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HOW TO OVERCOME THE NORMAL EXPLOITATION OBSTACLE: OPT-OUT FORMALITIES, EMBARGO PERIODS, AND THE INTERNATIONAL THREE-STEP TEST

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I. INTRODUCTION

The initial three-step test in international copyright law was developed at the 1967 Stockholm Conference for the Revision of the Berne Convention.

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The three-step test regulates the adoption of copyright limitations and exceptions at the national level. It permits the introduction of use privileges in (1) certain special cases that (2) do not conflict with a work's normal exploitation and (3) do not unreasonably prejudice legitimate interests of authors and right holders.[1]

Given the present need for new limitations and exceptions—for instance, in the area of search engine services,[2] user-generated content,[3] cloud

1. In treaties administered by the World Intellectual Property Organization ("WIPO"), the three-step test refers to the interests of authors. Berne Convention for the Protection of Literary and Artistic Works, Paris Act art. 9(2), July 24, 1971, 25 U.S.T. 1341, 828 U.N.T.S. 221 [hereinafter Berne Convention]; WIPO Copyright Treaty art. 10, Dec. 20, 1996, 36 L.L.M. 65. Article 13 of the Agreement on Trade-Related Aspects of Intellectual Property Rights ("TRIPS"), by contrast, addresses the interests of the right holder. TRIPS constitutes Annex 1C to the Marrakesh Agreement Establishing the World Trade Organization. Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, Apr. 15, 1994, 1869 U.N.T.S. 299, 33 L.L.M. 1197.

2. While U.S. courts seem capable of dealing with copyright issues raised by search engines on the basis of the U.S. fair use doctrine, courts in the European Union have difficulty inventing around the overly restrictive E.U. system of copyright limitations and exceptions that is often found not to offer the use privileges necessary to strike a proper balance between copyright protection and freedom of information. *Compare* Perfect 10, Inc. v. Amazon.com, 508 F.3d 1146, 1163–68 (9th Cir. 2007) (pointing out 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"), *with* Martin Senftleben, *Internet Search Results – A Permissible Quotation?*, 235 REVUE INTERNATIONALE DU DROIT D'AUTEUR 3, at 85–89 (2013) (explaining that apart from a broadened application of the quotation right in the Netherlands, breathing space for search engine services could only be created in several national copyright systems in the European Union outside the copyright limitations system on the basis of doubtful assumptions related to E.U. safe harbor provisions, national implied consent theories, or the assumption of an abuse of rights); Lucie Guibault, *Why Cherry-Picking Never Leads to Harmonisation*, 1 J. INTELL. PROP., INFO. TECH. & E-COM. L. 55, at 56–57 (2010) (underlining that in contrast to flexible fair use systems, the closed list of copyright exceptions in European Union copyright law is incapable of keeping pace with technological developments and dynamically developing markets); Martin Senftleben, *Bridging the Differences Between Copyright's Legal Traditions – The Emerging EC Fair Use Doctrine*, 57 J. COPYRIGHT SOC'Y U.S.A. 521, 528–29 (2010) (pointing out that the present regulation of copyright exceptions in the European Union is a "worst case scenario" in the sense that it "provides neither sufficient flexibility for copyright limitations nor sufficient legal certainty for users of copyrighted material"); *see also* Matthias Leistner, *The German Federal Supreme Court's Judgment on Google's Image Search – A Topical Example of the "Limitations" of the European Approach to Exceptions and Limitations*, 42 INT'L REV. INTELL. PROP. & COMPETITION L. 417, 440–42 (2011) (concluding, on the one hand, that the insufficient flexibility of the present system of copyright exceptions in the European Union results in inconsistent "makeshift solutions" invented by the courts, but, on the other hand, the introduction of a broad, U.S.-style fair use blanket clause would go too far).

computing,[4] and data mining[5]—it is important to clarify the room available under the three-step test. An overly restrictive approach, such as the interpretation developed in the World Trade Organization ("WTO") panel decision on Section 110(5) of the U.S. Copyright Act,[6] can easily become an

3. *See* Copyright Act art. 29.21, R.S.C., 1985, c. C-42, amended by Copyright Modernization Act, S.C. 2012, c. 20 (Can.) (discussing an exceptional case of a specific use privilege for user-generated content). As to the general debate on user-generated content and the need for copyright limitations in this area, see generally Tom W. Bell, *The Specter of Copyism v. Blockheaded Authors: How User-Generated Content Affects Copyright Policy*, 10 VAND. J. ENT. & TECH. L. 841 (2008); Branwen Buckley, *SueTube: Web 2.0 and Copyright Infringement*, 31 COLUM. J. L. & ARTS 235 (2008); Steven Hechter, *User-Generated Content and the Future of Copyright: Part One – Investiture of Ownership*, 10 VAND. J. ENT. & TECH. L., 863 (2008); Steven D. Jamar, *Crafting Copyright Law to Encourage and Protect User-Generated Content in the Internet Social Networking Context*, 19 WIDENER L. J. 843 (2010); Greg Lastowka, *User-Generated Content and Virtual Worlds*, 10 VAND. J. ENT. & TECH. L. 893 (2008); Edward Lee, *Warming up to User-Generated Content*, 2008 U. ILL. L. REV. 1459 (2008); Mary W.S. Wong, *Transformative User-Generated Content in Copyright Law: Infringing Derivative Works or Fair Use?*, 11 VAND. J. ENT. & TECH. L. 1075 (2009); Natalie Helberger et al., Institute for Information Law (IViR), Legal Aspects of User Created Content (2009), http://ssrn.com/ abstract=1499333.

4. For an overview of the debate over exemptions for cloud computing services, see Martin Senftleben, *Breathing Space for Cloud-Based Business Models—Exploring the Matrix of Copyright Limitations, Safe Harbours and Injunctions*, 4 J. INTELL. PROP., INFO. TECH. & E-COM. L. 874 (2013). With regard to definitions of cloud computing, see *supra* note 1.

5. New copyright limitations and exceptions for purposes of data mining have been discussed in jurisdictions such as the U.K. For information about the different positions taken in the debate, see HM Government, Consultation on Copyright: Summary of Responses June 2012 17–18 (June 2012) (discussing different public opinions about a copyright exemption for the use of text and data mining for research), http://www.ipo.gov.uk/copyright-summaryofresponses-pdf. In light of the responses, the U.K. government has proposed to:

> [A]mend the Copyright, Designs and Patents Act 1988 so that it is not an infringement of copyright for a person who already has a right to access a work (whether under a license or otherwise) to copy the work as part of a technological process of analysis and synthesis of the content of the work for the sole purpose of non-commercial research.

See HM Government, Modernizing Copyright: A Modern, Robust and Flexible Framework 37 (Dec. 2012), http://www.ipo.gov.uk/response-2011-copyright-final.pdf. The text of the proposed new exception is available at http://www.ipo.gov.uk/techreview-data-analysis.pdf.

6. On the basis of a meticulous interpretation of each element of the three-step test, the WTO panel stated that section 110(5)(B) of the U.S. Copyright Act, which exempts certain bars and restaurants that broadcast non-dramatic musical works from copyright royalty payments, violated all three steps of Article 13 TRIPS. *See* Panel Report, *United States—Section 110(5) of the U.S. Copyright Act*, WT/DS160/R (June 15, 2000), *available at* docs.wto.org [hereinafter Panel Report]. For comments, see generally Martin Senftleben, *Towards a Horizontal Standard for Limiting Intellectual Property Rights?: WTO Panel Reports Shed Light on the Three-Step Test in Copyright Law and Related Tests in Patent and Trademark Law*, 37 INT'L REV. OF INTELL. PROP. & COMPETITION L. 407 (2006); Mihály Ficsor, *How Much of What? The Three-Step Test and Its Application in Two Recent WTO Dispute Settlement Cases* Section VI, 192 REVUE INTERNATIONALE DU DROIT D'AUTEUR 111 (2002); Jo Oliver, *Copyright in*

obstacle to ongoing innovation in the creation and dissemination of copyrighted works. It will deprive national lawmakers of the breathing space necessary to reconcile copyright protection with freedom of expression and competition.

Against this background, this Article discusses the potential role of embargo periods and opt-out formalities in the enhancement of flexibility under the international three-step test. The traditional focus on the payment of equitable remuneration as a flexibility tool will be explained in Part II before discussing the problem that remuneration is not considered under the normal exploitation analysis in Part III. Given this weakness of the traditional approach, Part IV will explain how embargo periods and opt-out formalities can serve as important alternative mechanisms to avoid conflicts with normal exploitation. Furthermore, the combination of both mechanisms may even allow national policymakers to phase out exclusive rights and replace them with remuneration rights.

II. THE TRADITIONAL FOCUS ON EQUITABLE REMUNERATION AS A FLEXIBILITY TOOL UNDER THE THREE-STEP TEST

The first three-step test in international copyright law constituted a counterbalance to the formal recognition of a broad, general right of reproduction in Article 9(1) BC.[7] According to Article 9(2) BC, national legislation is free to permit the reproduction of protected 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." This three-step test was understood to

the WTO: The Panel Decision on the Three-Step Test, 25 COLUM. J. L. & ARTS 119 (2002); David J. Brennan, *The Three-Step Test Frenzy: Why the TRIPS Panel Decision Might be Considered Per Incuriam*, 2 INTELL. PROP. Q. 213 (2002); Jane C. Ginsburg, *Toward Supranational Copyright Law? The WTO Panel Decision and the "Three-Step Test" for Copyright Exceptions*, 190 REVUE INTERNATIONALE DU DROIT D'AUTEUR 13 (2001).

7. Berne Convention, *supra* note 1, art. 9(1). For a more detailed description of the drafting history, see Daniel Gervais, *Fair Use, Fair Dealing, Fair Principles: Efforts to Conceptualize Exceptions and Limitations to Copyright*, 57 J. COPYRIGHT SOC'Y U.S.A. 499, 510–11 (2010); Annette Kur, *Of Oceans, Islands, and Inland Water—How Much Room for Exceptions and Limitations Under the Three-Step Test?*, 8 RICH. J. GLOBAL L. & BUS. 287, 307–08 (2009); SAM RICKETSON & JANE C. GINSBURG, INTERNATIONAL COPYRIGHT AND NEIGHBOURING RIGHTS – THE BERNE CONVENTION AND BEYOND 759–63 (2d ed. 2006); MARTIN SENFTLEBEN, COPYRIGHT, LIMITATIONS AND THE THREE-STEP TEST: AN ANALYSIS OF THE THREE-STEP TEST IN INTERNATIONAL AND EC COPYRIGHT LAW 47–52 (2004) (explaining that formal recognition of a general right of reproduction in the 1967 Stockholm Conference depended on finding a satisfactory formula for permissible limitations).

offer national policymakers sufficient room for exemptions from the right of reproduction that are necessary to satisfy social, cultural, and economic needs.[8]

In the deliberations at the Diplomatic Conference, the payment of equitable remuneration was recognized as an important factor in the three-step test analysis. The report on the work of Main Committee I—the Committee dealing with the right of reproduction—gave the following example of the test's function:

> 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.[9]

Hence, the Committee regarded the payment of equitable remuneration as a factor capable of tipping the scales in favor of finding compliance. An unreasonable prejudice against the author's interests arising from the exemption of "a rather large number of copies for use in industrial undertakings" can be reduced to a permissible reasonable level by paying equitable remuneration.[10]

This Berne standard also made its way into the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS), in which the test's ambit of operation was substantially broadened. With Article 13 TRIPS, the three-step test became a general yardstick for the permissibility of copyright exemptions. The provision covers limitations and exceptions to the economic rights newly granted under TRIPS as well as those recognized in the Berne Convention.[11]

The three-step test also played a decisive role during the negotiations of the World Intellectual Property Organization (WIPO) "Internet" Treaties. In Article 10(1) of the WIPO Copyright Treaty (WCT), the three-step test paved the way for an agreement on the limitations and exceptions to the new

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8. *See* WIPO, *Records of the Intellectual Property Conference of Stockholm June 11 to July 14, 1967*, at 81 (1971) [hereinafter *WIPO Conference of Stockholm 1967*].

9. *Id.* at 1145–46.

10. *Id.*

11. For a description of the functioning of Article 13 TRIPS, see DANIEL GERVAIS, THE TRIPS AGREEMENT: DRAFTING HISTORY AND ANALYSIS 237–43 (3rd ed. 2008); SENFTLEBEN, *supra* note 7, at 83–90.

rights recognized in the Treaty, including the right of making works available on the Internet as part of the general right of communication to the public.[12] Article 10(2) WCT confirms the test's applicability to exemptions from the exclusive rights granted in the Berne Convention.

When considering the international 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 international basis for the development of national use privileges, including use privileges required in the digital environment. Against this background, it is important to note that the test's fundamental role in enabling limitations and exceptions, and enhancing the flexibility of the copyright system has been underlined in the Agreed Statement Concerning Article 10 WCT that was formally adopted at the 1996 WIPO Diplomatic Conference:

> 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.[13]

As explained above, the payment of equitable remuneration has been part of this permission to "carry forward and appropriately extend" limitations and exceptions from the very beginning.[14] It extends the options available to

12. For the debate in the context of the WIPO "Internet" Treaties, see SENFTLEBEN, *supra* note 7, at 96–98; MIHÁLY FICSOR, THE LAW OF COPYRIGHT AND THE INTERNET: THE 1996 WIPO TREATIES, THEIR INTERPRETATION AND IMPLEMENTATION 515–19 (2002); JÖRG REINBOTHE & SILKE VON LEWINSKI, THE WIPO TREATIES 1996: COMMENTARY AND LEGAL ANALYSIS 118–21 (2002).

13. Agreed Statements Concerning the WIPO Copyright Treaty, art. 10 (Dec. 20, 1996), http://www.wipo.int./treaties/en/ip/wct/statements.html.

14. *Id.* This is obvious in the case of the WIPO Copyright Treaty, which, according to its Article 1(1), is a special agreement within the meaning of Article 20 BC. It is thus consistent to read the three-step test in Article 10 WCT in the light of the drafting history underlying the first three-step test in international copyright law that was laid down in Article 9(2) BC. With regard to Article 13 TRIPS, the issue has been clarified by the WTO panel dealing with Section 110(5) of the U.S. Copyright Act. The Panel Report, *supra* note 6, at para. 6.62, explicitly concluded that the inclusion of Berne provisions by virtue of Article 9(1) BC included the Berne acquis: "If that incorporation should have covered only the text of Articles 1–21 of the Berne Convention (1971), but not the entire Berne *acquis* relating to these articles, Article 9.1 of the TRIPS Agreement would have explicitly so provided." This conclusion can be understood to also cover the recognition of equitable remuneration as an additional balancing tool under the three-step test. The Panel itself, at para. 6.73, quotes the relevant passage from the report on the work of Main Committee 1 of the 1967 Stockholm Conference.

national policymakers. Instead of a mere black-and-white decision between the permission or prohibition of a use privilege, shades of grey can be added by mitigating the corrosive effect of a broad use privilege through the payment of equitable remuneration: an otherwise unacceptable exemption becomes compliant with the three-step test because of the remuneration.

III. NORMAL EXPLOITATION OBSTACLE TO A FLEXIBLE THREE-STEP TEST

The effectiveness of equitable remuneration as an additional flexibility tool for national lawmaking, however, is overshadowed by the architecture of the three-step test. Traditionally, the three steps of the test—certain special cases (step 1), no conflict with a normal exploitation (step 2), and no unreasonable prejudice to legitimate interests (step 3)—are applied cumulatively: a national use privilege must pass all three steps to be adopted.[15] Moreover, the test procedure is traditionally seen as a step-by-step exercise: a national use privilege must pass one step after another.[16] If the use privilege cannot be qualified as a certain special case, or if it conflicts with a normal exploitation, the analysis ends: the use privilege is declared impermissible regardless of whether it also causes an unreasonable prejudice to legitimate interests. Considering the above-cited practical example concerning photocopying for various purposes that was given at the 1967 Stockholm Conference,[17] an appropriate remuneration scheme is capable of reducing an unreasonable prejudice to a permissible reasonable level. However, it does not make a use privilege a certain special case, nor does it resolve a conflict with a normal exploitation.

Hence, a strict application of the certain special cases test and the normal exploitation test will inevitably erode the flexibility available under the final unreasonable prejudice test. It follows from the wording of this final test ("... and does not unreasonably prejudice the legitimate interests of the author") that not every interest of authors and right holders becomes relevant. Only legitimate interests are to be factored into the equation.[18] Furthermore, not every prejudice to legitimate interests is relevant. Only unreasonable prejudices are unacceptable.[19] The third step, therefore, offers

15. *See* REINBOTHE & VON LEWINSKI, *supra* note 12, at 124.

16. For a more detailed discussion of these features and the resulting test procedure, see SENFTLEBEN, *supra* note 7, at 125–33.

17. *See WIPO Conference of Stockholm 1967*, *supra* note 8.

18. Panel Report, *supra* note 6, para. 6.222, at 57.

19. *Id.* para. 6.229, at 59 (noting that "a certain amount of 'prejudice' has to be presumed justified as 'not unreasonable' ").

several filters that transform it into a refined proportionality test: the legitimacy of the interests invoked by authors and right holders are to be weighed against the reasons justifying the use privilege. The payment of equitable remuneration allows refined solutions in this context.[20]

This panoply of balancing tools—the legitimacy filter, the unreasonableness filter, and the remuneration option—is indispensable in the digital environment. If copyright limitations and exceptions are to be carried forward and appropriately extended into the digital environment, as enunciated in the Agreed Statement Concerning Article 10 WCT, more is needed than a verdict of noncompliance based on a finding that the use privilege does not constitute a certain special case or conflicts with a normal exploitation. The rationales of copyright protection must be weighed against the justifications for an exemption. In many cases, this weighing process involves fundamental rights and freedoms, in particular freedom of speech, the protection of privacy, and freedom of competition.[21] While the third step of the three-step test offers sufficient flexibility for this balancing exercise, the first and second steps constitute risk factors. Through misinterpretations, steps one and two may become straitjackets preventing national policymakers from developing balanced solutions that leave sufficient room for freedom of expression and freedom of competition.

The WTO panel decision on Article 110(5) of the U.S. Copyright Act enhanced this risk of diminished flexibility in the application of the three-step test. The panel held that for a national use privilege to constitute a certain special case, it should be narrow in a quantitative, as well as a qualitative, sense.[22] To avoid a conflict with a work's normal exploitation, it must not encroach upon forms of exploitation that currently generate "significant or tangible revenue" or could acquire "considerable economic or practical importance" in the future.[23] Under this interpretation, the first two steps become minefields for national policymakers seeking to ensure compliance with the three-step test. This is particularly true with regard to the normal exploitation test. If understood broadly, the criterion of potential

20. *See WIPO Conference of Stockholm 1967*, *supra* note 8, at 1145–46.

21. For an analysis of the impact of fundamental rights on copyright limitations and exceptions, see Christophe Geiger, *"Constitutionalising" Intellectual Property Law? The Influence of Fundamental Rights on Intellectual Property in the European Union*, 37 IIC: INT'L REV. INTELL. PROP. & COMPETITION L. 371 (2006); P. Bernt Hugenholtz, *Copyright and Freedom of Expression in Europe*, *in* THE COMMODIFICATION OF INFORMATION 239 (Niva Elkin-Koren & Neil Weinstock Netanel eds., 2002); Yochai Benkler, *Free as the Air to Common Use: First Amendment Constraints on Enclosure of the Public Domain*, 74 N.Y.U. L. REV. 354 (1999); Neil Weinstock Netanel, *Copyright and a Democratic Civil Society*, 106 YALE L.J. 283 (1996).

22. Panel Report, *supra* note 6, para. 6.109–.112, at 33–34.

23. *Id.* para. 6.180, at 48.

markets of "considerable economic or practical importance" may cover all forms of using copyrighted works on the Internet. Arguably, technological protection measures and digital rights management offer unprecedented opportunities for establishing new digital markets.[24]

Not surprisingly, the WTO panel decision triggered several proposals for a more balanced interpretation. The criterion of "considerable economic or practical importance" could be understood to cover only the economic core of copyright, specifically those modes of exploitation that typically constitute a major source of income.[25] Instead of focusing on a market analysis, the normative question could prevail: whether it is justifiable from a public-policy perspective to give the copyright owner control over a given form of exploitation.[26] The traditional step-by-step analysis could be abandoned in favor of a global balancing exercise in which the individual steps constitute mere factors to be weighed against each other. The three-step test could also be read in reverse, starting with the flexible unreasonable prejudice test. The normal exploitation analysis would then only function as a safeguard against the abuse of overbroad use privileges.[27] Synthesizing these approaches, the *Declaration on a Balanced Interpretation of the Three-Step Test* sees the different tests as an indivisible entirety requiring a comprehensive overall assessment.[28] The

24. This risk of diminishing flexibility has also been pointed out by Jonathan Griffiths, *The "Three-Step Test" in European Copyright Law: Problems and Solutions*, 9 INTELL. PROP. Q. 428, at 441 (2009); *see also* Daniel Gervais, *Making Copyright Whole: A Principled Approach to Copyright Exceptions and Limitations*, 5 U. OTTAWA L. & TECH. J. 1, 30 (2008); Christophe Geiger, *The Three-Step Test, a Threat to a Balanced Copyright Law?*, 37 IIC: INT'L REV. INTELL. PROP. & COMPETITION L. 683 (2006); *see* Thomas Heide, *The Berne Three-Step Test and the Proposed Copyright Directive*, 21 EUR. INTELL. PROP. REV. 105, 106 (1999).

25. SENFTLEBEN, *supra* note 7, at 184–94.

26. Ginsburg, *supra* note 6, at 23, sees room for the inclusion of normative considerations: ". . . if the exploitation falls within the scope of copyright, and no copyright or related cultural policies undergird the right holder's disability from exercising the right, then the exploitation may, as a normative matter, be 'normal.'" See also the comments in favor of the inclusion of normative considerations by Oliver, *supra* note 6, at 158; Gervais, *supra* note 24, at 30.

27. *See* Christophe Geiger, *Right to Copy v. Three-Step Test*, 6 COMPUTER L. REV. INT'L 7, 12 (2005).

28. *See* Christophe Geiger et al., *Declaration on a Balanced Interpretation of the "Three-Step Test" in Copyright Law*, 39 INT'L REV. INTELL. PROP. & COMPETITION L. 707, 711 (2008). The Declaration is the result of a joint project organized by the Max Planck Institute for Intellectual Property and Competition Law, Munich, and Queen Mary, University of London. They brought together a group of experts who jointly drafted the Declaration aiming at securing a balanced interpretation of the three-step test in copyright law. *See also* Reto M. Hilty, *Declaration on the Three-Step Test–Where do we go from here?*, 1 J. INTELL. PROP., INFO. TECH. & E-COM. L. 83 (2010).

payment of equitable remuneration is regarded as a universal balancing tool that also impacts the decision on a conflict with a normal exploitation.[29]

IV. ALTERNATIVE SOURCES OF FLEXIBILITY IN ADOPTING A USE PRIVILEGE

Despite these flexible alternative approaches, exploring additional mechanisms is important for enhancing the policy space available under the three-step test. First, national policymakers may hesitate to follow a more flexible approach while WTO jurisprudence adheres to the traditional step-by-step analysis.[30] Second, policymakers may find that the equitable remuneration option does not fit well into their national copyright systems.[31] Against this background, embargo periods and opt-out formalities can constitute attractive supplements to the traditional reliance on the payment of equitable remuneration.

A. EMBARGO PERIODS

The basic idea underlying embargo periods on copyright limitations and exceptions is simple: a use privilege only becomes available after a certain period of time has passed since the work has first been made available to the public with the consent of the right holder. To ensure compliance with the three-step test, the embargo period should align with the normal exploitation test: the use privilege should become available only after the work's normal exploitation has been completed. The drafting history underlying the three-step test is silent on the inclusion of this dynamic element in copyright limitations and exceptions. Unlike equitable remuneration, embargo periods are not linked with the unreasonable prejudice test through a practical example given at the 1967 Stockholm Conference. Moreover, the WTO panel's formula of exploitation forms that currently generate "significant or

29. *See* Geiger et al., *supra* note 28, at 710; *see also* Hilty, *supra* note 28, at 83.

30. Future WTO panels dealing with Article 13 TRIPS are not formally bound by the approach taken in the report on Section 110(5) of the U.S. Copyright Act. Adopted panel reports do not have a *stare decisis* effect in the sense that their findings cannot be overruled in the course of future dispute settlement procedures. *See* IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 19–22 (5th ed. 1998); JOHN H. JACKSON, THE JURISPRUDENCE OF GATT AND THE WTO: INSIGHTS ON TREATY LAW AND ECONOMIC RELATIONS 127 (2000). Therefore, the panel report on Section 110(5) does not necessarily constitute established case law. Further panel reports are necessary to clarify which features of the actual interpretation are lasting.

31. For an overview of various national systems of copyright limitations and exceptions, see BALANCING COPYRIGHT – A SURVEY OF NATIONAL APPROACHES (Reto M. Hilty & Sylvie Nérisson eds., 2012).

tangible revenue"[32] or could potentially acquire "considerable economic or practical importance"[33] seems to leave room for the introduction of embargo periods. Arguably, the exploitation of many works only yields significant, tangible, or considerable income during an initial period of several months or years. Once this normal exploitation period expires, the room for copyright limitations and exceptions becomes broader. As a conflict with a normal exploitation need not be feared any longer, the use privilege need only comply with the much more flexible unreasonable prejudice test.[34]

Embargo periods can be used in different areas. The E.U. Orphan Works Directive,[35] for instance, allows Member States to exempt the making available and certain acts of reproduction of orphan works by publicly accessible libraries, educational establishments and museums, archives, film or audio heritage institutions, and public-service broadcasting organizations.[36] The use privilege only becomes available if the right holder cannot be found through a diligent search.[37] This situation is unlikely to arise before the normal exploitation has been completed. As long as significant, tangible, or considerable income accrues from the work's commercialization, it should not be difficult to find the right holder. The Orphan Works Directive also provides for the payment of "fair compensation" in case the right holder turns up and puts an end to the orphan work status.[38] This can be seen as an additional safeguard against the remaining risk of an unreasonable prejudice to legitimate interests.

The Orphan Works Directive is far from offering an ideal solution.[39] Its search requirement, administrative burdens, and the legal uncertainty arising from the possible termination of orphan work status make it an unattractive or even unworkable model. However, this need not discredit embargo periods as a flexibility tool. If, instead of requiring a diligent search, the exemption of the making available of cultural heritage material became

32. Panel Report, *supra* note 6, para. 6.180, at 48.

33. *Id.*

34. *See* Reto M. Hilty, "Lessons From Other Intellectual Property Regimes: Reform(aliz)ing Copyright for the Internet Age" at the Berkeley Symposium(Apr. 19, 2013), *available at* http://www.law.berkeley.edu/15235.htm.

35. Directive 2012/28/EU of the European Parliament and of the Council of 25 October 2012 on Certain Permitted Uses of Orphan Works, 2012 O.J. (L 299)5 [hereinafter Orphan Works Directive].

36. *Id.* art. 6(1), at 9–10.

37. *Id.* art. 3(1), at 9.

38. *Id.* art. 6(5), at 10.

39. For a discussion of alternative approaches, see Stef van Gompel, *Unlocking the Potential of Pre-Existing Content: How to Address the Issue of Orphan Works in Europe?*, 38 INT'L REV. INTELL. PROP. & COMPETITION L. 669 (2007).

generally available after an appropriate embargo period, mass digitization projects could be encouraged without encroaching upon a work's normal exploitation.[40] Embargo periods could also be used to exempt user-generated content from the control of copyright holders once a work's normal exploitation has come to an end.

B. OPT-OUT FORMALITIES

Besides embargo periods, opt-out formalities can serve as a tool to avoid conflicts with normal exploitation. Again the underlying idea is simple: the right holder can render a use privilege inapplicable by reserving her rights. This, in turn, will prevent users from eroding a work's normal exploitation. In international law, for example, the press privilege laid down in Article 10bis(1) BC rests on this opt-out solution:

> It shall be a matter for legislation in the countries of the Union to permit the reproduction by the press, the broadcasting or the communication to the public by wire of articles published in newspapers or periodicals on current economic, political or religious topics, and of broadcast works of the same character, in cases in which the reproduction, broadcasting or such communication thereof is not expressly reserved.[41]

The reservation of rights reflected in this provision entered the Berne Convention as an element of the debate on the protection of publications in newspapers and periodicals, and the freedom to use news information and newspaper articles with the exception of serial stories and tales.[42] From the perspective of the three-step test, the option to reserve rights can be deemed necessary to avoid a conflict with the normal exploitation. The forms of exploitation covered by Article 10bis(1) BC—reproduction, broadcasting, and communication to the public—are central to the normal exploitation of press articles and broadcasts. Moreover, the exemption concerns the initial exploitation period. Article 10bis(1) BC applies to "current economic, political or religious topics." Hence, it exempts the use of fresh articles with news value. As the right holder can opt out by reserving her rights, however, the risk of a conflict with the normal exploitation is minimized.

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40. According to the Orphan Works Directive, *supra* note 35, at Recital 4, the Directive does not address mass digitization projects, which are left to individual solutions developed in E.U. Member States.

41. Article 10bis(1) BC *supra* note 1, at 9.

42. For the development of the provision in the Berne Convention, see RICKETSON & GINSBURG, *supra* note 7, at 796–800; Lucie Guibault, *The Press Exception in the Dutch Copyright Act*, *in* A CENTURY OF DUTCH COPYRIGHT LAW – AUTEURSWET 1912–2012 443, 447–50 (P. Bernt Hugenholtz et al. eds., 2012).

For national policymakers, opt-out formalities offer an instrument to experiment with relatively broad copyright limitations and exceptions. To ensure compliance with the three-step test, the potential adverse effect on a work's normal exploitation can be minimized by giving right holders the opportunity to opt out. The use of this possibility in practice, then, will show whether right holders really see the exemption as a risk factor. The reservation of rights in Article 10bis(1) BC, for instance, evolved from industry practice more than a century ago.[43] At the time, newspapers considered the reproduction of their articles in other newspapers as an advertisement and promotion of their activities.[44] In particular, local newspapers with limited financial resources could hardly have satisfied the news demand of their readers without reproducing newspaper articles from bigger newspapers.[45]

This historical background to Article 10bis(1) BC gives rise to the question whether the opt-out model can readily be extended to other situations where no such industry practice exists. Does the opt-out provision in Article 10bis(1) BC pass the normal exploitation test only because it had already become "normal" on the market for news to reproduce and disseminate articles from other newspapers that had not reserved their rights? Or can an opt-out model also be used as a means to avoid a conflict with a normal exploitation test in cases where no such pre-existing industry practice can be found?

The better arguments support this latter assumption. The opt-out model in Article 10bis(1) BC can, as mentioned, be traced back to industry practices that originated in the news sector over a century ago.[46] At the time of the introduction of the first international three-step test in the framework of the 1967 Stockholm Conference, however, different practices had already evolved on the news market. In the preparatory documents of the Diplomatic Conference, it was even proposed to abolish the opt-out provision because of these changed practices.[47] During the Conference, however, several delegations had success in defending the use privilege by

43. *See* LUCIE GUIBAULT, COPYRIGHT LIMITATIONS AND CONTRACTS—AN ANALYSIS OF THE CONTRACTUAL OVERRIDABILITY OF LIMITATIONS ON COPYRIGHT 58 (2002) (discussing the rationales underlying the newspaper exemption).

44. *Id.*

45. *See* Guibault, *supra* note 42, at 444–45 (stating that "[h]ardly any newspaper in those days could survive without citing or borrowing articles from prestigious foreign publications").

46. *See* GUIBAULT, *supra* note 43, at 58.

47. *WIPO Conference of Stockholm 1967*, *supra* note 8, at 114.

arguing that it contributed substantially to the free flow of information.[48] When the three-step test was later implemented in Article 13 TRIPS and Article 10(2) WCT (and thus also became applicable to Article 10bis(1) BC), the compliance of the opt-out model with the normal exploitation test was not called into doubt. Hence it seems that during the TRIPS and WCT negotiations, the fact that the reproduction and dissemination of newspaper articles no longer constituted a well-established industry practice in the news sector was not regarded as an obstacle to compliance with the normal exploitation test.

The reason for this can be seen in the possibility to render the use privilege inapplicable through the reservation of rights. When opting out, copyright owners put an end to unauthorized use on the basis of Article 10bis(1) BC. Accordingly, they can regulate the impact on their exploitation strategy and safeguard the normal exploitation of their works themselves. This can also be assumed in cases where the market concerned has not yet developed corresponding industry practices.

Nowadays, an opt-out solution could be adopted, for instance, in the area of search engine services. Far-reaching use privileges for search engine providers may be acceptable to right holders who see the Internet as an advertisement and promotion instrument for their works. For instance, the copyright issues arising from image search services could be solved by giving right holders the opportunity to opt out through the use of appropriate technical instructions for search robots.[49] This solution may be of particular importance in countries without an open-ended fair-use clause that allows

48. See the description of the deliberations at the Conference by RICKETSON & GINSBURG, *supra* note 7, at 799.

49. On the basis of a theory of implied consent, this solution has been developed by the German Supreme Court. *See* Bundesgerichtshof [BGH] [Federal Court of Justice] Apr. 29, 2010, I ZR 69/08 ¶ 29, *available at* http://juris.bundesgerichtshof.de/cgi-bin/rechtsprechung/document.py?Gericht=bgh&Art=en&Datum=2010-4&nr=51998&pos=16&anz=298; Bundesgerichtshof [BGH] [Federal Court of Justice] Oct. 19, 2011, I ZR 140/10 ¶ 18, *available at* http://juris.bundesgerichtshof.de/cgi-bin/rechtsprechung/document.py?Gericht=bgh&Art=en&Datum=2011-10&Seite=4&nr=59857&pos=134&anz=292. For commentary, see Thomas Dreier, *Thumbnails als Zitate?—Zur Reichweite von § 51 UrhG in der Informationsgesellschaft*, *in* FESTSCHRIFT FÜR ACHIM KRÄMER, 225 (Uwe Blaurock et al. eds., 2009); Matthias Berberich, *Die urheberrechtliche Zulässigkeit von Thumbnails bei der Suche nach Bildern im Internet*, 8 MULTIMEDIA UND RECHT 145 (2005); Ansgar Ohly, *Zwölf Thesen zur Einwilligung im Internet*, 114 GEWERBLICHER RECHTSSCHUTZ UND URHEBERRECHT 983 (2012); Dr. Matthias Leistner & Felix Stang, *Die Bildersuche im Internet aus urheberrechtlicher Sicht*, 24 COMPUTER UND RECHT 499 (2008); Stephan Ott, *Zulässigkeit der Erstellung von Thumbnails durch Bilder- und Nachrichtensuchmaschinen*?, 119 ZEITSCHRIFT FÜR URHEBER- UND MEDIENRECHT 119 (2007).

the courts to adapt the system of limitations and exceptions to new information services and needs.[50]

Opt-out formalities may also create additional breathing space for the exemption of user-generated content.[51] Right holders who see amateur performances and remixes as promotion activities for the original work will refrain from reserving their rights. Others who see amateur creations as an encroachment upon their copyright remain free to opt out. The market will determine which approach generates higher revenue for a work, and thus, determine the approach that is preferred in the long run. Today's Internet users are likely to prefer works that can later be adapted and discussed on platforms for user-generated content.[52] Hence, right holders may prefer not to reserve these rights.

A final question concerns the prohibition of formalities in Article 5(2) BC, according to which "the enjoyment and the exercise" of copyright shall not be subject to any formality. Does this provision militate against the use of opt-out formalities in the area of limitations and exceptions? As Stef van Gompel has shown, the answer need not be in the affirmative.[53] He argues that while Article 5(2) prohibits formal requirements as to the coming into being and the enforcement of copyright (external conditions), the prohibition leaves room for formalities with regard to the extent, quality, and contents of protection (internal conditions).[54] Certain aspects of protection may thus be made subject to formal requirements. For instance, a country may combine the adoption of a use privilege with an opt-out formality for right holders if it is free under the three-step test to adopt the same use privilege even without

50. For a comparative analysis of problems that have arisen in Germany, France and Spain because of the absence of a sufficiently flexible system of copyright limitations and exceptions, see generally Senftleben, *Internet Search Results*, *supra* note 2; Leistner, *supra* note 2.

51. As to the need for broader copyright limitations and exceptions in this area, see Jamar, *supra* note 3, at 870–72 (arguing that an "explicit, relatively bright-line rule" exempting use for the purpose of creating user-generated content "would remove much uncertainty associated with reliance on fair use and concomitantly reduce transaction costs associated with a permission-based system"); Wong, *supra* note 3, at 1108–09 (arguing for a more complete understanding of "transformativeness" in the context of both the fair use doctrine and the right of adaptation. This broader understanding would not only focus on the purpose and extent of the use made by the creator of user-generated content but also on the result of the user's additions and changes in the sense of evaluating whether new meaning, information, or expression has been added to the original work).

52. *See* Sacha Wunsch-Vincent & Graham Vickery, *Participative Web: User-Created Content*, OECD, Apr. 12, 2007, *available at* http://www.oecd.org/internet/ieconomy/38393115.pdf.

53. STEF VAN GOMPEL, FORMALITIES IN COPYRIGHT LAW—AN ANALYSIS OF THEIR HISTORY, RATIONALES AND POSSIBLE FUTURE 179–93 (2011).

54. *Id.*

any opt-out feature. In such case, the opt-out possibility is more favorable for right holders because it allows them to restrict the exempted use.[55]

The crucial question, however, is whether opt-out formalities can be employed to broaden the room for the introduction of limitations and exceptions under the three-step test. Does national legislation first have to ensure full compliance with the three-step test before it can add an opt-out formality? Or can the national legislature achieve compliance with the three-step test by adding an opt-out possibility for right holders? Is national legislation free to introduce a use privilege that otherwise—without an opt-out feature—would fail the test? Against the background of Article 10bis(1) BC, this latter view seems to be correct.[56] Article 10bis(1) BC complies with the three-step test because it contains an opt-out formality. Nonetheless, further research seems necessary to verify the validity of this position. In particular, the rationales underlying the prohibition of formalities in Article 5(2) BC must be taken into account. The provision seeks to afford authors the opportunity to obtain copyright protection in different states without being obliged to comply with various formalities.[57] Thus, whatever opt-out system is invented in combination with copyright limitations and exceptions, it should not become too heavy a burden for right holders seeking protection in different national systems.

C. USING FLEXIBILITY TOOLS TO PHASE OUT EXCLUSIVE RIGHTS

When taken together, the package of all three flexibility tools—equitable remuneration, embargo periods, and opt-out formalities—might even allow the establishment of a new system of limitations and exceptions that offers policymakers the opportunity to phase out exclusive rights and replace them with remuneration rights.[58] Through embargo periods, it could be ensured that such a phase-out system does not become operational before a work's

55. *See id.* at 210–11.

56. *See id.* at 211 (agreeing that "it may well be that the possibility to 'opt out' eases compliance with the three-step test, as it mitigates some of the adverse effects of the proposed copyright exceptions."). *But see* Alexander Peukert, *A Bipolar Copyright System for the Digital Network Environment*, 28 HASTINGS COMM. & ENT. L.J. 1, at 60–69 (2005) (arguing that the opt-out model potentially clashes with Article 5(2) BC prohibition against formalities and poses further problems in compliance with the three-step test).

57. VAN GOMPEL, *supra* note 53, at 155–57.

58. For a more detailed discussion of the merits of a remuneration-based reward and incentive system, see Christophe Geiger, *Promoting Creativity Through Copyright Limitations: Reflections on the Concept of Exclusivity in Copyright Law*, 12 VAND. J. ENT. & TECH. L. 515, 531–33 (2010). *See also* N. Suzor, *Access, Progress, and Fairness: Rethinking Exclusivity in Copyright Law*, 15 VAND. J. ENT. & TECH. L. 297, at 322–29 (discussing the necessity to abandon traditional incentive and reward justifications for exclusive rights in copyright law and inquiring into appropriate reward schemes and alternate compensation models instead).

normal exploitation has been completed. The payment of equitable remuneration will be necessary in many cases to compensate right holders for the loss of the opportunity to prohibit and actively control the use of their works once the normal exploitation has come to an end. Finally, opt-out formalities could be used to prevent the phase-out system from causing disproportionate harm to right holders.[59] As long as the work is actively promoted and commercialized, the right holder may have legitimate reasons to insist on the right to prohibit and control its use even after the normal exploitation. In this situation, an appropriate registration or notification system would allow right holders to maintain their exclusive rights. A system that allows policymakers to phase-out exclusive rights is capable of safeguarding a proper balance between copyright protection and areas of freedom that are necessary to satisfy competing social, cultural, and economic interests. From the perspective of utilitarian copyright theory, copyright is not only granted to reward authors for the time and effort spent on the creation of a new work.[60] Rather, the lawmaker seeks to enhance benefits for society as a whole. The promise of exclusive rights allowing the commercialization of a work is offered to authors as an incentive to encourage their intellectual productivity.[61] A marketable copyright is

59. As to previous proposals concerning the inclusion of opt-out or opt-in features in the system of copyright limitations and exceptions, see Oren Bracha, *Standing Copyright Law on Its Head? The Googlization of Everything and the Many Faces of Property*, 85 TEX. L. REV. 1799, 1826–41 (2007); Jessica Litman, *Sharing and Stealing*, 27 HASTINGS COMM. & ENT. L.J. 1, 39–50 (2004); WILLIAM FISHER III, PROMISES TO KEEP: TECHNOLOGY, LAW, AND THE FUTURE OF ENTERTAINMENT 199–258 (2004).

60. As to this latter reward rationale in copyright law, see STEPHEN M. STEWART & HAMISH R SANDISON, INTERNATIONAL COPYRIGHT AND NEIGHBOURING RIGHTS 3 (1989); JOHN LOCKE, TWO TREATISES OF GOVERNMENT 287–88 (Cambridge University Press 1988); William Enfield, *Observations on Literary Property* (London 1774), *reprinted in* THE LITERARY PROPERTY DEBATE: EIGHT TRACTS, 1774–1775, at 21 (Stephen Parks ed., 1974).

61. 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 U.S. 539, 558 (1985). *But cf.* Alain Strowel, *Droit d'auteur and Copyright: Between History and Nature*, *in* OF AUTHORS AND ORIGINS 235, 241–49 (B. Sherman & A. Strowel eds., 1994) (pointing out that this utilitarian view makes copyright a granted prerogative requiring exclusive rights to be positively enacted whereas natural law theory allows the assumption of comprehensive exclusive rights that do not deserve positive legal enactment); P.E. Geller, *Must Copyright Be Forever Caught Between Marketplace and Authorship Norms?*, *in* OF AUTHORS AND ORIGINS 159, 164–66 (B. Sherman & A. Strowel eds., 1994) (describing copyright in the sense of utilitarian theory as a bait to encourage the intellectual productivity of authors); Steven 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*, 9 FORDHAM INTELL. PROP. MEDIA & ENT. L. J. 301, 310–26 (1998) (discussing possible alternative non-economic incentives that may encourage authors to produce works).

conferred to ensure a sufficient supply of disseminated knowledge and information.[62]

Following this utilitarian line of argument, the grant of exclusive rights in copyright law must offer authors and the creative industries the possibility to recoup their investment in the creation and dissemination of protected works.[63] However, the grant of rights need not be broader than that. The utilitarian approach merely justifies rights strong enough to induce the desired production of intellectual works.[64] Limitations and exceptions, and thus the breathing space offered under the three-step test, play a crucial role in avoiding overbroad exclusive rights. Through the flexible application of the three-step test, national policymakers can ensure that exclusive rights do not go beyond what is necessary to attain the objectives underlying the copyright system.

The flexible application of the three-step test is of particular importance when the term of copyright protection is too long and cultural follow-on innovation based on pre-existing works—the creative reuse and remix of protected material—is delayed or even frustrated.[65] In such a situation, additional room to phase out exclusive rights with regard to certain forms of use is crucial to the maintenance of an efficient copyright system. Embargo periods and opt-out formalities provide this additional room. As the term of copyright protection in the United States and the European Union amounts

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62. *See* U.S. CONST. art. I, § 8 (containing the famous formula of promoting "the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries"). Utilitarian principles are also reflected in E.U. copyright legislation. For instance, Recital 4 of the Information Society Directive 2001/29/EC states that:

> A harmonised legal framework on copyright and related rights, through increased legal certainty and while providing for a high level of protection of intellectual property, will foster substantial investment in creativity and innovation, including network infrastructure, and lead in turn to growth and increased competitiveness of European industry, both in the area of content provision and information technology and more generally across a wide range of industrial and cultural sectors. This will safeguard employment and encourage new job creation.

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, 2001 O.J. (L 167).

63. B.W.F. Depoorter, *Intellectueel eigendomsrecht*, *in* DE ECONOMISCHE ANALYSE VAN HET RECHT 209 (W.C.T. Weterings et al. eds., 2007).

64. Strowel, *supra* note 61, at 241–49; Calandrillo, *supra* note 61, at 310–12.

65. For a description of this corrosive effect on cultural follow-on innovation, see Richard A. Posner, *Intellectual Property: the Law and Economic Approach*, 19 J. ECON. PERSP. 57, 60–61 (2005).

to seventy years *post mortem auctoris*,[66] it cannot be ruled out that the time is ripe to make use of this additional room under the international three-step test to prevent the copyright system that was designed to stimulate the creation and dissemination of new works, from frustrating both objectives instead.

V. CONCLUSION

Traditionally, the payment of equitable remuneration is seen as the primary tool to enhance flexibility for the introduction of copyright limitations and exceptions under the international three-step test. The present analysis has shown, however, that the use of embargo periods and opt-out formalities may also enhance the room available to national policymakers. In particular, these additional flexibility tools can help to overcome a potential conflict with a work's normal exploitation. They are important supplements to the payment of equitable remuneration, which traditionally has been understood only to reduce an unreasonable prejudice to a permissible reasonable level. The combination of the payment of equitable remuneration with embargo periods and opt-out formalities may even pave the way for a new system of limitations and exceptions that offers policymakers the opportunity to phase out exclusive rights and replace them with remuneration rights. Once this new system is introduced to prevent the long term of copyright protection from becoming an obstacle to the productive remix and reuse of protected works, it could provide strong additional support for follow-on innovation in the cultural sector.

66. With regard to the situation in the European Union, see article 1(1) of the Copyright and Related Rights Term Directive 2006/116/EC. As to the extension of the term of copyright protection to seventy years after the author's death in the United States, see Sonny Bono Copyright Term Extension Act of 1998, Pub. L. No. 105-298, 112 Stat. 2827 and *Eldred v. Reno*, 239 F.3d 372 (D.C. Cir. 2001), *aff'd, Eldred v. Ashcroft*, 537 U.S. 186 (2003). The international minimum term of protection is fifty years after the author's death. *See* Article 7(1) BC.