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## FTAs' Contribution Towards a More Flexible Copyright Space: Possibilities and Limits

Maria Vasquez Callo-Muller

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# FTAS' CONTRIBUTION TOWARDS A MORE FLEXIBLE COPYRIGHT SPACE: POSSIBILITIES AND LIMITS

MARÍA VASQUEZ CALLO-MÜLLER\*

*Free Trade Agreements (FTAs) have often been considered instruments for heightened intellectual property rights protection, thereby in detriment of a more flexible copyright space. However, since the adoption of the Comprehensive and Progressive Agreement for Trans-Pacific Partnership, some FTAs have been incorporating a clause on the “Balance in Copyright and Related Rights Systems.” Among these, the Regional Comprehensive Economic Partnership Agreement and, more recently, the 2021 Australia-U.K. FTA contain such a clause. In addition, more discrete FTAs, such as the Australia-Peru FTA, also incorporate similar provisions. This article considers what incorporating such clauses in FTAs means for the interpretation of the three-step test embedded in Article 13 of the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement), which is key for enabling a more flexible copyright space. This article seeks to understand whether FTAs’ clauses on “Balance in Copyright and Related Rights Systems” can support a more flexible interpretation of the three-step test in the context of the World Trade Organization dispute settlement system.*

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## INTRODUCTION

Free Trade Agreements (FTAs) have traditionally been considered as instruments for heightened intellectual property rights (IPRs) protection.<sup>1</sup> In the words of Dinwoodie and Dreyfus, “[b]ilaterals

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1. See Henning Grosse Ruse-Khan, *Effects of Combined Hedging: Overlapping and Accumulating Protection for Intellectual Property Assets on a Global Scale*, in GLOBAL INTELLECTUAL PROPERTY PROTECTION AND NEW CONSTITUTIONALISM 23, 36–39 (Jonathan Griffiths & Tuomas Mylly eds., 2021) (noting the interest of IP protection in international law); Henning Grosse Ruse-Khan, *From TRIPS to FTAs and Back: Re-Conceptualising the Role of a Multilateral IP Framework in a TRIPS-Plus World*, 48 NETH. Y.B. OF INT’L L. 57, 58–59 (Fabian Amtenbrink et al. eds., 2017) (stating that the TRIPS Agreement “marked a milestone in global IP norm-setting”); GRAEME B. DINWOODIE & ROCHELLE C. DREYFUSS, A NEOFEDERALIST

focus on providing additional detail to existing producers rights. They (bilaterals) often lack provisions dealing with limits to these rights, which might prompt the conclusion that measures safeguarding user and broader societal interest are inapplicable.”<sup>2</sup> This characterization corresponds mainly to North-South FTAs, in which parties such as the European Union (E.U.) and the United States have consistently promoted TRIPS-plus obligations,<sup>3</sup> to the detriment of intellectual property (IP) flexibilities. Yet an aspect often overlooked within this narrative is the gradual incorporation of certain flexibilities within contemporary FTAs’ IP chapters. This article will concentrate on one of these flexibilities: copyright’s limitations and exceptions. More specifically, this article will track the incorporation of specific clauses on the “Balance in Copyright and Related Rights System” and provide an analysis of what they mean for international copyright law and the interpretation of the three-step test in the context of the World Trade Organization (WTO) dispute settlement system.

To address this question, this article will analyze clauses on copyright’s limitations and exceptions corresponding to FTAs in three regions: the European Union, United States, and the Asia-Pacific. This selection is backed in recent policy studies demonstrating that these are major hubs serving as engines for robust TRIPS-plus provisions.<sup>4</sup>

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VISION OF TRIPS: THE RESILIENCE OF THE INTERNATIONAL INTELLECTUAL PROPERTY REGIME 197 (2012) (showing that “recent bilateral focus on providing additional detail to existing producer rights.”).

2. DINWOODIE & DREYFUSS, *supra* note 1, at 197.

3. TRIPS-plus norms are those international norms setting higher standards of protection for IP rights than the 1994 WTO Agreement on Trade-Related Aspects of Intellectual Property Rights. See Agreement on Trade-Related Aspects of Intellectual Property, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, 1869 U.N.T.S. 299 [hereinafter TRIPS Agreement]. As the TRIPS Agreement only offers minimum standards of protection—in large part reiterating previous standards contained in pre-TRIPS IP conventions—TRIPS-plus norms have emerged as a policy undertaking of countries with strong IP industries seeking higher standard of protection than those found at the multilateral level. For a critical approach see Thomas Cottier et al., *The Prospects of TRIPS-Plus Protection in Future Mega-Regionals*, in MEGA-REGIONAL TRADE AGREEMENTS 191, 191–215 (Thilo Rensmann ed., 2017) (listing some of the major bilateral agreements that fit into the General Agreement on Tariffs and Trade and TRIPS framework to protect IP).

4. Mark Wu, *Intellectual Property Rights*, in HANDBOOK OF DEEP TRADE AGREEMENTS 202, 204 (Aaditya Mattoo et al. eds., 2020).

The main objective is to test if the respective clauses regarding copyright limitations and exceptions merely reiterate the TRIPS three-step test or deviate from it, for instance, by incorporating a clause on the “Balance in Copyright and Related Rights Systems.” The outcome of this analysis will shed light on whether relevant FTAs’ clauses on copyright’s exceptions and limitations could serve as material evidence to support a more flexible interpretation of TRIPS three-step test.

This article proceeds as follows. Part I explores whether FTAs’ clauses on limitations and exceptions contain innovative aspects, for instance, a clause on the “Balance in Copyright and Related Rights Systems.” The analysis will demonstrate that only a small subset of FTAs out of a universe of more than 360 contains such a clause. Part II will contextualize these findings. Specifically, Part II will explore the legal value of FTAs’ clauses on “Balance in Copyright and Related Rights Systems” with regard to the interpretation of the TRIPS Agreement. The objective is to determine how and to what extent parties can integrate FTAs clauses into the interpretative exercise of Article 13 of the TRIPS Agreement. Part III will provide an outlook of the significance of FTAs’ clauses on the “Balance in Copyright and Related Rights Systems” for contemporary international copyright law-making. The last part concludes.

## I. POSSIBILITIES: FTA CLAUSES ON COPYRIGHT LIMITATIONS AND EXCEPTIONS

### A. DO FTAS MERELY REITERATE THE TRIPS THREE-STEP TEST?

Well-established copyright scholarship has highlighted that “[b]uilding on the foundations established in the TRIPS Agreement, a slew of international economic agreements have fortified constraints on national copyright policy making, especially in the area of limitations and exceptions (L&Es), by including the three-step test obligation.”<sup>5</sup> The test, as incorporated in Article 13 of the TRIPS Agreement, mandates that WTO members must “confine limitations

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5. Ruth L. Okediji, *Reframing International Copyright Limitations and Exceptions as Development Policy*, in *COPYRIGHT LAW IN AN AGE OF LIMITATIONS AND EXCEPTIONS* 429, 444 (Ruth L. Okediji ed., 2017).

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.”<sup>6</sup> Many scholars have noted that the cumulative nature of the test carries the risk that the first step—“to confine limitations to certain special cases”—may actually preclude policy space for adopting exceptions and limitations, such as text and data mining, for scientific research.<sup>7</sup>

The revision of the respective clauses on limitations and exceptions on copyright and related rights systems in a set of more than 360 FTAs signed after the year 2000 and mapped in the Trade Agreements Provisions on Electronic Commerce and Data (TAPED) database indeed corroborate that the TRIPS three-step test is included in most FTAs to date.<sup>8</sup> For instance, U.S. and E.U. FTAs incorporate the three-step test in all of their FTAs containing an IP chapter. However, there are variations within these references. For instance, the incorporation of the three-step test could be coupled with the reaffirmation of international commitments, for example, “[t]his Article does not reduce or extend the scope of applicability of the limitations and exceptions permitted by the TRIPS Agreement, the Berne Convention, the WCT or the WPPT,”<sup>9</sup> or “[e]ach Party may provide for limitations or exceptions to the rights set out in Articles . . . only in certain special cases which neither conflict with a normal exploitation of the subject matter nor unreasonably prejudice the legitimate interests of the right

6. TRIPS Agreement, *supra* note 3, art. 13.

7. Christophe Geiger et al., *The Three-Step Test Revisited: How to Use the Test's Flexibility in National Copyright Law*, 29 AM. U. INT'L L. REV. 581, 582 (2014) (“A flexible domestic provision on [L&Es], so runs the argument, is incompatible with the requirement of ‘certain special cases’ contained in some versions of the three-step test.”) [hereinafter Geiger et al., *The Three-Step Test*].

8. See Mira Burri et al., *TAPED: Trade Agreements Provisions on Electronic Commerce and Data* 33 (Jan. 2022), <https://unilu.ch/taped> (noting the inclusion of the three-step TRIPS test in most agreements).

9. Agreement between the United States of America, the United Mexican States, and Canada art. 20.64, ¶ 2, July 1, 2020, OFF. U.S. TRADE REP., <https://ustr.gov/trade-agreements/free-trade-agreements/united-states-mexico-canada-agreement/agreement-between>; see also Australia Free Trade Agreement, Austl.-U.S., ART. 17.10, ¶ 1, May 18, 2004, OFF. U.S. TRADE REP. [hereinafter U.S.-Australia FTA], [https://ustr.gov/sites/default/files/uploads/agreements/fta/australia/asset\\_upload\\_file148\\_5168.pdf](https://ustr.gov/sites/default/files/uploads/agreements/fta/australia/asset_upload_file148_5168.pdf); Chile Free Trade Agreement, Chile-U.S., art. 17.7, ¶ 3, n.17, Jan. 1, 2004, OFF. U.S. TRADE REP., <https://ustr.gov/trade-agreements/free-trade-agreements/chile-fta> [hereinafter U.S.-Chile FTA].

holders, in accordance with the conventions and international agreements to which it is party.”<sup>10</sup> In other cases, new exceptions for the digital environment,<sup>11</sup> including temporary acts of reproduction, are explicitly allowed,<sup>12</sup> and in only one case is there an express reference to fair use.<sup>13</sup>

However, an important variation on how the three-step test has been incorporated in FTA practice includes the adoption of a “Balance in Copyright and Related Rights Systems” clause, which seems to provide a glimpse of hope towards a more flexible copyright space.<sup>14</sup> The analysis of the legal value of this clause *vis-à-vis* the TRIPS

10. Agreement Between the European Union and Japan for an Economic Partnership art. 14.14, COM (2018) 192 final, annex 1 (Apr. 18, 2018) [hereinafter E.U.-Japan FTA]; *see also* Free Trade Agreement Between the European Union and the Republic of Singapore art. 10.11, 2019 J.O. (L 294) 3, 79 [E.U.-Sing. FTA]; Free Trade Agreement Between the European Union and the Socialist Republic of Viet Nam art. 12.14, ¶ 1, 2020 J.O. (L 186) 3, 133 [hereinafter E.U.-Viet Nam FTA].

11. U.S.-Chile FTA, *supra* note 9, art. 17.7, ¶ 3, n.17.

12. *See* Association Agreement between the European Union and the European Atomic Energy Community and their Member States, of the One Part, and Georgia, of the Other Part art. 162, ¶ 2, 2014 O.J. (L 261) 4, 106 [hereinafter E.U.-Georgia FTA]; E.U.-Viet Nam FTA, *supra* note 10, art. 12.14.

13. *See* U.S.-Korea Free Trade Agreement, S. Kor.-U.S., art 18.4, ¶ 1, n.11, Mar. 15, 2020, OFF. U.S. TRADE REP., <https://ustr.gov/trade-agreements/free-trade-agreements/korus-fta> (“Each Party shall confine limitations or exceptions to the rights described in paragraph 1 to certain special cases that do not conflict with a normal exploitation of the work, performance, or phonogram, and do not unreasonably prejudice the legitimate interests of the right holder. For greater certainty, each Party may adopt or maintain limitations or exceptions to the rights described in paragraph 1 for fair use, as long as any such limitation or exception is confined as stated in the previous sentence.”).

14. For examples of the “Balance in Copyright and Related Rights Systems” clause, *see* Regional Comprehensive Economic Partnership art. 11.18, ¶ 3, Nov. 15, 2020, AUSTL. GOV'T DEP'T OF FOREIGN AFFS. & TRADE, <https://www.dfat.gov.au/trade/agreements/in-force/rcep/rcep-text> [hereinafter RCEP]; Australia-United Kingdom Free Trade Agreement, Austl.-U.K., art. 15.63, Dec. 17, 2021, AUSTL. GOV'T DEP'T OF FOREIGN AFFS. & TRADE, <https://www.dfat.gov.au/trade/agreements/not-yet-in-force/aukfta> [hereinafter Austl.-U.K. FTA]; Peru-Australia Free Trade Agreement, Austl.-Peru, art. 17.35, Feb. 11, 2020, AUSTL. GOV'T DEP'T OF FOREIGN AFFS. & TRADE, <https://www.dfat.gov.au/trade/agreements/in-force/pafta/full-text/Pages/chapter-17-intellectual-property> [hereinafter Austl.-Peru FTA]; Australia-Hong Kong Free Trade Agreement and Associated Investment Agreement, Austl.-H.K., art. 14.14, ¶ 2, Jan. 17, 2020, AUSTL. GOV'T DEP'T OF FOREIGN AFFS. & TRADE, <https://www.dfat.gov.au/trade/agreements/in-force/hkfta/Pages/default> [hereinafter Austl.-H.K. FTA].

Agreement, as well as in the broader context of international copyright law-making, merits more scholarly attention. International copyright scholarship, in its pursuit to find a more balanced interpretation of the three-step test, has placed greater emphasis on the negotiating history of the three-step test in the Berne Convention, and its subsequent incorporation in the TRIPS Agreement, than in the current practice of states, as reflected in contemporary treaty-making, for instance in FTAs. The reluctance to look at FTAs as possible sources of flexibilities is grounded in the fact that, after all, these instruments have served as conduits for greater trade and market access liberalization, with negative trade-offs for IPR flexibilities.<sup>15</sup> But contemporary FTA practice may provide a new set of interpretive material that could influence a more flexible interpretation of the test.<sup>16</sup> For this reason, the next sub-section elaborates on the origins and current conceptualization of the clause on “Balance in Copyright and Related Rights Systems” in selected FTA IP chapters.

#### B. FTA CLAUSES ON “BALANCE IN COPYRIGHT AND RELATED RIGHTS SYSTEMS”

Clauses on the “Balance in Copyright and Related Rights Systems” trace their origins to the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP), signed in 2018, which provides:

Each Party shall endeavour to achieve an appropriate balance in its copyright and related rights system, among other things by means of limitations or exceptions that are consistent with Article 18.65 (Limitations and Exceptions), including those for the digital environment, giving due consideration to legitimate purposes such as, but not limited to: criticism; comment; news reporting; teaching, scholarship, research, and other similar purposes; and facilitating access to published works for persons who are

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15. For an example of a critical approach to the international political economy of FTAs on IP, see Susan K. Sell, *The Dynamics of International IP Policymaking*, in *INTELLECTUAL PROPERTY, TRADE AND DEVELOPMENT* 73 (Daniel Gervais ed., 2d ed. 2014) (discussing generally the TRIPS Agreement and its influence in FTAs).

16. See María Vásquez Callo-Müller & Pratyush Nath Upreti, *RCEP IP Chapter: Another TRIPS-Plus Agreement?*, 70 *GRUR INT'L* 667, 667–671 (2021) (providing examples of how new language on flexibilities may be incorporated not only with regards to copyright, but also with regard to patent protection).



blind, visually impaired or otherwise print disabled.<sup>17</sup>

A footnote to the same article indicates that “[f]or greater certainty, a use that has commercial aspects may in appropriate circumstances be considered to have a legitimate purpose under Article 18.65 (Limitations and Exceptions).”<sup>18</sup>

A similar clause was included in the Regional Comprehensive Economic Partnership (RCEP) Agreement, signed in 2020, which specifically mentions that “[f]or greater certainty, a Party may adopt or maintain limitations or exceptions to the rights referred to in paragraph 1 (resembling the three-step test) for fair use, as long as any such limitation or exception is confined as stated in paragraph 1.”<sup>19</sup>

Next to these megaregional FTAs, the Australia-United Kingdom (U.K.),<sup>20</sup> Peru-Australia,<sup>21</sup> and Hong Kong-Australia<sup>22</sup> bilateral FTAs also incorporate a clause on “Balance in Copyright and Related Rights System.” In all these cases, the legitimate purposes that may give rise or justify relevant limitations and exceptions to copyright include, but are not limited to, “criticism; comment; news reporting; teaching, research, and other similar purposes; and facilitating access to published works for persons who are blind, visually impaired or otherwise print disabled.”<sup>23</sup> In the case of the Australia-U.K. FTA, the relevant provision is complemented by a clarification stating that “[f]or greater certainty, a use that has commercial aspects may in appropriate circumstances be considered to have a legitimate purpose under Article 15.62 (Limitations and Exceptions).”<sup>24</sup> This clarification is similar to the one provided in the CPTPP.<sup>25</sup>

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17. Comprehensive and Progressive Agreement for Trans-Pacific Partnership art. 18.66 n.79, Mar. 8, 2018, AUSTL. GOV'T DEP'T OF FOREIGN AFFS. & TRADE, <https://www.dfat.gov.au/trade/agreements/in-force/cptpp/official-documents> [hereinafter CPTPP].

18. *Id.* art. 18.66 n.79.

19. RCEP, *supra* note 14, art. 11.18, ¶¶ 3–4.

20. Austl.-U.K. FTA, *supra* note 14, art. 15.63.

21. Austl.-Peru FTA, *supra* note 14, art. 17.35.

22. Austl.-H.K. FTA, *supra* note 14, art. 14.14, ¶ 2.

23. Austl.-U.K. FTA, *supra* note 14, art. 15.63; Austl.-Peru FTA, *supra* note 14, art. 17.35; Austl.-H.K. FTA, *supra* note 14, art. 14.14, ¶ 2; RCEP, *supra* note 14, art. 11.18, ¶ 3.

24. Austl.-U.K. FTA, *supra* note 14, art. 15.63, n.24.

25. CPTPP, *supra* note 17, art. 18.66.

At the outset, there are two important commonalities across this set of clauses. First, they are non-legally binding; in other words, they do not require parties to an FTA to implement a certain limitation and exception in domestic law.<sup>26</sup> Rather, they only state that each party of the treaty at stake “shall endeavour” to achieve appropriate balance in its copyright and related rights system by means of considering certain “legitimate purposes.”<sup>27</sup> Second, the legitimate purposes stated in each one of these clauses clearly follow the U.S. fair use purposes—that is, criticism, comment, news reporting, teaching, scholarship, or research.<sup>28</sup> The clauses also provide that other similar purposes are possible as well as limitations to facilitate access to published works for people with a disability—in reference to the Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired or Otherwise Print Disabled.<sup>29</sup> Furthermore, in the case of RCEP, teaching and scholarship are replaced by “education” which could potentially lead to a broader scope of application.<sup>30</sup>

Another key aspect to note is that these clauses cannot be read in a

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26. See Kenneth W. Abbott & Duncan Snidal, *Hard and Soft Law in International Governance*, 54 INT'L ORG. 421, 422 (2000) (noting that binding commitments (hard law) refers to legally binding obligations that are precise, whereas non-binding commitments (soft law) are legal arrangements that are “weakened along one or more of the dimensions of obligation, precision, and delegation”).

27. “Shall endeavor” language in FTAs corresponds to soft law commitments (that is, hortatory clauses or cooperation pledges). One could however argue that these clauses create nonetheless favorable conditions for certain actions to occur. The scholarly literature in the International Investment Arbitration (IIA) field has in particular advanced this argument. See Barnali Choudhury, *The Role of Soft Law Corporate Responsibilities in Defining Investor Obligations in International Investment Agreements*, in INVESTORS' INTERNATIONAL LAW 151, 164–68 (Jean Ho & Mavluda Sattorova eds., 2021). For more about the incorporation of soft law in the design of international agreements, see Andrew T. Guzman, *The Design of International Agreements*, 16 EUR. J. INT'L L. 579, 579–612 (2005).

28. 17 U.S.C. § 107 (“Notwithstanding the provisions of sections 106 and 106A, the fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified by that section, for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright”).

29. Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired, or Otherwise Print Disabled art. 4, June 27, 2013, WORLD INTELL. PROP. ORG., <https://www.wipo.int/treaties/en/ip/marrakesh>.

30. RCEP, *supra* note 14, art. 11.18, ¶ 3.

vacuum. They are incorporated in each respective treaty right after a clause including the TRIPS three-step test, which, by the use of the term “shall,” constitutes a legal obligation.<sup>31</sup> The only exception is the case of the Australia-Hong Kong FTA, where the three-step test is oddly not directly incorporated.<sup>32</sup> As such, the treaties reviewed here leave unclear the status or the relationship between the three-step test (a binding legal obligation) and the respective clauses on balance (a soft-law clause).

Overall, albeit not legally binding and constituting only “soft law,” these provisions illustrate an interesting development in international copyright law because it is evident that they do not simply entail a paraphrasing of the three-step test. For instance, one could question the compatibility of TRIPS three-step test with the open-ended purposes mentioned in the relevant clauses on “Balance in Copyright and Related Rights System.” Based on previous discussions questioning the very validity of the U.S. fair use exception in light of the three-step test, the answer is not straightforward.<sup>33</sup>

Beyond the interpretation of the relationship between FTA provisions regarding the three-step *vis-à-vis* clauses on “Balance in Copyright and Related Rights Systems” within each FTA, which is a matter to be resolved by the dispute resolution body established for each of these treaties, a separate issue is what these clauses mean for international copyright law, and more specifically for the interpretation of the three-step test in the context of WTO dispute settlement. The next section explores this issue.

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31. Austl.-U.K. FTA, *supra* note 14, art. 15.62, ¶ 1; Peru-Austl. FTA, *supra* note 14, art. 17.35; RCEP, *supra* note 14, art. 11.18, ¶ 1.

32. Nevertheless, the parties affirm their commitment to the TRIPS Agreement, and by extension their commitment towards the three-step test. Austl.-H.K. FTA, *supra* note 14, art. 14.5.

33. See Ruth Okediji, *Toward an International Fair Use Doctrine*, 39 COLUM. J. TRANSNAT'L L. 75, 114–36 (2000) (comparing the fair use doctrine in U.S. law to other regimes, including the Berne Convention and TRIPS).

## II. LIMITS: IMPLICATIONS FOR INTERNATIONAL COPYRIGHT LAW

### A. AN *INTER-SE* APPROACH FOR INTERPRETING TRIPS AND FTA RELATIONS

Given the ever-growing adoption of comprehensive FTAs regulating multiple areas, including the digital economy, one could argue that, where relevant, FTA provisions should be able to inform the interpretation of Article 13 of the TRIPS Agreement—given the fact that FTAs regulate, in some cases, similar subject matter to TRIPS.<sup>34</sup> The relationship between these sets of treaty obligations is, however, complex. Not only are FTAs non-WTO agreements, but they might also apply to only a subset of WTO members.

Because they are non-WTO agreements, including FTA commitments as elements during the adjudication of a WTO dispute can only be done by recourse to the customary rules of treaty interpretation codified in Article 31 and 32 of the Vienna Convention of the Law of Treaties (VCLT).<sup>35</sup> Next to the well-known rule of treaty interpretation, according to the ordinary meaning and the context, Article 31(3) of the VCLT provides the following:

There shall be taken into account, together with the context: (a) *Any subsequent agreement between the parties* regarding the interpretation of the treaty or the application of its provisions; (b) *Any subsequent practice* in the application of the treaty which establishes the agreement of the parties regarding its interpretation; (c) *Any relevant rules of international law applicable in the relations between the parties.*<sup>36</sup>

The question is whether FTAs can be considered as elements during the interpretation exercise under any of the instances provided by

34. TRIPS Agreement, *supra* note 3, art. 13.

35. Understanding on Rules and Procedures Governing the Settlement of Disputes art. 3, ¶ 2, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, 1869 U.N.T.S. 401 [hereinafter DSU]. Article 3.2 of the DSU instructs the WTO dispute settlement bodies to clarify WTO-covered agreements “in accordance with customary rules of interpretation of public international law.” These rules are codified in the VCLT. *See* Vienna Convention on the Law of Treaties arts. 31–32, May 23, 1969, 1155 U.N.T.S. 331 [hereinafter VCLT].

36. VCLT, *supra* note 35, art. 31, ¶ 3 (emphasis added).

Article 31(3) of the VCLT. The International Law Commission (ILC) provided guidance on the interpretation of “subsequent agreements” and “subsequent practice,” which direct us to be cautious when considering the role of FTAs as subsequent agreements to TRIPS.<sup>37</sup> As the ILC denotes, “subsequent agreements” constitute “an authentic means of interpretation . . . reached after the conclusion of a treaty, regarding the interpretation of the treaty or the application of its provisions.”<sup>38</sup> The International Court of Justice (ICJ) reached a similar definition in the *Kasikili/Sedudu Island* case, in which the court noted that a subsequent agreement is “an agreement as to the interpretation of a provision reached after the conclusion of the treaty [that] represents an authentic interpretation by the parties which must be read into the treaty for purposes of its interpretation.”<sup>39</sup> The indication by both the ILC and the ICJ that a subsequent agreement constitutes an “authentic means of interpretation” leads us to consider the compatibility of subsequent agreements under the VCLT and the provisions established in the WTO Agreement itself.<sup>40</sup> According to Article IX(2) of the WTO Agreement:

The Ministerial Conference and the General Council shall have the exclusive authority to adopt interpretations of this Agreement and of the Multilateral Trade Agreements. In the case of an interpretation of a Multilateral Trade Agreement in Annex 1, they shall exercise their authority on the basis of a recommendation by the Council overseeing the functioning of that Agreement. The decision to adopt an interpretation shall be taken by a three-fourths majority of the Members.<sup>41</sup>

According to this provision, only the Ministerial Conference and the General Council have the power to establish authentic

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37. See Subsequent Agreements and Subsequent Practice in Relation to the Interpretation of Treaties: Text of the Draft Conclusions Adopted by the Drafting Committee on Second Reading, Int'l Law Comm'n on Its Seventieth Session, at 2, U.N. Doc. A/CN.4/L.907 (May 11, 2018) [hereinafter Draft Conclusions on Treaty Interpretation].

38. *Id.*

39. *Kasikili/Sedudu Island* (Bots./Namib.), Judgment, 1999 I.C.J. 1045, ¶ 49 (Dec. 13).

40. Marrakesh Agreement Establishing the World Trade Organization, ¶ 2, Apr. 15, 1994, 1867 U.N.T.S. 154 [hereinafter WTO Agreement].

41. *Id.* art. IX(2).

interpretations of WTO covered agreements, including TRIPS.<sup>42</sup> Yet a literal application of this rule would impede the application of the rules of treaty interpretation contained in the VCLT altogether, which are of a customary character and should be interpreted holistically. The WTO Appellate Body (AB) in *U.S.—Clove Cigarettes*<sup>43</sup> clarified the application of the procedures for authentic interpretation established in the WTO Agreement and how the VCLT rules on interpretation would apply in this context.<sup>44</sup> In this case, the AB noted that interpretations pursuant to Article IX(2) of the WTO agreement, on the one hand, and the rule contained in Article 31(3)(a) of the VCLT, on the other hand, serve different purposes.<sup>45</sup> The former constitutes a mechanism to adopt “binding interpretations that clarify WTO law for all members,”<sup>46</sup> whereas the latter is a tool for the interpretation of a specific provision that is binding only on the parties to the dispute.<sup>47</sup> This highlights the fine line between the modification of treaties through authentic interpretation *vis-à-vis* their interpretation.<sup>48</sup> Hence, a priori, the role of FTAs as subsequent agreements for the purposes of interpretation of a treaty provision contained in the TRIPS Agreement cannot be dismissed.

However, another point to consider is the temporary element that characterizes a subsequent agreement. As Dörr notes, an agreement must be actually “subsequent,” and this is key to ascertain the use of this provision.<sup>49</sup> The ILC also highlighted the temporal and contextual relationship between subsequent agreements and the conclusions of the treaty.<sup>50</sup> Based on this, it is unclear whether FTAs, in particular

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42. *Id.*

43. Appellate Body Report, *United States—Measures Affecting the Production and Sale of Clove Cigarettes*, WTO Doc. WT/DS406/AB/R (adopted Apr. 4, 2012).

44. *Id.* ¶¶ 248–63.

45. *Id.*

46. *Id.* ¶¶ 257–60.

47. *Id.*

48. See Dire Tladi, *Is the International Law Commission Elevating Subsequent Agreements and Subsequent Practice?*, EJIL: TALK! (Aug. 30, 2018), <https://www.ejiltalk.org/is-the-international-law-commission-elevating-subsequent-agreements-and-subsequent-practice> (presenting a critical analysis of the risks of confusing modification with interpretation).

49. Oliver Dörr, *Article 31*, in *VIENNA CONVENTION ON THE LAW OF TREATIES: A COMMENTARY* 521, 593 (Philip Bittner et al. eds., 2d ed. 2018).

50. Draft Conclusions on Treaty Interpretation, *supra* note 37, at 2.

those under consideration in this analysis, could meet the notion of subsequently, as more than 20 years have passed between the adoption of the TRIPS Agreement and the CPTPP—the first FTA to contain a clause on “Balance in Copyright and Related Rights Systems.”<sup>51</sup>

But if not a subsequent agreement under Article 31(3)(a) of the VCLT, can FTAs be “subsequent practice”? Similar to subsequent agreements, the ILC defines subsequent practice as “[a]n authentic means of interpretation under article 31, paragraph 3 (b), [which] consists of conduct in the application of a treaty, after its conclusion, which establishes the agreement of the parties regarding the interpretation of the treaty.”<sup>52</sup>

“Practice” denotes a broader concept than “agreement” as it can be determined from “any type of positive action” of a state,<sup>53</sup> including actions taken in the context of organizations such as the U.N. diplomatic conferences.<sup>54</sup> However, more important than defining state practice are the qualifications that elevate state practice to “subsequent practice.” In the context of WTO dispute settlement resolution, the AB in *U.S.—Gambling* set the following threshold:

Thus, in order for “practice” within the meaning of Article 31(3)(b) to be established: (i) there must be a common, consistent, discernible pattern of acts or pronouncements; and (ii) those acts or pronouncements must imply agreement on the interpretation of the relevant provision.<sup>55</sup>

Unfortunately, the review of the set of FTAs containing clauses on the “Balance on the Copyright and Related Rights” system does not meet the threshold set by the AB in *U.S.—Gambling* for two reasons. First, the alleged practice only concerns five FTAs—the CPTPP,

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51. *CPTPP Outcomes at a Glance*, AUSTL. GOV'T DEP'T OF FOREIGN AFFS. & TRADE, <https://www.dfat.gov.au/sites/default/files/cptpp-outcomes-at-a-glance.pdf> (last updated Sept. 2021); A HANDBOOK ON THE WTO TRIPS AGREEMENT 8 (Antony Taubman et al. eds., 2012).

52. Draft Conclusions on Treaty Interpretation, *supra* note 37, at 2.

53. IRINA BUGA, MODIFICATION OF TREATIES BY SUBSEQUENT PRACTICE 24 (2018).

54. *Id.* at 26.

55. Appellate Body Report, *United States—Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, ¶192, WTO Doc. WT/DS285/AB/R (adopted Apr. 7, 2015).

RCEP, Australia-U.K., Australia-Peru, and Australia-Hong Kong—which in total aggregates 21 out of the 164 WTO members.<sup>56</sup> Second, such practice is only observable across selected Asia-Pacific and Latin American countries and does not bind the United States, the European Union, India, or any African countries. Hence, the element of commonality in the interpretation of the three-step test in light of new FTA clauses on “Balance in Copyright and Related Rights Systems” is missing. If that is the case, it is difficult to argue that there is currently a common agreement on a more “balanced” interpretation of the three-step test among WTO members. Yet this conclusion leaves open whether there is common ground on a more balanced interpretation of the three-step test only among a subset of WTO members—those party to the FTAs under analysis.

This leaves us to consider whether FTAs are “relevant rules of international law,” as described by Article 31.3(c) of the VLCT, which would allow the interpretation of the three-step test in a wider normative environment.<sup>57</sup> If such an approach would be possible, as this article later analyzes, would this lead to a renewed interpretation of the three-step test in the context of WTO dispute settlement resolution *vis-à-vis*, for example, the interpretation previously rendered in *U.S.—Section 110(5) Copyright Act*?<sup>58</sup>

The relevance of complementing a much narrower treaty

56. CPTPP members include eleven countries, namely, Australia, Brunei Darussalam, Chile, Japan, Malaysia, Mexico, New Zealand, Peru, Singapore, and Viet Nam. See CPTPP, *supra* note 17. RCEP members include fifteen countries, namely, all ASEAN members—Brunei Darussalam, Cambodia, Indonesia, Lao PDR, Malaysia, Myanmar, Philippines, Singapore, Thailand, Viet Nam—and Australia, China, Japan, Republic of Korea, and New Zealand. See RCEP, *supra* note 14. Therefore, the overlapping number of countries among the CPTPP and RCEP is seven—ASEAN members Brunei Darussalam, Malaysia, Singapore and Viet Nam, and Australia, Japan, and New Zealand. In total, RCEP and CPTPP members account for nineteen countries. In addition, Australia has FTAs with Hong Kong and the U.K. currently not part of either the CPTPP or RCEP, which leads to a total of twenty-one countries that have agreed to a clause on a “Balance of Copyright and Related Rights System” in some of their FTAs. See agreements cited *supra* note 14.

57. VLCT, *supra* note 35, art. 31.

58. Panel Report, *United States—Section 110(5) of the U.S. Copyright Act*, ¶¶ 6.69–6.70, WTO Doc. WT/DS160/R (Adopted June 15, 2000) [hereinafter *U.S.—Section 110(5) Copyright Act*].



interpretation approach based in the ordinary meaning of Article 13 of the TRIPS Agreement by referring to Article 31.3(c) of the VCLT is not unfounded.<sup>59</sup> There is no rule in the VCLT establishing a hierarchy among the methods of interpretation contained therein.<sup>60</sup> Quite the contrary; the customary rules of treaty interpretation are intended to work as a unit, as part of a simultaneous exercise.<sup>61</sup> Moreover, the ILC studied the use of Article 31.3 (c) of the VCLT in its report on Fragmentation of International Law.<sup>62</sup> The ILC report highlights in particular the role of Article 31.3(c) as reflecting the objective of systemic integration, in which “material sources external to the treaty are relevant in its interpretation.”<sup>63</sup> Accordingly, non-WTO sources could be introduced, under this approach, through treaty interpretation into the resolution of a specific dispute.<sup>64</sup>

However, this analysis cannot ignore the “elephant in the room”—the WTO dispute settlement system stalemate.<sup>65</sup> Yet, while the AB’s

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59. See Henning Grosse Ruse-Khan, *The (Non)-Use of Treaty Object and Purpose in Intellectual Property Disputes in the WTO* 26 (Max Planck Institute for Intell. Prop. & Competition L., Research Paper No. 11–15, 2011) (discussing VCLT art. 31(1) and its interpretation).

60. See VCLT, *supra* note 35, arts. 31–33.

61. As a matter of fact, the commentary to Article 27 of the 1966 Draft Articles on the Law of Treaties remarks that “[t]he Commission, by heading the article ‘General rule of interpretation’ in the singular and by underlining the connection between paragraphs 1 and 2 and again between paragraph 3 and the two previous paragraphs, intended to indicate that the application of the means of interpretation in the article would be a single combined operation. . . . Thus, Article 27 is entitled ‘General rule of interpretation’ in the singular, not ‘General rules’ in the plural, because the Commission desired to emphasize that the process of interpretation is a unity and that the provisions of the article form a single, closely integrated rule.” See *Draft Articles on the Law of Treaties with Commentaries*, 2 Y.B. Int’l L. Comm’n. 219–20 (1966).

62. See, Int’l Law Comm’n, Rep. of the Study Grp. on Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law on its Fifty-Eighth Session, U.N. Doc. A/CN.4/L.702, ¶ 1 (July 18, 2006).

63. *Id.* at 17–23.

64. For a recent recount on how such approach can be possible, see Graham Cook, *Flying Under the Radar: Non-WTO International Law Sources in Recent WTO Cases (2015-2020)*, 10 J. INT’L TRADE & ARB. L. 2 (2021); see also Pamela Apaza Lanyi & Armin Steinbach, *Promoting Coherence Between PTAs and the WTO Through Systemic Integration*, 20 J. INT’L ECON. L. 61, 74–75 (2017).

65. For more details on this stalemate, see Peter Van den Bossche, *The TRIPS Agreement and WTO Dispute Settlement: Past, Present and Future* 10–11 (World

status is weakened, WTO parties can still initiate disputes. In 2022, the European Union submitted a request for consultations regarding China's patent practices.<sup>66</sup> Therefore, nothing could impede a WTO member in challenging the domestic adoption or implementation of broader copyright limitations and exceptions, in particular if such limitations and exceptions enable open-uses or allow fair use.<sup>67</sup> More importantly—despite the current geopolitical struggle that multilateral institutions like the WTO face—the goal of this analysis is to clarify the legal relationship and coherence between TRIPS and FTA provisions. This aspect has not received enough scholarly analysis despite the multitude of FTAs dealing with copyright to date.<sup>68</sup> In particular, this article considers the question of whether a clause on “Balance in Copyright and Related Rights Systems” can be raised as a defense in a WTO dispute.

Before engaging in such analysis, a few clarifications are warranted regarding the meaning of Article 31.3(c) of the VCLT. First, the term “rule of international law” denotes the sources of international law contained in Article 38.1 of the Statute of the ICJ (ICJ Statute), which includes international conventions for example, treaties like FTAs, customary rules of international law, and general principles of law.<sup>69</sup> To be “relevant”, a rule must concern the subject matter of the provision at issue.<sup>70</sup> To be “applicable in the relation between the

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Trade Inst., Working Paper No. 02/2020, 2020).

66. See Request for Consultations by the European Union, *China—Enforcement of Intellectual Property Rights*, WTO Doc. WT/DS611/1 (Feb. 18, 2022) (illustrating a relevant consultation request).

67. For instance, Singapore's new Copyright Act of 2021 includes a new section on “Fair use” and a new exception for the use of works for computational data analysis. See Singapore Copyright Act 2021 (No. 22 of 2021), <https://sso.agc.gov.sg/Act/CA2021?ProvIds=P15-#pr191->; see also Mike Palmedo, *Singapore's Copyright Act 2021: New Exception for Computational Uses and Updates to Fair Use and Educational Exceptions*, INFOJUSTICE (Nov. 27, 2021), <https://infojustice.org/archives/43799>.

68. Among the few IP scholars that have explored this issue in depth is Professor Grosse Ruse-Khan, who has written extensively on FTAs-TRIPS relations. HENNING GROSSE RUSE-KHAN, *THE PROTECTION OF INTELLECTUAL PROPERTY IN INTERNATIONAL LAW* 104 (2016).

69. Statute of the International Court of Justice art. 38, 1946, 33 U.N.T.S. 993.

70. MARK E. VILLIGER, *COMMENTARY ON THE 1969 VIENNA CONVENTION ON THE LAW OF TREATIES* 433 (2009); see also Appellate Body Report, *European Communities and Certain Member States—Measures Affecting Trade in Large Civil*

parties,” three approaches are possible. First, a narrow approach, under which the term “parties” should cover all the parties of the treaty under interpretation—in this case, the TRIPS Agreement.<sup>71</sup> Second, the term “parties” can cover a sub-set of parties, eventually including the parties to a dispute.<sup>72</sup> Third, a broad approach, in which the rule can cover non-parties of a treaty.<sup>73</sup>

While there is no uniform approach towards interpreting the term “parties,” if the term were to be interpreted in a narrow sense, it would preclude the application of Article 31.3(c) of the VCLT altogether.<sup>74</sup>

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*Aircraft*, ¶¶ 846–55, WTO Doc. WT/DS316/AB/R (adopted May 18, 2012) [hereinafter *EC—Large Civil Aircraft*] (finding that Article 4 of the 1992 EC-US Civil Aircraft Agreement was not a “relevant” rule of international law applicable in the relations between the parties, within the meaning of Article 31.3(c) of the VCLT. Hence, it could not inform the meaning of “benefit” under Article 1.1(b) of the Agreement on Subsidies and Countervailing Measures.)

71. In *EC-Biotech*, the panel took a narrow approach as it considered that Article 31(3) (c) requires that the rules to be taken into account should be those between all the parties to the treaty, which is being interpreted, hence requiring parallel membership. Accordingly, the panel dismissed the argument that Article 31(3)(c) VCLT obliged the panel to take into account the Convention on Biological Diversity (CBD) and the Cartagena Protocol on Biosafety to the Convention on Biological Diversity. See Panel Report, *European Communities—Measures Affecting the Approval and Marketing of Biotech Products*, ¶ 7.68, WTO Docs. WT/DS291/R, WT/DS292/R, and WT/DS293/R (adopted Sept. 29, 2006).

72. This is the approach undertaken by the AB in *EC—Large Civil Aircraft*. In this case, the AB noted that “[a]n interpretation of ‘the parties’ in Article 31(3)(c) [of the VCLT] should be guided by the [AB]’s statement that ‘the purpose of treaty interpretation is to establish the common intention of the parties to the treaty.’ This suggests that one must exercise caution in drawing from an international agreement to which not all WTO Members are party. At the same time, we recognize that a proper interpretation of the term ‘the parties’ must also take account of the fact that Article 31(3)(c) of the [VCLT] is considered an expression of the ‘principle of systemic integration.’” *EC—Large Civil Aircraft*, *supra* note 70, ¶ 845 (footnotes omitted).

73. This is the approach undertaken by the AB Body in *U.S.—Shrimp*. In order to interpret the term “exhaustible natural resource” as contained in Article XX (g) of the GATT, the AB cited Article 56 of the U.N. Convention on the Law of the Sea, the Convention on Biological Diversity and the Convention on the Conservation of Migratory Species and Wild Animals. Noteworthy is that the US is not a party to any of these agreements. Nevertheless, the AB did not formally invoke Article 31(3)(c) of the VCLT. See Appellate Body Report, *United States—Import Prohibition of Certain Shrimp and Shrimp Products*, ¶ 130, WTO Doc. WT/DS58/AB/R (adopted Nov. 6, 1998) (outlining applicability to non-parties).

74. VCLT, *supra* note 35, art. 31.3(c).

This is because it is unlikely that any relevant rule of international law will bind all 164 WTO Members.<sup>75</sup> To exemplify this point, one must only look at the few results achieved after the break of the Doha round of negotiations<sup>76</sup> and the current struggle to meet a middle point for a TRIPS waiver to facilitate access to COVID-19 vaccines.<sup>77</sup> In the other extreme, if the term “parties” were to be interpreted as binding to the parties that are not part of these “other rules of international law,” this could be subject to criticism beyond the pure legalistic realm.<sup>78</sup> The U.S. Trade Representative (USTR) has heavily criticized the WTO AB, to the point of effectively paralyzing it, for “interpreting WTO agreements in ways not envisioned by the WTO Members who entered into those agreements.”<sup>79</sup> It is thus important to understand the proper interpretation of the term “parties.”

Considering the pros and cons of a narrow and broad interpretation of the term “parties,” this article advances a moderate approach. The term “parties” can cover a sub-set of parties, an *inter se* approach, without affecting the rights or obligations of other WTO members.<sup>80</sup>

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75. See Valbona Muzaka & Matthew Louis Bishop, *Doha Stalemate: The End of Trade Multilateralism?*, 41 REV. INT'L STUDS. 383, 392 (2015) (describing scope of international requirements).

76. *Id.* at 383–84.

77. The negotiations on a TRIPS waiver started in October 2020 by initiative of India and South Africa and continue to date, lasting almost two years despite the emergency that a global pandemic represents. See Communication from India and South Africa, *Waiver from Certain Provisions of the TRIPS Agreement for the Prevention, Containment and Treatment of Covid-19*, WTO Doc. IP/C/W/669 (Oct. 2, 2020), <https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=q/IP/C/W669.pdf&Open=True> (offering relevant example of international authority); Communication from the Chairperson, *Council for Trade Related Aspects of Intellectual Property Rights*, WTO Doc. IP/C/W/688 (May 3, 2020), <https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=q/IP/C/W688.pdf&Open=True> (mentioning growth of WTO discussions).

78. This scenario has seldom taken place in WTO dispute settlement. In *U.S.—FSC*, in order to determine the meaning of ‘foreign-source income’, the Appellate Body took into consideration a number of regional agreements that were not binding on the disputing parties. See Appellate Body Report, *United States—Tax Treatment for “Foreign Sales Corporations,”* ¶¶ 143–45, WTO Doc. WT/DS108/AB/R (adopted Mar. 20, 2000).

79. OFF. OF U.S. TRADE REPRESENTATIVE, REPORT ON THE APPELLATE BODY OF THE WORLD TRADE ORGANIZATION, 1, 78 (Feb. 2020), [https://ustr.gov/sites/default/files/Report\\_on\\_the\\_Appellate\\_Body\\_of\\_the\\_World\\_Trade\\_Organization.pdf](https://ustr.gov/sites/default/files/Report_on_the_Appellate_Body_of_the_World_Trade_Organization.pdf).

80. See William J. Davey & Andre Sapir, *The ‘Soft Drinks’ Case: The WTO and*

Under this approach, relevant FTA provisions on “Balance in Copyright and Related Rights Systems” could be considered as elements, between the parties to an FTA, to take into account regarding the interpretation of Article 13 of the TRIPS Agreement.<sup>81</sup>

*Inter-se* agreements are not contrary to WTO objectives.<sup>82</sup> Under public international law, they are agreements binding only the parties—in this case, WTO Members—that have concluded them and do not create rights or obligations for a third state (in accordance with the principle of *pacta tertiis nec nocent nec prosunt*).<sup>83</sup> In *EC and Certain Member States—Large Civil Aircraft*, the AB, referring to Article 31.3(c) of the VCLT, noted that:

A proper interpretation of the term “the parties” must also take account of the fact that Article 31(3)(c) of the [VCLT] is considered an expression of the “principle of systemic integration” which, in the words of the ILC, seeks to ensure that “international obligations are interpreted by reference to their normative environment” in a manner that gives “coherence and meaningfulness” to the process of legal interpretation.<sup>84</sup>

This highlights the role of Article 31.3(c) of the VCLT as a tool to deter fragmentation of international law and to integrate a specific treaty provision within its normative environment.<sup>85</sup> To achieve this, “a delicate balance must be struck between ‘taking due account of an individual WTO Member’s international obligations and ensuring a consistent and harmonious approach to the interpretation of WTO law among WTO members.’”<sup>86</sup>

Moreover, Article 41 of the VCLT also reflects the principle of “systemic integration,” allowing parties to a multilateral treaty to

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*Regional Agreements*, 8 WORLD TRADE REV. 5, 13–14 (2009) (exemplifying *inter-se* agreements).

81. TRIPS Agreement, *supra* note 3, art. 63.

82. Davey & Sapir, *supra* note 80 at 18.

83. IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 622 (4th ed. 1990).

84. *EC—Large Civil Aircraft*, *supra* note 70, ¶ 845.

85. Campbell McLachlan, *The Principle of Systemic Integration and Article 31(3)(c) of the Vienna Convention*, 54 INT'L & COMP. L.Q. 279, 230 (2005) (asserting that the process of operationalizing art. 21(3)(c) will “reduce fragmentation and promote coherence in international law.”).

86. *EC—Large Civil Aircraft*, *supra* note 70, ¶¶ 846–55.

modify their obligations *inter se* so long as the following conditions apply:

- (a) the possibility of such a modification is provided for by the treaty; or
- (b) the modification in question is not prohibited by the treaty and:
  - (i) does not affect the enjoyment by the other parties of their rights under the treaty or the performance of their obligations;
  - (ii) does not relate to a provision, derogation from which is incompatible with the effective execution of the object and purpose of the treaty as a whole.<sup>87</sup>

FTAs as possible *inter se* agreements that would modify multilateral provisions have been deeply studied by Grosse Ruse-Khan.<sup>88</sup> To complement the scholar analysis, the next few paragraphs consider key aspects referred in Article 41 of the VCLT that would be examined to render the legal conformity of FTAs with WTO agreements.

As per the first condition, “a modification is provided for by the treaty or the modification in question is not prohibited by the treaty,” *inter se* agreements are in principle not expressly prohibited under WTO law.<sup>89</sup> In fact, the WTO AB has recognized that WTO members may modify the obligations between themselves—recognizing an *inter se* approach.<sup>90</sup> In the context of the TRIPS Agreement, an *inter se* modification of the agreement is similarly not prohibited.<sup>91</sup> Although TRIPS has no provision for FTAs that would be comparable to the General Agreement on Tariffs and Trade (GATT) Article XXIV,<sup>92</sup> this does not mean that WTO members are any less permitted

87. VCLT, *supra* note 35, art. 41.

88. GROSSE RUSE-KHAN, *THE PROTECTION OF INTELLECTUAL PROPERTY IN INTERNATIONAL LAW*, *supra* note 68, at 5.

89. *Id.*

90. See Appellate Body Report, *European Communities—Regime for the Importation, Sale, and Distribution of Bananas*, ¶ 217, WTO Docs. WT/DS27/AB/RW2/ECU & WT/DS27/AB/RW/USA (adopted Nov. 26, 2008) (exemplifying *inter se* approach).

91. Geraldo Vidigal, *From Bilateral to Multilateral Law-Making: Legislation, Practice, Evolution and the Future of Inter Se Agreements in the WTO*, 24 EUR. J. INT'L. L. 1027, 1048 (2013) (focusing on technicalities surrounding *inter se* agreements).

92. General Agreement on Tariffs and Trade 1994 art. XXIV, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1867

to conclude FTAs. In fact, TRIPS Article 1.1 explicitly allows for “more extensive protection than is required by this Agreement.”<sup>93</sup> However, it is unclear if limitations and exceptions qualify as “more extensive protection.”<sup>94</sup> In *China—Intellectual Property Rights*, the WTO panel interpreted Article 1.1 of TRIPS as enabling WTO parties to implement a higher standard of protection, but the panel made it clear that Article 1.1 cannot be interpreted to justify derogations from the obligations Members have under the TRIPS Agreement, in reference to TRIPS-minus provisions.<sup>95</sup> IP scholars have advanced an interpretation that implies that limitations and exceptions are part of the protection and enforcement of IP rights, therefore arguing that they could fall under the leeway that Article 1.1 of the TRIPS Agreement provides.<sup>96</sup> More importantly, this could also mean that the principle of “Most-Favoured Nation” (MFN) contained in Article 4 of the TRIPS Agreement would also apply to limitations and exceptions, making them available to third parties of a bilateral or regional treaty.<sup>97</sup> The issue has not yet been subjected to WTO dispute resolution and it remains unclear whether MFN applies to limitations and exceptions.<sup>98</sup>

Despite the lack of clarity regarding the compatibility of more flexible limitations and exceptions at the bilateral level *vis-à-vis* the notion of “higher standards of protection” contained in Article 1.1 of the TRIPS Agreement, there is another important aspect—FTA clauses on “Balance in Copyright and Related Rights Systems”

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U.N.T.S. 187 (1994) (dealing with customs unions and free-trade areas).

93. TRIPS Agreement, *supra* note 3, art. 1.1.

94. *Id.*

95. Panel Report, *China—Measures Affecting the Protection and Enforcement of Intellectual Property Rights*, ¶ 7.513, WTO Doc. WT/DS 362/R (adopted Mar. 20, 2009).

96. *Principles for Intellectual Property Provisions in Bilateral and Regional Agreements*, MAX PLANCK INST. FOR INNOVATION & COMPETITION, ¶ 23 (May 1, 2013), [https://www.ip.mpg.de/fileadmin/ipmpg/content/forschung\\_aktuell/06\\_principles\\_for\\_intellectua/principles\\_for\\_ip\\_provisions\\_in\\_bilateral\\_and\\_regional\\_agreements\\_final1.pdf](https://www.ip.mpg.de/fileadmin/ipmpg/content/forschung_aktuell/06_principles_for_intellectua/principles_for_ip_provisions_in_bilateral_and_regional_agreements_final1.pdf) (last visited Feb. 20, 2018). See principle 25, whereby the scholars agree in that “The notion of protection and enforcement of IP should be understood to encompass also exceptions, limitations and other rules that balance the interests of right-holders against those of users, competitors and the general public. This wider notion allows for an equally wider understanding of national treatment and most-favored-nation treatment in international IP law.”

97. *Id.* ¶ 23.

98. *Id.* ¶ 26.

contain non-legally binding language.<sup>99</sup> Therefore, they are technically not contrary to legal obligations instituted in the TRIPS Agreement. That is, there is no conflict of rules, but merely a co-existence of a binding obligation with a non-binding one. In this sense, FTA clauses on “Balance in Copyright and Related Rights Systems” are unlikely to be considered TRIPS-minus.<sup>100</sup>

On the other hand, while in principle not prohibited, the *inter se* modification of WTO Agreements, including TRIPS, also enjoys contrarian views. In *Peru-Agricultural Products*—a case involving the interpretation of WTO rules in light of WTO-minus provisions in an FTA between Guatemala and Peru, Guatemala argued that it is outside a WTO Panel’s terms of reference to examine the possible inconsistency between an FTA and WTO Agreement, as well as to whether an FTA can modify the WTO rights of a party.<sup>101</sup> Guatemala contended that WTO Panels cannot consider matters outside of the WTO covered agreements.<sup>102</sup> These views are not unfounded. Article 3.2 of the DSU provides that the DSU “serves to preserve the rights and obligations of Members under the *covered agreements*,” and DSU Article 19.2 provides that panel and AB rulings “cannot add to or diminish the rights and obligations provided in the *covered agreements*.”<sup>103</sup> These arguments were shared by the United States as a third party.<sup>104</sup> Under this understanding, FTAs cannot be considered legal sources for the interpretation of a specific provision on a WTO Agreement like the TRIPS Agreement.<sup>105</sup> Moreover, in case of conflict, WTO rules are to prevail.<sup>106</sup>

On the contrary, and aligning to the view that this article advances,

99. *Id.*

100. “TRIPS-minus” is an expression used in this article to denote lower standards of protection than the ones provided by the TRIPS Agreement. Note that current FTAs may contain different WTO-minus provisions, which are not intended to increase but decrease trade liberalization.

101. Panel Report, *Peru—Additional Duty on Imports of Certain Agricultural Products*, ¶ 7.270, WTO Doc. WT/DS457/R (adopted July 31, 2015) [hereinafter Panel Report, *Peru—Agricultural Products*].

102. *Id.* ¶ 7.511.

103. DSU, *supra* note 35, art. 3, ¶ 2 (emphasis added).

104. Panel Report, *Peru—Agricultural Products*, *supra* note 101, ¶¶ 7.519–7.520.

105. *Id.* ¶ 7.262.

106. *Id.*



Peru argued that WTO Treaty provisions should be interpreted pursuant to the VCLT.<sup>107</sup> Hence, Peru was of the view that an FTA concluded pursuant to GATT Article XXIV serves as a form of permissible modification under Article 41 of the VCLT.<sup>108</sup> According to Peru's defense, in case of conflict, FTA rules could be taken as a "subsequent agreement" and may prevail.<sup>109</sup> On appeal, Peru also argued that FTA rules may also be "relevant rules of international law" within the meaning of Article 31(3)(c) of the VCLT.<sup>110</sup> As third parties, Brazil and the E.U. agreed that an FTA may modify the rights and obligations of a WTO Agreement.<sup>111</sup> In particular, the E.U. argued that a modification could arise in the WTO context only if the FTA includes a specific commitment that a party will refrain from initiating a WTO challenge to the other party's measure, or a waiver of rights.<sup>112</sup> Currently, IP chapters in FTAs do not contain such waiver of rights. This is a policy option that, along with conflict resolution clauses, could be incorporated in future treaties.

There are good arguments supporting both of these positions, and, as the WTO adjudicating bodies have demonstrated, there is no clear rule as to whether WTO-covered agreements can accommodate *inter se* modifications.<sup>113</sup> In the case of the specific provision on "Balance in Copyright and Related Rights Systems," as previously mentioned, the binding character of the three-step test *vis-à-vis* the non-binding character on clauses on "Balance in Copyright and Related Rights Systems" does not immediately trigger a conflict—such as in the case of WTO and WTO-minus rules.<sup>114</sup>

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107. *Id.* ¶ 7.86.

108. *Id.* ¶ 7.508.

109. *Id.* ¶ 7.506.

110. Appellate Body Report, *Peru—Additional Duty on Imports of Certain Agricultural Products*, ¶ 5.98, WTO Doc. WT/DS457/R (adopted July 31, 2015) [hereinafter AB Report, *Peru—Agricultural Products*].

111. Panel Report, *Peru—Agricultural Products*, *supra* note 101, ¶¶ 7.18, 7.522.

112. *Id.* ¶ 7.522; see also Joost Pauwelyn, *Waiving WTO Rights in an FTA? Panel Report on Peru—Agricultural Products*, INT'L ECON. L. & POL'Y BLOG (2014), <https://iclp.worldtradelaw.net/2014/12/waiving-wto-rights-in-an-fta-panel-report-on-peru-agricultural-products.html> (offering an analysis on this issue).

113. See AB Report, *Peru—Agricultural Products*, *supra* note 110, ¶ 5.22 (referring to the ambiguity of whether FTAs are allowed to maintain WTO inconsistent rules).

114. *Id.* ¶ 5.26.

The second condition under Article 41 of the VCLT is that the modification of a rule “does not affect the enjoyment by the other parties of their rights under the treaty.”<sup>115</sup> That would mean, for instance, that WTO members, such as the European Union, should not see their rights impaired by a clause in non-E.U. FTAs promoting the “Balance in Copyright and Related Rights Systems.” Here again, if the interpretation of the term “parties” follows an *inter se* approach, the flexibilities that parties to FTAs like the CPTPP and RCEP enjoy can only render effects among them, and cannot impair the rights of third countries.<sup>116</sup> Moreover, as the clauses on “Balance in Copyright and Related Rights Systems” are of a non-binding nature, they do not immediately trigger an obligation which may violate a third party right.<sup>117</sup>

The third condition under Article 41 of the VCLT requires that the modification “does not relate to a provision, derogation from which is incompatible with the object and purpose of the treaty as a whole.”<sup>118</sup> Recalling once again that the TRIPS Agreement in Article 7 (Principles) refers explicitly to a balance of rights and obligations, this does not seem to be the case.<sup>119</sup>

After demonstrating that all the requirements set by Article 41 of the VCLT are met, the next step is to determine whether pertinent provisions in FTAs—once settled that they can be considered relevant rules of international law under Article 31.3(c) of the VCLT—could influence a different interpretation, or give a renewed meaning, to the three-step test.<sup>120</sup> This would facilitate a more flexible interpretation and could accommodate, for instance, limitations and exceptions for text and data mining (TDM) or computational analysis. The next section explores this question.

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115. See VCLT, *supra* note 35, art. 41.

116. CPTPP *supra* note 17, art. 18.66, RCEP, *supra* note 14, art. 11.16.

117. See VCLT, *supra* note 35, art. 41.

118. *Id.*

119. TRIPS Agreement, *supra* note 3, art. 7 (“The protection and enforcement of intellectual property rights should contribute to the promotion of technological innovation and to the transfer and dissemination of technology, to the mutual advantage of producers and users of technological knowledge and in a manner conducive to social and economic welfare, and to a balance of rights and obligations”).

120. VCLT, *supra* note 35, arts. 31, 41.

## B. THE TRIPS THREE-STEP TEST INTERPRETED IN LIGHT OF FTA CLAUSES ON “BALANCE IN COPYRIGHT AND RELATED RIGHTS SYSTEMS”: DOES SOMETHING CHANGE?

There is a robust body of scholarly literature on the interpretation of the three-step test.<sup>121</sup> However, the only time the WTO dispute settlement resolution interpreted the test was in *U.S.—Section 110(5) Copyright Act*—more than 20 years ago.<sup>122</sup> Moreover, this is the only time that an international tribunal interpreted the test.<sup>123</sup> Taking into consideration the WTO panel decision as a baseline, this section explores whether, even if rendering effects *inter se*, the interpretation of the three-step test in a wider normative environment that includes FTA provisions as “relevant rules of international law” could influence a renewed interpretation of TRIPS Article 13.

### 1. *Certain Special Cases*

The first step requires that a limitation or exception to copyright should apply to certain special cases.<sup>124</sup> According to the definition provided in the Oxford English Dictionary, “certain” means something “[d]efinite, fixed, sure.”<sup>125</sup> In turn, “special” means

121. See generally MARTIN SENFTLEBEN, *COPYRIGHT, LIMITATIONS AND THE THREE-STEP TEST. AN ANALYSIS OF THE THREE-STEP TEST IN INTERNATIONAL AND EC COPYRIGHT LAW* (2004) (Ph.D. thesis, Universiteit van Amsterdam) (Kluwer Law International) (providing context to the three-step test and interpreting the criteria); see, e.g., Geiger et al., *The Three-Step Test Revisited*, *supra* note 7, at 582 (suggesting that the true intention of the three-step test was to enable flexible copyright exceptions and limitations); Tanya Aplin & Lionel Bently, *Displacing the Dominance of the Three-Step Test: The Role of Global, Mandatory Fair Use* 11–23 (Univ. of Cambridge Fac. of L., Research Paper No. 33, 2018) (discussing an exception to the fair use doctrine, according to interpretations of the three-step test); Christophe Geiger et al., *Declaration on a Balanced Interpretation of the ‘Three-Step Test’ in Copyright Law*, 39 INT’L REVIEW OF INTELL. PROP. & COMPETITION L. 707, 708–11 (2008) (outlining a declaration that “aims to confirm the legitimacy of a balanced interpretation of the ‘three-step test’ in copyright law.”) [hereinafter Geiger et al., *Declaration*].

122. See *U.S.—Section 110(5) Copyright Act*, *supra* note 58, ¶ 6.103.

123. See SENFTLEBEN, *supra* note 121, at 138 (explaining that the WTO panel report in the WT/DS 160 report discussed the three-step test of copyright law, while another report only considered the three-step test in the patent section of TRIPS).

124. See *id.* at 117 (discussing the way in which a three-step test may allow for the introduction of a compulsory license regime only in certain special cases).

125. *Certain*, in OXFORD ENGLISH DICTIONARY (3d ed. 2022).

something “own, particular, individual.”<sup>126</sup> By placing these terms together, the dictionary meaning of this first step implies that a limitation or exception should be specific, so as to avoid any ambiguity and apply to a particular case. This will require a limitation and exception to copyright to clearly spell out its scope of application.<sup>127</sup> The WTO panel in *U.S.—Section 110(5) Copyright Act* reached a similar conclusion, establishing that step one regarding “certain special cases” means that a limitation should be clearly defined and be narrow scope and reach.<sup>128</sup> However, “there is no need to identify explicitly each and every possible situation to which the exception could apply, provided that the scope of the exception is *known and particularised*. This guarantees a sufficient degree of legal certainty.”<sup>129</sup>

The language included in RCEP and the CPTPP denotes that those limitations and exceptions can be formulated in general terms.<sup>130</sup> The relevant provisions in these FTAs state that limitations and exceptions to copyright “may include” or “give due consideration to” legitimate purposes “not limited to: criticism; comment; news reporting; teaching, scholarship, research, and other similar purposes; and facilitating access to published works for persons who are blind, visually impaired or otherwise print disabled.”<sup>131</sup> Considering this wording, the mere fact that a limitation and exception is open-ended has not been considered by parties to these FTAs as failing to meet the first step.

Furthermore, given the list of legitimate purposes included in clauses on “Balance in Copyright and Related Rights Systems,” it is possible that these exceptions are “known and particularized.”<sup>132</sup> In addition, as in the case of the U.S. fair use provision, as well as in

126. *Special*, in OXFORD ENGLISH DICTIONARY (3d ed. 2022).

127. See *U.S.—Section 110(5) Copyright Act*, *supra* note 58. The U.S. argued that treaty members have “flexibility to determine for themselves whether a particular case represents an appropriate basis for an exception.” *Id.* ¶ 6.103.

128. *Id.* ¶ 6.113.

129. *Id.* ¶ 6.108 (emphasis added).

130. See CPTPP, *supra* note 17, art. 18.66 (stating that parties should “endeavor to achieve an appropriate balance” by means of exceptions); RCEP, *supra* note 14, art. 11.16 (allowing for exceptions according to a party’s own laws and regulations).

131. CPTPP, *supra* note 17, art. 18.66; RCEP, *supra* note 14, art. 11.16.

132. CPTPP, *supra* note 17, art. 18.66.

similar provisions adopted in Singapore, whether a certain case falls under fair use can be determined by a set of factors—for example, the purpose and character of the use, the nature of the copyrighted work, the amount and substantiality of the portion used in relation to the copyrighted work, and the effect of the use upon the potential market for or value of the copyrighted work.<sup>133</sup> These factors are not included in the relevant clauses on “Balance in Copyright and Related Rights Systems” referenced in this article, but they can be included in the relevant domestic statute, or may arise from judicial practice, giving certainty as to what are the “special cases” that merit a limitation or exception to copyright.

## 2. *Not Conflicting with the Normal Exploitation of the Work*

The second step requires that a limitation or exception should not conflict with the normal exploitation of the work.<sup>134</sup> Taking the panel decision in *U.S.—Section 110(5) Copyright Act* as a baseline for comparison, “exploitation” of works refers to “the activity by which copyright owners employ the exclusive rights conferred on them to extract economic value from their rights to those works.”<sup>135</sup> As per the clarification of the term “normal,” the WTO panel concluded that that each and every opportunity in which a copyright holder is entitled to receive a remuneration would equate to a normal exploitation of the work.<sup>136</sup> This includes current forms of exploitation, but also future ones.<sup>137</sup> The limit to this approach is set by the WTO panel itself, which considered that to maintain that an exception and limitation encroaches on copyright’s exclusive rights, the rights-holder must be deprived of significant or tangible commercial gains.<sup>138</sup>

In case of the CPTPP and the Australia-U.K. FTA, a paragraph was

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133. TRIPS Agreement, *supra* note 3, art. 17.

134. SENFTLEBEN, *supra* note 121, at 132, 286; Geiger et al., *The Three-Step Test Revisited*, *supra* note 7, at 594; *see* Aplin & Bently, *supra* note 121, at 20–21 (offering a normative assessment of “normal exploitation”); *cf.* Geiger et al., *Declaration*, *supra* note 121, at 711 (declaring the criterion for limitations and exceptions that “do not conflict with a normal exploitation of protected subject matter”).

135. *U.S.—Section 110(5) Copyright Act*, *supra* note 58, ¶ 6.165.

136. *Id.* ¶ 6.210.

137. *Id.*

138. *Id.*

added to the respective clause on “Balance on Copyright and Related Rights Systems.”<sup>139</sup> That paragraph states that “[f]or greater certainty, a use that has commercial aspects may in appropriate circumstances be considered to have a legitimate purpose under Article 18.65 (Limitations and Exceptions).”<sup>140</sup> This clarification is important as commerciality should not, by itself, be weighed against the legitimacy of an exception and limitation.<sup>141</sup> Of note is that the analysis of the commerciality, or lack thereof, of certain use is an element that courts in fair use jurisdictions assess when determining the purpose and character of the use.<sup>142</sup> In such cases a use that is non-commercial is typically seen as favorable by courts, while a commercial use tends to generate the opposite effect.<sup>143</sup> Hence, the clarification included in the CPTPP and the Australia-U.K. FTA is a welcome one, and it constitutes a forward-looking approach to copyright limitations and exceptions as it pertains the parties to these FTAs.<sup>144</sup> This approach particularly contrasts with the one adopted in European Union in the context of copyright exceptions and limitations for TDM, which are limited to certain organizations and uses.<sup>145</sup>

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139. CPTPP *supra* note 17, art. 18.66 n.79; Austl.-U.K. FTA, *supra* note 14, art. 15.63.

140. CPTPP *supra* note 17, art. 18.66, n. 79.

141. *See id.* (noting that a use may have commercial aspects and yet still have a legitimate purpose).

142. *See* 17 U.S.C. § 107 (2006) (explaining that courts shall consider “the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes”).

143. *See* SAMUELSON LAW, TECH. & PUB. POL’Y CLINIC, AN EMPIRICAL ANALYSIS OF LEANING—PROMOTING FAIR USE CASE LAW (May 12, 2009), [https://wiki.creativecommons.org/images/4/4b/Samuelson\\_fair\\_use\\_study\\_.pdf](https://wiki.creativecommons.org/images/4/4b/Samuelson_fair_use_study_.pdf) (noting that commerciality weighs against fair use).

144. *See* Sean Flynn, *Protecting and Promoting Open Copyright User Rights in International Law*, INFOJUSTICE (May 2, 2017), <https://infojustice.org/archives/38068> (critiquing the ambiguity of existing protective model provisions).

145. Directive 2019/790, of the European Parliament and of the Council of 17 April 2019 on Copyright and Related Rights in the Digital Single Market and Amending Directives 96/9/EC and 2001/29/EC arts. 3–4, 2019 O.J. (L 130) 92, 113–14 (EU) (defining exceptions for text and data mining); for a critical view of the E.U. approach, see P. Bernt Hugenholtz, *The New Copyright Directive: Text and Data Mining (Articles 3 and 4)*, KLUWER COPYRIGHT BLOG (July 24, 2019), <http://copyrightblog.kluweriplaw.com/2019/07/24/the-new-copyright-directive-text-and-data-mining-articles-3-and-4> (highlighting the mandatory status of the DSM provisions in Articles 3 and 4).

Moreover, by using the word “balance” in the respective clause on “Balance on Copyright and Related Rights Systems,” FTAs reiterate the wording of Article 7 of the TRIPS Agreement (Objectives), which states that the objective of the IP system is “[t]he protection and enforcement of intellectual property rights (which) should contribute . . . to a balance of rights and obligations.”<sup>146</sup> According to the Oxford English Dictionary, “balance” means “to weight (a matter), to estimate the two aspects or sides of anything; to ponder.”<sup>147</sup> If this concept forms part of the normative environment of the three-step test, it modifies the conclusion reached by the Panel in *U.S.—Section 110(5) Copyright Act*.<sup>148</sup> The underlying reason is that a panel interpreting the phrase “normal exploitation of a work” would not only have to discuss the right of the copyright holder to exploit a work, but it would also have to consider the balance of rights and obligations between the economic exploitation of works and broader societal interests.<sup>149</sup> In this context, the sole deprivation of commercial gains, or whether the use enables commercial purposes, will not immediately constitute a conflict with the “normal exploitation of a work.”<sup>150</sup>

### 3. *Do Not Unreasonably Prejudice the Legitimate Interest of the Rightholder*

Finally, the third step requires that the limitation or exceptions should not unreasonably prejudice the legitimate interest of the right holder.<sup>151</sup> According to the WTO panel decision in *U.S.—Section*

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146. TRIPS Agreement, *supra* note 3.

147. *Balance*, in OXFORD ENGLISH DICTIONARY (3d ed. 2022).

148. *U.S.—Section 110(5) Copyright Act*, *supra* note 58, ¶¶ 6.74, 6.180–6.183.

149. See Geiger et al., *The Three-Step Test Revisited*, *supra* note 7, at 587–77, 595–96 (discussing the panel’s view on “legitimate interests” in the context of 110(5)); *U.S.—Section 110(5) Copyright Act*, *supra* note 58, ¶¶ 6.74, 6.180–6.183; see Charles Leininger, *The Business Exemption of § 110(5) of the Copyright Act Violates International Treaty Obligations under Trips: Will Congress Honor its Commitments?*, 25 J. NAT’L ASS’N ADMIN. L. JUDICIARY 611, 647 (2005) (explaining that the panel determined that prejudice from an exception is unreasonable if it causes or could cause “an unreasonable loss of income to the copyright owner”).

150. See Geiger et al., *The Three-Step Test Revisited*, *supra* note 7, at 595; *U.S.—Section 110(5) Copyright Act*, *supra* note 58, ¶¶ 6.180–6.183.

151. See Geiger et al., *The Three-Step Test Revisited*, *supra* note 7, at 595 (noting that the legitimacy of the interests invoked by authors and rights holders is also to

*110(5) Copyright Act*, this is a balancing exercise, which may involve an economic compensation.<sup>152</sup>

The language regarding FTA clauses on “Balance on Copyright and Related Rights Systems” included in the CPTPP, RCEP, and the relevant Australian FTAs gives context as to when a use can reasonably prejudice the legitimate interest of the right holder. In all five cases, the relevant FTA clause refers to legitimate purposes which may justify the limitation and exception.<sup>153</sup> These legitimate purposes are public policy reasons associated with fair use.<sup>154</sup> Moreover, these public policy reasons may evolve, and others may be added to the non-exhaustive list, by virtue of the use of the words “such as, but not limited” or “which may include” to denote the open-ended nature of the FTA clauses at issue.<sup>155</sup>

If something changes once the FTA’s relevant clauses are incorporated in the interpretation exercise of Article 13 of the TRIPS Agreement, the biggest contribution of the FTA clauses on “Balance in Copyright and Related Rights Systems” is the non-enunciative list of legitimate purposes included in such clauses, along with the clarification that in some cases, the commerciality of certain use does not immediately enter into conflict with the normal exploitation of a work.<sup>156</sup> This, in the context of the much-criticized interpretation of the WTO panel in *U.S.—Section 110(5) Copyright Act*, constitutes a steppingstone towards a more flexible interpretation of the TRIPS three-step test.<sup>157</sup> However, it might not be enough to meet the

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be considered).

152. *U.S.—Section 110(5) Copyright Act*, *supra* note 58, ¶¶ 6.226, 6.229.

153. CPTPP *supra* note 17, art. 18.66 n.79; RCEP, *supra* note 14, art. 11.18; Austl.-U.K. FTA, *supra* note 14, art. 15.63; Austl.-H.K. FTA, *supra* note 14, art. 14.14; Austl.-Peru FTA, *supra* note 14, art. 17.35.

154. See Peter K. Yu, *Fair Use and Its Global Paradigm Evolution*, 2019 U. ILL. L. REV. 111, 130 (2019) (explaining the attractiveness of a broad fair-use standard to policymakers).

155. See *id.* at 128 (elaborating that judges may use “fairness factors” other than those listed in the provision).

156. CPTPP *supra* note 17, art. 18.66 n.79; RCEP, *supra* note 14, art. 11.18; Austl.-U.K. FTA, *supra* note 14, art. 15.63; Austl.-H.K. FTA, *supra* note 14, art. 14.14; Austl.-Peru FTA, *supra* note 14, art. 17.35; TRIPS Agreement, *supra* note 3, at 305.

157. See Geiger et al., *The Three-Step Test Revisited*, *supra* note 7, at 613 (discussing the room left for national legislators to provide for open-ended



demands of the data-driven economy on the ground. Two reasons can be cited to substantiate the previous affirmation. First, given their non-binding nature, the relevant FTA clauses reviewed in this article do not entail an obligation for a country to implement them at the domestic level.<sup>158</sup> Therefore, they may as well be ignored by the national judiciary.<sup>159</sup> Second, at the level of international tribunals, it is unclear if the approach analyzed and advanced here could be taken into account in the context of WTO dispute resolution.<sup>160</sup> Treaty interpretation in international tribunals is context dependent, and in the context of the WTO, the systemic integration doctrine has not been openly welcomed.<sup>161</sup> In the words of Van Damme, “the limited application of Article 31(3)(c) VCLT has created uncertainty among WTO members on how the WTO covered agreements relate to other rules of international law.”<sup>162</sup>

Yet, even following a pessimistic view of the possibilities of interpreting the TRIPS Agreement considering FTA provisions, one should be aware that clauses on “Balance on Copyright and Related Rights Systems” are unlikely to be the only defense raised by a party during a WTO dispute. In fact, they are most likely to be complemented by citing developments that steer IP rights protection towards a more balanced space. Given these developments, a party is

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exceptions and limitations); Okediji, *Toward a Fair Use Doctrine*, *supra* note 33, at 132–34 (explaining the criticism received by the panel’s analysis).

158. See Mike Palmedo, *Copyright Exceptions, Trade Agreements, and the Digital Economy*, INFOJUSTICE (Oct. 15, 2018), <https://infojustice.org/archives/40333> (pointing out that the use of the word “endeavor” indicates the non-binding nature of the clauses); CPTPP *supra* note 17, art. 18.66 n.79; RCEP, *supra* note 14, art. 11.18; U.S.-Austl. FTA, *supra* note 9, art. 15.63; Austl.-H.K. FTA, *supra* note 14, art. 14.14; Austl.-Peru FTA, *supra* note 14, art. 17.35.

159. See Abbott & Snidal, *supra* note 26, at 426, 445 (“International regimes do not even attempt to establish legal obligations centrally enforceable against states”).

160. See Van den Bossche, *supra* note 65, at 7–8 (discussing the impact that the core features of the WTO dispute settlement have had on the number of TRIPS disputes brought before the WTO).

161. See Chin Leng Lim, *Trade Law and the Vienna Treaty Convention’s Systemic Integration Clause*, in INTERNATIONAL ECONOMIC LAW AND GOVERNANCE: ESSAYS IN HONOUR OF MITSUO MATSUSHITA 94, 99, 112 (Julien Chaisse & Tsai-yu Lin eds., 2016) (highlighting the WTO’s neglect of Article 31(3)(c) of the Vienna Convention on the Law of Treaties).

162. ISABELLE VAN DAMME, TREATY INTERPRETATION BY THE WTO APPELLATE BODY 370–71 (2009).

likely to argue that the interpretation of the three-step test should take into account the interpretation of the Panel in *Australia—Plain Packaging*,<sup>163</sup> in which emphasis was placed on Articles 7 and 8 of the TRIPS Agreement as part of the context relevant for the interpretation of certain provisions.<sup>164</sup>

Finally, on the question of who is likely to bring a complaint, it is worth noting that during the period of 1995-2019, the United States and the European Union were the most frequent complainants in TRIPS disputes.<sup>165</sup> The United States alone initiated almost fifty percent of all TRIPS dispute proceedings.<sup>166</sup> Yet the United States is unlikely to challenge a country's implementation of more flexible copyright limitations and exceptions.<sup>167</sup> After all, the United States counts with fair use itself.<sup>168</sup> On the other hand, the European Union could consider the rights of its copyright industry impaired by more flexible clauses on "Balance on Copyright and Related Rights Systems."<sup>169</sup> This could raise a dispute against those countries that are party to the list of the five FTAs reviewed in this article.

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163. Panel Report, *Australia—Certain Measures Concerning Trademarks, Geographical Indications and Other Plain Packaging Requirements Applicable to Tobacco Products and Packaging*, ¶¶ 7.2402–7.2403, WTO Docs. WT/DS435/R, WT/DS441/R WT/DS458/R & WT/DS467/R (adopted June 28, 2018).

164. For a fully-fledge analysis of the implications of the 2018 WTO Panel Report in *Australia-Plain Packaging* on the value of Article 7 and 8 of TRIPS, see Christophe Geiger & Luc Desautettes-Barbero, *The Revitalization of the Object and Purpose of the TRIPS Agreement: The Plain Packaging Reports and the Awakening of the TRIPS Flexibility Clauses* 40–41 (Ctr. for Int'l Intell. Prop. Stud., Research Paper No. 01, 2020).

165. For more details on the number of cases, see Van den Bossche, *supra* note 65, at 7 ("The United States was by far the most frequent complainant in TRIPS disputes (18), followed by the European Union (8)").

166. For more details on the number of cases, see *id.*

167. See *id.* at 15 (noting that the U.S. has not raised any concerns with the AB implementation thus far).

168. See Okediji, *Toward an International Fair Use Doctrine*, *supra* note 33, at 77–78 ("Indeed the official position of the United States is that the fair use doctrine is consistent with Article 13 of the TRIPS Agreement.").

169. See *id.* at 136 (noting that the fair use doctrine was questioned by the European Community during TRIPS negotiations).

### III. DO FTA'S CLAUSES ON BALANCE IN COPYRIGHT AND RELATED RIGHTS SYSTEMS REALLY MATTER? AN OPTIMISTIC VIEW ON NON-BINDING NORMS

This article has presented the possibilities and limits of clauses on “Balance in Copyright and Related Rights Systems” contained in the CPTPP, RCEP, and selected Australian FTAs. In doing so, this article has explored the possibility of including such clauses in the interpretation of Article 13 of the TRIPS Agreement by means of Article 31.3(c) of the VCLT. However, the most evident limitation relates to the personal scope of application of FTAs in light of an *inter se* approach. This means that the clauses this article reviewed cannot be used as a defense in a WTO dispute involving non-parties to the CPTPP, RCEP, the Australia-U.K. FTA, the Australia-Peru FTA or the Australia-Hong Kong FTA, to showcase that the normative environment of the three-step test might have evolved towards a more balanced one.

This limitation also exposes that while there can be several pathways for norms on a more flexible copyright space can emerge—for instance through FTAs—the ideal way is to agree on certain binding rules and enshrine them in an international, preferably multilateral, treaty.<sup>170</sup> Nonetheless, this is a difficult task. As FTA practice showcases, currently there is a lack of global, agreeable norms on a more balanced copyright space.<sup>171</sup> The developments that this article is mostly concerned about only occurred within a limited set of countries.<sup>172</sup> Even more recent FTAs that do not involve the United States or the European Union—and are thus less constrained by the

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170. See Mira Burri, *The Regulation of Data Flows Through Trade Agreements*, 48 GEO. J. INT'L L. 407, 444 (2017) (discussing the negative impact of patchwork and overlapping FTAs).

171. See Okediji, *Toward an International Fair Use Doctrine*, *supra* note 33, at 79 (explaining the conflict between the American fair use doctrine and the intellectual property rules of other states); see Apaza Lanya & Steinbach, *supra* note 64, at 84 (“The proliferation of PTAs leads to an increasing fragmentation of both substantial and procedural governance of trade, putting at risk the coherent application of global trade rules”).

172. Austl.-U.K. FTA, *supra* note 14, art. 15.63; Austl.-H.K. FTA, *supra* note 14, art. 14.14; Austl.-Peru FTA, *supra* note 14, art. 17.35.

traditional narrative of developed countries as demandeurs of TRIPS-plus protection and developing countries as norm-takers—do not exhibit signs deviating from TRIPS three-step test. This is the case of the latest India-United Arab Emirates Comprehensive Economic Partnership Agreement signed in February 2022.<sup>173</sup>

However, notwithstanding these apparent shortcomings, FTA clauses on “Balance in Copyright and Related Rights Systems” may provide more opportunities than initially thought. For instance, the greater advantage of non-binding rules, such as cooperation pledges, is that they provide greater flexibility during negotiations.<sup>174</sup> As non-compliance with these norms would not trigger the dispute resolution of any treaty, negotiators could be less reluctant on agreeing to them.<sup>175</sup> Such norms, after all, do not require any type of domestic implementation.<sup>176</sup> In this context, the continuous development of non-binding norms can progressively shed light on where current state practice stands, and eventually move towards a scenario where different countries agree to common standards. As an example, one could refer to the current work towards a Joint Statement Initiative on E-Commerce in the context of the WTO, which congregates more than eighty of the 164 WTO members.<sup>177</sup> Such initiative builds upon non-binding norms existing for more than twenty years in FTA e-commerce chapters.<sup>178</sup>

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173. Comprehensive Economic Partnership Agreement (CEPA) between the Government of the Republic of India and the Government of the United Arab Emirates (UAE), India-U.A.E., Feb. 18, 2022, <https://commerce.gov.in/wp-content/uploads/2022/03/Chapter-11.pdf>.

174. See Abbott & Snidal, *supra* note 26, at 444–45 (explaining that soft law allows for greater flexibility and adaptation).

175. See Guzman, *supra* note 27, at 580 (noting that states often make choices that weaken the force and credibility of their international commitments).

176. See Abbott & Snidal, *supra* note 26, at 444–45 (“International regimes do not even attempt to establish legal obligations centrally enforceable against states.”).

177. *Joint Statement on Electronic Commerce*, WTO Doc. WT/L/1056 (Jan. 25, 2019), <https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=q:/WT/L/1056.pdf>; George Mina, *Bridging the Digital Trade Law Gap: WTO E-Commerce Joint Statement Initiative*, AUSTL. GOV'T, DEP'T OF FOREIGN AFF. AND TRADE, <https://www.dfat.gov.au/about-us/publications/trade-and-investment/business-envoy-april-2021-digital-trade-edition/bridging-digital-trade-law-gap-wto-e-commerce-joint-statement-initiative> (last visited Oct. 2, 2022).

178. Mina, *supra* note 177.

Recognizing that flexibility as an advantage could also motivate policymakers and scholars to innovate on the legal design of copyright limitations and exceptions provisions, a few questions arise: are the legitimate purposes included in clauses on “Balance in Copyright and Related Rights Systems” enough? Should these clauses include that certain compensation for authors is provided? Is a waiver of rights, in the sense of specifically keeping parties from initiating a WTO challenge, needed?

Another final aspect to consider is the evolution of clauses on “Balance in Copyright and Related Rights Systems” by itself. As noted, such clauses reflect hortatory language.<sup>179</sup> Yet these types of clauses could in some ways substantiate the development of customary law once the requirements of *opinio juris* and state practice are met.<sup>180</sup> While the threshold for this is high, the development of international custom requires a starting point.

## CONCLUSION

In general terms, from the review of limitations and exceptions to copyright included in FTAs, two trends can be observed. Across the U.S. and the E.U. FTAs, there is a minimum gravitation towards a more flexible copyright space. In most of these cases, FTAs simply reiterate the three-step test, with very few exceptions. However, certain Asia-Pacific FTAs contain examples of innovative provisions promoting language on balance, which goes beyond what is already provided by Article 7 of TRIPS. This is the case of the CPTPP, RCEP, the Australia-U.K. FTA, the Australia-Peru FTA and the Australia-Hong Kong FTA. The specific clauses included in these agreements—that is, clauses on “Balance in Copyright and Related Rights Systems”—incorporate provisions on policy objectives that have been

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179. CPTPP *supra* note 17, art. 18.66 n.79; RCEP, *supra* note 14, art. 11.18; Austl.-U.K. FTA, *supra* note 14, art. 15.63; Austl.-H.K. FTA, *supra* note 14, art. 14.14; Austl.-Peru FTA, *supra* note 14, art. 17.35; *see* Abbott & Snidal, *supra* note 26, at 442, 444 (explaining that states use language that is very precise but not legally binding).

180. *See* Andrew D. Mitchell & Tania Voon, *PTAs and Public International Law*, in *BILATERAL AND REGIONAL TRADE AGREEMENTS COMMENTARY AND ANALYSIS* 120 (Simon Lester & Bryan Mercurio eds., 2009) (detailing the process by which customary law is created).

traditionally associated with fair use. Moreover, RCEP makes clear that fair use could potentially be compliant with the three-step test.

While it is interesting to note that Asia-Pacific FTAs are exercising the strongest influence towards a more flexible copyright landscape, this influence has limited effects for the purposes of interpreting WTO covered agreements, including TRIPS. As this article has explored, the possibility of including such clauses into the interpretation of Article 13 of the TRIPS Agreement can, at its best, occur based on Article 31.3(c) of the VCLT and under an *inter se* approach. Yet under this approach, non-parties to the CPTPP, RCEP, and relevant Australian FTAs cannot raise the existence of clauses on “Balance in Copyright and Related Rights Systems” in other FTAs as a means to demonstrate that the normative environment of the three-step test might have evolved towards a more balanced one. This constitutes a disadvantage to many countries in Latin American, except those that participate in the CPTPP or selected Australian FTAs, or Africa who could benefit from a broader interpretation of TRIPS three-step test.<sup>181</sup> Nevertheless, the value of FTA clauses on “Balance in Copyright and Related Rights Systems” is an aspect that merits more attention as it could establish the grounds for future multilateral rules, or even custom, indicating a more flexible international copyright environment.

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181. For an analysis of why more flexible copyright limitations and exceptions are necessary to promote innovation in Latin America, see Matías Jackson Bertón, *Test and Data Mining Exception in South America: A Way to Foster AI Development in the Region*, 70 GRUR INT'L 1145–57 (2021).