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A Scientific Analysis of the Three-Step Test: Through the Lenses of International and Australian Laws

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Abstract
The paper examines the open access movement and its principles concerning creative outputs and related access opportunities, considering copyright protection. The international and ongoing integration of open access practise has brought about a reconsideration of foundational principles of copyright law. The paper's discussion considers the three-step test legal edifice, which is deeply rooted in international copyright law, and argues that its importance and application is of paramount importance regarding potential revisions of copyright law that would need to introduce open access provisions.

Keywords Open access · Copyright · Three-step test · Fair use · Fair dealing

The Philosophy of Open Access

The concept of open access is characterised from openness that concerns the right and the ability to modify, repackage and add value to a resource.[1] In addition, 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 this 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] Chiarini T, Rapini MS, Silva LA. Access to knowledge and catch-up: exploring some intellectual property rights data from Brazil and South Korea. Sci Public Policy. 2017; 44(1):95, 102.

[2] Rossini CA. Green-paper: the state and challenges of OER in Brazil: from readers to writers? (SSRN Scholarly Paper No ID 1549922, Social Science Research Network, 8 February 2010), 57. https://papers.ssrn.com/abstract=1549922.

[3] Centivany A, Glushko B. Open educational resources and the University: Law, Technology, and Magical Thinking (SSRN Scholarly Paper No ID 1680562, Social Science Research Network, 21 September 2010), 16. https://papers.ssrn.com/abstract=1680562.

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1. to study a work and apply knowledge offered;
2. to redistribute copies, in whole or in part, of a work; and
3. to make improvements or other changes, that is, to make adaptations to the content of a work and to release modified copies of it.

These freedoms are based on principles and definitions regarding the substance of the open-source model, or open knowledge,[4] and open-source or free software, as they have been shaped by the open access movement. The term 'openness' was coined to typify the open access to information or material resources required for projects; openness to contributions from a diverse range of users, producers, contributors and flat hierarchies; and a fluid organisational structure.

The purpose of open access is to remove barriers to all legitimate scholarly uses for scholarly literature, but there is no legitimate scholarly purpose in suppressing attribution to the texts subject to open access publication and use. However, none of these shifts towards 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.

In such a context, an increasingly important concern is whether the present intellectual property legal framework, most relevantly comprising copyright laws, is adequate to deal successfully with free use issues arising from open access.[5] It is also argued that today's socio-technological environment provokes a potential reshaping of copyright law policy key areas.[6]

Fair Use

In most legal systems, the use of a work unencumbered by most of the restrictions of copyright law is recognised either as:

(a) fair use, which is an act of exploitation of the work that may be carried out without authorisation and without obligation to compensate the holder of rights for the use or
(b) occurring under non-voluntary licence, meaning the act of exploitation may be carried out without authorisation, but with an obligation to compensate the holder of rights.

Examples of free use include incorporating quotations from a protected work, provided that the source of the quotation, including the name of the author, is

[4] Koutras N. Educational resources and digital repositories of open access: an alternative educational method of information access, Lambert Academic Publishing; 2013, p. 147.

[5] Newman JC, Feldman. Copyright and open access at the bedside. New England Journal of Medicine; 2011;365(26):2447.

[6] Giblin R, Weatherall K. What if we could reimagine copyright?. ANU Press, 2017. https://press.anu.edu.au/publications/what-if-we-could-reimagine-copyright. Accessed 30 July 2020.

mentioned, that the extent of the quotation is compatible with fair practice and that the work in the quotation has been lawfully made available to the public; the use of works by way of illustration for teaching purposes; political speeches and speeches delivered in the course of legal proceedings; and the use of works for the purpose of news reporting.

In respect of free use for reproduction, the Berne Convention contains a general rule rather than an explicit limitation: art 9(2) of the *Berne Convention* provides that member states may allow 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. The same treaty provides in art 2(2) and (4) the restriction of copyright protection to works that have been fixed in a material form and allows for the exclusion from protection official texts of a legislative, administrative, and legal nature, as well as translations of such texts. It also allows through the provisions of art 10 s 2 the utilisation of literary or artistic works for teaching purposes, to the extent that this is compatible with fair practice. The provisions of art 10(1) allow legislatures to permit reproduction of articles published in newspapers or periodicals on current events in case where that reproduction has not been expressly reserved and the source is cited. Meanwhile, the art 10(2) provides a basis for allowing reproduction and making available to the public for the purposes of news reporting literary or artistic works seen or heard during current events. Regarding the entitlements under the broadcasting right anchored in art 11(1), the Berne Convention leaves it to member states to determine the conditions under which those rights may be exercised. However, the reservation is made that the moral rights of the author must be respected and his or her right to obtain equitable remuneration must not be prejudiced thereby. Art 11(3) provides for ephemeral recordings, which are permissible if foreseen by national legislation. In addition, art 13(1) of the Berne Convention allows for the introduction of reservations and conditions where the authors of music and lyrics have consented to the recording of words and music together subject to the right to obtain equitable remuneration.

The Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement) and the World Intellectual Property Organisation (WIPO) Copyright Treaty exclude certain subject matter from copyright protection, namely ideas, procedures, methods of operation and mathematical concepts (art 9(2) TRIPS, art 2 WIPO), as well as data (art 10(2) TRIPS, art 5 WIPO).[7] The TRIPS Agreement includes its own version of the three-step test in art 13. Whereas the wording of art 13 follows closely the pattern of art 9(2) of the Berne Convention, it is different in some respects.

National laws contain provisions to allow for reproduction of a work exclusively for the personal, private, and non-commercial use of individuals (private copy). However, the ease and quality of individual copying made possible by recent technology has led some countries to narrow the scope of such provisions, including

[7] See, also, Section 102(b) of the US Copyright Act of 1976. http://www.copyright.gov/title17/92chap1.html#102. [Accessed 30 July 2020], which excludes ideas, procedures, processes, systems, methods of operation, concepts, principles and discoveries from the scope of copyright protection.

through systems that allow certain copying but incorporate a mechanism for payment to owners of rights concerning prejudice to their economic interests resulting from technologically enabled easy copying.

Regarding countries with common law tradition, such as the United States, in addition to specific free uses enumerated in the national laws of these countries, the laws of common law legal systems recognise the concept known as 'fair use' or 'fair dealing', which allows use of works without the authorisation 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 Three-Step Test: in Light of International and European Laws

The three-step test emerged in international copyright law; it is embodied not only in the Berne Convention [art 9(2)] but also in the TRIPs Agreement (art 13) and the WIPO internet treaties (art 10 of the WIPO Copyright Treaty[8] and art 16 of the WIPO Performances and Phonograms Treaty[9]). 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 sets forth three abstract criteria:

(a) Limitations to copyright law are allowed in certain special cases (criterion 1). This rule is delineated by two subsequent criteria determining that:
(b) There may neither be a conflict with the normal exploitation of the work (criterion 2),
(c) 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, the wording of art 9(2) of the Berne Convention, art 13 of the TRIPs Agreement and arts 10 and 16 of the WIPO Copyright Treaty and the WIPO Performances and Phonograms Treaty indicates this structural legal edifice of the three-step test in copyright. The three criteria have always been understood to be cumulative. This means that limitations on copyright should satisfy all three criteria to be considered permissible, that is, all apply jointly to limitations so that if a limitation

[8] World Intellectual Property Organization. WIPO Copyright Treaty adopted in Geneva on December 20, 1996. http://www.wipo.int/treaties/en/ip/wct/trtdocs_wo033.html. Accessed 30 July 2020.

[9] World Intellectual Property Organization. WIPO Performances and Phonograms Treaty adopted in Geneva on December 20; 1996.

fails to comply with any one of the steps, it does not pass the test,[10] and if it does not pass the test, the limitation to copyright law must be abolished.

The three-step test is located at the interface between the author's exclusive rights and privileged uses. The three steps set up such a framework 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. It sets forth the basic rule of criterion 1, namely, limitations of copyright must be restricted to certain special cases. Copyright limitations that 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, that is, limitations to copyright must not lead to conflict with the normal exploitation of the work; conflict with the normal exploitation of the work is not permissible. At this stage no additional instruments, like the payment of equitable remuneration, for the reconciliation of the interests of authors and users are necessary. The third step sets up criterion 3, which is the closest among all three to the core of copyright's nature. In order to be valid, limitation on copyright must not be an unreasonable prejudice to the legitimate interests of the author and/or right holder.

The First Criterion

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 would not 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 narrowly limited ('special').[11] Though it seems clear that this condition does not rule out concepts such as 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 uses of works generally, is deemed to be impermissible under the interpretation of this first criterion.[12]

Regarding the first criterion for the three-step test, it could undoubtedly be said that personal use justifies a permitted exception in law. Moreover, personal use privileges affording use and enjoyment of copyrighted material in privacy may also be justified on the grounds that they contribute to the dissemination of information and culture. In addition, the right to privacy serves as justification. However, the

[10] Knights R. Limitations and exceptions under the "three-step test" and in national legislation—differences between the analog and digital environments, WIPO /DA/MVD/00/4; 2000, p. 3.

[11] Ginsburg J. ibid; 2001, p. 5; World Trade Organization, Panel Report. United States-Section 110(5) of the U.S. Copyright Act, WTO Document WT/DS160/R, 6.9–16; World Trade Organization, Panel Report, Canada-Patent Protection of Pharmaceutical Products, WT/DS114/R, 7.16; 2000. http://www.wto.org/english/tratop_e/dispu_e/7428d.pdf. Accessed 30 July 2020); Ficsor M. How much of what? The three-step test and its application in two recent WTO dispute settlement cases, 192 Revue Internationale de Droit d'Auteur, pp.129, 227; the same, The Law of Copyright and the Internet: the 1996 WIPO treaties, their interpretation and implementation, Oxford University Press; 2002, p. 151.

[12] Senftleben M. ibid; 2004, pp.133–137; Ginsburg J; 2001. pp. 991–1031; World intellectual Property Organization. Ibid; 2003, p. 22.

justification for an exemption on the grounds of personal use in privacy is met with critique in case said use is viewed from a broader perspective, such as openness. Thus, we could point out three different groups of users when analysing 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 organisations 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 organisations 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 when 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.[13] 'Private use' refers to any use that serves the personal purposes of a natural person in private mode, namely, in his or her private sphere of activity, which includes close friends or acquaintances and family.[14] The 'natural person' requirement in the private use meaning is understood in the sense that use made by a natural person representing an organisation (that is, a legal person or a legal entity), would not be considered conducted in 'private use' modus.[15]

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 participation in cultural life as well as the discovery and development of one's own creative potential. In the same sense, a non-voluntary licence—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 peer-to-peer (P2P) networks could be clearly defined and easily distinguished from

[13] Stewart S, Sandison H. International copyright and neighbouring rights, Lexis Law Publishing, 2nd edn; 1989.

[14] Walter M, Lewinski S. ibid; 2010, pp.1032–1033.

[15] Walter M, Lewinski S. ibid; 2010, p. 1033.

impermissible other P2P uses.[16] After all, 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.[17]

As to the second case described above copyrighted material is used by individuals operating within non-profit organisations and public entities within the scope of their statutory goals. Moreover, although it might seem at first politically correct to fit in a permitted limitation in law, it is not explicitly stated as such in the provisions of copyright law, currently.[18] However, the rational basis for a limitation in law in this case exists in the meaning that non-profit organisations 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 organisations would potentially be prevented 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 that of public educational organisations whose statutory goals are hindered by the lack of explicit limitation in copyright law regarding permitted use of copyrighted materials through these organisations with the aim to be used for educational and instructional activities.

In addition, it is not clear in the wording of the provision of art 5(2)(c) of the InfoSoc Directive that applies to any kind of libraries, namely, that it extends from the traditional book-keeping library establishments to modern digital library establishments offering their consumers materials other than text, such as audio-visual or audio content.[19] Moreover, the term 'educational establishments' is too broad in meaning; the aforementioned provision in Directive 2001/29/EC does not specify the educational activity that is privileged by said provisioning. Thus, it might cover any activity offered in the range of schools, universities, continuing education 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.[20] Regarding museums, the wording of the aforementioned provision in Directive 2001/29/EC seems to favour any institution that offers publicly accessible exhibits of any objects, be they protected by copyright or not.

Concerning the institutions addressed through the provision of art 5(2)(c) in Directive 2001/29/EC, the requirement set by the provision is that all said organisations must not be for direct or indirect commercial advantage. This requirement is

[16] Peukert A. A bipolar copyrights system for the digital network environment, in Alain Strowel [ed.] Peer-to-Peer File Sharing and Secondary Liability in Copyright Law; 2009, pp. 163–164.

[17] Lessig L. ibid; 2004, pp. 296–297.

[18] Walter M, Lewinski S. ibid; 2010, p. 1033.

[19] Guibault L. Evaluating directive 2001/29/EC in the light of the digital public domain. In: Dulong de Rosnay M, Carlos de Martin J, editors. The digital public domain—foundations for an open culture; 2012, pp. 61–79.

[20] Walter M, Lewinski S. ibid; 2010, p. 1036.

also vague in meaning. If the meaning was intended to be that no financial transaction should be present for any activity related to said organisations, then all institutions, for example, museums that are public in nature and allow entrance in exchange of entrance fees (tickets), would be exempted from the facultative limitation of art 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 favoured by the limitation.

The meaning that seems more reasonable and closer to the intended meaning regarding the abovementioned 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 Directive 92/100/EEC (i.e., the well-known 'Rental Directive'). According to this explanation, any commercial transaction that is intended to cover operating costs, or simply the costs of reproduction carried out by the favoured publicly accessed organisation, is not included in the sense of any direct or indirect commercial advantage. Therefore, any entrance fees or other charges that are intended to cover the operating costs or reproduction costs of the organisations favoured by art 5(2)(c) in InfoSoc Directive are permissible.[21] The problem of vagueness, however, remains, since there is hardly any appropriate way to claim and prove that any incurred costs in these publicly accessed institutions goes beyond their operating costs or the reproduction costs for the protected works.[22]

As to the third case described above, when analysing the private use regime, by default the use of copyrighted material by individuals operating within for-profit organisations and private entities within the scope of their statutory goals, it makes absolute 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 on 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 understood 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 organisations and private entities provide sufficient reason 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', that is, cases in which posting a work on a website takes place on a P2P dark net to which users have access only on a subscription basis. These cases cannot become a permitted limitation in the sense of the first criterion of the three-step test because these uses are made within a framework of activities dedicated for commercial purposes.

[21] Walter M, Lewinski S. ibid; 2010, p. 1037.

[22] Walter M, Lewinski S. ibid; 2010, pp. 1036–1037.

The Second Criterion

The second criterion for the three-step test—there cannot be a conflict with the normal exploitation of the work—means that the use of copyrighted material must not enter economic competition with all forms taken by normal exploitation of a work or with all forms of exploitation that are likely to acquire 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.[23]

In fact, 'normal exploitation' is a fictitious scenario with no secure basis in actual law.[24] In that sense, the application of the second criterion concerns not only actual markets, but also potential ones that might emerge in the (foreseeable) future. Thus, 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, namely, to make adaptations to the content of a work and to release modified copies of it, could not pass the second criterion of the three-step test: not being in economic competition with all forms that the exploitation of a work might take or with all forms of exploitation that 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 of an evaluation of the current practice in a relevant EU member state and abroad, the normative element will ensure that limitations are not regarded as non-interfering with a normal exploitation simply because they concern an option for revenues. For factual reasons, until now 'normal exploitation' is not or is only scarcely used.[25]

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

[23] Ricketson S. ibid; 1987, p. 176.

[24] Goldstein P. International copyright: principles, law, and practice. Oxford University Press; 2001, §5.5; Ricketson S, Ginsburg J. ibid; 2006, p. 769.

[25] Kur A. Limitations and exceptions under the three-step test—how much room to walk the middle ground?. In: Kur A, Levin M, editors. Intellectual property rights in a fair world trade system, Edward Elgar; 2011, pp. 228–230.

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.[26]

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.[27]

Thus, it seems that the second condition is normative in nature: a limitation to copyright is not permitted if it covers any form of exploitation that has, or is likely to acquire, considerable importance. In other words, if a 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; therefore, the limitation will not sustain.

The Third Criterion

As far as the third criterion for the three-step test is concerned it could be said that the regulatory framework of this criterion is established by the following elements:

1. It refers to 'interests' rather than rights.
2. The circle of relevant interests is reduced to 'legitimate' interests, which means that only these interests must be considered and not every conceivable relevant concern. The term 'legitimate' may be interpreted two ways:
    a. conformable to, sanctioned or authorised by, law or principle, lawful, justifiable, proper; or

[26] *Proposals for revising the substantive copyright provisions (articles 1–20), Doc S/1,* prepared by the Government of Sweden with the assistance of BIRPI, in the World Intellectual Property Organization (1971), *Records of the Intellectual Property Conference of Stockholm, 11 June to 14 July 1967*, p.137. BIRPI organised the administration of the *Berne Convention* before the inception of the World Intellectual Property Organization in 1967. See, also, Ricketson S, Ginsburg J. International copyright and neighboring rights: the berne convention and Beyond, 2nd edn. Oxford University Press; 2006.

[27] See World Trade Organization. Agreement on Trade-Related Aspects of Intellectual Property Rights, Article 13, Interpretation and Application of Article 13.

b. normal, regular, conformable to a recognised type.

Legitimate interests need to be limited to legal interests,[28] namely, 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.[29] Prejudices to the circle of legitimate interests are permissible insofar as they are reasonable—that is, 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 those of the beneficiaries of the restriction—exception or limitation—to exclusive rights.[30] The prejudice would reach an unreasonable level 'if an exception or limitation to copyright causes or has the potential to cause an unreasonable loss of income to the copyright owner'.[31] Openness, in the sense that it includes the freedom to redistribute copies in whole or in part of a work and the freedom to make improvements or other changes, that is, to make adaptations, to the content of a work and 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. Regarding 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 [sic] with some compensation (a system of compulsory licensing with equitable remuneration)'.[32]

A reasonable damage to the economic value of exclusive rights is a damage that is proportionate, that is, within the limits of reason, not greatly less or more than might be thought likely or appropriate or fair, or considerable amount or size. 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.

The inclusion of 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,

[28] Gervais D. ibid; 2004, p. 19.

[29] Gervais D. ibid; 2004, p. 19 who refers to the text of the *Proposals for Revising the Substantive Copyright Provisions (Articles 1–20), Doc S/1,* prepared by the Government of Sweden with the assistance of BIRPI; Ginsburg J. ibid; 2001, p. 6.; see case *Canada—Patent Protection of Pharmaceutical Products* presented on 17 March 2000, WTO Document WT/DS114/R, 7.69.

[30] Ficsor M. How much of what? The three-step test and its application in two recent WTO dispute settlement cases, 192 Revue Internationale de Droit d'Auteur; 2002, p. 145; Ricketson S. ibid; 1987, p. 27; Senftleben M. ibid; 2004, pp. 226–241.

[31] WTO Copyright Panel decision. United States—Section 110 (5) of the US Copyright Act, WT/DS160/R; 2000.

[32] Ginsburg J. ibid; 2001, 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. Ibid; 2003, p. 27; contra, Knights R. ibid; 2000, p. 5.

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 right holders. The insistence of right holders on full exclusivity, namely, the point of view that does not consider 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 the long term. 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.[33] 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 governs in case of a discrepancy between the French and other translations of the aforementioned legal text.[34] In other words, there must be a public interest justification to limit copyright through openness. 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 or open access 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, that is, where a limitation is sufficient for purpose and does not restrict exploitation of the copyright more than is necessary.[35]

The third criterion of the three-step test is widely understood as a reference to the principle of proportionality, a useful functional concept for a final balancing of interests that come to the fore. Every limitation in the field of copyright law is of some detriment to the interests of involved parties. For this reason, the third criterion insists on a qualified, unreasonable prejudice of these interests. It requires a distinction between permissible, reasonable losses and forbidden, unreasonable damages. To the extent that 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 to address social and cultural needs. The third criterion

[33] See HM Treasury. Gowers review of intellectual property, The Stationary Office; 2006; see, also, Leistner M. European Harmonization in Copyright Law—Status Quo, Recent Case Law, and Policy Perspectives, 46 Common Market Law Review; 2009, pp. 847–884.

[34] See art 37 s 1(c) of the Berne Convention for the Protection of Literary and Artistic Works, Paris Act of July 24, 1971 as amended on September 28, 1979.

[35] Nagaraj A. Does copyright affect reuse? Evidence from Google books and Wikipedia. Management Science. 2018; 64(7):3091 ('Does Copyright Affect Reuse?'); Bodó B, Gervais D, Quintais JP. Blockchain and smart contracts: the missing link in copyright licensing? Int J Law Inf Technol. 2018;26(4):311; Bosher H, Yeşiloğlu S. An analysis of the fundamental tensions between copyright and social media: the legal implications of sharing images on Instagram. Int Rev Law Comput Technol. 2019;33(2):164 ('an analysis of the fundamental tensions between copyright and social media').

of the three-step test reflects 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.

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, the said limitation is accepted to the point that it favours 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 centred on a delicate balance between grants and reservations. On one side of this balance, the economic and non-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 involved parties must leave room for a balancing movement. Authors and subsequent right holders must not assert each and every concern held. Only their legitimate interests should be taken into account. As a countermove, the users recognise that copyright limitations in their favour must keep within reasonable limits. An unreasonable prejudice of the authors' interests is unacceptable.

Reform to Australian Copyright Law Informed by the Three Step Process

The three-step process is remarkably straight forward and informed largely by common sense and practicality. On the other hand, the Australian copyright regime as codified in the *Copyright Act 1968* (Cth) ('the Act') is anything but practical and informed by common sense. It truly is an unwieldly piece of legislation that currently consists of 339 pages and continues to become more voluminous and convoluted with each passing year in the same way as taxation legislation and corporations' legislation does. Furthermore, while its utility is beyond question in regards to those who expend a considerable amount of time and effort on their creations of the intellect only to see others shamelessly steal their works in an effort to profit from the creator's hard work, there have undoubtedly been cases brought that would surely have been thrown out as frivolous and vexatious had not the more obscure provisions of the Act greenlighted such litigious nonsense, requiring much professional downtime from the bench and highly qualified silk in pondering the many provisions of the Act, construct detailed arguments and write even more detailed judgments, all in the name of something that can hardly call itself justice.

One case that readily comes to mind is *Telstra Corporation Ltd v Australasian Performing Right Association Ltd*[36] (*the Australasian Performing Right Association case*) where there was no real grievance to speak of but more a case of a company

[36] Telstra Corporation Ltd v Australasian Performing Right Association Ltd; 1997. 191 CLR 140.

exploiting intricacies of copyright law in order to publicly shame another, tantamount really to abuse of process.

In *the Australasian Performing Right Association case* (also known as the 'Music on hold case') the APRA had brought action against Telstra for playing to its customers music on hold that featured several songs for which APRA had the licensing rights. APRA alleged that Telstra had infringed s31 of the Act which relevantly provides that exclusive rights are granted in relation to a musical or literary work to perform that work in public, broadcast the work, or cause the work to be transmitted to subscribers to a diffusion service.[37]

Gummow J in the Federal Court rejected each of these claims and on appeal to the Full Federal Court, the Court allowed the appeal (Black CJ and Burchett J; Sheppard J dissenting) in respect of the claims that the work had been broadcast and had been caused to be transmitted to a diffusion service. On appeal to the High Court, the court dismissed the appeal with costs, upholding the Full Federal Court's decision.

APRA had contended that callers using a conventional telephone fell into the category of transmission to subscribers to a diffusion service and those using a mobile phone fell into the category of broadcasting. The court went to considerable lengths to determine whether the on-hold music was part of the diffusion service (notwithstanding that is not something necessarily requested by telephone customers or desired since it is simply foisted on them while they are forced to listed to it while they wait to be attended to) but nevertheless after much deliberation found it was incidental to the diffusion service, thus came under s31. In respect to the claim that the mobile phone users were being effectively broadcasted to, the court found, using the analogy of guests being broadcast to in a hotel room, that the number being broadcast to (in the case of a mobile phone, usually one) but rather the fact that the facility is available to members of the public generally.

This decision has since affirmed that music on hold must be paid for unless (usually annoying) licence-free music is played.

The authors submit that a three-step principle could be deployed to approach this type of issue in a more sensible pragmatic way, obviating the need for protracted and pointless litigation such as the *Australasian Performing Rights Association case*.

Firstly, regarding the first criterion, there is certainly an argument to make a special exception for broadcasting or dissemination to subscribers of a service that would be otherwise in breach of the Act where doing so has the effect of alleviating the frustration and stress of subscribing and prospective customers forced to wait before being attended to in respect of important and necessary services such as telecommunications. Like fair use and fair dealing, this special exception is justified on the grounds of providing a public service.

Secondly, regarding the second criterion, the playing of on-hold music is not something that would conflict with the normal exploitation of the copyrighted works or rather something that occurs in the same competition space where such works are being made available by others on demand for reward (such as an

[37] Copyright Act 1968 (Cth) s31.

unscrupulous competitor selling pirate CDs or downloads of copyrighted material). People simply do not actively seek out these musical works by going on hold to access them. The foregoing of a licence fee is really the only thing APRA can claim as a loss.

Which brings us to the third criterion, the question of any prejudice that will be caused to APRA's legitimate interests. This does not mean every conceivable right (such as a right to licence fees) but interests affected beyond a reasonable level (which arguably licence fees are not). The reputation of the company that plays the on-hold music could be a factor as customers may somehow perceive the artists, they are listening to support the company they have been put on hold for as they have given permission for the company to use that music. Some artists might not support the company who is wanting to use their music as on-hold music, but it is difficult to see how that would be the case with a company that provides essential services such as Telstra with its telecommunication services.

This is but one example of how a three-step test enshrined into domestic law, indeed into the very heart of the *Copyright Act 1968* (Cth) itself, could dramatically change the way we think about copyright protection. This would switch the emphasis from copyright protection as an individualistic enterprise where the Act can be weaponised against competitors or would-be competitors (or indeed anyone), to information as a public good balancing the public interest in having open access to the information commons for human welfare and flourishing with the private *legitimate* interests of the individuals who created that information and those who have a proprietary claim to it.

Indeed, any change to the current copyright regime to try and achieve open access goals are arguably futile and will only likely perpetuate the current malaise and individualistic weaponization of copyright law unless such change incorporates the philosophical underpinnings of the three-step test.

Conclusion

This paper discusses about open access practice and related movement through the prism of the three-step test, arguing that passing a general provision in a legal instrument in favour of openness to enhance access opportunities, 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 its foundations in international copyright law. The three-step test is present in four provisions of the TRIPS Agreement [arts 9, 13, 26(2), 30] and inspired the drafters of art 17. It has also been incorporated in arts 10(1) and (2) of the WIPO Copyright Treaty (20 December 1996), art 16(2) of the *WIPO Performances and Phonograms Treaty* (20 December 1996), art 13(2) of the Beijing Treaty on Audiovisual Performances (24 June 2012) and art 11 of the Marrakesh Treaty to Facilitate Access to Published Works for Persons who are Blind, Visually Impaired or Otherwise Print Disabled (27 June 2013). The three-step test has become one of the main issues, if not the main issue, when attempting to strike 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 and open access.