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Openness through the lenses of the three-step-test: international perspectives on copyright protection

Dr. Marinos Papadopoulos* and Dr Nikos Koutras**

Abstract
This paper is focused on openness movement and the principles that said movement declared regarding the use of works set under copyright protection to enable for open access works. On one hand, such movement has been of international poise and is aimed to cause reconsideration of the core principles of copyright law. On the other hand, copyright legal instruments are formed in consideration of international copyright law. The three-step-test legal edifice is deeply rooted in international copyright law; its meaning and application is of vital importance for any consideration of amending copyright law with the aim to include provisions for openness. Unless a provision for openness passes the three-step-test there can be no sustainable amendment of copyright law in favour of openness.

Keywords: openness, open access, three-step-test, fair use, fair dealing, copyright law

1. The openness movement

Openness is about the right and the ability to modify, repackage, and add value to a resource.¹ This kind of openness blurs the traditional distinction between the consumer and the producer of resources. The term “user-producer” is sometimes used to highlight this blurring of roles.² In that sense, openness leveraging upon open data or open access licensed works produced by legal entities or natural persons should make possible the following three freedoms:³

1. The freedom to study a work and apply knowledge offered from it.
2. The freedom to redistribute copies, in whole or in part, of a work.
3. The freedom to make improvements or other changes, i.e., to make adaptations, to the content of a work, and to release modified copies of it.

These freedoms are based on principles and definitions on the substance of open source, open knowledge⁴ and open source/free software⁵ as they have been shaped by initiatives related to openness. The term openness was coined to typify open

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access to information needed for projects, for contributions from a diverse range of users, producers, contributors, flat hierarchies, and a fluid organisational structure.

The sense for movement of openness was first understood according to Professor Yochai Benkler, at a conference at Yale University that Professor James Boyle\(^6\) organized in April 1999, which was already planned as a movement-building event. That conference, “Private Censorship/Perfect Choice”\(^7\) looked at the threats to free speech on the Web and how the public might resist. It took inspiration from John Perry Barlow’s 1996 manifesto “A Declaration of the Independence of Cyberspace”.\(^8\) The stirrings of a movement were evident in May 2000, when Yochai Benkler convened a small conference of influential intellectual property scholars at New York University Law School on “A Free Information Ecology in the Digital Environment”. This was followed in November 2001 by a large gathering at Duke Law School, the “Conference on the Public Domain,” the first major conference ever held on the public domain.\(^9\) It attracted several hundred people and permanently rescued the public domain from the netherworld of “non-property.” People from diverse corners of legal scholarship, activism, journalism, and philanthropy found each other and began to re-envision their work in a larger, shared framework.\(^10\)

In fact, the openness movement cropped up as a reaction of academia in the increasingly rising pricing of scientific publications and subscriptions controlled by publishers and distributors that intervene in the process of scientific knowledge dissemination and stifle competition in scientific publishing and distribution.\(^11\) By the time open access practice started to be a central point of discussion in the agenda of academic institutions,\(^12\) prices had risen many times faster than inflation since 1986.\(^13\) Fortuitously, just as journal prices were becoming unbearable, the Internet emerged to offer an alternative.

The Internet has played a catalytic role in the evolution of the Openness movement because of the radical changes it has imposed in the process of authoring, publishing, distributing, and pricing content via the Internet networked public sphere.

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\(^6\) See Boyle, J., (1997), *A Politics of Intellectual Property: Environmentalism For the Net?* available at [http://law.duke.edu/boylesite/intprop.htm](http://law.duke.edu/boylesite/intprop.htm) [last check, July 30, 2020], was an influential piece that James Boyle wrote in 1997, calling for the equivalent of an environmental movement to protect the openness and freedom of the Internet.

\(^7\) See Yale Bulletin & Calendar, *Private Censorship and Perfect Choice* Conference to explore Speech and Regulation on the Net, April 5-12, 1999 Volume 27, Number 27 available at [http://www.yale.edu/opa/arc-vbc/v27.n27/story3.html](http://www.yale.edu/opa/arc-vbc/v27.n27/story3.html) [last check, July 30, 2020].


The evolution of the Web into Web 2.0\textsuperscript{14} and Web 3.0 has enabled more interaction and participation among users and empowered them to undertake action both as readers and authors, publishers, and distributors, in the process of production and consumption of knowledge. Since the beginning of the Internet era, Openness of scientific knowledge, art, and culture has been fostered and cultivated in a way that indicates that the notion of openness is somewhat intrinsically connected to the hierarchical anarchy of the Net. While open access was born because of the need to remove price barriers (subscriptions, licensing fees, pay-per-view fees), it was soon realized that its survivability was subject to the need to remove permission barriers as well (most copyright and licensing restrictions).

The first initiative related to open access took place in Budapest 2002 with the Budapest Open Access Initiative statement. Its origins stem from the Open Society Institute\textsuperscript{15} which invited a group of people representing several institutions, working in this area to the discussion initiated in November 2001 by a large gathering at Duke Law School in the “Conference on the Public Domain”. In our point of view, informal actors of governance (e.g., institutions and universities) involvement in this initiative show the importance of informal perspective towards formal governance. Thus, the participation from institutions and universities indicate they can have a word concerning information sharing and exchange. Hence, associated governance should be constructed based on ‘directions’ and discussion from informal governance actors, in the examined subject of Openness.

In accordance with the Budapest Open Access Initiative statement, issued on 14 February 2002, two strategies form the governance framework to achieve open access as follows: a) either with self-archiving (i.e., green open access) or b) with publishing in journals where authors cover associated expenses (i.e., gold open access through article processing charges).

According to the Budapest Open Access Initiative statement, open access means that there is free access online to literature that scholars give to the world without expectation of payment. In other words, free availability of such literature on the public internet, permitting any users to read, download, copy, distribute, print, search, or link to the full texts of these articles, crawl them for indexing, pass them as data to software, or use them for any other lawful purpose, without financial, legal, or technical barriers other than those inseparable from gaining access to the internet itself. According to the Budapest Open Access Initiative statement the only impediment on reproduction and distribution, and the only role for copyright in this domain, should be to give authors control over the integrity of their work and the right to be properly acknowledged and cited.\textsuperscript{16}

The past decade has attested contemporary developments of technology and rapid growth of research capacity in producing large-scale biological information, both of which were associated with instant growth of biomedical literature.\textsuperscript{17} As a result, concerns regarding spreading and accessing opportunities to biomedical research outcomes emerged from relevant research discipline and more than a year later than


\textsuperscript{15}See also Diane Stone, \textit{Private philanthropy or policy transfer? The transnational norms of the Open Society Institute}, 38 POLICY POLIT. 269–287 (2010).

the previous initiative, a.k.a. in June 2003, another one emerged on associated institutions’ behalf as support for open access in a meeting on publishing via open access in the USA. Thus, the biomedical research community stimulated such discussion as it was concerned about ways to move on broadening access opportunities to scientific biomedical findings.

The Bethesda Statement on Open Access Publishing is worthy to be examined as its structure is two-folded and states that: a) the author(s) and copyright holder(s) grant(s) to all users a free, irrevocable, worldwide, perpetual right of access to, and a license to copy, use, distribute, transmit and display the work publicly and to make and distribute derivative works, in any digital medium for any responsible purpose, subject to proper attribution of authorship, as well as the right to make small numbers of printed copies for their personal use, and b) a complete version of the work and all supplemental materials, including a copy of the permission as stated above, in a suitable standard electronic format is deposited immediately upon initial publication in at least one online repository that is supported by an academic institution, scholarly society, government agency, or other well-established organization that seeks to enable open access, unrestricted distribution, interoperability, and long-term archiving.18

The Budapest Open Access Initiative19 set open access to peer-reviewed journal literature as its goal; it was mainly focused on scientific literature and the public good that it may crop up because of open access in scientific literature. In the context of said initiative, self-archiving and a new generation of open-access journals are the ways to attain the goal of peer-reviewed journal literature and openness through it. For the Budapest Open Access Initiative self-archiving and open-access journals are not only direct and effective means to this end, but they are also within the reach of scholars themselves, immediately, and need not wait on changes brought about by markets or legislation.

The ‘Bethesda Statement on Open Access’20 and the ‘Berlin Declaration on Open Access to Knowledge in the Sciences and Humanities’21 seem to agree that for a work to be considered for open access, the Copyright holder must consent in advance to let users copy, use, distribute, transmit and display the work publicly and to make and distribute derivative works, in any digital medium for any responsible purpose, subject to proper attribution of authorship. With open access individuals can take projects in their own direction without necessarily hindering the progress of others. The Bethesda Statement on Open Access reinforces the emphasis on barrier-free dissemination of scientific works and expressly details the types of re-use that open access permits, including the making of derivative works, and the licensing conditions that apply. The Bethesda Statement on Open Access specifies what an open access publication is, and which rights the owners or creators of the work grant to users through the attachment of particular licences. For the Bethesda Statement on Open Access an open access publication is one that meets the following two requirements:

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21 Gruss, P., (2003), The Berlin Declaration on Open Access to Knowledge in the Sciences and Humanities, The Max Planck Society.
a) the author(s) and copyright holder(s) grant(s) to all users a free, irrevocable, worldwide, perpetual right of access to, and a license to copy, use, distribute, transmit and display the work publicly and to make and distribute derivative works, in any digital medium for any responsible purpose, subject to proper attribution of authorship, as well as the right to make small numbers of printed copies for their personal use; and b) a complete version of the work and all supplemental materials, including a copy of the permission as stated above, in a suitable standard electronic format is deposited immediately upon initial publication in at least one online repository that is supported by an academic institution, scholarly society, government agency, or other well-established organization that seeks to enable open access, unrestricted distribution, interoperability, and long-term archiving.

The ‘Berlin Declaration on Open Access’ to Knowledge in the Sciences and Humanities is essentially the same as the ‘Bethesda Statement on Open Access’ but it includes an additional recommendation for research institutions: it requires for researchers to deposit a copy of all their published articles in an open access repository and it encourages researchers to publish their research articles in open access journals where a suitable journal exists (and provides the support to enable that to happen). The Berlin Declaration on Open Access to Knowledge in the Sciences and Humanities builds upon the Bethesda Statement on Open Access, which calls for the results of research produced by authors without expectation of payment to be made widely available on the Internet, and to carry permissions necessary for users to use and re-use results in a way that accelerates the pace of scholarship and research. It should be noticed that Berlin Declaration on Open Access to Knowledge in the Sciences and Humanities statement has been signed by nearly 300 research institutions, libraries, archives, museums, funding agencies, and governments from around the world. The geographic and disciplinary diversity of the support for the Berlin Declaration on Open Access to Knowledge in the Sciences and Humanities is illustrated by the signatories, which range from the leaders of the Max Plank Society to the Chinese Academy of Sciences, to Academia Europaea. Both Harvard University and the International Federation of Library Associations added their names to the roster of signatories.

The ‘Bethesda Statement on Open Access’ and the ‘Berlin Declaration on Open Access to Knowledge in the Sciences and Humanities’ seem to agree that for a work to be considered for open access, the copyright holder must consent in advance to let users copy, use, distribute, transmit and display the work publicly and to make and distribute derivative works, in any digital medium for any responsible purpose, subject to proper attribution of authorship. With open access individuals can take projects in their own direction without necessarily hindering the progress of others. Openness is being put forward to facilitate the growth of the open source and free software programming communities and may involve the consumption and production of free content.

Due to these initiatives the appeal of openness gains ground steadily and sometimes is difficult to recognize that limits on openness are not only necessary but desirable. The virtues of an open environment are undeniable; what is more difficult is

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22 Although there have been attempts to define Open Access after the Budapest, Bethesda, and Berlin declaration about it, these three (Budapest, Bethesda and Berlin declarations), usually used together and referred to as the BBB definition of Open Access, have become established as the working definition for Open Access.

23 Berlin Declaration on Open Access to Knowledge in the Sciences and Humanities, 3 JLISIT ITAL. J. LIBR. INF. SCI. (2012).
negotiating the proper levels of openness for a given realm of online life. 24 All three definitions of open access given upon it by the Budapest, the Bethesda, and the Berlin statements—also known as the BBB definition on open access—focus on free uses of an open access work but allow at least one limit on user’s freedom with said work: an obligation to attribute the work to the author. The purpose of open access is to remove barriers to all legitimate scholarly uses for scholarly literature, but there’s no legitimate scholarly purpose in suppressing attribution to the texts subject to open access publication and use. 25 None of these initiatives of openness claimed an amendment in international copyright law in the sense of adding a provision of a new limitation or exception to copyright law ruling for openness in the existing legal framework, though.

In such a context, an increasingly important question is whether current Australian intellectual property framework, most relevantly comprising of copyright provisions attached to the Copyright Act 1968 (Cth), is adequate to deal successfully with free use issues arising out of open access practice. 26 Literature reflects that today’s socio-technological environment provokes a potential reshape of copyright law policy key areas. 27

2. Free use and fair dealing provisions: considerations

In most legal systems the use of a work free from most of the restrictions of Copyright law is recognized as:

a) “Free uses” which are acts of exploitation of works which may be carried out without authorization and without an obligation to compensate the holder of rights for the use, 28 and

b) “Non-voluntary licenses” under which the acts of exploitation may be carried out without authorization, but with the obligation to compensate the holder of rights. 29

Examples of free uses include the making of quotations from a protected work, 30 provided that the source of the quotation, including the name of the author, is mentioned, that the extent of the quotation is compatible with fair practice, and that the

28 See, for example, articles 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 28A, and 28B of Greek Law 2121/1993 as amended.
30 See article 10§1 of the Berne Convention. This is a mandatory exception that must be applied by member countries in their national laws. In this regard, it is unique among Berne Convention limitations and exceptions, as all the others contained in it are permissive, in the sense that they set the limits within which national laws may provide for limitations and exceptions to protection. See World Intellectual Property Organization, (2003), ibid, p.14.
work in quotation has been lawfully made available to the public; \textsuperscript{31} use of works by way of illustration for teaching purposes; \textsuperscript{32} political speeches and speeches delivered in the course of legal proceedings; and use of works for the purpose of news reporting. \textsuperscript{33}

In respect of a free use for reproduction, the Berne Convention contains a general rule, rather than an explicit limitation: article 9\S 2 of the Berne Convention provides that member States may provide for free reproduction in “special cases” where the acts do not conflict with normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the author. for the ephemeral recordings which is permissible if foreseen by national legislation. Article 13\S 1 of the Berne Convention allows the introduction of reservations and conditions where the authors of music and lyrics have consented to the recording of words and the music together subject to the right to obtain equitable remuneration.

The TRIPS Agreement and the WIPO Copyright Treaties exclude certain subject matter from Copyright protection, namely ideas, procedures, methods of operation and mathematical concepts as such (article 9\S 2 TRIPS, article 2 WIPO) as well as data per se (article 10\S 2 TRIPS, article 5 WIPO). \textsuperscript{34} The TRIPS Agreement includes its own version of the three-step-test in article 13. Whereas the wording of article 13 follows closely the pattern of article 9\S 2 of the Berne Convention, it is different in some respects: while article 9\S 2 of the Berne Convention concerns only the reproduction right, article 13 of the TRIPS Agreement applies to all rights conferred under Copyright. While article 9\S 2 of the Berne Convention deals with the

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\textsuperscript{31} The work must have been published with the consent of the author. “Lawful availability” under article 10\S 1 of the Berne Convention also covers the situation where this has occurred under a compulsory license, although in the case of sound recordings the compulsory license allowed for under article 13\S 1 only comes into operation when the author has first authorized the recording, and presumably the making available, of his or her musical work.

\textsuperscript{32} See article 10\S 2 of the Berne Convention. The word ‘teaching’ includes teaching at all levels—in educational institutions and universities, municipal and State schools, and private schools. Education outside these institutions, for instance general teaching available to the general public but not included in the above categories, should be excluded. Teaching is not confined to actual classroom instruction, but it also extends to correspondence or online courses where students receive no face-to-face instruction from a teacher. See World Intellectual Property Organization, (2003), ibid, pp.15-16. See, also, the Rome Convention of 1961 for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations, according to which any contracting State may, in its domestic laws and regulations, provide for exceptions to the protection guaranteed by this Convention as regards … (d) use solely for the purposes of teaching or scientific research.

\textsuperscript{33} See article 2\S 8 of the Berne Convention. See, also, World Intellectual Property Organization, (2003), ibid, p.11, on the Report of the Main Committee I at the Stockholm Conference in 1967, according to which the Convention does not protect mere items of information on news of the day or miscellaneous facts, because such material does not possess the attributes needed to constitute a work. That implies a fortiori that news items or the facts themselves are not protected. The Articles of journalists or other “journalistic” works reporting news items are, on the other hand, protected to the extent that they are literary or artistic works. It did not seem essential to clarify the text of the Convention on this point. See, also, article 15\S 1(b) of the Rome Convention of 1961 for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations, according to which any contracting State may, in its domestic laws and regulations, provide for exceptions to the protection guaranteed by this Convention as regards …(b) use of short excerpts in connection with the reporting of current events.

\textsuperscript{34} See, also, Section 102(b) of the US Copyright Act of 1976, available at http://www.copyright.gov/title17/92chap1.html\#102 [last check, July 30, 2020] which excludes ideas, procedures, processes, systems, methods of operation, concepts, principles and discoveries from the scope of Copyright protection.
protection of the interests of the author (i.e., the personal creator of the work), article 13 of the TRIPS Agreement refers to the interests of the right-holder (i.e., those who have acquired a right originally).

National laws contain provisions allowing reproduction of a work exclusively for the personal, private and non-commercial use of individuals (private copy); the ease and quality of individual copying made possible by recent technology has led some countries to narrow the scope of such provisions, including through systems which allow certain copying but incorporate a mechanism for payment to owners of rights for the prejudice to their economic interests resulting from the technologically enabled easily copying.

Regarding countries with common law tradition such as Australia, in addition to specific free uses enumerated in national laws of these countries, regulatory frameworks of common law jurisdictions recognize the concept known as fair use or fair dealing which allows use of works without the authorization of the owner of rights, taking into account factors such as the following: 1) the nature and purpose of the use, including whether it is for commercial purposes; 2) the nature of the work used; 3) the amount of the work used in relation to the work as a whole; and 4) the likely effect of the use on the potential commercial value of the work.

The fair use is a doctrine based upon the analysis of all the above-mentioned factors and circumstances of any individual case at hand. Therefore, it is a flexible and technology-neutral solution. Thus, for example, the application of the fair use doctrine in the United States of America legal environment in the case of teaching and educational activity means that: Teaching including multiple copies for classroom use is expressly mentioned in Sec.107 of the U.S. Copyright Act as an example of fair use purposes. In considering whether a use is a teaching use, we may end up revisiting issues of whether the use at hand is “an integral part of a class,” whether it is “directly related and of material assistance to the teaching,” and whether the use is made or directed by an instructor, or rather originates from a student for purposes unrelated to a specific teaching activity. The profit or non-profit character of the use is also important. Thus, a non-profit educational use is more likely to be fair than an educational use that earns a profit in the sense of a tuition fee or any similar.

As to the nature of the copyrighted work used in the teaching scenery (second factor), U.S. courts generally look at whether the work is creative or factual, whether it has been published or not and whether the work is commercially available, or it is out of print. If the use is based on a lawfully obtained copy, this factor would weigh in favour of a fair use defence at a teaching background. Regarding the amount and substantiality of the use, as a rule of thumb, the smaller the portion used, the more

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35 Such countries include the U.S., the U.K., Canada, and Ireland. Israel has a mixed system of Common law and Civil law traditions; yet, Israeli Copyright law follows the pattern of the U.K. and the U.S. Copyright Acts regarding exceptions and fair use.

36 The ‘fair dealing’ doctrine is found in many of the common law jurisdictions of the Commonwealth of Nations. Thus, regarding ‘fair dealing’ in Australian law there is section 40 Copyright Act (Cth) 1968 and also ss.176-178, Section 182A (inserted by Act 154 of 1980, s.23) as well as Copyright Amendment Act 2006 (Cth) No. 158, 2006. In South Africa law there is Copyright Act of 1978 (Act 98 of 1978, including subsequent amendments). Fair dealing itself is described in section 12(1) of the Act, whereas sections 13 to 19 explain various exceptions to copyright. Section 20 deals with the author’s moral rights, which, if infringed, may also impact on a fair dealing ruling. In United Kingdom’s law fair dealing is defined as “private study and criticism and review and news reporting” (s. 29, 30 of the Copyright, Designs and Patents Act 1988 (CDPA)). New regulations came into force in the U.K. at the end of October 2003 which reduced the research fair dealing exception to non-commercial research only.
likely to be fair; however, the importance of this factor will depend upon the type of work and the subject of the course in which the work is used for educative purposes, as well as on the purpose and character of the use (first factor). The third factor is addressed to ensure that only what is necessary to satisfy the specific purpose of educative use is taken.

The fourth factor is probably the crucial one concerning any fair use compliance of a work used in an educative and teaching setting. In the online world, this fourth criterion is probably the ultimate challenge in order to decide whether there is fair use compliance for a work used with the aim to provide educative, teaching service or not. It depends upon the opportunities for sale or license of the work itself and derivative works, the availability of licenses for that use, the number of recipients of the presumed fair use copy, the character of the institution using the work, and whether the use usurps the intended audience of the work, that is, whether it substitutes for the purchase of a copy. In short, the provisioning in scope aims at protecting the commercial market of the work.

Overall, the fair use doctrine is an open norm, the shape and character of which is comparable to the three-step-test that is a yardstick of use of lawfulness of an exception or limitation to Copyright known in the European legal environment. Both provisions have the objective to circumscribe in general abstract terms those exceptional occasions on which the use of copyrighted material may be permissible without asking for the prior permission of the author. Though there are similarities between the two provisions, the fair use doctrine in the United States has a much longer tradition than the three-step-test in the European Union and operates under a richer experience through case-law in the market wherein it is applicable. Fair use provisioning in the US Copyright Act envisages a case-by-case approach, with the inclusion of guidelines to assist in the determination of the question of fairness.

Thus, there is the obvious advantage of flexibility in this open-ended provisioning style: it enables new kinds of uses to be considered as they arise, without having to anticipate them legislatively. The development of the fair use doctrine in the United States is traced back to the year 1841. The similarities of both provisions, the fair use and the three-step-test, could, however, qualify to enrich the discussion about the possibility for an amendment in Copyright law with the aim to include provision(s) for Openness in addition to a provision allowing the use open access licensing as well as the discussion about the interpretation of the three-step-test, thereby function as an element of cooperative law in the context to enhance the knowledge and understanding for possible solutions to the problems arising from the wording, meaning, and application of the three-step-test.

There are countries in which a combination of Civil law system’s provisions with common provisions of Common law system is found. Aside from the Israeli Copyright system, a combination of both legal systems (i.e., civil and common law) is also found in the Australian Copyright Act of 1968\(^{40}\) which combines features of the two: it includes many detailed exceptions but also some rather broad provisions reflecting the U.S. fair use formula.\(^{41}\)

Whereas under the common law system of Australia to decide in favour of fair dealing regularly means that the use is made in fact free, in civil law systems like the Greek one and most EU-members’ legal systems it is quite often that an admissible limitation to exclusivity of the copyright owner is made against the payment of an equitable remuneration fee.\(^{42}\) These differences between the civil law and common law jurisdictions grant them different traits: a common law jurisdiction has the advantage of flexibility which is increasingly important in the age of rapid technological change; on the other hand, it is beyond any doubt that the civil law system offers superior legal security and reliability regarding copyright protection in consideration of the copyright owner’s interests.

3. The Three-Step-Test

As is already noted above hereto the Civil law system traditionally favours enumerative and conclusive catalogues of limitations which must be compatible with the three-step-test to sustain. Which means that for an Openness or open access limitation of Copyright to sustain in a legal instrument of a Civil law system in a provision other than a general provision allowing the use of exploitation licenses, which of course includes allowance of open access licenses, the limitation must pass the three-step-test.

The three-step-test emerged in international Copyright law; it is embodied not only in the Berne Convention (article 9§2) but also in the TRIPs Agreement (article 13) and the WIPO Internet Treaties (article 10 of WIPO Copyright Treaty\(^{43}\) & article 16 of WIPO Performances and Phonograms Treaty).\(^{44}\) The substantial part of its wording in these international treaties has remained unchanged. The three-step-test serves as a counterweight to the formal recognition of a general right of reproduction, and as a compromise solution instead of a finite list of specific, named exceptions and limitations to copyright that are found in Copyright laws. The three-step-test as is also provisioned in article 5§5 of the InfoSoc Directive has become the cornerstone for almost all exceptions and limitations to all intellectual property rights at the international and/or European levels. The three-step-test provision of article 5§5 of Directive 2001/29/EC forms a uniform element of European Copyright law which always consists of the same building blocks:

1. It is enunciated that Copyright limitations must be certain special cases.

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\(^{40}\) See the Australian Copyright Act of 1968 as amended.


\(^{42}\) See article 18§3 of Greek Law 2121/1993.


2. It is clarified that these limitations may not conflict with the normal exploitation of
the work, and
3. It must be ensured that the limitations do not unreasonably prejudice the legitimate
interests of the author.

The three-step-test sets forth three abstract criteria:
1. Generally, limitations to Copyright law are allowed in certain special cases (criterion 1). This rule is delineated by two subsequent criteria determining that:
2. There may neither be a conflict with the normal exploitation of the work (criterion 2),
3. Nor an unreasonable prejudice to the legitimate interests of the author (and/or
   right-holder and/or user—depending on the interpretation) (criterion 3)

In addition to article 5§5 of Directive 2001/29/EC the wording of article 9§2 of
the Berne Convention, article 13 of the TRIPs Agreement and articles 10 and 16 of the
WIPO Copyright and Performances & Phonograms Treaties give evidence of this
structural legal edifice of the ‘three-step-test’ in Copyright. The three criteria have
always been understood to be cumulative.45 This means that limitations on Copyright
have to meet all three criteria to be considered permissible, that is, all of them apply
jointly to limitations so that if a limitation fails to comply with any one of the steps, it
does not pass the test.46 And if it does not pass the test, the limitation to Copyright law
must be abolished. All three criteria of the three-step-test must be deemed relevant
tests deserving the same interpretative effort.

The three-step-test is located at the interface between the author’s exclusive
rights and privileged uses. Its three steps make it possible to approach the core of
Copyright’s balance in stages. The first step is the furthest from the core of
Copyright’s nature and correspondingly is of a general nature. Its sets forth the basic
rule of criterion 1 (i.e., limitations of copyright must be restricted to certain special
cases). Copyright limitations which are incapable of fulfilling this criterion are
inevitably doomed to fail. The second step delineates the basic rule of criterion 1 by
setting up criterion 2 (i.e., limitations to copyright must not lead to conflict with the
normal exploitation of the work; the conflict with the normal exploitation of the work
is not permissible. At this stage no additional instruments, like the payment of the
equitable remuneration, for the reconciliation of the interests of authors and users are
necessary. Limitations that fail to meet this condition cannot be countenanced at all.
The third step sets up criterion 3 which is the closest among all three of them to the
core of copyright’s nature. In order to pass, limitation on copyright must not be an
unreasonable prejudice to the legitimate interests of the author and/or right-holder (and
for some legal theorists, it must not be an unreasonable prejudice to the legitimate
interests of the author and/or right-holder and/or user of the copyrighted work).

3.1 The first criterion

45 The WTO Decision Panel has expressed the opinion that the three conditions of the Three-Step
test must apply on a cumulative basis, each being a separate and independent requirement that
must be satisfied. See case USA—Section 110(3) of the US Copyright Act presented on June 15,
Pharmaceutical Products presented on March 17, 2000, WTO Document WT/DS114/R 7.21. See,
Kallinikou, D., (2008), ibid, pp.277-278.
46 Knights, R., (2000), Limitations and Exceptions Under the “Three-Step Test” and in National
Legislation—Differences Between the Analog and Digital Environments, WIPO /DA/MVD/00/4,
p.3.
As for the interpretation of the three criteria in the three-step-test, the following are noteworthy:

Regarding the first criterion for the three-step-test it has been supported that ‘special’ means that the exception must be well defined for a purpose and be justified by public policy. This purpose-oriented or teleological interpretation of the first criterion in the three-step-test is reinforced by the use of the phrasing of other articles in the Berne Convention which introduced the test in article 9§2, such as the phrasing “to the extent justified by the purpose” in articles 10§1 and 10§2 which allow exceptions to be made for quotation and teaching, and article 10bis§2 which allows reporting of current events.

The first criterion for the three-step-test precludes Copyright exceptions of broad general application. Thus, a broad general provision for Openness or open access in any legal instrument wouldn’t be fit to pass the first criterion of the three-step-test. Rather, the scope of an acceptable Copyright exception must be well-defined (“certain”) and must be narrowly limited (“special”). For the WTO Decision Panel, the narrow interpretation of the first step follows from the double qualification of a limited exception. A broad general provision for openness wouldn’t be of that nature. ‘Certain’ means that more is needed than a clear definition to meet the standard of the first condition. In addition, ‘special’ means that an exception or limitation must be limited in its field of application or must be exceptional in its scope. In other words, an exception or limitation should be narrow in quantitative as well as a qualitative sense. Though it seems clear that this condition does not rule out concepts like fair dealing or fair use, an incalculable, shapeless provision exempting a wide variety of different uses, such as all non-commercial uses of works or all open access


49 Gervais, D., (2004), ibid, p.16.


52 Regarding the ‘specialness’ of the limitation or exception, some commentators ask whether some clear reason of public policy or a rational basis for justification need exist for the restriction. See, for example, Ficsor, M., (2002), ibid, pp.129-132; Ricketson, S., (1987), ibid, p.482.


uses of works generally, is deemed to be impermissible under the interpretation of this first criterion.\textsuperscript{55}

Regarding the first criterion for the three-step-test, it could undoubtedly be said that personal use justifies for a permitted exception in law. Personal use privileges affording use and enjoyment of copyrighted material in privacy can also be justified on the grounds that they contribute to the dissemination of information and culture, too. In addition, the right to privacy serves as a justification. However, the justification for an exemption on the grounds of personal use in privacy is met with critique in case said use is seen in a broader perspective such as this one of openness. Thus, we could point out three different groups of users when analyzing the personal/private use regime:
- Case 1: copyrighted material is used by individuals in privacy solely for personal study, learning and enjoyment
- Case 2: copyrighted material is used by individuals operating within non-profit organizations and public entities within the scope of their statutory goals.
- Case 3: copyrighted material is used by individuals operating within their professional scope and/or within for-profit organizations and private entities within the scope of their statutory goals.

As to the first case, it can be clearly stated that the use of copyrighted material for personal study, learning and enjoyment in privacy constitutes a certain special case in the sense of the three-step-test. Even though private, in the sense that such use is neither public nor commercial, it is possible that such use may still be detrimental to the interests of the right-holder. Commentators have suggested that the criteria in the three-step-test of the Berne Convention might be appropriate in testing the validity of any private copying exception in national law, thereby ruling out such acts that do not comply with the criteria of the three-step-test.\textsuperscript{56}

To that direction, Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonization of certain aspects of copyright and related rights in the information society, a.k.a. the InfoSoc Directive, which includes provision on private use, i.e. article 5§2(b) leverages on this provision as an instructive guide catering for reproductions\textsuperscript{57} on any medium made by a natural person for private use and for ends that are neither directly nor indirectly commercial, on condition that the right-holders receive ‘fair compensation’ which takes account of the application or non-application of technological measures referred to in article 6 of the same EC Directive to the work or subject matter concerned.

This provision of the InfoSoc Directive limits the personal-use regime to individuals (i.e., natural persons—non-profit organizations or legal persons/entities) are not included in the personal-use regime, according to the meaning of the three-step-test addressed through the InfoSoc Directive—and makes it clear that the use must be confined to non-commercial purposes even when it’s in private use mode (first step). ‘Private use’ is any use that serves the personal purposes of a natural person in private mode, a.k.a. in his/her private sphere of activity which includes close friends or acquaintances and family.\textsuperscript{58} The ‘natural person’ requirement in the private use meaning


\textsuperscript{57} Only the reproduction right is exempted, but digital reproductions as well as analogue ones are included.

\textsuperscript{58} Walter, M., and Lewinski S., (2010), ibid, pp.1032-1033.
is understood in the sense that use made by a natural person representing an organization, i.e. a legal person, a legal entity, would not be considered done in ‘private use’ modus. However, in case that a natural person acts reproduction representing his/her friend or family or acquaintance, then private use is sensible, since private use does not necessarily require that the natural person makes the reproduction for his/her own sake.

Further, this provision of the InfoSoc Directive assumes that such uses do not conflict with the normal exploitation of the work (second step), possibly on the basis that it is almost impossible for the author or right-holder to regulate this through private licensing arrangements and possibly because this is a private, as distinct from a public, use of the work and that this is a non-economic normative factor that is to be weighed against the author or right-holder’s economic interests. Finally, so far as unreasonable prejudice to the author or right-holder’s interests is concerned (third step), the InfoSoc Directive requires that the author or right-holder should receive fair compensation that takes account of the application, if any, of technological protection measures.

On the other hand and aside from the wording of the three-step-test in the InfoSoc Directive, there is nothing in the text of article 15§1(a) of the Rome Convention of 1961 for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations that qualifies the adjective “private” in the way it is meant in the InfoSoc Directive; a better view of the meaning in the adjective “private” of the InfoSoc Directive must be that it means “private” as distinct from “professional” or “commercial” uses, and that, when “professional” or “commercial” uses are acknowledged, it is unnecessary to go further and consider the effect on the normal exploitation of the work or the legitimate interests of the right-holder as under article 9§2 of the Berne Convention approach. “Professional” or “commercial” uses of a work do not qualify as “private” use.

A legislator who exempts the use in privacy of copyrighted material for personal use reconciles the authors’ interest in the exploitation of their works with the users’ interest in free pathways through society’s landscape which allows the participation in cultural life as well as the discovery and development of one’s own creative potential. In the same sense, a non-voluntary license—a mandatory licensing scheme—in national copyright law privileging non-commercial, open access file sharing for private use through the Internet could possibly constitute a special case under the three-step-test. In addition, a limitation or exception that is geared towards the non-commercial reproduction and communication to the public with regard to P2P networks could be clearly defined and could be easily distinguished from impermissible other P2P uses. After all, the non-commercial file-sharing serves as a means to preserve the promising advantages of global digital networks for instant and global dissemination of knowledge, especially for those works that are not adequately exploited and offered by the right-holder.

60 World Intellectual Property Organization, (2003), ibid, pp.74-75.
61 The Rome Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations was accepted by members of BIRPI, the predecessor to the modern World Intellectual Property Organization, on October 26, 1961. The agreement extended copyright protection for the first time from the author of a work to the creators and owners of particular, physical manifestations of intellectual property, such as audiocassettes or DVDs.
62 World Intellectual Property Organization, (2003), ibid, p.44.
64 Lessig, L., (2004), ibid, pp.296-297.
As to the second case described above (copyrighted material is used by individuals operating within non-profit organizations and public entities within the scope of their statutory goals), it can be stated that the use of copyrighted material by individuals operating within non-profit organizations and public entities within the scope of their statutory goals, though it might seem at first sight politically correct to fit in a permitted limitation in law, it does not explicitly stated as such in the provisions of copyright law, currently.\(^65\) However, the rational basis for a limitation in law in this case exists in the meaning that non-profit organizations and public entities are involved in either the dissemination of knowledge and culture and/or in the process of serving the public interest in knowledge and culture within the scope of their statutory goals; these organizations would potentially be hindered from fulfilling their mission properly were authors to exert control over their output on the basis of the provisions of their exclusive rights rendered in copyright law. The most characteristic example in this case, is the example of a non-profit institution such as a public library or an archive, as well as the public educational organizations of which the statutory goals are hindered by the lack of explicit limitation in copyright law regarding permitted use of copyrighted materials through these organizations with the aim to be used for educational and instructional activities.

In the InfoSoc Directive there is, of course, the provision of article 5\(^2\)\(^c\)(c) which posits that Member States of the EU may provide for exceptions or limitations to the reproduction right provided for in Article 2 in respect of specific acts of reproduction made by publicly accessible libraries, educational establishments, or museums, or by archives, which are not for direct or indirect economic or commercial advantage. But this provision in Directive 2001/29/EC is vague in its wording and does not specifically favor certain kind of institutions. Thus, it is not clear whether the requirement for the public nature of the institution applies to libraries only, or pertains also to the educational establishments and museums or archives.\(^66\) In addition, it is not clear in the wording of the aforementioned provision of the InfoSoc Directive that it applies to any kind of libraries, i.e. that it extends from the traditional book-keeping library establishments to modern digital library establishments offering to their consumers other than text materials such as audiovisual content or audio content etc.\(^67\) Moreover, the term ‘educational establishments’ is too broad in its meaning; the aforementioned provision in Directive 2001/29/EC does not specify on the educational activity that is privileged by said provisioning. Thus, it might cover any activity offered in the range of schools, universities, continuing education activities for adults, language schools, and similar institutions that offer acquisition or deepening of knowledge or any kind of proficiency in any area either in face-to-face settings or via distance education or otherwise.\(^68\) Regarding the museums, the wording of the aforementioned provision in Directive 2001/29/EC seems to favor any institution that offers publicly accessible exhibits of any objects, be they protected by Copyright or not.\(^69\) As for the archives, which are separately reported in the wording of said

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\(^{68}\) Walter, M., and Lewinski S., (2010), ibid, p.1036.

\(^{69}\) Art.6 of the DSM Directive rules for preservation of cultural heritage allowing cultural heritage institutions to make copies of any works or other subject matter that are permanently in their collections, in any format or medium, for purposes of preservation of such works or other subject matter and to the extent necessary for such preservation. Art.8 of the DSM Directive rules for the use
provisioning, the inferred meaning of it might be that they are favored by said provisioning either they are public or private institutions provided that they are publicly accessible.70

Regarding the institutions addressed through the provision of article 5§2(c) in Directive 2001/29/EC the requirement set by the provision is that all said organizations must not be for direct or indirect commercial advantage. This requirement is also vague in its meaning. If the meaning was intended to be that no financial transaction should be present for any activity related to said organizations, then all institutions, (e.g., museums which are public in nature and allow entrance in exchange of entrance fee (tickets) would be exempted from the facultative limitation of article 5§2(c) in Directive 2001/29/EC). Suppose that said meaning was intended in the InfoSoc Directive, there would have remained very few institutions favored by the limitation.

The meaning that seems more reasonable and to be closer to the intended meaning regarding the aforementioned provision is that the phrase ‘not be for direct or indirect commercial advantage’ should be interpreted by adopting the explanation of Recital 14 of the Rental and Lending Rights Directive according to which any commercial transaction which is intended to cover operating costs or simply the costs of reproduction done by the favored publicly accessed organization is not included in the sense of any direct or indirect commercial advantage. Therefore, any entrance fees or other charges which are intended to cover the operating costs or reproduction costs of the organizations favored by article 5§2(c) in Directive 2001/29/EC are permissible.71 The problem of vagueness, however, remains since there is hardly any appropriate way to claim and prove that any incurred cost in these publicly accessed institutions goes beyond the operating costs of them or the reproduction costs for the protected works.72

As to the third case described above (copyrighted material is used by individuals operating within for-profit organizations and private entities within the scope of their statutory goals) when analyzing the private use regime, by default the use of copyrighted material by individuals operating within for-profit organizations and private entities within the scope of their statutory goals, it makes absolutely sense not to include said case in the limitations in law. The rational basis for such an exclusion from the provisions of copyright law in limiting permitted use of copyrighted materials rests in the fact that said use constitutes an action taken with the aim of profit (commercial use), directly and/or indirectly gained, since said action is seen in the broader scope of the for-profit and private entities’ statutory goals. The economic activities of industrial undertakings and the profit motive underlying uses of copyrighted materials by individuals operating within the context of for-profit organizations and private entities are enough reasons to silence arguments supporting a limitation in Copyright law. Within this category of non-permitted limitation in Copyright law are deemed to be cases such as P2P ‘dark nets’(i.e., cases in which posting a work on a website takes place on P2P ‘dark net’ where users have access only on a subscription basis). These cases cannot become a permitted limitation in the

of out-of-commerce works and other subject matter by cultural heritage institutions. Museums are included in the definition of the ‘cultural heritage institution’ which according to art.2(3) of the DSM Directive means a publicly accessible library or museum, an archive or a film or audio heritage institution.

70 See Recital 13 of the DSM Directive.
sense of the first criterion of the three-step-test because these uses are made within a framework of activities dedicated for commercial purposes.

3.2 The second criterion

Regarding the second criterion for the three-step-test (i.e., there cannot be a conflict with the normal exploitation of the work) the meaning is that the use of copyrighted material must not enter economic competition with all forms that exploitation of a work is having or with all forms of exploitation which are likely to acquire either considerable economic or practical importance. The question to ask regarding the application of the second criterion is whether the exempted use would otherwise fall within the range of activities from which the copyright owner would usually expect to receive compensation. The term ‘normal’ denotes any way in which the protected work is in fact exploited, but also considers any exploitation that is potential, permissible and (possibly) desirable in the normal course of events. In fact, ‘normal exploitation’ is a fictitious scenario with no secure basis in actual law. In that sense, the application of the second criterion concerns not only actual markets, but also potential ones which might emerge in the (foreseeable) future. In that consideration, a general provision for openness in any legal instrument supporting the freedom to redistribute copies, in whole or in part, of a work, and the freedom to make improvements or other changes, i.e. to make adaptations to the content of a work, and to release modified copies of it, couldn’t pass the second criterion of the three-step-test as being into economic competition with all forms that exploitation of a work or with all forms of exploitation which are likely to acquire considerable economic or practical importance in the foreseeable future.

This meaning in the law regarding consideration for potential means and methods of exploitation of a work in the market constitutes a direct indication in the interpretation process of the copyright law concerning the possibility of a currently exploited market to lose its considerable economic or practical importance. Under this consideration, ‘normal exploitation’ in its ordinary meaning has two connotations, one being of an empirical and the other of a somewhat more normative if not dynamic character. While the empirical approach basically consists in an evaluation of the current practice in a relevant EU Member State and abroad, the normative element shall ensure that limitations are not regarded as non-interfering with a normal exploitation simply because they concern an option for revenues which for factual reasons until now is not or is only scarcely used. On this more qualitative or dynamic approach, “normal exploitation” will therefore require consideration of potential, as well as current and actual, uses or modes of extracting value from a work.

Citing a report of the Swedish government and the Bureaux for the Protection of Intellectual Property (BIRPI, the predecessor organization to WIPO), the WTO Decision Panel indicated that a limitation to Copyright “should not enter into

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76 The most important WTO Decision Panel’s reports related to the three-step-test concern the case *Canada—Patent Protection of Pharmaceutical Products* presented on March 17, 2000, WTO Document WT/DS114/R, the case *USA—Section 110(5) of the US Copyright Act* presented on
economic competition” with the right-holder, since the meaning in Copyright protection is that “all forms of exploiting a work, which have, or are likely to acquire, considerable economic or practical importance, must be reserved to the authors.” “Thus,” the WTO decision Panel continued, “it appears that one way of measuring the normative connotation of normal exploitation is to consider, in addition to those forms of exploitation that currently generate significant or tangible revenue, those forms of exploitation which, with a certain degree of likelihood and plausibility, could acquire considerable economic or practical importance.”

And it continued “We believe that an exception or limitation to an exclusive right in domestic legislation rises to the level of a conflict with a normal exploitation of the work (i.e., the copyright or rather the whole bundle of exclusive rights conferred by the ownership of the copyright), if uses, that in principle are covered by that right but exempted under the exception or limitation, enter into economic competition with the ways that right holders normally extract economic value from that right to the work (i.e., the copyright) and thereby deprive them of significant or tangible commercial gains.”

Thus, it seems that the second condition is normative in nature: a limitation to copyright is not allowed if it covers any form of exploitation which has, or is likely to acquire, considerable importance. In other words, if the limitation such as Openness is used to limit a commercially significant market or, a fortiori, to enter competition with the copyright holder, then the limitation will not pass the three-step-test, thus the limitation will not sustain.

An issue that pertains to the question whether in order to measure the normal exploitation of a work one needs to take into account the options for deriving revenue from the bulk of rights attached to a work in its entirety or whether each exclusive right conferred by copyright must be evaluated separately without any difference between rights of major or minor importance, seems to be understood in the view that all exclusive rights must be considered separately so as not to undermine anyone of them on the basis that sufficient revenue may be flowing from exploitation of the remaining rights. But this understanding leans very strongly to the side of proprietary interests, and leaves almost no room for a limitation to copyright which will not be in conflict with the normal exploitation of a work. Therefore, the notion of ‘normal
exploitation’ in the second step of the three-step-test should be understood so as to cover only the main avenues of the exploitation of the work, a.k.a. those that provide the author with his/her main sources of revenue. After all, one should not take for granted that a typical right-holder may take steps—or has any interest in a given timeframe in taking all possible steps—towards full exploitation of what actual and potential markets may yield.

The meaning in the case of the second criterion is that the application of the three-step-test could reasonably justify the acceptance of a limitation in copyright law under certain circumstances in which the use of copyrighted material does not conflict with the normal exploitation of a work simply because there is no considerable economic or practical importance to the author and/or subsequent right-holder anymore through the application of a (traditional or not) method for marketing and exploitation of a work.

3.3 The third criterion

As far as the third criterion for the three-step-test is concerned, it could be argued that its regulatory framework is established by the following three elements:
1. It refers to ‘interests’ rather than rights.
2. The circle of relevant interests is reduced to ‘legitimate’ ones, which means that only these interests must be considered and not every conceivable relevant concern. The term ‘legitimate’ can have two meanings:
   a. conformable to, sanctioned or authorized by, law or principle, lawful, justifiable, proper; or
   b. normal, regular, conformable to a recognized type.

   ‘Legitimate’ interests need to be limited to legal interests, (i.e., interests provisioned in copyright law). ‘Legitimate’ interests are, also, justifiable interests in the sense that they are supported by social norms and relevant public policies. Prejudices to the circle of legitimate interests are permissible insofar as they are not unreasonable—they do not harm the legitimate interests to an unreasonable level. This last condition establishes a flexible standard of reasonableness, balancing the interests of right holders versus that of the beneficiaries of the restriction—exception or limitation—to exclusive rights. The prejudice would reach an unreasonable level “if an exception or limitation to copyright causes or has the potential to cause an

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unreasonable loss of income to the copyright owner.” 85 Openness in its sense that includes the freedom to redistribute copies, in whole or in part, of a work, and the freedom to make improvements or other changes, i.e. to make adaptations, to the content of a work, and to release modified copies of it without any compensation to the author of the original work is an unreasonable loss of income to the copyright owner. With respect to the conflict at stake, ‘legitimate interests’ refers to the economic value of the exclusive rights conferred by copyright on its holders. The prejudice to the legitimate interests of the copyright holder might be brought back to tolerable levels “in cases where there would be a serious loss of profit for the copyright owner, [but] the law should provide him with some compensation (a system of compulsory licensing with equitable remuneration).” 86 Unless for a copyrighted work of a “public sector body” which is compensated by public finance and succumbs to Openness through the rulings of Directive 2003/98/EC on the re-use of public sector information as it was amended by Directive 2013/37/EU and/or the production of open data held by public sector bodies or existing in documents held by public undertakings or are research data pursuant to certain conditions and ruled by Directive 2019/1024/EU, there can hardly be any compulsory licensing with equitable remuneration for Openness in the case of works produced by copyright-holders in the private sector.

A reasonable damage to the economic value of the exclusive rights is a damage that is proportionate. The words “not unreasonably prejudice” of the third criterion of the three-step-test, therefore, allow the making of exceptions that may cause prejudice of a significant or substantial kind to the author’s legitimate interests, provided that (a) the exception otherwise satisfies the first and second conditions stipulated in said test and (b) it is proportionate or within the limits of reason. Thus, Openness in the public sector information ruled through Directive 2003/98/EC as it was amended by Directive 2013/37/EU and/or in the case of open data ruled through Directive 2019/1024/EU passes the three-step-test because there is no prejudice of a significant or substantial kind to the author’s legitimate interests and because openness ruled through said Directives (a) is an exception which otherwise satisfies the first and second conditions stipulated in the three-step-test and (b) it is proportionate or within the limits of reason.

In addition, and from a general public’s point of view (a.k.a. the users’ point of view) the inclusion of a justifiability in the third criterion for the three-step-test is a key that allows national legislators to establish a balance between, on the one hand, the rights of authors and other copyright holders, and the needs and interests of users, on the other hand. The inclusion of reasonableness/justifiability in the third criterion for the three-step-test in consideration of both the author’s and the general public’s points of view could modulate the requirements for mass distribution of protected content via digital media and especially through the online environment in certain special cases that do not conflict with the normal exploitation of the works or other subject matter and do not unreasonably prejudice the legitimate interests of the rightholders. 87 The

85 WTO Copyright Panel decision, (2000), United States - Section 110 (5) of the US Copyright Act, WT/DS160/R.
86 Ginsburg, J., (2001), ibid, p.6 citing the WTO Copyright Panel decision in case WT/DS160; Schonwetter, T., (undated), The three-step test within the copyright system; World Intellectual Property Organization, (2003), ibid, p.27; contra, Knights, R., (2000), ibid, p.5.
87 See Recital 6 of the DSM Directive in which it is stressed the reasonableness/justifiability of a fair balance between the rights and interests of authors and other rightholders, on the one hand, and of users on the other.
insistence of right-holders on full exclusivity, i.e. the point of view that does not take into account the general public’s interests in the interpretation of justifiability in the third criterion of the three-step-test, fails to yield satisfactory results for copyright in the digital era either in the short or in the long run. The third criterion of the three-step-test calls for protection of interests that are ‘justifiable’ in the sense that they are supported by relevant public policies or other social norms.

The possibility of limiting to some extent and under certain conditions the scope of exclusivity is of pertinent interest for what is known as ‘transformative use’ and has significant and beyond doubt societal normalcy. The consideration and support of societal norms becomes even clearer when the French term “préjudice injustifié” is used in the text of the Berne Convention in consideration of the fact that the French version of the Berne Convention governs in case of a discrepancy between the French and other translations of the aforementioned legal text. In other words, there must be a public interest justification to limit copyright through openness, as is the case with the rulings of Directives 2003/98/EC as it was amended by Directive 2013/37/EU and Directive 2019/1024/EU. Therefore, on the third step, the conflicting interests of the affected groups of right-holders as well as of the public should be identified and evaluated in the light of public policies per application of openness in certain kinds of works on which they are based. The overall assessment on the third step should be that a limitation is admissible where the same policy objective could not be achieved by lesser means.

The third criterion of the three-step-test is widely understood as a reference to the principle of proportionality, a useful functional concept for the final balancing of the interests that come to the fore. Every limitation in the field of copyright law causes some detriment to the interests of the involved parties. For this reason, the third criterion insists on a qualified, unreasonable prejudice of these interests. It requires the distinction between permissible, reasonable losses and forbidden, unreasonable damages. Insofar as the objective underlying a limitation justifies the entailed prejudices to the involved parties’ legitimate interests, it can be approved.

The third criterion of the three-step-test provides sufficient margin of freedom to craft inevitable exceptions even to the point of openness to address important social and cultural needs. The third criterion of the three-step-test depicts the core thinking in the intellectual property discipline which is regulating with the aim to strike proper balance among interests of all the involved parties and not only of authors and subsequent right-holders.

Against this backdrop it is consistent to say that the last signpost in the copyright law field generally and in the legal edifice of the three-step-test rule specifically is the widely accepted and constitutionally safeguarded principle of proportionality. If a limitation fulfills the first and second criteria, said limitation is accepted to the point that it favors the principle of proportionality. To understand how the principle of proportionality operates in the framework of the three-step-test, the following picture can be drawn: copyright law is centered on the delicate balance between grants and reservations. On one side of this balance the economic and non-

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economic interests of authors and subsequent right-holders can be found. On the other side of this balance the interests of users—including a group encompassing authors wishing to build upon the work of their predecessors—are located. If a proper balance between the concerns of authors, subsequent right-holders and users is to be struck, all the involved parties must leave room for a balancing movement.

4. Conclusion

In this paper we approached openness through the prism of the three-step-test arguing that the pass of a general provision in a legal instrument in favour of openness, in addition to existing ruling for the use of open access licensing in copyright could not pass the three-step-test. The three-step-test has is foundations in international copyright law. The three-step-test is present in four provisions of the TRIPS Agreement (articles 9, 13, 26(2) and 30) and inspired the drafters of article 17. It has also been incorporated in articles 10(1) and (2) of the WIPO Copyright Treaty (Dec. 20, 1996); article 16(2) of the WIPO Performances and Phonograms Treaty (Dec. 20, 1996); article 13(2) of the Beijing Treaty on Audiovisual Performances (June 24, 2012); and article 11 of the Marrakesh Treaty to Facilitate Access to Published Works for Persons who are Blind, Visually Impaired or Otherwise Print Disabled (June 27, 2013). The three-step-test has become one of the main, if not the main issue, when trying to find a fair balance of interest in copyright law and policy. Thus, any openness consideration in an amendment of copyright law is challenged by the application of the three-step-test. Unless it passes this test, there can be no sustainable amendment that favours openness.