# From Flexible Balancing Tool to Quasi-Constitutional Straitjacket - How the EU Cultivates the Constraining Function of the Three-Step Test

Senftleben, M.

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# From Flexible Balancing Tool to Quasi-Constitutional Straitjacket—How the EU Cultivates the Constraining Function of the Three-Step Test

*Martin Senftleben*

## 1. Introduction

In the international intellectual property (IP) arena, the so-called 'three-step test' regulates the room for the adoption of limitations and exceptions (L&Es) to exclusive rights across different fields of IP.[1] As a flexible compromise formula, the provision plays a crucial role at the intersection between IP protection and areas of freedom that serve competing economic, social, and cultural interests. The individual tests—the requirement of 'certain special cases'[2] or 'limited exceptions';[3] the prohibition of a 'conflict'[4] or 'unreasonable conflict',[5] with a 'normal exploitation';[6] the prohibition of an 'unreasonable prejudice'[7] to 'legitimate interests' of IP owners[8] and third parties[9]—are elastic guidelines for national policymakers seeking to reconcile IP protection with other societal needs.[10]

[1] For a discussion of the horizontal application of the three-step test across copyright, patent, and trade mark law, see Martin R F Senftleben, 'Towards a Horizontal Standard for Limiting Intellectual Property Rights?—WTO Panel Reports Shed Light on the Three-Step Test in Copyright Law and Related Tests in Patent and Trademark Law' (2006) 37 International Review of Intellectual Property and Competition Law 407 (hereafter Senftleben, 'Towards a Horizontal Standard'); Martin R F Senftleben, *Copyright, Limitations and the Three-Step Test—An Analysis of the Three-Step Test in International and EC Copyright Law* (Kluwer Law International 2004) 134–230 (hereafter Senftleben, *Copyright, Limitations and the Three-Step Test*) ;Mihály J Ficsor, 'How Much of What? The Three-Step Test and Its Application in Two Recent WTO Dispute Settlement Cases' (2002) 192 Revue Internationale du Droit d'Auteur 111; Jo Oliver, 'Copyright in the WTO: The Panel Decision on the Three-Step Test' (2002) 25 Columbia Journal of Law and the Arts 119; David J Brennan, 'The Three-Step Test Frenzy: Why the TRIPS Panel Decision Might Be Considered Per Incuriam' [2002] Intellectual Property Quarterly 213; Jane C Ginsburg, 'Toward Supranational Copyright Law? The WTO Panel Decision and the "Three-Step Test" for Copyright Exceptions' (2001) 190 Revue Internationale du Droit d'Auteur 13.

[2] See Art 13 of the Agreement on Trade-Related Aspects of Intellectual Property Rights, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C (opened for signature 15 April 1994, entered into force 1 January 1995) 1869 UNTS 299 (hereafter TRIPS).

[3] Arts 17, 26(2), and 30 TRIPS (n 2).

[4] Art 13 TRIPS (n 2).

[5] Arts 26(2) and 30 TRIPS (n 2).

[6] Arts 13, 26(2), and 30 TRIPS (n 2).

[7] Arts 13, 26(2), and 30 TRIPS (n 2).

[8] Arts 13, 17, 26(2), and 30 TRIPS (n 2).

[9] Arts 17, 26(2), and 30 TRIPS (n 2).

[10] As to the debate about the right interpretation of the open-ended three-step test, see Martin R F Senftleben, 'How to Overcome the Normal Exploitation Obstacle: Opt-Out Formalities, Embargo Periods, and the International Three-Step Test' (2014) 1(1) Berkeley Technology Law Journal Commentaries 1; Christophe Geiger, Daniel Gervais, and Martin R F Senftleben, 'The Three-Step Test Revisited: How to Use the Test's Flexibility in

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Given the openness of the individual test criteria, the three-step test is not per se a fortification of the hegemony of IP owners. By contrast, the test has a dualistic nature. On the one hand, the three-step test has a strong enabling function in the sense that it constitutes the broadest and most important basis for the limitation of IP protection at the national level. On the other hand, it has an undeniable constraining function in the sense that national policymakers who seek to stay within the legislative boundaries of a given IP regime[11] can only devise and adopt L&Es within the framework set by the abstract criteria of the test.

Given this ambiguity that is inherent in the three-step test—the necessity to navigate between an enabling and constraining application—it is tempting for proponents of strong IP protection to strive for the fixation of the meaning of the three-step test at the constraining end of the spectrum of possible interpretations. As the three-step test lies at the core of legislative initiatives to balance exclusive rights and user freedoms, the cultivation of the test's constraining function and the suppression of the test's enabling function has the potential to transform the three-step test into a bulwark against limitations of IP protection. Once the test is primarily understood as a restriction of national IP policymaking that seeks to offer room for socially valuable use, it will systematically dry out L&Es. The transformation into a restrictive control mechanism would have repercussions in various fields of IP: after its evolution in international copyright law, the three-step test made its way into international patent, trade mark, and industrial designs law.[12]

The EU is at the forefront of a constraining use and interpretation of the three-step test in the field of copyright law. As a result of the inclusion of the international provision in EU copyright legislation,[13] the circle of actors in the copyright arena who are aligning their

National Copyright Law' (2014) 29 American University International Law Review 581 (hereafter Geiger, Gervais, and Senftleben, 'The Three-Step Test Revisited'); Christophe Geiger, Jonathan Griffiths, and Reto M Hilty, 'Declaration on a Balanced Interpretation of the "Three-Step Test" in Copyright Law' (2008) 39 International Review of Intellectual Property and Competition 707; P Bernt Hugenholtz and Ruth L Okediji, *Conceiving an International Instrument on Limitations and Exceptions to Copyright* (Institute for Information Law/University of Minnesota Law School 2008) 21 (hereafter Hugenholtz and Okediji, *Conceiving an International Instrument*); Kamiel J Koelman, 'Fixing the Three-Step Test' (2006) 28 European Intellectual Property Review 407 (hereafter Koelman, 'Fixing the Three-Step Test'); Christophe Geiger, 'From Berne to National Law, via the Copyright Directive: The Dangerous Mutations of the Three-Step Test' (2007) 29(12) European Intellectual Property Review 486 (hereafter Geiger, 'From Berne to National Law'); Christophe Geiger, *The Role of the Three-Step Test in the Adaptation of Copyright Law to the Information Society* (UNESCO e-Copyright Bulletin, January–March 2007) 3, 19 (hereafter Geiger, *The Role of the Three-Step Test*); Jonathan Griffiths, 'The "Three-Step Test" in European Copyright Law: Problems and Solutions' [2009] Intellectual Property Quarterly 489 (hereafter Griffiths, 'The "Three-Step Test" '); Daniel Gervais, 'Making Copyright Whole: A Principled Approach to Copyright Exceptions and Limitations' (2008) 3 University of Ottawa Law and Technology Journal 1, 30; Christophe Geiger, 'The Three-Step Test, a Threat to a Balanced Copyright Law?' (2006) 37 International Review of Intellectual Property and Competition Law 683 (hereafter Geiger, 'The Three-Step Test'); Thomas Heide, 'The Berne Three-Step Test and the Proposed Copyright Directive' (1999) 21 European Intellectual Property Review 105, 106.

[11] For a discussion of the relationship between the three-step test and fundamental rights and freedoms, see the discussion in the copyright arena. cf Geiger, Gervais, and Senftleben, 'The Three-Step Test Revisited' (n 10) 601–03; Christophe Geiger, '"Constitutionalizing" Intellectual Property Law, The Influence of Fundamental Rights on Intellectual Property in Europe' (2006) 37 International Review of Intellectual Property and Competition Law 371; Christophe Geiger, 'Copyright's Fundamental Rights Dimension at EU Level' in Estelle Derclaye (ed), *Research Handbook on the Future of EU Copyright* (Edward Elgar 2009) 27, 48; Christophe Geiger, 'Fundamental Rights as Common Principles of European (and International) Intellectual Property Law' in Ansgar Ohly (ed), *Common Principles of European Intellectual Property Law* (Mohr Siebeck 2012) 223, 225–26.

[12] For a discussion of this 'family' of three-step test provisions in international IP law, see Andrew F Christie and Robin Wright, 'A Comparative Analysis of the Three-Step Tests in International Treaties' (2014) 45 International Review of Intellectual Property and Competition Law 409; Senftleben, 'Towards a Horizontal Standard' (n 1) 407.

[13] For an overview of three-step tests in EU copyright law, see Senftleben, *Copyright, Limitations and the Three-Step Test* (n 1).

decisions with the criteria of the test has increased substantially. In the EU, the assessment of the permissibility of L&Es in the light of the three-step test is no longer the domain of law and policymakers. As EU copyright law stipulates in Art 5(5) of the Information Society Directive 2001/29/EC (InfoSoc) that L&Es 'shall only be applied' in accordance with the three-step test,[14] judges have developed a practice of scrutinising the scope of L&Es on the basis of the three-step test. The Court of Justice of the European Union (ECJ) has rendered several decisions in which the three-step test features prominently.[15] At the national level, it has become commonplace to apply the three-step test as a yardstick for the assessment of L&Es in the field of copyright law.[16]

While, in principle, there is no reason to assume that the application by judges will always be biased and imbalanced, the configuration of the legal framework in the EU is worrisome because it obliges judges to apply the three-step test as an additional control instrument. It is not sufficient that an individual use falls within the scope of a statutory copyright limitation that explicitly permits this type of use without prior authorisation.[17] In addition, judges applying the three-step test also examine whether the specific form of use at issue complies with each individual criterion of the three-step test. Hence, the test serves as an instrument to further restrict L&Es that have already been defined precisely in statutory law.[18] EU law neglects the enabling function of the three-step test and confines use of the test to the constraining function of imposing additional obligations on users seeking to benefit from a copyright limitation.[19] As a result of this legislative design, judges in the EU can only produce case-law in which the three-step test serves as an instrument to curtail L&Es. Not surprisingly, decisions from courts in the EU have a tendency of shedding light on the constraining aspect of the three-step test and, therefore, reinforcing the hegemony of copyright holders in the IP arena.

The hypothesis underlying the following examination, therefore, is that the EU approach to the three-step test is one-sided in the sense that it only demonstrates the potential of the test to set additional limits to L&Es. The following analysis will focus on this transformation of a flexible international balancing tool into a powerful confirmation and fortification of IP protection. For this purpose, the two facets of the international three-step test—its enabling and constraining function—will be introduced (following Section 2) before embarking on a discussion of case-law that evolved under the one-sided EU approach (Section 3). Analysing repercussions on international law-making, it will become apparent that the EU approach already impacted the further development of international L&Es. Certain features of the Marrakesh Treaty clearly reflect the EU approach (Section 4). Final remarks conclude the discussion (Section 5).

[14] See Art 5(5) of the Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society (Information Society Directive, InfoSoc Directive) [2001] OJ L167 (hereafter InfoSoc Directive).

[15] See the discussion of these decisions in Section 3.

[16] See the analysis conducted by Griffiths, 'The "Three-Step Test"' (n 10) 489.

[17] See the list of statutory L&Es in Art 5 InfoSoc Directive (n 14).

[18] *ACI Adam* [2014] ECLI:EU:C:2014:254, para 26 (hereafter *ACI Adam*).

[19] For a more detailed discussion of this problem, see Martin R F Senftleben, 'Comparative Approaches to Fair Use: An Important Impulse for Reforms in EU Copyright Law' in Graeme B Dinwoodie (ed), *Methods and Perspectives in Intellectual Property* (Edward Elgar 2013) 30.

## 2. Enabling and Constraining Function at the International Level

The first three-step test in international copyright law was laid down in Art 9(2) of the Berne Convention for the Protection of Literary and Artistic Works (BC). Its adoption followed a proposal tabled by the UK delegation at the 1967 Stockholm Conference for the Revision of the Berne Convention.[20] Having its roots in the Anglo-American copyright tradition, it is not surprising that the three-step test consists of open-ended factors comparable to traditional fair dealing and fair use legislation in common law countries. A line between the criteria of the three-step test and the factors to be found in fair use provisions, such as the US fair use doctrine,[21] can easily be drawn. The prohibition of a conflict with a normal exploitation, for example, recalls the fourth factor of the US fair use doctrine 'effect of the use upon the potential market for or value of the copyrighted work'.[22] Not surprisingly, the three-step test was perceived as a flexible framework at the 1967 Stockholm Conference—a framework within which national legislators would enjoy the freedom of safeguarding national L&Es and satisfying domestic social, cultural, and economic needs.[23] This international *acquis* of the provision already indicates that the three-step test must not be misunderstood as a straitjacket constraining the application of national L&Es. On its merits, the flexible formula constituting the three-step test is a compromise solution allowing Berne Union Members to tailor national L&Es to their specific domestic needs.[24]

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 L&Es for private copying, for instance, is sought in vain in international copyright law. It is the international three-step test[25] that creates breathing space for the adoption of this type of copyright limitation at the national level.[26] Further examples of national L&Es resting on the international three-step test can easily be found in the copyright laws of Berne Union Members, such as the exemption of reproductions for research purposes; the privilege of libraries, archives, and museums to make copies for the purpose of preserving cultural material; the exemption of reproductions that are required for administrative, parliamentary, or judicial proceedings; or of reproductions made by hospitals and prisons.[27]

[20] See observation by the United Kingdom, Document S/13, *Records of the Intellectual Property Conference of Stockholm June 11 to July 14, 1967* (WIPO 1971) 630 (hereafter *Records of the Intellectual Property Conference*). For a more detailed discussion of the drafting history, see Senftleben, *Copyright, Limitations and the Three-Step Test* (n 1) 47–52; Daniel Gervais, 'Fair Use, Fair Dealing, Fair Principles: Efforts to Conceptualize Exceptions and Limitations to Copyright' (2009–2010) 57 Journal of the Copyright Society of the U.S.A. 499, 510–11; Annette Kur, 'Of Oceans, Islands, and Inland Water—How Much Room for Exceptions and Limitations Under the Three-Step Test?' (2009) 8 Richmond Journal of Global Law and Business 287, 307–08; Sam Ricketson and Jane C Ginsburg, *International Copyright and Neighbouring Rights—The Berne Convention and Beyond* (Oxford University Press 2006) 759–63 (hereafter Ricketson and Ginsburg, *International Copyright)*.

[21] US Code, Copyright Act 1976, 17 USC § 107—Limitations on exclusive rights: Fair use.

[22] With regard to the application of fair use analyses concerning the fourth factor in the context of the three-step test, see Senftleben, *Copyright, Limitations and the Three-Step Test* (n 1) 184–87.

[23] Document S/1, *Records of the Intellectual Property Conference* (n 20) 81.

[24] cf Koelman, 'Fixing the Three-step Test' (n 10) 407; Geiger, 'From Berne to National Law' (n 10) 486.

[25] In particular, see Art 9(2) of Berne Convention for the Protection of Literary and Artistic Works (opened for signature 9 September 1886, entered into force 5 December 1887, as last revised at Paris 24 July 1971, and amended 28 September 1979) 1161 UNTS 30 (hereafter Berne Convention or BC).

[26] For a discussion of limitations for private copying and accompanying levy systems in different Member States of the EU, see *Padawan/SGAE* [2010] ECLI:EU:C:2010:620, para 49; *VG Wort* [2013] ECLI:EU:C:2013:426, paras 76–77; *Amazon/Austro-Mechana* [2013] ECLI:EU:C:2013:515, para 24; *ACI Adam* (n 18) para 52; *Copydan Båndkopi/Nokia* [2015] ECLI:EU:C:2015:144, para 23.

[27] For an example of regional copyright legislation containing these and other examples of L&Es based directly on the three-step test of Art 9(2) BC (n 25), see Art 5 InfoSoc Directive (n 14).

The three-step test of Art 9(2) BC, therefore, clearly has the function of creating room for the introduction of L&Es at the national level.[28] Vested with this function, it made its way into Art 13 TRIPS and played a decisive role during the negotiations of the WIPO 'Internet' Treaties.[29] In Art 10(1) of the WIPO Copyright Treaty (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 as part of the general right of communication to the public.[30] In consequence, all L&Es to the right of making available rest on the international three-step test. The room for these L&Es stems directly from Art 10(1) WCT. Considering the entire family of copyright three-step tests in Arts 9(2) BC, 13 TRIPS, and 10(1) WCT, it becomes obvious that the provision, by far, is the most important and comprehensive international basis for national L&Es.

At the same time, it is evident that the international copyright community employed the three-step test as a compromise formula whenever agreement about more specific use privileges was beyond reach. Again, the circumstances surrounding the adoption of Art 9(2) BC can serve as an example. The preparatory work for the 1967 Stockholm Revision Conference was based on the assumption that the intended perfection of the system of the Berne Union should be pursued, among other objectives, through the enlargement of the protection granted to authors by the creation of new rights or by the extension of rights which were already recognised.[31] In accordance with this approach, the establishment of the right of reproduction *jure conventionis* was regarded as one of the most important tasks of the Conference. Its accomplishment should redress the anomaly that the Convention did not contain a right of reproduction while this right held a fundamental position in national legislation.[32] The feasibility of the plan to attain the formal recognition of a general right of reproduction, however, depended on whether or not the Conference would succeed in finding a satisfactory formula for permissible limitations.[33]

In practice, the L&Es in the field of reproduction rights varied considerably throughout the Berne Union. The study group composed of representatives of the Swedish Government and the United International Bureaux for the Protection of Intellectual Property (BIRPI) which undertook the preparatory work for the Stockholm Conference noted that 'domestic

[28] cf Martin R F Senftleben, 'The International Three-Step Test: A Model Provision for EC Fair Use Legislation' (2010) 1 Journal of Intellectual Property, Information Technology and E-Commerce Law 67 (hereafter Senftleben, 'The International Three-Step Test'). See also the examples of a flexible application of the test given by Griffiths, 'The "Three-Step Test" (n 10) 436–41.

[29] With regard to the evolution of this 'family' of copyright three-step tests in international copyright law, see Geiger, Gervais, and Senftleben, 'The Three-Step Test Revisited' (n 10) 583–91; Senftleben, *Copyright, Limitations and the Three-Step Test* (n 1) 43–98; Joachim Bornkamm, 'Der Dreistufentest als urheberrechtliche Schrankenbestimmung—Karriere eines Begriffs' in Hans J Ahrens and others, *Festschrift für Willi Erdmann zum 65. Geburtstag* (Carl Heymanns 2002) 29.

[30] As to the debate in the context of the WIPO 'Internet' Treaties, see Senftleben, *Copyright, Limitations and the Three-Step Test* (n 1) 96–98; Mihály J Ficsor, *The Law of Copyright and the Internet: The 1996 WIPO Treaties, their Interpretation and Implementation* (Oxford University Press 2002); Jörg Reinbothe and Silke von Lewinski, *The WIPO Treaties 1996: Commentary and Legal Analysis* (Butterworths 2002).

[31] This conception was based on Art 24(1) of the Brussels Act of the Berne Convention. cf Document S/1, *Records of the Intellectual Property Conference* (n 20) 80.

[32] Prior to the 1967 Stockholm Act, the right of reproduction was only implicitly recognised in the Convention. cf Ricketson and Ginsburg, *International Copyright* (n 20) 623–25; Mario Fabiani, 'Le droit de reproduction et la revision de la Convention de Berne' [1964] Le droit d'auteur 286; Eugen Ulmer, 'Das Vervielfältigungsrecht (Art. 9)' in Eugen Ulmer and Friedrich K Beier, *Die Stockholmer Konferenz für geistiges Eigentum 1967* (Verlag Chemie 1969) 16. This point of view was discussed by the 1965 Committee of Governmental Experts. cf Document S/1, *Records of the Intellectual Property Conference* (n 20) 81 and 111–12.

[33] This is clearly stated in the Document S/1, *Records of the Intellectual Property Conference* (n 20) 113.

laws already contained a series of exceptions in favour of various public and cultural interests and that it would be vain to suppose that countries would be ready at this stage to abolish these exceptions to any appreciable extent'.[34] Given these circumstances, the 1965 Committee of Governmental Experts discussing the text proposals for the Diplomatic Conference agreed on the following draft for a separate paragraph dealing with L&Es to the envisaged general right of reproduction:

> It shall be a matter for legislation in the countries of the Union to permit the reproduction of such works (a) for private use; (b) for judicial or administrative purposes; (c) in certain particular cases where the reproduction is not contrary to the legitimate interests of the author and does not conflict with a normal exploitation of the work.[35]

At the Conference, the enumeration of specific limitations in (a) and (b) could not survive the more thorough scrutiny of the members of the Berne Union. Countries which pursued the development of a more restrictive formula sought for the most part either to delineate their scope more precisely or to delete them completely.[36] Italy suggested, for instance, that the term 'private use' be replaced with 'personal use', while France preferred the formulation 'for individual or family use' to inhibit corporate bodies from claiming that their copying served private purposes.[37] In respect of the exemption provided for under (b), the Netherlands proposed the wording 'for strictly judicial or administrative purposes'.[38] Eventually, the UK spoke up for the abolition of paragraphs (a) and (b) altogether to avert the possible harm to authors and publishers that could flow from mention of 'private use' and 'administrative purposes'. Instead, the UK proposed the adoption of a single general clause based on the abstract criteria set out in paragraph (c).[39] As an agreement on certain expressly listed limitations was out of reach, the catalogue of abstract criteria, provided for under (c), thus formed the groundwork for the final three-step test.

The final success of the open-ended UK proposal becomes understandable in view of the divergent views expressed by the Member States. While some delegations sought to further restrict the room for L&Es, others were of the opinion that more flexibility was needed. A comparison of the various observations made during the deliberations[40] elicits the specific quality of the abstract formula which finally became the first three-step test: due to its openness, the test has the capacity to encompass a wide range of L&Es and provide a

[34] Document S/1, *Records of the Intellectual Property Conference* (n 20) 111–12. The study group's survey of already existing limitations on the reproduction right, ibid 112, footnote 1, showed that the most frequent limitations related to public speeches; quotations; school books and chrestomathies; newspaper articles; reporting current events; ephemeral recordings; private use; reproduction by photocopying in libraries; reproduction in special characters for the use of the blind; sound recordings of literary works for the use of the blind; texts of songs; sculptures on permanent display in public places; artistic works used as a background in films and television programmes; reproduction in the interests of public safety. cf Senftleben, *Copyright, Limitations and the Three-Step Test* (n 1) 47–48.

[35] Document S/1, *Records of the Intellectual Property Conference* (n 20) 113.

[36] See the observation of Denmark, Document S/13, *Records of the Intellectual Property Conference* (n 20) 615.

[37] See the observations of Italy, *Records of the Intellectual Property Conference* (n 20) 623 and of France, ibid 615. cf in respect of the latter the comment made by Kerever, Minutes of Main Committee I, *Records of the Intellectual Property Conference* (n 20) 858.

[38] See Document S/81, *Records of the Intellectual Property Conference* (n 20) 691. cf Minutes of Main Committee I, *Records of the Intellectual Property Conference* (n 20) 857.

[39] See the observation of the United Kingdom, Document S/13, *Records of the Intellectual Property Conference* (n 20) 630.

[40] For such a comparison, see Senftleben, *Copyright, Limitations and the Three-Step Test* (n 1) 50–51.

basis for the reconciliation of contrary opinions.[41] The reaction to the final text proposal underlines that this solution was a compromise indeed. While India perceived the proposed wording as narrower than the initial draft and opposed its adoption, other countries contended that the three-step test was not restrictive enough.[42] The first three-step test, laid down in Art 9(2) BC, thus served as an open clause that left room for a broad spectrum of national approaches.

As a result, national lawmakers are free to adopt L&Es to satisfy social, cultural, and economic needs within the flexible conceptual contours of Art 9(2) BC. The three-step test has an enabling function in the sense that it serves as a direct basis for the introduction of L&Es at the national level. As indicated, private use privileges in Berne Union countries can only be justified internationally because of the three-step test in Art 9(2) BC. There is no other, more specific international provision that entitles national lawmakers to limit the right of reproduction for this purpose.

In the context of the TRIPS Agreement and the WIPO Copyright Treaty, the three-step test functions in the same, enabling sense in respect of those exclusive rights that have newly been granted in these treaties. Prior to the adoption of the WIPO Copyright Treaty, there was no clear international recognition of the right of making works available on the Internet in such a way that members of the public may have access from a place and at a time individually chosen by them. The adoption of a general right of communication to the public in Art 8 WCT filled this gap by adding this exclusive right to the pre-existing portfolio of internationally recognised rights of communication to the public.[43] With regard to this newly granted right of making available, the three-step test of Art 10(1) WCT fulfils the same function as Art 9(2) BC in the context of the right of reproduction: the test provides a basis for the introduction of L&Es at the national level.[44] Domestic lawmakers are free to limit the right of making available in certain respects because Art 10(1) WCT empowers them to do so. As in the case of Art 9(2) BC, there is no more specific provision in international law which could serve as an alternative basis.[45]

Art 13 TRIPS and Art 10 WCT, however, also concern the regulation of L&Es to the traditional exclusive rights recognised in the Berne Convention. In the context of these rights, the three-step tests of Art 13 TRIPS and Art 10(2) WCT serve a different function. They are vehicles to exercise additional control and scrutinise more thoroughly L&Es that have been adopted by national legislators.[46] Even though these national L&Es may fully comply with the conditions set forth in specific provisions of the Berne Convention, the open criteria of the three-step test must also be taken into account and fulfilled.[47] In Art 10(2) WCT, this

[41] See Minutes of Main Committee I, *Records of the Intellectual Property Conference* (n 20) 856–58, which show the fundamental differences. cf Geiger, *The Role of the Three-Step Test* (n 10) 3; Hugenholtz and Okediji, *Conceiving an International Instrument* (n 10) 18.

[42] cf Minutes of Main Committee I, *Records of the Intellectual Property Conference* (n 20) 883–85.

[43] cf Ricketson and Ginsburg, *International Copyright* (n 20) 746.

[44] cf Ricketson and Ginsburg, *International Copyright* (n 20) 868, who also draw a line between Art 9(2) BC (n 25) and Art 10(1) WIPO Copyright Treaty (opened for signature 20 December 1996, entered into force 6 March 2002) 2186 UNTS 121 (hereafter WCT).

[45] For a more detailed description of this enabling function of the three-step test, see Senftleben, *Copyright, Limitations and the Three-Step Test* (n 1) 118–21.

[46] cf Senftleben, *Copyright, Limitations and the Three-Step Test* (n 1) 121–24; Hugenholtz and Okediji, *Conceiving an International Instrument* (n 10) 20.

[47] For a detailed discussion of the relationship between specific Berne L&Es and the three-step tests of Art 13 TRIPS (n 2) and Art 10(2) WCT (n 44), see Ricketson and Ginsburg, *International Copyright* (n 20) 856–62 and 868–73.

constraining function of exercising additional control—even though specific conditions of Berne provisions are already met—clearly comes to the fore:

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

Hence, two different functions are assigned to the international three-step test. First, it serves as a direct, enabling basis for the adoption of L&Es within the realm of several exclusive rights, such as the general right of reproduction[48] and the right of making available to the public.[49] Second, it functions as an additional, constraining control mechanism vis-à-vis L&Es that are imposed on the rights granted in the Berne Convention. To illustrate this constraining function, the example of implementing the exemption of illustrations for teaching can be given: Art 10(2) BC permits the adoption of L&Es at the national level, 'to the extent justified by the purpose, of literary or artistic works by way of illustration in publications, broadcasts or sound or visual recordings for teaching, provided such utilization is compatible with fair practice'. This is a specific entitlement of Berne Union countries to create room for educational use that restricts exclusive rights granted in the Berne Convention, such as the right of reproduction. At the same time, Art 10(2) BC is the only provision in the Convention that deals with the issue of illustrations for teaching. To ensure compliance with the Berne Convention, it is thus sufficient for a Member State to comply with the conditions set forth in Art 10(2) BC.

If the Member State is also bound by the TRIPS Agreement and/or the WIPO Copyright Treaty, however, the three-step tests of Art 13 TRIPS and Art 10(2) WCT enter the picture. As these latter provisions require additional scrutiny in the light of the open criteria of the three-step test, it becomes necessary to ascertain—on top of the specific conditions following from Art 10(2) BC—whether the exemption of illustrations for teaching adopted at the national level constitutes a 'certain special case', avoids a conflict with a 'normal exploitation', and does not 'unreasonably prejudice' the 'legitimate interests' of authors or right-holders.[50] Hence, compliance with Art 10(2) BC is no longer sufficient. The use privilege adopted at the national level—in this case the rule regulating illustrations for teaching—may still be challenged on the ground that it does not meet the requirements following from Art 13 TRIPS and Art 10(2) WCT.

## 3. Focus on Constraining Function in EU Law

EU copyright law implements this constraining function of the three-step test. This follows clearly from the configuration of the system of L&Es in the InfoSoc Directive. Art 5(1) to (4) InfoSoc Directive sets forth various types of permissible, specific L&Es. Besides the

[48] Art 9(1) BC (n 25).
[49] Art 8 WCT (n 44).
[50] See the text of Art 13 TRIPS (n 2) on the one hand (reference to right-holders) and Art 10(2) WCT (n 44) on the other hand (reference to authors).

mandatory exemption of temporary acts of reproduction to be implemented by all Member States, the provision contains optional L&Es 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.

These listed L&Es, however, are subject to the three-step test laid down in Art 5(5) InfoSoc Directive. The interplay between the two elements—the closed catalogue of permissible L&Es and the flexible three-step test—is aligned with the constraining function of the three-step test:

> 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.[51]

If national legislation adopts and further specifies exceptions listed in the EU catalogue, these specific national L&Es may thus still be challenged on the ground that they are incompatible with the EU three-step test set forth in Art 5(5) InfoSoc Directive. In other words, national L&Es that are embedded in a national framework of precisely defined use privileges may further be restricted by invoking the open-ended three-step test. National copyright L&Es are thus straitjacketed. Their validity is hanging by the thread of compliance with the abstract criteria of the EU three-step test. Moreover, the test itself may only be invoked to place additional constraints on national L&Es that are defined narrowly anyway. Because of the described legislative design, the EU three-step test cannot be employed by the courts to create new, additional forms of permitted unauthorised use. It is impossible for judges in the EU to rely on the enabling function of the test and create new use privileges in the light of its abstract assessment criteria.[52]

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

> … the provisions of a directive which derogate from a general principle established by that directive must be interpreted strictly … This holds true for the exemption provided for in Article 5(1) of Directive 2001/29, which is a derogation from the general principle

[51] See Art 5(5) InfoSoc Directive (n 14).

[52] *ACI Adam* (n 18) para 26; cf Martin R F Senftleben, 'Fair Use in the Netherlands: A Renaissance?' [2009] Tijdschrift voor auteurs-, media-en informatierecht 1; Griffiths, 'The "Three-Step Test" ' (n 10) 489, 495; Geiger, 'The Three-Step Test (n 10) 683; K J Koelman, 'De nationale driestappentoets' [2003] Tijdschrift voor auteurs-, media en informatierecht 6.

> established by that directive, namely the requirement of authorisation from the rightholder for any reproduction of a protected work.[53]

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

> This is all the more so given that the exemption must be interpreted in the light of Article 5(5) of Directive 2001/29, under which that exemption is to be applied only in certain special cases which do not conflict with a normal exploitation of the work or other subject-matter and do not unreasonably prejudice the legitimate interests of the rightholder.[54]

In line with the described legislative focus on the constraining function of the three-step test, the ECJ thus saw Art 5(5) InfoSoc Directive as an element of EU copyright law which, in principle, requires a restrictive application of L&Es. Later decisions reflect this fundamental decision to interpret L&Es strictly. In *ACI Adam*, the ECJ applied the three-step test to the exemption of digital private copying in Art 5(2)(b) InfoSoc Directive.[55] In this case, prejudicial questions had arisen from the Dutch regulation of private copying which, at the time, concerned the whole spectrum of literary and artistic works, was applicable to private users in general, and covered all kinds of sources, including unlawful sources, such as content offered on the file-sharing platform The Pirate Bay.[56] Despite this broad scope, the Court did not arrive at the conclusion that the Dutch copyright limitation for private copying failed to meet the test of 'certain special case'.[57] However, it found that a private use privilege that permitted the making of personal copies from an unlawful source:

> would encourage the circulation of counterfeited or pirated works, thus inevitably reducing the volume of sales or of other lawful transactions relating to the protected works, with the result that a normal exploitation of those works would be adversely affected.[58]

Similarly, the ECJ held in *Stichting Brein (Filmspeler)* that a conflict with a normal exploitation arose from temporary acts of reproducing protected works on a multimedia player with add-ons that provided links to illegal streaming websites because 'that practice would usually result in a diminution of lawful transactions relating to the protected works'.[59] The Court thus focused on whether the exemption of temporary acts of copying in Art 5(1) InfoSoc Directive was likely to kill demand for literary and artistic works by acting as a substitute.

[53] *Infopaq* [2009] ECLI:EU:C:2009:465, paras 56–57 (hereafter *Infopaq)*.
[54] ibid para 58.
[55] *ACI Adam* (n 18) paras 38–41.
[56] For a detailed analysis of the evolution of a broad private copying privilege in Dutch copyright law, see Dirk J G Visser, 'Private Copying' in P Bernt Hugenholtz, Anton A Quaedvlieg, and Dirk J G Visser (eds), *A Century of Dutch Copyright Law—Auteurswet 1912–2012* (deLex 2012) 413–41.
[57] Instead, the ECJ, in *ACI Adam* (n 18) paras 39–40, concluded that private copying on the basis of illegal sources would adversely affect a work's normal exploitation and unreasonably prejudice copyright holders. These considerations concern steps 2 ('no conflict with a normal exploitation') and 3 ('no unreasonable prejudice to legitimate interests') of the three-step test. If the Court had been of the opinion that a broad private copying privilege failed step 1 ('certain special case'), it would not have reached these subsequent steps 2 and 3.
[58] *ACI Adam* (n 18) para 39.
[59] *Stichting Brein (Filmspeler)* [2017] ECLI:EU:C:2017:300, para 70.

Admittedly, the finding of copyright infringement in *ACI Adam* and *Filmspeler* does not come as a surprise. Downloading from illegal online sources and the use of multimedia players for the streaming of illegal content are not use activities that easily find favour with judges. In the absence of the three-step test laid down in Art 5(5) InfoSoc Directive, the ECJ may have drawn the same conclusions on the basis of a strict interpretation of the statutory private copying rule in Art 5(2)(b) InfoSoc Directive and the temporary reproduction rule following from Art 5(1) InfoSoc Directive. Arguably, the three-step test only offered additional ammunition for the verdict of infringement that would have been issued anyway. Against this background, the question arises whether ECJ jurisprudence really confirms the hypothesis that the three-step test in EU copyright law has a constraining effect on L&Es—not only at an abstract level (because the three-step test, as the ECJ stated in *ACI Adam*,[60] cannot be invoked to broaden L&Es) but also in practice (because the three-step test diminishes the breathing space for unauthorised use in concrete cases).

With regard to this question, additional nuances become necessary when case-law is taken into account that, instead of prohibiting unauthorised use altogether, preserves user freedoms on the condition that equitable remuneration be paid. In a 1999 case concerning the Technical Information Library Hanover, the German Federal Court of Justice, for example, permitted the library's practice of copying and dispatching scientific articles on request by single persons and industrial undertakings.[61] The legal basis of this practice was the copyright limitation for personal use in s 53 of the German Copyright Act (as in force at that time). Under this provision, the authorised user needed not produce the copy herself but was 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.[62] Nonetheless, it refrained from putting an end to the library practice by assuming a conflict with the normal exploitation of affected scientific works. Instead, the German Federal Court of Justice deduced an obligation to pay equitable remuneration from the three-step test in international copyright law (Art 5(5) InfoSoc Directive had not been adopted yet) and permitted the continuation of the information service on the condition that equitable remuneration be paid.[63]

Under harmonised EU copyright law, the ECJ adopted a similar approach. In *Technische Universität Darmstadt*, the Court recognised an 'ancillary right'[64] of libraries to digitise books in their holdings for the purpose of making these digital copies available via dedicated reading terminals on the library premises. To counterbalance the creation of this broad use privilege, the Court deemed it necessary—in the light of the three-step test in Art 5(5) InfoSoc Directive—to insist on the payment of equitable remuneration. Discussing compliance of German legislation with this requirement, the Court was satisfied that the conditions of the three-step test were satisfied because German libraries had to pay adequate remuneration for the act of making works available on dedicated terminals after digitisation.[65]

[60] *ACI Adam* (n 18) para 26.
[61] German Federal Court of Justice, 25 February 1999, case I ZR 118/96, 'TIB Hannover', *Juristenzeitung* 1999, 1000.
[62] ibid 1004.
[63] ibid 1005–07.
[64] *Technische Universität Darmstadt* [2014] ECLI:EU:C:2014:2196, para 48.
[65] ibid para 48.

Hence, the application of the three-step test need not automatically culminate in the erosion of use privileges in a copyright system that focuses on the constraining function of the test. Instead of categorically condemning a copyright limitation with a relatively broad scope, courts in the EU may establish an obligation to pay equitable remuneration. The courts derive this payment obligation from the three-step test. This court practice finds support in the drafting history underlying the adoption of the first international three-step test. When Art 9(2) BC was adopted at the 1967 Stockholm Conference for the Revision of the Berne Convention, the report on the work of Main Committee I (the Committee dealing with the three-step test) provided the following example of the functioning of the test:

> A practical example might be photocopying for various purposes. If it consists of producing a very large number of copies, it may not be permitted, as it conflicts with a normal exploitation of the work. If it implies a rather large number of copies for use in industrial undertakings, it may not unreasonably prejudice the legitimate interests of the author, provided that, according to national legislation, an equitable remuneration is paid. If a small number of copies is made, photocopying may be permitted without payment, particularly for individual or scientific use.[66]

Hence, the payment of equitable remuneration was regarded as a factor capable of tipping the scales in favour of a finding of compliance with the three-step test: it reduces the unreasonable prejudice arising from the exemption of 'a rather large number of copies for use in industrial undertakings' to a permissible reasonable level. With this additional balancing tool, the relatively broad scope and deep impact of use privileges, such as information services of libraries, no longer pose insurmountable hurdles. Providing for the payment of equitable remuneration, the judge can reduce the prejudice flowing from the use privilege to an acceptable level. Considering this option, it would be inaccurate to state that the scrutiny of L&Es in the light of the three-step test routinely puts an end to use privileges. The spectrum of possible outcomes is not only black (prohibition) and white (permission), but also shades of grey (permission depending on payment of remuneration).

Finally, the application of the three-step test in EU copyright law has led to court decisions confirming the permissibility of L&Es. In *Football Association Premier League*, the fundamental decision to adhere to the dogma of a strict interpretation in the light of the three-step test did not hinder the ECJ from emphasising—with regard to the exemption of temporary copying that had also been at issue in *Infopaq* (Art 5(1) InfoSoc Directive)—the need to guarantee the proper functioning of the limitation and ensure an interpretation that takes due account of its objective and purpose. The Court explained that, despite the required strict interpretation, the effectiveness of the limitation had to be safeguarded.[67] On the basis of these considerations, the Court concluded that the acts of transient copying in *Football Association Premier League*, performed within the memory of a satellite decoder and on a television screen, was compatible with the three-step test of Art 5(5) InfoSoc Directive.[68]

[66] See Report on the Work of Main Committee I, *Records of the Intellectual Property Conference* (n 20) 1145–46.
[67] *Football Association Premier League & QC Leisure* [2011] ECLI:EU:C:2011:631, paras 162–163.
[68] ibid para 181.

In *Infopaq II*, the ECJ even concluded that in the case of acts of temporary reproduction fulfilling all the conditions of Art 5(1) InfoSoc Directive, as interpreted by the Court, 'it must be held that they do not conflict with the normal exploitation of the work or unreasonably prejudice the legitimate interests of the rightholder'.[69] The Court, thus, deduced compliance with the three-step test of Art 5(5) InfoSoc Directive from compliance with the individual conditions of a specific statutory copyright limitation, namely the exemption of transient acts of reproduction in Art 5(1) InfoSoc Directive. Evidently, this circular line of reasoning de facto neutralises the constraining effect of the three-step test. If compliance with the individual requirements of a statutory copyright limitation automatically implies compatibility with the three-step test, the test no longer poses additional obstacles that could be distinguished from the requirements that follow from the invoked use privilege anyhow.

Is it thus wrong to assume that the three-step test, as configurated in EU copyright law, has a constraining effect on statutory copyright limitations that have already been defined precisely in the law? Does ECJ jurisprudence make it possible to sound the all-clear and declare the three-step test unproblematic? Can the green light for the EU approach be given even though EU legislation deprived the test of its enabling function to serve as a basis for new use privileges that may become necessary to satisfy social, cultural, and economic needs?

Despite the described nuances in ECJ case-law, the answer to these questions can hardly be in the affirmative. Admittedly, ECJ decisions demonstrate that several copyright limitations pass the three-step test. Where this is doubtful because of the breadth of the use privilege, the payment of equitable remuneration may tip the scales in favour of permissibility. Nonetheless, the fundamental flaw of the EU copyright system remains: the three-step test in Art 5(5) InfoSoc Directive creates a bias against L&Es. It only allows judges to further restrict use privileges that have already been delineated narrowly in statutory law. Embracing the dogma of strict interpretation in *Infopaq*,[70] the Court explicitly confirmed this bias. As the defendant must prove all facts that support the invocation of a copyright limitation, the application of the three-step test in the context of a strict interpretation obliges an unauthorised user to establish not only compliance with the specific requirements of the invoked copyright limitation but also with the abstract criteria of the three-step test. In practice, this bias against privileged, socially valuable use substantially enhances the legal uncertainty surrounding L&Es. A user seeking to benefit from a copyright limitation can no longer rely on the specific conditions set forth in statutory law. Even if the envisaged use is fully in line with the requirements of a statutory copyright limitation, the use may still be found to amount to infringement in the light of the elastic criteria of the three-step test. The described decision in *Infopaq II* is an exception to this rule. However, it is the only decision where the ECJ readily deduced compliance with the three-step test from compliance with specific statutory requirements of a copyright limitation.

In the more recent decision in *Pelham*—a case that concerned the unauthorised taking of a rhythmic sequence of two seconds and the use of this sound sample in a continuous loop

[69] *Infopaq II* [2012] ECLI:EU:C:2012:16, para 56.
[70] *Infopaq* (n 53) paras 56–57.

in a new musical composition[71]—this bias against copyright limitations and underlying social, cultural, and economic interests even obtained a constitutional dimension. Discussing the need to reconcile phonogram producer rights with the freedom of artistic expression of sampling artists, the ECJ stated that the requisite fair balance between the IP rights at issue, and the competing fundamental rights, in particular freedom of artistic expression, had to be found within the system of exclusive rights and limitations of the InfoSoc Directive.[72] Hence, the ECJ insisted on an internal balancing of interests—within the regulatory framework of copyright law.[73] Apparently, the Court was confident that EU copyright legislation offered sufficient room for freedom of the arts and other fundamental rights of users, such as freedom of expression, freedom of information, and freedom of science.[74] In the Court's opinion, even the three-step test in Art 5(5) InfoSoc Directive constituted a tool to maintain an appropriate balance:

> Article 5(5) of Directive 2001/29 also contributes to the fair balance [between, on the one hand, the interest of the holders of copyright and related rights in the protection of their intellectual property rights now guaranteed by Article 17(2) of the Charter and, on the other hand, the protection of the interests and fundamental rights of users of protected subject matter as well as of the public interest], in that it requires that the exceptions and limitations provided for in Article 5(1) to (4) of the directive be applied only in certain special cases which do not conflict with a normal exploitation of the work or other subject matter and do not unreasonably prejudice the legitimate interests of the rightholder.[75]

Considering this demonstration of limitless confidence in the appropriateness of the EU copyright *acquis*, it is not surprising that the ECJ was reluctant to enrich the harmonised copyright system with external correction mechanisms that are available in EU law, such as the option to allow the invocation of fundamental rights in the EU Charter of Fundamental Rights as direct safeguards against excessive copyright protection.[76] In *Pelham*, the Court

[71] *Pelham* [2019] ECLI:EU:C:2019:624, paras 14–16 (hereafter *Pelham*). cf Rupprecht Podszun, 'Postmoderne Kreativität im Konflikt mit dem Urheberrechtsgesetz und die Annäherung an "fair use"' [2016] Zeitschrift für Urheber- und Medienrecht 606, 606.

[72] *Pelham* (n 71) para 60.

[73] As to the question of internal or external balancing of copyright against competing societal values, see Stefan Kulk and Peter Teunissen, 'Naar een nieuw fundament—hoe het Handvest het auteursrecht hervormt (deel 1)' [2019] Tijdschrift voor auteurs-, media-en informatierecht 121, 126–29 (hereafter Kulk and Teunissen, 'Naar een nieuw'); Christophe Geiger and Elena Izyumenko, 'Copyright on the Human Rights' Trial: Redefining the Boundaries of Exclusivity Through Freedom of Expression' (2014) 45 International Review of Intellectual Property and Competition Law 316 (hereafter Geiger and Izyumenko, 'Copyright on the Human Rights'); Thomas Dreier, 'Balancing Proprietary and Public Domain Interests: Inside or Outside of Proprietary Rights?' in Rochelle C Dreyfuss, Diane Leenheer-Zimmerman, and Harry First (eds), *Expanding the Boundaries of Intellectual Property. Innovation Policy for the Knowledge Economy* (Oxford University Press 2001) 295.

[74] For examples of previous decision where these competing fundamental rights had to be reconciled with copyright protection, see District Court of Amsterdam, 23 December 2015, case ECLI:NL:RBAMS:2015:9312, Anne Frank-Fonds/Anne Frank Stichting and KNAW, *Intellectuele eigendom en reclamerecht* 2017, no 5, regarding the freedom of science. See also *Ashby Donald/Frankrijk*, App no 36769/08, 10 January 2013 (hereafter *Ashby Donald/Frankrijk*) para 38, and Geiger and Izyumenko, 'Copyright on the Human Rights' (n 73) 316, regarding the need to offer room for freedom of expression and freedom of information

[75] *Pelham* (n 71) para 62.

[76] cf Kulk and Teunissen, 'Naar een nieuw' (n 73) 130–32; Thom E Snijders and Stijn Van Deursen, 'The Road Not Taken—the CJEU Sheds Light on the Role of Fundamental Rights in the European Copyright Framework—a Case Note on the Pelham, Spiegel Online and Funke Medien Decisions' (2019) 50 International Review of Intellectual Property and Competition Law 1176, 1186–87; Christophe Geiger and Elena Izyumenko 'Freedom of Expression as an External Limitation to Copyright Law in the EU: The Advocate General of the CJEU Shows the Way' (2019) 41 European Intellectual Property Review 131; Jonathan Griffiths, 'European Union Copyright Law

rejected this option on the ground that balancing tools outside the copyright *acquis* may endanger the harmonisation goals of the Information Society Directive and have a disruptive effect on the internal market.[77] As a result, a traditional German copyright limitation that offered room for transformative forms of use—the so-called German doctrine of 'free use'[78]—could not survive. As the closed list of permissible L&Es in Art 5(1) to (4) InfoSoc Directive did not contain a limitation prototype covering the German free use rule, the ECJ held the view that EU Member States were not permitted to provide for this copyright limitation.[79]

Besides the erosion of this inherent[80] limitation of copyright that has evolved not only in Germany but also in other EU Member States,[81] the *Pelham* decision is remarkable because of the cited statement that the three-step test of Art 5(5) InfoSoc Directive contributes to safeguarding a fair balance between copyright and neighbouring rights, and the fundamental rights of users.[82] As the ECJ, at the same time, insists on internal balancing—within the legal framework of EU copyright law—this statement indicates that the balancing exercise must take place within the constraints of the three-step test. In other words, the maximum space that is available for safeguarding competing user freedoms is the breathing space offered by the three-step test of Art 5(5) InfoSoc Directive. Considering the described focus of EU copyright law on the constraining function of the three-step test, the dilemma arising from this decision clearly comes to the fore.

Once again: in international copyright law, the three-step test is a flexible instrument that allows the development of new copyright limitations if this is necessary to accommodate social, cultural, or economic needs. With regard to the three-step tests of Art 10 WCT, the Diplomatic Conference leading to the adoption of the WIPO 'Internet' Treaties[83] formally

and the Charter of Fundamental Rights—Advocate General Szpunar's Opinions in (C-469/17) *Funke Medien*, (C-476/17) *Pelham GmbH* and (C-516/17) *Spiegel Online*' [2019] ERA Forum 35, 46–49. This approach would also comply with the ECHR's case-law. See *Ashby Donald/Frankrijk* (n 74) para 38.

[77] *Pelham* (n 71) para 63.

[78] See s 24 (1) of the German Copyright Act (Copyright Act of 9 September 1965 (Federal Law Gazette I, p 1273), as last amended by Art 1 of the Act of 28 November 2018 (Federal Law Gazette I, p 2014): 'An independent work created in the free use of the work of another person may be published and exploited without the consent of the author of the work used'. cf Thomas Dreier and Gernot Schulze, *Urheberrechtsgesetz* (6th edn, C. H. Beck 2018) 454–57; Lionel Bently and others, 'Sound Sampling, a Permitted Use under EU Copyright Law? Opinion of the European Copyright Society in Relation to the Pending Reference Before the CJEU in Case C-476/17, Pelham GmbH v. Hütter' (2019) 50 International Review of Intellectual Property and Competition Law 467, 486–87 (hereafter Bently and others, 'Sound Sampling'); P Bernt Hugenholtz and Martin R F Senftleben, *Fair Use in Europe. In Search of Flexibilities* (IViR/VU Centre for Law and Governance 2011) 26–27; Paul E Geller, 'A German Approach to Fair Use: Test Cases for TRIPs Criteria for Copyright Limitations?' (2010) 57 Journal of the Copyright Society of the U.S.A. 901.

[79] *Pelham* (n 71) para 65.

[80] See *Pelham* (n 71) para 56, for the explanation given by the German Federal Court of Justice in the context of posing its prejudicial questions. For German decisions discussing this inherent limitation of copyright, see German Federal Court of Justice (Bundesgerichtshof), 16 April 2015, case I ZR 225/12, 'Goldrapper', *Gewerblicher Rechtsschutz und Urheberrecht* 2015, 1189 (1198); German Federal Court of Justice, 1 December 2010, case I ZR 12/08, 'Perlentaucher', *Gewerblicher Rechtsschutz und Urheberrecht* 2011, 134 (137–38); German Federal Court of Justice, 20 March 2003, case I ZR 117/00, 'Gies-Adler', *Gewerblicher Rechtsschutz und Urheberrecht* 2003, 956 (958).

[81] See Supreme Court of Austria (Oberster Gerichtshof), 13 July 2010, case 4 Ob 66/10z, 'Lieblingshauptfrau'; Supreme Court of Sweden (Högsta Domstolen), 21 February 2017, case T 1963-15, 'Swedish Scapegoats', *Gewerblicher Rechtsschutz und Urheberrecht—Internationaler Teil* 2019, 93, paras 12, 17–19; Supreme Court of Italy (Corte di Cassazione), 6 June 2018, case 14635/2018, Big Red/Gabibbo, *Gewerblicher Rechtsschutz und Urheberrecht—Internationaler Teil* 2019, 413 (415). cf Bently and others, 'Sound Sampling' (n 78) 486.

[82] *Pelham* (n 71) para 62.

[83] WCT (n 44) and the WIPO Performances and Phonograms Treaty (opened for signature 20 December 1996, entered into force 20 May 2002) 2186 UNTS 203 (hereafter WPP). cf Mihály Ficsor, 'The Spring 1997 Horace

adopted an Agreed Statement that confirms this enabling function of the three-step test. The Agreed Statement makes it clear that the test is not intended to pose obstacles to the evolution of new copyright limitations:

> It is understood that the provisions of Article 10 permit Contracting Parties to carry forward and appropriately extend into the digital environment limitations and exceptions in their national laws which have been considered acceptable under the Berne Convention. Similarly, these provisions should be understood to permit Contracting Parties to devise new exceptions and limitations that are appropriate in the digital network environment.
>
> It is also understood that Article 10(2) neither reduces nor extends the scope of applicability of the limitations and exceptions permitted by the Berne Convention.[84]

As explained, however, the crippled EU offspring of the international three-step test does not provide breathing space for the evolution of new use privileges and the further development of existing limitations.[85] In the balancing exercise which the ECJ has in mind, the only contribution of the three-step test is a further restriction of L&Es and a fortification of the exclusive rights of copyright holders. The decision leaves little doubt about a bias against social, cultural, and economic concerns that lie at the core of copyright limitations. Recalling its earlier ruling in *ACI Adam*,[86] the ECJ even emphasised in *Pelham* that 'no provision of Directive 2001/29 envisages the possibility for the scope of such exceptions or limitations to be extended by the Member States'.[87]

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

The corrosive effect of this inconsistent reversion of the norm hierarchy can easily be illustrated by revisiting previous decisions that shed light on potential collisions between copyright norms and competing fundamental freedoms. The *Scientology/Spaink* lawsuit in the Netherlands can serve as an example. In line with Art 5(3)(d) InfoSoc Directive, the right of quotation in Art 15a of the Dutch Copyright Act only permits the unauthorised use of sources that have already been lawfully made available to the public.[88] Nonetheless, the

S. Manges Lecture—Copyright for the Digital Era: The WIPO "Internet" Treaties' (1997) 21 Columbia-VLA Journal of Law & the Arts 197.

[84] Agreed Statement Concerning Art 10 WCT (n 44). cf Senftleben, 'The International Three-Step Test' (n 28).
[85] *Pelham* (n 71) para 64.
[86] *ACI Adam* (n 18) para 27.
[87] *Pelham* (n 71) para 64.
[88] For a more detailed discussion of the conceptual contours of the Dutch regulation of quotations, see Martin R F Senftleben, 'Quotations, Parody and Fair Use' in P Bernt Hugenholtz, Anton A Quaedvlieg, and Dirk J G Visser (eds), *A Century of Dutch Copyright Law—Auteurswet 1912–2012* (deLex 2012) 359 (hereafter Senftleben,

Court of Appeals of The Hague ruled in favour of the journalist Karin Spaink who had been sued for copyright infringement by Scientology. On an XS4All webpage, Karin Spaink had posted parts of the so-called 'Fishman Affidavit'—a semi-secret written declaration that had been submitted in other court proceedings initiated by Scientology against Steven Fishman. Karin Spaink used quotations from confidential parts of the Fishman Affidavit reflecting the teachings and organisation of Scientology to undergird her critique of Scientology.[89] As the document had never been published lawfully, the statutory right of quotation was unavailable as a defence.[90] However, Karin Spaink successfully argued for direct application of the fundamental guarantee of freedom of expression and information in Art 10 of the European Convention on Human Rights. The Court of Appeals of The Hague agreed that the quotations contributed to a legitimate form of criticising Scientology's questionable ideas and behaviour. In the opinion of the Court, Karin Spaink's use of the documents did not amount to copyright infringement against this background.[91]

In the light of *Pelham*, however, the *Scientology/Spaink* decision of the Court of Appeals of The Hague finally proves to be incompatible with EU copyright law.[92] Invoking the freedom of the press, the Court of Appeals neglected the requirement of an earlier lawful act of making available to the public that can be found in the statutory definition of the right of quotation.[93] Hence, the Court failed to keep within the harmonised legal framework for unauthorised quotations laid down in Art 5(3)(d) InfoSoc Directive. In line with the *Pelham* decision, however, the three-step test in Art 5(5) InfoSoc Directive cannot be invoked to broaden the scope of the statutory right of quotation in the light of the fundamental freedom of the press.[94] The three-step test is not available as a corrective measure to avoid excessive copyright protection and extend the scope of the use privilege to takings from unpublished sources where this is necessary to allow the press to do its work in a democratic society. The *Pelham* decision stifles the breathing space which national courts, such as the Court of Appeals of The Hague, derived in the past directly from the constitutional guarantee of freedom of expression and freedom of the press.

It cannot be ruled out that the ECJ—confronted with a *Scientology/Spaink* scenario—will finally realise that the invocation of fundamental rights as external correction tools is sometimes indispensable to strike a proper balance between copyright and competing values. As long as the ECJ upholds the mantra of complete and closed regulation of copyright and limitations in a *Scientology/Spaink* scenario, however, inroads into freedom of expression and freedom of the press seem inescapable. Takings from unpublished sources will inevitably fall outside the scope of Art 5(3)(d) InfoSoc Directive—regardless of their importance to the debate and the need to inform the public. In *Funke Medien NRW*, the ECJ already came within a hair's breadth of this dilemma. The case concerned the 'Afghanistan papers': military status reports on the deployment of German armed forces.[95] Given the confidentiality

'Quotations, Parody and Fair Use'). The requirement of lawful prior publication can also be found at the international level. See Art 10(1) BC (n 25) .

[89] Court of Appeals of The Hague, 4 September 2003, *Scientology/Spaink*, Tijdschrift voor auteurs-, media- en informatierecht 2003, 217, para 2 (hereafter *Scientology/Spaink*).
[90] ibid para 7.11.
[91] ibid paras 8.2 and 13. cf Senftleben, 'Quotations, Parody and Fair Use' (n 88) 372–73.
[92] Kulk and Teunissen, 'Naar een nieuw' (n 73) 153.
[93] *Scientology/Spaink* (n 89) paras 8.2 and 13.
[94] *Pelham* (n 71) para 64.
[95] *Funke Medien NRW* [2019] ECLI:EU:C:2019:623, para 9 (hereafter *Funke Medien NRW*).

of these documents, German courts had denied the right of quotation because the requirement of prior lawful making available was not fulfilled.[96] Not surprisingly, the prejudicial questions raised the issue of an extensive interpretation of the right of quotation in the light of freedom of expression and freedom of the press. The ECJ managed to bypass this delicate issue by following an alternative path and adopting a flexible interpretation of the concept of 'reporting of current events' which is central to one of the press privileges laid down in Art 5(3)(c) InfoSoc Directive. As Funke Medien had presented the Afghanistan papers on its website 'in a structured form in conjunction with an introductory note, further links and a space for comments',[97] the Court was satisfied that the online publication could be qualified as a privileged form of 'use of works … in connection with … reporting'.[98]

In this way, the Court paved the way for the application of Art 5(3)(c) InfoSoc Directive and concealed the dilemma arising from the lawful making available requirement in Art 5(3)(d) InfoSoc Directive.[99] Moreover, this strategy allowed the Court to maintain the rule that copyright had to be reconciled with freedom of expression and freedom of the press within the system of rights and limitations in EU copyright law.[100] For the time being, both the mantra of strict interpretation in the light of the three-step test[101] and the mantra of internal balancing within the system of rights and limitations in the copyright *acquis*[102] are thus intact. EU law relies on the three-step test as an instrument to determine the maximum space that is available for competing fundamental rights in copyright law. The flexible balancing tool known from international copyright law has become a quasi-constitutional straitjacket that delimits the room for L&Es in the EU.

In cases requiring the reconciliation of copyright protection with competing fundamental rights of users, the ECJ may have to soften the corrosive effect of the constraining function of the three-step test by interspersing the analysis with assessment criteria that comply with the traditional criteria known from the freedom of expression analysis,[103] and applying the option to provide for the payment of equitable remuneration.[104] Admittedly, starting points for this approach can already be found in *Pelham*. The ECJ recognised that freedom of the arts belonged to the circle of fundamental rights that impacted the scope of copyright and neighbouring rights.[105] The ECJ also underlined the importance of safeguarding an appropriate balance between copyright protection on the one hand, and freedom of artistic expression and other fundamental rights of users on the other.[106] Nonetheless, the problematic legislative design remains: the constraining function of the

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

[97] *Funke Medien NRW* (n 95) para 75.

[98] ibid para 75.

[99] ibid para 75.

[100] ibid para 58.

[101] *Infopaq* (n 53) paras 56–57.

[102] *Pelham* (n 71) para 60.

[103] cf Christophe Geiger and Elena Izyumenko, 'The Constitutionalization of Intellectual Property Law in the EU and the Funke Medien, Pelham and Spiegel Online Decisions of the CJEU: Progress, but Still Some Way to Go!' (2020) 51(3) International Review of Intellectual Property and Competition Law 282 (hereafter Geiger and Izyumenko, 'The Constitutionalization of Intellectual Property Law') (Section 3.1).

[104] See the above-discussed example given in Report on the Work of Main Committee I, *Records of the Intellectual Property Conference* (n 20) 1145–46.

[105] *Pelham* (n 71) paras 32–35.

[106] *Pelham* (n 71) paras 32, 37, and 59. As to the recognition of 'user rights' flowing from the recognition of exceptions and limitations in copyright law, see Geiger and Izyumenko, 'The Constitutionalization of Intellectual Property Law' (n 103) (Section 3.1).

three-step test in Art 5(5) InfoSoc Directive reigns supreme over L&Es. It has the potential to make inroads into areas of freedom that are necessary to safeguard social, cultural, and economic needs.

## 4. Repercussions at the International Level

The restrictive EU approach focusing on the constraining function of the three-step test—even in cases where L&Es are already defined precisely and even if competing fundamental freedoms are involved—already impacted the further development of international copyright law. In the context of the deliberations concerning the Marrakesh Treaty to Facilitate Access to Published Works for Persons who are Blind, Visually Impaired, or Otherwise Print Disabled (MT)[107] in 2013, the EU successfully insisted on the application of its restrictive approach to specific model provisions that have been included in the Treaty. In terms of substance, the Marrakesh Treaty provides for important new mechanisms to alleviate the serious problem of the 'book famine'.[108] It seeks to broaden the access of persons with print disabilities to knowledge and culture. The underlying fundamental rights dimension is obvious: the Marrakesh Treaty seeks to strike a balance between copyright protection on the one hand, and freedom of expression and information of disabled persons on the other.

Art 4(1)(a) MT sets forth the central obligation to limit the right of reproduction, the right of distribution, and the right of making available to facilitate the availability of works in accessible format copies for blind and print-disabled persons. This obligation includes room for changes necessary to make the work accessible in the alternative format. Interestingly, Art 4(2) MT contains an exemplary provision for the implementation of the new copyright limitation at the national level. With this model provision, the Marrakesh Treaty strives for maximum clarity about the new international obligation and possible ways of implementation. The importance of a high degree of legal certainty must not be underestimated in the context of initiatives seeking to establish ceilings of protection. As Annette Kur explains,

> … ceiling treaties bolster the position of their members vis-à-vis potential challenges already by fleshing out and concretizing the existing framework of IP provisions. In view of the difficulties TRIPS members face when appreciating the space available for legislative measures limiting the availability and scope of IP protection, the importance of such

[107] Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired, or Otherwise Print Disabled (opened for signature 27 June 2013, entered into force 30 September 2016) UNTC Reg No 54134 (hereafter Marrakesh Treaty or MT).

[108] cf Paul Harpur and Nicolas Suzor, 'Copyright Protections and Disability Rights: Turning the Page to a New International Paradigm' (2013) 36 UNSW Law Journal 745; Aaron Scheinwald, 'Who Could Possibly Be Against a Treaty for the Blind' (2012) 22 Fordham Intellectual Property, Media and Entertainment Law Journal 487. For an in-depth analysis of the Marrakesh Treaty, see Laurence R Helfer and others, *The World Blind Union Guide to the Marrakesh Treaty Facilitating Access to Books for Print-Disabled Individuals* (Oxford University Press 2017) (hereafter Helfer and others, *The World Blind Union Guide*); Mihály J Ficsor, 'Commentary to the Marrakesh Treaty on Accessible Format Copies for the Visually Impaired' (Copyright see-saw) <http://www.copyrightseesaw.net/en/papers> accessed 27 December 2020; Jonathan Band and Peter Jaszi, 'Model Statute for Implementation of the Marrakesh Treaty to Facilitate Access to Published Works for Persons who are Blind, Visually Impaired, or Otherwise Print Disabled' (*InfoJustice*, 26 September 2013) <http://infojustice.org/archives/30778> accessed 27 December 2020. As to the preparatory work underlying the Treaty, see, in particular, Judith Sullivan, 'Study on Copyright Limitations and Exceptions for the Visually Impaired' (WIPO Document SCCR/15/7, 20 February 2007) <www.wipo.int/meetings/en/details.jsp?meeting_id=11264> accessed 27 December 2020.

> efforts should not be underestimated . . . From that perspective, international rules drawing a clearer picture of what can (or must) be accepted as an exception in international IP law already for that reason are useful and welcome.[109]

Against this background, it is not surprising that Art 4 MT contains not only the general obligation to adopt a certain type of copyright limitation but also a concrete example of an appropriate mode of implementation at the national level. The model provision laid down in Art 4(2) MT makes it possible for Contracting Parties to successfully defend their limitation infrastructure during negotiations of free-trade agreements in which they may be urged to abandon or further restrict L&Es.[110] As there is international consensus supporting a specific way of implementing the mandatory copyright limitation following from the Marrakesh Treaty, national L&Es that are aligned with the model provision in Art 4(2) MT can survive in such a situation. Arguments against such national L&Es can be rebutted in the light of the underlying international consensus. In the words of Annette Kur, model provisions, as Art 4(2) MT, constitute 'a stronghold bolstering resistance against external pressure' which may be exerted on countries with a relatively weak bargaining position.[111]

Art 5(1) MT complements the new copyright limitation infrastructure with the further obligation to allow the cross-border exchange of special format copies. If an accessible format copy is made under the new limitation in one Contracting Party, that copy may also be distributed and made available to beneficiaries in another Contracting Party.[112] Again, the Treaty seeks to ensure maximum legal certainty as to domestic implementation options by setting forth an exemplary provision in Art 5(2) MT that can serve as a model for national lawmakers.[113] It remains to be seen how difficult it is to reconcile different national concepts of 'beneficiary person',[114] 'accessible format copy',[115] and 'authorized entity'[116] when it comes to the cross-border exchange of works in special format.[117] Nonetheless, the prospect of producing accessible format copies under the new copyright limitation and sharing them across borders is promising and constitutes an important step in the right direction.

However, the 'Miracle of Marrakesh' came at a price. Art 11 MT makes it clear that copyright L&Es resulting from the implementation of the Treaty must be confined to certain special cases which do not conflict with a normal exploitation of the work and do not

[109] Annette Kur, 'From Minimum Standards to Maximum Rules' in Hanns Ullrich and others (eds), *TRIPS plus 20—From Trade Rules to Market Principles* (Springer 2016) 133, 147 (hereafter Kur, 'From Minimum Standards to Maximum Rules').

[110] Cf. Henning Grosse Ruse-Khan, 'IP and Trade in a Post-TRIPS Environment' in Hanns Ullrich and others (eds), *TRIPS plus 20—From Trade Rules to Market Principles* (Springer 2016) 163.

[111] Kur, 'From Minimum Standards to Maximum Rules' (n 109) 146. However, Kur, ibid 147, also points out that the dynamics of trade negotiations and the preferences of trade negotiators are unforeseeable. It cannot be ruled out that a country will finally renounce to a ceiling treaty in order to conclude an attractive free trade agreement.

[112] See also Art 6 MT (n 107) in this context which permits the importation of accessible format copies.

[113] For a discussion of the practical effect of this 'safe harbour option', see Helfer and others, *The World Blind Union Guide* (n 108) 43–46. As to the need for sufficient legal certainty in the field of copyright L&Es, see Kur, 'From Minimum Standards to Maximum Rules' (n 109) 146–47; Annette Kur and Henning Grosse Ruse-Khan, 'Enough is Enough—The Notion of Binding Ceilings in International Intellectual Property Protection' in Annette Kur and Marianne Levin (eds), *Intellectual Property Rights in a Fair World Trade System* (Edward Elgar 2011) 367.

[114] Art 3 MT (n 107).

[115] Art 2(b) MT (n 107).

[116] Art 2(c) MT (n 107).

[117] As to this problem, see Marketa Trimble, 'The Marrakesh Puzzle' (2014) 45 International Review of Intellectual Property and Competition Law 768. cf also Kur, 'From Minimum Standards to Maximum Rules' (n 109) 154–56.

unreasonably prejudice the legitimate interests of the author or right-holder.[118] The new copyright limitations in favour of blind and print-disabled persons are thus subject to thorough scrutiny in the light of the three-step test.[119] This configuration of the Marrakesh Treaty leads to the dilemma known from the restrictive approach taken in the EU. The Treaty combines specific, very detailed rules on permissible L&Es with the open-ended criteria of the three-step test in an unfortunate way: the open-ended three-step test is used as a general yardstick to determine the permissibility of specific L&Es in the area of accessible format copies for blind and print-disabled persons, including specific L&Es modelled on Arts 4(2) and 5(2) MT. The resulting problem is obvious: the open-ended, abstract assessment criteria following from the three-step test may erode the legal certainty that could arise from the detailed, specific regulation of L&Es for blind and print-disabled persons, including the enhanced legal certainty that could follow from the model provisions laid down in Arts 4(2) and 5(2) MT.[120] As the three-step test is hanging above these specific L&Es as a sword of Damocles, the whole system of precisely defined L&Es established in the Marrakesh Treaty is in danger of becoming dysfunctional. The three-step test may thwart the objective to provide maximum clarity about permissible use privileges. It reduces the added value of an international treaty exclusively devoted to a specific type of copyright limitation.

Considering the human rights dimension of the Marrakesh Treaty—the enhancement of freedom of expression and information for disabled persons—the configuration of the interplay between the model provisions in Arts 4(2) and 5(2) MT and the three-step test in Art 11 MT also raises the spectre of the three-step test prevailing over fundamental freedoms with a constitutional status: the Pandora's box which the ECJ opened in its *Pelham* decision.[121] Instead of supporting the enabling function of the three-step test to offer room for the reconciliation of copyright protection with competing social, cultural, and economic interests, the Marrakesh Treaty thus confirms the constraining function of the three-step test. This conclusion seems inescapable at least in respect of the model provisions in Arts 4(2) and 5(2) MT.[122] In the context of these specific model provisions, the test is used as a vehicle to exercise additional control even though the relevant L&Es are already clearly defined. As the Marrakesh Treaty subjects the implementation of the model provisions laid down in Arts 4(2) and 5(2) MT to more thorough scrutiny in the light of the three-step test, it employs the three-step test in the problematic sense of further constraining specific

[118] See also the further reference to this three-step test in Art 5(4)(b) MT (n 107) which confirms the obligation to comply with the test in the context of cross-border exchange of accessible format copies.

[119] For a detailed discussion of the evolution of the three-step test in international copyright law, see Senftleben, *Copyright, Limitations and the Three-Step Test* (n 1) 43–98.

[120] However, see Kur, 'From Minimum Standards to Maximum Rules' (n 109) 149, who points out that, practically speaking, a finding of incompliance with the three-step test is unlikely in cases where a national provision is modelled on Art 4(2) MT (n 107).

[121] *Pelham* (n 71) paras 60 and 64.

[122] Admittedly, this scenario is not the only option under the Marrakesh Treaty. The Treaty also leaves room for combining the open-ended assessment factors stemming from the three-step test with flexible, broadly defined obligations to introduce L&Es, namely the open-ended requirements following from Arts 4(3) and 5(3) MT (n 107). This alternative approach can lead to sufficiently elastic national solutions that implement not only the constraining function of the three-step test but also its enabling function that supports the development of new use privileges. For a more detailed discussion of this alternative approach, see Martin R F Senftleben, 'A Copyright Limitations Treaty Based on the Marrakesh Model: Nightmare or Dream Come True?' in Wee Loon Ng-Loy, Shyamkrishna Balganesh, and Haochen Sun (eds), *The Cambridge Handbook of Copyright Limitations and Exceptions* (Cambridge University Press 2021) 74–90.

L&Es. In respect of national L&Es based on the model provisions laid down in Arts 4(2) and 5(2) MT, the three-step test of Art 11 MT does not have the enabling function which Art 9(2) BC and Art 10(1) WCT fulfil with regard to the right of reproduction (Art 9(1) BC) and the right of making available to the public (Art 8 WCT). By contrast, it fulfils the constraining function that is known from Art 13 TRIPS and Art 10(2) WCT—the constraining function which the EU has implemented and cultivated in Art 5(5) InfoSoc Directive. The Marrakesh Treaty thus reflects a worrisome proliferation of the constraining effect of the three-step test that has been taken to the extremes in the EU.

## 5. Conclusion

In international copyright law, the three-step test has a dualistic nature. On the one hand, it constitutes the most far-reaching basis for the adoption of L&Es at the national level (Art 9(2) BC, Art 13 TRIPS, and Art 10(1) WCT). On the other hand, it can also be invoked to ensure that long-standing Berne L&Es keep within the limits of the abstract prohibition of a conflict with a normal exploitation and an unreasonable prejudice to legitimate interests of copyright holders (Art 13 TRIPS; Art 10(2) WCT). This constraining function of the three-step test has been cultivated in EU copyright legislation. Instead of transposing the dualistic concept of the international provision—the enabling as well as the constraining function—into EU law, Art 5(5) InfoSoc Directive reduces the three-step test to the constraining function of setting additional limits to L&Es which are circumscribed precisely in Art 5(1) to (4) InfoSoc Directive anyway. The three-step test cannot be invoked as an instrument to extend the scope of L&Es or create new L&Es to avoid overbroad copyright protection.

ECJ jurisprudence enhances the constraining effect by placing the three-step test in the context of the obligation to interpret L&Es strictly and allowing the balancing of copyright protection against competing fundamental freedoms only within the statutory system of rights and limitations in EU copyright law. The result is a three-step test that has been transformed from a flexible balancing tool into a robust straitjacket of copyright L&Es. In copyright cases, the ECJ has taken the position that the three-step test even determines the maximum space for freedom of expression and information, freedom of the arts, freedom of the press, and freedom of science. This conclusion—and the corresponding institutionalised bias against fundamental freedoms that may reduce the scope of copyright protection—seems inescapable as long as the ECJ does not abandon the mantra of internal balancing within the statutory system of rights and limitations in EU copyright law.

In the context of the Marrakesh Treaty, the EU managed to export this highly problematic amalgam of precisely defined L&Es and an abstract three-step test with a constraining effect to the first international treaty that focuses on the limitation of copyright protection. This development is particularly worrisome because it leads to an inconsistent proliferation of the EU approach. It thwarts the objective of the Marrakesh Treaty to offer maximum legal certainty with regard to appropriate modes of national implementation. It is also worrisome because the Marrakesh Treaty has an undeniable human rights dimension. From a legal-doctrinal perspective, the predominance of the EU model in the Marrakesh negotiations points in the direction of elevating the three-step test to a norm with quasi-constitutional status that shields copyright holders from potential limitations of their exclusive rights. Even if these L&Es can be justified in the light of competing fundamental rights,

such as freedom of expression and information, freedom of the arts, freedom of the press, and freedom of science, the criteria of the three-step test still restrict the spectrum of legislative solutions which lawmakers and judges have at their disposal to reconcile the competing rights and interests at stake. To solve this dilemma, copyright law and practice would have to depart from the EU approach and emphasise the higher rank of fundamental rights in the norm hierarchy. On this basis, fundamental rights obligations could override specific three-step test criteria. As a first step in the right direction, the criteria of the three-step test should be brought in line with the analysis that has evolved in human rights cases, such as the freedom of expression analysis known from the European Court of Human Rights. In this way, the risk of encroachments upon fundamental rights could be reduced. Even the alignment of the three-step test analysis with the human rights analysis, however, is incapable of remedying the structural shortcoming of legislation that only employs the three-step test as a tool to further restrict statutory L&Es. This type of legislation fails to leave room for the test's enabling function to support the evolution of new use privileges that may become necessary in the light of new social, cultural, and economic developments and corresponding human rights obligations.