EU Copyright 20 Years After the InfoSoc Directive – Flexibility Needed More Than Ever

Senftleben, M.

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13. EU copyright 20 years after the InfoSoc Directive – flexibility needed more than ever

Martin Senftleben[1]

I INTRODUCTION

In the copyright arena, the European Union (EU) is a champion of a restrictive approach to copyright limitations and exceptions (L&Es). In the 2001 Information Society Directive (ISD),[2] the EU combined a closed catalogue of permissible L&E prototypes[3] with the three-step test known from Article 9(2) of the Berne Convention (BC), Article 13 of the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) and Article 10 of the WIPO Copyright Treaty (WCT).[4] Stipulating that L&Es could only be applied in certain special cases that do not conflict with a normal exploitation of the work and do not unreasonably prejudice legitimate interests of copyright holders,[5] the EU created a worst-case scenario for cultural remix activities, socially valuable access to the cultural landscape and technological innovation.[6] The closed list of pre-defined L&E prototypes, if anything, could have the advan-

[1] Professor of Intellectual Property Law and Director, Institute for Information Law (IViR), University of Amsterdam; Of Counsel, Bird & Bird, The Hague.

[2] Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001, on the harmonisation of certain aspects of copyright and related rights in the information society (*OJ* 2001 L 167, 10).

[3] Article 5(1) to (4) ISD.

[4] For a more detailed discussion of this regulatory model, see Martin R.F. Senftleben, *Copyright, Limitations and the Three-Step Test – An Analysis of the Three-Step Test in International and EC Copyright Law*, Den Haag/London/New York: Kluwer Law International 2004, 245–282.

[5] Article 5(5) ISD.

[6] Martin R.F. Senftleben, "Bridging the Differences Between Copyright's Legal Traditions – the Emerging EC Fair Use Doctrine", *Journal of the Copyright Society of the U.S.A.* 57 (2010), 521 (528–538).

tage of enhanced legal certainty.[7] This potential advantage, however, is beyond reach because of the unfortunate combination with the open-ended three-step test. If an EU Member State adopts and further specifies L&Es from the EU catalogue, these specific national L&Es may still be challenged on the grounds that they are incompatible with the three-step test. In other words, national L&Es – no matter how narrowly they are circumscribed in domestic legislation – may further be restricted by invoking the three-step test.

On the one hand, national L&Es are thus straitjacketed. Their validity is hanging by the thread of compliance with the abstract criteria of the three-step test. For this reason, legal certainty in the field of L&Es is sought in vain and cultural, social and economic benefits which a robust L&E infrastructure could provide – more cultural follow-on innovation, more participatory culture, more breathing space for new products and services[8] – are beyond reach. On the other hand, the three-step test itself may only be invoked to further restrict national L&Es. Unlike fair use provisions with comparable abstract criteria,[9] the EU manifestation of the three-step test cannot be employed by the courts to create new, additional forms of permitted unauthorized use case by case. Hence, it is impossible to realize the central advantage of flexibility that is inherent in

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[7] See Herman Cohen Jehoram, "Fair use – die ferne Geliebte", *Tijdschrift voor auteurs-, media en informatierecht* 1998, 174; Herman Cohen Jehoram, "Implementatie van de Auteursrechtrichtlijn – De stille strijd tegen een spookrijder", *Nederlands Juristenblad* 2002, 1690; Herman Cohen Jehoram, "Nu de gevolgen van trouw en ontrouw aan de Auteursrechtrichtlijn voor fair use, tijdelijke reproductie en driestappentoets", *Tijdschrift voor auteurs-, media en infomatierecht* 2005, 153; Herman Cohen Jehoram, "Wie is bang voor de driestappentoets in de Auteursrechtrichtlijn?", in: Nico A.N.M. van Eijk/P. Bernt Hugenholtz (eds), *Dommering-bundel*, Amsterdam: Otto Cramwinckel 2008, 57.

[8] See the overview of rationales given by Pamela Samuelson, "Justifications for Copyright Limitations and Exceptions", in: Ruth Okediji (ed.), *Copyright Law in an Age of Limitations and Exceptions*, Cambridge: Cambridge University Press 2017, 12–59.

[9] For a comparative analysis, see Martin R.F. Senftleben, "Comparative Approaches to Fair Use: An Important Impulse for Reforms in EU Copyright Law", in: Graeme B. Dinwoodie (ed.), *Methods and Perspectives in Intellectual Property*, Cheltenham: Edward Elgar 2013, 30–67. For a description of the results achieved in the United States on the basis of an open-ended fair use provision, see B. Beebe, "An Empirical Study of U.S. Copyright Fair Use Opinions, 1978–2005", *University of Pennsylavania Law Review* 156 (2008), 549; Matthew Sag, "Predicting Fair Use", *Ohio State Law Journal* 73 (2012), 47; Pamela Samuelson, "Unbundling Fair Uses", *Fordham Law Review* 77 (2009), 2537; Pamela Samuelson, "Possible Futures of Fair Use", *Washington Law Review* 90 (2015), 815; Peter Jaszi, "Quoting Copyrighted Sports Content Under Fair Use After *Google v. Oracle*", in: Martin R.F. Senftleben, Joost Poort et al. (eds), *Intellectual Property and Sports – Essays in Honour of Bernt Hugenholtz*, The Hague/London/New York: Kluwer Law International 2021, 361–371.

open norms with flexible criteria, such as the three-step test.[10] The EU system provides neither sufficient flexibility for cultural, social and economic needs which flexible copyright L&Es could satisfy, nor does it offer sufficient legal certainty for users of copyrighted material which, at least theoretically, could be an advantage of precisely defined L&Es.

EU policymakers, however, are unwilling to change course. Instead of departing from this dysfunctional L&E system, the 2019 Directive on Copyright in the Digital Single Market (CDSMD)[11] led to the adoption of L&Es that are even more specific than the prototypes laid down in the ISD.[12] Despite the more specific (and restrictive) delineation of L&Es, the EU legislator deemed it necessary to subordinate the application of these use privilege to additional scrutiny in the light of the three-step test.[13] Important room for text and data mining,[14] educational use,[15] and use by cultural heritage institutions[16] is thus further reduced because of the chilling effect that can arise from the three-step test as an additional risk factor for users relying on a copyright limitation.[17] In addition, the Court of Justice of the European Union (CJEU) has closed the door to an external balancing of competing fundamental rights and interests outside of the overly restrictive copyright *acquis*. The Court held in *Pelham* that breathing space for satisfying cultural, social and economic needs in copyright law had to be found internally: within the dysfunctional amalgam of precisely defined L&Es and the three-step test.[18]

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[10] See Martin R.F. Senftleben, "The International Three-Step Test – A Model Provision for EC Fair Use Legislation", *Journal of Intellectual Property, Information Technology and E-Commerce Law* 1 (2010), 67–82; Martin R.F. Senftleben, "Fair Use in the Netherlands – a Renaissance?", *Tijdschrift voor auteurs-, media- en informatierecht* 2009, 1; Jonathan Griffiths, "The 'Three-Step Test' in European Copyright Law – Problems and Solutions", *Intellectual Property Quarterly* 2009, 489 (495); Christophe Geiger, "The Three-Step Test, a Threat to a Balanced Copyright Law?", *International Review of Intellectual Property and Competition Law* 37 (2006), 683; Kamiel J. Koelman, "De nationale driestappentoets", *Tijdschrift voor auteurs-, media en informatierecht* 2003, 6.

[11] Directive 2019/790 of the European Parliament and of the Council of 17 April 2019 on Copyright and Related Rights in the Digital Single Market and Amending Directives 96/9/EC and 2001/29/EC (*OJ* 2019 L 130, 92).

[12] Articles 3 to 6 CDSMD.

[13] Article 7(2) CDSMD.

[14] Articles 3 and 4 CDSMD.

[15] Article 5 CDSMD.

[16] Articles 3 and 6 CDSMD.

[17] See Senftleben, n 6, 529–532.

[18] CJEU 29 July 2019, case C-476/17, Pelham, paras 60–62. For a more detailed analysis, see Martin R.F. Senftleben, "Flexibility Grave – Partial Reproduction Focus and Closed System Fetishism in CJEU, *Pelham*", *International Review of Intellectual Property and Competition Law* 51 (2020), 751–769.

The following analysis sheds light on these developments and the increasing need for a new approach and more flexibility in EU copyright law. To lay groundwork for the discussion, the following section 2 describes the role of the three-step test in international copyright law. In particular, this discussion shows that it is wrong to reduce the three-step test to the function of constraining L&Es. The international three-step test is the most powerful basis and engine of new L&Es, in particular use privileges that become necessary in the digital environment. Bearing this insight in mind, section 3 sheds light on the dysfunctional EU approach which stifles L&Es by employing the three-step test exclusively as an additional control mechanism and straitjacket of use privileges. Section 3 also highlights further risks that follow from the internal balancing mantra which the CJEU expressed in *Pelham* – requiring the reconciliation of copyright protection with other fundamental rights and freedoms within the overly restrictive copyright framework. Considering the lamentable state of EU copyright law, the conclusion is inescapable that the time is ripe for a paradigm shift. EU courts and policymakers should put an end to L&E constraints and devise a more flexible system that allows the EU to realize the benefits of a copyright limitation infrastructure that, instead of systematically frustrating cultural remix, social participation and economic innovation, is capable of satisfying cultural, social and economic needs.

II FLEXIBILITY IN INTERNATIONAL COPYRIGHT LAW

In international copyright law, the so-called "three-step test" laid down in Article 9(2) BC, Article 13 TRIPS and Article 10 WCT regulates the room for the adoption of L&Es to exclusive rights at the national level.[19] As a flexible compromise formula, the provision plays a crucial role at the intersection of

[19] For a discussion of the application of the three-step test at the international level, see Martin R.F. Senftleben, "Towards a Horizontal Standard for Limiting Intellectual Property Rights? – WTO Panel Reports Shed Light on the Three-Step Test in Copyright Law and Related Tests in Patent and Trademark Law", *International Review of Intellectual Property and Competition Law* 37 (2006), 407; Senftleben, n 4, 134–230; Mihály J. Ficsor, "How Much of What? The Three-Step Test and Its Application in Two Recent WTO Dispute Settlement Cases", *Revue Internationale du Droit d'Auteur* 192 (2002), 111; Jo Oliver, "Copyright in the WTO: The Panel Decision on the Three-Step Test", *Columbia Journal of Law and the Arts* 25 (2002), 119; David J. Brennan, "The Three-Step Test Frenzy: Why the TRIPS Panel Decision might be considered Per Incuriam", *Intellectual Property Quarterly* 2002, 213; Jane C. Ginsburg, "Toward Supranational Copyright Law? The WTO Panel Decision and the 'Three-Step Test' for Copyright Exceptions", *Revue Internationale du Droit d'Auteur* 190 (2001), 13.

copyright protection and areas of freedom that serve competing economic, social and cultural interests. The individual tests – the requirement of "certain special cases," the prohibition of a "conflict" with a "normal exploitation," the prohibition of an "unreasonable prejudice" to "legitimate interests" of copyright owners – are elastic guidelines for national policy makers seeking to reconcile copyright protection with other societal needs.[20]

Given the openness of the individual test criteria, the three-step test has a dualistic nature. On the one hand, the three-step test has a strong *enabling* function in the sense that it constitutes the broadest and most important basis for the limitation of copyright protection at the national level. At the 1967 Stockholm Conference, the three-step test was perceived as a flexible, open norm – a framework within which national legislators would enjoy the freedom of safeguarding national L&Es and satisfying domestic social, cultural and economic needs.[21] A comparison of the various observations made during the deliberations concerning the adoption of Article 9(2) BC[22] elicits the specific quality of the abstract formula which finally became the first three-step test in international copyright law: due to its openness, the test has the capacity to encompass a wide range of L&Es and provide a basis for the reconciliation

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[20] As to the debate about the right interpretation of the open-ended three-step test, see Martin R.F. Senftleben, "How to Overcome the Normal Exploitation Obstacle: Opt-Out Formalities, Embargo Periods, and the International Three-Step Test", *Berkeley Technology Law Journal Commentaries* 1, No. 1 (2014), 1; Christophe Geiger, Daniel Gervais and Martin R.F. Senftleben, "The Three-Step Test Revisited: How to Use the Test's Flexibility in National Copyright Law", *American University International Law Review* 29 (2014), 581; Christophe Geiger, Jonathan Griffiths and Reto M. Hilty, "Declaration on a Balanced Interpretation of the 'Three-Step Test' in Copyright Law", *International Review of Intellectual Property and Competition Law* 39 (2008), 707; P. Bernt Hugenholtz and Ruth L. Okediji, *Conceiving an International Instrument on Limitations and Exceptions to Copyright*, Amsterdam: Institute for Information Law/University of Minnesota Law School 2008, 21; Christophe Geiger, "From Berne To National Law, via the Copyright Directive: The Dangerous Mutations of the Three-step Test", *European Intellectual Property Review* 2007, 486; Christophe Geiger, *The Role of the Three-step Test in the Adaptation of Copyright Law to the Information Society*, UNESCO e-Copyright Bulletin, January-March 2007, 3 (19); Jonathan Griffiths, "'The "Three-Step Test' in European Copyright Law: Problems and Solutions", *Intellectual Property Quarterly* 2009, 489; Daniel Gervais, "Making Copyright Whole: A Principled Approach to Copyright Exceptions and Limitations", *University of Ottawa Law and Technology Journal* 3 (2008), 1 (30); Geiger, n 10, 683; Thomas Heide, "The Berne Three-Step Test and the Proposed Copyright Directive", *European Intellectual Property Review* 1999, 105 (106).

[21] Document S/1, *Records of the Intellectual Property Conference of Stockholm June 11 to July 14, 1967*, Geneva: WIPO 1971, 81.

[22] For such a comparison, see Senftleben, n 4, 50–51.

of contrary opinions.[23] The reaction to the final text proposal underlines that this solution was a compromise indeed. While India perceived the proposed wording as narrower than the initial draft and opposed its adoption, other countries contended that the three-step test was not restrictive enough.[24] The first three-step test, laid down in Article 9(2) BC, thus served as an open clause that left room for a broad spectrum of national approaches.

For instance, private use privileges in Berne Union countries can only be justified internationally because of the three-step test in Article 9(2) BC. There is no other, more specific international provision that entitles national lawmakers to limit the right of reproduction for this purpose. Further examples of national L&Es resting on the international three-step test can easily be found in the copyright laws of Berne Union Members, such as the exemption of reproductions for research purposes, the privilege of libraries, archives and museums to make copies for the purpose of preserving cultural material, the exemption of reproductions that are required for administrative, parliamentary or judicial proceedings, or of reproductions made by hospitals and prisons.[25]

The three-step test of Article 9(2) BC, therefore, clearly has the function of creating room for the introduction of L&Es at the national level.[26] Vested with this function, it made its way into Article 13 TRIPS and played a decisive role during the negotiations of the WIPO "Internet" Treaties.[27] In the context

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[23] See Minutes of Main Committee I, Records of the Intellectual Property Conference of Stockholm June 11 to July 14, 1967, Geneva: WIPO 1971, 856–858, which show the fundamental differences. See Christophe Geiger, *The Role of the Three-step Test in the Adaptation of Copyright Law to the Information Society*, UNESCO e-Copyright Bulletin, January–March 2007, 3. Available at: http://unesdoc.unesco.org/images/0015/001578/157848e.pdf; P. Bernt Hugenholtz and Ruth L. Okediji, Conceiving an International Instrument on Limitations and Exceptions to Copyright, Amsterdam: Institute for Information Law/University of Minnesota Law School 2008, 18.

[24] See Minutes of Main Committee I, Records of the Intellectual Property Conference of Stockholm June 11 to July 14, 1967, Geneva: WIPO 1971, 883–885.

[25] For an example of regional copyright legislation containing these and other examples of L&Es based directly on the three-step test of Article 9(2) BC, see Article 5 of Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001, on the harmonisation of certain aspects of copyright and related rights in the information society ("Information Society Directive", *Official Journal* 2001 L 167, 10).

[26] See Senftleben, "Model Provision", n 10, 67. See also the examples of a flexible application of the test given by Jonathan Griffiths, "The 'Three-Step Test' in European Copyright Law: Problems and Solutions", *Intellectual Property Quarterly* 2009, 428 (436–441).

[27] With regard to the evolution of this "family" of copyright three-step tests in international copyright law, see Geiger, Gervais and Senftleben, n 20, 581 (583–591); Senftleben, n 4, 43–98; Joachim Bornkamm, "Der Dreistufentest als urheberrechtliche Schrankenbestimmung – Karriere eines Begriffs", in: Hans J. Ahrens/

of the TRIPS Agreement and the WCT, the three-step test functions in the same, enabling sense in respect of those exclusive rights that have newly been granted in these treaties.[28] Prior to the adoption of the WCT, there was no clear international recognition of the right of making works available on the Internet in such a way that members of the public may have access from a place and at a time individually chosen by them. The adoption of a general right of communication to the public in Article 8 WCT filled this gap by adding this exclusive right to the pre-existing portfolio of internationally recognized rights of communication to the public.[29] With regard to this newly granted right of making available, the three-step test of Article 10(1) WCT fulfils the same function as Article 9(2) BC in the context of the right of reproduction: the test provides a basis for the introduction of L&Es at the national level.[30] Domestic lawmakers are free to limit the right of making available in certain respects because Article 10(1) WCT empowers them to do so. As in the case of Article 9(2) BC, there is no more specific provision in international law which could serve as an alternative basis.[31] In consequence, all L&Es to the right of making available rest on the international three-step test. The room for these L&Es stems directly from the three-step test in Article 10(1) WCT.

Considering the entire family of copyright three-step tests in Articles 9(2) BC, 13 TRIPS and 10(1) WCT, it becomes obvious that the provision, by far, is the most important and comprehensive international basis for national L&Es. This international *acquis* of the provision already indicates that the three-step test must not be misunderstood as a straitjacket constraining the application of national L&Es. On its merits, the flexible formula constituting the three-step test is a compromise solution allowing national legislators to tailor national L&Es to their specific domestic needs.[32]

Joachim Bornkamm/Wolfgang Gloy/Joachim Starck/Joachim von Ungern-Sternberg, *Festschrift für Willi Erdmann zum 65. Geburtstag*, Köln/Berlin/Bonn/München: Carl Heymanns 2002, 29.

[28] As to the debate in the context of the WIPO "Internet" Treaties, see Senftleben, n 4, 96–98; Mihály J. Ficsor, *The Law of Copyright and the Internet: The 1996 WIPO Treaties, their Interpretation and Implementation*, Oxford: Oxford University Press 2002; Jörg Reinbothe/Silke von Lewinski, *The WIPO Treaties 1996: Commentary and Legal Analysis*, Butterworths 2002.

[29] See Sam Ricketson/Jane C. Ginsburg, *International Copyright and Neighbouring Rights – The Berne Convention and Beyond*, Oxford: Oxford University Press 2006, 746.

[30] Ibid., 868; they also draw a line between Art. 9(2) BC and Art. 10(1) WCT.

[31] For a more detailed description of this enabling function of the three-step test, see Senftleben, n 4, 118–121.

[32] See. Kamiel J. Koelman, "Fixing the Three-step Test", *European Intellectual Property Review* 2006, 407; Geiger, "Dangerous Mutations", n 20, 486.

However, the three-step test has an undeniable *constraining* function in the sense that national policymakers who seek to stay within the legislative boundaries of international copyright law[33] can only devise and adopt L&Es within the framework set by the abstract criteria of the test. A closer look at Article 13 TRIPS and Article 10(2) WCT reveals this different function. Article 13 TRIPS and Article 10(2) WCT are vehicles to exercise additional control and scrutinize more thoroughly L&Es that have been adopted by national legislators.[34] Even though these national L&Es may fully comply with the conditions set forth in specific provisions of the Berne Convention, the open criteria of the three-step test must also be taken into account and fulfilled.[35] In Article 10(2) WCT, this *constraining* function of exercising additional control – even though specific conditions of Berne provisions are already met – clearly comes to the fore:

> Contracting Parties shall, when applying the Berne Convention, confine any limitations of or exceptions to rights provided for therein to certain special cases that do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the author.

Hence, two different functions are assigned to the international three-step test. First, the three-step test constitutes the most important basis and engine for the adoption of L&Es at the national level. Even broad use privileges, such as the exemption of private copying, can be justified in the light of the international three-step test. Evidently, the provision has an *enabling* function. It allows national legislators to reconcile copyright protection with competing cultural,

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[33] For a discussion of the relationship between the three-step test and fundamental rights and freedoms, see Geiger, Gervais and Senftleben, n 20, 581 (601–603); Christophe Geiger, "'Constitutionalizing' Intellectual Property Law, The Influence of Fundamental Rights on Intellectual Property in Europe", *International Review of Intellectual Property and Competition Law* 37 (2006), 371; Christophe Geiger, "Copyright's Fundamental Rights Dimension at EU Level", in: Estelle Derclaye (ed.), *Research Handbook on the Future of EU Copyright*, Cheltenham: Edward Elgar 2009, 27 (48); Christophe Geiger, "Fundamental Rights as Common Principles of European (and International) Intellectual Property Law", in: Ansgar Ohly (ed.), *Common Principles of European Intellectual Property Law*, Tübingen: Mohr Siebeck 2012, 223 (225–226).

[34] See Senftleben, n 4, 121–124; P. Bernt Hugenholtz and Ruth L. Okediji, *Conceiving an International Instrument on Limitations and Exceptions to Copyright*, Amsterdam: Institute for Information Law/University of Minnesota Law School 2008, 20.

[35] For a detailed discussion of the relationship between specific Berne L&Es and the three-step tests of Article 13 TRIPS and Article 10(2) WCT, see Ricketson/Ginsburg, n 29, 856–862 and 868–873.

social and economic needs.[36] Second, the three-step test sets forth a framework of abstract criteria within which national legislators enjoy the freedom of developing L&Es. From a copyright perspective, the abstract criteria of the test demarcate the outer limits of permissible inroads into the exclusive rights of authors. It can thus be said that the three-step test can also function as a *constraining* control mechanism. When L&Es are imposed on the rights granted in the Berne Convention, this limitation of copyright must keep within the framework circumscribed in the three-step test. National L&Es must comply with the abstract criteria of the three-step test.[37]

III INFLEXIBILITY IN EU COPYRIGHT LAW

As already indicated, EU copyright law neglects the enabling function of the three-step test and confines use of the test to the constraining function of imposing additional obligations on users seeking to benefit from a copyright limitation.[38] This follows clearly from the configuration of the EU system of L&Es. Article 5(1) to (4) ISD sets forth various types of permissible, specific L&Es. These listed L&Es, however, are subject to the three-step test laid down in Article 5(5) ISD. As a result of this legislative design, judges in the EU can only produce case law in which the three-step test serves as an instrument to curtail L&Es. EU copyright law stipulates in Article 5(5) ISD that L&Es "shall only be applied" in accordance with the three-step test.[39] Therefore, judges have developed a practice of scrutinizing the scope of L&Es based on the three-step test. The CJEU has rendered several decisions in which the three-step test features prominently.[40] At the national level, it has become commonplace to apply the three-step test as a yardstick for the assessment of L&Es in the field of copyright law.[41]

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[36] This enabling function is clearly expressed in Article 9(2) BC and Article 10(1) WCT.

[37] This constraining function comes to the fore in Article 13 TRIPS and Article 10(2) WCT.

[38] For a more detailed discussion of this problem, see Senftleben, n 9, 30.

[39] Article 5(5) ISD.

[40] For an overview of these decisions, see Martin R.F. Senftleben, "From Flexible Balancing Tool to Intellectual Property Protection Champion – How the EU Cultivates the Constraining Function of the Three-Step Test", in: Tuomas Mylly/Jonathan Griffiths (eds), *The Transformation of Global Intellectual Property Protection*, Oxford: Oxford University Press 2021, Section 3.

[41] See the analysis conducted by Jonathan Griffiths, "The 'Three-Step Test' in European Copyright Law: Problems and Solutions", *Intellectual Property Quarterly* 2009, 489.

In the EU, national L&Es may thus be challenged on the ground that they are incompatible with the EU three-step test set forth in Article 5(5) ISD. L&Es that are embedded in a national framework of precisely defined use privileges may still further be restricted by invoking the open-ended three-step test. National copyright L&Es are thus straitjacketed. Their validity is hanging by the thread of compliance with the abstract criteria of the EU three-step test. Moreover, the test itself may only be invoked to place additional constraints on national L&Es that are defined narrowly anyway. Because of the described legislative design, the EU three-step test cannot be employed by the courts to create new, additional forms of permitted unauthorized use. It is impossible for judges in the EU to rely on the enabling function of the test and create new use privileges in the light of its abstract assessment criteria.[42] Not surprisingly, decisions from courts in the EU shed light only on the constraining aspect of the three-step test.

In CJEU jurisprudence, the three-step test paved the way for the Court's adherence to the traditional continental-European dogma of a strict interpretation of L&Es. In *Infopaq*, the Court pointed out that, according to established case law,

> … the provisions of a directive which derogate from a general principle established by that directive must be interpreted strictly […]. This holds true for the exemption provided for in Article 5(1) of Directive 2001/29, which is a derogation from the general principle established by that directive, namely the requirement of authorisation from the rightholder for any reproduction of a protected work.[43]

The impact of the three-step test on this approach to L&Es clearly comes to the fore in a following paragraph of the Court's decision:

> This is all the more so given that the exemption must be interpreted in the light of Article 5(5) of Directive 2001/29, under which that exemption is to be applied only in certain special cases which do not conflict with a normal exploitation of the work or other subject-matter and do not unreasonably prejudice the legitimate interests of the rightholder.[44]

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[42] CJEU, 10 April 2014, case C-435/12, ACI Adam, para. 26. See M.R.F. Senftleben, "Fair Use in the Netherlands: A Renaissance?", *Tijdschrift voor auteurs-, media- en informatierecht* 2009, 1; J. Griffiths, "The 'Three-Step Test' in European Copyright Law: Problems and Solutions", *Intellectual Property Quarterly* 2009, 489 (495); Geiger, n 10, 683; Koelman, n 10, 6.

[43] CJEU, 16 July 2009, case C-5/08, Infopaq, paras 56–57.

[44] CJEU, ibid., para. 58.

In line with the described legislative focus on the constraining function of the three-step test, the CJEU thus saw Article 5(5) ISD as an element of EU copyright law which, in principle, requires a restrictive application of L&Es.

Admittedly, CJEU decisions also demonstrate that several forms of use pass the three-step test.[45] In *Football Association Premier League*, the fundamental decision to adhere to the dogma of a strict interpretation in the light of the three-step test did not hinder the CJEU from emphasizing – with regard to the exemption of temporary copying that had also been at issue in *Infopaq* (Article 5(1) ISD) – the need to guarantee the proper functioning of the limitation and ensure an interpretation that takes due account of its objective and purpose. The Court explained that, despite the required strict interpretation, the effectiveness of the limitation had to be safeguarded.[46] On the basis of these considerations, the Court concluded that the acts of transient copying in *Football Association Premier League*, performed within the memory of a satellite decoder and on a television screen, was compatible with the three-step test of Article 5(5) ISD.[47]

Where compliance with the three-step test is doubtful because of the breadth of the use privilege, the payment of equitable remuneration may tip the scales in favour of permissibility.[48] In *Technische Universität Darmstadt*, the Court recognized an "ancillary right"[49] of libraries to digitize books in their holdings for the purpose of making these digital copies available via dedicated reading terminals on the library premises. To counterbalance the creation of this use privilege, the Court deemed it necessary – in light of the three-step test in Article 5(5) ISD – to insist on the payment of equitable remuneration. Discussing compliance of German legislation with this requirement, the Court was satisfied that the conditions of the three-step test were met because German libraries had to pay adequate remuneration for the act of making works available on dedicated terminals after digitization.[50]

Nonetheless, the fundamental flaw of the EU copyright system remains: the three-step test in Article 5(5) ISD creates a bias against L&Es. It only allows judges to further restrict use privileges that have already been deline-

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[45] For a broader overview of CJEU case law making this point, see Senftleben, n 40, Section 3.

[46] CJEU, 4 October 2011, cases C-403/08 and C-429/08, Football Association Premier League/QC Leisure, paras 162–163.

[47] CJEU, ibid., para. 181.

[48] Again, see Senftleben, n 40, Section 3, for a broader overview of relevant CJEU case law.

[49] CJEU, 11 September 2014, case C-117/13, Technische Universität Darmstadt, para. 48.

[50] CJEU, ibid., para. 48.

ated narrowly in statutory law. Embracing the dogma of strict interpretation in *Infopaq*,[51] the Court explicitly confirmed this bias. As the defendant must prove all facts that support the invocation of a copyright limitation, the application of the three-step test in the context of a strict interpretation obliges an unauthorized user to establish not only compliance with the specific requirements of the invoked copyright limitation but also with the abstract criteria of the three-step test. In practice, this bias against privileged, socially valuable use substantially enhances the legal uncertainty surrounding L&Es. A user seeking to benefit from a copyright limitation can no longer rely on the specific conditions set forth in statutory law. Even if the envisaged use is fully in line with the requirements of a statutory copyright limitation, the use may still be found to amount to infringement in the light of the elastic criteria of the three-step test.

In the more recent decision in *Pelham* – a case that concerned the unauthorized taking of a rhythmic sequence of two seconds and the use of this sound sample in a continuous loop in a new musical composition[52] – this bias against L&Es and underlying cultural, social and economic interests even obtained a constitutional dimension. Discussing the need to reconcile phonogram producer rights with the freedom of artistic expression of sampling artists, the CJEU stated that the requisite fair balance between the intellectual property rights at issue, and the competing fundamental rights, in particular freedom of artistic expression, had to be found *within* the system of exclusive rights and limitations of the ISD.[53] Hence, the CJEU insisted on an internal balancing of interests – within the regulatory framework of copyright law. Apparently, the Court was confident that EU copyright legislation offered sufficient room for freedom of the arts and other fundamental rights of users, such as freedom of expression, freedom of information and freedom of science.[54] In the Court's

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[51] CJEU, 16 July 2009, case C-5/08, Infopaq, paras 56–57.

[52] CJEU 29 July 2019, case C-476/17, Pelham, paras 14–16. See R. Podszun, "Postmoderne Kreativität im Konflikt mit dem Urheberrechtsgesetz und die Annäherung an 'fair use'", *Zeitschrift für Urheber- und Medienrecht* 2016, 606 (606).

[53] CJEU 29 July 2019, case C-476/17, Pelham, para. 60.

[54] For examples of previous decisions where these competing fundamental rights had to be reconciled with copyright protection, see District Court of Amsterdam, 23 December 2015, case ECLI:NL:RBAMS:2015:9312, Anne Frank-Fonds/Anne Frank Stichting and KNAW, *Intellectuele eigendom en reclamerecht* 2017, no. 5, regarding the freedom of science. See also ECHR, 10 January 2013, case 36769/08, Ashby Donald/Frankrijk, para. 38.

opinion, even the three-step test in Article 5(5) ISD constituted a tool to maintain an appropriate balance:

> Article 5(5) of Directive 2001/29 also contributes to the fair balance [between, on the one hand, the interest of the holders of copyright and related rights in the protection of their intellectual property rights now guaranteed by Article 17(2) of the Charter and, on the other hand, the protection of the interests and fundamental rights of users of protected subject matter as well as of the public interest], in that it requires that the exceptions and limitations provided for in Article 5(1) to (4) of the directive be applied only in certain special cases which do not conflict with a normal exploitation of the work or other subject matter and do not unreasonably prejudice the legitimate interests of the rightholder.[55]

Considering this demonstration of limitless confidence in the appropriateness of the EU copyright *acquis*, it is not surprising that the CJEU was reluctant to enrich the harmonized copyright system with external correction mechanisms that are available in EU law, such as the option to allow the invocation of fundamental rights in the EU Charter of Fundamental Rights (CFR) as direct safeguards against excessive copyright protection.[56] In *Pelham*, the Court rejected this option on the ground that balancing tools outside the copyright *acquis* may endanger the harmonization goals of the ISD and have a disruptive effect on

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[55] CJEU 29 July 2019, case C-476/17, Pelham, para. 62.

[56] As to the question of internal or external balancing of copyright against competing societal values, see Stefan Kulk/Peter Teunissen, "Naar een nieuw fundament – hoe het Handvest het auteursrecht hervormt (deel 1)", *Tijdschrift voor auteurs-, media- en informatierecht* 50 (2019), 121 (126–132); Thom E. Snijders/Stijn Van Deursen, "The Road Not Taken – the CJEU Sheds Light on the Role of Fundamental Rights in the European Copyright Framework – a Case Note on the Pelham, Spiegel Online and Funke Medien Decisions", *International Review of Intellectual Property and Competition Law* 50 (2019), 1176 (1186–1187); Christophe Geiger and Elena Izyumenko, "Copyright on the Human Rights' Trial: Redefining the Boundaries of Exclusivity Through Freedom of Expression", *International Review of Intellectual Property and Competition Law* 45 (2014), 316; Christophe Geiger and Elena Izyumenko, "Freedom of Expression as an External Limitation to Copyright Law in the EU: The Advocate General of the CJEU Shows the Way", *European Intellectual Property Review* 41 (2019), 131; Jonathan Griffiths, "European Union Copyright Law and the Charter of Fundamental Rights – Advocate General Szpunar's Opinions in (C-469/17) *Funke Medien*, (C-476/17) *Pelham GmbH* and (C-516/17) *Spiegel Online*", *ERA Forum* 2019, 35 (46–49); Thomas Dreier, "Balancing Proprietary and Public Domain Interests: Inside or Outside of Proprietary Rights?", in: Rochelle C. Dreyfuss/Diane Leenheer-Zimmerman/Harry First (eds), *Expanding the Boundaries of Intellectual Property. Innovation Policy for the Knowledge Economy*, Oxford: Oxford University Press 2001, 295. The use of fundamental rights and freedoms as external balancing tools would also comply with the ECHR's case law. See EHRM, 10 January 2013, case 36769/08, Ashby Donald/Frankrijk, para. 38.

the internal market.[57] As a result, a traditional German copyright limitation that offered room for transformative forms of use – the so-called German doctrine of "free use"[58] – could not survive. As the closed list of permissible L&Es in Article 5(1) to (4) ISD did not contain a limitation prototype covering the German free use rule, the CJEU held the view that EU Member States were not permitted to provide for this copyright limitation.[59]

Besides the erosion of this inherent[60] limitation of copyright that has evolved not only in Germany but also in other EU Member States,[61] the *Pelham* decision is remarkable because of the cited statement that the three-step test of Article 5(5) ISD contributes to safeguarding a fair balance between copyright and neighboring rights, and the fundamental rights of users.[62] As the CJEU, at the same time, insists on internal balancing – within the legal framework of EU copyright law – this statement indicates that the balancing exercise must take place within the constraints of the three-step test. In other

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[57] CJEU, 29 July 2019, case C-476/17, Pelham, para. 63.

[58] See § 24 (1) of the German Copyright Act: "An independent work created in the free use of the work of another person may be published and exploited without the consent of the author of the work used." See Thomas Dreier/Gernot Schulze, *Urheberrechtsgesetz*, 6th edn, Munich: C.H. Beck 2018, 454–457; Lionel Bently, Séverine Dusollier et al., "Sound Sampling, a Permitted Use Under EU Copyright Law? Opinion of the European Copyright Society in Relation to the Pending Reference Before the CJEU in Case C-476/17, Pelham GmbH v. Hütter", *International Review of Intellectual Property and Competition Law* 50 (2019), 467 (486–487); P. Bernt Hugenholtz/Martin R.F. Senftleben, *Fair Use in Europe. In Search of Flexibilities*, Amsterdam: IViR/VU Centre for Law and Governance 2011, 26–27; Paul E. Geller, "A German Approach to Fair Use: Test Cases for TRIPs Criteria for Copyright Limitations?", *Journal of the Copyright Society of the U.S.A.* 57 (2010), 901.

[59] CJEU, ibid., para. 65.

[60] See CJEU, 29 July 2019, case C-476/17, Pelham, para. 56, for the explanation given by the German Federal Court of Justice in the context of posing its prejudicial questions. For German decisions discussing this inherent limitation of copyright, see German Federal Court of Justice (Bundesgerichtshof), 16 April 2015, case I ZR 225/12, "Goldrapper", *Gewerblicher Rechtsschutz und Urheberrecht* 2015, 1189 (1198); German Federal Court of Justice, 1 December 2010, case I ZR 12/08, "Perlentaucher", *Gewerblicher Rechtsschutz und Urheberrecht* 2011, 134 (137–138); German Federal Court of Justice, 20 March 2003, case I ZR 117/00, "Gies-Adler", *Gewerblicher Rechtsschutz und Urheberrecht* 2003, 956 (958).

[61] See Supreme Court of Austria (Oberster Gerichtshof), 13 July 2010, case 4 Ob 66/10z, "Lieblingshauptfrau"; Supreme Court of Sweden (Högsta Domstolen), 21 February 2017, case T 1963-15, "Swedish Scapegoats", *Gewerblicher Rechtsschutz und Urheberrecht – Internationaler Teil* 2019, 93, para. 12, 17–19; Supreme Court of Italy (Corte di Cassazione), 6 June 2018, case 14635/2018, Big Red/Gabibbo, *Gewerblicher Rechtsschutz und Urheberrecht – Internationaler Teil* 2019, 413 (415). Bently/ Dusollier/ Geiger et al., n 58, 467 (486).

[62] CJEU 29 July 2019, case C-476/17, Pelham, para. 62.

words, the maximum space that is available for safeguarding competing user freedoms, is the breathing space offered by the three-step test of Article 5(5) ISD. Considering the described focus of EU copyright law on the constraining function of the three-step test, the dilemma arising from this decision clearly comes to the fore.

Once again: in international copyright law, the three-step test is a flexible instrument that allows the development of new copyright limitations if this is necessary to accommodate social, cultural or economic needs. With regard to the three-step tests of Article 10 WCT, the Diplomatic Conference leading to the adoption of the WIPO "Internet" Treaties[63] formally adopted an Agreed Statement that confirms this enabling function of the three-step test. The Agreed Statement makes it clear that the test is not intended to pose obstacles to the evolution of new copyright limitations:

> 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. Similarly, these provisions should be understood to permit Contracting Parties to devise new exceptions and limitations that are appropriate in the digital network environment.
>
> It is also understood that Article 10(2) neither reduces nor extends the scope of applicability of the limitations and exceptions permitted by the Berne Convention.[64]

As explained, however, the crippled EU offspring of the international three-step test does not provide breathing space for the evolution of new use privileges and the further development of existing limitations.[65] In the balancing exercise which the CJEU has in mind, the only contribution of the three-step test is a further restriction of L&Es. The decision leaves little doubt about a bias against social, cultural and economic concerns that lie at the core of copyright limitations. Recalling its earlier ruling in *ACI Adam*,[66] the CJEU even emphasized in *Pelham* that "no provision of Directive 2001/29 envisages the possibility for the scope of such exceptions or limitations to be extended by the Member States."[67]

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[63] The WIPO Copyright Treaty and the WIPO Performance and Phonograms Treaty. See Mihály Ficsor, "The Spring 1997 Horace S. Manges Lecture – Copyright for the Digital Era: The WIPO 'Internet' Treaties'", *Columbia-VLA Journal of Law & the Arts* 21 (1997), 197.

[64] Agreed Statement Concerning Article 10 WCT. See Senftleben, "Model Provision", n 10, 67.

[65] CJEU, 29 July 2019, case C-476/17, Pelham, para. 64.

[66] CJEU, 10 April 2014, case C-435/12, ACI Adam, para. 27.

[67] CJEU, 29 July 2019, case C-476/17, Pelham, para. 64.

With the *Pelham* decision, the conclusion seems inescapable that the crippled EU manifestation of the three-step test – deprived of the enabling function that can be found at the international level – *de facto* acquired a quasi-constitutional status. Article 5(5) ISD constitutes an element of secondary EU legislation. Nonetheless, the CJEU seems determined to employ the test as a yardstick for determining the ambit of operation of fundamental freedoms, such as freedom of expression and freedom of the arts, in copyright law. These fundamental freedoms, however, constitute elements of primary EU legislation. In principle, they constitute higher-ranking norms. If the CJEU does not change its course in subsequent decisions, the three-step test will nevertheless reign supreme over fundamental freedoms in the copyright arena.

The corrosive effect of this inconsistent reversion of the norm hierarchy can easily be illustrated by revisiting previous decisions that shed light on potential collisions between copyright norms and competing fundamental freedoms. The *Scientology/Spaink* lawsuit in the Netherlands can serve as an example. In line with Article 5(3)(d) ISD, the right of quotation in Article 15a of the Dutch Copyright Act only permits the unauthorized use of sources that have already been lawfully made available to the public.[68] Nonetheless, the Court of Appeals of The Hague ruled in favour of the journalist Karin Spaink who had been sued for copyright infringement by Scientology. On an XS4All webpage, Spaink had posted parts of the so-called "Fishman Affidavit" – a semi-secret written declaration that had been submitted in other court proceedings initiated by Scientology against Steven Fishman. Spaink used quotations from confidential parts of the Fishman Affidavit reflecting the teachings and organization of Scientology to undergird her critique of Scientology.[69] As the document had never been published lawfully, the statutory right of quotation was unavailable as a defence.[70] However, Spaink successfully argued for direct application of the fundamental guarantee of freedom of expression and information in Article 10 of the European Convention on Human Rights. The Court of Appeals of The Hague agreed that the quotations contributed to a legitimate form of criticizing Scientology's questionable ideas and behaviour. In the opinion of the Court, Spaink's use of the documents did not amount to copyright infringement against this background.[71]

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[68] For a more detailed discussion of the conceptual contours of the Dutch regulation of quotations, see Senftleben 2012a, 359. The requirement of lawful prior publication can also be found at the international level. See Art. 10(1) BC.

[69] Court of Appeals of The Hague, 4 September 2003, Scientology/Spaink, *Tijdschrift voor auteurs-, media- en informatierecht* 2003, 217, para. 2.

[70] Court of Appeals of The Hague, ibid., para. 7.11.

[71] Court of Appeal of The Hague, ibid., paras 8.2 and 13. See Senftleben 2012a, 372–373.

In the light of *Pelham*, however, the *Scientology/Spaink* decision of the Court of Appeals of The Hague finally proves to be incompatible with EU copyright law.[72] Invoking the freedom of the press, the Court of Appeals neglected the requirement of an earlier lawful act of making available to the public that can be found in the statutory definition of the right of quotation.[73] Hence, the Court failed to keep within the harmonized legal framework for unauthorized quotations laid down in Article 5(3)(d) ISD. In line with the *Pelham* decision, however, the three-step test in Article 5(5) ISD cannot be invoked to broaden the scope of the statutory right of quotation in the light of the fundamental freedom of the press.[74] The three-step test is not available as a corrective measure to avoid excessive copyright protection and extend the scope of the use privilege to takings from unpublished sources where this is necessary to allow the press to do its work in a democratic society. The *Pelham* decision stifles the breathing space which national courts, such as the Court of Appeals of The Hague, derived in the past directly from the constitutional guarantee of freedom of expression and freedom of the press.

It cannot be ruled out that the CJEU – confronted with a *Scientology/Spaink* scenario – will finally realize that the invocation of fundamental rights as external correction tools is sometimes indispensable to strike a proper balance between copyright and competing values. As long as the CJEU upholds the mantra of complete and closed regulation of copyright and limitations in a *Scientology/Spaink* scenario, however, inroads into freedom of expression and freedom of the press seem inescapable. Takings from unpublished sources will inevitably fall outside the scope of Article 5(3)(d) ISD – regardless of their importance to the debate and the need to inform the public. In *Funke Medien NRW*, the CJEU already came within a hair's breadth of this dilemma. The case concerned the "Afghanistan papers:" military status reports on the deployment of German armed forces.[75] Given the confidentiality of these documents, German courts had denied the right of quotation because the requirement of prior lawful making available was not fulfilled.[76] Not surprisingly, the prejudicial questions raised the issue of an extensive interpretation of the right of quotation in the light of freedom of expression and freedom

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[72] Stefan Kulk and Peter Teunissen, "Naar een nieuw fundament – hoe het Handvest het auteursrecht hervormt (deel 2)", *Tijdschrift voor auteurs-, media- en informatierecht* 2019, 149 (153).

[73] Hof Den Haag 4 September 2003, *Tijdschrift voor auteurs-, media- en informatierecht* 2003, 217, Scientology/Spaink, paras 8.2 and 13.

[74] CJEU, 29 July 2019, case C-476/17, Pelham, para. 64.

[75] CJEU, 29 July 2019, case C-469/17, Funke Medien NRW, para. 9.

[76] German Federal Court of Justice, 1 June 2017, case I ZR 139/15, 'Afghanistan Papiere', *Gewerblicher Rechtsschutz und Urheberrecht* 2017, 901, paras 27–30.

of the press. The CJEU managed to bypass this delicate issue by following an alternative path and adopting a flexible interpretation of the concept of "reporting of current events" which is central to one of the press privileges laid down in Article 5(3)(c) ISD. As Funke Medien had presented the Afghanistan papers on its website "in a structured form in conjunction with an introductory note, further links and a space for comments,"[77] the Court was satisfied that the online publication could be qualified as a privileged form of "use of works … in connection with … reporting."[78]

In this way, the Court paved the way for the application of Article 5(3)(c) ISD and concealed the dilemma arising from the lawful making available requirement in Article 5(3)(d) ISD.[79] Moreover, this strategy allowed the Court to maintain the rule that copyright had to be reconciled with freedom of expression and freedom of the press within the system of rights and limitations in EU copyright law.[80] For the time being, both the mantra of strict interpretation in the light of the three-step test[81] and the mantra of internal balancing within the system of rights and limitations in the copyright *acquis*[82] are thus intact. The flexible balancing tool known from international copyright law only has a constraining function in the EU copyright system. As the three-step test in Article 5(5) ISD reigns supreme over L&Es, it has the potential to make inroads into areas of freedom that are necessary to safeguard fundamental rights and corresponding social, cultural and economic needs.

IV CONCLUSION

EU copyright legislation has cultivated the constraining function of the three-step test. Instead of transposing the dualistic concept of the international provision – the enabling as well as the constraining function – into EU law, Article 5(5) ISD reduces the three-step test to the constraining function of setting additional limits to L&Es which are circumscribed precisely anyway. The three-step test cannot be invoked as an instrument to extend the scope of L&Es or create new L&Es to avoid overbroad copyright protection. CJEU jurisprudence enhances the constraining effect by placing the three-step test in the context of the obligation to interpret L&Es strictly and allowing the balancing of copyright protection against competing fundamental freedoms only

77 CJEU, 29 July 2019, case C-469/17, Funke Medien NRW, para. 75.
78 CJEU, ibid., para. 75.
79 CJEU, ibid., para. 75.
80 CJEU, ibid., para. 58.
81 CJEU, 16 July 2009, case C-5/08, Infopaq, paras 56–57.
82 CJEU 29 July 2019, case C-476/17, Pelham, para. 60.

within the statutory system of rights and limitations in EU copyright law.[83] The result is a three-step test that has been transformed from a flexible balancing tool into a robust straitjacket of copyright L&Es. After *Pelham*, the three-step test even determines the maximum space for freedom of expression and information, freedom of the arts, freedom of the press and freedom of science. Considering that the fundamental rights in the CFR have a higher rank in the norm hierarchy than Article 5(5) ISD, this development is highly inconsistent and worrisome. So, the question is: What can be done?

Evidently, the CJEU could abandon the *Pelham* approach in future decisions and emphasize the higher rank of fundamental rights in the norm hierarchy. On this basis, fundamental rights obligations could override specific three-step test criteria. The criteria of the three-step test could be brought in line with the analysis that has evolved in human rights cases,[84] such as the freedom of expression analysis known from the European Court of Human Rights.[85] In this way, the risk of encroachments upon fundamental rights could be reduced. Even the alignment of the three-step test analysis with the human rights analysis, however, is incapable of remedying the structural shortcoming of legislation that only employs the three-step test as a tool to further restrict statutory L&Es. This type of legislation fails to leave room for the test's enabling function to support the evolution of new use privileges that may become necessary in the light of new cultural, social and economic developments and corresponding human rights obligations.[86]

Hence, it would be preferable to change the configuration of the EU L&E infrastructure altogether and implement the three-step test in a way that allows judges to devise new L&Es on the basis of the abstract test criteria case-by-case.[87] This solution would open up the EU copyright *acquis* and pave the way for applying the three-step test not only in a constraining way but also in an enabling sense. As a result, the test could become an engine of new use privileges where the introduction of additional breathing space is necessary to satisfy cultural, social and economic needs.[88] While a legislative text for this preferable solution can easily be developed and has already been proposed

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[83] CJEU, ibid., paras 60–62. See Senftleben, n 18, 751–769.

[84] Geiger, Gervais and Senftleben, n 20, 581 (601–605).

[85] See Christophe Geiger and Elena Izyumenko, "The Constitutionalization of Intellectual Property Law in the EU and the Funke Medien, Pelham and Spiegel Online Decisions of the CJEU: Progress, but Still Some Way to Go!", *International Review of Intellectual Property and Competition Law* 51 (2020), 282 (292–302).

[86] See WCT, Agreed Statement Concerning Article 10.

[87] See Senftleben, "Model Provision", n 10, 73–77.

[88] See the overview of rationales provided by Samuelson, nn 7, 12–59.

several times,[89] this system change seems particularly difficult from a political perspective. As long as policymaking in EU copyright law focuses on maximizing exclusive rights and licensing opportunities for copyright holders, there is hardly any chance of cultivating not only the constraining but also the enabling function of the three-step test.

Evidently, EU policymakers are unwilling to accept that L&E solutions – where necessary accompanied by the payment of equitable remuneration – may lead to a copyright system that achieves better cultural, social and economic results: more room for cultural remix, more socially valuable access to the cultural landscape, enhanced opportunities to develop and experiment with new products and services that depend on the use of copyrighted resources, in particular in the digital environment. In the CDSMD, the EU legislator has missed at least two opportunities to develop L&E-based solutions that could have served cultural, social and economic needs much better than the grant of rights to prohibit use with the vague hope that well-functioning licensing infrastructures will evolve in the highly fragmented market for digital use in the EU:

– In the area of text and data mining, Article 3 CDSMD only provides for a specific use privilege for research organizations and cultural heritage institutions. Following the traditional, dysfunctional EU approach to the three-step test, Article 7(2) CDSMD exposes this specific use privilege to further scrutiny in the light of the three-step test laid down in Article 5(5) ISD. The broader L&E for text and data mining in Article 4 CDSMD cannot be invoked if copyright holders exercise the veto right following from the rights reservation option offered in paragraph 3. The success of EU high-tech industries that depend on copyrighted training material for new products and services, thus, depends on the evolution of an appropriate copyright data and licensing infrastructure.[90] If the creative and high-tech industries cannot reach agreement, neither industry branch will benefit from the new rules: no copyrighted training material for the high-tech

[89] See the proposal made by Senftleben, n 6, 548–550. See also Article 5.5 of the European Copyright Code that is the result of the Wittern Project that was established in 2002 as a collaboration between copyright scholars across the European Union concerned with the future development of European copyright law. The proposed European Copyright Code of the Wittern Project is available online at https://www.ivir.nl/copyrightcode/european-copyright-code/.

[90] See Martin R.F. Senftleben, Thomas Margoni et al., "Ensuring the Visibility and Accessibility of European Creative Content on the World Market: The Need for Copyright Data Improvement in the Light of New Technologies", available at: https://ssrn.com/abstract=3785272.

industry; no new revenue stream for the creative industries.[91] Evidently, it would have been a more promising solution to exempt text and data mining from the control of copyright holders and adopt a statutory obligation to pay equitable remuneration in case of use for commercial purposes (which could have been combined with the establishment of an EU collecting society granting licenses for the entire EU territory);

– Article 17 CDSMD leads to new licensing and content filtering obligations in the field of user-generated content.[92] The costs of this regulatory model in terms of investment in rights clearance and filtering technology (instead of remuneration for authors), and inroads into freedom of expression and information, are considerable.[93] Again, a broad exemption of

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[91] For a more detailed analysis of potential problems arising from the overly restrictive regulation of text and data mining in the EU, see Christophe Geiger, "The Missing Goal-Scorers in the Artificial Intelligence Team: Of Big Data, the Right to Research and the Failed Text-and-Data Mining Limitations in the CSDM Directive", in: Martin R.F. Senftleben, Joost Poort et al. (eds), *Intellectual Property and Sports – Essays in Honour of Bernt Hugenholtz*, The Hague/London/New York: Kluwer Law International 2021, 383–394; Christophe Geiger et al., "Text and Data Mining in the Proposed Copyright Reform: Making the EU Ready for an Age of Big Data?", *International Review of Intellectual Property and Competition Law* 49 (2018), 814 (814–844); Thomas Margoni, "AI, Machine Learning and EU Copyright Law: Who owns AI?", *Annali Italiani del Diritto d'Autore, della Cultura e dello Spettacolo* XXVII (2018); 281 (281–304); Rossana Ducato and Alain Strowel, "Limitations to Text and Data Mining and Consumer Empowerment: Making the Case for a Right to 'Machine Legibility'", *International Review of Intellectual Property and Competition Law* 50 (2019), 649; Eleonora Rosati, "An EU Text and Data Mining Exception for the Few: Would it Make Sense?", *Journal of Intellectual Property Law and Practice* 13 (2018), 429 (429–430); Christian Handke, Lucie Guibault and Joan-Josep Vallbé, "Is Europe Falling Behind in Data Mining? Copyright's Impact on Data Mining in Academic Research", in: Birgit Schmidt and Milena Dobreva (eds), *New Avenues for Electronic Publishing in the Age of Infinite Collections and Citizen Science: Scale, Openness and Trust – Proceedings of the 19th International Conference on Electronic Publishing*, IOS 2015, 120–130.

[92] For an overview of the new obligations, see Axel Metzger and Martin R.F. Senftleben, "Understanding Article 17 of the EU Directive on Copyright in the Digital Single Market – Central Features of the New Regulatory Approach to Online Content-Sharing Platforms", *Journal of the Copyright Society of the U.S.A.* 67 (2020), 279 (284–308).

[93] For a critique of the approach taken in Article 17 CDSMD, see Christophe Geiger and Bernd Justin Jütte, "Platform liability under Article 17 of the Copyright in the Digital Single Market Directive, Automated Filtering and Fundamental Rights: An Impossible Match", available at https://ssrn.com/abstract=3776267; Sebastian Felix Schwemer, "Article 17 at the Intersection of EU Copyright Law and Platform Regulation", *Nordic Intellectual Property Law Review* 2020, 400–435; Martin R.F. Senftleben, "Institutionalized Algorithmic Enforcement – The Pros and Cons of the EU Approach to Online Platform Liability", *Florida International University Law Review* 14 (2020), 299–328; Martin Husovec and João Pedro Quintais, "How

> user-generated content and an obligation to pay equitable remuneration appears as a preferable solution that could have ensured a new revenue stream for authors without eroding open, participatory internet communication and restricting freedom of expression and information.[94]

Twenty years after ISD adoption, the cultural, social and economic benefits of a flexible copyright system are still disregarded in the EU. In the light of

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to License Article 17? Exploring the Implementation Options for the New EU Rules on Content-Sharing Platforms", *Gewerblicher Rechtsschutz und Urheberrecht International* 70 (2021), 325–348; Matthias Leistner, "European Copyright Licensing and Infringement Liability Under Art. 17 DSM-Directive Compared to Secondary Liability of Content Platforms in the U.S. – Can We Make the New European System a Global Opportunity Instead of a Local Challenge?", *Zeitschrift für Geistiges Eigentum/Intellectual Property Journal* 26 (2020), 123–214; João Pedro Quintais, Giancarlo Frosio et al. "Safeguarding User Freedoms in Implementing Article 17 of the Copyright in the Digital Single Market Directive: Recommendations from European Academics", *Journal of Intellectual Property, Information Technology and Electronic Commerce Law* 10 (2020), 277–282; Giancarlo Frosio, "Reforming the C-DSM Reform: A User-Based Copyright Theory for Commonplace Creativity", *International Review of Intellectual Property and Competition Law* 51 (2020), 709 (724–726); Sebastian Felix Schwemer and Jens Schovsbo, "What is Left of User Rights? – Algorithmic Copyright Enforcement and Free Speech in the Light of the Article 17 Regime", *Intellectual Property Law and Human Rights,* 4th edn, Alphen aan den Rijn: Wolters Kluwer 2020, 569–589; Martin R.F. Senftleben, "Bermuda Triangle: Licensing, Filtering and Privileging User-Generated Content Under the New Directive on Copyright in the Digital Single Market", *European Intellectual Property Review* 41 (2019), 480 (483–484); Martin R.F. Senftleben, et al., "The Recommendation on Measures to Safeguard Fundamental Rights and the Open Internet in the Framework of the EU Copyright Reform", *European Intellectual Property Review* 40 (2018), 149; Christina Angelopoulos, "On Online Platforms and the Commission's New Proposal for a Directive on Copyright in the Digital Single Market" (2017), available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2947800; Giancarlo Frosio, "From Horizontal to Vertical: An Intermediary Liability Earthquake in Europe", *Oxford Journal of Intellectual Property and Practice* 12 (2017), 565–575; Giancarlo Frosio, "Reforming Intermediary Liability in the Platform Economy: A European Digital Single Market Strategy", *Northwestern University Law Review* 112 (2017), 19; Reto M. Hilty and Valentina Moscon (eds), "Modernisation of the EU Copyright Rules – Position Statement of the Max Planck Institute for Innovation and Competition", Max Planck Institute for Innovation and Competition Research Paper No. 17-12, Max Planck Institute for Innovation and Competition: Munich 2017.

[94] For a more detailed discussion of the room which the three-step test offers for this alternative solution, see Martin R.F. Senftleben, "User-Generated Content – Towards a New Use Privilege in EU Copyright Law", in: Tanya Aplin (ed.), *Research Handbook on IP and Digital Technologies*, Cheltenham: Edward Elgar 2020, 136–162.

current challenges and rapid technological developments, a more flexible system of L&Es is needed more than ever.[95]

[95] For an exploration of the need for flexibility and potential room in the EU *acquis*, see Hugenholtz/Senftleben, n 58.