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# The International Three-Step Test

## A Model Provision for EC Fair Use Legislation\*

by **Martin Senftleben**, Amsterdam

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**Abstract:** The three-step test is central to the regulation of copyright limitations at the international level.<sup>1</sup> Delineating the room for exemptions with abstract criteria, the three-step test is by far the most important and comprehensive basis for the introduction of national use privileges. It is an essential, flexible element in the international limitation infrastructure that allows national law makers to satisfy domestic social, cultural, and economic needs. Given the universal field of application that follows from the test's open-ended wording, the provision creates much more breathing space than the more specific exceptions recognized in international copyright law.<sup>2</sup>

EC copyright legislation, however, fails to take advantage of the flexibility inherent in the three-step test. Instead of using the international provision as a means to open up the closed EC catalogue of permissible exceptions, offer sufficient breathing space for social, cultural, and economic needs, and enable EC copyright law to keep pace with the rapid development of the Internet, the Copyright Directive 2001/29/EC encourages the application of the three-step test to further restrict statutory exceptions that are often defined narrowly in national legislation anyway.<sup>3</sup>

In the current online environment, however, enhanced flexibility in the field of copyright limitations is indispensable. From a social and cultural perspec-

tive, the web 2.0 promotes and enhances freedom of expression and information with its advanced search engine services, interactive platforms, and various forms of user-generated content. From an economic perspective, it creates a parallel universe of traditional content providers relying on copyright protection, and emerging Internet industries whose further development depends on robust copyright limitations. In particular, the newcomers in the online market – social networking sites, video forums, and virtual worlds – promise a remarkable potential for economic growth that has already attracted the attention of the OECD.<sup>4</sup>

Against this background, the time is ripe to debate the introduction of an EC fair use doctrine on the basis of the three-step test. Otherwise, EC copyright law is likely to frustrate important opportunities for cultural, social, and economic development. To lay groundwork for the debate, the differences between the continental European and the Anglo-American approach to copyright limitations (section 1), and the specific merits of these two distinct approaches (section 2), will be discussed first. An analysis of current problems that have arisen under the present dysfunctional EC system (section 3) will then serve as a starting point for proposing an EC fair use doctrine based on the three-step test (section 4). Drawing conclusions, the international dimension of this fair use proposal will be considered (section 5).

**Keywords:** Three-step test, fair use, private copying, search engines, right of quotation, user-generated content, press summaries, international harmonization

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## A. Copyright's Legal Traditions

- 1 International law making and harmonization activities have led to a remarkable approximation of Anglo-American copyright and continental European *droit d'auteur*. To this day, however, the approach to copyright limitations differs significantly: Whereas continental European countries provide for a closed catalogue of carefully defined exceptions, the Anglo-American copyright tradition allows for an open-ended fair use system that leaves the task of identifying individual cases of exempted unauthorized use to the courts.
- 2 Reflecting the continental European approach, Article 5 of the EC Copyright Directive sets forth various types of specific copyright exceptions. Besides the mandatory exemption of temporary acts of reproduction to be implemented by all member states, Article 5 contains optional exceptions that relate to private copying; use of copyrighted material by libraries, museums, and archives; ephemeral recordings; reproductions of broadcasts made by hospitals and prisons; illustrations for teaching or scientific research; use for the benefit of people with a disability; press privileges; use for the purpose of quotations, caricature, parody, and pastiche; use for the purposes of public security and for the proper performance or reporting of administrative, parliamentary, or judicial proceedings; use of political speeches and public lectures; use during religious or official celebrations; use of architectural works located permanently in public places; incidental inclusions of a work in other material; use for the purpose of advertising the public exhibition or sale of artistic works; use in connection with the demonstration or repair of equipment; use for the reconstruction of buildings; and additional cases of use having minor importance.
- 3 A prominent example of the Anglo-American approach to copyright limitations is the fair use doctrine that has evolved in the United States. Section 107 of the U.S. Copyright Act permits the unauthorized use of copyrighted material for purposes "such as criticism, comment, news reporting, teaching [...], scholarship, or research."<sup>5</sup> To guide the decision on individual forms of use, four factors are set forth in the provision which shall be taken into account among other considerations that may be relevant in a given case:
  - (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
  - (2) the nature of the copyrighted work;
  - (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
  - (4) the effect of the use upon the potential market for or value of the copyrighted work.<sup>6</sup>
- 5 On the basis of this legislative framework and established case law, U.S. courts conduct a case-by-case analysis in order to determine whether a given use can be exempted from the control of the copyright holder.<sup>7</sup>
- 6 The remarkable difference in the regulation of copyright limitations becomes understandable in the light of the theoretical groundwork underlying common law and civil law copyright systems. The fair use approach can be traced back to the utilitarian foundation of the Anglo-American copyright tradition that perceives copyright as a prerogative granted to enhance the overall welfare of society by ensuring a sufficient supply of knowledge and information.<sup>8</sup> This theoretical basis only justifies rights strong enough to induce the desired production of intellectual works. Therefore, the exclusive rights of authors deserve individual positive legal enactment.<sup>9</sup> Those forms of use that need not be reserved for the right owner to provide the necessary incentive remain free. Otherwise, rights would be awarded that are unnecessary to achieve the goals of the system. In sum, exclusive rights are thus delineated precisely, while their limitation can be regulated flexibly in open-ended provisions, such as fair use.<sup>10</sup> Oversimplifying the theoretical model underlying common law copyright, it might be said that freedom of use is the rule; rights are the exception.
- 7 The opposite constellation – rights the rule, freedom the exception – follows from the natural law underpinning of continental European *droit d'auteur*. In the natural law theory, the author occupies center stage.<sup>11</sup> A literary or artistic work is perceived as a materialization of the author's personality. Accordingly, it is assumed that a bond unites the author with the object of her creation.<sup>12</sup> Moreover, the author acquires a property right in her work by virtue of the mere act of creation. This has the corollary that nothing is left to the law apart from formally recognizing what is already inherent in the "very nature of things."<sup>13</sup> The author-centrism of the civil law system calls on the legislator to safeguard rights broad enough to concede to authors the opportunity to profit from the use of their self-expression, and to bar factors that might stymie their exploitation. In consequence, civil law copyright systems recognize flexible, broad exclusive rights. Exceptions, by contrast, are defined narrowly and often interpreted restrictively.<sup>14</sup>

## B. Flexibility and Legal Certainty

- 8 Both approaches to copyright limitations have specific merits. Precisely defined exceptions in continental European countries may offer a high degree of

legal certainty.<sup>15</sup> With a closed catalogue of permissible exceptions and a detailed description of their scope, it becomes foreseeable for users and investors which forms of use fall under the control of the copyright holder and can serve as a basis for the exploitation of copyrighted material, and which acts of unauthorized use remain outside this controlled area and can be carried out without infringing copyright.

- 9 The central advantage of the Anglo-American fair use approach, however, is flexibility. Within a flexible fair use framework, the courts can broaden and restrict the scope of copyright limitations to safeguard copyright's delicate balance between exclusive rights and competing social, cultural, and economic needs. Judges are rendered capable of adapting the copyright limitation infrastructure to new circumstances and challenges, such as the digital environment. Leaving this discretion to the courts reduces the need for constant amendments to legislation that may have difficulty in keeping pace with the speed of technological development.<sup>16</sup>
- 10 These benefits accruing from flexible copyright limitations must not be underestimated in the present situation. *Flexible rights necessitate flexible limitations.* With advanced copyright systems offering flexible, broad exclusive rights, it is wise to adopt fair use defenses as a counterbalance. In this way, the risk of counterproductive overprotection can be minimized. On the basis of an elastic fair use test, the courts can keep the broad grant of protection within reasonable limits and inhibit exclusive rights from unduly curtailing competing freedoms, such as freedom of expression and freedom of competition.<sup>17</sup> This becomes obvious in the ongoing process of adapting copyright law to the rapid development of the Internet. Broad copyright protection is likely to absorb and restrict new possibilities of use even though this may be undesirable from the perspective of social, cultural, or economic needs.<sup>18</sup> User-generated content, advanced search engine services, and the digitization of cultural material can serve as examples of current phenomena requiring the reconsideration of the scope of copyright limitations.<sup>19</sup> Without sufficient breathing space, important social, cultural, and economic benefits that could be derived from timely adaptations of the legal framework are likely to be lost.

### C. EC Worst Case Scenario

- 11 Considering these options, law makers can be expected to realize at least one of the outlined potential advantages – enhanced legal certainty on the basis of precisely defined exceptions or sufficient flexibility resulting from open-ended fair use legislation. In the light of important opportunities offered by the rapid development of the Internet, the

advantage of flexibility may even be deemed more important than the benefits of enhanced legal certainty.<sup>20</sup> Instead of following these guidelines, however, the drafters of EC copyright law developed a system that frustrates both objectives. The present regulation of copyright limitations in the EC offers *neither legal certainty nor sufficient flexibility.* The adaptation of EC copyright law to the digital environment has led to a legislative framework that employs the open-ended three-step test to erode the legal certainty following from precisely defined exceptions instead of using the test as a means of providing sufficient flexibility.<sup>21</sup>

- 12 To establish this inconsistent system, elements of both traditions of copyright law have been combined in the most unfortunate way. In the EC Copyright Directive, paragraphs 1, 2, 3, and 4 of Article 5 set forth the closed catalogue of exceptions described above. This enumeration of permissible exceptions is in line with the continental European copyright tradition. The listed exceptions, however, are subject to the EC three-step test laid down in paragraph 5 of Article 5. As the test consists of several open-ended criteria, it recalls the Anglo-American copyright tradition.<sup>22</sup> However, the interplay between the two elements – the closed catalogue and the open three-step test – is regulated as follows:

“The exceptions and limitations provided for in paragraphs 1, 2, 3 and 4 shall only be applied in certain special cases which do not conflict with a normal exploitation of the work or other subject-matter and do not unreasonably prejudice the legitimate interests of the rightholder.”<sup>23</sup>

- 13 This approach, inevitably, leads to a dilemma. As discussed, a closed list of precisely defined exceptions may have the advantage of enhanced legal certainty. This potential advantage, however, is beyond reach under the current EC system. If national legislation adopts and further specifies exceptions listed in the EC catalogue, these specific national exceptions may still be challenged on the grounds that they are incompatible with the EC three-step test. In other words, national exceptions that are embedded in a national framework of precisely defined use privileges may further be restricted by invoking the open-ended three-step test. On the one hand, national copyright exceptions are thus straitjacketed. Their validity is hanging by the thread of compliance with the abstract criteria of the EC three-step test. On the other hand, the test itself may only be invoked to place additional constraints on national exceptions that are defined narrowly anyway. Unlike fair use provisions with comparable abstract criteria, the EC three-step test cannot be employed by the courts to create new, additional forms of permitted unauthorized use. Hence, it is impossible to realize the central advantage of flexibility that is inherent in the test's open-ended wording.<sup>24</sup>



- 14 In consequence, the current EC system fails to realize any advantage that may follow from the outlined Anglo-American or continental European approach to copyright limitations. The corrosive effect of this dysfunctional concept can currently be observed in EC member states. The following overview of Dutch (section 3.1), French (section 3.2), and German (section 3.3) case law gives evidence of the need to reconsider the current legislation (section 3.4).

## I. Legal Uncertainty: The Netherlands

- 15 Dutch courts already applied the three-step test prior to the Copyright Directive.<sup>25</sup> On the one hand, the adoption and implementation of the Directive led to more frequent references to the three-step test that are made to confirm and strengthen findings equally following from domestic rules.<sup>26</sup> This way of applying the three-step test has little impact on the Dutch catalogue of statutory exceptions. On the other hand, however, the Directive inspired a line of decisions that use the three-step test to override the closed Dutch system of precisely defined user privileges.

- 16 In a ruling of March 2, 2005, the District Court of The Hague forced the long-standing exception for press reviews onto the sidelines, and invoked the three-step test of the Copyright Directive instead.<sup>27</sup> The case concerned the unauthorized scanning and reproduction of press articles for internal electronic communication (via e-mail, intranet, etc.) in ministries – a practice that also offered certain search and archive functions. Seeking to determine whether this practice was permissible, the Court refused to consider several questions raised by the parties with regard to the specific rules laid down in Article 15 of the Dutch Copyright Act and Article 5(3)(c) of the EC Copyright Directive. In the Court's view, consideration of these specific rules was unnecessary because the contested use did not meet the requirements of the EC three-step test anyway:

“The reason for leaving these three questions unanswered is that the digital press review practice of the State, in the opinion of the court, does not comply with the so-called three-step test of Article 5(5) of the Copyright Directive.”<sup>28</sup>

- 17 The subsequent discussion of non-compliance with the three-step test resembles a U.S. fair use analysis rather than a close inspection of a continental European statutory limitation. In particular, the Court stresses the growing importance of digital newspaper exploitation and the impact of digital press reviews on this promising market. The ministry press reviews are held to “endanger” a normal exploitation of press articles and unreasonably prejudice the

publisher's legitimate interest in digital commercialization.<sup>29</sup> Under the fourth U.S. fair use factor “effect of the use upon the potential market for or value of the copyrighted work,” similar considerations could play a decisive role.<sup>30</sup>

- 18 The focus on the three-step test, constituting the basis of the Court's reasoning in the press review case, inevitably marginalizes the detailed rules established in Dutch law. On its merits, the applicable statutory limitation laid down in Article 15 of the Dutch Copyright Act merely opens the door to the three-step test. As a result, however, it is rendered incapable of influencing the further test procedure.<sup>31</sup>

- 19 In a more recent decision of June 25, 2008, the District Court of The Hague invoked the three-step test again in a case concerning the payment of equitable remuneration for private copying activities. In this context, the Court devoted attention to the question of use of an illegal source as a basis for private copying.<sup>32</sup> The detailed regulation of private copying in Article 16c of the Dutch Copyright Act does not contain any indication to the effect that private copying from an illegal source is to be deemed impermissible. The drafting history of the provision, by contrast, reflects the clear intention of the Dutch legislator to exempt private copying irrespective of whether a legal or illegal source is used.<sup>33</sup> Having recourse to the three-step test of Article 5(5) of the Copyright Directive, the District Court of The Hague nonetheless dismantled this seemingly robust edifice of legal certainty in one single sentence. Without offering a detailed analysis, the Court stated that private copying from an illegal source was “in conflict with the three-step test.” Accordingly, it was held to fall outside the private copying exemption of Article 16c:

“In the parliamentary history, there are indications of a different interpretation. However, the interpretation advocated by the minister and supported by the government – assuming that private copying from an illegal source was legal – is in conflict with the three-step test of Article 5(5) of the Directive.”<sup>34</sup>

- 20 The central point here is not the prohibition of private copying using illegal sources. It is the erosion of the central argument weighing in favor of precisely defined exceptions and against a fair use system. Regardless of precise definitions given in the Dutch Copyright Act, the ruling of the Court minimizes the degree of legal certainty in the field of copyright limitations. Users of copyrighted material in the Netherlands can no longer rely on the wording of the applicable statutory exception. On the basis of the EC three-step test, a certain use may be held to amount to copyright infringement even though it is exempted from the authorization of the rightholder in the Dutch Copyright Act.<sup>35</sup> Hence, the degree of legal certainty can hardly be deemed higher than the degree attained in a fair use system. Arguably,

the standard of certainty is even lower because the additional scrutiny of precisely defined exceptions in the light of the three-step test is not reflected in the Dutch Copyright Act. In copyright systems with a statutory fair use provision, by contrast, the factors applied by the courts are clearly stated in the law. Consulting Section 107 of the U.S. Copyright Act, users of copyrighted material in the U.S., for instance, can inform themselves about the criteria that the courts will consider when determining the permissibility of a given unauthorized use.

## II. Inflexibility: France

- 21 Admittedly, this problem of insufficient transparency can easily be solved by incorporating the three-step test of the EC Copyright Directive into national law. In EC member states following this approach,<sup>36</sup> the tension between precisely defined exceptions on the one hand, and additional control on the basis of the abstract criteria of the three-step test on the other hand, is made obvious for users relying on copyright exceptions. In France, for instance, it is apparent from national legislation that use falling under a copyright exception will additionally be scrutinized in the light of the three-step test. According to Article L. 122-5 of the French Intellectual Property Code, the listed statutory exceptions may neither conflict with a normal exploitation of the work nor prejudice the author's legitimate interests.<sup>37</sup>
- 22 The central problem raised by an additional examination of exceptions in the light of the three-step test, however, cannot be solved in this way. Although copyright exceptions are already defined precisely, their application still depends on compliance with the open-ended three-step test. As a result, the attainable degree of legal certainty is reduced substantially when compared with the traditional continental European approach of precisely defined exceptions that are not examined additionally in the light of abstract criteria.<sup>38</sup>
- 23 Moreover, the amalgam of specific statutory exceptions and the open-ended three-step test further diminishes the limited flexibility of systems with precisely defined use privileges. Like the reported Dutch cases, the French *Mulholland Drive* case gives evidence of this freezing effect. The case was brought by a purchaser of a DVD of David Lynch's film *Mulholland Drive* who sought to transfer the film into VHS format in order to watch it at his mother's house. Technical protection measures applied by the film producers prevented the making of the VHS copy.<sup>39</sup> In this regard, the French Supreme Court held that the relevant Articles L. 122-5 and L. 211-3 of the French Intellectual Property Code had to be interpreted in the light of the three-step test. The exception for private copying could not be invoked against the appli-

cation of technical protection measures when the intended act of copying would conflict with a normal exploitation of the work concerned.<sup>40</sup>

- 24 Examining the private copying exception in the light of this criterion of the three-step test, the French Supreme Court rejected the previous decision taken by the Paris Court of Appeals. The latter Court had ruled that the intended private copy did not encroach upon the film's normal DVD exploitation.<sup>41</sup> The French Supreme Court reversed this holding for two reasons. On the one hand, it asserted that a conflict with a normal exploitation had to be determined against the background of the enhanced risk of piracy inherent in the digital environment. On the other hand, the Court underlined that the exploitation of cinematographic works on DVD was important for recouping the investment in film productions.<sup>42</sup>
- 25 The verdict of the French Supreme Court resembles the decisions taken in the Netherlands. It is based on the three-step test rather than the specific requirements laid down in the national statutory exception. On its merits, the national exception merely constitutes a starting point for the Court to embark on a scrutiny of the contested use in the light of the three-step test. The result of this way of applying the test is the erosion of the French private copying exception in the digital environment.<sup>43</sup> The Court employs the three-step test to place further constraints on the scope of the national exception. In consequence, the limited flexibility of the French system of precisely defined exceptions is further restricted.

## III. Alternative Routes: Germany

- 26 German case law also testifies to the insufficient flexibility of the current EC framework for copyright limitations. While the foregoing Dutch and French examples illustrate problems arising from the application of the three-step test, developments in Germany show that the very basis of the current EC system – a closed catalogue of precisely defined exceptions – already renders the courts incapable of keeping pace with the constant evolution of new Internet technologies. Complex questions about the scope of precisely defined exceptions arise particularly with regard to the distribution of primary and secondary markets for information products and services.<sup>44</sup> In the relation between copyright or database owners and search engines, for instance, the right of quotation has become a crucial factor.
- 27 Implementing the EC Copyright Directive, legislators in EC member states, as indicated above, enjoyed the freedom to choose exceptions from the catalogue of Article 5 of the Directive and tailor the scope of resulting use privileges to individual national needs. Apart from the mandatory exemption of temporary

acts of reproduction, the transposition of exceptions into national law is optional under the Copyright Directive. In consequence, the domestic scope of an exception listed in Article 5 of the Directive, such as the right of quotation, may differ from country to country. These differences can have a deep impact on the information that may be displayed by search engines in EC member states without the authorization of the copyright owner.

- 28 The Dutch legislator, for instance, decided to broaden the scope of the right of quotation during the implementation of the EC Copyright Directive. The long-standing “context requirement” of Article 15a of the Dutch Copyright Act, according to which quotations had to serve the purpose of criticism and review, has been attenuated. In the amended version, the provision is also applicable to announcements and expressions serving comparable purposes. Accordingly, the quotation right has been held to cover information made available by search engines on the grounds that these engines “announce” the contents of underlying source databases.<sup>45</sup> In a case concerning a search engine that collects information from the websites of housing agencies, the Court of Alkmaar clarified that for the quotation right to apply, the reproduction and communication of collected data to the public had to keep within the limits of what was necessary to give a good impression of the housing offer concerned.<sup>46</sup> The Court specified that, under this standard, it was permissible to provide search engine users with a description of up to 155 characters, address and rent details, and one single picture not exceeding the format of 194x145 pixels.<sup>47</sup>
- 29 In Germany, by contrast, the traditional confinement of the quotation right to criticism and review was upheld when implementing the Copyright Directive. This more restrictive approach limits the room to maneuver for the courts. The District Court of Hamburg, for instance, refused to bring thumbnails of pictures displayed by Google’s image search service under the umbrella of the right of quotation. Before turning to an analysis of copyright exceptions, the Court clarified that a thumbnail did not have characteristic features of its own that made the individual features of the original work fade away. Accordingly, there was no room for qualifying the conversion of pictures into thumbnails as a “free use” not falling under the exclusive rights of authors by virtue of § 24 of the German Copyright Act.<sup>48</sup>
- 30 On this basis, the Court argued with regard to copyright exceptions that thumbnails could not be regarded as permissible quotations in the sense of § 51 no. 2 of the German Copyright Act because they did not serve as evidence or argumentative basis for independent comment.<sup>49</sup> The stricter German quotation standard, still requiring use in the context of criticism and comment, thus prevented the Court from offering breathing space for the image-related

search service in question. Interestingly, the District Court of Hamburg expressly recognized that search engines were of

“essential importance for structuring the decentralised architecture of the world wide web, localising widely scattered contents and knowledge, and therefore, ultimately, for the functioning of a networked society.”<sup>50</sup>

- 31 In spite of this “esteem for search engine services,” the Court did not feel in a position to interpret the German quotation right extensively to exempt the use of thumbnails for the image search system. As the right of quotation had been designed with an eye to use under different circumstances, the Court felt that it was the task of the legislator to intervene and reconcile the interests of authors and right owners with the strong public interest in access to graphical online information and the economic interests of search engine providers.<sup>51</sup> In the absence of an open-ended fair use provision, the Court was paralyzed by an inflexible limitation infrastructure.
- 32 In a recent decision also dealing with Google’s image search service, the German Federal Court of Justice confirmed that the unauthorized use of picture thumbnails did not fall under the right of quotation in § 51 of the German Copyright Act. To fulfill the traditional context requirement that had not been abandoned during the implementation of the Copyright Directive, the user making the quotation had to establish an inner connection between the quoted material and her own thoughts. This requirement was not satisfied in the case of picture thumbnails that were merely used to inform the public about contents available on the Internet.<sup>52</sup> In this context, the Court stated that
- “neither the technical developments concerning the dissemination of information on the Internet nor the interests of the parties which the exception seeks to protect justify an extensive interpretation of § 51 of the German Copyright Act that goes beyond the purpose of making quotations. Neither the freedom of information of other Internet users, nor the freedom of communication or the freedom of trade of search engine providers, require such an extensive interpretation.”<sup>53</sup>
- 33 This clarification indicates that the German Federal Court of Justice did not deem it necessary to solve the case on the basis of the right of quotation. By contrast, the Court followed an alternative route to create breathing space for the image search service at issue. While it refrained from inferring an implicit contractual license for search engine purposes from the mere act of making content available on the Internet,<sup>54</sup> the Court held that Google’s use of the pictures was not unlawful because the copyright owner had consented implicitly to use of her material in the



image search service by making her works available online without employing technical means to block the automatic indexing and displaying of online content by search engines.<sup>55</sup>

- 34 It is unclear whether this solution on the basis of implicit consent will yield satisfactory results in all cases of contested search engine use. The case before the District Court of Hamburg, for instance, concerned protected material that had not been made available by the copyright owner but by an unauthorized third party. In this constellation, implicit consent can hardly be assumed. Referring to this situation, the German Federal Court indicated that the search engine provider could rely on the safe harbor for the hosting of third party content set forth in Article 14 of the E-Commerce Directive 2000/31/EC.<sup>56</sup> Accordingly, liability for copyright infringement could be avoided by providing for appropriate notice-and-take-down procedures.
- 35 The decision of the German Federal Court of Justice is of particular interest because it shows a further consequence of the current restrictive EC framework for copyright limitations. As the hybrid concept of precisely defined exceptions and the three-step test does not offer sufficient room to maneuver for the courts, alternative routes are chosen to arrive at satisfactory results. The assumption of implicit consent, for instance, appears as an attempt to bypass the inflexible copyright limitation infrastructure altogether. It is questionable whether this solution is consistent. Virtually, the German Federal Court of Justice introduced a flexible element through the back door of doubtful assumptions on the intentions of a copyright owner making her works available on the Internet.

#### IV. Need for Change

- 36 In sum, case law from several EC member states testifies to substantial shortcomings in the present EC framework for copyright limitations.<sup>57</sup> As demonstrated by the Dutch and French cases, legal certainty is minimized under the current legal regime because the application of the open-ended three-step test imposes further constraints on exceptions that are defined precisely in the national laws of EC member states. With its abstract criteria, the three-step test erodes the legal certainty that could result from a precise definition of use privileges. The decisions in Germany, moreover, show that the narrow definition of exceptions renders the limitation system incapable of reacting adequately to advanced online information services.
- 37 The discussed case law confirms that the current EC regulation of copyright limitations offers neither legal certainty nor sufficient flexibility. When it is considered that, in addition, law making in the EC

is much slower than in individual countries, it becomes apparent that the *current regulation of limitations in the EC is a worst-case scenario*.<sup>58</sup> The process of updating EC copyright legislation requires not only lengthy negotiations at Community level but also national implementation acts in all member states. Therefore, reactions to unforeseen technological developments and new social, cultural, or economic needs will not only be slow, as in traditional continental European systems with precisely defined exceptions. In the EC, these reactions will be very slow, and far too slow to keep pace with the rapid development of the Internet.

- 38 While the reported German cases give evidence of attempts to find loopholes for the creation of more breathing space by circumventing the current restrictive combination of exceptions and the three-step test, it is obvious that these remedies are rather inconsistent and incompatible with the overall structure of copyright law. The right place to strike a proper balance between freedom and protection in copyright law is the regulation of copyright limitations. Instead of inducing courts to invent around an overly restrictive framework for limitations, EC copyright law should provide the courts with the legal instruments necessary to maintain copyright's delicate balance even in times of rapid technological developments that constantly require fast adaptations.
- 39 In other words, the time is ripe to reconsider the regulation of copyright limitations in the EC. Taking the guidelines developed above as a starting point, it can be posited that reforms in the field of copyright limitations should primarily seek to enhance flexibility in order to render the EC system capable of coping with the rapid development of the Internet and the ongoing evolution of socially valuable Internet services, such as platforms for user-generated content, enhanced search engine services, and access to digitized cultural material. The introduction of a fair use element in the field of copyright limitations seems indispensable to achieve this goal. More flexibility is also required because the process of EC policy making in the field of copyright limitations is far too slow to maintain a closed system of precisely defined exceptions that necessitates repeated legislative intervention. Given the social, cultural, and economic concerns at stake, it would be irresponsible not to switch to more sustainable law making that includes flexible fair use elements.
- 40 U.S. decisions on advanced search engine services, for instance, give evidence of the merits of a more flexible legislative framework. With regard to Google's image search service, the Ninth Circuit Court of Appeals held that the display of image thumbnails by Google qualified as a fair use under the U.S. fair use doctrine. The Court grounded its analysis on the notion of transformative use that, traditionally, con-



stitutes an important factor capable of tipping the scales to a finding of fair use.<sup>59</sup> Pointing out a significant benefit to the public, the Court noted that “a search engine may be more transformative than a parody because a search engine provides an entirely new use for the original work, while a parody typically has the same entertainment purpose as the original work.”<sup>60</sup> In this vein, the Court concluded that

“the significantly transformative nature of Google’s search engine, particularly in light of its public benefit, outweighs Google’s superseding and commercial uses of the thumbnails in this case. In reaching this conclusion, we note the importance of analyzing fair use flexibly in light of new circumstances.”<sup>61</sup>

- 41 This decision differs markedly from the outcome of the comparable German cases described above. Even though recognizing the benefits of advanced search engine services, German courts did not manage to provide the required breathing space within the current inflexible system of copyright exceptions. The more flexible U.S. framework, by contrast, enables the courts to formulate an adequate answer reflecting their favorable assessment of the search engine service on the basis of the U.S. system of copyright limitations. Decisions in the area of user-generated content also testify to efficient use of the room to maneuver offered by the U.S. fair use doctrine.<sup>62</sup>
- 42 A further guideline can be derived from the analysis conducted above. While the need for a flexible limitation infrastructure may occupy center stage in the light of challenges arising from the digital environment, the benefits accruing from a high degree of legal certainty must not be neglected. Ideally, law making in the field of copyright limitations strives for sufficient flexibility without abandoning the further goal of legal certainty. Therefore, reforms in EC copyright law should aim to transform the current system that offers neither flexibility nor legal certainty into a system that provides both sufficient flexibility to face the challenges of digital technology and a high degree of legal certainty.

## D. International Three-Step Test as a Model

- 43 Interestingly, this fundamental improvement of the EC system does not necessarily require a fundamental change in the legislative framework. Any future regulation of EC limitations is likely to remain predominantly based on precisely defined exceptions, even if a flexible fair use element is included. Rather than abolishing long-standing EC exceptions in the course of introducing a broad fair use clause, the EC discussion on fair use will most probably lead to the maintenance of a comprehensive list of specific exceptions that is supplemented rather than replaced with an open-ended fair use clause.<sup>63</sup> Allowing the identification of additional types of permissible unauthorized use in the light of the individual circumstances of a given case, this fair use clause would nonetheless open up the currently closed catalogue of limitations that are permissible in the EC.
- 44 Considering these determinants of an EC fair use doctrine, the three-step test that is already enshrined in Article 5(5) of the Copyright Directive appears as a logical starting point for future fair use initiatives.<sup>64</sup> Like traditional fair use legislation, the three-step test sets forth open-ended factors. The drafting history of the three-step test confirms that the flexible formula has its roots in the Anglo-American copyright tradition.<sup>65</sup> Not surprisingly, a line between the criteria of the three-step test and the factors to be found in fair use provisions, such as the U.S. fair use doctrine, can easily be drawn. The prohibition of a conflict with a normal exploitation, for instance, recalls the fourth factor of the U.S. fair use doctrine “effect of the use upon the potential market for or value of the copyrighted work.”<sup>66</sup> Given the appearance of the three-step test in several EC Directives,<sup>67</sup> the provision can moreover be regarded as part of the *acquis communautaire*.
- 45 The introduction of an EC fair use doctrine on the basis of the three-step test, however, requires a substantial change in the current EC approach to the use and interpretation of the provision. *The three-step test would have to be redefined.* Instead of perceiving and employing the test exclusively as a strait-jacket of copyright limitations – a means of placing further constraints on precisely defined exceptions – it would be necessary to recognize that the open-ended criteria of the test allow not only the restriction but also the introduction and broadening of limitations. Interestingly, this more holistic understanding complies with the concept underlying the international three-step test (section 4.1). As the EC provision is modeled on the corresponding international norms, this first hurdle on the way toward an EC fair use doctrine is thus surmountable. An additional question, however, is whether national fair use legislation is compatible with the international three-step test (section 4.2). If the international three-step test precludes the introduction of fair use at the national level, the test can hardly serve as a basis for an EC fair use doctrine. This fundamental question will be discussed before tracing the conceptual contours of a future EC fair use legislation based on the three-step test (section 4.3).

## I. Enabling Function of the Three-Step Test

46 In international copyright law, there can be little doubt that the three-step test does not only serve the purpose of restricting national copyright limitations. At the 1967 Stockholm Conference for the Revision of the Berne Convention, the first three-step test in international copyright law was devised as a flexible framework, within which national legislators would enjoy the freedom of safeguarding national limitations and satisfying domestic social, cultural, and economic needs.<sup>68</sup> The provision was intended to serve as a basis of national copyright limitations. Accordingly, Article 9(2) BC offers national law makers the freedom

“... to permit the reproduction of such works in certain special cases, provided that such reproduction does not conflict with a normal exploitation of the work and does not unreasonably prejudice the legitimate interests of the author.”

47 Many use privileges that have become widespread at the national level are directly based on the international three-step test. A specific provision that permits the introduction of national exemptions for private copying, for instance, is sought in vain in international copyright law. It is the international three-step test that creates breathing space for the adoption of this copyright limitation at the national level. Further examples of national limitations resting on the international three-step test can easily be found in the copyright laws of Berne Union Members, like the exemption of reproductions for research purposes, the privilege of libraries, archives and museums to make copies for the purpose of preserving cultural material, the exemption of reproductions that are required for administrative, parliamentary or judicial proceedings, or of reproductions made by hospitals and prisons.

48 The three-step test of Article 9(2) BC, therefore, clearly has the function of creating room for the introduction of copyright limitations at the national level. Vested with this function, it made its way into Article 13 TRIPS and played a decisive role during the negotiations of the WIPO “Internet” Treaties.<sup>69</sup> In Article 10(1) WCT, it paved the way for agreement on limitations of the rights newly granted under the WIPO Copyright Treaty, including the right of making available online as part of the general right of communication to the public.<sup>70</sup> In consequence, all limitations on the right of making available, including those listed in Article 5(3) of the EC Copyright Directive, rest on the international three-step test. Considering the international family of three-step tests in Articles 9(2) BC, 13 TRIPS and 10(1) and (2) WCT, it becomes obvious that the provision, by far, is the most important and comprehensive in-

ternational basis for national copyright limitations. Against this background, it is not surprising that the test’s fundamental role in enabling limitations and enhancing the flexibility of the copyright system has been underlined in the context of the WIPO Copyright Treaty:

“It is understood that the provisions of Article 10 permit Contracting Parties to carry forward and appropriately extend into the digital environment limitations and exceptions in their national laws which have been considered acceptable under the Berne Convention. Similarly, these provisions should be understood to permit Contracting Parties to devise new exceptions and limitations that are appropriate in the digital network environment.”<sup>71</sup>

49 At the national level, the three-step test has been used in this enabling sense,<sup>72</sup> for instance, in decisions of the German Federal Court of Justice. In a 1999 case concerning the Technical Information Library Hannover, the Court underlined the public interest in unhindered access to information. Accordingly, it offered support for the Library’s practice of copying and dispatching scientific articles on request by single persons and industrial undertakings.<sup>73</sup> The legal basis of this practice was the statutory limitation for personal use in § 53 of the German Copyright Act. Under this provision, the authorized user need not necessarily produce the copy herself but is free to ask a third party to make the reproduction on her behalf. The Court admitted that the dispatch of copies came close to a publisher’s activity.<sup>74</sup> Nonetheless, it refrained from putting an end to the library practice by assuming a conflict with a work’s normal exploitation. Instead, the Court deduced an obligation to pay equitable remuneration from the three-step test, and enabled the continuation of the information service in this way.<sup>75</sup>

In a 2002 decision concerning the scanning and storing of press articles for internal e-mail communication in a private company, the Court gave a further example of its flexible approach to the three-step test. It held that digital press reviews had to be deemed permissible under § 49(1) of the German Copyright Act just like their analogue counterparts, if the digital version – in terms of its functioning and potential for use – essentially corresponded to traditional analogue products.<sup>76</sup> To overcome the problem of an outdated wording of § 49(1) that seemed to indicate the limitation’s confinement to press reviews on paper,<sup>77</sup> the Court stated that, in view of new technical developments, a copyright limitation may be interpreted extensively.<sup>78</sup> Taking these considerations as a starting point, the Court arrived at the conclusion that digital press reviews were permissible if articles were included in graphical format without offering additional functions, such as a text collection and an index. This extension of the analogue press review exception to the digital envi-

ronment, the Court maintained, was in line with the three-step test.<sup>79</sup>

- 50 Hence, the test can be used to enable limitations and enhance flexibility in copyright law. National legislation using the three-step test as a basis for fair use legislation, however, goes beyond the described court decisions. It would allow the courts to create new limitations on the basis of the test's abstract criteria instead of entrusting them merely with the flexible interpretation of pre-defined, specific exceptions in the light of the open-ended test criteria. In other words, national *fair use legislation relying on the three-step test would "institutionalize" the function of enabling limitations* which the international three-step test has because of its open-ended wording.

## II. Three-Step Test and Fair Use

- 51 In this context, it is to be considered that doubt has been cast upon the compliance of national fair use legislation with the international three-step test. In particular, it has been asserted that a national fair use system did not qualify as a "certain special case" in the sense of the three-step test.<sup>80</sup> The validity of this argument is questionable. Interpreting the three-step test of Article 13 TRIPS, the WTO Panel reporting on Section 110(5) of the U.S. Copyright Act, for instance, did not endorse the view that fair use, by definition, was incompatible with the requirement of "certain special cases." Instead, the Panel followed a more cautious approach:

"However, there is no need to identify explicitly each and every possible situation to which the exception could apply, provided that the scope of the exception is known and particularised. This guarantees a sufficient degree of legal certainty."<sup>81</sup>

- 52 In this way, the Panel left room for national copyright laws providing for fair use. Legal certainty is not necessarily an exclusive task of the legislator. It may be divided between law makers and judges. In fair use systems, the degree of legal certainty need not be lower than in systems with precisely defined statutory exceptions. The open factors constituting the fair use criteria allow the courts to determine "certain special cases" of permissible unauthorized use in the light of the individual circumstances of a given case. With every court decision, a further "special case" becomes known, particularized, and thus "certain" in the sense of the three-step test. A sufficient degree of legal certainty follows from established case law instead of detailed legislation. For instance, a sufficient degree of legal certainty can be attained in a system with a long-standing fair use tradition, such as the U.S. copyright system.<sup>82</sup>
- 53 Moreover, it is to be recalled that flexible law making in the field of copyright limitations is a particu-

lar feature of the Anglo-American copyright tradition. At the international level, a WTO Panel can be expected to take into account both the continental European and the Anglo-American tradition of copyright law. The Panel's formula of "a sufficient degree of legal certainty" can thus be understood to ensure that not only precisely defined civil law exceptions but also common law fair use limitations are capable of passing the test of "certain special cases." Otherwise, an entire legal tradition of copyright law would be discredited and declared incompatible with international standards. The international three-step test, therefore, can hardly be understood to preclude national fair use legislation. With the open-ended factors of special cases, normal exploitation, legitimate interests, and unreasonable prejudice, the test itself is a source of inspiration for flexible law making in the field of copyright limitations rather than an obstacle to the introduction of national fair use systems.

## III. Toward an EC Fair Use Doctrine

- 54 In this vein, an EC fair use doctrine can be established on the basis of the three-step test embodied in Article 5(5) of the Copyright Directive. As the international three-step test does not militate against national fair use legislation, policy makers in the EC are free to model an EC fair use doctrine on the test's flexible, open-ended criteria. Such a provision based on the three-step test, and incorporated into the Copyright Directive as a new Article 5(5), could take the following shape:

"In certain special cases comparable to those reflected by the exceptions and limitations provided for in paragraphs 1, 2, 3 and 4, the use of works or other subject-matter may also be exempted from the reproduction right provided for in Article 2 and/or the right of communication and making available to the public provided for in Article 3, provided that such use does not conflict with a normal exploitation of the work or other subject-matter and does not unreasonably prejudice the legitimate interests of the rightholder."<sup>83</sup>

- 55 In line with this proposal, the exceptions currently enumerated in paragraphs 1, 2, 3, and 4 of Article 5 of the Copyright Directive would remain unchanged. The proposed wording, however, would make it clear that these exceptions are regarded as certain special cases in the sense of the three-step test. Accordingly, they can serve as a reference point for the identification of further cases of permissible unauthorized use on the basis of the proposed EC fair use doctrine. It follows from this approach that these further cases would have to be comparable with those reflected in the enumerated exceptions, for instance, in the sense that they serve comparable purposes or are



justified by comparable policies. The catalogue of explicitly listed EC exceptions would thus fulfill the same function as the indication of purposes, “such as criticism, comment, news reporting, teaching [...], scholarship, or research,” in Section 107 of the U.S. Copyright Act.

- 56 Recalibrating the interplay between the catalogue of permissible exceptions and the open-ended three-step test in this way, the proposed fair use provision would also ensure that the current dysfunctional system – no flexibility, no legal certainty – is transformed into a consistent system attaining both objectives. Sufficient flexibility results from use of the three-step test as an opening clause that allows the courts to further develop the limitation infrastructure by devising new exceptions on the basis of the examples given in paragraphs 1, 2, 3, and 4 of Article 5. For instance, the proposed provision would allow the courts to offer additional breathing space for advanced search engine services in those EC member states that do not provide for a right of quotation flexible enough to cover unauthorized use for the purpose of searching the Internet. Given the underlying rationale of supporting freedom of expression and information, the policy justifying the introduction of new use privileges in this area can be deemed comparable with those reflected by the right of quotation, the press privileges, and the exceptions for private copying that are part of the Article 5 catalogue.
- 57 Furthermore, the change in the use of the three-step test would enhance the degree of legal certainty provided by the EC system. The proposed redefinition of the three-step test would prevent the courts from employing the test as a means to place additional constraints on statutory exceptions that are defined precisely in national legislation. By contrast, the abstract criteria of the test could only be invoked to devise new exceptions. They would no longer be available as an additional control mechanism and a straitjacket of specific copyright limitations. As a result, the legal certainty resulting from the precise definition of use privileges at the national level would no longer be eroded through the additional application of the open-ended three-step test. In case of precisely defined national exceptions, users of copyrighted material could rely on the scope following from the wording of the respective national provisions. There would be no need to speculate on the outcome of an additional scrutiny in the light of the three-step test that makes it difficult to foresee the exception’s definite ambit of operation.
- 58 When compared with the lamentable current state of the regulation of copyright limitations in the EC, the adoption of the proposed fair use provision based on the three-step test would thus improve the limitation infrastructure substantially. Instead of minimizing both flexibility and legal certainty, the pro-

posed redefinition of the three-step test in Article 5(5) of the Copyright Directive would ensure sufficient flexibility to cope with the challenges of the rapid development of the Internet and, at the same time, enhance the degree of legal certainty that can be achieved on the basis of a precise definition of exceptions.

## E. Conclusion and International Perspective

- 59 The EC system of copyright limitations is dysfunctional. The traditional continental European approach to copyright limitations promotes legal certainty by providing for precisely defined exceptions. In the Anglo-American copyright tradition, open-ended fair use legislation enhances flexibility. The current EC regulation of copyright limitations, however, fails to realize any of these potential advantages. The three-step test enshrined in Article 5(5) of the Copyright Directive offers flexible, open-ended factors. However, this flexibility is not used to create additional breathing space for copyright limitations that is required in the digital environment. By contrast, the three-step test is applied to further restrict exceptions that are already defined precisely in the national laws of EC member states.
- 60 Applying open-ended factors to precisely defined statutory exceptions, the legal certainty that could follow from the precise definition of use privileges is minimized. In consequence, the current EC system offers neither legal certainty nor sufficient flexibility. When it is considered that, in addition, law and policy making in the EC is much slower than in individual countries, it becomes obvious that the current legal framework is a worst-case scenario. With use privileges being forced into an inflexible legislative straitjacket, the EC limitation infrastructure is rendered incapable of keeping pace with the rapid development of the Internet. Important opportunities for social, cultural, and economic development offered by innovative online platforms and services are likely to be missed.
- 61 As a way out, it is indispensable to incorporate flexible fair use elements into the EC system. This solution need not lead to a radical structural change. In particular, it is unnecessary to sacrifice long-standing EC exceptions on the altar of a broad fair use provision. By contrast, it would be sufficient to take full advantage of the flexibility inherent in the three-step test that has already become a cornerstone of EC legislation in the field of copyright limitations. As in international copyright law, the three-step test would have to be perceived and used as a flexible balancing tool that can be employed to broaden existing limitations and introduce new use privileges. In this way, an appropriate limitation infrastruc-



ture could be established, for instance, to support advanced search engine services, the digitization of cultural material, and online platforms for user-generated content.

- 62 To achieve the indispensable redefinition of the three-step test, future EC fair use legislation should use the current catalogue of exceptions in Article 5 of the Copyright Directive as examples of “certain special cases” in the sense of the three-step test. The courts should be entrusted with the task of identifying comparable further cases of permissible unauthorized use on the basis of the test’s abstract criteria of “no conflict with a normal exploitation” and “no unreasonable prejudice to legitimate interests.” As a result, the three-step test could no longer be applied as an additional control mechanism and strait-jacket of precisely defined exceptions. It would be prevented from eroding the legal certainty following from the precise definition of use privileges. Serving instead as an opening clause that supplements the EC catalogue of specific exceptions, the three-step test would provide the enhanced flexibility necessary to benefit from the rapid development of the Internet.
- 63 An EC fair use doctrine based on the three-step test would not only remedy the shortcomings of the current EC system. It can also be expected to have a beneficial effect on the further harmonization of copyright limitations at the international level.<sup>84</sup> The proposed EC fair use doctrine would reflect a balanced, holistic approach to the three-step test. At the international level, the open-ended criteria of the three-step test have always been intended to provide a flexible framework, within which national legislators enjoy the freedom of safeguarding national limitations and satisfying domestic social, cultural, and economic needs.<sup>85</sup> Not only the restriction of excessive copyright limitations but also the broadening of important use privileges and the introduction of appropriate new exemptions fall within the test’s field of application. What is proposed here, in other words, is a renaissance of the initial understanding of the three-step test – a renaissance of the test as a refined proportionality test that offers breathing space for unauthorized use within reasonable limits.<sup>86</sup> The reinforcement of this balanced understanding of the test is central to the international debate on copyright limitations. It challenges the false rhetoric of a three-step test that is primarily designed to restrict all kinds of copyright limitations.

\* The present article is part of a broader research project concerning the development of a horizontal fair use defense that could be applied across the different domains of intellectual property law. For an introduction to this horizontal fair use approach, see M.R.F. Senftleben, *Overprotection and Protection Overlaps in Intellectual Property Law: The Need for Horizontal Fair Use Defences*, in: A. Kur (ed.), *Horizontal Issues in Intellectual Property Law, Uncovering the Matrix*, ATRIP

Conference 2009, Cheltenham: Edward Elgar Publishing 2010, available online at <http://ssrn.com/abstract=1597123>.

- 1 See Articles 9(2) BC, 13 TRIPS and 10 WCT.
- 2 See Articles 2bis(2), 10(1) and (2), 10bis(1) and (2), 11bis(2) and (3) and 13 (1) BC.
- 3 See Article 5(5) of Directive 2001/29/EC of the European Parliament and of the Council of May 22, 2001, on the harmonization of certain aspects of copyright and related rights in the information society. Cf. M.R.F. Senftleben, *Copyright, Limitations and the Three-Step Test: An Analysis of the Three-Step Test in International and EC Copyright Law*, The Hague/London/New York: Kluwer Law International 2004, p. 125-133; C. Geiger, *From Berne to National Law, via the Copyright Directive*, *European Intellectual Property Review* 2007, p. 486.
- 4 See OECD, *Participative Web: User-Created Content*, document DSTI/ICCP/IE(2006)7/Final, dated April 12, 2007, available online at <http://213.253.134.43/oecd/pdfs/browseit/9307031E.PDF>. Cf. Th. Dreier, *Primär- und Folgemärkte*, in: G. Schricker/Th. Dreier/A. Kur, *Geistiges Eigentum im Dienst der Innovation*, Baden-Baden: Nomos 2001, p. 51; C. Geiger, *Die Schranken des Urheberrechts als Instrumente der Innovationsförderung – Freie Gedanken zur Ausschließlichkeit im Urheberrecht*, *Gewerblicher Rechtsschutz und Urheberrecht International* 2008, p. 459.
- 5 The list is understood as an open, non-exclusive enumeration. See Senate and House Committee Reports, as quoted by L.E. Seltzer, *Exemptions and Fair Use in Copyright: The Exclusive Rights Tensions in the 1976 Copyright Act*, Cambridge (Massachusetts)/London: Harvard University Press 1978, p. 19-20: “...since the doctrine is an equitable rule of reason, no generally applicable definition is possible, and each case raising the question must be decided on its own facts... The bill endorses the purpose and general scope of the judicial doctrine of fair use [...] but there is no disposition to freeze the doctrine in the statute... Beyond a very broad statutory explanation of what fair use is and some of the criteria applicable to it, the courts must be free to adapt the doctrine to particular situations on a case-by-case basis.”
- 6 See Section 107 of the U.S. Copyright Act.
- 7 The factors provide guidance for the application of the “equitable rule of reason” which fair use represents. Cf. *Sony Corp. of America v. Universal City Studios, Inc.*, 464 U.S. 417 (1984), section IV.B. Additional factors may be taken into account. As to the application of the fair use doctrine in practice, see B. Beebe, *An Empirical Study of U.S. Copyright Fair Use Opinions, 1978-2005*, *University of Pennsylvania Law Review* 156 (2008), p. 549; P.N. Leval, *Toward a Fair Use Standard*, *Harvard Law Review* 103 (1990), p. 1105 (1125-1130); J. Litman, *Reforming Information Law in Copyright’s Image*, *University of Dayton Law Review* 22 (1997), p. 588 (612); D. Nimmer, “*Fairest of Them All*” and Other Fairy Tales of Fair Use, in: J. Boyle (ed.), *Law and Contemporary Problems*, Duke University Law Journal 66 (2003), p. 263.
- 8 In this vein, the U.S. Supreme Court, for instance, referred to copyright as an “engine of free expression” in *Harper & Row v. Nation Enterprises*, 471 US 539 (1985), III B.
- 9 Cf. A. Strowel, *Droit d’auteur and Copyright: Between History and Nature*, in: B. Sherman/A. Strowel, *Of Authors and Origins*, Oxford: Clarendon Press 1994, p. 235 (241-249); S.P. Calandrillo, *An Economic Analysis of Property Rights in Information: Justifications and Problems of Exclusive Rights, Incentives to Generate Information, and the Alternative of a Government-Run Reward System*, *Fordham Intellectual Property Media and Entertainment Law Journal* 9 (1998), p. 301 (310).
- 10 See P.E. Geller, *Must Copyright Be For Ever Caught Between Marketplace and Authorship Norms?*, in: B. Sherman/A. Strowel, *supra* note 9, 159 (170); Strowel, *supra* note 9, 250-251.

- 11 Cf. B. Edelman, *The Law's Eye: Nature and Copyright*, in: B. Sherman/A. Strowel, supra note 9, 79 (82-87); Geller, supra note 9, 169-170; Strowel, supra note 9, 236-237.
- 12 Cf. E. Ulmer, *Urheber- und Verlagsrecht*, Berlin/Heidelberg/New York: Springer 1980, p. 110-111. See H. Desbois, *Le droit d'auteur en France*, 2<sup>nd</sup> edn. – mise a jour 1973, Paris: Dalloz 1978, p. 538.
- 13 See Desbois, supra note 12, 538; Ulmer, supra note 12, 105-106.
- 14 Cf. F.W. Grosheide, *Auteursrecht op Maat*, Deventer: Kluwer 1986, p. 2; Geller, supra note 9, 170; Strowel, supra note 9, 249-250. For a recent confirmation of this questionable dogma, see A. Förster, *Fair Use*, Tübingen: Mohr Siebeck 2008, p. 182-184. Cf. ECJ, July 16, 2009, case C-5/08, *Infopaq International/Danske Dagblades Forening*, available online at [www.curia.eu](http://www.curia.eu).
- 15 This line of argument has been invoked recently, for instance, by A. Lucas, *For a Reasonable Interpretation of the Three-Step Test*, *European Intellectual Property Review* 2010, p. 277 (282). However, Lucas raises this argument with regard to the current regulation of copyright limitations in the EC. As argued below, the validity of the legal certainty argument is doubtful in this context. Cf. also H. Cohen Jehoram, *Fair use – die ferne Geliebte*, *Tijdschrift voor auteurs-, media en informatierecht* 1998, p. 174, *Implementatie van de Auteursrechtlijn – De stille strijd tegen een spookrijder*, *Nederlands Juristenblad* 2002, p. 1690, “Nu de gevolgen van trouw en ontrouw aan de Auteursrechtlijn voor fair use, tijdelijke reproductie en driestappentoets,” *Tijdschrift voor auteurs-, media en informatierecht* 2005, p. 153, *Wie is bang voor de driestappentoets in de Auteursrechtlijn?*, in: N.A.N.M. van Eijk/P.B. Hugenholtz (eds.), *Dommering-bundel*, Amsterdam: Otto Cramwinckel 2008, p. 57.
- 16 See M.R.F. Senftleben, “Beperkingen à la carte: Waarom de Auteursrechtlijn ruimte laat voor fair use,” *Tijdschrift voor auteurs-, media en informatierecht* 2003, p. 10; Chr.A. Alberdingk Thijm, “Fair use: het auteursrechtelijk evenwicht hersteld,” *Tijdschrift voor auteurs-, media en informatierecht* 1998, p. 145, en “Fair use – In weiter Ferne, so nah,” *Tijdschrift voor auteurs-, media en informatierecht* 1998, p. 176.
- 17 See E.J. Dommering, *De achtereenvolgende van Prometheus – over vrijheid en bezit van informatie*, Amsterdam: Otto Cramwinckel 2008; C. Geiger, “Constitutionalising” Intellectual Property Law? The Influence of Fundamental Rights on Intellectual Property in the European Union, *International Review of Intellectual Property and Competition Law* 37 (2006), p. 371; A. Strowel/F. Tulkens/D. Voorhoof (eds.), *Droit d'auteur et liberté d'expression*, Brussels: Editions Larcier 2006; P.B. Hugenholtz, *Copyright and Freedom of Expression in Europe*, in: N. Elkin-Koren/N.W. Netanel (eds.), *The Commodification of Information*, The Hague/London/Boston: Kluwer 2002, p. 239; Th. Dreier, *Balancing Proprietary and Public Domain Interests: Inside or Outside of Proprietary Rights?*, in: R. Dreyfuss/D. Leenheer-Zimmerman/H. First (eds.), *Expanding the Boundaries of Intellectual Property. Innovation Policy for the Knowledge Economy*, Oxford: Oxford University Press 2001, 295-316; S. Macciachini, *Urheberrecht und Meinungsfreiheit*, Bern: Stämpfli 2000; Y. Benkler, *Free as the Air to Common Use: First Amendment Constraints on Enclosure of the Public Domain*, *New York University Law Review* 74 (1999), p. 355; N.W. Netanel, *Copyright and a Democratic Civil Society*, *Yale Law Journal* 106 (1996), p. 283.
- 18 With regard to the critical assessment of broad IP protection, see G. Mazziotti, *EU Digital Copyright Law and the End-User*, Berlin/Heidelberg: Springer 2008; O. Depenheuer/K.N. Peifer (eds.), *Geistiges Eigentum: Schutzrecht oder Ausbeutungstitel?*, Berlin/Heidelberg: Springer 2008; R.M. Hilty, *Sündenbock Urheberrecht?*, in: A. Ohly/D. Klippel (eds.), *Geistiges Eigentum und Gemeinfreiheit*, Tübingen: Mohr Siebeck 2007, p. 111; R.M. Hilty/A. Peukert, *Interessenausgleich im Urheberrecht*, Baden-Baden: Nomos 2004; C. Geiger, *Droit d'auteur et droit du public à l'information, approche de droit comparé*, Paris: Litec 2004; D. Kröger, *Informationsfreiheit und Urheberrecht*, München: C.H. Beck 2002; Th. Hoeren, *Urheberrecht in der Informationsgesellschaft, Gewerblicher Rechtsschutz und Urheberrecht* 1997, p. 866.
- 19 Cf. M. Knopp, *Fanfiction – nutzergenerierte Inhalte und das Urheberrecht, Gewerblicher Rechtsschutz und Urheberrecht* 2010, p. 28; A.C. Beunen, *De Google Book Settlement nader beschouwd en bekeken vanuit bibliotheken*, *Tijdschrift voor auteurs-, media- en informatierecht* 2010, p. 38; S. Bechtold, *Optionsmodelle und private Rechtssetzung im Urheberrecht am Beispiel von Google Book Search, Gewerblicher Rechtsschutz und Urheberrecht* 2010, p. 282; M.R.F. Senftleben, *Pacman forever – preserving van computergames*, *Tijdschrift voor auteurs-, media- en informatierecht* 2009, p. 221; N. Helberger/L. Guibault/E.H. Janssen/N.A.N.M. Van Eijk/C. Angelopoulos/J.V.J. Van Hoboken, *Legal Aspects of User Created Content* (2009), available online at <http://ssrn.com/abstract=1499333>; P.B. Hugenholtz, *De Google Book-schikking: de wereldliteratuur gelicentieerd*, *Nederlands Juristenblad* 2009, p. 2145; M. Elferink/A. Ringnalda, *Digitale ontsluiting van historische archieven en verweesde werken*, Amstelveen: deLex 2009; J.V.J. Van Hoboken, *De aansprakelijkheid van zoekmachines. Uitzondering zonder regels of regels zonder uitzondering?*, *Computerrecht* 2008, p. 15; S. van Gompel, *Unlocking the Potential of Pre-Existing Content: How to Address the Issue of Orphan Works in Europe?*, *International Review of Intellectual Property and Competition Law* 38 (2007), p. 669; D.B. Sherman, *Cost and Resource Allocation Under the Orphan Works Act of 2006: Would the Act Reduce Transaction Costs, Allocate Orphan Works Efficiently, and Serve the Goals of Copyright Law?*, *Virginia Journal of Law & Technology* 12(2007), p. 13.
- 20 Not surprisingly, fair use legislation has recently been adopted in Israel. See O. Fischman Afori, *An Open Standard “Fair Use” Doctrine: A Welcome Israeli Initiative*, *European Intellectual Property Review* 2008, p. 85; G. Pessach, *The New Israeli Copyright Act: A Case-Study in Reverse Comparative Law*, *International Review of Intellectual Property and Competition Law* 41 (2010), p. 187 (189-193).
- 21 As to the drafting history of this hybrid framework for copyright exceptions, see M. Hart, *The Proposed Directive for Copyright in the Information Society: Nice Rights, Shame about the Exceptions*, *European Intellectual Property Review* 1998, p. 169; P.B. Hugenholtz, *Why the Copyright Directive Is Unimportant, and Possibly Invalid*, *European Intellectual Property Review* 2000, p. 499; D.J.G. Visser, *De beperkingen in de Auteursrechtlijn*, *Tijdschrift voor auteurs-, media en informatierecht* 2001, p. 9; F. Bayreuther, *Beschränkungen des Urheberrechts nach der neuen EU-Urheberrechtsrichtlinie*, *Zeitschrift für Urheber- und Medienrecht* 2001, p. 828; J. Reinbothe, *Die EG-Richtlinie zum Urheberrecht in der Informationsgesellschaft, Gewerblicher Rechtsschutz und Urheberrecht International* 2001, p. 733.
- 22 The criterion of “no conflict with a normal exploitation,” for instance, resembles the fourth factor of the U.S. fair use doctrine “effect of the use upon the potential market for or value of the copyrighted work.” In fact, the drafting history of the three-step test confirms that the flexible formula has its roots in the Anglo-American copyright tradition. See observation by the United Kingdom, Doc. S/13, *Records of the Intellectual Property Conference of Stockholm June 11 to July 14, 1967*, Geneva: WIPO 1971, p. 630.
- 23 See Article 5(5) of the Copyright Directive 2001/29/EC.
- 24 Cf. M.R.F. Senftleben, *Fair Use in the Netherlands: A Renaissance?*, *Tijdschrift voor auteurs-, media- en informatierecht* 2009, p. 1, available online at <http://ssrn.com/abstract=1563986>; J. Griffiths, *The “Three-Step Test” in European Copyright Law: Problems and Solutions*, *Intellectual Property Quarterly* 2009, p. 489 (495), available online at <http://ssrn.com/abstract=1476968>; C. Geiger, *The Three-Step Test, a*

- Threat to a Balanced Copyright Law?, *International Review of Intellectual Property and Competition Law* 37 (2006), p. 683; K.J. Koelman, *De nationale driestappentoets*, *Tijdschrift voor auteurs-, media en informatierecht* 2003, p. 6. The restrictive nature and freezing effect of the EC copyright three-step test has been confirmed by the ECJ, July 16, 2009, case C-5/08, *Infopaq/Danske Dagblades Forening*. The Court, *ibid.*, para. 58, pointed out that the precisely defined exception of Article 5(1) of the EC Copyright Directive, in addition, had to satisfy the criteria of the three-step test laid down in Article 5(5).
- 25 In the case *Zienderogen Kunst*, dating back to the year 1990, the Dutch Supreme Court invoked the three-step test of Art. 9(2) of the Berne Convention to support its holding that the quotation of a work may not substantially prejudice the right-holder's interest in the exploitation of the work concerned. See Hoge Raad, June 22, 1990, *Nederlandse Jurisprudentie* 1991, no. 268 with case comment by J.H. Spoor; *Informatierecht/AMI* 1990, p. 202 with case comment by E.J. Dommering; *Ars Aequi* 40 (1991), p. 672 with case comment by H. Cohen Jehoram.
  - 26 In 2003, the Amsterdam Court of Appeals found that a parody did not harm the normal exploitation of the parodied work because it concerned a different market. See *Gerechtshof Amsterdam*, January 30, 2003, *Tijdschrift voor auteurs-, media en informatierecht* 2003, p. 94 with case comment by K.J. Koelman. In a 2006 decision concerning online advertisements reproducing the so-called "TRIPP TRAPP chair," the Court of Zwolle-Lelystad referred to the three-step test of Art. 5(5) of the Directive in the context of Art. 23 of the Dutch Copyright Act – a limitation permitting the use of certain artistic works for the purpose of advertising their public exhibition or sale. The Court found that the use in question prejudiced the exploitation interest of the rightholder. This was one of the reasons for denying compliance with Art. 23. See *Rechtbank Zwolle-Lelystad*, May 3, 2006, case no. 106031, LJN: AW 6288, *Tijdschrift voor auteurs-, media en informatierecht* 2006, p. 179 with case comment by K.J. Koelman; *Mediaforum* 2006/9 with case comment by B.T. Beuving.
  - 27 See *Rechtbank Den Haag*, March 2, 2005, case no. 192880, LJN: AS 8778, *Computerrecht* 2005, p. 143 with case comment by K.J. Koelman
  - 28 See *Rechtbank Den Haag*, *ibid.*, para. 14.
  - 29 See *Rechtbank Den Haag*, *ibid.*, para. 16-18.
  - 30 See the decision of the U.S. Supreme Court in *Sony Corporation of America v. Universal City Studios, Inc.*, 464 US 417 (1984), section IV.B: "actual harm need not be shown [...]. Nor is it necessary to show with certainty that future harm will result. What is necessary is a showing by a preponderance of the evidence that some meaningful likelihood of future harm exists."
  - 31 See M.R.F. Senftleben, *L'application du triple test: vers un système de fair use européen?*, *Propriétés intellectuelles* 2007, p. 453.
  - 32 See *Rechtbank Den Haag*, June 25, 2008, case 246698, LJN BD5690, *Tijdschrift voor auteurs-, media en informatierecht* 2008, p. 146 with case comment by C.B. van der Net.
  - 33 See the material quoted by the *Rechtbank Den Haag*, *ibid.*, para. 4.4.1.
  - 34 See *Rechtbank Den Haag*, June 25, 2008, case 246698, LJN BD5690, *Tijdschrift voor auteurs-, media en informatierecht* 2008, p. 146 with case comment by C.B. van der Net, para. 4.4.3.
  - 35 See M.R.F. Senftleben, *Privé-kopiëren in het licht van de driestappentoets – opmerkingen naar aanleiding van het vonnis van de Haagse rechtbank inzake de thuiskopie*, *Intellectuele eigendom en reclamerecht* 2008, p. 265.
  - 36 For an overview of the implementation strategies followed by EC member states, see *Institute for Information Law, Study on the Implementation and Effect in Member States' Laws of Directive 2001/29/EC on the Harmonization of Certain Aspects of Copyright and Related Rights in the Information Society*, Amsterdam: Institute for Information Law 2007, available online at [www.ivir.nl](http://www.ivir.nl).
  - 37 Cf. A. Lucas/P. Sirinelli, *Chronique: Droit d'auteur et droits voisins, Propriétés intellectuelles* 2006, p. 297 (314-316); V.L. Benabou, *Patatras! A propos de la décision du Conseil constitutionnel du 27 juillet 2006, Propriétés intellectuelles* 2006, p. 240; C. Geiger, *The French Implementation of the Information Society Directive: A Disappointing Result of a Promising Debate*, *Tijdschrift voor auteurs-, media en informatierecht* 2008, p. 1; Senftleben, *supra* note 31, 453.
  - 38 Therefore, it is inconsistent to invoke legal certainty as an argument to justify the current hybrid EC concept of specific exceptions that are additionally controlled in the light of the three-step test. Nonetheless, this argument is still advanced by Lucas, *supra* note 15, 282.
  - 39 See *Cour de cassation française*, case 05-15824, February 28, 2006, *Mulholland Drive : JCP éd. G* 2006, II, 10084, with case comment by A. Lucas. For further commentary, see Geiger, *supra* note 24, 683; L.Y. Ngombe, *Technical Measures of Protection versus Copy for Private Use: Is the French Legal Saga Over?*, *European Intellectual Property Review* 2007, p. 61.
  - 40 See *Cour de cassation*, *ibid.*, *JCP éd. G* 2006, II, 10084.
  - 41 See *Cour d'appel de Paris*, fourth chamber B, decision of April 22, 2005, *Juris-Data n° 2005-268600*, *Mulholland Drive*, *JCP éd. G* 2005, II, 10126, with case comment by C. Geiger.
  - 42 See *Cour de cassation*, *ibid.*, *JCP éd. G* 2006, II, 10084.
  - 43 Cf. C. Geiger, *The Answer to the Machine Should Not Be the Machine: Safeguarding the Private Copy Exception in the Digital Environment*, *European Intellectual Property Review* 2008, p. 121.
  - 44 Cf. Dreier, *supra* note 4, 51; Geiger, *supra* note 4, 459.
  - 45 See *Gerechtshof Arnhem*, July 4, 2006, case no. 06/416, LJN AY0089, *Mediaforum* 2007, p. 21, with case comment by B. Beuving; *Tijdschrift voor auteurs-, media en informatierecht* 2007, p. 93, with case comment by K.J. Koelman.
  - 46 See *Rechtbank Alkmaar*, August 7, 2007, case no. 96206, *Tijdschrift voor auteurs-, media en informatierecht* 2007, p. 148, with case comment by K.J. Koelman. On procedural grounds, the judgment was annulled by *Gerechtshof Amsterdam*, December 13, 2007, case no. LJN BC0125, available online at [www.iept.nl](http://www.iept.nl).
  - 47 See *Rechtbank Alkmaar*, *ibid.*, para. 4.14.
  - 48 See *Landgericht Hamburg*, September 26, 2008, case no. 308 O 248/07, section II.B.4. The decision is available online at [http://www.openjur.de/u/30461-308\\_o\\_248-07.html](http://www.openjur.de/u/30461-308_o_248-07.html).
  - 49 See *Landgericht Hamburg*, *ibid.*, section II.B.6.a. With regard to the right of quotation in German copyright law, see G. Schricker, in: G. Schricker (ed.), *Urheberrecht Kommentar*, 3<sup>rd</sup> edn., Munich: C.H. Beck 2006.
  - 50 See *Landgericht Hamburg*, *ibid.*, section B.I.6.d.
  - 51 See *Landgericht Hamburg*, *ibid.*, section B.I.6.d. With regard to the scope of the quotation right under the German Copyright Act, see Th. Dreier, *Thumbnails als Zitate? – Zur Reichweite von § 51 UrhG in der Informationsgesellschaft*, in: U. Blaurock/J. Bornkamm/C. Kirchberg (eds.), *Festschrift für Achim Krämer zum 70. Geburtstag*, Berlin: De Gruyter 2009, p. 225.
  - 52 See *Bundesgerichtshof*, April 29, 2010, case I ZR 69/08, p. 11-12, available online in German at [www.bundesgerichtshof.de](http://www.bundesgerichtshof.de).
  - 53 See *Bundesgerichtshof*, *ibid.*, 12-13.
  - 54 See *Bundesgerichtshof*, *ibid.*, 14-15.
  - 55 See *Bundesgerichtshof*, *ibid.*, 15-19.
  - 56 See *Bundesgerichtshof*, *ibid.*, 21-22, referring to ECJ, July 16, 2009, joined cases C-236/08 to C-238/08, *Google/Louis Vuitton*



et al., available online at [www.curia.eu](http://www.curia.eu). Cf. Directive 2000/31/EC of the European Parliament and of the Council of June 8, 2000, on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market.

- 57 For a broader overview of EC case law, see J. Griffiths, *supra* note 24, 493-499.
- 58 See Senftleben, *supra* note 24, 2-4. To reduce the harm flowing from the Copyright Directive, the EC three-step test should at least be construed flexibly. For guidelines in this regard, see C. Geiger/J. Griffiths/R.M. Hilty, Declaration on a Balanced Interpretation of the “Three-Step Test” in Copyright Law, *International Review of Intellectual Property and Competition Law* 39 (2008), p. 707.
- 59 Cf. Leval, *supra* note 7, 1111; Netanel, *supra* note 17, 381.
- 60 See U.S. Court of Appeals for the Ninth Circuit, May 16, 2007, Perfect 10, Inc. vs. Amazon.com, Fd 3d., para. 11. With regard to parody and the notion of transformative use, see also the U.S. Supreme Court decision *Campbell v. Acuff-Rose*, 510 US 569 (1994), II A: “The central purpose of this investigation is to see [...] whether the new work merely supersedes the objects of the original creation [...] or instead adds something new, with a further purpose or different character, altering the first with new expression, meaning, or message; it asks, in other words, whether and to what extent the new work is ‘transformative.’”
- 61 See U.S. Court of Appeals, *ibid.*, para. 12.
- 62 For instance, see United States District Court Southern District of New York, *Warner Bros. Entertainment Inc. and J.K. Rowling vs. RDR Books and Does 1-10*, case 07 Civ. 9667 (RPP), September 8, 2008, concerning the online platform “The Lexicon” offering an alphabetically organized reference guide to the Harry Potter books. Even though “The Lexicon” contained material that was held to be infringing and, accordingly, could not be defended entirely on the basis of the fair use doctrine, the Court recognized the transformative purpose of the online platform as a reference guide: “Because it serves these reference purposes, rather than the entertainment or aesthetic purposes of the original works, the Lexicon’s use is transformative and does not supplant the objects of the Harry Potter works.” See District Court of the Southern District of New York, *ibid.*, p. 44. In this way, the decision creates breathing space for user-generated reference guides to commercial productions, such as the Harry Potter books. Cf. A.J. Sanders, J.K. Rowling and The Lexicon: Warner Bros. Entertainment Inc. and J.K. Rowling v. RDR Books, et al., *European Intellectual Property Review* 2009, p. 37 (45); Knopp, *supra* note 19, 28.
- 63 Cf. the detailed discussion of different types of fair use legislation by Förster, *supra* note 14, 211-222.
- 64 As to the application of the three-step test criteria in the framework of a fair use weighing process, see K.J. Koelman, *Fixing the Three-Step Test*, *European Intellectual Property Review* 2006, p. 407; Senftleben, *supra* note 16, 10. However, see also the conclusions drawn by Griffiths, *supra* note 24, who doubts that the three-step test offers an appropriate basis for the enhancement of flexibility in the area of copyright limitations.
- 65 See observation by the United Kingdom, Doc. S/13, Records 1967, *supra* note 22, 630. Cf. Senftleben, *supra* note 3, 47-52.
- 66 Cf. Section 107 of the U.S. Copyright Act. With regard to the application of fair use analyses concerning the fourth factor in the context of the three-step test, see Senftleben, *supra* note 3, 184-187. Lessons for the application of an EC fair use doctrine can particularly be derived from experiences with an overly broad application of the fourth factor test. As pointed out by Leval, *supra* note 7, 1124-1125: “By definition every fair use involves some loss of royalty revenue because the secondary user has not paid royalties. Therefore, if an substantial loss of revenue turned the fourth factor in favor of the copyright holder, this factor would never weigh in favor of the secondary use. [...] The market impairment should not turn the fourth factor unless it is reasonably substantial. When the injury to the copyright holder’s potential market would substantially impair the incentive to create works for publication, the objectives of the copyright law require that this factor weigh heavily against the secondary user.”
- 67 See the overview provided by Senftleben, *supra* note 3, 245.
- 68 See Doc. S/1, Records 1967, *supra* note 22, 81. For a discussion of the breathing space offered by the three-step test, A. Kur, *Of Oceans, Islands, and Inland Water – How Much Room for Exceptions and Limitations Under the Three-Step Test?*, Max Planck Institute for Intellectual Property, Competition & Tax Law Research Paper Series No. 08-04 (2008), available online at <http://ssrn.com/abstract=1317707>; M.R.F. Senftleben, *Grundprobleme des urheberrechtlichen Dreistufentests*, *Gewerblicher Rechtsschutz und Urheberrecht International* 2004, p. 200 (206-207). For a proposal to use the three-step test as an instrument to delineate the exclusive rights of copyright owners, see D. Gervais, *Toward a New Core International Copyright Norm: The Reverse Three-Step Test*, *Marquette Intellectual Property Law Review* 9 (2005), p. 1.
- 69 With regard to the evolution of this “family” of copyright three-step tests in international copyright law, see Senftleben, *supra* note 3, 43-98; N. Dittrich, *Der Dreistufentest*, in: N. Dittrich (ed.), *Beiträge zum Urheberrecht VIII*, Wien 2005, p. 63; J. Bornkamm, *Der Dreistufentest als urheberrechtliche Schrankenbestimmung – Karriere eines Begriffs*, in: H.-J. Ahrens/J. Bornkamm/W. Gloy/J. Starck/J. von Ungern-Sternberg, *Festschrift für Willi Erdmann zum 65. Geburtstag*, Köln/Berlin/Bonn/München: Carl Heymanns 2002, p. 29.
- 70 As to the debate in the context of the WIPO “Internet” Treaties, see Senftleben, *supra* note 3, 96-98; M. Ficsor, *The Law of Copyright and the Internet: The 1996 WIPO Treaties, their Interpretation and Implementation*, Oxford: Oxford University Press 2002; J. Reinbothe/S. Von Lewinski, *The WIPO Treaties 1996: Commentary and Legal Analysis*, Butterworths 2002.
- 71 See *Agreed Statement Concerning Article 10 of the WIPO Copyright Treaty*.
- 72 For an overview of national case law applying the three-step test as a flexible standard, see Griffiths, *supra* note 24, 489.
- 73 See Bundesgerichtshof, February 25, 1999, case I ZR 118/96, *Juristenzeitung* 1999, p. 1000, with case comment by H. Schack. For an English description of the case, see Senftleben, *supra* note 3, 206-208.
- 74 See Bundesgerichtshof, *ibid.*, 1004.
- 75 See Bundesgerichtshof, *ibid.*, 1005-1007. Cf. P. Baronikians, *Kopienversand durch Bibliotheken – rechtliche Beurteilung und Vorschläge zur Regelung*, *Zeitschrift für Urheber- und Medienrecht* 1999, p. 126. In the course of subsequent amendments to the Copyright Act, the German legislator modeled a new copyright limitation on the Court’s decision. § 53a of the German Copyright Act goes beyond the court decision by including the dispatch of digital copies in graphical format.
- 76 See Bundesgerichtshof, July 11, 2002, case I ZR 255/00, *Gewerblicher Rechtsschutz und Urheberrecht* 2002, p. 963; *Juristenzeitung* 2003, p. 473, with case comment by Th. Dreier. Cf. Th. Hoeren, *Presspiegel und das Urheberrecht*, *Gewerblicher Rechtsschutz und Urheberrecht* 2002, p. 1022.
- 77 § 49(1) of the German Copyright Act, as in force at that time, referred to “*Informationsblätter*.”
- 78 See Bundesgerichtshof, *ibid.*, 966-966.
- 79 See Bundesgerichtshof, *ibid.*, 966-967. The Court referred to the three-step test of Article 5(5) of the EC Copyright Directive 2001/29. The EC three-step test enshrined in this provision, however, does not deviate from the international three-step test.



- 80 As to the debate on the impact of the three-step test on open-ended limitations, such as the U.S. fair use doctrine, cf. Förster, *supra* note 14, 191-201; Senftleben, *supra* note 3, 133-137 and 162-168; Bornkamm, *supra* note 69, 45-46; H. Cohen Jehoram, *Restrictions on Copyright and their Abuse*, *European Intellectual Property Review* 2005, p. 359; S. Ricketson, *The three-step test, deemed quantities, libraries, and closed exceptions*, *Centre for Copyright Studies* 2003, p. 147-154; M. Leaffer, *The Uncertain Future of Fair Use in a Global Information Marketplace*, *Ohio State Law Journal* 62 (2001), p. 849; R. Okediji, *Toward an International Fair Use Doctrine*, *Columbia Journal of Transnational Law* 39 (2000), p. 75 (116-130); J.E. Cohen, *WIPO Copyright Treaty Implementation in the United States: Will Fair Use Survive?*, *European Intellectual Property Review* 1999, p. 236; T. Newby, *What's Fair Here Is Not Fair Everywhere: Does the American Fair Use Doctrine Violate International Copyright Law?*, *Stanford Law Review* 1999, p. 1633.
- 81 See WTO Document WT/DS160/R, available online at [www.wto.org](http://www.wto.org), para. 6.108. For comments on the report, see M.R.F. Senftleben, *Towards a Horizontal Standard for Limiting Intellectual Property Rights? – WTO Panel Reports Shed Light on the Three-Step Test in Copyright Law and Related Tests in Patent and Trademark Law*, *International Review of Intellectual Property and Competition Law* 37 (2006), p. 407; M. Ficsor, *How Much of What? The Three-Step Test and Its Application in Two Recent WTO Dispute Settlement Cases*, *RIDA* 192 (2002), p. 111; J. Oliver, *Copyright in the WTO: The Panel Decision on the Three-Step Test*, *Columbia Journal of Law & the Arts* 25 (2002), p. 119; D.J. Brennan, *The Three-Step Test Frenzy: Why the TRIPS Panel Decision might be considered Per Incuriam*, *Intellectual Property Quarterly* 2002, p. 213; J. Ginsburg, *Toward Supranational Copyright Law? The WTO Panel Decision and the “Three-Step Test” for Copyright Exceptions*, *RIDA* 2001, p. 13; P.B. Hugenholtz, *De wettelijke beperkingen beperkt. De WTO geeft de driestappentoets tanden*, *Tijdschrift voor Auteurs-, Media- en Informatierecht* 2000, p. 197.
- 82 In this sense already Senftleben, *supra* note 3, 162-168. Cf. Beebe, *supra* note 7, 549. However, see the critical comments by Förster, *supra* note 14, 197-201, on the unrestricted openness of the U.S. system. With regard to the predictability of fair use decisions, see also Nimmer, *supra* note 7, 263.
- 83 This proposal is in line with Article 5.5 of the European Copyright Code that is the result of the Wittem Project that was established in 2002 as a collaboration between copyright scholars across the European Union concerned with the future development of European copyright law. The proposed European Copyright Code of the Wittem Project is available online at [www.copyrightcode.eu](http://www.copyrightcode.eu). With regard to national court decisions that can be regarded as precursors of the proposed development of new exceptions on the basis of the existing catalogue of precisely defined exceptions, see Hoge Raad, October 20, 1995, *Dior/Evora*, *Nederlandse Jurisprudentie* 1996, no. 682 with case comment J.H. Spoor, *Tijdschrift voor auteurs-, media en informatierecht* 1996, p. 51 with case comment F.W. Grosheide. In this decision, the Hoge Raad, *ibid.*, para. 3.6.2, held that the specific exceptions laid down in the Dutch Copyright Act did not necessarily exclude the further delineation of the limits of copyright protection “in other cases on the basis of a comparable weighing of interests.” Cf. J.H. Spoor/D.W.F. Verkade/D.J.G. Visser, *Auteursrecht*, 3rd edn., Deventer: Kluwer 2005, p. 221.
- 84 With regard to current WIPO initiatives in the area of copyright limitations, see the overview provided in document SCCR/20/4. With regard to recent studies concerning educational activities, see documents SCCR/19/4 (Monroy Study), SCCR/19/5 (Fometeu Study), SCCR/19/6 (Nabhan Study), SCCR/19/7 (Seng Study), SCCR/19/8 (Xalabarder Study). As to the current debate on exceptions and limitations for educational activities and practices and measures for the benefit of persons with print disabilities, see documents SCCR/20/3 and SCCR/20/5. The WIPO documents are available online at [www.wipo.int](http://www.wipo.int). Cf. N.W. Netanel (ed.), *The Development Agenda: Global Intellectual Property and Developing Countries*, Oxford: Oxford University Press 2007.
- 85 See Doc. S/1, *Records 1967*, *supra* note 22, 81.
- 86 For a concept interpreting the three-step test as a refined proportionality test, see Senftleben, *supra* note 3, 226-244. With regard to guidelines for the application of the three-step test under this premise, see Geiger/Griffiths/Hilty, *supra* note 58, 707.