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A second Dutch deviation from the Copyright Directive concerns the three-step test of its Article 5(5). According to this section all the foregoing restrictions of this Article 5 shall only be *applied* in certain special cases which do not conflict with a normal exploitation of the work or other protected subject matter and do not unreasonably prejudice the legitimate interests of the right holder. The formula of the three-step test is to a large degree, but not completely, copied from a number of older copyright treaties. But the three-step test in these older treaties is explicitly only addressed to the contracting states, whereas the formula in the Directive does not mention anymore these contracting states. The three-step test in Article 5(5) Copyright Directive has other addressees: the citizens and the courts directly, although the provision is not - as a Directive rule - directly invokeable in national courts; first the Directive provision has to be enacted in the national law. But after enactment this newly addressed three-step test is intended as a new protection of the copyright owner against an eventual abusive user's appeal in court to any official copyright restriction. This three-step test has been omitted in the Dutch Implementation Act, on the Dutch governments' reasoning that the older treaty-based three-step tests had never been directly addressed to the courts. This fundamental mistake has in the mean time been closely copied by the Belgian legislature and maybe other legislators as well. It is clear that in this way copyright owners in the Netherlands and Belgium, and possibly other nations, will not profit from the extra protection, intended by Article 5(5) Directive.

What about the result from these deviations from the Directive? Would it be possible for the national courts to apply the provision of Article 5(5) Directive indirectly, as a Directive-oriented interpretation of the national law? This question has to be answered in the negative. According to several court decisions, such Directive-oriented interpretation of the national law finds its limit in cases where this would run counter to the security of law of an interested party. Indeed, the indirect application of the three-step provision by the national courts would run counter to the security of law of the *users* of protected works, who had thought they could rely on the *absence* of any three-step provision in the national law. The final result of all this is, just as in the case of the first Dutch deviation from the Directive mentioned earlier, that the eventual damages of copyright owners resulting from this state of affairs can be claimed back from the states which have not implemented correctly the Directive (Frankovich): the Netherlands and Belgium and eventually other states.