

## Appendix III: Responding to Frequently Asked Questions About Flexible Use Provisions

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### **A. Flexible use clauses are not unpredictable, and do not undermine the need for reasonable certainty in law.**

Research by legal scholars in countries, like the United States, which have extensive experience with open L&E clauses, increasingly are calling into question the empirical foundation of this objection: the work of Samuelson, Netanel, Beebe, Madison and others indicates that the results of actual adjudication under even a broad “fair use” clause may be forecast with a relatively high degree of certainty. This concern, however, remains pervasive, and it is therefore worth noting that several other devices are available to address it. One is the development of “best practices” documents articulating reasonable interpretations of a flexible L&E provision on behalf of various groups of beneficiaries (filmmakers, libraries, poets, bloggers, librarians, journalists, etc.). Such guidance documents, prepared by and for specific communities of practice, have proved enormously helpful in setting fears about the uncertainty of fair use in the United States. The example provided in Israel’s recent legislation, which introduced fair use into that country’s law, is also instructive. There, the decision was taken to authorize competent authorities to issue official guidance on fair use in the form of administrative regulations, subject to potential

judicial review. In addition, case law from jurisdictions with established legal traditions of open L&E's may have informative and persuasive value in countries that newly adopt such approaches. Finally, it should be noted that legal academics, treatise writers, etc., have an important role to play in clarifying the application new copyright law provisions.

**B. This type of approach will not generate excessive litigation or impose a social cost on countries adopting it.**

It is easy to overstate the actual amount of litigation over copyright L&E's in jurisdictions that have adopted open clauses. In the United States, for example, the fair use doctrine has existed for almost 175 years, and the number of significant decisions that actually turned on its application is in the dozens. Because copyright L&E's are, by nature, exceptional, it should not be assumed that in jurisdictions with open clauses the actual rate of litigation over these issues is significantly higher than in jurisdictions with closed systems. In either, cases in which there is an actual, significant dispute over whether users' rights justify an unlicensed and uncompensated taking are likely to be relatively few. By the same token, however, lawyers and practitioners have the ability to derive significant amounts of guidance from even a modest volume of litigation, especially when it is supplemented with other interpretative mechanisms.

**C. Flexible use clauses do not require excessive litigation to define and ground the doctrine.**

This objection is, in effect, the obverse of the one just addressed, and much the same answer is in order. Although iterative full-scale litigation certainly is one method for "fleshing out" an open L&E clause, it is not the only one. In particular, it will be noted that courts in many jurisdictions have the ability to provide advisory opinions on stated cases, or on points of law extracted from actual cases. A jurisdiction anxious to know without delay how its open clause would be interpreted in the court would thereby have the means to find out, by sanctioning this kind of low-cost, high-value judicial proceeding.

**D. Flexible use clauses are consistent with international 3-step test.**

The quick answer is that rather than restricting the use of open clauses, the language of Berne Art. 9(2) and TRIPS Art. 13 actually authorizes it. In effect, the three-step test embodies a "balancing" approach to copyright L&E's, and it is precisely such an approach that undergirds most open clauses. As both the history and the (admittedly limited) jurisprudence of the 3-step test indicates, the goal of this formulation is to assure that in identifying legitimate constraints on copyright protection, all competing interests – in access and protection alike – be taken into account.

**E. Using an enabling version of the 3-step test may not be the best way to achieve flexibility.**

One method of expanding flexibility in copyright limitations and exceptions that is different

than the approach of the Global Expert Network on Flexible Limitations and Exceptions is through an enabling use of the Berne “3-step” test. This approach has some built in advantages and disadvantages.

The “three-step test” arises from the clause in Article 9.2 of the Berne Convention, which was meant to enable limitations and exceptions to the right of reproduction. That clause states:

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

A group of scholars proposed a revision to European law using the elements of Berne to authorize “any other use” than those mentioned in specific limitations and exceptions in national law, as long as such use complies with the author protections enumerated in Berne.<sup>1</sup> The latest proposed revision of China’s Copyright Act contains a similar clause.

The approach has the distinct advantage of clearly complying with the Berne test itself. It is also clearly an open and flexible clause – potentially any use (for any purpose) that operates beyond the bounds of Berne’s definition of copyright holder interests would be permissible.

Incorporating the 3-step test directly into a national law also presents notable disadvantages. By adopting a line-drawing approach instead of an explicit balancing of interests, the approach may fail to authorize uses that have particularly strong social benefits despite some encroachment on rights holder interests. This concern is magnified by the approach’s potential to tie the interpretation of the clause to the international standard – which thus far has been formulaically applied and widely criticized by scholars and public interest advocates.<sup>2</sup>

#### **F. Flexible use clauses are not antithetical to the civil law tradition.**

Neither in theory nor in practice is the civil law incapable of dealing effectively with statutory provisions that require interpretation and application. This notion represents a time-worn and discredited distinction between supposedly “dynamic” common law-based systems and “static” civil law ones. In fact, just as common law systems rely today on extensive codification, civil law systems recognize the importance of interpretation. This may be particularly apparent in areas of legal doctrine to which copyright (and other kinds of intellectual property) have close affinities, such as competition law and other forms of economic regulation. Here, no amount of detail in the statutory provision itself can relieve

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<sup>1</sup> WITTEM INTERNATIONAL NETWORK PROJECT ON A EUROPEAN COPYRIGHT CODE, Art. 5.5 (2010)

<sup>2</sup> The Max Plank Institute, Declaration: A Balanced Interpretation of the “Three-Step Test” in Copyright Law 4, [http://www.ip.mpg.de/files/pdf2/declaration\\_three\\_step\\_test\\_final\\_english1.pdf](http://www.ip.mpg.de/files/pdf2/declaration_three_step_test_final_english1.pdf) (last visited Sept. 7, 2012).

courts of the burden of applying general principles to specific cases.

**G. Flexible use clauses do not endanger individual authors.**

Large companies generally benefit the least from open L&E clauses, because they generally have invested in proprietary business models and because they have the means and the money to license the intellectual property rights they need in order to do business. On the other hand, in countries with open L&E clauses, the greatest beneficiaries are individuals, non-profit cultural institutions and small companies who need reasonable access to existing copyrighted material in order to fulfill their missions: teaching and learning, making new culture, or finding a niche in a commercial field already dominated by firms with greater market power and large IP portfolios. In fact, open L&E clauses exist, in part, to “level the playing field” for all.

**H. Flexible use clauses do not interfere with the development of local cultural industries**

Not to put too fine a point on it, this is the “big lie” about the place that flexible L&E’s play in relation to development. Countries where creative innovators have enjoyed success in the competitive international marketplace tend to ascribe this to strong IP laws which are seriously enforced. These countries (most notably the United States) leave out of the account the important role that open provisions in their national laws have played in allowing innovation to thrive – in fields as disparate as publishing, motion pictures, and computer software development. Far from exposing nascent national cultural industries to “unfair” competition, flexible L&E’s tend to encourage the development of robust, competitive firms and markets. Indeed, the argument can be made that by failing to encourage (or even permit) their trading partners to adopt open L&E clauses, the most developed countries are perpetuating a two-tiered international information economy.

**I. Flexible use clauses do not authorize “piracy.”**

Any copyright defendant can invoke any defensive doctrine in an attempt to avoid liability, no matter how it may be richly deserved. The history of litigation under open clauses, however, discloses no obvious examples of their being employed successfully by individuals or firms engaged in massive, commercial-scale infringement. File-sharers and providers of file-sharing software in the United States, for example, have sometimes attempted to rely upon “fair use,” but never with any success whatsoever. Likewise, concerns voiced by photographers and graphic artists that fair use might somehow justify the commercial re-use of copyrighted images that are found on line appear to be without any basis. The fear here is a natural and understandable one, but it is misplaced. By and large, open L&E clauses apply – and can only apply – to good faith value-added uses of material which cannot easily be confused with piracy under any definition.

**J. Flexible use clauses do not violate the human right to protection of the moral and material interests of authors.**

This objection operates by acknowledging only one part of the dual mandate that the international law of human rights imposes on intellectual property systems. Thus, while Article 27 of the International Declaration on Human Rights does acknowledge the individual's protected "moral and material" interests, it does so only after stating that "Everyone has the right freely to participate in the cultural life of the community, to enjoy the arts and to share in scientific advancement and its benefits." It is this sort of sharing that can be fully effectuated only through open language on copyright L&E's. In most jurisdictions, the provisions of copyright law that provide protection for works of authorship are either open-ended or regularly updated. If the balance between access and ownership contemplated in international human rights law is to be realized, L&E's must be imbued with a similar flexibility.