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Rethinking Normal Exploitation: Enabling Online Limitations in EU Copyright Law

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The adoption of limitations to copyright is regulated at international and EU level by the three-step test. The major obstacle to new limitations for online use is a strict interpretation of the test, namely its second step, according to which a limitation shall not conflict with the normal exploitation of works. This article examines the test with a focus on the second step and its application to the digital and cross-border environment. It argues for a flexible and policy-oriented reading of the concept of normal exploitation. Following this approach could enable the introduction of new online limitations in EU law. In particular, within the context of current EU copyright reform, a flexible interpretation could support the introduction of a mandatory and unwaivable limitation for user-generated content.

Introduction

More than fifteen years after the adoption of Directive 2001/29/EC (InfoSoc Directive), the application of copyright online remains challenging. At international and EU level, the development of copyright law has trended towards the strengthening of protection. With the advent and mass adoption of the internet, this has meant the increased application of exclusive rights to online activities involving protected content. In EU law, for example, the current interpretation by the Court of Justice of the European Union (CJEU) of the already broadly worded exclusive rights of reproduction and communication to the public in the directive extends their application to all manner of everyday activities of individuals on the internet, such as downloading, streaming and posting hyperlinks.[2]

This state of affairs is problematic. First, it extends the scope of copyright to acts of enjoyment and expression of users, often outside the realm of commercial exploitation. In many cases, enforcement of these uses is either impossible or undesirable, due to high transaction costs or potential conflicts with fundamental rights.[3] Furthermore, it erodes the respect for and legitimacy of copyright law by creating and deepening a mismatch between the law and technology-influenced social norms.[4] These considerations provide a good case for legislative reform, especially through the adoption of exceptions or limitations to certain types of online use with strong policy justifications and not in direct competition with the commercialization of works.

The adoption and definition of limitations to copyright is regulated at international and EU level by the three-step test. However, restrictive interpretations of the test impose barriers to new digital limitations. The most formidable obstacle in this respect is a narrow reading of the second step of the test, pursuant to which a limitation shall not conflict with the normal exploitation of works. This article examines the test with a focus on the second step and its application to online use. The analysis shows that at the heart of restrictive interpretations lies a conservative or traditional view of normal exploitation. This view is contrasted with a flexible and policy-oriented approach that is more consistent with a systematic and teleological interpretation of the law.

This flexible interpretation could unlock the adoption of online limitations that are respectful of fundamental rights, responsive to technological development, and aligned with social norms. In the current policy debate, it could for

1 Parts of this article are based on and develop the research in J. P. Quintais, *Copyright in the Age of Online Access: Alternative Compensation Systems in EU Law,* Kluwer Law International 2017.

2 Quintais 2017, *op. cit.*, pp. 1-17, 158-234.

3 *Ibid.*, pp. 1-17.

4 P.B. Hugenholtz, 'Fair Use in Europe', Communications of the ACM 56(5) (2013), p. 26.

instance allow the EU legislator to go beyond the proposed measures to adapt limitations to the digital and cross-border environment in the proposal for a directive on 'Copyright in the Digital Single Market' (Draft DSM Directive).[5] Such measures include limitations for text and data mining, use in digital and cross-border teaching activities, and preservation of cultural heritage.[6] During the legislative process, however, both the Internal Market and Culture Committees advanced proposals for a limitation for user-generated content.[7] A provision of this type could be admissible under a flexible reading of the three-step test, as could other limitations for non-commercial activities of individuals in online platforms.[8]

The article proceeds as follows. After this introduction, the following section describes the different incarnations of the three-step test at international and EU level, as well as their interaction. The third section focuses on the second step. It critically examines its traditional reading as an obstacle to online limitations and suggests a more flexible approach. The fourth section concludes, suggesting that a flexible interpretation could enable the introduction of new online limitations in EU law, such as for user-generated content.

Three-step Test: Variants and Interpretation

The international tests

The three-step test is a set of three conditions that regulate the imposition and permissible scope of limitations to copyright. According to it, limitations must: (1) Be certain special cases, (2) Not conflict with the normal exploitation of the work, (3) Not unreasonably prejudice the legitimate interests of the author or rights holder.

In international intellectual property law, there are eight variations of the test in four conventions currently in force: Article 9(2) Berne Convention (BC); Articles 10(1) and (2) WCT; Article 16(2) WPPT; and Articles 13, 17, 26(2) and 30 TRIPS. Articles 17, 26(2) and 30 TRIPS do not refer to copyright but to trademarks, designs and patents, and present some differences to their copyright counterparts.[9] In the EU copyright *acquis*, the main embodiment of the test is Article 5(5) InfoSoc Directive, but other sectorial directives contain similar versions of it.[10]

The myriad tests have different wordings with slightly varying purpose and operation. Still, the copyright versions share a common structure and content in relation to the three steps.[11] They also share an intentionally general and abstract formulation. In the BC, this was intended to enable Union members to accommodate existing national limitations and afford them discretion on how to give effect to the test.[12] The same lack of specificity makes the test a challenging standard for interpretation, especially in the dynamic context of new technologies.[13]

The interpretation of the international tests should be made in accordance with Articles 31–33 of the Vienna Convention on the Law of Treaties (VCLT). These rules favour a literal approach, mitigated by systematic ("context") and teleological ("object and purpose") interpretation of treaty provisions.[14] The "context" comprises the text of the treaty, including preamble and annexes, together with related agreements and instruments made or accepted by all the parties in relation to the treaty. These documents include the majority of Agreed Statements to different provisions of the WIPO Treaties. The "object and purpose" of a treaty relies on elements like preambles.[15] In certain circumstances, Article 32 VCLT allows recourse to extrinsic elements to the treaty's text, such as preparatory works and supplementary materials.[16] The latter may include, for example, the reports of pan-

5 European Commission, Proposal for a Directive of the Commission and the Council on Copyright in the Digital Single Market, COM(2016) 593 final.

6 Draft DSM Directive, Title II, Arts. 3 to 6.

7 See: European Parliament, *Opinion of the Committee on the Internal Market and Consumer Protection for the Committee on Legal* (COM(2016)0593 – C8-0383/2016 – 2016/0280(COD)), Rapporteur: Catherine Stihler, 14.6.2017 [EP IMCO Opinion], Amendment 55, new art. 5b, p. 36; European Parliament, *Opinion of the Committee on Culture and Education for the Committee on Legal Affairs* (COM(2016)0593 – C8-0383/2016 – 2016/0280(COD)), Rapporteur: Marc Joulaud, 4.9.2017 [EP CULT Opinion], Amendment 60, Proposal for a directive Article 5 a (new) on 'Use of short extracts and quotations from copyright- protected works or other subject matter in content uploaded by users'. N.B. such a provision is absent from the Council's revised presidency proposal. See Council of the European Union, *Revised Presidency compromise proposal regarding Articles 2 to 9*, 2016/0280 (COD), 26 September 2017.

8 On the admissibility of these limitations, see T. Dreier, 'Toughts on revising the limitations on copyright under Directive 2001/29', JIPLP 11(2) (2015), p. 8, and Quintais 2017, *op. cit.*, p. 276. See also *infra* the section 'The way forward for online limitations and the case of user-generated content'.

9 A. Christie & R. Wright, 'A Comparative Analysis of the Three-Step Tests in International Treaties' 45 IIC 409 (2014), examining the three-step tests in international treaties.

10 Art. 6(3) Computer Programs Directive (2009/24/EC); Art. 6(3) Database Directive (96/9/EC). Application of the test in the Rental and Lending Directive (2006/115/EC) operates by virtue of Art. 11(1)(b) InfoSoc Directive.

11 M. Senftleben, *Copyright, Limitations and the Three-Step Test. An Analysis of the Three Step Test in International and EC Copyright Law,* Kluwer Law International 2004, p. 105. *Contra*, Christie & Wright 2014, *op.cit.,* p. 409.

12 S. Ricketson & J. Ginsburg, *International Copyright and Neighbouring Rights: The Berne Convention and Beyond*, OUP 2006, I, pp. 182-183.

13 See, e.g., J. Griffiths, 'The "three-Step Test" in European Copyright Law – Problems and Solutions', Intellectual Property Quarterly 489 (2009), pp. 20-21; and K.J. Koelman, 'Fixing the Three-Step Test', 8 E.I.P.R. 407 (2006), p. 407.

14 S. Ricketson, *WIPO Study on Limitations and Exceptions of Copyright and Related Rights in the Digital Environment*, SCCR/9/7 WIPO (2003), pp. 6-7; Senftleben 2004, *op. cit.*, pp. 100-101.

15 I.M. Sinclair, *The Vienna Convention on the Law of Treaties*, Manchester University Press 1984, pp. 117-118.

16 Recourse to supplementary materials is allowed to confirm the meaning resulting from the application of Art. 31 VCLT or to determine the meaning of a provision when Art. 31 leads to an interpretation that is unclear or "manifestly absurd or unreasonable." See Y. le Bouthillier, 'Art. 32 of the 1969 Vienna Convention', in: O. Corten & P. Klein (eds), *The Vienna Conventions on the Law of Treaties : A Commentary*, OUP 2011, p. 843.

els appointed in the course of procedures of the WTO Dispute Settlement Body.[17]

It is beyond the scope of this article to address the nuances of the interpretation of the international versions of the test. For our purposes, the following remarks suffice. A first point is that there is no authoritative interpretation of Article 9(2) BC.[18] The provision, introduced in the 1967 Stockholm revision conference, applies only to the reproduction right and mentions the interests of authors. It has a mixed nature, being viewed both as a limiting clause – to be read in a sequential and cumulative manner[19] – and as sufficiently flexible to accommodate diverse national limitations with social, cultural and economic motivations.[20] Also, the test currently extends (with different wordings) to all rights and rights holders, by virtue of TRIPS and the WIPO Treaties.[21] In addition, as these treaties incorporate Article 9(2) BC by reference, the context of the BC provides common ground for analysis of the subsequent tests.[22]

When considering these "interwoven contexts", it must be remembered that the object and purpose of the later treaties is more complex, especially due to their reference to notions of balance and public interest.[23] This has led some scholars to argue for a flexible interpretation of the test in the later treaties.[24] The point is reinforced for online limitations, due to temporal issues on interpretation. As per Article 31(1) VCLT, the ordinary meaning of a provision is fixed at the date of conclusion of the treaty text.[25] For Berne, that date significantly precedes the advent of the internet and refers to a different technological and economic context, with a clearer definition of "primary" exploitation markets.[26] Accordingly, the tests in the 1990's TRIPS and WIPO Treaties are more suited to assess limitations in the internet age.

In particular, the Agreed Statement on Article 10 WCT, which qualifies as "context" for interpretation of the treaty, allows for the consideration of policy aims and societal values.[27] It states that Article 10 permits "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." The statement is difficult to reconcile with a rigid and restrictive sequential interpretation of the test.[28] Instead, it should be considered as a guideline for the adaptation and extension of existing limitations to BC rights to the digital environment, and the creation of new limitations for digital use (e.g. for acts of making available to the public).[29]

Finally, the TRIPS three-step test replaces "authors" with "the right holder", broadening the scope of the provision to derivative rights holders.[30] It also extends the test to new rights provided for in TRIPS.[31] Regarding copyright, the test was interpreted by a WTO Panel in *US–Copyright* (2000). As supplementary means of interpretation, the panel report may assist in defining the scope of the TRIPS and BC tests and, to an indirect extent, the WCT test.[32] However, for the interpretation of the European test, the report has less weight than the aforementioned WCT Agreed Statement.

17 J.-M. Sorel & V.B. Eveno, 'Commentary to Art. 31 of the 1969 Vienna Convention', in: O. Corten & P. Klein (eds), *The Vienna Conventions on the Law of Treaties : A Commentary*, OUP 2011, pp. 820-821.

18 A definitive interpretation can only be given by the International Court of Justice (Art. 33 BC) but no case has ever been brought before this Court, as dispute resolution procedures under the BC are not deemed effective. See P.B. Hugenholtz & R.L Okediji, *Conceiving an International Instrument on Limitations and Exceptions to Copyright*, Final Report, IViR and University of Minesota Law School (2008), p. 21.

19 M. Ficsor, 'How Much of What? Three-Step Test and Its Application in Recent WTO Dispute Settlement Cases', 192 R.I.D.A. 110 (2002), 125-127.

20 Griffiths 2009, *op. cit.*, p. 489; Hugenholtz & Okediji 2008, *op. cit.*, p. 18; C. Geiger, D. Gervais & M. Senftleben, 'The Three-Step-Test Revisited: How to Use the Test's Flexibility in National Copyright Law', 29 American University International Law Review 581 (2014), p. 616; R. Wright, 'The "Three-Step Test" and the Wider Public Interest: Towards a More Inclusive Interpretation', 12 The Journal of World Intellectual Property 600 (2009), pp. 603-604; M. Senftleben, 'Comparative Approaches to Fair Use: An Important Impulse for Reforms in EU Copyright Law', in: G.B. Dinwoodie (ed.), *Methods and Perspectives in Intellectual Property*, Edward Elgar 2013, p. 16.

21 Arts 13 TRIPS, 10 WCT (and its Agreed Statements), and 16(2) WPPT, including the Agreed Statements to the latter treaties.

22 Senftleben 2004, *op. cit.*, p. 106. See Arts 9(1) TRIPS and 1(4) WCT. This much can be deduced from references in the preparatory works of TRIPS and the WCT. Cf. ibid, pp. 111-112., and supplementary sources cited therein. This approach was followed in WTO, *Canada–Patent*, paras 6.14-6.15, 7.72, and WTO, *US–Copyright*, paras 6.73, 6.179, 6.181.

23 The attention to the object and purpose of the treaty is fully consistent with the rules of the VCLT. Cf. Geiger, Gervais & Senftleben 2014, *op. cit.*, pp. 597ff.

24 See, e.g., Ricketson & Ginsburg 2006, *op. cit.*, pp. 208-209.

25 See, e.g., Sinclair 1984, *op. cit.*, pp. 124-126.

26 G. Westkamp, 'Three-Step Test and Copyright Limitations in Europe: European Copyright Law between Approximation and National Decision Making,' 56 Journal of the Copyright Society of the U.S.A. (2008), pp. 7-8.

27 See A. Kur, 'Of Oceans, Islands, and Inland Water – How Much Room for Exceptions and Limitations Under the Three-Step Test?', Max Planck Institute for Intellectual Property, Competition & Tax Law Research Paper Series No. 08-04 (2008), p. 46; D. Shabalala, 'United States – Section 115(5) of the US Copyright Act: Summary and Analysis', in: C.M. Correa (ed.), *Research Handbook on the Interpretation and Enforcement of Intellectual Property under WTO Rules. Intellectual Property in the WTO*, II, Edward Elgar 2010, p. 185. *But see* J Reinbothe & S.von Lewinski, *The WIPO Treaties 1996*, Butterworths 2002, p. 132, considering that Art. 10(2) WCT contains "a scrutiny test", rather than an "enabling clause". N.B. the statement was adopted mutatis mutandis for Article 16 WPPT.

28 Geiger, Gervais & Senftleben 2014, *op. cit.*, pp. 610.

29 *Ibid*., pp. 591, 617, 625-626. See also Christie & Wright 2014, *op. cit.*, pp. 418-419, arguing on the basis of the wording of Art. 10(1) WCT and the Agreed Statement that member states are not restricted to implementing exceptions in the digital environment only in certain special cases or in those permitted in the BC.

30 N.B. TRIPS contains slightly different versions of the test in the fields of trademarks (Art. 17), designs and models (Art. 26(2)) and patents (Art. 30).

31 This includes rental of computer programs and cinematographic works. See Art. 11 TRIPS.

32 Senftleben 2004, *op. cit.*, pp. 107-110.

Indeed, the InfoSoc Directive implements the WIPO Treaties and should be read in their light.[33] This matters because strict readings of the three-step test often rely on *US–Copyright*, to the detriment of the Agreed Statements.

The EU test in context

Article 5(5) InfoSoc Directive states that the limitations provided in the same article shall only be applied 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.

This test is the "benchmark for all copyright limitations" in the EU.[34] Its main function is to control the application of limitations to the directive's exclusive rights in Articles 2–4: reproduction, communication to the public, and distribution. For national legislators, this means that limitations must comply with the conditions set forth in the exhaustive list of Article 5(1) to (4) and the three-step test in paragraph (5).

The EU test deviates from its international predecessors by stating that limitations "shall only be applied in certain special cases". The references to the modal verb "shall" and to *application* in the article (and recital 44) raise the question of whether the test is also a substantive norm for national judges to decide on specific instances of liability.[35] The topic is controversial and has not been settled by the CJEU. Whereas the Court does not consider the test to affect the substantive content of limitations, it likewise holds that where certain acts of a defendant fall within their scope, the requirements of 5(5) must be met.[36] In addition, the Court has interpreted limitations *in light* of Article 5(5).[37] On this basis, some authors and AGs consider that the test is also addressed to national courts.[38]

Beyond this aspect, the relationship of Article 5(5) with the aims of the InfoSoc Directive and international obligations is often at the centre of interpretations on the scope and flexibility of the test. Among the objectives of the directive are increased legal certainty, a high level of protection, and a functioning internal market. To achieve them it is crucial to harmonise copyright and its limitations, while respecting fundamental rights. The harmonisation goal intersects with the adaptation of EU law to international standards, in particular the WIPO Treaties, as stated in recital 15.[39] Furthermore, recital 44 states that limitations "should be exercised in accordance with international obligations". It is noted that the EU is a member of TRIPS and the WIPO Treaties, making these treaties binding on its institutions and member states.[40]

For some, the reference to "international obligations" relates specifically to Article 10 WCT and its Agreed Statement.[41] In this view, a WCT-compliant reading of the EU test would require that it is interpreted as an enabling norm for the adaptation/creation of online limitations.[42] But other readings are possible. For instance, recital 44 also supports the opposite view that future limitations for online use should have a narrow scope due to their "increased economic impact" on rightholders' revenues.[43]

Focus on Normal Exploitation

The above framework influences the range of potential readings of the test, demarcated by two opposing views: strict *versus* flexible interpretation. On one side of the spectrum, the test can be interpreted as a restricting clause. This understanding derives from the doctrine of strict interpretation, which departs from the principle of exclusivity and construes derogations thereto as exceptional. It posits that the test can only have a narrow sphere of operation, imposing "limits on limitations".[44] According to this approach, the three conditions have a conjunctive structure: they are cumulative and successive "steps" instead of factors.[45] Analysis starts from the first condition and works its way up. If a condition is not met, the limitation fails the test. In contrast,

33 N.B. no CJEU decision on limitations mentions the WTO Panel Reports, although WTO, *US-Copyright* is mentioned in *Opinion AG in VG Wort*, par. 9, and *Opinion AG in ACI Adam*, par. 55.

34 European Commission, 16 July 2008, Green Paper Copyright in the Knowledge Economy, COM(2008) 466/3, p. 5.

35 For a recent discussion of the issue, see R. Arnold & E. Rosati, 'Are National Courts the Addressees of the Infosoc Three-Step Test?', JIPLP 10 (2015), pp. 741-749.

36 CJEU, 4 October 2011, joined cases C-403/08 and C-429/08, Premier League/Murphy (*Murphy*), par. 181; CJEU, 5 July 2014, case C-360/13, Meltwater (*Meltwater*), par. 53; CJEU, 10 April 2014, case C-435/12, ACI Adam (*ACI Adam*), paras 25-26; CJEU, 5 March 2015, case C-463/12, Copydan (*Copydan*), par. 90; CJEU, 11 September 2014, case C-117/13, Ulmer (*Ulmer*), par. 56.

37 CJEU, 16 July 2009, case C-5/08, Infopaq (*Infopaq I*), par. 58; CJEU, 27 February 2014, case C-351/12, OSA (*OSA*), par. 40; CJEU, *Ulmer*, par. 47. See also CJEU, 15 March 2012, case C-162/10, Phonographic Performance Ireland (*PPI*), paras 75–76, in connection with Art. 10(3) Rental and Lending Directive.

38 See: Arnold & Rosati 2015, *op. cit.*; *Opinion AG in Stichting de Thuiskopie*, para. 42 ("…though being primarily a norm addressed to the legislature, the three-step test must also be applied by the national courts in order to ensure that the practical application of the exception to Article 2 of Directive 2001/29 provided by national legislation remains within the limits allowed by Article 5 of that drective" [sic]); *Opinion AG in ACI Adam*, para. 48.

39 Senftleben 2004, *op. cit.*, pp. 253-254.

40 Cf. Art. 216 TFEU. On the need to interpret the *acquis* in light of international law, see C. Geiger & F. Schönherr, 'Limitations to Copyright in the Digital Age', in: A. Savin & J. Trzaskowski (eds.), *Research Handbook on EU Internet Law*, Edward Elgar 2014.

41 Senftleben 2013, *op. cit.*, pp. 15-17; Geiger & Schönherr 2014, *op. cit.*, p. 121 & n.41.

42 Geiger & Schönherr 2014, *op. cit.*, p. 121.

43 See recital 44, in fine, InfoSoc Directive. For a restrictive interpretation of limitations based on this recital, see e.g., CJEU, *ACI Adam*, par. 27.

44 Cf. M. 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' 37 IIC 407 (2006), p. 413, describing the WTO Panel approaches to the test.

45 See, e.g., B. Rietjens, 'Copyright and the Three-Step Test: Are Broadband Levies Too Good to Be True?' 20 International Review of Law, Computers & Technology (2006), pp. 323, 326; H. He, 'Seeking a Balanced Interpretation of the Three-Step Test – An Adjusted Structure in View of Divergent Approaches', IIC 274 (2009), pp. 277-278.

more flexible constructions see the test as an enabling clause, allowing for different interests and for a better calibration of rights and limitations.[46]

The second step of the test is usually considered the most restrictive and the major obstacle to new online limitations.[47] The concept of "normal exploitation" of works is a legal fiction with no clear meaning and undeniable circularity: exploitation occurs in markets to which exclusive rights extend, whereas privileged uses are by definition outside those markets. Hence, the analysis should avoid turning the step into a "self-validating" mechanism for limitations, while rejecting a construction of the concept so broad that it only allows *de minimis* use.[48] Within this range lies the appropriate definition of normal exploitation. This section first considers the traditional view of normal exploitation, rooted in *US–Copyright*. It then raises some objections to the traditional view, which justify a more flexible interpretation.

The Traditional View

"Exploitation" refers to the economic value extracted from rights through the commercialisation of works.[49] To define "normal" exploitation scholars commonly seek guidance from the WTO panel reports on the test, especially *US–Copyright*.[50] The concept has empirical and normative dimensions. The first dimension reflects the degree of market displacement caused by a limitation as measured by different standards, including lost profits, reasonably expected licensing fees, or actual and potential effects.[51] There is some confusion as to the normative dimension, which is ascribed meanings ranging from the effect of a limitation on potential markets (in *US–Copyright*) to the policy justifications of exclusive rights (in other WTO panel reports).[52]

In *US–Copyright*, normal exploitation involves the assessment of the *actual* and *potential* impact on the market of a limitation. The actual or "empirical" aspect reflects the effect of the limitation on forms of exploitation that "currently generate significant or tangible revenue".[53] This effect is measured in relation to markets that rights holders would expect to exploit if not for the limitation, and the reference point is the exclusive right or category of right affected.[54] If this were the sole test, the concept would exclude uses for which there is no expectation of compensation.[55]

In contrast, the potential or "normative" aspect in *US–Copyright* relates to forms of exploitation that "with a certain degree of likelihood and plausibility, could acquire considerable economic or practical importance".[56] In other words, the emphasis is on the potential effect of a limitation on the market.[57] On this point, the panel relied on the Swedish/BIRPI Study Group report of 1964, adopted in 1965.[58] According to this, "normal" includes current and future forms of exploiting a work of "considerable economic or practical importance in potential future markets".[59] The reliance on this document, without scrutinising its status, has been qualified as a "significant misapplication of normal practice under the Vienna Convention".[60]

The consequences are far-reaching. "Normal" exploitation now includes "potential, permissible or desirable" forms of exploitation, including new technological modes of exploitation not presently "common or normal in an empirical sense".[61] It covers potential sources of income for every individual right, irrespective of their importance in the overall commercialisation of works.[62]

The reference point to assess this potential impact is the current and "near future" commercial and technological conditions.[63] Yet, the copyright panel rejects treating the non-exercise of rights as indicative that a use is outside normal exploitation.[64] That is to say, it does not exclude uses for which rightholders are unwilling or unable to exercise their

46 See, e.g., Hugenholtz & Okediji 2008, *op. cit.*, p. 25; D. Gervais, 'Towards A New Core International Copyright Norm: The Reverse Three-Step Test', 9 Marquette Intellectual Property Law Review (2005); Kur 2008, *op. cit.*; Westkamp 2008, *op. cit.*; Wright 2009, *op. cit.*; He 2009, *op. cit.*; Geiger & Schönherr 2014, *op. cit.* Notable efforts by groups of academics in this regard include the MPI Declaration and the European Copyright Code that resulted from the Wittem Project. On the first, see C. Geiger, J. Griffiths & R.M. Hilty, 'Declaration on a Balanced Interpretation of the "Three-Step Test" in Copyright Law', IIC 39 (2008). On the second, see www.copyrightcode.eu.

47 On the restrictive nature of the step, see Koelman 2006, *op. cit.*; Geiger 2007, *op. cit.*, p. 6; Kur 2008, *op. cit.*, pp. 5-27; M. Senftleben, 'How to Overcome the Normal Exploitation Obstacle : Opt-Out Formalities, Embargo Periods and the International Three-Step Test', 1 BTLJ Commentaries 1 (2014). Regarding its application to specific limitations for non-commercial online use, see, S. Dusollier & C. Colin, 'Peer-to-Peer File Sharing and Copyright: What Could Be the Role of Collective Management?', 34 Columbia Journal of Law & the Arts 809 (2011), p. 829; Geiger & Schönherr 2014a, *op. cit.*, p. 135.

48 Rietjens 2006, *op. cit.*, p. 329; Kur 2008, *op. cit.*, p. 25. The "circular reasoning" critique of the step originates from P. Goldstein, *International Copyright. Principles, Law, and Practice*, OUP 2001.

49 Gervais 2005, *op. cit.*, p. 16. See: WTO, *Canada-Patent*, par. 7.53; WTO, *US-Copyright*, par. 6.165.

50 Kur 2008, *op. cit.*, pp. 16-17.

51 A. Peukert, 'A Bipolar Copyright System for the Digital Network Environment', 28 Hastings Communications & Entertainment Law Journal 1 (2005), p. 33.

52 Hugenholtz & Okediji 2008, *op. cit.*, p. 24.

53 WTO, *US-Copyright*, par. 6.180.

54 *Ibid.*, paras 6.172-173, and 175, adding that a rights holder is entitled "to exploit each of the rights for which a treaty, and the national legislation implementing that treaty, provides."

55 WTO, *US-Copyright*, paras 6.177-6.178.

56 *Ibid*, par. 6.180.

57 *Ibid.*, paras 6.184-6.185.

58 See BIRPI, 'General Report of the Swedish/BIRPI Study Group Established at July 1, 1964 − Committee of Governmental Experts (1965)' (1965).

59 WTO, *US-Copyright*, par. 179.

60 Shabalala 2010, *op. cit.*, pp. 173, 174.

61 Gervais 2005, *op. cit.*, p. 16.

62 WTO, *US-Copyright*, paras 6.166, 6.178, 6.180ff. See Kur 2008, *op. cit.*, p. 25.

63 WTO, *US-Copyright*, par. 6.187.

64 *Ibid.*, par. 6.188. The examples provided are those of "current licensing practices" and cases "where, due to lack of effective or affordable means of enforcement, right holders may not find it worthwhile or practical to exercise their rights".

rights. Thus read, the second step becomes an economic test deprived of policy considerations.[65]

According to this view, a conflict with the normal exploitation of works arises when newly exempted uses enter into "economic competition with the ways that right holders normally extract economic value" from the exclusive right affected, depriving them of "significant or tangible commercial gains."[66] However, because the hypothetical economic loss caused by the limitation is compared to the *actual and potential* full exploitation of the right, most limitations whose scope goes beyond *de minimis* use are outlawed.[67]

This strict interpretation line is visible in CJEU case law. In *ACI Adam* and its progeny, for example, the Court argues that allowing reproductions from unlawful sources encourages piracy, "inevitably" reducing revenues from lawful sources and conflicting with the normal exploitation of works.[68] The Court in essence makes an empirical assessment that there is a substitution effect between reproductions made from lawful sources and those made from unlawful sources. However and remarkably, it fails to provide evidence for this claim or address the limitation's justification, anchored on the fundamental right of privacy.[69]

To conclude, the application of the traditional view of normal exploitation, supported in *US–Copyright* or *ACI Adam* and its progeny, probably prevents the adoption of most online limitations. It becomes irrelevant whether an online use covered by a limitation is susceptible of monetisation or enforcement. What matters is whether that use enters into economic competition with current and potential forms of exploitation of works. If that happens, the limitation conflicts with the "normal exploitation" of works, thereby failing to meet the second (cumulative) condition of the three-step test.[70]

Towards a Flexible Interpretation

The traditional view of normal exploitation is problematic on two counts. First, it relies on an broad notion of the concept that extends beyond the reasonable economic core of copyright. Second, it foregoes policy considerations. A flexible interpretation should address these shortcomings.

A reasonable definition of normal exploitation

Beyond adhering to a canon of strict interpretation, the traditional view relies on an "idealized" notion of normal exploitation, which includes unlicensed, non-monetised and unenforced uses.[71] This risks crystallising limitations in time. For existing privileges, it disallows uses included in its spirit but not apparent from its letter.[72] For new limitations, it erects a near insurmountable legal obstacle where a digital use is *susceptible* of technological control, as that use will probably integrate the concept of normal exploitation concept.[73] The result is a chilling effect on domestic legislative freedom in the field of online copyright limitations and, more generally, communication and information law.[74]

In a flexible reading, the analysis focuses on the effect of a limitation on the overall commercialisation of works, including the associated bundle of exclusive rights.[75] The relevant forms of exploitation correspond to the typical major sources of rights revenue. As a result, a conflict only arises when a proposed limitation causes substantial market impairment to those revenue sources.[76] This entails economic analysis for different types of work in order to estimate the impact of the limitation in areas where authors extract the most royalties.[77] The emphasis is on the economic core of copyright, rather than the imperfect legal construction of rights, which reflects the technical characterisation of digital uses.[78]

In sum, there is a conflict with the normal exploitation of works if a limitation demonstrably deprives rights holders of substantive, reasonably expected and foreseeable sources of income under normal commercial circumstances.[79] As a consequence, if an online use is not susceptible of adequate licensing, monetisation or enforcement, it will be difficult to consider that a limitation on it contravenes the second step of the test, especially if it is has strong non-economic motivations.

65 Kur 2008, *op. cit.*, pp. 26-27.

66 WTO, *US-Copyright*, par. 6.183 and, for the analysis, paras 6.176–6.183. See also Shabalala 2010, *op. cit.*, 174.

67 Senftleben 2006, *op. cit.*, pp. 426, 429; Kur 2008, *op. cit.*, pp. 26-27.

68 CJEU, *ACI Adam*, para. 39. See also CJEU, *Copydan*, paras 74-79; *Opinion AG in Copydan*, paras 81-85; CJEU, 12 November 2015, case C-572/13, *Reprobel*, paras 59-62. Similarly, see CJEU, *Filmspeler*, par. 70.

69 For a critical assessment, see J.P. Quintais, 'Private Copying and Downloading from Unlawful Sources', 46 IIC 66 (2015).

70 Peukert 2005, *op. cit.*, p. 34; Rietjens 2006, *op. cit.*, pp. 331-332.

71 Shabalala 2010, *op. cit.*, p. 174, calling this the "the weakest part of a generally weak legal analysis". See also J. Ginsburg, 'Toward Supranational Copyright Law? The WTO Panel Decision and the "Three-Step Test" for Copyright Exceptions', RIDA (2001) pp. 19-25, 49-53; Kur 2008, *op. cit.*, p. 31; Griffiths 2009, *op. cit.*, p. 10.

72 Geiger, Gervais & Senftleben 2014, *op. cit.*, p. 594.

73 Geiger 2005, *op. cit.*, p. 6; Griffiths 2009, *op. cit.*, pp. 10-11; Geiger, Gervais & Senftleben 2014, *op. cit.*, pp. 594-595; Senftleben 2014, *op. cit.*, p. 9.

74 Westkamp 2008, *op. cit.*, pp. 9-10, considering this proposition unacceptable.

75 See WTO, *US–Copyright*, par. 6.173, and Peukert 2005, *op. cit.*, p. 33., arguing for a separate right analysis. *Contra*, Senftleben 2004, *op. cit.*, pp. 177-194.

76 Senftleben 2004, *op. cit.*, pp. 177-194. This seems to be the approach followed in *Opinion AG Infopaq I*, paras 137-138, which focuses on the effect of the limitation on a specific market (here, the newspaper market).

77 This argument is based on Senftleben 2004, *op. cit.*, pp. 184-193.

78 Parts of this argument derive from S. Depreeuw, *The Variable Scope of the Exclusive Economic Rights in Copyright*, Kluwer Law International 2014.

79 A. Lucas, 'For a Reasonable Interpretation of the Three-Step Test', E.I.P.R. 281 (2010), p. 277; Gervais 2005, *op. cit.*; Griffiths 2009, *op. cit.*, p. 457; Geiger, Gervais & Senftleben 2014, *op. cit.*, pp. 603-604. See also Hugenholtz & Okediji 2008, *op. cit.*, pp. 23-24., stating that this is the correct reading of *US–Copyright* in light of historic elements.

Taking normative justifications seriously

Critics of the traditional view also object to its disregard for the policy underpinnings of limitations, which are examined only in the third step.[80] As a result, few limitations survive the second step. This forecloses analysis of public interest motivations that ultimately justify restrictions on copyright.[81] The advantage of normative analysis in the second step is to allow consideration of the social function of copyright and technological developments.[82] The approach has historical pedigree. Indeed, the BC recognises public interest limitations and the grandfathering of existing domestic exceptions.[83] For Ricketson, the "omnibus" nature of Article 9(2) BC and the wider context of the convention lead to the "logical" conclusion that the three-step test includes "non-economic normative considerations", namely whether a "particular kind of use is one that the copyright owner *should* control".[84] The WTO panel in *Canada–Patent* follows a similar reasoning, considering a form of exploitation to be normal if it is "essential to the achievement of the goals of patent policy".[85] Some influential scholarship considers it desirable to extend a similar approach to copyright law.[86]

But how to infuse normative content into the second step? One possibility is to make normal exploitation responsive to social norms in the online environment, for example by allowing limitations for private digital use and non-commercial transformative use.[87] Other approaches include approximating the second step to the fourth factor of the US fair use test,[88] taking into account reasonableness and proportionality in the analysis[89], requiring that the application of exclusive rights to exempted forms of use be justified on policy grounds[90], or incorporating competing considerations within the definition of normal exploitation.[91]

The common theme of these approaches seems to be the consideration of a limitation's motivations in a balancing exercise. The motivations can be economic or non-economic. In the context of the InfoSoc Directive, where contractual and technical restrictions appear to predominate over limitations, economic market failure motivations for a limitation are inherently weaker. As a result, to justify a restriction on exclusivity, an online limitation should also be motivated by non-economic arguments.[92] These may include ensuring legal certainty for users, improving access to works and the circulation of culture over the internet, promoting technological development, ensuring fair remuneration of creators, and/or facilitating the respect for fundamental rights.

If international and EU copyright law indeed aim at striking a fair balance between competing rights and interests, the policy justifications for a limitation can be considered at either the second or third step. The crucial aspect is to ensure that their analysis is not pre-empted by a strict reading of the test. Instead, those justifications ought to play a central role when deciding on the admissibility of a limitation in EU copyright law, especially in the digital and cross-border environment.

The way forward for online limitations and the case of user-generated content

Limitations are essential tools to balance copyright exclusivity with the public interest and fundamental rights. They enable the promotion of access to, and dissemination of, culture, education and knowledge. In the online environment, they provide a necessary counterweight to the expansion of technically defined exclusive rights to digital activities outside the commercial core of copyright. In order to secure the public interest dimension of limitations, it is important to reject restrictive interpretations of the three-step test – especially its second step – that rely on idealized notions of "normal exploitation" or forego analysis of normative justifications.

Building on influential scholarship and case law, this article offers an appealing alternative reading of "normal exploitation". The proposed flexible interpretation is consistent with a systematic and teleological interpretation of international and EU law, relies on a reasonable economic standard to

80 Kur 2008, *op. cit.*, pp. 27, 30-31; Shabalala 2010, *op. cit.*, pp. 172-175; Lucas 2010, *op. cit.*, p. 279; Ricketson 2003, *op. cit.*, p. 25. An alleged benefit of *US-Copyright*'s approach is to avoid redundancy in the examination of different steps. See Ricketson & Ginsburg 2006, *op. cit.*, pp. 767-773, and Griffiths 2009, *op. cit.*, p. 16

81 Shabalala 2010, *op. cit.*, p. 156.

82 Koelman 2006, *op. cit.*, pp. 408-409.

83 Senftleben 2004, *op. cit.*, pp. 182-183; Ricketson & Ginsburg 2006, *op. cit.*, pp. 771-773. *Contra* Lucas 2010, *op. cit.*, p. 280.

84 Ricketson 2003, *op. cit.*, p. 25. He 2009, *op. cit.*, pp. 284-285., argues that the normative element is implicitly recognised in the report of the Swedish/BIRPI group on which *US–Copyright* relies for its strict interpretation.

85 WTO, *Canada-Patent*, paras 751-759.

86 Geiger, Gervais & Senftleben 2014, *op. cit.*, p. 600; Kur 2008, *op. cit.*, p. 27; Ricketson 2003, *op. cit.*, p. 26; Ricketson & Ginsburg 2006, *op. cit.*, p. 773. See also, supporting the application of the *Canada–Patent* approach, Senftleben 2006, *op. cit.*, p. 426; Hugenholtz & Okediji 2008, *op. cit.*, p. 24.

87 Gervais 2005, *op. cit.*, pp. 37ff.

88 The fourth factor of the fair use doctrine, listed in Section 107 US Copyright Act, is "the effect of the use upon the potential market for or value of the copyrighted work'". See Koelman 2006, *op. cit.*, pp. 411-412., and He 2009, *op. cit.*, pp. 285-286, 294-300.

89 Koelman 2006, *op. cit.*, pp. 411-412.

90 Senftleben 2006, *op. cit.*

91 C. Geiger, 'The Role of The Three-Step Test in the Adaptation of Copyright Law to the Information Society', *UNESCO E-Copyright Bulletin* 1 (2007); Geiger, Griffiths & Hilty 2008, *op. cit.* See, similarly, Hugenholtz & Okediji 2008, *op. cit.*, p. 21; He 2009, *op. cit.*, pp. 294-300., who emphasise a proportionality assessment at this stage. *But see* Griffiths 2009, *op. cit.*, p. 16 & n.114. (on the uncertainty risk of this approach), and Lucas 2010, *op. cit.*, p. 279-280 (against the consideration of non-economic motivations at this stage).

92 Ginsburg 2001, *op. cit.*, pp. 51-53. In this line, see Peukert 2005, *op. cit.*, p. 34, arguing that some widely accepted limitations, like criticism or parody, only survive the second step in the digital environment due to their normative underpinnings.

define the concept, and takes into account the policy objectives of limitations. With this design, the three-step test could become a catalyst for the adoption of online limitations that adequately balance fundamental rights, promote technological development, and approximate the law to social norms.

A practical and current example of the application of this interpretation can be seen in the case of user-generated content (UGC), a type of use that is part of the everyday online practices of individual users. In the context of current copyright reform, UGC has been defined as "an image, a set of moving images or without sound, a phonogram, text, software, data, or a combination of the above, which is uploaded to an online service by its users."[93] The types of use of works made by individuals in the context of UGC often include not just partial reproductions but also transformative use, such as remixes and mashups.[94]

UGC can involve three exclusive rights: reproduction (of the pre-existing work), communication to the public (of that work through its upload), and adaptation (resulting from digital transformations to the work).[95] The first two rights are harmonised in Articles 2 and 3 InfoSoc Directive. Differently, the right of adaptation is only harmonised in different provisions in the BC (incorporated in the WCT and TRIPS), and at EU level for computer programs and databases.[96] As a result, limitations in the InfoSoc Directive do not apply to the adaptation right, but merely to reproduction and communication to the public.[97]

For some authors, this framework leaves "ample unregulated space with regard to the right of adaptation" in the *acquis*.[98] Certain Member States use that space to enable free non-commercial online transformative uses. For instance, German law recognises a free adaptation/use rule ("Freie Benutzung"), while Dutch law contains a "new work" exemption as a carve-out from the right of adaptation. Outside Europe, Canadian law has implemented a specific limitation for UGC.[99]

Within EU law, the aforementioned "unregulated space" could be maximised to facilitate UGC through a broad application of the limitations for quotation, incidental inclusion, and parody.[100] However, the approach may be insufficient to achieve that goal. This is not only because of divergent national interpretations of the exclusive (domestic) right of adaption and applicable limitations, but also due to the broad interpretation of harmonised rights by the CJEU, which encroach upon the margin of discretion of Member States to regulate acts within the concept of UGC.[101]

Some scholars contend that the harmonisation of the cited limitations *and* their broad interpretation could cover the majority of UGC, or at least the "most valuable" use from the viewpoint of freedom of expression and development of culture. Yet, even they recognise the need for legislative change to the limitations, including making them mandatory, unwaivable, and for the sole benefit of their creators.[102]

It is against this background that the aforementioned proposals for a UGC limitation by the Internal Market Committees (IMCO) and the Culture Committee (CULT) in the context of the Draft DSM Directive should be understood.[103] The IMCO proposes a *mandatory* limitation to all exclusive rights in the InfoSoc Directive *and* to the "value gap" provision in the Draft DSM Directive (Article 13). The limitation allows for the digital use of quotations or extracts of works and other subject-matter comprised within UGC for "purposes such as criticism, review, entertainment, illustration, caricature, parody or pastiche". Like the quotation limitation, it is subject to the conditions of lawful prior availability, indication of source, and use in accordance with fair practice. If those conditions are met, the limitation cannot be overridden by contract.[104] The CULT proposal is similar in its scope and conditions but undeniably narrower: the limitation is *optional*, applies only to "digital, non-commercial and propor-

93 EP IMCO Opinion, *op. cit.*, p. 29, Proposal -or a directive Article 2 – paragraph 1 – point 3 a (new). For broader definitions, see Quintais 2017, op. cit., pp. 157-158, 227-238.

94 See, e.g., B.J. Jütte, 'The EU's Trouble with Mashups: From Disabling to Enabling a Digital Art Form', JIPITEC 5 (3) 2014.

95 J.-P. Triaille et al., *Study on the application of Directive 2001/29/EC on copyright and related rights in the information society*, Study for the European Commission, DG MARKT (2013), p. 459.

96 Arts. 8, 12 and 14(1) BC; Arts 4(1)(b) Computer Programs Directive, and 5(b) Database Directive. As a result, the right of adaptation is present in the national laws of Member States as a stand-alone provision or part of the reproduction right. See Quintais 2017, *op. cit.*, p. 228 with further references.

97 M. van Eechoud et al., *Harmonizing European Copyright Law. The Challenges of Better Law Making*, Kluwer Law International (2009), pp. 83-84, 100.

98 Hugenholtz & Okediji, 2008, *op. cit.*, pp. 14-15; Hugenholtz & Senftleben, 2011, *op. cit.*, pp. 2, 26.

99 See Art. 29.21 Canadian Copyright Act on "Non-commercial User-generated Content" (introduced in 2012 through the Bill C-11 – "Copyright Modernization Act").

100 Hugenholtz & Senftleben, 2011, *op. cit.*, making reference to Art. 24 German Copyright Act, and Arts 13 and 18b (for parody) Dutch Copyright Act. See also M. Senftleben, 'Breathing space for cloud-based business models; exploring the matrix of copyright limitations, safe-harbours and injunctions', JIPITEC 4(2) (2013), p. 89, making reference to the exemption for "independent new works" that results from an adaptation provided in Art. 5(2) Austrian Copyright Act.

101 See, e.g., E. Rosati, 'CJEU says that copyright exhaustion only applies to the tangible support of a work', JIPLP 10(5) (2015), pp. 309-330, commenting on the implications of the judgments in Infopaq I and CJEU, 22 January 2015, case C-419/13, *Arts & Allposters*.

102 Triaille et al., 2013, *op. cit.*, pp. 524, 534-541. The authors would combine this with making the relevant limitations mandatory and at least quotation and parody unwaivable by contract. They would further make clear that only the individual creators would benefit from the limitations, as opposed to UGC platforms.

103 See the 'Introduction' section *supra*.

104 EP IMCO Opinion, *op. cit.*, pp. 29, 36 (Amendment 55, Proposal for a directive – Article 5 b (new)).

tionate use of short extracts or short quotations", does not include use for the purpose of "entertainment", and is without prejudice to the "value gap" provision in Article 13.[105]

A strict reading of the test and the concept of normal exploitation would probably prevent the application of either proposal, or merely leave the possibility of adopting the more modest CULT limitation. Against the IMCO proposal, it could be argued that it is too broad in scope, covering types of use that are susceptible of legal and technological control, especially if the rules in Article 13 Draft DSM Directive allow copyright owners to control the activities of online platforms hosting UGC. Furthermore, the lack of normative considerations at this stage could weaken the case for making this limitation mandatory.

Conversely, under a flexible interpretation of the three-step test and the concept of normal exploitation, there is a strong case for the admissibility of the IMCO proposal. On the one hand, this limitation does not appear to conflict with the reasonably expected and foreseeable commercial exploitation of the works. First, only a relatively small portion of the work can be used: a quotation or extract. Second, the use must be for one of a number of delimited purposes that are familiar to already existing and adjacent limitations (criticism, review, illustration, caricature, parody or pastiche) or reflect social norms of cultural consumption (entertainment). Third, the applicable conditions, identical to those of the quotation limitation, prevent uses in direct competition with the exploitation models of copyright owners.

On the other hand, the proposed limitation has solid normative justifications. First, it will improve legal certainty online, both for individual users and (theoretically) for platforms in the context of UGC. Second, it will align copyright with online social norms, with benefits for the respect and legitimacy of the law. Third, a UGC limitation construed as an online extension of the concepts of quotation and parody is clearly grounded on the fundamental freedom of expression and information, recognized in Article 11 of the Charter and identified in recital 3 InfoSoc Directive as on par with intellectual property. The CJEU has used this fundamental freedom not only to limit remedies for copyright infringement[106], but also – with direct relevance here – to justify the existence and broad interpretation of the parody and quotation limitations in *Deckmyn* and *Painer*.[107] Additionally, the combination of these normative arguments with the single market relevance of UGC argues in favour of a *mandatory* limitation. An optional limitation could be self-defeating, as it risks insufficient harmonization and fails to adequately protect the fundamental rights dimension of UGC.[108]

Beyond UGC, a flexible view of normal exploitation could unlock future limitations for large-scale non-commercial activities of users. Where the adoption of a limitation is justified on economic and non-economic grounds but may cause harm to copyright owners, a flexible interpretation could enable a shift towards systems of access and remuneration. Those systems, as argued elsewhere, could contribute to the modernization of EU copyright law in a way that safeguards the interests of copyright owners (including the fair remuneration of creators), promotes technological development, increases legal certainty, and enables users to preserve a personal sphere of enjoyment and expression online.[109]

105 EP CULT Opinion, *op. cit.*, pp. 41-42 (Amendment 60, Proposal for a directive, Article 5 a (new). The proposal is explicitly justified with the need to protect consumer's legitimate practices as service users in the digital environment, especially as current copyright law fails to provide them with legal certainty. *Ibid*., p. 5.

106 CJEU, 24 November 2011, case C-70/10, Scarlet Extended, pars 43, 50–53; CJEU, 16 February 2012, case C−360/10, *Netlog*, pars 41-43, 48, 50-51; CJEU, 27 March 2014, case C-314/12, *UPC Telekabel*, pars 46-47, 55-57.

107 CJEU, 3 September 2012, case C-201/13, Deckmyn; CJEU, 1 December 2011, case C-145/10, Eva-Maria Painer.

108 Eechoud et al., 2009, *op. cit.*, pp. 128-129, identifying these arguments for qualifying limitations as mandatory.

109 For detailed proposals in this respect, see Quintais 2017, *op. cit.*