

HARMONIZATION OF COPYRIGHT LAW IN RESPONSE TO TECHNOLOGICAL CHANGE: LESSONS FROM EUROPE ABOUT FAIR USE AND FREE EXPRESSION

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I. INTRODUCTION

Free expression principles traditionally have not been applied against the U.S. Copyright Act,¹ but technology-driven changes in the global copyright law landscape are forcing reconsideration of how to protect the public interest, including in free expression. Traditionally, U.S. courts maintained that the idea-expression dichotomy, along with the doctrine of fair use, provided sufficient protection for free expression such that First Amendment scrutiny need not be applied.² Additionally, the U.S. Supreme Court held that, notwithstanding the First Amendment's free speech guarantee, Congress did not violate the Constitution in extending copyright duration to life of the author plus 70 years in the Sonny Bono Copyright Term Extension Act of 1998.³ However, the U.S. Court of Appeals for the Tenth Circuit broke new ground in 2007 when it held that First Amendment scrutiny had to be applied to Congress' adoption of § 514 of the Uruguay Round Agreements Act (URAA) of 1994.⁴

Congress passed the URAA in order for the United States to come into compliance with Article 18 of the Berne Convention for the Protection of Literary and Artistic Works; the effect of the URAA was to extend copyright protection to certain works that had fallen into the public domain in the United States but remained protected under copyright law in their countries of origin.⁵ Citing the 2003 U.S. Supreme Court opinion *Eldred v. Ashcroft*, the Tenth Circuit held that the URAA had to be reviewed under free-expression scrutiny because it "altered the traditional contours of copyright protection" by removing works from the public domain and bringing them back into copyright protection.⁶ In remanding the case for the district court to apply First Amendment scrutiny, the Tenth Circuit made an important statement that copyright law is subject to scrutiny under free-speech guarantees.⁷

1. See Pamela Samuelson, *Economic and Constitutional Influences on Copyright Law in the United States*, 23 EUR. INTELL. PROP. REV. 409 (2001).

2. *Harper & Row Publishers, Inc. v. Nation Enter.*, 471 U.S. 539, 555-58 (1985).

3. *Eldred v. Ashcroft*, 537 U.S. 186 (2003).

4. *Golan v. Gonzales*, 501 F.3d 1179 (10th Cir. 2007).

5. *Id.* at 1181-82.

6. *Id.* at 1184 (quoting *Eldred*, 537 U.S. at 221).

7. *Id.* at 1196. On remand the trial court was instructed to consider whether the URAA constituted content-based or content-neutral regulation of speech. *Id.* An important question left unanswered by the Tenth Circuit, however, is what level of First Amendment scrutiny should be applied to copyright law. If content-based, the statute will be subject to strict scrutiny, which requires the government to demonstrate a compelling interest, and

Application of First Amendment scrutiny to any copyright rule that alters “traditional contours” could demand much judicial attention, as technology and other forces regularly demand adaptations and alterations in copyright law.

In fact, probably the single most significant development in copyright law in the 20th century—incorporation of copyright within international trade agreements—was largely the result of copyright holders’ fears about how technology could affect their ability to exploit their intellectual property. As a result of international trade negotiations known as the Uruguay Round, the Agreement on Trade-Related Aspects of Intellectual Property (TRIPS) was adopted in 1994.⁸ TRIPS was largely a response to calls by countries with developed economies, including prominently the United States, for stronger intellectual property protections around the world. The defining characteristics of the TRIPS Agreement are minimum standards for intellectual property protection and national treatment.⁹ In other words, World Trade Organization member nations must guarantee that the copyrights, patents and trademarks of foreign individuals and corporations will receive a certain minimum level of protection and that those foreigners will be treated no worse than nationals.

Entertainment industries are credited with leading the charge to strengthen rights of copyright holders in the online world.¹⁰ Those efforts, including bans on circumvention of technical protection measures and requirements placed on Internet service providers to remove purportedly infringing content, have paid off for the entertainment industry. Entertainment corporations largely have been successful in lobbying copyright policymakers at the national, regional

narrow tailoring, in order to save the law. If content-neutral, the statute will be reviewed under more relaxed scrutiny.

8. Agreement on Trade-Related Aspects of Intellectual Property Rights art. 13, Apr. 15, 1994, 1869 U.N.T.S. 299, 33 I.L.M. 1197 [hereinafter TRIPS Agreement].

9. *Id.*

10. See Digital Performance Right in Sound Recordings Act of 1995, Pub. L. No. 104-39, § 2, 109 Stat. 336 (1995) (creating a limited right to publicly and digitally perform a sound recording). See also *Bonneville Int’l Corp. v. Peters*, 153 F. Supp. 2d 763 (E.D. Pa. 2001), *affirmed by Bonneville Int’l Corp. v. Peters*, 347 F.3d 485 (3rd Cir. 2003) (holding that AM/FM internet streamers were required to pay royalties to record labels holding the copyright); Charlotte Waelde & Hector MacQueen, *From Entertainment to Education: The Scope of Copyright*, 3 INTELL. PROP. Q. 259 (2004); Edward L. Carter, *Promoting Progress or Rewarding Authors? Copyright Law and Free Speech in Bonneville Int’l Corp. v. Peters*, 2002 BYU L. REV. 1155 (2002); Pamela Samuelson, *Intellectual Property and the Digital Economy: Why the Anti-Circumvention Regulations Need to Be Revised*, 14 BERKELEY TECH. L.J. 519 (1999) (explaining that copyright holders are afforded rights in the digital medium not available in the analog medium).

and international levels.¹¹ This so-called digital copyright agenda has resulted in significant changes to copyright law; among other things, copyright owners have gained the ability to prevent access to their works for traditionally permitted non-infringing uses.¹² Copyright owners also have been able to continually stave off the passage of their works into the public domain, especially by statutory extensions of the copyright term.¹³ As will be seen, these changes to copyright law have restricted the educational, research and other public-interest uses of copyright-protected works that traditionally have been considered the core of copyright-protected creative expression.¹⁴

TRIPS did not introduce minimum international standards in copyright law. That effort dates from 1886 with the adoption of the Berne Convention for the Protection of Literary and Artistic Works.¹⁵ The Berne Convention had a long history of harmonizing copyright law among nations of the world even before the United States became a party to the Convention in 1989. But the Berne Convention was perceived by some to be too weak to mandate compliance by members. The adoption of TRIPS, however, gave teeth to the harmonization effort by tying intellectual property protection to trade; nations that fail to comply with TRIPS may be subject to international trade sanctions. As will be seen, however, these contemporary developments in copyright law primarily account for the interests of copyright holders. The public interest, including in free expression, has generally been confined to limited exceptions to the copyright monopoly.

Although the United States' doctrine of fair use generally has been protective of interests in access to copyright-protected works and public interest uses of those works,¹⁶ a broad fair-use doctrine is the exception rather than the rule in national copyright law systems. In fact, the U.S. doctrine of fair use may itself violate the TRIPS Agreement's measuring stick for "exceptions" to the exclusive rights of copyright holders.¹⁷ Although U.S. lawmakers and scholars might believe U.S. exceptionalism can remain intact in this regard, the reality is that

11. Waelde & MacQueen, *supra* note 10.

12. Martin Kretschmer, *Digital Copyright: The End of an Era*, 25 EUR. INTELL. PROP. REV. 333, 337 (2003).

13. See United States Copyright Office, A Brief Introduction and History, <http://www.copyright.gov/circs/circ1a.html> (last visited Mar. 17, 2009).

14. Waelde & MacQueen, *supra* note 10.

15. Berne Convention for the Protection of Literary and Artistic Works art. 9.2, Aug. 11, 1910, 38 Stat. 1785, 828 U.N.T.S. 221 [hereinafter Berne Convention].

16. See Edward L. Carter, *Reclaiming Copyright From Privacy: Public Interest in Use of Unpublished Materials*, 85 J. & MASS COMM. Q. 417 (2008).

17. See *infra* notes 101, 169-70 and accompanying text.

pressure will only increase on the United States to harmonize its copyright law with the rest of the world. It is not a given that fair use will survive harmonization, but there are recent compelling signs that even Europeans are now realizing fair use may be the last and best hope for preserving the public interest within copyright law.¹⁸

The United States has largely resisted the forces of international harmonization. For example, in joining the Berne Convention in 1989, the United States was required to recognize the moral rights of authors, but the U.S. Congress basically skirted this requirement by recognizing moral rights in a very limited way only for certain visual artists.¹⁹ Likewise, the United States has resisted Europe's efforts to force U.S. copyright law to conform with TRIPS by simply paying an annual damage award to the European Community rather than redrafting the U.S. Copyright Act to meet the standard of a WTO panel's adjudication.²⁰ This type of resistance, however, will increasingly be seen as hypocrisy because it is the United States—pushed by the large and powerful U.S. entertainment industries—that primarily insists other countries conform with TRIPS.²¹

This article seeks to shed some light on the types of challenges the U.S. fair use doctrine will face as technology and economics continue to lead to harmonization and strengthening of copyright protections at home and abroad. Because harmonization of copyright law is much more advanced in Europe than virtually anywhere else in the world, the current state of European copyright law provides a possible model for the United States in years to come. This article will examine harmonization forces and counter-forces in the United Kingdom of Great Britain and Northern Ireland, in particular, for what that country's experience might teach the United States. First, the article discusses in

18. See *infra* notes 136-52 and accompanying text.

19. See Cyril P. Rigamonti, *Deconstructing Moral Rights*, 47 HARV. INT'L L.J. 353, 404-11 (2006) (discussing the Visual Artists Rights Act of 1990, which created rights of paternity—called attribution—and integrity for certain U.S. creators of works). See also Bill Werde, *Barbie's Manufacturer is Ordered to Pay \$1.8 Million in Legal Fees to Artist*, N.Y. TIMES, June 28, 2004, at A11 (reporting that an artist did not infringe Barbie's moral right of integrity after taking provocative photos of the doll near and in various household appliances); Greg Levine, *Study: Barbie Butchery is Normal Child's Play*, FORBES.COM, Dec. 19, 2005, http://www.forbes.com/2005/12/19/barbie-carnage-research-cx_gl_1219au_tofacescan15.html (identifying a potential violation of the moral right of integrity when young people mutilate their Barbie dolls).

20. See *infra* notes 134-35 and accompanying text.

21. For a discussion regarding the potential moral hazards of imposing the Western concept of intellectual property on developing nations, see Andres Guadamuz: Intellectual Property and Technology – Developing Countries, <http://www.law.ed.ac.uk/ahrc/teaching/llm/information/moduleinformation/modulesix/index.aspx> (last visited Mar. 17, 2009).

Part II the concept of public interest in Anglo-American copyright law, with a particular focus on the place of free expression. Next, Part III considers the extent to which copyright law exceptions that attempt to protect public interest—fair use is one example—are permissible under Berne and TRIPS. Part IV examines how a modified version of the so-called Berne three-step test might function in the face of challenges to fair-use protected free expression brought on by international copyright harmonization. Part V offers a brief conclusion.

II. BACKGROUND

A. The Concept of “Public Interest” in Copyright Law

Beginning with the Statute of Anne in the early Eighteenth century, statutory copyright law granted authors a limited monopoly as an incentive for the creation of works that would benefit society.²² Thus copyright initially aimed to serve the public interest in, as the Statute of Anne and U.S. Copyright Act of 1790 say, “the encouragement of learning” and, as the U.S. Constitution puts it, “the progress of science and useful arts.”²³ Contemporary copyright law, however, must balance the public interest in fostering societal progress and learning, including “education, research and access to information[,]”²⁴ with other powerful public interests. For example, both private and public interests call for “protection of the rights of authors in their literary and artistic works[,]”²⁵ and an undoubtedly important public interest seeks to “reduce distortions and impediments to international trade.”²⁶

In light of these various objectives, the important question relating to copyright law today might be not whether it serves the public interest but rather which public interest it serves. Scholars have pointed out the challenge in not only balancing the private interests of authors and publishers with the public interests in access and disclosure, but also in striking equilibrium among competing public interests in copyright law questions.²⁷ Scholars have pined for copyright law’s return to the focus,

22. Craig W. Dallon, *The Problem with Congress and Copyright Law: Forgetting the Past and Ignoring the Public Interest*, 44 SANTA CLARA L. REV. 365 (2004).

23. See U.S., CONST. art. 1, sec. 8, cl. 8; see *id.* at 423, 427.

24. World Intellectual Property Organization [WIPO], Copyright Treaty pmbl., 2186 U.N.T.S. 38542 (Dec. 20, 1996) [hereinafter WIPO Copyright Treaty].

25. Berne Convention, *supra* note 15, art. 1.

26. TRIPS Agreement, *supra* note 8, pmbl.

27. Charlotte Waelde & Mags McGinley, *Public Domain; Public Interest; Public Funding: Focusing on the ‘Three Ps’ in Scientific Research*, 2 SCRIPT-ED 71, 86-90 (2005).

embodied in the Statute of Anne and the U.S. Constitution, on the public interest in gaining access to and use of copyright-protected works in order to promote societal progress and learning. For example, one author concluded that statutory extensions of copyright duration have harmed the public interest by shrinking the public domain while valuing the property-right rationale for copyright law over the utilitarian, incentive rationale.²⁸ Given that international harmonization drove the argument for copyright extension in the United States, the author suggested that Europe abandoned the public interest first and the United States is following not far behind.²⁹ Technology-driven global growth in copyright owner protections, however, will not easily be reined in.³⁰

Scholars are not alone in their struggle to understand and explain copyright's public interest. Jurists in the UK, for example, have attempted to convince would-be users of copyright-protected material that invoking the public interest in disclosure would ultimately harm not just publishers but also the users themselves, who presumably would have less published expression to make use of without copyright enforcement.³¹ In another context, the public policy interest in repairing motor vehicles has justified a copyright law exception in the UK to allow for after-market production of spare parts,³² but the application of that exception in other factual settings has been blocked. For example, notwithstanding a public interest argument, the maker of spare cartridge parts for printers and photocopiers was not allowed to copy protected drawings.³³

Meanwhile, the drafters of copyright legislation and international agreements have failed to carefully define public interest. For example, the term "public interest" does not appear in the Berne Convention, but the agreement nonetheless carves out certain exceptions to the general rule protecting "every production in the literary, scientific and artistic domain[.]"³⁴ The Convention allows signatory nations to recognize public interest in access, reproduction and disclosure of political and

28. Dallon, *supra* note 22.

29. *Id.* at 438-42.

30. Peter A. Jaszi, *Goodbye to All That—A Reluctant (and Perhaps Premature) Adieu to a Constitutionally-Grounded Discourse of Public Interest in Copyright Law*, 29 VAND. J. TRANSNAT'L L. 595, 610 (1996).

31. *Universities U.K. Ltd. v. Copyright Licensing Agency Ltd.*, 2001 W.L. 1844504.

32. *British Leyland Motor Corp. v. Armstrong Patents Co.*, [1986] A.C. 577 (H.L.) (U.K.).

33. *Canon Kabushiki Kaisha v. Green Cartridge Co.*, [1997] A.C. 728 (P.C.) (appeal taken from Hong Kong).

34. Berne Convention, *supra* note 15, art. 2.

legal speeches.³⁵ The treaty also contemplates uses involving quotations, education and reporting of current events, as long as they constitute fair practice.³⁶

In the TRIPS Agreement the term “public interest” appears twice, both referencing copyright exceptions but neither doing so in the name of free expression. Instead, the agreement contemplates overriding copyright “to protect public health and nutrition, and to promote the public interest in sectors of vital importance to . . . socio-economic and technological development[.]”³⁷ The TRIPS Agreement also requires transparency, in that member nations should publish their copyright laws and regulations, but confidential law enforcement information need not be disclosed against the public interest.³⁸ The Preamble to the WIPO Copyright Treaty sets forth a goal to balance protection of author works and the public interest in access and disclosure.³⁹ However, the treaty also authorizes creation of a public communication right,⁴⁰ which would seem to tip the scale in favor of private and not public interests. In the end, the WIPO Copyright Treaty relegates the public interest in access and disclosure to a limited exception that may “not conflict with a normal exploitation of the work and [may] not unreasonably prejudice the legitimate interests of the author.”⁴¹ A 2001 European Union Directive on harmonization also contains public interest in education within a limited exception.⁴²

Although one UK Court of Appeal jurist asserted that no fewer than forty-nine sections in Chapter III of the United Kingdom of Great Britain and Northern Ireland’s Copyright, Designs and Patents Act 1988 (CDPA 1988) relate to uses that may be made of copyrighted works in the public interest,⁴³ the term “public interest” appears only once in CDPA 1988. The phrase’s lone appearance comes in § 171(3): “Nothing in this Part affects any rule of law preventing or restricting the enforcement of copyright, on grounds of public interest or otherwise.”⁴⁴ This public interest defense is apart from fair dealing provisions for

35. *Id.* art. 2.

36. *Id.* art. 10.

37. TRIPS Agreement, *supra* note 8, art. 8(1).

38. *Id.* art. 63(4).

39. WIPO Copyright Treaty, *supra* note 24, pmbl.

40. *Id.* at art. 8.

41. *Id.* at art. 10.

42. Information Society Directive, 2001/29, 2001 O.J. (L 167) recital 14 (EC).

43. *Pro Sieben Media A.G. v. Carlton U.K. Television Ltd.*, [1998] EWCA (Civ) 2001 (Eng.).

44. Copyright, Designs and Patents Act, 1988, ch. 48, § 171(3) (Eng.) [hereinafter CDPA 1988].

research and private study;⁴⁵ criticism, review and news reporting;⁴⁶ and education.⁴⁷ Among researchers who have traced the history and contours of the public interest defense,⁴⁸ one concluded that, notwithstanding arguments that the defense cut back too far on authors' copyrights, the defense was a necessary if rarely used way to keep copyright law from infringing too much on access and expression rights held by the public.⁴⁹ The UK public interest defense generally has been considered narrower than the broad fair use principle in the United States.⁵⁰

Virtually all UK jurists who have considered the statutory public interest defense seem to have agreed with the sentiment expressed by Lord Justice Griffiths in a case called *Lion Laboratories*: “[T]here is a world of difference between what is in the public interest and what is of interest to the public.”⁵¹ One of the challenges of studying cases about the public interest defense in copyright law is that the issues are often closely tied to breach of confidence claims, thus increasing the difficulty of identifying the nature, function and role of the public interest within copyright.⁵² Similarly, the courts sometimes discuss the concept of public interest within the context of fair dealing;⁵³ fair dealing that serves the public interest is related but not identical to the defense of public interest.

B. The Place of Free Expression in Harmonized Copyright Law

While it is true that copyright grants an exclusive right in the owner to reproduce and distribute, or publicly communicate, a protected work, the purpose of that right has traditionally been to encourage

45. *Id.* at § 29.

46. *Id.* at § 30.

47. *Id.* at § 32.

48. See Saw Cheng Lim, *Is There a Defence of Public Interest in the Law of Copyright in Singapore?*, 2003 SING. J. LEGAL STUD. 519.

49. Alexandra Sims, *The Public Interest Defence in Copyright Law: Myth or Reality?*, 28 EUR. INTELL. PROP. REV. 335 (2006).

50. See Janice E. Oakes, Comment, *Copyright and the First Amendment: Where Lies the Public Interest?*, 59 TUL. L. REV. 135 (1984).

51. *Lion Lab. Ltd. v. Evans*, [1985] Q.B. 526, 553.

52. *Hyde Park Residence Ltd. v. Yelland*, [2001] Ch. 143, ¶ 65 (noting that Stephenson, LJ, had considered breach of confidence and copyright infringement together, for purposes of public interest, in *Lion Laboratories*); *Hubbard v. Vosper*, [1972] 2 Q.B. 84 (considering both a copyright infringement defense of fair dealing and a breach of confidence defense of public interest).

53. *Id.* (concluding that an author's book on Scientology may well have been engaging in fair dealing of the writings of founder L. Ron Hubbard for the purpose of criticism and review).

creativity and innovation in expression, and thus to benefit society as a whole. Today, however, the public interest in access to and dissemination of works in order to benefit society seems to have become somewhat lost amid other public interests, such as the interests in removing trade barriers (embodied in the TRIPS Agreement) and compensating authors for their economic and moral rights (embodied in the Berne Convention). Commentators have called for a more robust protection of the public interest in access to and dissemination of works in order to help bring copyright law back in line with its original purpose.⁵⁴

In the UK, jurists traditionally were tentative in applying the public interest defense in CDPA 1988 § 171(3) to protect free expression, but a more vigorous application in some recent cases holds some promise for restoring the focus on societal progress and encouragement of learning while still preserving incentives for production of new works. Traditionally, the public interest defense was not so much an affirmative right protecting the subjective claims of users of copyrighted works but rather a provision that merely allowed the courts to avoid having their authority used to enforce copyrights against public policy.⁵⁵ For example, in a case called *Hyde Park*, the UK Court of Appeal allowed Mohamed Al Fayed to invoke copyright law as a way to punish a newspaper for publishing unauthorized still photographs taken from a security camera.⁵⁶ The video camera had taken footage of Princess Diana and Dodi Al Fayed in the hours before their deaths; the newspaper argued that the footage debunked certain claims about the couple's last days made by Mohamed Al Fayed, Dodi Al Fayed's father. But the leading opinion by Lord Justice Aldous rejected this public interest free expression argument.⁵⁷

A very different view of the public interest defense arose in a case where a former leader of the Liberal Democrats, Paddy Ashdown, sought remedies for copyright infringement by the *Sunday Telegraph* for publishing his confidential notes about a meeting with Prime Minister Tony Blair in 1997.⁵⁸ The court noted that the interest in free expression is accounted for within copyright law in part by the idea-expression dichotomy; while copyright law gives the copyright holder

54. See Graeme Johnston, *Copyright and Freedom of the Media: A Modest Proposal*, 18 EUR. INTELL. PROP. REV. 6 (1996).

55. *Hyde Park*, [2001] Ch. 143, ¶ 65.

56. *Id.*

57. *Id.*

58. *Ashdown v. Telegraph Group Ltd.*, [2001] EWCA (Civ) 1142 (Eng.).

the exclusive right to reproduce and distribute works, it does not operate to allow the copyright holder to prevent others from expressing the ideas or information contained in a copyrighted work.⁵⁹ The court also concluded that there was a public interest in the disclosure of the actual words Ashdown used in a private diary to describe his meeting with the Prime Minister, because the meeting involved the future makeup of the government.⁶⁰ Thus the court viewed the public interest defense applied by Lord Justice Aldous in *Hyde Park* as too narrow; particularly given the free expression principles in the Human Rights Act 1998 and Article 10 of the European Convention of Human Rights, the public interest defense could and should be used to override copyright protection at times, even absent a copyright holder who “reek[s] of turpitude.”⁶¹

The narrow interpretation of the defense by Lord Justice Aldous in *Hyde Park* does little to assist users of copyright-protected works in building new works, but the broader reading of the defense by the *Ashdown* court holds promise. In its consideration of the impact on copyright law of the UK Human Rights Act 1998 and Article 10 of the European Convention of Human Rights, the *Ashdown* court also may have provided a road map for rediscovering the proper focus on public interest in copyright.⁶²

Article 10 states that “[e]veryone has the right to freedom of expression” and that this includes “freedom . . . to receive and impart information.”⁶³ If they are “necessary in a democratic society,” limitations on freedom of expression may be imposed to protect, *inter alia*, “rights of others.”⁶⁴ The Human Rights Act reinforces the importance of Article 10’s free speech guarantee, and the Act specifically requires that courts not grant relief that would result in bottling up material if publication would be in the public interest.⁶⁵ In interpreting the impact of the Human Rights Act on copyright law, the *Ashdown* court concluded that free expression guarantees will occasionally dictate that copyright law give way in order to allow a user to express himself or herself using the exact words in copyright-

59. *Id.* at ¶¶ 24, 31.

60. *Id.* at ¶ 79.

61. *Id.* at ¶ 49 (quoting opinion of Aldous, LJ, in *Hyde Park*).

62. See Laurence R. Helfer, *A European Human Rights Analogy for Adjudicating Copyright Claims Under TRIPS*, 21 EUR. INTELL. PROP. REV. 8 (1999) (discussing the balance between intellectual property rights and human rights, specifically as represented in TRIPS and the European Convention, respectively).

63. European Convention for the Protection of Human Rights and Fundamental Freedoms art. 10, Nov. 4, 1950, 213 U.N.T.S. 221.

64. *Id.*

65. *Ashdown*, [2001] EWCA (Civ) 1142 (Eng.).

protected material.⁶⁶ The court pointed out that injunctive relief in copyright infringement actions could become particularly suspect as an improper prior restraint.⁶⁷ Under *Ashdown* it appears UK copyright law will not survive a conflict with the Human Rights Act unless its restrictions on free expression (at least involving journalistic, literary and artistic works) are necessary in a democratic society to protect the rights of others.⁶⁸

The European Court of Human Rights has held several times in recent years that enforcement of national copyright law infringed Article 10 because the subsequent curtailing of free expression was not necessary in a democracy. For example, in 2007 the Court concluded that the Austrian courts' imposition of an injunction barring the exhibition of a sexually explicit painting depicting public officials and public figures violated the Human Rights Convention.⁶⁹ Although the painting used a photograph of a political figure who objected, the court nonetheless held that the artist's right to comment publicly outweighed the subject's right to object to the graphic criticism.⁷⁰ Similarly, the same court held in 2006 that publication of the photograph of a business magnate charged with tax evasion was in the public interest and, as a result, the imposition of an injunction under copyright law violated Article 10.⁷¹ The court also found a public interest in the reporting on criminal charges against a former member of the Austrian Parliament such that the nation's courts were not permitted, under Article 10, to issue an injunction against further news coverage using the term "Bonnie and Clyde" to describe the former official and his female companion.⁷² Finally, the court concluded that a public interest existed in publication of the photograph, notwithstanding a copyright law claim, of an individual accused in a high-profile letter-bomb case.⁷³

Although a breach of confidence case rather than a copyright infringement case, the so-called *Spycatcher* litigation also gives an indication of how the European Court of Human Rights views information of which disclosure is in the public interest. Peter Wright, a former member of the British Security Service, planned to publish a

66. *Id.* at ¶ 39.

67. *Id.* at ¶ 46.

68. *Id.* at ¶ 24.

69. Vereinigung Bildender Künstler v. Austria, 79 Eur. Ct. H.R. 2007.

70. *Id.*

71. Verlagsgruppe News GMBH v. Austria, 1092 Eur. Ct. H.R. 2006.

72. Wirtschafts-Trend Zeitschriften-Verlagsgesellschaft M.B.H. v. Austria, Eur. Ct. H.R. 2005.

73. News Verlags v. Austria, 5 Eur. Ct. H.R. 2000.

book alleging that agents of the UK government engaged in nefarious activities such as bugging the conversations of other nations' diplomats, committing crimes and spying for the Soviets.⁷⁴ The UK sought and obtained injunctions prohibiting the book's publication in Australia, but nevertheless, much of the book's content was published in newspapers in the UK before the full book itself was published in the United States.⁷⁵ The Court of Human Rights eventually held that Article 10 was violated by continuation of the injunctions against publication even when much of the information in the book already had been made known publicly.⁷⁶ Once the information was out publicly, the court said, the government could no longer claim a national security interest but was left to rely only on the weaker interest in preserving reputation; the continued injunctions were not necessary in a democracy that needed to be informed about its government's activities, and, therefore, the injunctions violated Article 10.⁷⁷

Notwithstanding these speech-friendly recent precedents, free expression's place within copyright law is far from settled. In the United States, the First Amendment as a defense to copyright infringement seems to have been rejected more often than it has been accepted by judges.⁷⁸ It has been suggested that, in Europe, a more straightforward approach to balancing interests in copyright law is abuse of copyright rather than free expression.⁷⁹ Yet some scholars see the application of free-expression principles within copyright law as necessary to restore balance between the rights of users and authors.⁸⁰ Free access to works does not mean, however, that users may not be required to compensate authors under a statutory licensing system that levels the playing field between unequal bargaining partners.⁸¹ While in 2003 a scholar could say that free expression's role in UK copyright law had been little-explored in literature and judicial decisions,⁸² just a few

74. *Observer and Guardian v. The United Kingdom* 49 Eur. Ct. H.R. 1991.

75. *Id.*

76. *Id.*

77. *Id.*

78. See Patricia L. Loughlan, *Looking at the Matrix: Intellectual Property and Expressive Freedom*, 24 EUR. INTELL. PROP. REV. 30 (2002).

79. Herman Cohen Jehoram, *Copyright and Freedom of Expression, Abuse of Rights and Standard Chicanery: American and Dutch Approaches*, 26 EUR. INTELL. PROP. REV. 275 (2004).

80. See, e.g., Christophe Geiger, *Copyright Law and Free Access to Information: For a Fair Balance of Interests in a Globalised World*, 28 EUR. INTELL. PROP. REV. 366 (2006).

81. *Id.* at 372.

82. M.D. Birnhack, *Acknowledging the Conflict Between Copyright Law and Freedom of Expression Under the Human Rights Act*, 14 ENT. L. REV. 24 (2003).

years later another author concluded that was no longer the case.⁸³ Thus it appears the issue is receiving and likely will continue to receive consideration.

Free-expression law's enveloping of the public interest in access to and dissemination of copyrighted works could be a positive development. While valuable, the public interest defense in CDPA 1988 §171(3) appears insufficient, standing alone, to achieve and maintain a balance with opposing interests that would strengthen copyright protection at the expense of access and dissemination. The public interest defense to copyright infringement has been viewed by some courts as merely a tool to keep their authority from being abused. Other courts have expanded the application of the defense somewhat to expose wrongdoing or prevent harm notwithstanding copyright claims. Still, the future of the public interest in copyright law's encouragement of learning may well rest with the application of free-expression principles, perhaps in conjunction with the public interest defense—as was the case in *Ashdown*. Provisions such as those in Article 10 of the Human Rights Convention, reinforced by the UK Human Rights Act, and the First Amendment to the U.S. Constitution may be the last line of defense against an apparent global-technology driven tendency of copyright law to assign ownership even to public information and ideas.

III. EXCEPTIONS TO HARMONIZED COPYRIGHT LAW'S MONOPOLY

European copyright law scholars responded to changes brought about by technology and harmonization with a July 2008 manifesto intent on recommending a method for the rescue of public interest within copyright. The document, titled "Declaration: A Balanced Interpretation of the 'Three-Step Test' in Copyright Law," advocates adaptations in the prevailing method of evaluating limitations and exceptions to the exclusive rights held by copyright owners. This prevailing method, called the three-step test, originated as a vague diplomatic compromise in a 1967 amendment of the Berne Convention for the Protection of Literary and Artistic Works. Now, though, the three-step test "is at the core of copyright law."⁸⁴ So far, that core has generally favored copyright owners at the expense of the public interest. If, however, the recommendations of the scholarly Declaration are followed, the interests of copyright users and the general public will

83. Ronan Deazley, Publication Review, *Copyright and Human Rights: Freedom of Expression—Intellectual Property—Privacy*, 27 EUR. INTELL. PROP. REV. 440 (2005).

84. Kamiel J. Koelman, *Fixing the Three Step Test*, 28 EUR. INTELL. PROP. REV. 407 (2006).

become more prominent within copyright policymaking and adjudication.

A. Centrality of the Three-Step Test in International Copyright

The three-step test requires exceptions to the rights of copyright owners (1) to be confined to certain special cases; (2) not to interfere with “normal exploitation” of copyright-protected works; and (3) not to unreasonably prejudice copyright owners’ interests. Scholars have noted the surprising evolution of the three-step test from its inception in 1967 to today.⁸⁵ When initially incorporated within the Berne Convention in 1967, the three-step test seemed little more than a simple confirmation that public-interest exceptions to the author’s reproduction right could be permitted.⁸⁶ Today, however, the three-step test— included as part of the Agreement on Trade-Related Aspects of Intellectual Property (TRIPS) and two World Intellectual Property Organization (WIPO) treaties—constitutes a substantive limit on the ability of nations to allow exceptions to any of the exclusive rights of the copyright monopoly.⁸⁷ The three-step test also has been incorporated in national law, meaning it is viewed by legislators and judges as the analytical tool for determining whether specific exceptions or limitations on the exclusive rights of copyright are permissible.⁸⁸ The three-step test has come to stand for the idea that virtually no copyright exception can be allowed if it diminishes the compensation to authors or subsequent rights-holders.⁸⁹

In France the three-step test has been viewed as threatening the private copy exception to copyright law; without the private copy exception, prospective authors may not have access to the creative works they typically use to make new works.⁹⁰ French legislators and judges, however, avoided addressing the question whether the private copy exception, in light of the three-step test, permitted the downloading of music from the Internet.⁹¹ This avoidance caused

85. See, e.g., Christophe Geiger, Jonathan Griffiths & Reto M. Hilty, *Towards a Balanced Interpretation of the “Three-Step Test” in Copyright Law*, 30(12) EUR. INTELL. PROP. REV. 489 (2008) [hereinafter *Balanced Interpretation*].

86. *Id.* at 489.

87. *Id.*

88. *Id.*

89. *Id.* at 490-91.

90. Christophe Geiger, *The Answer to the Machine Should Not Be the Machine: Safeguarding the Private Copy Exception in the Digital Environment*, 30 EUR. INTELL. PROP. REV. 121, 126-29 (2008) [hereinafter *Answer to the Machine*].

91. Christophe Geiger, *Legal or Illegal? That is the Question! Private Copying and Downloading on the Internet*, 39 INT’L REV. OF INTELL. PROP. & COMPET. L. 597 (2008).

confusion and raised doubts about how the three-step test could be applied in the specific circumstances.⁹² Current applications of the three-step test have been viewed as inadequate to protect public interests in access to copyright-protected works and free expression.⁹³ As a result scholars have found it necessary to propose an alternative three-step test that would move copyright law from a system primarily protecting private ownership of knowledge, with certain narrow exceptions, to a system primarily protecting public access to knowledge, with certain narrow exceptions.⁹⁴ Given that even slight variations in the three-step test can greatly impact the balance between copyright owners' rights and users' free expression, the adoption of various forms of the three-step test in national law could be problematic.⁹⁵

It is clear that the three-step test has become entrenched in copyright law. Major debates about revisions to copyright law often hinge on the question whether a given course of conduct would violate the three-step test.⁹⁶ For example, a sweeping, somewhat whimsical imagination of how copyright law could be reformed upon the 300th anniversary of the Statute of Anne, in 2010, was stopped short by the query, "To what extent does changing the scope of the exclusive rights fall outside the Berne Convention's 'three step test'?"⁹⁷ The incorporation of the three-step test into European Union directives—and, thus, national law in the UK, at least implicitly⁹⁸—has been said to bring the UK closer to the U.S. fair use approach, but the three-step test in the hands of judges has more often than not resulted in restrictions on users.⁹⁹ By contrast, U.S. fair use takes an expansive view of users' rights.¹⁰⁰ The U.S. doctrine of fair use even has been said to violate the

92. *See id.*, at 603.

93. Christophe Geiger, *Flexibilising Copyright—Remedies to the Privatisation of Information by Copyright Law*, 39 INT'L REV. OF INTELL. PROP. & COMPET. L. 178 (2008).

94. *Id.* at 192-97.

95. Christophe Geiger, *From Berne to National Law, Via the Copyright Directive: The Dangerous Mutations of the Three-Step Test*, 29 EUR. INTELL. PROP. REV. 486 (2007) [hereinafter *From Berne*].

96. *See Balanced Interpretation*, *supra* note 85, at 489, 491 (noting the "argument that a particular policy choice cannot be adopted because it would 'conflict with the three-step test' is increasingly heard").

97. Brian Fitzgerald, *Copyright 2010: The Future of Copyright*, 30 EUR. INTELL. PROP. REV. 43 (2008).

98. *See* Michael Hart & Steve Holmes, *Implementation of the Copyright Directive in the United Kingdom*, 26 EUR. INTELL. PROP. REV. 254 (2004).

99. Christina J. Angelopoulos, *Freedom of Expression and Copyright: The Double Balancing Act*, 3 INTELL. PROP. Q. 328, 340 (2008).

100. Paul Goldstein, *Berne in the USA*, 39 IIC. 216 (2008).

Berne three-step test, but a successful WTO challenge to fair use would be difficult to fashion.¹⁰¹

Although copyright scholars have saddled one another with (inadvertently) reducing permissible exceptions to copyright,¹⁰² researchers and commentators generally have argued for increasing the availability of copyright exceptions through copyright-user-friendly interpretations of the three-step test.¹⁰³ For example, it has been argued that the three-step test—originally a vague diplomatic compromise not intended for direct judicial application—could be made more suitable to test specific copyright exceptions in national law if it were interpreted similar to the U.S. fair use doctrine.¹⁰⁴ This view is held by those who favor the interests of users at least as much as those of rights holders. Scholars have paid particular attention to the so-called “three-step test frenzy” as embodied in the decision of a WTO panel considering a European challenge to the U.S. Copyright Act in 2000.¹⁰⁵ Following that panel decision, which is considered in detail in the next section, scholars bemoaned that “the three-step test is no test at all.”¹⁰⁶ In essence, critics contend that the three-step test is nothing more than a tautology.¹⁰⁷

B. Evolution of the Three-Step Test

When added to the Berne Convention in 1967 at the Stockholm Revision Conference, the three-step test was designed to broadly endorse the variety of reproduction-right exceptions already in place in common-law and civil-law countries.¹⁰⁸ In order to encompass both broad exceptions in the model of fair use as well as narrow, listed exceptions, the three-step test’s language was intentionally crafted to be vague and thus offer countries much latitude in interpreting their own conformity: “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

101. *Id.* at 221.

102. Angelopoulos, *supra* note 99 at 340 (internal quotation and citation omitted).

103. *Answer to the Machine*, *supra* note 90, at 126.

104. Koelman, *supra* note 84 at 410-12.

105. David J. Brennan, *The Three Step Test Frenzy—Why the TRIPs Panel Decision Might Be Considered Per Incuriam*, 2 INTELL. PROP. Q. 212 (2002).

106. *Id.* at 225.

107. *See id.*

108. *From Berne*, *supra* note 95 at 487; Thomas Heide, *The Berne Three-Step Test and the Proposed Copyright Directive*, 21 EUR. INTELL. PROP. REV. 105 (1999).

legitimate interests of the author.”¹⁰⁹ Under this formulation, the phrases “certain special cases” and “does not conflict with a normal exploitation” seemed to mean very little. In truth, the phrase “certain special cases” meant only that exceptions were not the rule, and the counsel against conflicting with “normal exploitation” could not have meant that exceptions were prohibited from interfering with *any* exploitation.¹¹⁰ Otherwise, the three-step test would not be needed at all because exceptions would be banned altogether. It was precisely because the three-step test exacted no mandatory requirements of the Berne Convention signatory countries that it was acceptable to them in the negotiation process.

When incorporated in the TRIPS Agreement in 1994, however, the three-step test evolved from a non-binding “rule of referral” to a “rule of mandatory application.”¹¹¹ By that time, the language of the three-step test had eliminated any hint of country-specific flexibility: “Members shall confine limitations or exceptions to exclusive rights to 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.”¹¹² The TRIPS Agreement version of the three-step test made several significant changes to its Berne Convention antecedent. Under TRIPS, the three-step test functions as a mandatory limitation on countries’ ability to provide exceptions, and it applies not just to the reproduction right but to all exclusive rights. Also, the TRIPS version of the three-step test purports to protect the interests not just of authors of creative works but also rights holders, meaning protection is granted to corporate and other interests that obtain copyrights as business investments.

Later, the three-step test was incorporated in the WIPO Copyright Treaty, which seemed to soften the hard language of the TRIPS version somewhat by at least acknowledging limitations were allowed.¹¹³ In general, though, the WIPO Copyright Treaty strengthened the position of copyright holders by including a right of public communication and a

109. Berne Convention *supra* note 15, art. 9(2).

110. See Heide, *supra* note 108 at 106.

111. *Id.* at 105.

112. TRIPS Agreement *supra* note 8, at art. 13.

113. World Intellectual Property Organization Copyright Treaty art. 10, Dec. 20, 1996, 2186 U.N.T.S. 38542, 36 I.L.M. 65 [hereinafter WIPO Copyright Treaty] (“Contracting Parties may, in their national legislation, provide for limitations of or exceptions to the rights granted to authors of literary and artistic works under this Treaty in certain special cases that do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the author.”).

requirement that contracting nations prevent anti-circumvention of technological protection measures.¹¹⁴ The three-step test also appeared in the WIPO Performances and Phonograms Treaty¹¹⁵ as well as the EU Copyright Directive in 2001.¹¹⁶ The Directive sought, as a primary goal, to harmonize various nations' copyright laws "in order to respond to . . . technological challenges. . . ."¹¹⁷ Inclusion of the three-step test was a significant step toward harmonization.

Thus far, the only interpretation of the three-step test in the international copyright context came from a WTO panel in 2000. The importance of this initial interpretation is demonstrated by extensive scholarly treatment.¹¹⁸ Among other things, scholars have speculated about the extent to which the WTO panel's interpretation could influence a future European Court of Justice application of the three-step test under the EU Copyright Directive.¹¹⁹ The report originated with a complaint by the European Community against the United States for a revision to the U.S. Copyright Act made by the 1998 Fairness in Music Licensing Act.¹²⁰ Even prior to the 1998 revision, the U.S. Copyright Act contained a "homestyle" exception that allowed the playing of a radio or television station in a public place, as long as no admission charge was made and the playing was done on a device intended for home use.¹²¹ The "homestyle" exception was approved by the U.S. Supreme Court in *Twentieth Century Music Corp. v. Aiken*; in that case the Court held it would not be reasonable to require small restaurants, for example, to pay copyright royalties just for turning on a radio.¹²² The 1998 revision of the Copyright Act added a business exception that allowed retail establishments smaller than 2,000 square feet, and restaurants and bars smaller than 3,750 square feet, to publicly play broadcast, cable and satellite radio and television programming without a copyright license.¹²³

114. WIPO Copyright Treaty, *supra* note 113, at art. 10.

115. World Intellectual Property Organization Performances and Phonograms Treaty art. 16, Dec. 20, 1996, 2186 U.N.T.S. 245, 36 I.L.M. 76 [hereinafter Phonograms Treaty].

116. Council Directive 2001/29, art. 11, 2001 O.J. (L 167) 10 (EC) [hereinafter "Copyright Directive"].

117. *Id.*

118. Martin Senftleben, *Towards a Horizontal Standard for Limiting Intellectual Property Rights? - WTO Panel Reports Shed Light on the Three-Step Test in Copyright Law and Related Tests in Patent and Trademark Law*, 37 IIC 407 (2006).

119. Koelman, *supra* note 84, at 407.

120. Fairness in Music Licensing Act of 1998, 17 U.S.C. § 110(5) (2007).

121. Panel Report, United States – Sections 110(5) of the United States Copyright Act, ¶ 2.4, WT/DS160/R (June 15, 2000) [hereinafter Section 110(5) Panel Report].

122. *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151 (1975).

123. Section 110(5) Panel Report, *supra* note 121, at ¶ 2.10.

In its complaint to the WTO, the EC contended that the U.S. retail establishments, restaurants and bars were being allowed to violate the public performance right of European composers in violation of the Berne Convention and TRIPS Agreement. The U.S. contended that the three-step test allowed it to carve out minor exceptions to any aspect of the copyright monopoly, but the EC countered that new exceptions could only be made—under the three-step test—to rights created after Berne by the TRIPS Agreement.¹²⁴ The WTO panel disagreed with the EC and instead sided with the United States on that point,¹²⁵ but the panel ultimately held that the U.S. exception was not permissible under the three-step test. In doing so the panel concluded that each of the three elements of the three-step test must be given meaningful substance, and each must be satisfied in order for an exception to be allowed.¹²⁶ In other words, the test was not a flexible overall balancing test similar to U.S. fair use.

With regard to the first element of the test, the WTO panel stated that the exception must be clearly defined and narrow.¹²⁷ The panel concluded that the business exception in question was not narrow because it potentially applied to more than 70 percent of restaurants and bars, as well as 45 percent of retail establishments, in the United States.¹²⁸ The “homestyle” exception, however, did—in the panel’s view—conform to the requirement of a clearly defined and narrow exception.¹²⁹ With regard to the second element of the three-step test, the panel concluded that the business exception, but not the homestyle exception, interfered with normal exploitation of creative works because copyright owners could potentially make money from licensing to restaurants, bars and retail businesses the right to publicly perform their works.¹³⁰ The panel rejected the argument of the United States that this potential was only theoretical because those businesses would not likely choose to play music or television programs at all if they had to pay for the right to do so. So, in the U.S. view at least, there was no market displacement and thus no economic harm to copyright holders.

With regard to the third element of the test, the United States argued that EC copyright holders were not unreasonably prejudiced because the annual lost licensing revenues as a result of the 1998

124. *Id.* at ¶¶ 6.33-6.35.

125. *Id.* at ¶ 6.94.

126. *Id.* at ¶ 6.97.

127. *Id.* at ¶ 6.112.

128. *Id.* at ¶ 6.122.

129. Section 110(5) Panel Report, *supra* note 121, at ¶ 6.159.

130. *Id.* at ¶ 6.211.

business exception totaled only about \$1 million.¹³¹ The United States also pointed to evidence that the copyright holders had taken other measures to make up for those lost revenues. The EC, on the other hand, estimated lost revenues at more than \$53 million annually and contended there was no way to make up that shortfall.¹³² The panel ultimately concluded that the business exception violated the third factor of the three-step test, although the homestyle exception was found not to be in violation. The WTO panel report has been criticized as overly focused on economic factors and quantitative data,¹³³ rather than qualitative social factors that could be just as important in applying the three-step test.

Although the United States was required to take remedial action in conformity with the panel's decision, the United States has opted not to do so and has, instead, merely paid the \$1.1 million annual arbitration amount.¹³⁴ This amount has been called the "yearly ransom for the maintenance of the infringing business exception in the US law."¹³⁵ The United States has treated the amount as merely the equivalent of a statutory licensing fee that is an acceptable part of doing business.

C. Declaration on the Three-Step Test

In July 2008, a group of primarily European copyright scholars, carefully distancing themselves from the label "anti-copyright activists,"¹³⁶ introduced their "Declaration." This scholarly manifesto disagreed head-on with the WTO panel's interpretation and application of the three-step test in the U.S. Copyright Act Section 110(5) case described above. In its Preface, the Declaration states that copyright law has responded to the threat of technological change by, primarily, seeking harmonization toward "securing rightholders' ability to benefit from new modes of exploitation and business models."¹³⁷ In doing so, according to the scholars, the law of copyright has essentially

131. *Id.* at ¶ 6.252.

132. *Id.* at ¶ 6.253.

133. See Charlotte Waelde, *Databases and Lawful Users: The Chink in the Armour*, 3 INTELL. PROP. Q. 256, 276-77 (2006) (citing references).

134. Phillip Johnson, *One Small Step or One Giant Leap?*, 26 EUR. INTELL. PROP. REV. 265, 272 (2004).

135. Herman Cohen Jehoram, *Restrictions on Copyright and Their Abuse*, 27 EUR. INTELL. PROP. REV. 359, 362 (2005).

136. Balanced Interpretation, *supra* note 85 at 492.

137. *Id.*

abandoned the public interest, particularly in pursuits like education, research, access to information and human rights.¹³⁸

The Declaration calls for a more appropriate balancing of public versus private interests in copyright law, and the scholars viewed expanded copyright exceptions under a more copyright-user-friendly three-step test as the primary method of achieving this re-balancing of interests. In its basic outlook, the document takes a very utilitarian approach to copyright law. The Declaration states, for example, that copyright law has as its objective the service of public interest through provision of an incentive for the creation of new works.¹³⁹ The Declaration does not once mention moral rights, and the economic interests of rights holders are reduced to a necessary evil that must be held in check.

With regard to specific observations about the three-step test, the Declaration recommends that the test not be interpreted with a view only, or even primarily, toward what will benefit copyright holders.¹⁴⁰ The document calls upon the judiciary to explicitly consider third-party interests in copyright law questions, even though the three-step test in the copyright law context (TRIPS Article 13) does not mention those interests.¹⁴¹ The scholars noted that TRIPS does account for third-party interests in Articles 17, 26 and 30 dealing with other areas of intellectual property.¹⁴² In order to achieve a proper balancing of these third-party interests, the three-step test must not—in the view of the Declaration’s authors—be applied in a successive fashion where failure of any one step means failure of the entire test.¹⁴³ Instead, the test should be conceived of and applied as “a comprehensive overall assessment” in which “[n]o single step is to be prioritized.”¹⁴⁴ In other words, factors disfavoring allowance of an exception on one or two of the steps of the test should not necessarily kill the exception altogether.

The Declaration also calls for a move away from a purely economic analysis under the three-step test. Unlike the WTO panel in the Section 110(5) case, for example, the scholars in the Declaration call for allowance of copyright limitations and exceptions even when, at times, the resulting compensation to copyright holders falls below

138. *Id.* at 493, 495.

139. *Id.* at 493.

140. *Id.*

141. *Id.* at 493.

142. Balanced Interpretation, *supra* note 85 at 493.

143. *Id.*

144. *Id.*

market rate.¹⁴⁵ The Declaration reminds that the sole purpose for compensation under the copyright monopoly is to provide an incentive for creation of new works; if compensation dips below market level due to a copyright exception but nonetheless still provides an incentive for new works, then that compensation is inherently adequate.¹⁴⁶ In the end, the document makes six specific declarations:

- “The Three-Step Test constitutes an indivisible entirety.”¹⁴⁷
- “The Three-Step Test does not require limitations and exceptions to be interpreted narrowly.”¹⁴⁸
- The “certain special cases” language of the three-step test does not prevent (1) creation of new limitations and exceptions; (2) extension of existing limitations and exceptions as new facts warrant; or (3) introduction of new, open-ended exceptions as long as legislatures can reasonably foresee the scope of those exceptions.¹⁴⁹
- “Normal exploitation” of a work is not interfered with as long as copyright exceptions serve sufficiently important public interests, including ensuring competition, and “adequate compensation” is made to copyright holders.¹⁵⁰
- The three-step test should account for the interests of authors or creators as well as subsequent rights holders.¹⁵¹
- The three-step test should be interpreted in light of third-party interests in human rights, fundamental freedoms, market competitiveness and societal progress in science, culture and economics.¹⁵²

IV. FAIR USE AND FREE EXPRESSION

A. Reforming the Three-Step Test to Resemble Fair Use

The vision of the three-step test held by the Declaration’s authors bears a striking resemblance to the venerable U.S. fair use doctrine, which had its beginnings in common-law adjudication before being

145. *Id.* at 494.

146. *Id.*

147. *Id.* at 495.

148. Balanced Interpretation, *supra* note 85 at 495.

149. *Id.*

150. *Id.*

151. *Id.* at 495.

152. *Id.*

codified by Congress. First, the Declaration's authors have called for interpretation of the three-step test as an indivisible entirety, or a comprehensive overall assessment.¹⁵³ Similarly, the doctrine of fair use has four individual and well-developed factors, but no single factor is definitive or conclusive. In fact, the U.S. Supreme Court has described the four fair use factors—purpose and character of the use, nature of the copyrighted work, amount and substantiality of the portion used, and use's effect on the market—as non-exclusive,¹⁵⁴ meaning other considerations also may be brought to bear.

The four fair use factors are not to “be treated in isolation, one from another.”¹⁵⁵ Instead, “[a]ll are to be explored, and the results weighed together, in light of the purposes of copyright.”¹⁵⁶ This reference to the purpose of copyright is relevant in both fair use analysis and application of the three-step test. Both the Declaration, with regard to the three-step test, and U.S. Supreme Court jurisprudence, with respect to fair use, make it clear that copyright exceptions and limitations for education, research, commentary, access to information and free expression are at the heart of the objectives of copyright law.¹⁵⁷ Thus both the fair-use factors and the elements of the three-step test should not be “interpreted narrowly.”¹⁵⁸

On a related note, the Declaration emphasizes that the “certain special cases” language of the three-step test does not limit the creation of new copyright exceptions or the extension of existing exceptions in light of technological or other developments.¹⁵⁹ This is already true of fair use. For example, when Congress codified fair use in 1976, it made clear that it was not trying to narrow the future application of the fair-use doctrine as technology evolved.¹⁶⁰ Since then, the Supreme Court has considered fair use extensively in four cases; in two of those cases fair use was allowed,¹⁶¹ and in two it was not.¹⁶² The two cases in which fair use was allowed make it clear that the fair use doctrine

153. See *supra* notes 143-44 and accompanying text.

154. *Harper & Row Publishers, Inc., v. Nation Enter.*, 471 U.S. 539, 549 (1985) (citing 17 U.S.C. § 107).

155. *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 578 (1994).

156. *Id.*

157. *Balanced Interpretation*, *supra* note 85 at 495; *Sony Corp. of Am. v. Universal City Studios*, 464 U.S. 417, 432 (1984) (noting the “ultimate aim” of copyright law is “to stimulate artistic creativity for the general public good.”).

158. *Balanced Interpretation*, *supra* note 85 at 495.

159. *Id.*

160. *Sony*, 464 U.S. at 447 n.29 (citation and quotation omitted).

161. *Id.*; *Campbell*, 510 U.S. 569.

162. *Harper & Row*, 471 U.S. 539; *Stewart v. Abend*, 495 U.S. 207 (1990).

continues to evolve to more broadly and deeply protect unlicensed use of copyright-protected material. For example, in *Sony* the Supreme Court extended the fair-use doctrine to cover the then-emerging technology of Sony Betamax home-video recorders and their use by consumers to record copyright-protected television programs.¹⁶³ The Court recognized that this technology presented new problems for copyright owners but the Court did not allow dire predictions by the entertainment industry to prevent consumers from being able to make use of this reasonable copyright exception. In a later case, the Court held that a rap musician's parody of a popular song was fair use; in that case, the Court significantly extended the fair-use doctrine to cover commercial uses where significant transformation of the copyright-protected work has taken place.¹⁶⁴ The Declaration seems to call for similar common-sense extensions of copyright exceptions under the three-step test as technology presents new issues for copyright owners and new opportunities for copyright users and the general public.

At its core, the Declaration calls for more equitable and reasonable balancing of public interests versus private copyright owners' interests. For example, the Declaration states that copyright limitations do not interfere with normal exploitation if those limitations "are based on important competing considerations."¹⁶⁵ Further, the Declaration calls for more attention to be given, in the copyright calculus, to "human rights and fundamental freedoms."¹⁶⁶ European scholars' desired outcomes for the three-step test, as expressed in the Declaration, closely resemble the established doctrine of U.S. fair use. The Supreme Court has called that doctrine an "equitable rule of reason."¹⁶⁷ As such, fair use does not primarily hinge on economic factors; some commercial uses may be fair uses, while some non-commercial uses may not. Instead of an over-emphasis on economics, fair use takes account of the importance of public interest in societal progress and fundamental freedoms such as free speech. In fact, Justice Sandra Day O'Connor, writing for the Court in *Harper & Row*, has called the entire copyright law system nothing less than "the engine of free expression."¹⁶⁸

It must be acknowledged that fair use has not been universally accepted as compatible with the three-step test. In fact, several

163. *Sony*, 464 U.S. 417.

164. *Campbell*, 510 U.S. 569.

165. Balanced Interpretation, *supra* note 85 at 495.

166. *Id.*

167. *Sony*, 464 U.S. at 448.

168. *Harper & Row*, 471 U.S. at 558.

scholars—both European and American—have made the point that fair use may well violate the three-step test because, at times, it is not narrowly confined and it does reduce remuneration for copyright holders.¹⁶⁹ Although acknowledging that U.S. fair use, especially in the hands of lower courts emboldened by the Supreme Court's decision in *Campbell*, may violate the three-step test, one American scholar contended that a WTO challenge to fair use under the TRIPS Agreement would be very difficult to bring because "fair use takes its shape from *ad hoc* judicial decisions rather than definitive statutory direction."¹⁷⁰ The three-step test does not restrict U.S. law with regard to American copyright owners, and so only foreign copyright owners are in a position to complain about fair use.¹⁷¹ The United States already demonstrated, in its veritable disdain for the WTO panel's decision in the Section 110(5) case, that it is not inclined to alter its copyright law to conform to international norms. However, this presents a significant problem of hypocrisy, if nothing else, as the United States continues to demand that the rest of the world meet the international minimum standards of Berne and TRIPS.

Calls for Europe to adopt broad fair-use style exceptions to the copyright holders' monopoly are nothing new.¹⁷² The scholars who wrote the 2008 Declaration, however, have linked the successful future of copyright law for everyone—not just copyright owners—to the continued evolution of the three-step test toward a broad balancing test similar to fair use. In doing so, the scholars have bucked the trend favoring narrow and specific exceptions spelled out in great statutory detail.¹⁷³ Perhaps the scholars believe the specific exceptions approach is simply not working, at least not sufficiently well. Their advocacy of a broad and strong balancing approach to the three-step test likely will not be broadly adopted across Europe or the globe, and so it will not contribute to harmonization. But the most important contribution of the Declaration may well be to cause at least some policymakers to question whether harmonization is indeed a desirable goal. It may not be

169. See, e.g., Koelman, *supra* note 84 at 409 n.13, 411 n.27 (citing authorities); Goldstein, *supra* note 100 at 221.

170. *Id.*

171. *Id.*

172. See, e.g., F. Willem Grosheide, *Copyright Law From a User's Perspective: Access Rights for Users*, 23 EUR. INTEL. PROP. REV. 321 (2001); Robert Burrell, *Reining in Copyright Law: Is Fair Use the Answer?*, 4 INTEL. PROP. Q. 361 (2001).

173. See, e.g., Shira Perlmutter, *Convergence and the Future of Copyright*, 23 EUR. INTEL. PROP. REV. 111, 116 (2001).

desirable if it benefits only copyright holders and not the public in general.

The future of the three-step test is tied to its ability to successfully transform itself from a purposely vague diplomatic compromise with little intention of being applied other than in a subjective way by nations to evaluate themselves. The three-step test must become an effective evaluation tool in the hands of jurists charged with considering specific exceptions to the copyright monopoly. These exceptions probably will be of the *ad hoc*, user-generated variety rather than of the legislative variety. An increased number of fair-use based challenges brought in national courts would be a positive development in copyright law, especially if the judges considering those challenges do engage in the type of balancing and consideration of user and third-party interests advocated by the Declaration. Fair-use advocates will not win all those challenges, nor should they. But if they can win their share, the future of copyright law might become something from which everyone can benefit.

The Declaration on “A Balanced Interpretation of the ‘Three-Step Test’ in Copyright Law” will not likely contribute to national convergence or harmonization of copyright limitations and exceptions. As noted in the Declaration itself, harmonization has become a legislative and diplomatic code word for using technological change as an excuse to strengthen the position of copyright holders vis-à-vis the users of copyright-protected works. In this sense, then, the Declaration is anti-harmonization: The Declaration seeks to strengthen the position not of copyright holders but rather the position of users, interested third parties and the public in general. This may come at the expense of some copyright holders in some instances, but even if that were the case it would not mean the Declaration ultimately will harm copyright law, the creative works it protects, or the public interest. Indeed, harmonization—at least as practiced against free expression by a restrictive version of the three-step test—seems a flawed goal¹⁷⁴ for all who have something at stake in copyright questions except wealthy and large corporate interests.

174. See Charles-Henry Massa & Alain Strowel, *The Scope of the Proposed IP Enforcement Directive: Torn Between the Desire to Harmonise Remedies and the Need to Combat Privacy*, 26 EUR. INTELL. PROP. REV. 244 (2004) (discussing the merits of harmonization as an international goal).

B. Free Expression and the Reformed Three-Step Test

Based on the experiences of Europe, and especially the UK, it might be possible to make some educated guesses about what pressures harmonization could put on the U.S. Copyright Act to further reform in line with the technology-driven concerns of copyright holders. First, the United States could be forced to truly incorporate moral rights by granting all copyright holders—not just those of certain works of visual art—the right to paternity and integrity.¹⁷⁵ Second, the three-step test could eviscerate fair use altogether as a violation of the Berne Convention and the TRIPS Agreement. While this seems unlikely, it is perhaps somewhat more likely that certain applications of fair use could be declared inappropriate by a WTO panel adjudicating a dispute against the United States. Third, copyright holders may continue to invoke contract law as a way to get around user-friendly aspects of copyright law.

With regard to this latter point, InfoSoc Directive 2001 by the European Parliament and the Council of the European Union seems to give priority to contractual agreements over copyright law, at least with respect to copyright holders' ability to induce contractual waiver of certain copyright exceptions or fair uses.¹⁷⁶ Article 6(4) of the Directive says that member nations should take measures to ensure end users can benefit from fair practice or fair dealing exceptions to copyright, but only "in the absence of voluntary measures taken by rightholders, including agreements between rightholders and other parties concerned. . . ."¹⁷⁷ Thus it would seem the Directive enables the contracting away of fair use rights and other limitations on the copyright monopoly. But this raises a host of questions. Who is entitled to sign away users' ability to engage in fair use? Does the copyright holder carry the burden to show that each potential fair user has agreed to waive the ability to use the copyrighted works under the exceptions or limitations on copyright? Why bother even including limitations on copyright if they can easily be written out of the law by contract?

In any case, it is clear there must be some limit on the ability of copyright holders to induce users to contract away fair use rights, just as it is clear there must be some limit generally on the extent to which copyright law may be altered by contract. Otherwise, copyright law is rendered meaningless. One simple example of this point is the case

175. See *supra* notes 20-21 and accompanying text.

176. HECTOR MACQUEEN, CHARLOTTE WAEDELDE & GRAEME LAURIE, *CONTEMPORARY INTELLECTUAL PROPERTY: LAW AND POLICY* 163 (2007).

177. *Id.*

decided by the U.S. Court of Appeals for the Second Circuit in New York City. In *Davis v. Blige et al.*,¹⁷⁸ a copyright co-owner had attempted to retroactively transfer its copyright interests in order to help a third party avoid an infringement lawsuit by another co-owner. The Second Circuit did not allow this contractual end-run around infringement; otherwise, the copyright owner's ability to exploit the work and enforce its rights through an infringement action would have been eviscerated.

Finally, it appears likely that intellectual property-based threats to the public interest, including in free expression, will come not only from copyright law but also trademark and perhaps even patent. Issues with trademark and preservation of free language seem particularly vexing. In some countries, including the United States, firms may purchase their competitors' trademark-protected brand names for keyword searches on Google. The New York Times wrote, "Ford, for example, can bid on and buy 'Toyota,' so that a person typing Toyota as a search term would see a link to Ford's Web site in the paid-for links on the right hand side of Google's Web page."¹⁷⁹ In other countries, however, this is not allowed.¹⁸⁰ In the area of trademark law and communication, the United Kingdom's experience in the aftermath of technological changes of the last 15 years once again proves instructive for the future of the United States.¹⁸¹ An extended discussion of the impact of technology on harmonized trademark law, however, is beyond the scope of this manuscript. Instead, this section will examine how a reformed version of the three-step test might treat free-expression-based fair use claims.

178. *Davis v. Blige*, 505 F.3d 90 (2d Cir. 2007).

179. Steve Lohr, *A New Battle Is Beginning In Branding For The Web*, N.Y. TIMES, Sept. 1, 2008.

180. *Id.*

[I]n a French court ruling in 2005, Google was enjoined from allowing others to buy as a keyword the trademark brand of a French luxury goods maker, Louis Vuitton. For countries other than the United States, Canada, the United Kingdom and Ireland, Google has a trademark complaint system, so holders can generally prevent their brands from being purchased as keywords by others. *Id.*

181. European courts applying harmonized trademark law have sometimes disallowed seemingly descriptive uses of terms and thus locked up language in the hands of "wealthy traders." See *British Sugar Plc v. James Robertson & Sons Ltd.*, [1997] ETMR 118 (Ch.) (explaining that trademark law operates to prevent access by the general public to certain words in the English language); see First Directive (EC) No. 89/104 of 21 Dec., 1988, art. 2, 1988 O.J. (L40) (defining the monopoly created by the grant of a trademark). *But see* *Century 21 Real Estate Corp. v. Lending Tree, Inc.*, 425 F.3d 211 (3d Cir. 2005); *KP Permanent Make-Up, Inc. v. Lasting Impression I, Inc.*, 543 U.S. 111 (2004); *New Kids On the Block v. New America Pub., Inc.*, 971 F.2d 302, 306 (9th Cir. 1992) (applying fair use doctrines to limit economic interests which would create a monopoly over the use of common English words).

If the fair-use-like version of the three-step test envisioned by the authors of the 2008 Declaration becomes reality, fair uses of copyright-protected material based for purposes of free expression could likely receive a favorable reception in judicial circles. These cases—whether in national courts in the United States and Europe, or in international tribunals such as the WTO or European and American human rights tribunals—would reinforce the notion by the U.S. Court of Appeals for the Tenth Circuit in its 2007 *Golan v. Gonzales* case that copyright law is subject to free-expression scrutiny.¹⁸² This treatment largely would mirror the analysis of courts such as the UK Court of Appeal in *Ashdown*¹⁸³ and the European Court of Human Rights in a series of cases applying Article 10 of the European Convention of Human Rights.¹⁸⁴

In the United States, the reinforcement of fair use with free-expression principles would result in a subtle shift of attitude with regard to the relationship of the Copyright Act and the First Amendment. As has been indicated, U.S. courts have relied on the notion that First Amendment concerns already are accounted for within the Copyright Act through the idea-expression dichotomy and fair use. Thus it is said that, for example, a news magazine cannot rely on the First Amendment to publish, without authorization, copyright-protected material but must instead obey the Copyright Act like everyone else.¹⁸⁵ Cases such as this one rely on a line from the U.S. Supreme Court, which said in a non-copyright-law case, “[t]he press, like others interested in publishing, may not publish copyrighted material without obeying the copyright laws.”¹⁸⁶

This notion is fine insofar as it goes, but the problem for the United States is that, like Europe, it faces increasing pressure from technology-paranoid copyright holders and international bodies to narrow the application of fair use to fit the restrictive parameters of the current Berne and TRIPS three-step test. Thus the version of fair use in the U.S. Copyright Act could increasingly come to resemble, through harmonization, the emasculated UK fair dealing defense. The narrow notion of fair dealing in the UK, until strengthened by the Human Rights Act and Article 10 of the European Convention, would permit a wealthy copyright owner to prevail in an infringement against a

182. See *supra* notes 4-7 and accompanying text.

183. See *supra* notes 56-61 and accompanying text.

184. See *supra* notes 67-73 and accompanying text.

185. See *Sarl Louis Feraud Intern. v. Viewfinder, Inc.*, 489 F.3d 474 (2d Cir. 2007).

186. *Cohen v. Cowles Media Co.*, 501 U.S. 663, 669-71 (1991).

newspaper for publishing security-camera photographs at the heart of an issue seemingly of genuine public interest.¹⁸⁷ It is this slavish devotion to copyright holders' rights that also, for example, would have a U.S. district court judge allow a news organization to proceed with a lawsuit against another publisher for conveying news, which is the very heart of free expression in the public interest.¹⁸⁸ If the U.S. version of fair use comes to resemble the Berne three-step test or the UK fair dealing exceptions, then the First Amendment must play a much bigger role in protecting the public interest and free expression within copyright.¹⁸⁹

It has been argued that the public interest could be served well if the recommendations in the European copyright law scholars' 2008 Declaration are incorporated to, in essence, replace the Berne three-step test with a version of the U.S. fair use doctrine. Fair use, or fair dealing in the UK, should be an affirmative users' right, placing the burden on the copyright owner to show non-fair use. In other words, the presumption should be that all works are subject to whatever uses may be made of them unless the copyright owner is able to carry the burden to show that a particular use infringes an exclusive creators' right and causes harm.

This simple recommendation—to preserve and strengthen fair use throughout intellectual property—would likely accommodate the public interest very well. More radical solutions have been suggested, but these seem unlikely. For example, shortening the duration of copyright protection would allow works to enter the public domain—and hence be fully available for other authors and creators to build on them—more quickly. This could strike a better balance between the need for an author incentive and the societal goal of copyright law to promote progress. As MacQueen, Waelde and Laurie point out,¹⁹⁰ the current, relatively long duration of copyright is not necessary from an economic standpoint as an incentive for creators and authors. Although shortening the term might harm corporate interests and could potentially lessen the incentive for large and long-term corporate investment in innovation,

187. See *supra* notes 55-57 and accompanying text.

188. See *Judge Reaffirms 1918 Legal Doctrine in AP Lawsuit*, ASSOCIATED PRESS, Feb. 18, 2009, http://www.ap.org/pages/about/pressreleases/pr_021809b.html.

189. In reality, if the fair use doctrine in the United States were to become so watered down as to resemble the three-step test, the First Amendment would indeed have to come into play because the copyright law then would have become altered beyond historical contours and the rule of *Eldred v. Ashcroft* requiring First Amendment scrutiny would kick in.

190. MACQUEEN ET AL., *supra* note 176, at 241.

the overall benefits might outweigh the harms. Still, the momentum seems to be toward lengthening, not shortening, copyright monopolies.

Second, and even more radical, one could acknowledge that “copy” has become increasingly non-essential to copyright.¹⁹¹ The digital world is one in which copies necessarily must be made in order to merely access works. Hence, continuing to grant copyright holders an exclusive reproduction right inhibits access and even fair uses of works. Doing away with the exclusive right of reproduction may well seem extreme and could produce some large (and unforeseen) problems. But it is also the case that copyright owners would continue to exercise their exclusive right of distribution, public display, and public performance, among others. Simply making a copy of something (even in the analog world) does not cause the author any harm and may cause great benefit for the legal end user. Making copies of works does not affect the marketplace, but distribution does, the argument says. The elimination of the reproduction right, at least in the digital realm, would open up a world of works to access. Improper uses of the works thus accessed could still be sanctioned. This approach would have an effect on the burgeoning public communication right. In other words, simply making a copy of something and making it publicly available (but not distributing it) would no longer be actionable. Subsequent users could also be sanctioned if they made improper uses of works thus accessed, but merely viewing a work would no longer be considered an infraction.

But these relatively radical solutions would be very difficult to get past national and international legislative bodies influenced heavily by industry. Thus the preservation of public interest in areas such as free expression could depend on fair use and a variety of applications of the principles behind fair use. Many of these applications may come outside the legislative and judicial settings. Creative Commons, for example, is a well-known effort to assist creators of copyright-protected works to license their works under terms favorable to users.¹⁹² But perhaps more relevant and helpful to fair users of copyright works are efforts by organizations such as the Center for Social Media, which has experienced initial success with a series of “best practice” statements that have endorsed a strong concept of fair use and that have become industry standards.¹⁹³

191. *Id.* at 242; JESSICA LITMAN, *DIGITAL COPYRIGHT* 177 (2001).

192. See Creative Commons Home Page, <http://creativecommons.org/> (last visited Mar. 17, 2009).

193. Center for Social Media Home Page, <http://centerforsocialmedia.org/> (last visited Mar. 17, 2009).

V. CONCLUSION

It has been said that “information and ideas want to be free in the same sense as a prisoner or a caged wild animal might do.”¹⁹⁴ Many believed the Internet would democratize the distribution of information, but the reality has been that technological advances that could facilitate flow of information have also been accompanied by efforts to control and own information. Instead of the Internet being a place where law could not regulate free speech, for example, the Internet has become, in some ways, a place where speech is regulated more stringently than in the real human world. In copyright law, too, it might be the case that rhetoric about the Internet as an unregulated place has caused more regulation than otherwise would have been the case. Because corporations believe the Internet is a lawless place, they have taken measures to ensure themselves the ability to protect their own interests. In the area of copyright, for example, this has resulted in technological protection measures that go beyond those same corporations’ ability to control their IP content in the real world. The simple remedy is zealous protection and promotion of fair use to protect the public interest from being enveloped in technology and economics.

While the move toward harmonization has advantages, most of those advantages are for copyright owners rather than users of copyright-protected material. The copyright owners who push for, and benefit from, harmonization are often not themselves creators of copyright-protected works but rather subsequent rights-holders. As subsequent rights-holders, these corporations need little if any incentive to create further expressive works. Thus it seems there is a disconnect between the economic motives of many copyright owners—an economic motive manifest in harmonization, which facilitates money-making on intellectual property—and the incentive rationale that traditionally has been at the core of copyright law. The experience of Europe has shown that while harmonization may enrich large corporations, it does not necessarily result in more and better creative works.

Harmonization is a one-way ratchet. Efforts to harmonize national copyright law only result in more protections for copyright owners and more restrictions on users. The one-way ratchet of harmonization could threaten fair use, and thus free expression, unless the international intellectual property community can accept a version of the three-step test that more closely resembles that advocated by the authors of the

194. MACQUEEN ET AL., *supra* note 176, at 227.

2008 “Declaration on the Three-Step Test” rather than the version applied by the WTO panel that decided against the United States in the Fairness in Music Licensing Act case. Although that case did not deal with free expression *per se*, it did demonstrate the potential for an overzealous harmonization regime to favor large corporate interests over small retail establishments and their consumers. Ultimately, unchecked harmonization could eviscerate the public interest from copyright law.

While Europe’s experience has demonstrated to the United States the pitfalls of harmonization, Europe also has demonstrated the potential to restore the proper balance between copyright and free expression. European jurists in the *Ashdown* case and a series of cases in the European Court of Human Rights have shown that the fundamental human interest in free access to and expression about copyright-protected works can be protected even in a technology-fueled harmonization environment. If the United States is to follow suit, First Amendment analysis and robust fair use protection must become regular fixtures of copyright law legislation and litigation as well as industry practice.