# THE INTERPRETIVE ARGUMENT FOR A BALANCED THREE-STEP TEST?

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## I. INTRODUCTION

Something curious is happening in global copyright law. At the end of the twentieth century, the Fair Use Doctrine was an idiosyncratic feature of American law.[1] This doctrine, that permits

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copying of copyrighted works without the owner's permission for certain "fair" uses, appeared on the statue books of no nation other than the U.S.A.[2] But today the landscape of global copyright is changing.[3] Since 2000, Israel,[4] South Korea,[5] the Philippines,[6] Sri Lanka,[7] and more, have adopted this erstwhile American doctrine. Canada modified its existing Fair Dealing defense to resemble Fair Use.[8] Australia[9] and Ireland[10] may be poised to follow suit after law reform commissions recommended their respective legislatures adopt Fair Use to facilitate growth in the "digital economy." The United Kingdom, finding Fair Use to be helpful for ensuring flexibility in copyright doctrine, would perhaps have adopted the defense if it were not for the lingering concern that doing so might breach European copyright norms.[11] Once viewed as a quirk of U.S. law, the

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Oren Bracha, Graeme Dinwoodie, Sean Flynn, Janet Freilich, Henning Grosse Ruse-Khan, Dmitry Karshtedt, Martin Senftleben, Peter Yu, the participants of the American University, Washington College of Law Symposium on Globalizing Fair Use, and the editors of the American University International Law Review.

1. Peter Decherney, *Fair Use Goes Global,* 31 CRITICAL STUD. IN MEDIA COMM. 146, 146 (2014) (stating that "[f]or 150 years, fair use was a solely American doctrine.").

2. *See* 17 U.S.C. §107 (2017).

3. *See* Richard J. Peltz, *Global Warming Trend? The Creeping Indulgence of Fair Use in International Copyright Law?*, 17 TEX. INTELL. PROP. L.J. 267, 267-68 (2009) (stating that "[t]he concept has escaped its disfavored status as a U.S. peculiarity and achieved some traction in international legal circles.").

4. Copyright Act, 2007-19 (Isr.) [hereinafter Israel Copyright Act].

5. [Copyright Act], Act. No. 432, 2011, *amended by* Act. No. 12137, 35*ter* (S. Kor.) [hereinafter South Korean Copyright Act].

6. An Act Prescribing the Intellectual Property Code and Establishing the Intellectual Property Office, Providing for Its Powers and Functions, and for Other Purposes, Rep. Act. No. 8293, §185 (1998) (Phil.) [hereinafter Philippines Intellectual Property Code].

7. Intellectual Property Act §12 (Act No. 36 of 2003) (Sri Lanka) [hereinafter Sri Lanka Intellectual Property Act].

8. Michael Geist, *Fairness Found: How Canada Quietly Shifted from Fair Dealing to Fair Use*, *in* THE COPYRIGHT PENTALOGY: HOW THE SUPREME COURT OF CANADA SHOOK THE FOUNDATIONS OF CANADIAN COPYRIGHT LAW 157-186 (Michael Geist ed., 2013).

9. Australian Law Reform Commission, *Copyright and the Digital Economy*, ALRC Report 122, November 2013, paras 11.77-11.84.

10. COPYRIGHT REV. COMM., COPYRIGHT AND INNOVATION, A CONSULTATION PAPER 89 (2012) (Ir.), http://www.djei.ie/science/ipr/crc_consultation_paper.pdf.

11. *See* IAN HARGREAVES, DIGITAL OPPORTUNITY: A REVIEW OF INTELLECTUAL PROPERTY AND GROWTH 44-46 (2011) (discussing the benefits and challenges associated with adopting Fair Use in the UK).

Fair Use doctrine now presents an opportunity for many countries to promote efficient and fair copyright law in the Information Age. The question on the minds of lawmakers is: Does the Fair Use doctrine comply with the requirements of international copyright law?

The Fair Use doctrine's legitimacy is determined by international copyright law's "Three-Step Test," but the interpretation of this provision is viciously contested. [12] International copyright law permits states to enact copyright exceptions and limitations only in "certain special cases which do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the author."[13] Broadly, this provision is subject to two diverging interpretations: the so-called "Traditional" and "Balanced" Interpretations.[14] The Traditional Interpretation claims the purpose of international copyright law is to increase worldwide copyright standards and to ensure copyright owners a high level of legal protection.[15] The Three-Step Test provision is therefore interpreted restrictively and thus narrows down the array of exceptions and limitations that a state may enact.[16] Under this interpretation, the Fair Use doctrine exempts too much copying and is too unpredictable to pass the Test.[17] By contrast, the Balanced Interpretation emphasizes that international copyright law's purpose is to appropriately balance the interests of copyright owners and wider society.[18] Creators require some copyright protection to ensure a fair reward for their labor and to preserve their creative incentives. However, the interests of copyright owners must be balanced against the interest of wider society in accessing copyrighted material. The goal of international copyright law is, therefore, to guarantee that states provide a minimum level of copyright protection, while simultaneously permitting states to enact exceptions and limitations that are in the broader social interest. The Three-Step Test is the

12. *See infra* Part II.

13. Berne Convention for the Protection of Literary and Artistic Works art. 9(2), Sept. 9, 1886, 331 U.N.T.S. 217 [hereinafter Berne Convention]; *see also* Agreement on Trade-Related Aspects of Intellectual Property Rights art. 13, Jan. 1, 1995, 1869 U.N.T.S. 299 [hereinafter TRIPS].

14. *See infra* Part II.

15. *See infra* Part II.B.

16. *Id.*

17. *Id.*

18. *Id.*

fulcrum of this balancing project; and the Fair Use doctrine is generally seen to pass the Balanced Interpretation of the Test.[19] National lawmakers, therefore, cite the Balanced Interpretation as evidence that enacting Fair Use will not breach international obligations.

This Essay analyzes the Balanced Interpretation of the Three-Step Test. Advocates of the Balanced Interpretation make a bold doctrinal argument: When the Three-Step Test is "correctly" interpreted, the Balanced Interpretation is the legitimate description of states' legal obligations.[20] Supporters of the Traditional Interpretation criticize this claim. Traditionalists argue that the Balanced Interpretation cannot be the right interpretation of the Three-Step Test because it contradicts an important WTO panel

19. *Id.*

20. Some commentators have characterized this argument as a "Legal Realist" argument, *see e.g.* Jerome H. Reichman & Ruth L. Okediji, *When Copyright Law and Science Collide: Empowering Digitally Integrated Research Methods on a Global Scale*, 96 MINN. L. REV. 1362, 1455 (2012) (praising the Balanced Interpretation for introducing "a healthy dose of legal realism into the traditional positivism surrounding European copyright jurisprudence"). If by "realism" such commentators simply mean that the authors of the Balanced Interpretation recognize a connection between law and politics, then there is no serious problem in calling the Balanced Interpretation's argument "realist." However, labeling this argument as a Realist argument would conflict somewhat with how the "Realism" and "Formalism" terms typically are used in legal philosophy literature. In this literature, "Realism" and "Formalism" are theories of adjudication. Formalism stands for the belief that laws can be applied by a judge to determine a uniquely correct answer to a question of law; Realism by contrast argues that laws are indeterminate and thus to decide questions of law, judges necessarily need recourse to non-legal concerns. *See e.g.* HLA HART, THE CONCEPT OF LAW 124-154 (2012, 3d ed); Brian Leiter, *Positivism, Formalism, Realism*, 99 COLUM. L. REV. 1138, 1144-1153 (1999). If we adopt this terminology, then the arguments advanced by many supporters of the Balanced Interpretation are Formalist: the argument they offer is that there is a correct legal interpretation of the Three-Step Test, i.e. the Balanced Interpretation, and that those adopting an alternative interpretation (including WTO panels), such as the more traditionalist interpretation, are making some form of legal error. Furthermore, as discussed below, *infra* Part II.C., this position is open to the usual criticism leveled against Formalist claims, i.e. that such arguments are merely masks for hidden normative judgments. By contrast, a "Realist" argument would be to say the Three-Step Test has no determinate meaning, and that interpreting the test requires the interpreter to have recourse to some form of extra-legal considerations (such as normative value). It is the Formalist claim made on behalf of the Balanced Interpretation that this Essay examines.

report – one of the few authorities to interpret the Three-Step Test's meaning – and is inconsistent with some of the intentions of the international copyright lawmakers who originally drafted the provision.[21] Traditionalists argue that the Balanced Interpretation is therefore not really an interpretation at all, but a disguised normative argument and reform proposal. The question, therefore, is: Can the doctrinal claim made in support of the Balanced Interpretation be defended against this critique? Note, the question is not which interpretation is simply the most normatively attractive? Nor is the question, given the vagueness and ambiguity of the Three-Step Test's wording, which interpretation ought judges or national policymakers, in their discretion, to adopt? Instead, this Essay takes seriously the claim, made by the Balanced Interpretation's supporters, that the Balanced Interpretation is the correct legal interpretation of the Three-Step Test, and asks whether this can be defended in light of the traditionalist criticism.

This Essay argues that in order to defend the Balanced Interpretation's doctrinal claim, then one must adopt some version of, what this Essay calls, the "Interpretive Argument."[22] Broadly, jurists divide into three schools on the issue of treaty interpretation: textualist, intentionalist, and teleological.[23] It is hard to defend the doctrinal claims made on behalf of the Balanced Interpretation on the grounds of textualism or intentionalism: the ordinary meaning of the treaty wording is too ambiguous to provide conclusive support for the Balanced Interpretation; and arguably the drafters of the original Three-Step Test intended a more restrictive provision than that envisioned by the Balanced Interpretation. If the Balanced Interpretation is to be proclaimed the correct interpretation, then it must rest on a more teleological approach to treaty interpretation which favors the provision's "purpose" over text and intent.[24]

Within the realm of teleological approaches to legal interpretation, strongest support for the Balanced Interpretation comes from a teleological approach found more commonly at the national level:

21. *See infra* Part II.C.
22. *See infra* Part III.
23. *See infra* Part III.A.
24. *Id.*

Legal Interpretivism.[25] Legal Interpretivism – developed primarily by Ronald Dworkin – argues that law is not merely a social construct, but is a partly moral enterprise. Therefore, when interpreting the content of law on a given issue (whether that be construing a line of cases, interpreting a statute, or indeed reading a treaty provision), one must take into account the most normatively defensible purpose justifying the relevant area of law. Legal interpretation is thus a creative process whereby lawyers aim to produce a "constructive interpretation" guided by underlying normative principles. [26] The goal of such a creative process is ultimately to find the interpretation which shows the provision in its "best light." [27]

When viewed through an Interpretivist lens, the doctrinal claim made by supporters of the Balanced Interpretation is at its most persuasive.[28] The most normatively defensible purpose of international copyright law is that such regulation harmonizes national copyright standards in a way that will balance the rights of owners and users in order to maximize society's interests. From the standpoint of Legal Interpretivism, this justification must therefore be used as the guiding light when interpreting the Three-Step Test, and ambiguities in the text must be resolved in a way that favors this purpose. On Interpretivist grounds therefore, the Balanced Interpretation is arguably the correct interpretation of the Three-Step Test, because only this interpretation gives effect to the most normatively defensible purposes of international copyright law, and thus presents the Test in its "best light."

The significance of the Interpretive Argument is three-fold. First, if persuasive, it supports the claim that the Balanced Interpretation is the correct legal interpretation of the Three- Step Test. Second, the Interpretative Argument enables a rational response to some traditionalist criticisms.[29] For example, in response to the traditionalist claim that the Balanced Interpretation is really a disguised normative reform proposal, supporters of the Balanced

25. *Id.*

26. RONALD DWORKIN, LAW'S EMPIRE 45-87 (1986).

27. *Id.* at 90 (stating that theories of law "try to show legal practice as a whole in its best light, to achieve equilibrium between legal practice as they find it and the best justification of that practice.").

28. *See infra* Part III.B.

29. *Id.*

Interpretation could counter argue that they are not proposing legal reform, but instead re-aligning the Test's interpretation to conform to the normative values justifying international copyright law as a whole. In response to the traditionalist argument that the Balanced Interpretation does not fit some aspects of the WTO panel report, or the intentions of some of the drafters, supporters of the Balanced Interpretation could counter-argue that the right interpretation need not be consistent with all aspects of the Test's history in order to be, overall, the interpretation most capable of showing the Test in its "best light." And third, by introducing the Interpretive Argument, this Essay clarifies and highlights the methodological and jurisprudential commitments of the supporters of this interpretation.[30]

Note, however, what is *not* riding on the strength of the Interpretive Argument. If one finds the Interpretive Argument unpersuasive, and thus presumably that the Balanced Interpretation's doctrinal claim fails, then one could still legitimately claim either: (i) that the Balanced Interpretation presents the most normatively attractive vision for the Three-Step Test and that states have the freedom to alter international copyright norms to adopt this new rule (the Normative Argument); or (ii) that, given the Three-Step Test's wording and history are indeterminate, the Balanced Interpretation is one of many legitimate doctrinal interpretations from which judges and national policy makers could, in their discretion, choose to adopt as they prefer (the Discretion Argument).[31]

The Essay is in three parts: Part II summarizes the debate regarding the interpretation of the Three-Step Test. It introduces the so-called "Traditional" and "Balanced" Interpretations, and explains how they apply to the question of Fair Use. This Essay adopts the terms "Traditional" and "Balanced" because these terms reflect how supporters perceive these interpretations. The "Traditional" Interpretation, for example, is so-named here, not because it is necessarily more traditional, but because its advocates often claim that it is. Part III introduces the "Interpretive Argument" to support the Balanced Interpretation. Finally, Part IV considers challenges to the Interpretive Argument, and briefly develops the alternative Normative Argument and Discretion Argument.

30. *Id.*
31. *See infra* Part IV.

# II. TRADITIONAL VERSUS BALANCED INTERPRETATIONS OF THE THREE-STEP TEST

May a state adopt a Fair Use doctrine without breaching international copyright obligations? The answer depends on whether the Fair Use doctrine passes the "Three-Step Test." Sadly, there is little consensus on what the Three-Step Test requires. Part I of this Essay summarizes the so-called "Traditional" and "Balanced" Interpretations of the Three-Step Test and their respective answers on the question of Fair Use's legitimacy. Part I then describes an important criticism of the Balanced Interpretation.

## A. DOES FAIR USE PASS THE THREE-STEP TEST?

The "Three-Step Test" determines what copyright exceptions and limitations states may enact.[32] The Berne Convention on Literary and Artistic Works, first signed in 1886, requires all member states to give authors an exclusive legal right to reproduce their expressive works.[33] In 1967, the parties revised the Convention to include a provision determining what exceptions and limitations to the authors' reproduction right would be permitted.[34] Article 9(2) of the Berne Convention, now known as the Three-Step Test, states:

> It shall be a matter for legislation in the countries of the Union to permit the reproduction of such works in certain special cases, provided that such reproduction does not conflict with a normal exploitation of the work, and does not unreasonably prejudice the legitimate interests of the author.[35]

The international community further embedded the Three-Step Test into international copyright law in the 1990s. To join the World Trade Organization, states are required to ratify the 1994 Agreement

32. *See* JANE GINSBURG & SAM RICKETSON, INTERNATIONAL COPYRIGHT AND NEIGHBOURING RIGHTS: THE BERNE CONVENTION AND BEYOND 759-783 (2010) (providing commentary on Article 9(2) of the Berne Convention).

33. Berne Convention, *supra* note 13, art. 9.

34. *Id.*

35. Berne Convention, *supra* note 13, art. 9(2).

on Trade Related Aspects of Intellectual Property (TRIPS).[36] Article 13 of TRIPS states that member states shall "confine limitations . . . [to]exclusive rights . . . [and] certain special cases which do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the right holder."[37] Accordingly, the Three-Step Test determines not only how states may limit an author's right of reproduction, but rather restricts how states may limit any authorial right, including rights to distribute, adapt, perform, or display a work. Finally, in 1996, the Three-Step Test was also included in the World Intellectual Property Organization's "Internet Treaties," designed to regulate copyright in the digital age. [38]

The Fair Use Doctrine is a limit to copyright protection.[39] Fair Use permits the copying of an expressive work without the copyright owner's consent provided that the copying and subsequent use of the expressive work is "fair." [40] What qualifies as a "fair" use is not precisely defined. Rather the concept of "fair use" is left deliberately vague.[41] Through the twentieth-century only the U.S.A. adopted this unique copyright limitation.[42] The Fair Use doctrine originated in the 1841 case of *Folsom v Marsh*,[43] and was later codified in §107 of the U.S. Copyright Act 1976.[44] This section provides some illustrative examples of uses that may be "fair," including research, teaching, criticism, and related uses.[45] It also provides a non-exhaustive list of

36. TRIPS, *supra* note 13.

37. *Id.*

38. World Intellectual Property Organization Copyright Treaty, art 10., Dec. 20, 1996, 828 U.N.T.S. 221 [hereinafter WIPO Copyright Treaty]. ; *see also* WIPO Performances and Phonograms Treaty art. 16, Dec. 20, 1996, 2186 U.N.T.S. 203 [hereinafter WPPT].

39. 17 U.S.C. §107.

40. *Id.*

41. H.R. REP. NO. 94-1476, at 65 (1976) ("there is no disposition to freeze the doctrine in the statute"); *see also* Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 584 (1994) ("Congress resisted attempts to narrow the ambit of this traditional enquiry by adopting categories of presumptively fair use, and it urged courts to preserve the breadth of their traditionally ample view of the universe of relevant evidence.").

42. Decherney, *supra* note 1, at 146 ("[f]or 150 years, fair use was a solely American doctrine.").

43. 9 F. Cas. 342, 344 (C.C.D. Mass. 1841).

44. 17 U.S.C. §107.

45. *Id.*

factors that judges ought to consider when determining whether a use is fair: the purpose and character of the use, the nature of the copyrighted work, the amount of expression copied, and the effect of the copying upon the market or value for the original work.[46] By leaving the "fairness" concept vague, the law retains flexibility to keep pace with technological change. Under the doctrine, judges can hold new, technology-enabled uses to be non-infringing "fair" uses, even though Congress did not envision these uses when it passed the 1976 Copyright Act. Since the codification, judges have held many new uses to be fair, including time-shifting of television programs,[47] caching of Internet websites by search engines,[48] creating digital libraries for limited public access,[49] and reverse engineering of computer code,[50] to give just a few examples.[51]

Today many states are adopting this erstwhile American doctrine. Historically, civil law countries allowed the use of copyrighted material without permission only in a small number of precisely defined situations.[52] Section VI of the German Copyright Act, for example, lists 18 permitted "free uses,"[53] such as the making of "transient or incidental" copies as part of a "technical process"[54] and copying "limited parts of works" on a "small scale" for use by schools on a non-commercial basis.[55] These limits to copyright are more precise than the Fair Use approach but also less flexible. Lacking a specific statutory provision, judges faced with new, technologically-enabled uses cannot easily hold such use to be non-infringing.[56] Other common law countries adopt a mid-way "Fair Dealing" solution.[57] Fair Dealing countries allow users to copy a

46. *Id.*
47. Sony Corp. v. Universal City Studios, Inc., 464 U.S. 417, 418 (1984).
48. Field v. Google Inc., 412 F. Supp. 2d 1106, 1107 (D. Nev. 2006).
49. Authors Guild v. Google, Inc., 804 F.3d 202, 229 (2d Cir. 2015).
50. Sega Enterprise Ltd. v. Accolade, Inc., 977 F.2d 1510 (9th Cir. 1992).
51. For greater discussion, *see* Pamela Samuelson, *Unbundling Fair Uses*, 77 FORDHAM L. REV. 2537, 2619 (2009).
52. *See* Samuel Ricketson, *WIPO Study on Limitations and Exceptions of Copyright and Related Rights in the Digital Environment*, 67-73 SCCR/9/7 (Apr. 5, 2003) (comparing "closed list" and other approaches to copyright exceptions).
53. Urheberrechtsgesetz [UrhG][Copyright Act], § 6 (Ger.).
54. *Id.*
55. *Id.* at § 44a.
56. *Id.* at § 46.
57. LIONEL BENTLY & BRAD SHERMAN, INTELLECTUAL PROPERTY LAW 223

work without permission provided the copying is in aid of some exclusive, statutorily defined purposes.[58] For example, the U.K. allows "fair dealing" with copyrighted works for purposes of non-commercial research, study, criticism, review, or news reporting.[59] The Fair Dealing approach is thus more limited than the Fair Use approach because the number of uses that may be permitted is limited to a small class of purposes, although judges have flexibility to decide what constitutes a "fair" amount of copying for those purposes.[60] Still, in the current information age, many countries have perceived the need for greater flexibility in their domestic copyright law. To ensure their law keeps pace with technological change, countries such as Israel,[61] South Korea,[62] and Philippines[63] have adopted Fair Use doctrines, while others like Australia[64] and Ireland[65] have recommended its adoption. Other jurisdictions, such as the U.K.[66] and the E.U.,[67] are considering Fair Use but have, so far, only recommended trying to recreate the flexibility of Fair Use within their existing legal frameworks.[68]

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(2014); *see also* Giuseppina D'Agostino, *Healing Fair Dealing? A Comparative Copyright Analysis of Canada's Fair Dealing to U.K. Fair Dealing and U.S. Fair Use*, 53 MCGILL L.J. 309, 312-14 (2008).

58. Copyright, Designs and Patents Act ¶ 29-30 (1988) (Eng.).

59. *Id.*

60. BENTLY & SHERMAN, *supra* note 57, at 224 (stating that "[t]he restricted approach adopted in the United Kingdom should be contrasted with US copyright law, which has a general defense of fair use such that if the court is satisfied that the use is fair, then there will be no infringement."); *see also* JONATHAN BAND & JONATHAN GERAFI, THE FAIR USE/FAIR DEALING HANDBOOK (2013), http://infojustice.org/wpcontent/uploads/2013/03/band-and-gerafi-2013.pdf (extrapolating on the evolution of fair use statutes).

61. Israel Copyright Act § 19.

62. South Korean Copyright Act § 35*ter*.

63. Philippines Intellectual Property Code § 185 (providing fair use protections for comment, criticism, reporting, and teaching based on copyrighted works).

64. *See Copyright and the Digital Economy*, ALRC Report 122, paras 11.77-11.84 (highlighting the Australian Law Reform Commission's endorsement of fair use protections for use of copyright material for non-expressive purposes).

65. *See* COPYRIGHT REV. COMM., *supra* note 10, at 89 (discussing whether a US-style Fair Use doctrine would be appropriate for Ireland).

66. *See* HARGREAVES, *supra* note 11, at 45-46.

67. P. BERNT HUGENHOLTZ & MARTIN R.F. SENFTLEBEN, FAIR USE IN EUROPE: IN SEARCH OF FLEXIBILITIES 2-4 (2012), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2013239.

68. *See* HARGREAVES, *supra* note 11, at 5 (arguing that adopting Fair Use would be unfeasible in the U.K. and that the U.K. can achieve many of these

Therefore, the question is: Does the Fair Use doctrine pass the Three-Step Test? May a country enact a U.S. style Fair Use doctrine consistent with its obligation to allow copyright exceptions only in "certain special cases?" Lawmakers have yet to clearly articulate an answer to this question. In 1967, the U.S. was not party to the Berne Convention. While the U.S. was present at the Revision Conference, very few references are made in the official documents to "Fair Use," none of which explain what the drafters thought regarding the legality of the doctrine under the new standard.[69] The de-restricted documents from the Uruguay Round of trade negotiations leading to TRIPS similarly contain only scattered references to the doctrine.[70] When the U.S. joined the Berne Convention in 1989, it was certainly not forced to abandon the Fair Use doctrine,[71] but nor was the doctrine explicitly endorsed as passing the Test. Later in 1996, when the parties ratified TRIPS, the European Community ("E.C."), Australia, and New Zealand each questioned the U.S. on the legitimacy of Fair Use doctrine under the Three-Step Test.[72] The U.S.

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benefits under existing E.U. law); HUGENHOLTZ & SENFTLEBEN, *supra* note 67, at 29.

69. *See e.g.* WORLD INTELLECTUAL PROPERTY ORGANIZATION, RECORDS OF THE INTELLECTUAL PROPERTY CONFERENCE OF STOCKHOLM 860, 978 (1967) [hereinafter WIPO Stockholm Records]. (highlighting when discussion of the reproduction of copyrighted materials for news reporting hinted at Fair Use).

70. Negotiating Group on Trade-Related Aspects of Intellectual Property Rights, Including Trade in Counterfeit Goods, *Meeting of Negotiating Group 12-14 September 1988*, GATT Doc. MTN.GNC/NG11/9, 8 (Oct. 13, 1988) [hereinafter Negotiating Group on Trade-Related Intellectual Property 1]; *see also* Negotiating Group on Trade-Related Aspects of Intellectual Property Rights, Including Trade in Counterfeit Goods, *Existence, Scope and Form of Generally Internationally Accepted and Applied Standards/Norms for the Protection of Intellectual Property*, GATT Doc. MTN.GNG/NG11/W/24, 23 (May 5, 1988) [hereinafter Negotiating Group on Trade-Related Intellectual Property 2] (explaining commonly applied national provisions within copyright law).

71. The U.S. joined the Berne Convention by enacting the Berne Convention Implementation Act Pub.L. 100-568, 102 Stat. 2853. For discussion of the US accession to the Berne Convention and Fair Use, see Ruth Okediji, *Toward an International Fair Use Doctrine*, 39 COLUM. J. TRANSNAT'L L. 75, 105 (2000) (noting that the United States did not change this aspect of domestic law, although other parts of domestic law were changed).

72. *See, e.g.*, Council for Trade-Related Aspects of Intellectual Property Rights, *Review of Legislation on Copyright and Related Rights United States*, WTO Doc. IP/Q/USA/1 at 2, 4, 18 (Oct. 30, 1996); *See generally* Okediji, *supra* note 71, at 116 (discussing the questions presented to the USA regarding Fair Use

delegates defended Fair Use arguing that it embodied "essentially the same goals as Article 13 of TRIPS"[73] and is "applied and interpreted in a way entirely congruent with the standards set forth in that Article."[74] Ultimately, however, the European Community, Australia, and New Zealand dropped the issue, and it never reached a tribunal or court. Accordingly, the answer today still depends largely on how one interprets the Three-Step Test. This interpretation remains hotly contested.

## B. TWO ANSWERS: THE "TRADITIONAL" AND "BALANCED" INTERPRETATIONS

Two interpretations of the Three-Step Test exist: the so-called "Traditional" and "Balanced" Interpretations. Those who adopt the Traditional Interpretation typically find Fair Use fails to pass the Three-Step Test; those who adopt the Balanced Interpretation reach the opposite conclusion.

### *1. The Traditional Interpretation*

According to the Traditional Interpretation, the purpose of the Berne Convention Revision was to increase worldwide copyright standards, and to ensure authors enjoy a high level of legal protection. As stated in the preparatory documents created by The United International Bureaux for the Protection of Intellectual Property (BIRPI), the purpose of the Stockholm Revision was "the enlargement of the protection granted to authors by the creation of new rights or by the extension of rights which are already recognized."[75] The enlargement goal was executed by the introduction of Article 9 and the right of reproduction. According to BIRPI, "it was obvious that all forms of exploiting a work which had, or were likely to acquire, considerable economic or practical importance must in principle be reserved to the authors and "exceptions that might restrict the possibilities open to authors in

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and article 13 TRIPS).

73. *See* Council for Trade-Related Aspects of Intellectual Property Rights, *supra* note 72, at 4; Okediji, *supra* note 71, at 117.

74. Council for Trade-Related Aspects of Intellectual Property Rights, *supra* note 72, at 4.

75. WIPO Stockholm Records, *supra* note 69, at 80.

these respects were unacceptable."[76] Subsequently, this high-protectionist goal has been criticized. Ruth Okediji, for example, criticizes the progressive "ratcheting up" of copyright protections in each round of Berne Revisions,[77] and the developed nation desire to ensure "near absolute control over reproduction of the protected works."[78]

Those who favor the so-called Traditional Interpretation do not deny that exceptions and limitations play an important role in international copyright law; however, given the overall purpose of increasing worldwide copyright standards, supporters of this interpretation take a conservative stance towards permissible limitations. The BIRPI study, after deciding that exceptions are generally unacceptable, stated that "it should not be forgotten that domestic laws already contained a series of exceptions in favor 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."[79] Rather than abolish such exceptions, the Three-Step Test formula ensures that pre-existing exceptions and limitations remained unscathed.[80] But while the Three-Step Test clearly permits Union members' pre-existing exceptions, the Three-Step Test views new exceptions suspiciously. Scholars have occasionally argued that, consistent with the "strong level of protection that the Berne Convention creates, the three requirements of article 9(2) are cumulatively interpreted to yield the most narrow effect"[81] and that "[b]road exceptions are not sanctioned."[82] To accomplish this, each "step" of the Three-Step Test

76. *Id.* at 111.

77. Okediji, *supra* note 71, at 105. *See also* Okediji, *supra* note 71, at 106 ("By the time of the last substantive Berne Convention revision, the Stockholm Conference of 1967, the scope of *exceptions* to authors' rights had noticeably contracted."). Indeed the "fundamental design objective" of the Berne Convention changed through revisions from a "pan-universal, minimalist treaty" to "one which provided significant substantive provisions for the protection of copyright on a multilateral basis," *Id.* at 109. This trend was arguably even more noticeable in TRIPS. Arguably one of the "cardinal objectives" of TRIPS was to "extend strong intellectual property rules to the rest of the world" *Id.* at 81.

78. *Id.* at 107.

79. WIPO Stockholm Records, *supra* note 69, at 111-12.

80. *Id.*

81. Okediji, *supra* note 71, at 111.

82. *Id.*

is construed as a necessary condition that a national copyright limitation must successfully pass, and is to be interpreted narrowly.

The Traditional Interpretation came to prominence in the year 2000 when it was adopted and formulated in the WTO panel report on §110(5) of the U.S. Copyright Act.[83] In this case, the E.C. challenged a provision of the U.S. Copyright Act, which allowed bars, stores, and restaurants to play broadcast radio and TV music to patrons without the permission of the owners.[84] The E.C. argued that this provision was inconsistent with the Three-Step Test as embodied in Article 13 of TRIPS, and argued that the "objective of the TRIPS Agreement is to reduce or eliminate existing exceptions, rather than to grant new or extend existing ones." [85] But the panel provided no conclusions regarding the purpose of the TRIPS agreement. The Panel did agree that parties should interpret the three steps "cumulatively" as independent, necessary conditions, and interpreted each step in a manner that has subsequently been described as narrow and restrictive.[86] The Panel interpreted the "certain special case" clause as requiring exceptions to be "clearly defined" [87] (to "guarantee a sufficient degree of legal certainty"[88]) and "narrow" in scope [89] (defined by the number of users to whom the exception applies). Copying would conflict with a "normal exploitation" of the work, if it potentially could enter into economic competition with the ways the owner had traditionally extracted, or with "a certain degree of likelihood and probability"[90] could in the

83. *See* Panel Report, *United States – Section 110(5) of the US Copyright Act*, 31-34, WTO Doc. WT/DS160/R (adopted June 15, 2000) [hereinafter Section 110(5) Panel Report].

84. *See id.* at 2-3 (noting that the dispute concerned Section 110(5) of the Copyright Act which limited exclusive ownership rights by allowing radio and television broadcasts of copyrighted materials).

85. *Id.* at 28.

86. *Id.* at 27 (noting that new limitations or exceptions to copyright ownership rights can only be made if they satisfy all three conditions of the Three-Step Test).

87. *See id.* at 33 (highlighting that while "certain, special cases" must be clearly defined, this does not mean that each and every possible situation must be explicitly named but that the scope of the exception is known and particularized).

88. Section 110(5) Panel Report, *supra* note 83, at 33.

89. *See id.* (arguing that the use of the word "special" means that any exceptions or limitations must be narrow in application or exceptional in scope).

90. *Id.* at 48.

future extract, "economic value"[91] from the work. Finally, such copying would "unreasonably prejudice the legitimate interests" of the owner if it had the "potential to cause an unreasonable loss of income."[92] Section 1105(B), which enabled businesses under a certain square footage to enjoy an exception, failed each of these steps. In particular, the Panel did not consider Section 1105(B) narrow in scope because 70 percent of all eating and drinking establishments, and 45 percent of all retail establishments could benefit from the exemption. Accordingly, it deprived copyright owners of "a major potential source of revenue."[93] The cumulative requirements of clear definition, narrowness in scope, and the absence of negative market effect now or sometime in the future formed a high burden that the "business exemption" could not overcome.

A number of scholars have applied the "Traditional Interpretation" of the Three-Step Test to the question of Fair Use and concluded that the doctrine fails to pass the test. Writing in 2000, Okediji found a number of challenges to Fair Use under the WTO panel's reasoning.[94] First, the requirement that the limitation be well-defined, and thus provide a sufficient degree of legal certainty, is problematic because the "only certainty involved in construing fair use is uncertainty in how a court will ultimately rule."[95] As a vague, flexible standard the Fair Use concept is one of the least predictable in U.S. law and one of the least predictable exceptions in global copyright.[96] Second, the Fair Use doctrine may not be a "special

91. *Id.*

92. *Id.* at 59.

93. *Id.* at 54-55.

94. *See* Okediji, *supra* note 71, at 117 (finding there are "at least three potential arguments to support the supposition that the fair use doctrine violates Article 9(2) of the Berne Convention and, de facto, Article 13 of the TRIPS Agreement"); those arguments are the indeterminacy of fair use, the breadth of fair use, and fair use's potential nullification and impairment of expected benefits. Okediji does note, however, that it is unlikely that these arguments would ever result in an international challenge to the doctrine. The overall conclusion is that, under the more Traditionalist interpretation, the "status of the fair use doctrine under international law is, at best, uncertain despite averments to the contrary by the United States." *Id.* at 87.

95. *Id.* at 118.

96. Some scholars have previously criticized the Fair Use doctrine for such lack of predictability, *see e.g.* LAWRENCE LESSIG, FREE CULTURE: HOW BIG

case" in terms of the overall number of copiers it exempts.[97] The Fair Use doctrine is broad and exempts a highly heterogeneous set of copying, and, unlike other U.S. copyright limits, "is unlimited in the scope of users because it is a defense potentially available to every defendant in a claim for copyright infringement."[98] Finally, in some cases, copying that causes economic competition with the copyright owner may still be considered "fair."[99] While negative market effect is a strong factor against a finding of fair use, it is not conclusive proof of unfairness, and may be outweighed by countervailing considerations.

The fact that the Fair Use doctrine appears to fail the Three-Step Test under the "Traditional" Interpretation begs the question: Why was the U.S. allowed to join the Berne Union without amending §107 of the Copyright Act? Okediji suggests one possibility: that other Union members were "willing to accept less than full compliance in exchange for the increased importance that U.S. accession would bring to the Berne Convention."[100] Nevertheless, despite her conclusion that, as a descriptive matter, Fair Use arguably fails the Three-Step Test as interpreted by the WTO panel, Okediji supports the Fair Use doctrine normatively.[101] Unlike others analyzing the issue from the Traditional Interpretation, Okediji finds the Fair Use doctrine beneficial to the public interest and accordingly advocates that international copyright norms ought to be altered to permit the limitation.[102]

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MEDIA USES TECHNOLOGY AND THE LAW TO LOCK DOWN CULTURE AND CONTROL CREATIVITY 187 (2004) (noting that Fair Use is so unpredictable that it is only the "right to hire a lawyer"). Other scholars have noticeably reacted against such views and pointed out that Fair Use is more predictable than some have previously suggested, *see* Barton Beebe, *An Empirical Study of U.S. Copyright Fair Use Opinions*, 156 U. PA. L. REV. 549 (2008); Neil Weinstock Netanel, *Making Sense of Fair Use*, 15 LEWIS & CLARK L. REV. 715 (2011); Matthew Sag, *Predicting Fair Use*, 73 OHIO ST. L.J. 47 (2012); Samuelson, *supra* note 51. However, while clearly outcomes are to an extent predictable, Fair Use is nevertheless the one of the most unpredictable doctrines known to US domestic, or international copyright, law.

97. *See* Okediji, *supra* note 71, at 119.

98. *Id.* at 128.

99. *Id.* at 130.

100. *Id.* at 114-15.

101. *See id.* at 151-72 (providing an argument that international copyright law should adopt a form of "international fair use doctrine").

102. *Id.*

### *2. The Balanced Interpretation*

Reacting in part to the WTO panel report, some scholars propose an alternative "Balanced Interpretation" of the Three-Step Test. Two primary sources of this interpretation are Martin Senftleben's monograph, COPYRIGHT, LIMITATIONS, AND THE THREE-STEP TEST,[103] and the DECLARATION ON THE BALANCED INTERPRETATION OF THE "THREE-STEP TEST" IN COPYRIGHT LAW (the Munich Declaration),[104] prepared by the Max Planck Institute for Intellectual Property and Queen Mary's School of Law, and later signed by 50 intellectual property researchers. This interpretation confirms the legitimacy of Fair Use.[105]

According to the Balanced Interpretation, the purpose of the Berne Convention, TRIPS, and other international copyright treaties is not merely to increase worldwide copyright protection, but to ensure an effective and appropriate "balance of interests" between copyright owners and others in society.[106] Senftleben's monograph, and the Munich Declaration diverge slightly regarding what normative values are to be used in measuring the appropriateness of the balance. Senftleben adopts a deontological normative baseline of "intergenerational equality" in which authors are naturally entitled to own their creative works so long as ownership leaves "enough and as good" in common" for later authors to create.[107] The Munich Declaration, in contrast, suggests that copyright's purpose is to "benefit the public interest" and hints that an appropriate balance is one that maximizes the interests or preferences of all members of

103. MARTIN SENFTLEBEN, COPYRIGHT, LIMITATIONS, AND THE THREE-STEP TEST (Kluwer 2004) [hereinafter Senftleben].

104. Christophe Geiger, Jonathan Griffiths & Reto Hilty, *Towards a Balanced Interpretation of the "Three-Step Test" in Copyright Law,* 30 E.I.P.R. 489 (2008) [Hereinafter "Munich Declaration"].

105. Other less restrictive interpretations of the Three-Step Test can be found in, e.g. Daniel J. Gervais, *Towards a New Core International Copyright Norm: The Reverse Three-Step Test*, 9 MARQ. INTELL. PROP. L. REV. 1, 28 (2005) (arguing for a reverse three-step approach focusing on the effect on the rights holder).

106. Munich Declaration, *supra* note 104, at 492.

107. SENFTLEBEN, *supra* note 103, at 34-42. In effect, Senftleben adopts a Lockean normative theory of copyright. *See generally*, Wendy Gordon, *A Property Right in Self-Expression: Equality and Individualism in the Natural Law of Intellectual Property*, 102 Yale L.J. 1533 (1993).

society.[108] Both sources agree that the Traditional Interpretation does not achieve the "appropriate balance" of interests.[109] The Traditional Interpretation prevents states from enacting limitations that fundamentally undermine incentives to create new works. Unfortunately, the restrictive Traditional Interpretation prevents states from enacting some limitations, such as Fair Use, to ensure an appropriate balance of interests, especially in the current information age.[110] This new theory therefore "proposes an appropriately balanced interpretation of the Three-Step Test under which existing exceptions and limitations within domestic law are not unduly restricted and the introduction of appropriately balanced exceptions and limitations is not precluded." [111]

The "appropriately balanced" interpretation differs from the Traditional Interpretation in two ways. First, the three steps are not read as cumulative or necessary conditions but rather require a "comprehensive overall assessment."[112] When assessing whether a limitation passes the Three-Step Test, the decision maker must first assess how the limitation fairs under each individual step, and then weigh the conclusions reached under each step against one another in a final analysis. This allows the decision maker to hold that if the limitation passes two of the steps but fails one then, on balance, it should potentially be allowed to pass the Three-Step Test's overall

108. Munich Declaration, *supra* note 104, at 493.

109. *See* SENFTLEBEN, *supra* note 103, at 81-82 (noting the dualist character of the Three-Step Test; designed both to preserve limitations existing at the time of the 1967 Stockholm Conference as well as to preserve the author's right to control reproduction of the copyrighted work); Munich Declaration, *supra* note 119, at 492 (stating "[t]he Three-Step Test has already established an effective means of preventing the excessive application of limitations and exceptions . . . [h]owever, there is no complementary mechanism prohibiting an unduly narrow or restrictive approach.").

110. *See* Munich Declaration, *supra* note 104, at 490-91 (arguing that the restrictive nature of the traditional approach may hinder policy-makers in responding to technological change and make it more difficult to respond to the interests of economic competition and creators and performers who might use the work).

111. *Id.* at 494.

112. Munich Declaration, *supra* note 104, at 495 (highlighting that the three steps are to be considered together and as a whole). *See also* Christophe Geiger et al, *The Three Step Test Revisited: How to Use the Test's Flexibility in National Copyright Law,* 29 AM. U. INT'L L. REV. 581, 585 (2014) (defending a view that the three steps are not separate although they should be considered sequentially).

assessment.[113] Second, the Balanced Interpretation differs in its interpretation of each individual step. The Balanced Interpretation disagrees that "certain special cases" require a limitation that should call for both a clear definition and a narrow scope. The Munich Declaration interprets the first step as simply requiring that the application of the limitation be "reasonably foreseeable."[114] Senftleben's analysis adds some more complexity. In Senftleben's interpretation, the "certainty" term only requires that the limitation clearly indicate "some" uses that are privileged,[115] and the "specialness" requirement is fulfilled if the limitation fulfills some "clear reason of public policy" and thus "rests on a rational justificatory basis."[116] The Balanced Interpretation also disagrees that any actual or potential economic competition in a current or reasonably plausible future market conflicts with a normal exploitation.[117] Rather the Balanced Interpretation finds that defining "normal" expectation must take into account competing considerations such as the beneficial effect of competition.[118] Similarly, when defining what qualifies as unreasonable prejudice to the author's legitimate interests, the analysis must account for the human and fundamental rights of others, as well as the public interest in social and scientific progress.[119] The divergences between the Traditional and Balanced Interpretations are summarized in Table 1.

**TABLE 1: SUMMARY OF TRADITIONAL AND BALANCED INTERPRETATIONS**

113. *See* Munich Declaration, supra note 104, at 495 (stating that the three steps are an "indivisible entirety" to be taken together during assessment of whether a limitation passes or fails the tests).

114. Munich Declaration, *supra* note 104, at 495.

115. SENFTLEBEN, *supra* note 103, at 133-37.

116. *Id.* at 137-38.

117. Munich Declaration, *supra* note 104, at 490.

118. *Id.* at 495 (stating that limitations and exceptions do not conflict with a normal exploitation of protected subject matter if they "are based on important competing considerations").

119. *Id.* (declaring that the Three-Step Test should be interpreted in a manner respecting the legitimate interest of third parties including "interests deriving from human rights and fundamental freedoms" and "other public interests, notably in scientific progress and cultural, social, or economic development").

| | **Traditional Interpretation** | **Balanced Interpretation** |
|---|---|---|
| **Purpose** | Ensure High Level of Author Rights Protection | Appropriate Balance of Interests |
| **Interrelationship of Steps** | Cumulative Conditions | Comprehensive Overall Assessment |
| **1. Certain Special Cases** | Clear Definition + Narrow Scope | Reasonable Foreseeability OR Some uses privileged for policy reasons |
| **2. Normal Exploitation** | Actual or Potential, Present or Future, Economic Competition | Unreasonable Economic Competition |
| **3. Unreasonable Prejudice to Legitimate Interest** | Unreasonable Loss of Income | Unreasonable Loss of Income, taking into account Third Party Interests |

The Fair Use doctrine passes the Balanced Interpretation of the

Three-Step Test. The *Declaration* finds that the certain special case requirement does not prevent legislatures from introducing "open ended limitations" so long as their scope is reasonably foreseeable.[120] The *Declaration* states this is of "particular importance in the common law world, in which "fair use" and "fair dealing" provisions have traditionally functioned as mechanisms of balancing the interests" of owners and users, suggesting the U.S. Fair Use doctrine passes the reasonable foreseeability test.[121] Senftleben concurs that the U.S. style Fair Use doctrine is limited to certain special cases.[122] Not only legislatures, but also courts can indicate which uses fall within the exception. The U.S. Fair Use doctrine is sufficiently certain, therefore, because over time courts have identified a clear group of uses that are privileged.[123] Furthermore, regarding the "special case" requirement, Senftleben concludes that, because the Fair Use doctrine has some underlying policy rationale, it "appears not unreasonable to assume that on balance, the fair use doctrine meets this qualitative standard."[124] Finally, the argument for Fair Use's legitimacy is strengthened by the Balanced Interpretation's claim that a limitation need not pass every step in order to pass the Three-Step Test overall.[125] The Fair Use doctrine is a necessary doctrinal tool that enables countries to define what qualifies as a "normal exploitation" of the work, as well as what the "legitimate interests of authors" are, in a world where technological change prevents legislatures from setting precise copyright rules far in advance. Therefore, to the extent the doctrine fails the first step, it may still pass muster under the Three-Step Test overall.

Subsequently, a number of countries have relied on the Balanced Interpretation to justify their decision to adopt, or propose the adoption of, a Fair Use doctrine. The Australian Law Reform Commission[126] and the Irish Copyright Commission[127] both cite to

120. *Id.*
121. *Id.* at 491.
122. SENFTLEBEN, *supra* note 103, at 112.
123. *Id.* at 166 (using U.S. fair use doctrine towards "criticism, comment, news reporting, teaching, scholarship, or research").
124. *Id.* at 167.
125. *See* Munich Declaration, *supra* note 104, at 491 (describing the test as functioning "as an indivisible entity and that, accordingly, one particular 'step' cannot function as a 'showstopper'").
126. *Copyright and the Digital Economy*, ALRC Report 122, para 4.147.

the Declaration and Senftleben's monograph to support their conclusion that Fair Use complies with the Three-Step Test. The new approach also has considerable impact in copyright reform debates of other countries, such as the UK.[128]

### C. THE CRITIQUE OF THE BALANCED INTERPRETATION

Advocates of the WTO approach have subsequently criticized the Balanced Interpretation. Supporters of the Traditional Interpretation argue the Balanced Interpretation is not an interpretation at all, but a reform proposal in disguise. Former WIPO Assistant Director General Mihály Ficsor argues that "[w]hat [the *Declaration* drafters] truly aimed for is not just "correcting" the above-outlined consistently followed "traditional" interpretation but rather *changing the relevant international norms under the guise of a new interpretation.*"[129] Likewise, André Lucas accuses the *Declaration* drafters of concocting an interpretation of the Three-Step Test that is not based on treaty language or history, but rather on the "desire to legitimize" the U.S. Fair Use Doctrine. [130] This critique can be broken down into two parts.

First, critics argue that the Traditional Interpretation is more consistent with the relevant legal sources.[131] The Vienna Convention on the Law of Treaties ("VCLT") requires that treaty parties interpret provisions in "accordance with the ordinary meaning," taking into account relevant context and the treaty's object and purpose. [132] Arguably the purpose behind the Stockholm Revision Conference was to ensure copyright owners a strong level of protection. As the BIRPI preparatory study suggested, the goal was to ensure that "all

127. COPYRIGHT REVIEW COMM., DEP'T OF JOBS, ENTER., & INNOVATION., COPYRIGHT AND INNOVATION: A CONSULTATION PAPER 123 (2012).

128. Supra note 11.

129. Mihály J. Ficsor, "Munich Declaration" on the Three-Step Test - Respectable Objective; Wrong Way to Try to Achieve It 13 (May 11, 2012) (unpublished manuscript), http://www.copyrightseesaw.net/archive/?sw_10_item=15.

130. André Lucas, *For a Reasonable Interpretation of the Three-Step Test,* 32 EUROPEAN INTELL. PROP. REV. 277, 279 (2010).

131. *See* Ficsor, *supra* note 129, at 15 (arguing that the Three-Step Test does not have appropriate legal foundation).

132. Vienna Convention on the Law of Treaties art. 31, *opened for signature* May 23, 1969, 1155 U.N.T.S. 331, 340.

forms of exploiting a work" with potential economic significance ought to be reserved to the authors, while exceptions to that principle were "unacceptable."[133] The "ordinary meaning" of the Three-Step Test's wording seems consistent with that protectionist goal. By requiring that exceptions be limited to "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," the Three-Step Test created a number of necessary, cumulative conditions that a limitation must satisfy in order to be legitimate. Moreover, the few cases in which the Test has been interpreted, the most important being the WTO panel report, follow the restrictive interpretation.[134]

Second, critics argue that the Balanced Interpretation is not really a description of the Three-Step Test's requirements at all, but rather is a thinly veiled argument about what the law ought to be. And certainly, this seems a plausible interpretation of the argument, given the type of rhetoric and evidence used to defend the Balanced Interpretation. The drafters of the Balanced Interpretation support their interpretation, in large part, by appealing to normative value. The central contention is that the new interpretation is more "appropriately balanced" and, ergo, is a more accurate description of what the Three-Step Test really requires.[135] The "appropriateness" of the values is appraised in the light of intergenerational equality (Senftleben) or the maximization of society's aggregate interests (Declaration).[136] From this perspective, the Traditional Interpretation is "*undesirable*" [137] and "*unduly*" [138] narrows the scope of limitations that states may enact.[139] The Balanced Interpretation then proceeds

133. Section 110(5) Panel Report, *supra* note 83, at 28.

134. *E.g.*, Section 110(5) Panel Report, *supra* note 83, at 31 (requiring the three conditions to "apply on a cumulative basis").

135. Munich Declaration, *supra* note 104, at 494 (noting the Declaration's proposal for an "appropriately balanced interpretation of the Three-Step Test" under which exceptions and limitations "are not unduly restricted").

136. SENFTLEBEN, *supra* note 103, at 92-93 (arguing that the use of modern technology for reproduction of works should "not be hindered and its adverse effects on the interests of authors and beneficiaries of neighboring rights should be mitigated by appropriate means of protection").

137. Munich Declaration, *supra* note 104, at 494 (describing "certain interpretations of the Three-Step Test at international level to be undesirable").

138. *Id.* at 491.

139. *Id.*

from this normative value to propose what sound like changes to the dominant Traditional Interpretation. The Declaration concludes the Test "*should* be interpreted"[140] less restrictively in the future and, to that end, "*proposes* an appropriately balanced interpretation of the Tree-Step Test."[141] The overt normative judgment, coupled with the prescriptive solution, certainly make it sound like the Balanced Interpretation is a proposal for changing existing obligations.

## III. THE INTERPRETIVE ARGUMENT FOR THE BALANCED INTERPRETATION

Can the Balanced Interpretation's doctrinal claim be defended in light of the traditionalist criticism? Note, the question is not which interpretation is simply the most normatively attractive[142] nor whether the Balanced Interpretation is one of many legitimate interpretations, but rather whether, in the light of the traditionalists' arguments, the Balanced Interpretation could nevertheless be seen as the correct interpretation of the Three-Step Test? This Part argues that the doctrinal claim could be defended, but to do so requires supporters of the interpretation to adopt some version of, what this Essay calls, the "Interpretive Argument." In a nutshell, this argument proclaims the Balanced Interpretation the correct legal interpretation because it presents the Three-Step Test in its "best light." Section A discusses approaches to international treaty interpretation. Section B then develops the Interpretive Argument.

### A. INTERPRETING THE THREE-STEP TEST

Articles 31 and 32 of the VCLT create a specific hierarchy of considerations to be taken into account when interpreting treaty provisions.[143] Nevertheless, despite this hierarchy, legal writers have

140. *Id.* at 492 (arguing that the Three-Step Test "should be interpreted so as to ensure a proper and balanced application of limitations and exceptions").

141. *Id.*

142. In this author's opinion the Balanced Interpretation is a clearly more normatively attractive vision for the Three-Step Test. If the Berne Convention were to be rewritten, I would prefer to see this version of the Test incorporated. But the question for now is more legalistic: can it be plausibly claimed that the Balanced Interpretation is already an accurate understanding of state obligations under the Test?

143. Vienna Convention on the Law of Treaties art. 31 & art.32, *opened for signature* May 23, 1969, 1155 U.N.T.S. 331, 340.

historically emphasized competing considerations in the interpretive process. Very broadly, three schools of treaty interpretation exist: textualist, intentionalist, and teleological.[144] This Section argues that it is difficult to support the formal-doctrinal claims of the Balanced Interpretation on the grounds of textualism or intentionalism, but that there may be greater support from teleological approaches.

Textualist approaches emphasize the words of the treaty provision.[145] This commitment to textualism is found in article 31 VCLT, which requires that treaty provisions be interpreted in good faith in accordance with the "ordinary meaning" of the terms. The approach, is sometimes seen as epitomized in the famous statement of Vattell: "the first general maxim of interpretation is that it is not permissible to interpret what does not need interpretation."[146] When the ordinary meaning of the provision is clear, there is little need to search further.

However, textualism provides little support for the doctrinal claims of the Balanced Interpretation. In some cases, the "ordinary meaning" of the Three-Step Test is hostile to the Balanced Interpretation. In particular, the text's ordinary meaning fits uncomfortably with the claim that the three steps should be read as a "comprehensive overall assessment."[147] The provision permits copying 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."[148] On the basis of "ordinary meaning" it is difficult to view the steps as anything other than necessary and cumulative conditions. In other cases, the text is not hostile to the Balanced Interpretation, but is too vague and ambiguous to support the formalist claims made on its behalf. For example, the term "certain special cases" is capable of

144. Francis G. Jacobs, *Varieties of Approach to Treaty Interpretation: With Special Reference to the Draft Convention on the Law of Treaties before the Vienna Diplomatic Conference*, 18 INT. & COMP. L. Q. 318, 318-320 (1969); IAN SINCLAIR, THE VIENNA CONVENTION ON THE LAW OF TREATIES 69-76 (1973).

145. Jacobs, *supra* note 144, at 322-323.

146. VATTEL, LE DRIOT DES GENS OU PRINCIPES DE LA LOI NATURELLE para 263 (1758) ("la premiere maxime generale sur l'interpretation est, qu'il n'est pas permis d'intepreter ce qui n'a pas besoin d'interpretation").

147. Munich Declaration, *supra* note 104, at 495.

148. Berne Convention for the Protection of Literary and Artistic Works, *supra* note 13, art. 9.

multiple "ordinary meanings." The "certain special case" requirement could be read either as a requirement that all limitations be clearly defined and narrow in scope, or more modestly, that limitations be confined to some "reasonably foreseeable" instances, and in neither case would we contravene any conventional use of language.[149] In such cases, the Balanced Interpretation's meaning is certainly not ruled out or precluded, but there is not the conclusive support required to proclaim it the sole correct interpretation, and the Traditional interpretation invalid. To support this bolder claim, one must go beyond the text's ordinary meaning.

The second well-known approach is intentionalism.[150] This school emphasizes the actual intentions of the parties. If states are only bound by international obligations based on their consent, then it would follow that, in order to understand the extent of a state's obligations, one must try to find out what rules the state intended to follow. Jurists in this school argue that the *travaux préparatoires* and negotiating history frequently must be consulted to gain insight into the will of the contracting states. However, this approach has historically adopted a secondary role in international treaty interpretation – as evidenced by the fact that the VCLT allows recourse to "supplemental means of interpretation" only when the interpretation would otherwise be ambiguous, obscure, absurd or unreasonable.[151] This reflects concerns over some of the theoretical problems associated with divining the intent of the parties.[152] Frequently there will be no common intention amongst parties, but instead states will each have their own intentions in joining the treaty; what intent should govern in such cases? Furthermore, even in the case where there is a meeting of the minds, frequently the states will not anticipate future developments, making it necessary for jurists to try to extrapolate state intent to the new situation.

Intentionalism does not provide the level of support required to support the Balanced Interpretation as a formal-doctrinal matter. As an initial matter, there is some reason to believe that the parties "intended" the Three-Step Test as a restrictive provision, as

149. Senftleben, *The International Three-Step Test, supra* note 103, at 78.
150. Jacobs, *supra* note 144, at 320-22.
151. Vienna Convention on the Law of Treaties art. 32 (1969).
152. Jacobs, *supra* note 144, at 338-39.

evidenced by the high-protectionist rhetoric surrounding the Test's introduction. As noted earlier, the BIRPI study proclaimed the reason for the Berne revision was the "enlargement of the protection granted to authors by the creation of new rights or by the extension of rights which are already recognized,"[153] and that the "it was obvious that all forms of exploiting a work which had, or were likely to acquire, considerable economic or practical importance must in principle be reserved to the authors."[154] On the question of exceptions, BIPRI concluded that "exceptions that might restrict the possibilities open to authors in these respects were unacceptable."[155] Begrudgingly, the study group admitted that national legislation already contained many exceptions and that "it would be vain to suppose that States would be ready at this stage to do away with this exceptions to any appreciable extent,"[156] leaving open the possibility that this questionable ideal could be obtained in the future.[157]

But even more importantly, it seems unlikely that there was a common intent regarding the meaning of the Test's wording. As Martin Senftleben points out, there is a "dualism" inherent in the Three-Step Test.[158] When the Test was drafted, states adopted a highly heterodox array of exceptions. The Three-Step Test was not, as acknowledged by BIRPI, intended to hack away at these national approaches to copyright scope. The task of the Conference was therefore to find a linguistic formula that would have some "bite" and prevent excessive limitations to the reproduction right, while

153. Section 110(5) Panel Report, *supra* note 83, at 2-3.

154. *Id.*

155. *Id.* at 28.

156. *Id.* at 33.

157. Arguably the parties also intended the steps of the Three-Step Test to be necessary cumulative conditions. *See* WIPO Stockholm Records, *supra* note 69, at 1145-6:

> The Committee also adopted a proposal by the Drafting Committee that the second condition should be placed before the first, as this would afford a more logical order for the interpretation of the rule. If it is considered that reproduction conflicts with the normal exploitation of the work, reproduction is not permitted at all. If it is considered that reproduction does not conflict with the normal exploitation of the work, the next step would be to consider whether it does not unreasonably prejudice the legitimate interests of the author. Only if such is not the case would it be possible in certain special cases to introduce a compulsory license, or to provide for use without payment.

*But see* Geiger et al, *supra* 112 (arguing the steps are sequential without necessarily being separate).

158. SENFTLEBEN, *supra* note 103, at 81-82.

permitting a broad array of traditional national exceptions. Early in the drafting process, the parties attempted to define some specific permissible exceptions. But the parties could not agree what specific uses ought to be exempted. Illustrative is the issue of "private use." Initially "private use" was included as a specifically exempted use, but was removed due to party disagreement: Italy preferred a "personal use" exemption, while France opted for an "individual or family use" formulation.[159] After such debates, the UK proposed simply to adopt a general, abstract formula, rather than try to enumerate specific exceptions. This abstract formula was ultimately adopted.[160] But in so doing, the parties stripped away much of the provision's meaning. The new provision was sufficiently light on substance that it could plausibly cover the great array of different national exceptions that existed, and was so lacking in meaning that it could not be seriously objectionable to any states' national interests. If history demonstrates anything here, it is that the parties intended an ambiguous and vague provision with little concrete rules. It is accordingly difficult to divine more precise meaning for the Test's provisions from party intentions. If meaning is to be found, it would need to come from somewhere other than the parties' intentions.

The final school is the teleological school.[161] In the words of article 31 VCLT the treaty wording should be interpreted in the "light of its object and purpose."[162] Thus ambiguous treaty language is to be interpreted in a way that furthers the fundamental reason or problem the treaty is meant to address. To a certain extent, this inquiry overlaps with the first two schools: the ordinary meaning and party intentions often clearly highlight the object and purpose of a treaty. However, this is not *necessarily* the case.[163] For some treaties, particularly more "organic" or "constitutional" treaties such as the UN Charter, the object and purpose may be construed in the light of subsequent developments. Some scholars, such as Fitzmaurice, have claimed that according to a doctrine of "emergent purpose," the objects and purposes of a treaty are not "fixed and static" but "liable

159. *Id.* at 50-51.
160. *Id.*
161. Jacobs, *supra* note 144, at 323-25.
162. Vienna Convention on the Law of Treaties art. 31 (1969).
163. Jacobs, *supra* note 144, at 319-20.

to change" over time.[164] The purpose used to guide the interpretation are those which the interpreter views the treaty as achieving at time of interpretation, and not necessarily those which existed at the time of the treaty's conclusion. Some have, however, noted this is an "extreme" teleological approach.[165]

Adopting a teleological lens would undoubtedly provide the greatest support for the Balanced Interpretation as a doctrinal matter. Not only are there problems with the competing approaches of textualism and intentionalism, but the authors of the Balanced Interpretation appeal very heavily to the concepts of "appropriate balance" and public interest to justify their conclusions.[166] However, adopting a teleological lens is itself not free from problems. Firstly, there is the question of how do we construe the object and purposes of the Three-Step Test when those objects and purposes are contested? For example, while an appropriate balance of rights and obligations to maximize social interests is the purpose favored by the *Declaration*, not too long ago, in the WTO, the European Community argued that, at least in TRIPS, the Three Step Test's objective was to "reduce or eliminate existing exceptions, rather than to grant new or extend existing ones."[167] Even if we grant that objects and purposes may change over time, which conception of objects and purposes ought to guide interpretation today? Secondly, what is to be done in cases where furthering the objects and purposes attributed to a treaty today conflicts with other considerations such as the ordinary meaning of the provisions wording, or prior judicial interpretations? In order to answer these questions, one needs a more fully fleshed-out theory of teleological interpretation.

The strongest support for the Balanced Interpretation arguably comes from a teleological approach commonly adopted at the domestic level: Legal Interpretivism as developed primarily be Ronald Dworkin.[168] Strictly speaking, Legal Interpretivism is not a

164. *Id.* at 320.

165. G. Fitzmaurice, *The Law and Procedure of the International Court of Justice 1951-4: Treaty Interpretation and Certain other Treaty Points*, 33 B.Y.I.L. 208 (1957).

166. *See e.g.* ALEXANDER ORAKHELASHVILI, THE INTERPRETATION OF ACTS AND RULES IN PUBLIC INTERNATIONAL LAW 343 (2008).

167. *Supra* note 85.

168. Dworkin, *supra* note 26, at 45-87 (1986).

theory of interpretation, but a jurisprudential theory on the nature of law. Its chief foil is Legal Positivism, particularly as defended by HLA Hart.[169] Legal Positivism is commonly associated with two theses: the social fact thesis and the separability thesis.[170] Briefly, the first thesis holds that law is a social fact, not a moral fact. That is, law is something created by people, not by God, reason, or abstract morality. The separability thesis holds that what the law is and what the law ought to be are distinct questions. While Positivists disagree internally about the connection of law and morality, at the very least they agree that in order for a social rule to be "law" it need not *necessarily* align with morality. This stands in contrast to the Natural Law tradition which views law, at least partly, as flowing from morality, and that social rules in contravention of morality were not "law" properly so called (summed up in the Aquinas phrase of *lex injustia est not lex*). Legal Interpretivism is commonly seen as being a third jurisprudential school occupying a space between Positivism and Natural Law. In contrast to Positivists, Interpretivists claim that "law" is not so much a noun, but a verb. That is, law is not a set of socially constructed rules, but is an *act* of interpretation.[171] Understanding what the law on a given issue involves more than a search for a set of historical legal materials, but requires the interpretation of such materials today in light of contemporary values.

Given Legal Interpretivism views interpretation as the very "nature" of law, it has a particularly robust conception of how legal interpretation works. To Dworkin, legal interpretation is not merely a historical search for certain social facts (e.g. legislation, case decisions), but is a partly moral exercise. In contrast to Positivism, moral values, even when not explicitly incorporated into legal materials, are relevant to legal interpretation. In particular, when trying to interpret a source of law (whether that be a case holding, or a statutory section etc.), one must take into account the *purpose* that the area of law is meant to serve. Like Fitzmaurice in the international arena, "purpose" is understood dynamically by

169. HLA HART, THE CONCEPT OF LAW 79-99 (2012, 3d ed).

170. Brian Leiter, *Positivism, Formalism, Realism*, 99 COLUM. L. REV. 1138, 1140-1144 (1999).

171. And as such, has some connection or overlap with the Legal Process school of jurisprudence. *See id.* at 1155-1158.

Dworkin. Rather than being fixed in time, purpose is, to an extent, *imposed* on legal materials.[172] The goal of legal interpretation is to find the most *normatively desirable* purpose that an area of law could fulfil, and interpret the sources in light of that objective. Thus, legal interpretation is a "constructive" or "creative" process.[173] The creative nature of interpretation, however, does not enable the interpreter to interpret a legal rule in whatever way most pleases her.[174] The interpretation must be an interpretation, rather than complete reinvention, of a social practice. The goal of constructive interpretation is to find an interpretation which "fits" the existing material while simultaneously furthering the most morally attractive purposes "justifying" the law.[175] The goal is thus to find the interpretation which shows the law in its "best light," or which pro-actively makes the law the best it possibly can be, given the constraints of history.[176]

In turn, this theory offers an account of legal interpretation which is robust enough to answer the two questions posed earlier to teleological approaches. The purpose which should govern an interpretation is the most normatively attractive justification. Furthermore, certain sources of law (an outlying case for example) can be proclaimed as erroneous to the extent they conflict with the overall best constructive interpretation. Indeed, these commitments enabled Dworkin to defend a formalist theory of adjudication: there was, in practically all cases, a best constructive interpretation which a court could use to decide a controversy, and thus "right" answers in hard cases.[177]

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172. *See* Dworkin, *supra* note 26, at 52 ("Roughly, constructive interpretation is a matter of imposing purpose on an object or practice in order to make of it the best possible example of the form or genre to which it is taken to belong.")

173. *Id.*

174. *Id.* ("It does not follow, even from that rough account, that an interpreter can make of a practice or work of art anything he would have wanted it to be . . . For the history or shape of a practice or object constrains the available interpretations of it . . . ").

175. *Id.* at 285 ("A successful interpretation must not only fit but also justify the practice it interprets").

176. *Id.* at 90 (stating that theories of law "try to show legal practice as a whole in its best light, to achieve equilibrium between legal practice as they find it and the best justification of that practice.").

177. For the infamous defense of this view, *see* Ronald Dworkin, *Hard Cases,* 88 HARV. L. REV. 1057 (1975).

## B. THE "INTERPRETIVE ARGUMENT" FOR BALANCE

While textualism and intentionalism provide little conclusive support for the doctrinal claims of the Balanced Interpretation, a particularly strong teleological approach, such as that encapsulated by Legal Interpretivism, would arguably justify such claims. The Balanced Interpretation is far more capable of presenting the Test in its "best light" and thus serves as a better constructive interpretation than the Traditional Interpretation. This Section therefore sketches the type of Interpretive Argument that could be made in favor of the Balanced Interpretation before using the argument to respond to some of the traditionalist criticisms.

### *1. Fit*

A successful constructive interpretation must broadly "fit" the existing legal sources. Our interpretation of the Three-Step Test must be largely consistent with the Test's wording, its context, and its purpose, as required by the VCLT.[178] However, a constructive interpretation "need not fit *every* aspect" of the wording and history.[179] To Interpretivists, the "fit" criterion is a "threshold" requirement.[180] The interpretation must, in other words, "fit *enough* [of the historical legal sources] for the interpreter to be able to see himself as interpreting that practice, not inventing a new one."[181] Accordingly, an interpretation may be inconsistent with some of the Three-Step Test's wording and history and yet still be, overall, the right interpretation. The aim is not to create an interpretation that exhibits perfect "vertical consistency" with a chain of historical decisions, but an interpretation which is "horizontally consistent" with the Test's history, and the most normatively attractive purpose the Test serves today.[182]

The Balanced Interpretation, largely, passes the "threshold" of fit.[183] In particular, the alternative meanings ascribed to each step are

178. Vienna Convention, *supra* note 143, 1155 U.N.T.S. at 340.

179. DWORKIN, *supra* note 26, at 66.

180. *Id.* at 255 (stating that "[c]onvictions about fit will provide a rough threshold requirement").

181. *Id.* at 66.

182. *Id.* at 277.

183. *See supra* Part II.B.1 (explaining that the interpretation need only fit enough of a source for the interpreter to not invent a new practice); *see also*

not foreclosed. The requirement that limitations be confined to "certain special cases" may, for example, mean the limitation be clearly defined and narrow in scope. However, most English speakers would agree that it may equally be a requirement of "reasonable foreseeability" or that limitations identify "some" special cases where the specialness of the case is defined teleologically. Furthermore, the more permissive interpretation of each step fits with the context of the Stockholm Revision and the desire amongst delegates not to enact a provision which would divest states of their traditional approaches to tailoring copyright scope.[184] Certainly, the meanings ascribed by the Balanced Interpretation are not consistent with all the relevant legal sources. The interpretation of "certain special cases" as a reasonable foreseeability requirement is arguably inconsistent with the WTO Copyright Case and its decision that the first step be interpreted as requiring a narrow scope as well as reasonable certainty.[185] Nevertheless, this aspect of the Balanced Interpretation clearly does enough to pass the threshold of "fit." It fits with enough of the legal sources (especially the ordinary meaning of the words and the context) for a future adjudicator to consider it a good faith interpretation of the Three-Step Test, rather than the pure invention of new norms.

More difficult is the Balanced Interpretation's claim that the three steps can be interpreted as a "comprehensive overall assessment" and not as three necessary and cumulative conditions.[186] It is difficult to see how this particular aspect of the new theory "fits" with the historical legal sources. This aspect of the interpretation is difficult to reconcile with the ordinary meaning of the language, which states that limits are lawful 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."[187] This aspect of the interpretation perhaps fails to meet the threshold of fit.[188]

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Munich Declaration, supra note 104, at 494.

184. *See* SENFTLEBEN, *supra* note 103 at 91-92.

185. Section 110(5) Panel Report, *supra* note 83, at 11.

186. Munich Declaration, *supra* note 104, at 493.

187. Berne Convention for the Protection of Literary and Artistic Works art. 9(2).

188. *See* Ficsor, *supra* note 129 at 15 (noting that what the Declaration suggests

### *2. Justification*

The next question is which interpretation best "justifies" the Three Step Test? Which interpretation of the Test is consistent with the most normatively attractive justification for international copyright regulation? The answer is: the Balanced Interpretation.

The Traditional Interpretation views the purpose of international copyright law as increasing worldwide copyright standards to the highest feasible level and the Three-Step Test as safeguarding that strong copyright protection.[189] This is undeniably the purpose that many international copyright lawyers intended modern international copyright law to serve .[190] However, to Interpretivists, the right interpretation is not necessarily that which is consistent with the historically intended purposes for international copyright law, but rather that which furthers the most normatively defensible ones.[191]

This traditionalist justification for international copyright regulation is not normatively attractive. If international copyright law tries to achieve the highest feasible level of protection, bad consequences will likely follow. Copyright protection benefits some individuals in society. The Copyright owners are enabled to charge a fee from those who would use the work, which not only is in their interest but also in the interest of consumers who enjoy the new works that are created as a result. However, copyright protection also negatively affects the interests of others. Those who wish to use the work in the future are required to pay higher fees for doing so, thus preventing socially valuable uses (*e.g.*, parody, news reporting, research etc.), and discouraging follow-on creators from creating new works in the future.[192] Assuming that all interests are of equal importance, copyright protection ought to ensure the maximization

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is not just a new interpretation but rather a proposal for an amendment of the treaties concerned).

189. Section 110(5) Panel Report, *supra* note 83, ¶ 6.78 (noting that "a principle should be respected according to which the objective of the TRIPS Agreement is to reduce or eliminate existing exceptions, rather than to grant new or extend existing ones").

190. Okediji, *supra* note 71, at 109.

191. *See supra* Part III.A.

192. *See generally* WILLIAM LANDES & RICHARD POSNER, ECONOMIC STRUCTURE OF INTELLECTUAL PROPERTY 37-70 (2003); Stanley M. Besen & Leo J. Raskind, *An Introduction to the Law and Economics of Intellectual Property Law*, 5 J. ECON. PERSP. 3, 5 (1991).

of these different interests. Unilaterally increasing copyright standards without taking into account these other interests will likely lead to a sub-optimal situation where society's aggregate interests are negatively affected.[193]

Appealing to natural rights cannot justify such a copyright-maximum stance. On some accounts, authors are naturally entitled to control the use of their works.[194] Others in society, however, equally enjoy natural rights.[195] Those who build on prior works are as much authors who deserve the products of their creative labor, and who ought to have the autonomy to engage in culture as prior generations' creators.[196] Even from a natural rights perspective, there must be some way of reconciling the natural rights of authors, and the equally important rights of others in society.[197] Whatever way one looks at the problem, therefore, the idea that international copyright law must provide the highest level of protection to owners without considering the desires of others in society is not defensible.

The Balanced Interpretation presents a far more normatively attractive vision of international copyright regulation. On the domestic level, the dominant justification for copyright protection is that such regulation is in society's best interest. As noted above, copyright protection not only enables copyright owners to satisfy their interest in controlling the use of, and gaining revenue from the use of the work, but also benefits others in society who enjoy the new works. However, this does not negate the fact that copyright protection also costs those who otherwise could use the work freely, and the legal system which must enforce copyright standards. The dominant economic-utilitarian belief is that copyright ought to maximize society's interests (or preferences). It is likely that society's interests will be maximized if domestic copyright provides

193. Gene M. Grossman & Edwin L.C. Lai, *International Protection of Intellectual Property,* 94 AM. ECON. REV. 1635, 1636-37 (2004).

194. *See* ROBERT P. MERGES, JUSTIFYING INTELLECTUAL PROPERTY (2011 ABRAHAM DRASSINOWER, WHAT'S WRONG WITH COPYING? (2015).

195. MERGES, *supra* note 194, at 95.

196. *See generally* DRASSINOWER, *supra* note 194, at 145-87

197. IMMANUEL KANT, THE METAPHYSIC OF ETHICS (3d ed. 1886) (exemplifying that "[e]very action is right which in itself, or in the maxim on which it proceeds, is such that it can coexist along with the freedom of the will of each and all in action, according to a universal law").

enough reward to copyright owners to induce creation.[198] Any protection above and beyond that which is necessary to bring forth the work creates the aforementioned costs without any of the benefits. Some international copyright standards aid this purpose.[199] If copyright owners cannot derive financial reward from foreign markets, it is likely that their creative incentives would be suboptimal, and the interests of the national society would be minimized. By agreeing on some worldwide minimum standards of copyright protection, states can ensure their authors are adequately compensated and thus the interests of states are enhanced.[200] But, those minimum standards must not damage the fundamental purpose copyright serves: maximizing the interests of society. If minimum standards are high enough to prevent socially valuable uses and future creation, then the regulation has undercut the very purpose it ought to serve. For this reason, international copyright law must bring about the "appropriate balance" of rights and obligations. It must ensure authors receive adequate financial incentive to create, but not go beyond that point.

The Balanced Interpretation more effectively achieves this purpose than the Traditional Interpretation. In particular, the Traditional Interpretation of the Three-Step Test prevents states from limiting copyright protection when doing so is necessary to maximize society's interests. The Traditional Interpretation of the first step ("certain special cases"), which requires limitations to be both "clearly defined" and "narrow in scope," threatens the ability of states to enact open-ended limitations necessary for calibrating copyright in the Information Age.[201] As explained in Part I, states increasingly need a flexible, open-ended doctrinal limitations that will allow courts to exempt new uses of copyrighted material from licensing requirements as they arise.[202] To the extent that the Traditional Interpretation casts doubt on such exceptions, it threatens to prevent states from achieving the appropriate, interest-maximizing

198. *See, e.g.*, Mark Lemley, *The Economics of Improvement in Intellectual Property*, 75 TEX. L. REV. 1, 49-75 (1997).

199. Grossman & Lai, *supra* note 193, at 1635 (discussing different examples of international copyright agreements).

200. *Id.*

201. *See supra* Part II.A and notes 56-71.

202. *See supra* Part II.A.

balance. On the other hand, the "reasonable foreseeability" approach suggested by the *Declaration*, achieves this goal.[203] Under this approach, the scope of limitations must be foreseeable but only "reasonably" so.[204] The "reasonableness" assessment takes into account both the value of predictability and the value of flexibility such that open-ended limitations are helpful in achieving the right balance.[205]

Likewise, the Balanced Interpretation's approach to steps two and three is more likely to achieve the appropriate balance of interests than the Traditional Interpretation. The second step requirement that limitations not conflict with a "normal exploitation" of the work has traditionally prevented states from enacting limits which would create any actual or potential, present or future, economic competition with the copyright holder.[206] This has the negative effect of preventing limitations that create any competition with the copyright holder.[207] However, some competition is clearly desirable and necessary to ensure the copyright owner does not enjoy an unrestrained monopoly. If a state wishes to balance the interests of creators and users, copyright must enable some competition, providing that competition does not undercut creative incentives.[208] The Traditional Interpretation prevents states from striking this balance by restricting all competition with the copyright owner. By contrast, the Balanced Interpretation's requirement that competition is only unlawful when it is unreasonable permits competition when there is no clear reason to believe that such exceptions and limitations undercut creative incentives. For example, copying

203. Munich Declaration, *supra* note 104, at 495.

204. *Id.*

205. *Id.* at 491 (noting that this clarification is in line with a realization in certain civil law jurisdictions that a traditional preference for a narrow interpretation of all exceptions and limitations may not always be appropriate in the contexts in which copyright works are exploited today; also noting that the first "step" of the "test" does not preclude legislatures from introducing or retaining "open-ended" limitations and exceptions, so long as the scope of such provisions is reasonably foreseeable).

206. *See id.* at 492 (describing the evolution of new business models within the realm of intellectual property).

207. Lemley, *supra* note 198, at 49-68.

208. *See id.* (describing the relationship between competition and prices concerning property owners).

legitimately acquired works for purely private uses[209] – *e.g.,* creating back-up copies of works, or moving digital files from a computer to a smart phone – is unlikely to have a meaningful effect on creative incentives,[210] and thus would not create "*unreasonable* economic competition.[211]" Similarly, under the third step requirement that limitations not cause "unreasonable prejudice to legitimate interests," the Balanced Interpretation explicitly calls for third party interests to be taken into account when deciding what is unreasonable.[212] Accordingly, the Balanced Interpretation is more likely to facilitate limitations which, when all social interests are taken into account, achieves the right balance.

Finally, while the "comprehensive overall assessment" requirement is of dubious "fit,"[213] it is important to note that this requirement would nevertheless help achieve the right balance of interests. Currently, each step highlights a factor, such as legal certainty or normal expectations, which law makers must take into account when assessing whether a limitation furthers the public interest or not. However, while a proper assessment of the public interest cannot be complete without assessing the limitation's effects on these criteria, it does not follow that a limitation must pass each step to be in the public interest. It is highly possible that a limitation fails to pass one step, and yet overall, still may be in the public interest. The clearest example of such a case is the Fair Use doctrine. The lack of legal certainty provided by such doctrines is a factor against finding a limitation to be in the society's interest, but nevertheless the doctrine may ensure a balance of interests conducive to the public interest because of the strong benefit it provides to

209. *See generally* Peter K. Yu, *P2P and the Future of Private Copying,* 76 U. COLO. L. REV. 653, 654 (2005) (describing changing social and political norms as they relate to intellectual property law and regulation of its use).

210. *See* Stanley M. Besen & Sheila Nataraj Kirby, *Private Copying, Appropriability, and Optimal Copying Royalties*, 32 J. L. & ECON. 255, 256-57 (1989) (noting that society may be better off by restricting copying because of its higher social marginal cost); *see also* Glynn S. Lunney, Jr., *The Death of Copyright: Digital Technology, Private Copying, and the Digital Millennium Copyright Act*, 87 VA. L. REV. 813, 882 (2001) (arguing that prohibiting private copying serves no purpose but to enrich copyright owners).

211. Besen & Kirby, *supra* note 210, at 256-57; Lunney, Jr., *supra* note 210, at 882.

212. Munich Declaration, *supra* note 104, at 495.

213. *See supra* Part III.B.1.

countries trying to define the "legitimate interests" of authors in the twenty-first century. As a result, the Balanced Interpretation construes the interrelationship between the steps in a way that allows the "public interest" value to be the most important criterion in assessing a limitation, to which the steps are crucial guides but not themselves the ultimate arbiters.

### *3. Summary*

In summary, while textualist and intentionalist Interpretivist approaches do not yield enough support to proclaim the Balanced Interpretation the right interpretation of the Three-Step Test, a particularly strong teleological approach, such as the one adopted by Legal Interpretivists on the domestic level, would support such doctrinal claims. The Balanced Interpretation broadly fits enough of the legal sources to be an interpretation, rather than mere reinvention, of the Test, while promoting an appropriate balance of interests conducive to maximizing society's interests. To those inclined to adopt the teleological Interpretive Argument, this enables a response to some of the traditionalist criticisms.

Firstly, traditionalists argue that the Balanced Interpretation is not a faithful interpretation at all, but is in fact a normative reform proposal in disguise.[214] To which, the response of supporters of the Balanced Interpretation adopting the Interpretivist Argument should be that theirs is not a re-imagining of the Test, but is a reconstruction of the Test in light of the most normatively attractive justifications for international copyright law today. The appeal to normative value is not a barefaced attempt to change international legal norms, but is justified on the plausible grounds that normatively attractive purposes are internal to the interpretive process. In effect, the response must be that the traditionalists adopt a thin and unpersuasive vision of international legal interpretation.

Second, while traditionalists argue that the WTO approach is conclusive,[215] supporters of the Balanced Interpretation can claim that the WTO panel erred in their interpretation of the Three Step Test. The Interpretation which we, potentially, should follow is that which gives effect to the normatively defensible objects and

214. *Supra* notes 129-130 and accompanying text.
215. *Supra* note 134 and accompanying text.

purposes of international copyright law, and thus shows the Test in its best light. The WTO approach arguably fails that standard and thus is not consistent with the best constructive interpretation.

Finally, not only does the Interpretive Argument provide some potential ammunition to those supporting the Balanced Interpretation as a doctrinal matter, arguably Legal Interpretivism is already, albeit implicitly, the jurisprudential and methodological approach they adopt. Ronald Dworkin famously described how lawyers adopt an "Interpretive Attitude" towards legal sources, and this explained how legal interpretations evolved over time. This evolution comes in three stages.[216] First, at a "pre-interpretive stage" lawyers identify the "tentative content" of the relevant rule.[217] Second is an "interpretive stage" wherein "the interpreter settles on some general justification for the main elements of the practice identified at the pre-interpretive stage."[218] At this stage, interpreters "impose meaning on the institution" and crucially ask not for the historical justification but the most normatively defensible justification. And finally is a "post-interpretive or reforming stage" wherein the interpreter "adjusts his sense of what the practice "really" requires so as better to serve the justification he accepts at the interpretive stage."[219]

Arguably, in the last twenty years, the Interpretive Attitude has taken hold in international copyright. In 2000, at a pre-interpretive stage, international copyright lawyers tentatively interpreted the Three-Step Test in a restrictive and protectionist manner. But the occurrence of an "interpretive stage" in the twenty-first century lead international copyright lawyers to a different justification for international copyright law: harmonizing the balance of rights and obligations in a way that roughly maximize society's interests. The revised interpretations of the Three-Step Test are the product of the "post-interpretive or reforming stage" and attempt to bring the rule into conformity with this more attractive purpose.

## IV. CHALLENGES AND ALTERNATIVE

216. Dworkin, *supra* note 26, at 65.
217. *Id.* at 65-66.
218. *Id.* at 66.
219. *Id.*

## ARGUMENTS

This Essay articulates the Interpretivist Argument in favor of a more balanced interpretation of the Three-Step Test. While textualist and intentionalist approaches to treaty interpret fail to provide support for the Balanced Interpretation's formal-doctrinal claim, a rather strongly teleological approach, such as that found domestically in the theory of Legal Interpretivism, would support such conclusions. However, this Interpretive Argument is vulnerable to attack. This Part briefly considers theoretical objections to the Interpretive Argument. Should the Interpretive Argument fail, then presumably the Balanced Interpretation's doctrinal claim also fails. This Part therefore also considers alternative arguments (the Normative Argument and the Discretion Argument) that could be made in favor of the Balanced Interpretation, while highlighting the problems associated with those arguments.

One may dispute the grounds on which the Interpretivist argument rests. One may argue that normative value is never relevant to interpreting international copyright provisions, or alternatively, that it is only relevant when that normative value has been clearly agreed upon and incorporated into law (through, for example, treaty ratification). This line of criticism is particularly important because very few scholars have proposed or defended Interpretivist accounts of international law, let alone international copyright law. In part, this is likely because Interpretivism's chief proponent, Ronald Dworkin, was primarily concerned with explaining the attributes of law in a single political community and, furthermore, concentrated his attention on Anglo-American common law systems.[220] It is possible, therefore, to argue that, in the absence of a serious defense of Interpretivism at the international level, we must assume the Positivist theories are more accurate and thus moral value plays a very limited role in interpreting international legal sources.

This criticism is, however, unpersuasive. Fundamentally, Interpretivism is a conceptual theory of the nature of law. It applies to all law, whether that be domestic or international. Accordingly, scholars are now starting to develop Interpretivist accounts of

220. *See* Jason A. Beckett, *Behind Relative Normativity: Rules and Process as Prerequisites of Law*, 12 EUR. J. INT'L L. 627, 634-37 (2001).

international law. Basak Cali, has argued effectively that Interpretivism is relevant to the theoretical and normative debates about international law.[221] Meanwhile, John Tasioulas supports an Interpretivist theory of customary international law, in which he argues that the "ethical appeal of a candidate norm figures among the criteria for determining whether it is a valid norm of CIL [Customary International Law]."[222] And, in a posthumously published essay, Ronald Dworkin argued for a partially moralized conception of international law, in which states have a moral duty to accept constraints on their sovereignty that would enhance their political legitimacy.[223]

Nevertheless, if one disagrees with the Interpretive Argument, two alternative lines of argument are open to those who favor a more permissive Three-Step Test. First is the "Normative Argument." This is, in effect, to concede that the Balanced Interpretation is not an accurate description of the law and to argue that international law norms ought to be changed. This argument benefits from the role of state practice as a source of international law. Arguably, the process of changing the Three-Step Test would not require action as drastic as a treaty modification. Instead, states could simply adopt and practice a more permissive interpretation of the Test with the hope that over time the volume of state practice would alter existing legal norms.

Second is the "Discretion" Argument. This argument involves accepting that the Three-Step Test has very little settled meaning. Rather, this argument views the wording of the Three-Step Test as ambiguous in large part because its drafters did not want to fully decide the issue of what exceptions and limitations are permissible, but instead kicked the can down the road, allowing states to figure the issue out on a more case-by-case basis. Following this line of

221. Başak Çali, *On Interpretivism and International Law*, 20 EUR. J. INT'L L. 805, 821-22 (2009) (juxtaposing positivism and interpretivism).

222. John Tasioulas, *Customary International Law and the Quest for Global Justice*, *in* THE NATURE OF CUSTOMARY LAW: LEGAL, HISTORICAL, AND PHILOSOPHICAL PERSPECTIVES 307, 310 (2006).

223. Ronald Dworkin, *A New Philosophy for International Law*, 41 PHIL. & PUB. AFFAIRS 2 (2013); *see* Adam S. Chilton, *A Reply to Dworkin's New Theory of International Law*, 80 U. CHI. L. REV. DIALOGUE 105, 109 (2013) (articulating Dworkin's point that states have an obligation to citizens to mitigate the failures of state sovereignty).

reasoning, both the Traditional and Balanced Interpretations are legitimate, plausible, interpretations not ruled out by the Three-Step Test. Judges and policymakers thus have discretion to adopt whichever interpretation they prefer. The weakness of this argument is that it gives up on the formalist reasoning that the Balanced Interpretation typically adopts. No longer could supporters of the Balanced Interpretation claim that the WTO panel somehow made a legal error. The most supporters could claim is the WTO panel made a different policy judgment, which it had discretion to do. Thus, it is only the Interpretive Argument which supports the strongest claims made by advocates of the Balanced Interpretation

## V. CONCLUSION

The interpretation of the Three-Step Test is one of the most hotly contested issues in international economic regulation. This Essay analyzed the doctrinal claim made by the Balanced Interpretation (i.e. that the Balanced Interpretation is the correct legal interpretation of the Three-Step Test) and asked whether it can be defended. It argued that such a claim could not be supported by two main approaches to treaty interpretation – textualism and intentionalism – but may be supported if one adopts a particularly strong teleological approach to interpretation, such as that developed by Ronald Dworkin and Legal Interpretivists on the domestic level.