No step-free copyright exceptions: The role of the three-step in defining permitted uses of protected content (including TDM for AI-training purposes)

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Executive summary

International instruments providing for exceptions and limitations (“E&Ls”) to copyright and related rights invariably refer to the three-step test (“3ST”). The requirement that permitted uses of copyright works and protected subject-matter be limited to certain special cases, which do not conflict with a normal exploitation thereof and do not unreasonably prejudice the legitimate interests of the concerned rightholder is found in regional legislation and several national copyright statutes too. Yet, the meaning, scope of application, and addressees of the 3ST remain – still today – the subject of uncertainty and diverging views. A debated issue is whether a court, having established that the relevant conditions of an applicable E&L under national law are prima facie satisfied, is also required to assess if the unauthorized act in question passes the 3ST to determine if that particular act is in fact outside the control of the concerned rightholder. This study addresses this question, which is ultimately answered in the affirmative.

As international, regional and national practices alike indicate, the 3ST is not only binding upon national (and, where relevant, regional) legislatures, but also courts when interpreting and applying domestic copyright statutes. That is so irrespective of whether the relevant copyright statute expressly refers to the language of the 3ST. By also considering as a case study – though the relevant conclusions hold true for any E&L and any system of E&Ls (whether open-ended or closed) – unlicensed text and data mining (“TDM”) practices and related E&Ls in selected jurisdictions in Asia and Europe, the study shows that national courts tasked with determining if an available TDM E&L is applicable in a certain case are also required to assess if the requirements of the 3ST are fulfilled given the circumstances at hand.

The analysis is structured as follows. Part 1 is devoted to the 3ST as found in international law: it reviews relevant history, rationale, and scope of application before turning to its application in practice. Part 2 considers the 3ST as found in regional (EU) and national law. With regard to the former, it discusses case law of the Court of Justice of the European Union, which clearly imposes an obligation upon national courts also to consider the 3ST when deciding on the applicability of a potentially available E&L under national law. Turning to the latter, a review of selected national experiences is conducted, which demonstrates how the consideration of the 3ST is not only necessary for courts in jurisdictions whose relevant statutes expressly refer to it, but also in jurisdictions where no specific mention is found in legislative instruments. Part 3 adopts purpose-specific E&Ls allowing TDM as a case study for a review of E&Ls in light of the international/regional three-step. In this sense, the focus is on the experience of selected jurisdictions in Asia (Japan and Singapore) and Europe (UK and EU). Part 4 discusses how national courts in those jurisdictions shall be required to interpret and apply national E&Ls for TDM in order to construe them in a way that satisfies the relevant requirements thereunder. Part 5 reflects on the broader implications of the

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Introduction

International instruments providing for exceptions and limitations ("E&Ls") to copyright and related rights invariably refer to the three-step test ("3ST"). That is the case of the Berne Convention

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1 Berne Convention for the Protection of Literary and Artistic Works (as amended on September 28, 1979).

Yet, the meaning, scope of application, and addressees of the 3ST remain – still today – the subject of uncertainty and diverging views. A debated issue is whether a court, having established that the relevant conditions of an applicable E&L under national law are prima facie satisfied, is also required to assess if the unauthorized act at issue passes the 3ST to determine if that particular act is in fact outside the control of the concerned rightholder.

This study is precisely concerned with this question, which is ultimately answered in the affirmative. As international, regional and national practices alike indicate, the 3ST is not only binding upon national (and, where relevant, regional) legislatures, but also courts when interpreting and applying domestic copyright statutes. That is so irrespective of whether the relevant copyright statute expressly refers to the language of the 3ST.

By also considering as a case study – though the relevant conclusions hold true for any copyright E&L and any system of E&Ls (whether open-ended or closed) – unlicensed text and data mining (“TDM”) practices and related E&Ls in selected jurisdictions in Asia and Europe, the study shows that national courts tasked with determining if an available TDM E&L is applicable in a certain case are also required to assess if the requirements of the 3ST are fulfilled given the circumstances at hand.

The analysis is structured as follows. Part 1 is devoted to the 3ST as found in international law: it reviews relevant history, rationale, and scope of application before turning to its application in practice. Part 2 considers the 3ST under regional (EU) and national law. With regard to the former, it discusses case law of the Court of Justice of the European Union (“CJEU”), which imposes an obligation upon national courts also to consider the 3ST when deciding on the applicability of a potentially available E&L under national law. Turning to the latter, a review of selected national experiences is conducted, which demonstrates how consideration of the 3ST is not only necessary for courts in jurisdictions whose relevant statutes expressly refer to it, but also in jurisdictions where no specific mention is found in legislative instruments. Part 3 adopts purpose-specific E&Ls allowing TDM as a case study for an assessment of their wording and scope in light of the 3ST. In this sense, the experience of selected jurisdictions in Asia (Japan and Singapore) and Europe (UK and EU) is

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3 WIPO Copyright Treaty (WCT) (1996).
5 Beijing Treaty on Audiovisual Performances (2012).
6 Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired, or Otherwise Print Disabled (2013).
reviewed. Part 4 discusses how national courts in those jurisdictions shall be required to interpret and apply national E&Ls for TDM when the opportunity arises in order to construe them in a way that satisfies the relevant requirements thereunder. Part 5 reflects on the broader implications of the analysis conducted in the preceding parts, by considering the applicability of the 3ST to any E&L and to any system of E&Ls (exhaustive/open-ended) and the function of the 3ST more generally to ensure that a fair balance is struck between the requirement of ensuring a high level of protection of intellectual property and copyright, on the one hand, and third-party fundamental rights and interests, on the other.

1. The international three-step test

International instruments harmonizing E&Ls invariably refer to the 3ST, a phrase popularized (though not coined) during the TRIPS negotiations. Today, the 3ST is found in Article 9(2) Berne, Article 13 TRIPS, Article 10 WCT, Article 16(2) WPPT, Article 13(2) of the Beijing Treaty, and Article 11 of the Marrakesh Treaty.

a. History, rationale, and scope

The requirement that permitted uses of copyright works and protected subject-matter are limited to certain special cases, which do not conflict with a normal exploitation thereof and do not unreasonably prejudice the legitimate interests of the concerned rightholders was first explicitly enshrined in the 1967 revision to Berne. While the Berne 3ST is referred to E&Ls to the right of reproduction, subsequent instruments clarify that it applies to E&Ls to any right under copyright and related rights.

Insofar as the construction of the test is concerned, some commentators have considered it inappropriate “to cast Article 9(2) [of the Berne Convention] as a cumulative test, one in which every element must be separately satisfied”. It appears however that the three steps of the test are indeed cumulative conditions which must be considered in their logical order, i.e., as steps. Such an interpretation is also authoritatively supported by both existing WIPO Guides to Berne. It should be noted that neither guide is an authentic interpretation to Berne, nor – for this reason – the one published in 2003 is a replacement to the 1978 one. The latter considers that Member States of the Berne Union are conferred:

the power to cut down this exclusive right of reproduction and permit works to be reproduced in certain special cases. But the freedom allowed them is not total. The Convention adds two conditions in a formula, the drafting of which, in Stockholm (1967), led to prolonged debate, and the interpretation of which produces much difference of opinion. It consists of two phrases which apply cumulatively: the reproduction must not conflict with a

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9 Ibid, BC-9.1., noting that the 3ST could however be considered implied under the previous acts.
10 WF Patry, Patry on Fair Use (Thomson Reuters:2023), March 2023 update, §8.2.
11 The 2003 Guide was authored by Mihály Ficsor, formerly Director and Assistant Director General of Division on Copyright and Related Rights at WIPO.
normal exploitation of the work and must not unreasonably prejudice the legitimate interests of the author.\textsuperscript{14}

The 2003 Guide also upholds this as the correct interpretation and recalls that that Main Committee I of the Stockholm revision conference shaped the 3ST as one that consists of conditions that, not only are cumulative, but must also be considered in sequence:

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.\textsuperscript{15}

The logic sequence for the consideration of the conditions of the 3ST is also found in available case law, including at the international level. The WTO panel in United States – Section 110(5) of the US Copyright Act held that, before determining whether a certain E&L unreasonably prejudices the legitimate interests of the concerned rightholder, it is necessary to decide whether there is a conflict with a normal exploitation of protected content and, prior to that, whether the E&L at hand only applies to certain special cases.\textsuperscript{16}

Turning to the individual conditions of the 3ST, various questions have been raised over time, including amongst other the well-known one regarding the admissibility, under international law, of an E&L with “a general impact”\textsuperscript{17}, i.e., an open-ended, fair use-style clause. Without entering into the merits of such a discussion here, aside from scholarly literature interpreting the international 3ST in an ‘enabling’ perspective inter alia to support the compatibility of open-ended approaches with the 3ST\textsuperscript{18}, it is worth recalling that, as discussed in greater detail elsewhere\textsuperscript{19}, the meaning of ‘certain special cases’ is that “a limitation or exception in national legislation should be clearly defined and should be narrow in its scope and reach.”\textsuperscript{20} To this it should be added that, when an E&L has the potential to reduce the volume of sales or of other lawful transactions relating to protected works\textsuperscript{21} up to the point that exempted uses enter into economic competition with non-exempted ones, then such a provision would be incompatible with the second step of the 3ST\textsuperscript{22}, that is that the E&L at

\textsuperscript{14}Ibid, §9.6.


\textsuperscript{17}WTO, United States – Section 110(5) of the US Copyright Act, WT/DS160/R, 15.06.2000 (United States – Section 110(5)), §6.112.


\textsuperscript{19}WTO, United States – Section 110(5) of the US Copyright Act, WT/DS160/R, 15.06.2000 (United States – Section 110(5)), §6.112.

\textsuperscript{20}ACI Adam and Others, C-435/12, EU:C:2014:254, para 39.

\textsuperscript{21}WTO, United States – Section 110(5) of the US Copyright Act, WT/DS160/R, 15.06.2000 (United States – Section 110(5)), §6.181.
hand does not conflict with the normal exploitation of a work.\textsuperscript{23} It is also likely to fail the third prong of the 3ST analysis, in that it causes or has the potential to cause “an unreasonable loss of income to the copyright owner.”\textsuperscript{24}

b. Addressees

Having clarified the relationship between and meaning of the individual steps of the test, a further key issue, with which the present analysis is concerned, is that of its addressees: is it solely signatory countries to the various international instruments when they draft relevant E&Ls or also courts when they determine the applicability of an available E&L? While the 2003 Guide does not address this point specifically, the 1978 WIPO Guide sheds some light in this respect too.

The 1978 Guide expressly refers expressly to courts, not only legislatures, when considering the “latitude” that the second step – the prohibition of an unreasonable prejudice to the legitimate interests of the author – of the Berne 3ST affords.\textsuperscript{25} The circumstance that the 1978 Guide also indicates courts as the addressees of the 3ST is further reinforced by the considerations developed there in relation to unlicensed quotations under Article 10(1): the Guide is adamant that it is also for courts, in the specific circumstances at hand, to determine if the requirements of fairness and justification are fulfilled.\textsuperscript{26} Insofar as the first condition is concerned, the Guide echoes the requirements of the 3ST when it states that:

\begin{quote}
The fairness or otherwise of what is done is ultimately a matter for the courts, who will no doubt consider such questions as the size of the extract in proportion both to the work from which it was taken and that in which it is used, and, particularly the extent to which, if any, the new work, by competing with the old, cuts in upon its sales and circulation, etc.
\end{quote}

The 1978 Guide is correct in considering the 3ST as being also addressed at courts. As it is discussed in Part 2 with reference to the jurisprudence of the CJEU and national courts in Europe (EU Member States and UK), existing practice at the level of regional and national courts also confirms all this. Importantly, national case law further indicates that judges are bound to consider the 3ST irrespective of whether the applicable domestic statute refers to it.

2. The three-step test in EU and national law

Besides international instruments, the directives that compose the EU copyright acquis invariably refer to the 3ST too. Express references are included in the Rental and Lending Directive\textsuperscript{28}, the

\textsuperscript{23} This requires consideration of whether this is such that “uses, that in principle are covered by that right but exempted under the exception or limitation, enter into economic competition with the ways that rightholders normally extract economic value from that right to the work (i.e., the copyright) and thereby deprive them of significant or tangible commercial gains”: WTO, United States – Section 110(S) of the US Copyright Act, WT/DS160/R, 15.06.2000 (United States – Section 110(S)), §6.183.

\textsuperscript{24} Ibid, §6.229. See also the discussion in D Gervais, ‘TRIPS pluralism’ (2022) 21(2) World TR 185, p. 197-199, noting that early TRIPS cases focused on the economic impact of E&Ls.

\textsuperscript{25} 1978 Guide, §9.9, referring to unlicensed photocopies.

\textsuperscript{26} Ibid, §§10.5-10.6.

\textsuperscript{27} Ibid, §10.4.

Software Directive\(^{29}\), the Database Directive\(^{30}\), the Orphan Works Directive\(^{31}\), the Marrakesh Directive\(^{32}\), and the DSM Directive\(^{33}\) which, in turn, refers specifically to the 3ST as found in Article 5(5) of the InfoSoc Directive. It is in particular having regard to the latter (though the conclusions apply to any of the 3STs found in EU law, given that the same concepts in different directives must receive the same interpretation\(^{34}\)) that the CJEU has developed a consistent and extensive body of case law. Such jurisprudence incontrovertibly indicates that the 3ST is aimed at national legislatures and courts alike. This applies to the international 3ST too because, by adopting the InfoSoc Directive, the EU legislature inter alia implemented into the EU legal order the WIPO Internet Treaties.\(^{35}\) In turn, the WCT requires compliance with Articles 1 to 21 Berne.

a. The EU three-step test

Article 5(5) of the InfoSoc Directive mandates that the E&Ls provided for in paragraphs 1 to 4 therein shall only apply in certain special cases, which do not conflict with a normal exploitation of the work or other subject-matter and do not unreasonably prejudice the legitimate interests of the rightholder. Under Article 5 and with the exclusion of Article 5(1), EU Member States enjoy the discretion to decide whether to incorporate an E&L from the list into their own laws. Such a freedom is nevertheless limited in two fundamental ways: first, it cannot be used to compromise the objectives of that legislation and the functioning of the EU internal market; secondly, a national E&L must also comply with Article 5(5).\(^{36}\) While the implications of the former are discussed in greater detail elsewhere\(^{37}\), the analysis below focuses on the latter.

It is settled CJEU case law that the provisions of a directive which derogate from a general principle established by EU legislation must be interpreted strictly. In the field of copyright, the principle according to which E&Ls are to receive strict interpretation has been linked to the consideration of them as derogation from the general rule that authors’ original creations are deserving of protection and the objective to ensure a high level of protection.\(^{38}\)


\(^{33}\) Recital 6 and Article 7(2) of DSM Directive.

\(^{34}\) Specifically in the copyright field, see: Poland, C-401/19, EU:C:2022:297, paras 26-30; Mc Fadden, C-484/14, EU:C:2016:689, para 36; UsedSoft, C-128/11, EU:C:2012:407, para 60; Luksan, C-277/10, EU:C:2012:65, para 85; Football Association Premier League and Others, C-403/08 and C-429/08, EU:C:2011:631, paras 187-188.

\(^{35}\) Recital 15 of InfoSoc Directive.

\(^{36}\) Opinion 3/15 of the Court (Grand Chamber), EU:C:2017:114, paras 123-125.

\(^{37}\) E Rosati, Copyright and the Court of Justice of the European Union (OUP:2023), 2nd edn, Chapter 3.

All the above said, the InfoSoc Directive specifically requires that a fair balance of rights and interests is struck between the different categories of rightholders, as well as between the different categories of rightholders and users of protected subject-matter.\textsuperscript{39} In turn, E&Ls must be interpreted in such a way that their effectiveness is safeguarded and their purpose is observed.\textsuperscript{40} The ‘fair balance’ mandate has gained increasing relevance in CJEU case law.\textsuperscript{41} The effect of all this, as discussed further below in Part 5, has also been a growing awareness that consideration of the three-step is needed to ensure that a fair balance of rights and interests is struck.\textsuperscript{42}

Besides the role of the 3ST, the CJEU has also tackled the question of its addressees. While neither the text of the InfoSoc Directive nor the relevant travaux préparatoires provide an explicit answer in this respect\textsuperscript{43}, over time the Court has consistently and progressively clarified that the InfoSoc 3ST is addressed at both national legislatures when they transpose relevant E&Ls from Article 5 into their own legal regimes and courts when interpreting the scope of resulting national provisions. In the past, some commentators submitted that Article 5(5) does not provide “grounds which can be raised in the course of private litigation”\textsuperscript{44}, and that only national legislatures are to be regarded as the addressees of the InfoSoc 3ST.\textsuperscript{45} Such a reading is no longer tenable: for a long time, there have


\textsuperscript{40} Spiegel Online, C-516/17, EU:C:2019:625, para 36; Funke Medien, C-469/17, EU:C:2019:623, para 51; Vereniging Openbare Bibliotheken, C-174/15, EU:C:2016:856, para 50; Deckmyn and Vrijheidsfonds, C-201/13, EU:C:2014:2132, para 23; Painer, C-145/10, EU:C:2011:798, para 133; Football Association Premier League, C-403/08 and C-429/08, EU:C:2011:631, para 164; Tele 2, C-557/07, EU:C:2009:107, para 28; Promusicae, C-275/06, EU:C:2008:54, para 68.

\textsuperscript{41} See further E Rosati, Copyright and the Court of Justice of the European Union (OUP:2023), 2nd edn., p. 77-79.

\textsuperscript{42} Pelham, C-476/17, EU:C:2019:624, para 62; Spiegel Online, C-516/17, EU:C:2019:625, para 46; Funke Medien, C-469/17, EU:C:2019:623, para 61.


\textsuperscript{45} C Geiger, ‘From Berne to national law, via the Copyright Directive: the dangerous mutations of the three-step test’ (2007) 29(12) EIPR 486, 488. More recently, D Jongsmà, ‘The nature and content of the three-step test in EU copyright law: a reappraisal’, in E Rosati (ed), Routledge Handbook of EU Copyright Law (Routledge:2021), 345-348, arguing that the EU three-step test would neither delineate the scope of protection nor require express implementation in national law, also labelling the incorporation of the language of the Berne 3ST into domestic statutes “a disturbing trend”.


been clear indications and instructions from the CJEU that the EU 3ST should not be intended as limited to national legislatures when implementing relevant provisions contained in Article 5 of this directive into their own legal systems. As explained in greater detail elsewhere, CJEU case law on Article 5(5) leads to the conclusion that: (i) the provision does not affect the substantive content of the E&Ls contained in Articles 5(1)-(4), and cannot therefore extend their scope; (ii) if acts clearly fall within one of those E&Ls, they satisfy Article 5(5); (iii) in any case the E&Ls in the InfoSoc Directive must be construed in light of Article 5(5) therein; (iv) although Article 5(5) takes effect only at the time that the E&Ls are applied by the EU Member States, the acts of the defendant in question must satisfy the requirements of Article 5(5).

Such an interpretation has been endorsed and followed by national courts too, both in EU Member States where relevant statutes refer expressly to the 3ST and in Member States (as well as the UK) where no such reference is found.

b. National judicial practice: Application of the three-step test irrespective of a textual basis

Without pretension of exhaustiveness, the following EU Member States are examples of jurisdictions whose national copyright statutes contain express references to the 3ST: France, Italy, Czech Republic and Slovakia, Poland, Spain, and (from 2022) Belgium. Courts in these countries consider the 3ST when making a determination regarding the applicability of a potentially available E&L, at least in less straightforward cases.

So, the French Supreme Court referred to both the InfoSoc and Berne 3STs in order to determine the applicability of the national provision allowing private copying. A more recent consideration of the 3ST can be also found in the decision Court of First Instance of Rennes regarding the application of the parody E&L under French law. Similarly, Italian courts decide if a certain E&L is available in

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47 Spiegel Online, C-516/17, EU:C:2019:625, para 79; Funke Medien, C-469/17, EU:C:2019:623, para 52; ACI Adam and Others, C-435/12, EU:C:2014:254, para 26; Ulmer, C-117-13, EU:C:2014:2196, para 47; Copydan Båndkopi, C-463/12, EU:C:2015:144, para 90.


50 Stichting de Huiskopie, C-462/09, EU:C:2011:397, paras 21-22 and 33; Painer, C-145/10, EU:C:2011:798, paras 301 and 104-110; ACI Adam and Others, C-435/12, EU:C:2014:254, para 25.


53 Inter alia Article 71-nonies of the Italian Copyright Act.

54 Respectively, §§29 of the Czech Copyright Act and 34 of the Slovak Copyright Act.

55 Article 35 of the Polish Copyright Act.

56 Article 40bis of Royal Legislative Decree 1/1996.

57 Articles XI. 192/3 and XI. 218/3 of the Belgian Code of Economic Law.

58 French Supreme Court, decision 28 February 2006, 05-15:824.

59 Rennes, Court of First Instance, 10 May 2021, n° 17/04478, Société Moulsart v Xavier Marabout, as discussed in The Bird & Bird IP Team, ‘Round-up of national copyright decisions 2021’ (2022) 173 JIPLP 233, p. 244-245. See also E Derclaye, ‘To
the circumstances at hand considering the steps of the 3ST: this was, for example, the case in a recent decision of the Italian Supreme Court concerning parody. Like the appellate court in the same case, the Czech Supreme Court also directly relied on the 3ST to determine the applicability of the national E&L for parody in the circumstances at hand. Similarly, the Polish Supreme Court emphasized the need to consider the 3ST to determine whether the E&L for quotation would be applicable in a specific case, and so did the Polish Supreme Administrative Court in a case relating to a media monitoring service. Amongst other, the Spanish Supreme Court referred to the 3ST to determine the applicability of the national provision on temporary copies. As mentioned, Belgian law only expressly incorporated the language of the 3ST in 2022. Nevertheless, even prior to that, courts materially relied on the relevant conditions thereof: for example, in 2011 the Brussels Court of Appeal discussed the 3ST in a case concerning the unauthorized reproduction of excerpts of press content.

Like Belgian law prior to the 2022 reform, other national copyright systems do not contain express references to the 3ST either. Yet, this has not prevented courts in those countries from materially considering the various steps in order to decide on the applicability of E&Ls in specific circumstances. Again, without any expectation of completeness, all this can be observed in the case law issued in countries like the UK, Germany, the Netherlands, Sweden, and Finland.

Starting with the UK, at the time of implementing the InfoSoc Directive into its own legal system, UK Government held the view that relevant copyright exceptions already complied with Article 5(5). This has been arguably the reason the 3ST in case law has been historically considered to a limited extent. Nevertheless, decisions like those in Forensic Telecommunications Services v Chief Constable of West Yorkshire and England and Wales Cricket Board v Tixdaq (2016) provide some meaningful considerations of the 3ST. In particular in the latter, Arnold J (as he then was) inter alia addressed the individual steps in the 3ST. He noted that “conflict with a normal exploitation of the work or other subject matter” refers to exploitation of the work by the copyright owner, whether directly or through licensees. This requires “consideration of potential future ways in which the copyright owner may extract value from the work as well as the ways in which the copyright owner currently does so. On the other hand, it also embraces normative considerations of the extent to which the copyright owner should be able to control exploitation of the kind in question having regard to countervailing interests such as freedom of speech.” Considering the third step (that the

what extent is the parody exception truly harmonised? An empirical analysis of the Member States’ case law post-Deckmyn’ (2023) 2023/2 IPQ 59, p. 82, noting that the 3ST was materially considered by that court in reaching its decision.

60 Italian Supreme Court, decision 38165/2022, CO.GE.DI. International – Compagnia Generale Distribuzione s.p.a. v Zorro Productions Inc.. A few years prior, in a different case, the Rome Court of First Instance considered the 3ST in relation to the availability of Italian E&Ls for news reporting and criticism/review (decision 18413/2016, RTI – Reti Televisive Italiane v Gruppo Editoriale L’Espresso). There, the Rome court also recalled that, in the then recent decision in ACI Adam, C-435/12, the CJEU had indicated that E&L must be applied by courts in compliance with the 3ST in Article 5(5) of the InfoSoc Directive.

61 High Court in Prague, decision 27 January 2022, č.j. 3 Co 55/2021- 165.

62 Czech Supreme Court, decision 14 August 2023, 23 Cdo 2178/2022-188.

63 Polish Supreme Court, decision 9 August 2019, II CSK 7/18.

64 Polish Supreme Administrative Court, decision 24 March 2017, II OSK 1897/15.

65 Spanish Supreme Court, decision 172/2012 of 3 April 2012.

66 Brussels Court of Appeal, decision 5 May 2011, Copiepresse.


E&L at hand must not ‘unreasonably prejudice the legitimate interests of the rightholder’), the judge found that:

Although this is often treated as a separate and additional requirement to the second step, it has also been forcefully argued that it qualifies the second step. In other words, it indicates that it is not sufficient for an exception not to apply that there is some conflict with the copyright owner’s legitimate interests, including the copyright owner’s normal exploitation of the work. Rather, the exception can apply unless those interests are unreasonably prejudiced. This requires consideration of proportionality, and a balance to be struck between the copyright owners’ legitimate interests and the countervailing interests served by the exception.70

More recently, in Shazam, the Intellectual Property Enterprise Court confirmed that E&Ls under UK law must be construed in light of the 3ST. If an E&L (in that specific case, it was pastiche under section 30A of the Copyright, Designs and Patents Act (“CDPA”)), “is too widely interpreted, to cover any imitation or reproduction of subject matter it ceases to be a "special case" of protected expression. It would encompass virtually any form of borrowing, imitation or reproduction.”71

Turning to Germany, as a recent example, the Federal Court of Justice directly referred to the 3ST when it decided Funke Medien, further to the relevant CJEU judgment (C-469/71), eventually finding in favour of the defendant organization in relation to its unauthorized publication of reports of German military forces’ operations in Afghanistan.72

Insofar as Dutch copyright is concerned, when implementing the InfoSoc Directive, Dutch Government’s view was that the 3ST is primarily aimed at legislatures and that adopting it into law would lead to unwanted legal uncertainty.73 Nevertheless, Dutch courts consider the 3ST when determining the availability of an E&L. A recent application may be found in a 2023 decision of the Court of Appeal of Amsterdam regarding the applicability – eventually ruled out – of the E&L for quotation.74

Sweden and Finland are countries whose copyright statutes do not expressly refer to the 3ST either. This, however, has not prevented domestic courts from relying upon and directly applying it. For example, the Swedish Supreme Court applied the guidance under Article 5(5) of the InfoSoc Directive when deciding a case concerning ‘freedom of panorama’ under section 24(1) of the Swedish Copyright Act.75 The Swedish highest court inter alia clarified that the provisions in the domestic statute should be read in light of the InfoSoc Directive, which mandates a high level of protection of copyright – “especially in the digital environment” – and also seeks to balance the rights of authors with the public interest in accessing and using works. With regard to the system of E&Ls in Article 5 of the InfoSoc Directive, the Supreme Court recalled that this contains an exhaustive

70 Ibid, para 92.
71 Shazam Productions Ltd v Only Fools The Dining Experience Ltd & Ors (Rev1) [2022] EWHC 1379 (IPEC) (08 June 2022), para 189.
72 German Federal Court of Justice, Judgment of 30 April 2020 - I ZR 139/15 - Afghanistan Papers II, paras 75-79.
73 This position led to criticism in the Netherlands and the House of Representatives subsequently – yet unsuccessfully – urged the Government to amend the statute: NV II w.v. 28,482, no. 5, pp. 17-19 and NEV II w.v. 26,482, no. 8, p. 5-6.
75 Swedish Supreme Court, Judgment 4 April 2016, Bildupphovsrätt i Sverige v Wikimedia Sverige, Ö 849-15.
list of optional E&Ls, which must be also interpreted in light of the 3ST. A substantially identical position is endorsed in Finnish practice too: recently, the Finnish Supreme Court referred to the 3ST ultimately to rule out the applicability of the domestic E&L for quotation.

In conclusion, as both CJEU and national case law across Europe demonstrates, the 3ST – whether the one found in EU or international law – informs (a) the drafting and construction of E&Ls, (b) their implementation into domestic law, and (c) their application in practice. Furthermore, it is irrelevant whether a certain national law incorporates or not the language of the 3ST: national courts are bound to consider it in any event in order to determine if a certain, potentially applicable, E&L is in fact available in the specific circumstances at hand. All this is discussed further below by taking recently adopted E&Ls allowing TDM in a number of jurisdictions as a case study.

3. Shaping E&Ls: The case of TDM

Over the past several years, multiple jurisdictions around the world have adopted E&Ls for TDM, this being “a term commonly used to describe the automated processing (“machine reading”) of large volumes of text and data to uncover new knowledge or insights”. While a number of commentators have argued that non-expressive uses of protected content would not even fall under the scope of (at least) the authorial right of reproduction, with the result that unlicensed TDM activities would not attract liability, the policy and legislative direction emerged and endorsed in different jurisdictions over the past few years has been different: TDM processes are relevant to the scope of application of copyright and related rights. The result, as stated, has been that multiple legislatures have introduced purpose-specific E&Ls to allow certain TDM activities. Although TDM practices in a variety of sectors had been already and are still authorized by means of licensing agreements concluded by rightholders and users, one of the principal justifications given to support the introduction of such E&Ls has been the need to free up certain copyright-covered spaces to facilitate research and increase innovation and competitiveness. Among the applications of TDM, generative Artificial Intelligence (AI) is one of the most relevant and, currently, surrounded by a considerable degree of legal uncertainty.

As it is discussed in greater detail elsewhere, broadly speaking, TDM processes consist of three phases: (1) access to text and/or data; (2) extraction and/or copying of content; and (3) mining of text and/or data and knowledge discovery. While TDM processes may involve content that is not

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76 The direct relevance of the 3ST may be also appreciated in the more recent decision of the Patents and Market Court of Appeal in PMOD B 12315-20.
79 The originality-based rationale of copyright differs from the investment-based justification underpinning related rights: with specific regard to the EU experience, see further E Rosati, Copyright and the Court of Justice of the European Union (OUP:2023), 2nd edn, p. 155-161.
81 Recently, see R Xalabarder, Scoping Study on the Practices and Challenges of Research Institutions and Research Purposes in Relation to Copyright (WIPO:2023), SCCR/44/4, §3.
subject to protection under copyright and/or related rights, if the TDM technique employed involves the doing of acts of access, extraction and/or copying in relation to protected content, then legal restrictions are likely to be in place. Such restrictions are not necessarily limited to copyright and related rights. The application of data protection and privacy laws to the realm of text and data extraction may for example come into consideration too, including relevant provisions on the processing of personal data for archiving purposes in the public interest, scientific or historical research purposes or statistical purposes. Questions concerning data ownership, being this an area surrounded by a degree of legal uncertainty and subject to diverging national approaches, may arise as well. Hence, the phrase popularized in connection with TDM-related policy discussions across different jurisdictions, i.e., “The right to read is the right to mine”, stands out as an oversimplification of the legal complexities underlying TDM processes.

In Asia, Japan and Singapore have both adopted purpose-specific TDM provisions, while Hong Kong considered but eventually decided not to legislate in this area. In Europe, TDM E&Ls have been introduced at the national level first (with the UK paving the way by adopting its own fair dealing provision allowing text and data analysis in 2014) and, then, at the EU level through the adoption of Articles 3 and 4 of the DSM Directive. In other jurisdictions, notably the US, no legislative reform has been undertaken: ongoing litigation will serve to determine whether and to what extent the existing fair use doctrine under Section 107 of the US Copyright Act may accommodate unlicensed TDM activities finalized at inter alia training AI systems. In any event, even an open-ended doctrine like US fair use requires consideration of multiple factors. Furthermore, it is a doctrine that by its very nature warrants a case-by-case assessment. As incisively summed up, “fair use is a common law doctrine whose scope and application evolve through case law.”

83 As it is also specifically acknowledged by Recital 9 in the preamble to the DSM Directive, TDM can be carried out in relation to mere facts or data: in such instances no authorization is required under copyright law.

84 In Europe, following the adoption of the DSM Directive, in an op-ed published by Politico, the former Rapporteur on the Proposal on behalf of the Committee on Legal Affairs (JURI) of the Parliament (see Report on the Proposal for a Directive of the European Parliament and of the Council on Copyright in the Digital Single Market (COM(2016)0593 – C8-0383/2016 – 2016/0280(COD)) (Rapporteur: MEP Axel Voss)) lamented that provisions in the General Data Protection Regulation 2016/679 “make it impossible to properly use or even develop” several of the “important technologies of the future – such as artificial intelligence” and noted that “[i]n order to train AI systems, you need to be able to process large amounts of data, particularly if you want to avoid discrimination in their algorithms”: A Voss, ‘How to bring the GDPR into the digital age’ (25 March 2021) Politico, available at https://www.politico.eu/article/gdpr-reform-digital-innovation/. See also A Strowel, ‘ChatGPT and generative AI tools: theft of intellectual labor?’ (2023) 54(4) IIC 491, p. 492.


86 At the EU level, this phrase emerged in the context of the 2013 stakeholder dialogue Licences for Europe, which inter alia included a (rapidly collapsed) working group on TDM. See https://ec.europa.eu/commission/presscorner/detail/en/MEMO_13_986. In the context of the subsequent discussion leading to the adoption of the DSM Directive, the phrase re-emerged during the parliamentary discussion: see E Rosati, Copyright in the Digital Single Market. Article-by-Article Commentary to the Provisions of Directive 2019/790 (OUP:2021), p. 66.

87 For an up-to-date repository of current AI-related litigation in the US, see the AI Litigation Database run and maintained by the Law School students at George Washington University: https://blogs.gwu.edu/law-eti/ai-litigation-database/. In Authors Guild v. Google, Inc., No. 13-4829 (2d Cir. 2015), the 2nd Circuit suggested that the possibility to mine the Google Books Library corpus would inter alia support a finding of fair use.

88 All this is exemplified by the most recent US Supreme Court decision on fair use: Andy Warhol Foundation for the Visual Arts, Inc. v. Goldsmith, No. 21-869 (May 18, 2023).

89 W Patry, ‘Andy Warhol Foundation for the Visual Arts, Inc. v Goldsmith: did the U.S. Supreme Court tighten up fair use?’ (2023) 18(9) JIPLP 628, p. 628.
a. Selected Asian experiences

Japan was the first to introduce, in 2011, an E&L specifically concerning TDM. The Japanese statute, as subsequently reformed, allows the unauthorized use of a work for use in data analysis, by that “meaning the extraction, comparison, classification, or other statistical analysis of the constituent language, sounds, images, or other elemental data from a large number of works or a large volume of other such data”, provided that (i) the person undertaking that has no purpose to “personally enjoy or cause another person to enjoy the thoughts or sentiments expressed in that work” and (ii) no unreasonable prejudice is caused to the interests of the copyright owner in light of the nature or purpose of the work or the circumstances of its exploitation.\(^90\) The Japanese provision does not in itself restrict the availability of the E&L to any particular categories of beneficiaries, types of copyright works or other protected subject-matter, or purposes of the TDM at issue (commercial/non-commercial). Furthermore, commentators have submitted that any contractual reservations to TDM would be unenforceable.\(^91\) All that said and considering that the E&L shall not lead to “unreasonable prejudice” to rightholders, it is clear that the language of the statute does frame the E&L within the boundaries of the 3ST (even if it does not verbatim reproduce the language): in turn, this shall inform the provision’s interpretation and application in practice.

In 2021, Singapore also reformed its copyright law. Like some other countries (e.g., Israel, Philippines, Sri Lanka, South Korea, Taiwan), Singapore decided to move from a closed to an open-ended system of E&Ls. What is referred to as ‘fair use’ in the 2021 Act\(^92\) exists alongside several other fair dealing provisions. Among the newly introduced E&Ls that cannot be restricted by contract, there is also one allowing uses of works for computational data analysis, including TDM. The introduction of such a provision was justified on consideration that “text and data mining and its applications are crucial to fuelling economic growth and supporting Singapore’s drive to catalyse innovation in the digital economy.”\(^93\) Section 244 does not pose restrictions in terms of beneficiaries and allows the making of copies of works and recordings of protected performances for the purpose of computational data analysis or preparatory activities thereto. While purpose-specific, the provision does not expressly discriminate at the outset between the commercial and non-commercial character of the computational data analysis at hand. Unlike the corresponding Japanese provision, no reference is found in either Section 244 or the rest of the Singapore statute to the 3ST. That said and among other things, as the Government of Singapore also announced prior to legislating, “safeguards to protect rights-holders’ interests” would be incorporated in the resulting provision.\(^94\)

\(^90\) Article 30-4 of the Japanese Copyright Act.


\(^92\) The Copyright Act 2021, published in Acts Supplement on 7.10.2021 replaced the act adopted in 1987. The newly created Division 2 of Part 5 no longer refers to ‘fair dealing’, but rather to ‘fair use’. In addition, section 191 only specifically lists four factors that courts are required to consider when determining whether a certain use should be regarded as fair, having removed an obligation of courts to consider, in each and every case, whether the defendant was in a position to obtain a work within a reasonable time at an ordinary commercial price.


Such safeguards include that Section 244 is only applicable provided that the act of reproduction is undertaken in relation to protected material to which lawful access has been secured.\(^95\)

The introduction of a specific E&L for TDM also featured in inter alia Hong Kong copyright reform discourse. The Hong Kong Government, however, eventually decided against introducing such a provision, finding that, given the diversity of views expressed by concerned stakeholders, including having regard to compliance with the international 3ST, “rushing into incorporating these issues in the amendment bill” would not be recommended.\(^96\) The Copyright (Amendment) Bill 2022 (n 29) therefore contains no specific E&L allowing TDM.

b. UK and EU experiences

The UK was the first EU Member State to rely on the EU acquis as it existed in 2014 – specifically: the research E&L in Article 5(3)(a) of the InfoSoc Directive – to legislate and adopt a defence, which cannot be overridden by contract and is framed within fair dealing, allowing text and data analysis solely for non-commercial research in relation protected content that has been lawfully accessed.\(^97\) As of today, section 29A CDPA remains unapplied. Despite indicating, in 2022, that provision as an area of potential review\(^98\), recently UK Government announced that no plans are in place to reform it.\(^99\)

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\(^95\) See further D Tan, ‘The price of generative AI learning: exceptions and limitations under the new Singapore Copyright Act’ (2023) 45(7) EIPR 400, p. 402.


\(^97\) The Hargreaves Review, from which the reform originated, expressly noted how “the law can block valuable new technologies like text and data mining, simply because those technologies were not imagined when the law was formed”\(^97\) and all this whilst the resulting activities would “not prejudice the central objective of copyright, namely the provision of incentives to creators”: I Hargreaves, Digital Opportunity. A Review of Intellectual Property and Growth (2011), available at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/32563/preview-finalreport.pdf, §§5.3 and 5.40.


Further to the UK initiative, other EU Member States also considered legislating or legislated in the field of TDM. Nevertheless, in 2019, two new mandatory EU-wide E&Ls for TDM were adopted as part of the DSM Directive. While the DSM Directive allows Member States to maintain or introduce E&Ls that comply with the pre-existing copyright acquis, the focus of EU Member States following the adoption of the directive has been mostly on transposing the TDM E&Ls found there into national law.

Both Articles 3 and 4 of the DSM Directive solely encompass acts of extraction and reproduction. This means that the doing of subsequent acts restricted by copyright and/or related rights shall not be within the scope of either E&L. To exemplify: if a generative AI model lawfully (e.g., because the conditions of the TDM provisions are complied with) trained on third-party protected subsequently reproduced and/or communicated/made available to the public third-party protected content, such acts would not be covered by either E&L.

Article 3 of the directive provides for an exception in favour of research organizations and cultural heritage institutions that is purpose-limited (scientific research) and cannot be restricted by contract. Article 4 introduces an exception or limitation that has no restrictions in terms of beneficiaries and purposes of the TDM to be undertaken. That provision also allows rightholders to exclude the application of the E&L through an appropriate reservation. The specific rationale of the proviso is explained in Recital 18 and is inter alia linked to the consideration that licensing opportunities should not be unduly affected by the availability of an E&L. Such a caveat reflects the requirements of the 3ST, including the consideration that, prior to the adoption of the DSM Directive, TDM practices in Europe did not develop in a context devoid of licensing opportunities. Like all other E&Ls in the DSM Directive, it is specifically prescribed in Recital 6 and Article 7 therein that Articles 3 and 4 must comply with the InfoSoc 3ST.

4. Applying E&Ls: The case of TDM

The TDM E&Ls reviewed in the preceding section indicate that the 3ST has been generally (though not necessarily completely) taken into account by legislatures when drafting relevant provisions and...
that the relevant obligations thereunder bind courts too. The following analysis focuses on the relevance of the 3ST to courts when construing and applying resulting TDM provisions.\textsuperscript{106}

a. Selected Asian experiences

If we take the Japanese provision, while broadly phrased, it does not set forth a limitless E&L. The 3ST is materially referred to in Article 30-4 of the Japanese statute and is clearly aimed at courts, which are tasked with determining, in the circumstances at hand, (i) the defendant’s purpose, which must specifically not be to personally enjoy or cause another person to enjoy the thoughts or sentiments expressed in the work that has been used, and (ii) that no unreasonable prejudice is caused to the interests of the copyright owner in light of the nature or purpose of the work or the circumstances of its exploitation. Insofar as the latter is concerned, this means – as an example – that lawful access to the content in respect of which the TDM activities will be performed is required.\textsuperscript{107} Despite the circumstance that the Japanese statute appears to be silent on this point, holding otherwise would be contrary at least to the requirement that an E&L does not conflict with the normal exploitation of a copyright work or other protected subject-matter and does not cause unreasonable prejudice to the legitimate interests of the rightholder. Such an interpretation also finds support in, among other things, existing CJEU case law, which has ruled out the applicability of E&Ls for private copying and temporary copies under the InfoSoc Directive to, respectively, unlawful internet downloads\textsuperscript{108} and streaming.\textsuperscript{109}

It further follows, for instance, that blanket copying of protected content for the purpose of training a generative AI model where such use is or could be reasonably expected to be licensed by the rightholder might not be allowed under the Japanese TDM provision because of the second limb of the 3ST (no conflict with the normal exploitation of the work). Furthermore, the copying of protected content to train AI that is capable of producing content that could substitute the consumption of the original copyright works or other content protected under related and/or other rights would also not be allowed under the TDM E&L – nor, in some instances at least, other areas of the law (including data protection/privacy, as well as image/publicity/personality rights\textsuperscript{110}) – since it would “unreasonably prejudice” rightholders’ interests (and also conflict with the normal exploitation of the work).\textsuperscript{111} Support for such considerations may be specifically found in the conclusion of the WTO Panel Report in United States – Section 110(5) of the US Copyright Act:

\begin{quote}
We believe that an exception or limitation to an exclusive right in domestic legislation rises to the level of a conflict with a normal exploitation of the work (i.e., the copyright or rather the whole bundle of exclusive rights conferred by the ownership of the copyright), if uses, that in principle are covered by that right but exempted under the exception or limitation, enter into economic competition with the ways that right holders normally extract economic
\end{quote}

\begin{flushleft}
\textsuperscript{106} Also discussing the need to consider the 3ST with specific regard to TDM E&Ls, see J Vesala, ‘Developing artificial intelligence-based content creation: are EU copyright and antitrust law fit for purpose?’ (2023) 54(3) IIC 351, p. 365-367.
\textsuperscript{108} ACI Adam and Others, C-435/12, EU:C:2014:254.
\textsuperscript{109} Stichting Brein, C-527/15, EU:C:2017:300.
\textsuperscript{110} In this sense, the reference goes intuitively to deepfakes.
\textsuperscript{111} WTO, United States – Section 110(5) of the US Copyright Act, WT/DS160/R, 15.06.2000 (United States – Section 110(5)), in particular. §§6.183 and 6.186.
\end{flushleft}
value from that right to the work (i.e., the copyright) and thereby deprive them of significant or tangible commercial gains.\textsuperscript{112}

Turning to Singapore, as it is drafted, the TDM provision has the potential to be broader in scope than corresponding provisions in Japanese, UK, and EU laws alike. Also considering the blanket prohibition of contractual override and the open-ended fair use clause in Singapore’s copyright law, which no longer requires courts to consider whether licensing solutions would be available when making a determination of whether the use at hand qualifies as fair, no meaningful licensing room for TDM appears to remain left under that country’s law. In turn, this begs the question whether such an approach could be regarded as compatible with international law, including the second and third prongs of the 3ST analysis. The answer, unlike what it is for, e.g., Article 4 of the DSM Directive, would appear to be in the negative, also because licensing practices in the TDM field have been established over time.\textsuperscript{113} To this it should be added that court practice in Singapore suggests that the 3ST is usually not taken into account to decide on the applicability of a given E&L to the specific circumstances at issue. Nevertheless, neither the open-ended fair use-style provision nor the TDM E&L come devoid of what some commentators have correctly referred to as “stringent” requirements.\textsuperscript{114} As the Intellectual Property Office of Singapore also stated in its guidance to Section 244, the relevant conditions under the provision must be complied with. These include: (i) lawful access to the protected content that would be used; and (ii) use of the copies subsequently made exclusively for the purpose of computational data analysis.\textsuperscript{115} In turn, all this indicates that – for a meaningful balancing exercise to be conducted – courts in that country would have to review the fulfilment thereof in light of the circumstances at hand.

b. UK and EU experiences

Insofar as the UK provision is concerned, as mentioned, this remains unapplied at the time of writing. Nevertheless, like most UK defences, section 29A CDPA is framed within fair dealing. Hence, a court tasked with determining whether the provision is applicable in the circumstances at hand will need to determine if the relevant conditions are satisfied, including having regard to the fairness of the dealing at hand. The CDPA does define ‘fair dealing’, nor does it stipulate what factors are to be considered when assessing whether a certain dealing with a work is to be considered fair. The notion has thus developed though case law from the perspective of a “fair-minded and honest person”\textsuperscript{116}, and has been traditionally considered a matter of degree and impression.\textsuperscript{117} Several factors inform the decision whether a certain use of a work is fair, although the relative importance of each of them will vary according to the case in hand and the dealing at issue.\textsuperscript{118}

\textsuperscript{112} Ibid, §6.183.

\textsuperscript{113} Also (yet critically) acknowledging it from an international perspective, see SM Fiil-Flynn and Others, ‘Legal reform to enhance global text and data mining research’ (2022) 378(6623) Science 951, 951.

\textsuperscript{114} D Tan, ‘The price of generative AI learning: exceptions and limitations under the new Singapore Copyright Act’ (2023) 45(7) EIPR 400, p. 402.


\textsuperscript{116} Hyde Park Residence Ltd v Yelland & Ors [2000] EWCA Civ 37 (10 February 2000), para 38.

\textsuperscript{117} Hubbard v Vosper [1972] 2 QB 84.

\textsuperscript{118} See further L Bently – B Sherman – D Gangjee – P Johnson, Intellectual Property Law (OUP:2022), 6\textsuperscript{th} edn, 245-249. In Ashdown v Telegraph Group Ltd [2001] EWCA Civ 1142 (18 July 2001), para 70, it was noted how: “any hard-and-fast definition of what is fair dealing, for it is a matter of fact, degree and impression. However, by far the most important factor is whether the alleged fair dealing is in fact commercially competing with the proprietor’s exploitation of the copyright work, a substitute for the probable purchase of authorised copies, and the like […] The second most important factor is whether the work has already been published or otherwise exposed to the public […] The third most important factor is the amount and
Unlike other EU Member States, the UK did not transpose the language of the 3ST within Article 5(5) of the InfoSoc Directive into its own copyright law. The more recent case law discussed above in Part 2, b., however, indicates that domestic defences need to be read and construed in light of the 3ST. This will be also true when section 29A CDPA is applied. So, for example, while the provision does not exclude in itself that a work or a copy thereof may be taken in its entirety, the copying at hand will need to be justified by its purpose: this is in line not only with the literal wording of the provision, but also the requirements under the 3ST and fair dealing. In this regard, it might be useful to refer for support to recent UK case law on other defences, including quotation under section 30(1ZA) CDPA. Unlike section 29A, the defence for quotation under UK law does not require the quotation be for any specified purpose. That said, by referring to ‘use of a quotation from that work’, section 30(1ZA) appears to imply that the defence be only available to limited, partial reproductions of a work.\textsuperscript{119} The recent decision of the High Court of England and Wales in \textit{Pastemak} confirms such a reading: also in light of available CJEU case law on quotation under Article 5(3)(d) of the InfoSoc Directive, as well as the wording of Article 10(1) Berne, it is inter alia necessary for the quotation at hand to be in accordance with fair practice and be of the extent required by the specific purpose, so that the intention of entering into a dialogue with the publication being quoted is apparent.\textsuperscript{120} As also stated in \textit{Shazam}, allowing the blanket copying of a work in its entirety could be in conflict with the ‘certain special cases’ requirement of the 3ST.

Turning to Articles 3 and 4 of the DSM Directive, national courts across the EU will need to apply the resulting national transpositions of these provisions, given the lack of horizontal direct effect of EU directives.\textsuperscript{121} As discussed in greater detail elsewhere, both Articles 3 and 4 require a minimalistic transposition technique on the side of national legislatures, with the result that the normative content of either provision cannot be compromised at the Member State level.\textsuperscript{122} In turn, a national E&L with a broader scope of application than what either provision allows would be incompatible with EU law. That would be, e.g., the already mentioned case of a national E&L that encompassed not only acts of extraction and reproduction of third-party protected content but also the doing of restricted acts further to the conclusion of the TDM process at hand. So, if a certain AI-generated output reproduced protectable elements of third-party content (whether works or other subject-matter) used to train the AI model at hand (hence, at the input level) and acts of communication/making available to the public were undertaken, all this would not be covered by, e.g., a national transposition of Article 4 of the DSM Directive. Such a conclusion would apply irrespective of whether access to the content in question has been lawful and/or relevant rightholders have opted out of the E&L in the specific circumstances at hand.

\textsuperscript{119} A Cameron, ‘Copyright exceptions for the digital age: new rights of private copying, parody and quotation’ (2014) 9(12) JIPLP 1002, 1007.

\textsuperscript{120} \textit{Pastemak} v \textit{Prescott} [2022] EWHC 2695 (Ch) (25 October 2022), paras 450-452, also discussed in E Rosati, \textit{Copyright and the Court of Justice of the European Union} (OUP:2023), 2nd edn, p. 341-342.

\textsuperscript{121} Under EU law, directives do not produce any horizontal direct effect. This means that they cannot be relied upon in private-party proceedings and do not impose obligations on individuals: \textit{Marshall}, Case 152/84, EU:C:1986:84, para 48. Nevertheless, EU directives may produce – at certain conditions – a vertical direct effect. In cases in which EU law imposes upon Member States “the obligation to pursue a particular course of conduct, the useful effect of such an act would be weakened if individuals were prevented from relying on it before their national courts and if the latter were prevented from taking it into consideration as an element of [EU] law.” (\textit{van Duyun}, Case 41-74, EU:C:1974:133, para 12)

\textsuperscript{122} E Rosati, \textit{Copyright and the Court of Justice of the European Union} (OUP:2023), 2nd edn, p. 120-121.
In any event, as stated above in Part 2, a., in line with settled CJEU case law, when considering whether a national TDM provision is applicable in a certain case, a court would need not just to consider if the specific conditions for the application thereof are satisfied, but also if the requirements of the 3ST are complied with. As an example, one might consider the possibility of reservation under Article 4(3) of the DSM Directive: it would be erroneous to think that, where a rightholder has not exercised this option, their works or other protected subject-matter could be used for purposes of TDM without any limitations. Compliance with the 3ST – as per Article 7(2) of the directive – requires that the conditions thereof are satisfied. Hence, it would not be possible to, e.g., copy the entire repertoire of a musician who happens not to have opted out of Article 4 to train an AI model that would create music in their style and essentially compete with or even replace them.

5. Broader implications: Direct applicability of the three-step test

The preceding discussion has shown how the 3ST binds legislatures and courts alike. For the latter, that is true having regard to any E&Ls and irrespective of whether the applicable copyright statute contains an express reference to the language of the test. It is precisely from this perspective that the broader role performed by the 3ST – when both drafting and applying E&Ls – becomes apparent: by requiring that E&L be limited to certain special cases, which do not conflict with a normal exploitation of the work or protected subject-matter and do not unreasonably prejudice the legitimate interests of the rightholder, the test contributes to achieving the overarching objective of any copyright system, i.e., that a fair balance is struck between, on the one hand, protection of copyright and related rights and, on the other hand, third-party rights and legitimate interests.

At the international level, the preambles to the WIPO Internet Treaties acknowledge the need to maintain a balance between the rights of authors, performers and producers of phonograms and the public interest, particularly education, research and access to information. Such a mandate is also provided for in regional and national legislation. If we consider the EU copyright system, the fair balance obligation is enshrined in inter alia the language employed in Recitals 31 of the InfoSoc Directive and 6 of the DSM Directive. The CJEU has also recently stressed how “maintaining such a fair balance is precisely the objective of the harmonisation effected”123 by the InfoSoc Directive. Overall, compliance with the fair balance requirement serves to ensure the achievement of the objectives of EU copyright legislation, including – having specific regard to the InfoSoc Directive – to establish a high level of protection for rightholders and enable rightholders to obtain an appropriate reward for the use of their protected works or other subject-matter.124

To all this it should be added that the fair balance mandate has been increasingly characterized by a fundamental rights dimension. If we take Europe as an example, this has been true at the level of the CJEU and national courts alike.125 In this sense, the status upgrade of the EU Charter, which was granted the status of primary source of EU law by the 2007 Lisbon Reform Treaty, has been pivotal to such a process. As the CJEU put it in Åkerberg Fransson, C-617/10, “[s]ince the fundamental rights guaranteed by the Charter must […] be complied with where national legislation falls within the scope of European Union law, situations cannot exist which are covered in that way by European Union law without those fundamental rights being applicable.”126 Outside of the EU legal order, the

123 Ocilion IPTV Technologies, C-426/21, EU:C:2023:564, para 34.
124 Mircom, C-597/19, EU:C:2021:492, para 58.
126 Åkerberg Fransson, C-617/10, EU:C:2013:105, para 21.
European Court of Human Rights ("ECtHR") has also routinely tackled the relationship between copyright protection and freedom of expression and information under the European Convention on Human Rights ("ECHR"). In Europe at least, the growing relevance of the fundamental rights discourse has thus resulted in a process of constitutionalization in the field of copyright, helped by the horizontal direct effect of at least some of the provisions of the EU Charter. Pursuant to Article 52(1) EU Charter, any limitation on the exercise to a right recognized thereunder – including intellectual property within Article 17(2) – must be provided for by law, which implies that the legal basis which permits the interference with that right must itself define, clearly and precisely, the scope of the limitation on its exercise.

The required balancing exercise is not just carried out externally: balancing mechanisms are also present internally. Within copyright itself there are safeguards in the interest of third parties, including – just to name a few – the idea/expression divide, subsistence requirements (in particular: originality), limited term of protection, standard of infringement, and E&Ls. Within the latter, the 3ST contributes to striking a fair balance between competing rights and interest too. At the EU level, such a role has been explicitly recognized by the CJEU in its case law. While the Grand Chamber of the CJEU has correctly ruled out the possibility for users directly to invoke EU Charter rights lacking an available E&L at both the EU level and in the applicable national law adopted in compliance with EU law, E&Ls must be interpreted in such a way that their effectiveness is safeguarded and their purpose is observed. In this context, the Grand Chamber of the CJEU has expressly referred to the 3ST as an instrument that contributes to the fair balance between exclusive rights and E&L. Such an interpretation has also found application in attentive national case law.

127 Neij and Sunde Kolmisoppi v Sweden, Application No 40397/12, CE:ECtHR:2013:0219DEC004039712; Donald and Others v France, Application No 36769/08, CE:ECtHR:2013:0110JUD003676908. For more recent copyright-focused ECtHR decisions, see also: Safarov v Azerbaijan, Application No 885/12, CE:ECtHR:2022:0901JUD000088512, holding that the refusal – by domestic authorities – to enforce copyright may qualify as a breach of the ECHR; and Korotyuk v Ukraine, Application No 74663/17, CE:ECtHR:2023:0119JUD0007466317, holding that ineffective investigation of an alleged copyright infringement would qualify as a breach of the right to property.

128 Some have however considered such process essentially cosmetic and underlying a de facto harmonizing agenda on the side of the Court instead: J Griffiths, ‘Constitutionalising or harmonising? The Court of Justice, the right to property and European copyright law’ (2013) 38(1) EL Rev 65, 77.


130 Poland, C-401/19, EU:C:2022:297, paras 63-68. See also RAAP, C-265/19, EU:C:2020:677, para 86, referring to: WebMindLicens, C-419/14, EU:C:2015:832, para 81; Opinion 1/15 (EU-Canada PNR Agreement) of 26 July 2017, EU:C:2017:592, para 139; and Facebook Ireland and Schrem, C-311/18, EU:C:2020:559, paras 175-176.


132 See also Opinion of Advocate General Szpunar in Funke Medien, C-469/17, EU:C:2018:870, para 37.

133 Spiegel Online, C-516/17, EU:C:2019:625, para 49; Funke Medien, C-469/17, EU:C:2019:623, para 64. This inter alia indicates that exceptions and limitations cannot be regarded as fully-fledged rights: see further E Rosati, ‘Copyright reformed: the narrative of flexibility and its pitfalls in policy and legislative initiatives (2011–2021)’ (2023) 31(1) APLR 33, 48-49.


135 For example, in the context of litigation relating to parody under Italian copyright and trade mark law, the Italian Supreme Court has held that the 3ST is part of the fair balance mandate, with the result that the circumstance that a parody is made for
when considering the applicability of a potentially available E&L, a national court must consider both the relevant conditions thereunder and those of the 3ST. Not only is such an obligation imposed by international and (where applicable) regional and national law, but it stems from the very role that the 3ST performs in ensuring that the fair balance mandate may be complied with.

Conclusion

This study has focused specifically on the role and addressees of the 3ST under international, regional, and national law alike. Having reviewed the history and rationale thereof, the analysis has shown that it is not just legislatures when shaping E&Ls to copyright and related rights that must construe them in accordance with the requirements of the test, but also national courts when determining the availability in the specific circumstances at hand of a certain E&L. The latter is true irrespective of whether the applicable statute expressly refers to the 3ST. It follows that it is not sufficient for a court to consider whether the specific conditions of a given E&L are satisfied: the court must also review whether the unauthorized use of a copyright work or other protected subject-matter may exclude liability of the defendant in light of the requirement that an E&L is limited to certain special cases, which do not conflict with the normal exploitation of the protected content at hand and do not unreasonably prejudice the legitimate interests of the rightholder. For example, an E&L cannot be regarded as having blanket availability irrespective of whether access to the content in question has been lawful or not or whether the use in question is non-commercial or commercial. While, as discussed, it is doubtful that regional and national statutes containing E&Ls drafted this way could be regarded as fulfilling the requirements under international law, even in such cases a court tasked with determining the availability of the E&L in question is required to construe it in a way that complies with the 3ST.

All the above has been exemplified having regard to selected experiences in Asia (Japan and Singapore) and Europe (UK and EU) concerning purpose-specific E&Ls for TDM. In this sense, the plain wording of legislation like the Japanese Copyright Act, the CDPA and the DSM Directive indicates that the constraints of the 3ST (fair dealing in the case of the UK) must be considered when determining if the resulting E&L is in fact applicable. It is submitted that the same is true of the Singaporean provision (and any other system of E&Ls): while its wording and potential scope of application raise concerns regarding the very compatibility of the provision with the international 3ST, courts should still interpret it in a way that ensures that all the relevant steps thereunder are complied with. In all this, one might also wonder whether it is appropriate for legislatures to draft E&L in a way that does not fully take into account and complies with the requirements of the 3ST, leaving this balancing task (often with limited and/or ambiguous guidance) to courts instead.

In sum: compliance with the 3ST is mandated on the side of both legislatures and courts. All this, as seen, is true of any E&L and any system of E&L. Such a conclusion if further confirmed by the consideration that the 3ST is a fundamental mechanism that contributes to ensuring – in compliance with international, regional and national laws alike – that a fair balance is struck between protection of copyright and related rights, on the one hand, and third-party rights and legitimate interests, on the other. Failure to consider the 3ST on the side of either legislatures or courts implies that no fair balance may be fully achieved, including having regard to the development of generative AI.

profit would not in itself render it ineligible for the application of the relevant exception or limitation: what matters is not the intention of the user, but rather whether the alleged parody unduly conflicts with the normal exploitation of the earlier work: Italian Supreme Court, decision 38165/2022, CO.GE.Di. International – Compagnia Generale Distribuzione s.p.a. v Zorro Productions Inc.