the synthesis of author's rights and the* ***interests of the public****, in the preeminence of the creator.*[79]*"*(emphasis added)

The Law of 1957 introduced certain statutory exceptions to the rights of authors, which were considered by one commentator to represent certain concessions to copyright in the public interest.[80] It was also considered as a recognition of the right of the public to information and culture.[81]

Similarly during the Parliamentary debates preceding the enactment of the Law of 1985, the then Minister of Culture, Jack Lang expressed the belief that the Bill represented a balance between the rights of authors and performers and the needs of various interested parties, including the public interest.[82]

Notwithstanding the sentiments expressed by the promoters of these laws and the strong tradition of cultural heritage in French law

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77 Law No. 85-660 of July 3, 1985 on Authors' Rights and on the Rights of Performers, Phonogram and Videogram Producers and Audiovisual Communication Enterprises.

78 Law No. 92-597 of July 1, 1992, on the Intellectual Property Code.

79 M Boutet, *General Considerations* [1958] XIX R.I.D.A. 13 as cited in Gillian Davis *Copyright and the Public Interest* Sweet and Maxwell (2nd Ed. 2002) at 152.

80 A Tournier *An Appraisal of the Law* [1958] XIX RIDA 79 as cited in Davis at 159.

81 E. Derieux*, Bases de donnés et droit du public à l'information* 21 Les Petites Affiches 1998, 13, as cited in Davis at 159.

82 *Journal Officiel*, session of April 2, 1985.as cited in Davis at 157.

that has consistently viewed copyright as a means by way of which such heritage may be disseminated to the public, French copyright law is considerably tilted in favor of protecting the rights of the author as opposed to the free communication of thoughts and opinions under which each citizen may … speak, write and print freely as guaranteed under Article 11 of the Declaration of Human Rights.[83]

The limitations to the rights of authors in French law are rigidly defined and the creation of novel exceptions is reserved for the legislature, leaving the courts with the limited function of applying such exceptions as provided by statute.[84]

However in recent times there has been greater willingness on the part of the legislature to impose new restraints upon the exercise of exclusive rights.

This is reflected for example by the legal measures introduced under the Intellectual Property Code, which allows for a work to be used without authorization where there is manifest abuse in the exercise of the moral right of disclosure as well as other rights of exploitation by a deceased author's representative.[85]

Further a new statutory exception was introduced to remedy the the restrictive interpretation given by the *Cour de Cassation* to the "brief-quotation exception" in the *Utrillo* case of 1993.[86] The case concerned the reproduction of certain works of the painter Utrillo in a miniature catalogue of a sale by public auction. The Court held that the reproduction of a work in its entirety, regardless of its format, cannot be held as a brief quotation under the brief-quotation exception to copyright. The new statutory exception permits the complete or

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83 As noted by Marcel Boutet *"French law had from the beginning to choose between two intellectual tendencies; one which attributed the pre-eminence to the person of the author and the other that envisaged above all the purpose of the book, that is to say it's communication to the public." See* Boutet, *General Considerations* [1958] XIX R.I.D.A. 13.

84 *See* Law No.57-298 of March 11, 1957, on the Literary and Artistic Property L. 122-5-3.

85 *Id.* L.111-3, 121-3 and 122-9 as cited in Davis at 169.

86 *Cass ass. Plen.,* November 5, 1993; [1994] 159 RIDA, 320 as cited in Davis at 164.

partial reproduction of works of graphic or three dimensional art intended to appear in the catalogue of sale by public auction.[87]

In yet another decision the *Cour de Cassation* significantly upheld the public's right to information in allowing journalists to broadcast short extracts of sporting events in news programs notwithstanding the exclusive rights of the copyright holders to broadcast these events.[88]

A new law relating to freedom of communication further extends this approach by specifically limiting the exclusive right to broadcast by providing that major events may not be exclusively broadcast in such a way that an important section of the public maybe deprived of the possibility of following them live or recorded on the free television service.[89]

As noted by Davis the enactment of these new exceptions seem to reflect a welcome tendency towards greater recognition by the legislature of the need to take into account the public's right to information in the copyright context.[90]

In another decision the *Tribunal de Grande Instance* of Paris[91] was faced with the issue as to whether the unauthorized reproduction of twelve paintings of Utrillo in a program sought to be broadcast over television could be permissible use of such works. At the first instance level the Court although recognizing that the complete reproduction of a work could not come under the brief-quotation exception upheld that such use was permissible in the light of the freedom of information of the public under Article 10 of the ECHR which takes precedence over national law.[92] It determined that the right of the public to information included the right to be informed rapidly and in an appropriate manner of **newsworthy cultural events** and that the

87 Law number 97-283 of March 27,1997 Art. 17.
88 Cass lere civ. February 6, 1996 *FOCA v. FR3, Legipresse* Number 133, III, 87.
89 Law number 2000-179 of August 1, 2000 (Art. 21) as cited in Davis 168.
90 Davis at 164.
91 *Jean Fabris v. Ste FRANCE 2* Trib. de grande instance de Paris, 3rd ch, February 23,1999.
92 Davis at 169.

unauthorized reproduction did not interfere with the normal exploitation of the work.

This decision was however overturned by the Court of Appeal,[93] which significantly observed that the inherent principles of author's rights effected an adequate equilibrium between the freedom of expression and copyright by recognizing an exception for the accessory usage of works. It went on to hold that in this instance the Defendants could not proft from such exception since the use of the paintings did not constitute an acccessory use of the copyrighted works. The Court emphasized that under Article 10(2) the freedom of expression and the right to information was subject to the protection of the rights of third parties and that hence permission should have been sought to show the paintings.[94]

This in turn brings us to a consideration as to the conduciveness of the French copyright system to the introduction of a public interest exception to copyright.

The French copyright system has always acknowledged the need to achieve a balance between copyright and the interests of the public. As Davis points out this is reflected throughout the development of French copyright law. However although in recent times there has been a clear trend on the part of the courts and the legislature towards limiting the exclusive copyright in the interests of promoting the right to information, these limitations have by far been introduced in relation to specific situations and to a limited degree. As such there is as yet no doctrine in French law that is capable of general application, that could be applied to a wide variety of situations in order to bring about a balance between copyright and the freedom of expression.

However it is noted that the perceptible trend towards greater recognition of the need to achieve an adequate equilibrium between the rights of authors and performers and the public interest as well as

93 Cour d'appel de Paris, 4th. ch. May 30,2001.

94 Alain Strowel and François Tulkens *Equilibrer La Liberte D'Expression et Le Droit D'Auteur* in *Droit d'auteur et liberté d'expression: Regards francophones, d'Europe at d'ailleurs* 9 at 30 Larcier (2006).

the strong tradition of cultural heritage in French copyright law may furnish the necessary conditions to render the copyright legal framework of France conducive to the introduction of a public interest exception to copyright.

C. Germany

The copyright framework of Germany has strong constitutional underpinnings by virtue of its being derived from the basic rights guaranteed under the *Grundgesetz* (Constitution) of Germany.

The economic rights of copyright holders are protected under the right to property in Article 14 of the *Grundgesetz*. Article 14 (2) however takes cognizance of the fact that 'properties impose duties and that its use should also serve the public interest.'[95]

Under Article 3 of the Constitution expropriation is permitted only in the public interest. It may take place only by or pursuant to law which provides for compensation for such expropriation. The compensation shall be determined upon just consideration of the public interest and of the interests of the persons affected.

In addition the moral rights of authors are grounded upon the constitutional guarantee of human dignity under Article 1 and the right to personal freedom of the individual which is inviolable and may only be encroached upon pursuant to a law.[96]

It is therefore evident that as far as the economic rights of the author are concerned, the constitutional underpinning under Article 14 im-

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95 E. Ulmer *Lettre d'Allemagne* [1965] Copyright 275 at 282 "*I believe in particular that the constitutional guarantee of property applies to copyright. The basic law guarantees property. In constitutional language that means that intellectual property is also guaranteed.".*

96 Decision of the Federal Supreme Court, November 26,1945, 15 B.G.H.Z. 249. Recognized the existence of a general right to personality grounded in the Basic Law *(Grundgesetz),* the court reasoned that the expression of ideas is an emanation of the personality of the author and that therefore the author had the right to decide if, and in what form his writings should be distributed to the public.