

Examining Copyright Exemptions for Web Mashups in the International Context: Applying American Constitutional Considerations as Guideposts for the TRIPS Three-Step Test

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We thus have a system of technology that invites our kids to be creative. Yet a system of law that prevents them from creating legally. The regulation of this creativity thus fails every important standard of efficiency and justice.

–Lawrence Lessig¹

Introduction

Over the past few years, a significant industry involving established companies and start-ups has taken shape around the production and use of web mashup² websites that combine content from multiple sources. This burgeoning web mashup industry is unlikely to disappear because of the numerous potential benefits provided to consumers. While the technology that powers web

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1. LAWRENCE LESSIG, REMIX: MAKING ART AND COMMERCE THRIVE IN THE HYBRID ECONOMY 266 (2008).

2. See Mashup Dashboard – Programmable Web, available at <http://www.programmableweb.com/mashups> (last visited Apr.18 2010) (The Mashup Dashboard currently lists 4739 different mashups on its site) [hereinafter Mashup Dashboard]; Larry Clarkin & Josh Holmes, *Enterprise Mashups*, THE ARCHITECTURE J., MSDN Architecture Center, available at <http://msdn.microsoft.com/en-us/architecture/bb906060.aspx> (last visited Apr.18, 2010).

mashups continues to evolve at a rapid pace³, important concerns regarding compliance with intellectual property laws have become increasingly pervasive.⁴ In particular, questions regarding possible copyright infringement loom over this relatively new space. Such debate can pit the copyright interests of original content providers and rights-holders against the broader interests of web mashup creators and consumers. These conflicts are not limited within the United States, but can reach across national borders and implicate different systems of copyright law worldwide.

Significant case law regarding web mashups, in both the domestic and international context, remains almost nonexistent. Even those who track the progress of web mashups have noted the curious lack of litigation against web mashups,⁵ and attributed this dearth to a lack of visibility or significance in the market.⁶ However, a lack of known litigation does not mean that there is no problem to address. Web mashups are far from clandestine activity. Rather, they provide services that often comprise part of our everyday routine.⁷ These circumstances allow us to consider whether the utility of web mashups affords them an exemption from copyright claims, before any significant litigation undermines their creation. In this note, I examine whether such an exemption for web mashups is appropriate under both the domestic and international context.

In Part I, I lay the groundwork for the discussion by offering a working definition of web mashups and a brief explanation of the current market. I also lay out the basic copyright infringement concerns surrounding web mashups and the insufficiency of current

3. See Mashup Dashboard, *supra* note 2 (estimates that over sixty-two new mashups have been created in the past thirty days); see also Mashup Dashboard, *supra* note 2, at <http://www.programmableweb.com/apis> (estimating that ninety-seven new Application Programming Interfaces (“APIs”) have been added in the past thirty days).

4. Urs Gasser & John G. Palfrey Jr., *Case Study: Mashups Interoperability and eInnovation*, 2007 BERKMAN CTR. FOR INTERNET & SOC’Y, HARV. L. SCH., UNIV. ST. GALLEN 9, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1033232 [hereinafter *Mashups Interoperability*] (“[T]he system by which it has come to pass is currently unstable, in the sense that a lawsuit or withdrawal of interoperable interfaces by a key stakeholder could set back innovation considerably.”).

5. See Hacker News, *Ask HN: How Do Mashups Avoid Copyright Infringement Lawsuits?*, available at <http://news.ycombinator.com/item?id=411555> (last visited Apr. 18, 2010) (Ycombinator provides seed funding for startup companies. This website includes a forum discussion thread noting a lack of litigation regarding mashups).

6. *Id.*

7. Gasser & Palfrey Jr., *supra* note 4, at 10; see, e.g., Yelp API Profile, available at <http://www.programmableweb.com/api/yelp/mashups> (last visited Apr. 18, 2010) (Yelp API Profile lists numerous Yelp powered mashups that address common tasks).

safeguards against infringement. Part II discusses values that underlie the United States' copyright system and important constitutional interests regarding freedom of expression. I will refer to these values and interests later in the main analysis. In Part III, I provide a general overview of the World Trade Organization's ("WTO") Agreement on Trade-Related Aspects of Intellectual Property Rights ("TRIPS")⁸—important provisions which one might use to assert a lawful limitation on the copyright interests of original content creators—and the "Three-Step Test" used to analyze such claims. I also address why TRIPS and the Three-Step Test are proper vehicles for examining web mashups, and introduce two important WTO panel reports which will serve as reference points for the forthcoming analysis.

Part IV contains the three-step inquiry itself, where I analyze the possibility of creating an exemption to copyright liability for web mashups under Article 13 of the TRIPS agreement. I analogize and contrast some of the previous limitation claims made under Article 13 and Article 30 of TRIPS, and work through each prong of the Three-Step Test to determine whether such an exception is appropriate in the web mashup context.

While I offer historical accounts of previous attempts to use the three-step test as points of reference, I argue that the three-step test should not be interpreted using a strict textual interpretation of TRIPS provisions, as has been done in the past. Rather, because TRIPS itself allows—and calls for—a balancing of interests,⁹ the proper framework is to account for societal interests besides those of the rights-holders. In particular, the societal interests in promoting expression, debate, and a vibrant public domain that apply in the United States context are also applicable in the international context. Finally, I conclude with a brief recap of the three-step analysis for web mashups.

8. Agreement on Trade-Related Aspects of Intellectual Property Rights, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, Legal Instruments—Results of the Uruguay Round, 33 I.L.M. 1125 (1994) [hereinafter TRIPS].

9. Christophe Geiger et al., *Declaration: A Balanced Interpretation of the 'Three-Step Test' in Copyright Law*, 39 INT'L REV. INTEL. PROP. & COMPETITION L. 707, 708 (2008).

I. Web Mashups

A. Definition of a 'Mashup'

The term “mashup” can have various meanings, depending on the context. For example, a mashup can refer to a musical or audiovisual work “that consists entirely of parts of other songs or videos.”¹⁰ Examples involve song remixes and YouTube videos, which blend various media and content.¹¹ Any mashup can also be called a “remix,” or recombination of elements from other media into a new creative work.¹² For this inquiry, I will focus primarily on “web mashups,” which combine data “from two or more Web applications to create an integrated experience informed by the original data sources.”¹³ Such web pages are increasingly common and encountered quite frequently.¹⁴ Of particular interest are the results pages generated by newer mashup-based search engines, which attempt to surface more relevant content in response to web consumers’ inquiries.¹⁵

Just as web mashups can vary in their form and content, so can their creators. Web mashup developers that engage in remixing can consist of “professional” companies or businesses, such as movie studios or recording companies.¹⁶ However, web mashups are increasingly created by “amateur” end-users and consumers that receive content before manipulating it into new works.¹⁷ The works created by this latter class of amateur web mashup creators are often referred to as “user-generated content” (“UGC”). While this distinction is important, I will generally refer to all web mashup creators as part of a single class for this paper.

10. WGBH Educational Foundation, *Open Content and Public Broadcasting Report: Glossary*, <http://opencontent.wgbh.org/report/glossary.html> (last visited Apr. 18, 2010).

11. See LESSIG, *supra* note 1, at 1-2.

12. *Id.* at 69.

13. Gasser & Palfrey Jr., *supra* note 4, at 2.

14. See Mashup Dashboard, *supra* note 2 (estimating that over sixty-two new mashups have been created in the past thirty days).

15. See, e.g., Kosmix.com, <http://www.kosmix.com> (last visited Apr. 11, 2010); Google Maps, <http://maps.google.com> (last visited Apr. 11, 2010); Yahoo Pipes, <http://pipes.yahoo.com/pipes/> (last visited Apr. 11, 2010); see Programmable Web, <http://www.programmableweb.com> (last visited Apr. 11, 2010) (additional mashup examples).

16. Mary W. S. Wong, ‘Transformative’ User-Generated Content in Copyright Law: *Infringing Derivative Works or Fair Use?*, 11 VAND. J. ENT. & TECH. L. 1075, 1077-78 (2009).

17. *Id.*

For purposes of this discussion, I will focus on external, consumer facing web mashups rather than those that remain internal to a company. I also make the assumption that web mashup creators are using data that they did not create or originally own. Thus, an enterprise may choose to create a strictly internal web mashup for its employees, and only use the information it can claim to have rights to.¹⁸ Such a web mashup does not concern this inquiry because there are fewer concerns about copyright infringement in such a context.

B. The Web Mashup ‘Market’ and Value for Web Mashup Consumers

Besides offering a definition of web mashups, it makes sense to provide an overview of the web mashup market so we can understand the scope and context of the problem. Today’s web mashups support varying business models and practices. First, existing companies can incorporate web mashups to improve or complement their existing business model. Such companies can choose to use web mashups for external or internal purposes.¹⁹ Second, a web mashup itself can serve as the main service or product for a new company or start-up.²⁰ Indeed, numerous start-ups are attempting to use web mashups in pay-per-use, subscription, or ad-funded revenue models.²¹ Third, web mashups also have noncommercial applications and can support public service or nonprofit goals.²² The first two models are typically considered commercial ventures, done for profit. Web mashups in the third category can be considered “sharing economies” which focus on conveying information, encouraging exchange, dialogue, or contribution.²³ While no hard distinction exists between commercial and sharing economies, monetary profit is usually not the primary motivator in a sharing economy.²⁴ However, newer “hybrid economies” which blend aspects of commercial and sharing economies can also exist.²⁵ Such hybrid companies, including web mashups, may still wish to foster collaboration and exchange among a community while still seeking to profit from the transactions.²⁶ Taken

18. Clarkin & Holmes, *supra* note 2.

19. Gasser & Palfrey Jr., *supra* note 4, at 9.

20. *Id.*

21. *Id.*

22. *Id.*

23. LESSIG, *supra* note 1, at 148.

24. *Id.*

25. *Id.* at 228.

26. *Id.*

as a whole, the web mashup market seems to be part of a formidable market. A recent Business Wire study suggests that the enterprise web mashup market was worth around \$161 million in 2008, and is forecasted to grow to \$1.74 billion by 2013.²⁷

Whatever their form, web mashups benefit their users by presenting information in ways that have more meaning for the user.²⁸ However, such benefits do not come without legal costs.

C. Potential Copyright Infringement Via Web Mashup Creation

As seen above, web mashups represent an increasingly promising market and result in greater benefits for their users and community members, but also face an increasing and corresponding risk of possible copyright infringement violations. Companies and individuals often create web mashups using other parties' information without first seeking permission, and then present it in ways the original rights-holders may not have intended.²⁹ These actions implicate copyright infringement concerns, either as a form of direct infringement or secondary liability.³⁰ For purposes of this discussion, it suffices to assert that copyright concerns are implicated. Web mashups also present a particularly interesting scenario because of the sheer amount of information they are capable of processing and presenting. Further, it is increasingly likely that web mashup pages

27. *Reportlinker Adds the Future of Enterprise Mashups: Demand, Challenges and Vendor Opportunities*, BUSINESS WIRE, Sept. 21, 2009, available at http://www.businesswire.com/portal/site/google/?ndmViewId=news_view&newsId=20090921005858&newsLang=en (summary includes a study on enterprise web mashups).

28. Clarkin & Holmes, *supra* note 2.

29. Robert D. Hof, *Mix, Match, and Mutate*, BUSINESS WEEK ONLINE, July 25, 2005, available at http://www.businessweek.com/magazine/content/05_30/b3944108_mz063.htm (last visited Sept. 25, 2010).

30. While I do not undertake a detailed analysis of which form of copyright infringement may be committed by a mashup, a brief discussion is in order. If a mashup creator gains access to copyrighted material through screen scraping or an API without the copyright owner's permission, the mashup creator may commit direct infringement if it reproduces, displays, or distributes the copyright content of others. A mashup creator may also violate the copyright owner's right to create derivative works by presenting the content in a different context than the copyright owner intended.

Meanwhile, a mashup creator may also commit indirect infringement. The mashup creator could be accused of vicarious liability because it has the ability to control the infringing conduct and arguably has a direct financial interest in the infringing activity. Further, if a mashup creator facilitates or allows the consumer to further edit or change the content, that act could be viewed as contributory liability if the mashup creator facilitated the further infringement and provided the means allowing for the infringement.

will reach an international audience, or will utilize information coming from international sources.

Scholars and intellectual property (“IP”) attorneys agree that web mashups create uncertainty regarding existing IP laws. One professor notes that web mashups create a gray area between the rights-holder’s original material and the composite web mashup product.³¹ Similarly, the lack of meaningful court litigation regarding web mashups also means that the consequences of sampling copyrighted materials for web mashups remain unpredictable.³² However, one notable IP attorney posits that commercial or promotional work may be harder to defend from potential lawsuits.³³

From a technical standpoint, many web mashups utilize Application Programming Interfaces (“API”) from other companies to access the information that will get incorporated into the web mashup page.³⁴ Web mashup creators usually require a license from the API’s provider to gain access to an API.³⁵ Such licensing agreements may help prevent copyright infringement because the provider retains control of the API and can take down the API if it chooses.³⁶ For this reason, some argue that web mashups should be exempt from secondary infringement liability because the content provider has full control over the API.³⁷

However, API licensing may create greater risks for copyright infringement instead of providing copyright protection. Even if content providers allow web mashup developers to use an API, it is quite possible that someone else’s copyrighted information is included in that data and is subject to misuse.³⁸

31. Victoria Ho, *Mashups changing the face of copyright laws*, ZDNET ASIA, Jan. 8, 2009, available at <http://www.zdnetasia.com/mashups-changing-the-face-of-copyright-laws-62049904.htm>.

32. Alexandra Wharton, *Getting Into the Mashup Mix*, MTHINK, Sept. 1, 2007, available at <http://www.mthink.com/affiliate-performance-marketing/getting-mashup-mix>.

33. *Id.*

34. Gasser & Palfrey Jr., *supra* note 4, at 3.

35. Lisa Veasman, *‘Piggy Backing’ on the Web 2.0 Internet: Copyright Liability and Web 2.0 Mashups*, 30 HASTINGS COMM. & ENT. L.J. 311, 315 (2008).

36. *Id.* at 330.

37. *Id.* at 326–33.

38. Gasser & Palfrey Jr., *supra* note 4, at 21 (The authors go on to offer an example, explaining that “[A]mazon and Google book searching APIs reveal information about copyrighted books, and the authors of those books might have colorable copyright claims against those who make mashups with that information, depending on what portions of the books are accessible through the APIs.”).

Web mashup creators may also gain access to desired content without going through a company's API. Less sanctioned methods such as "screenscraping" (in which a computer program extracts information from human-readable website content) can also be used to procure copyrighted information.³⁹ Thus, whether APIs or screenscraping methods are used to access information, a web mashup can be created without the rights-holder's express permission.

D. Deficiencies and Concerns with Current Copyright Protections

Many web mashup developers recognize that they do not operate in a vacuum, and have tried to establish common industry practices regarding the creation of web mashup pages. In the spirit of cooperation, many web mashup creators and content providers have tried to set terms of use through contract formation, licensing agreements, or by establishing social norms.⁴⁰ However, each approach has limited effectiveness, especially in a web mashup space that offers little settled law for guidance and was likened to "the wild west all over again."⁴¹

Social norms in the web mashup space dictate that companies and users remain committed to sharing information and keeping their APIs open for use by others.⁴² However, this approach seems to offer little solace for content providers who may fear stigmatization and a public relations backlash if they attempted to restrict access to their APIs.⁴³ Rather than offer a principled reason for content providers to make their APIs available, this approach merely seems to scare providers into complying with social norms.

While it makes sense for web mashup creators and content providers to form contracts or licensing agreements with each other, the resulting morass can become quite complex and pose potential problems.⁴⁴ Web mashup creators will often need to form several contracts with numerous content providers to integrate various types of information into their product.⁴⁵ These contracts may have vague

39. *Web Scraping*, WIKIPEDIA, http://en.wikipedia.org/wiki/Web_scraping (last visited Apr. 10, 2010).

40. Gasser & Palfrey Jr., *supra* note 4, at 19-21.

41. Hof, *supra* note 29.

42. Gasser & Palfrey Jr., *supra* note 4, at 19.

43. *Id.*

44. Gasser & Palfrey Jr., *supra* note 4, at 19-20.

45. *Id.* at 20.

or conflicting terms of service between data sources.⁴⁶ Similarly, web mashup creators that try to procure licenses from other content providers may find those licenses incompatible with the usage contemplated for the intended web mashup product.⁴⁷ In turn, ambiguous contracts, licenses, or the threat of litigation over such agreements can chill any potential innovations or web mashup products.⁴⁸

Indeed, content providers often use copyright claims to limit consumers to acting as end-users,⁴⁹ instead of amateur creators of new content. One prominent example includes the use of Digital Millennium Copyright Act (“DMCA”) “takedown” provisions, (Section 512 of the Copyright Act), which offer Internet Service Providers (“ISPs”) safe harbor from copyright infringement claims if they promptly remove infringing content after being notified.⁵⁰ As a senior IP attorney for the Electronic Frontier Foundation notes, copyright owners can use the DMCA to pressure website owners into removing online content—even when it does not infringe upon any existing copyrights.⁵¹ Similarly, content providers may threaten web mashup creators with possible legal action if they do not comply with takedown requests. Such tactics are unfair because content providers can misuse the DMCA for censorship purposes.⁵²

The flaw with current safeguards is that they offer too much control for one side or the other. Social norms can coerce content providers into keeping their APIs open while they may have legitimate concerns over copyright infringement. Meanwhile, contracts and licensing agreements are difficult to implement and may afford too much censorship power to content providers. A more principled balancing of interests between rights-holders and web mashup creators needs to be struck.

The current situation leaves interested parties unsure of their rights in the internet context. To properly consider the interests of content providers and web mashup creators, we require a clearer understanding of copyright law’s objectives.

46. *Id.*

47. *Id.* at 21.

48. *Id.*

49. Daniel J. Gervais, *Towards a New Core International Copyright Norm: The Reverse Three-Step Test*, 9 MARQ. INTELL. PROP. L. REV. 1, 6 (2005).

50. Digital Millennium Copyright Act, Pub. L. No. 105-304, 112 Stat. 2860 (1998).

51. Wharton, *supra* note 32.

52. *Id.*

II. Reconciling U.S. Copyright Values and Constitutional Free Speech Interests

It may be helpful to view American copyright law and the United States Constitution as two sets of interests that should be considered when examining a workable solution regarding web mashups. Indeed, “scholars are focusing more attention on the interaction between intellectual property, internet regulation and the Constitution than ever before.”⁵³ This interplay is also beneficial when considering web mashups within both a domestic and international context.

A. The Default View of American Copyright Law – A Utilitarian and Economic Rationale

The United States Constitution gives Congress the enumerated power “[t]o promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.”⁵⁴ This Intellectual Property Clause serves as the foundation for the United States’ system of copyright and patent law by giving Congress the power to pass copyright legislation.⁵⁵ The clause essentially serves a utilitarian public purpose of advancing knowledge and learning.⁵⁶ To that end, the United States Supreme Court stated that copyright’s primary goal is to promote public access to knowledge.⁵⁷ Granting protections to authors and inventors is a means to these ends, and not the primary goal in itself. The United States places emphasis on maintaining a vibrant public domain.

The American copyright system and its utilitarian underpinnings are predicated largely on economic considerations.⁵⁸ Under this view, American copyright law continually tries to balance competing interests. The American copyright system accords copyright protections to authors so they can recoup their investment in their

53. Mark A. Lemley, *The Constitutionalization of Technology Law*, 15 BERKELEY TECH. L.J. 529, 529 (2000).

54. U.S. CONST. art. I, § 8, cl. 8.

55. JULIE COHEN ET AL., *COPYRIGHT IN A GLOBAL INFORMATION ECONOMY* 3-4 (2d ed. 2006).

56. *Id.* at 21–22 (noting that “Science” in the Intellectual Property Clause referred to knowledge and learning during that era).

57. *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 429 (1984) (promoting public access to knowledge as principal purpose of copyright).

58. Wong, *supra* note 16, at 1082–83.

creative works.⁵⁹ This, in turn, gives the authors an economic incentive to keep creating new works.⁶⁰

On the other hand, copyright law must also limit authors' rights in order to maintain a vibrant public domain so others can create their own works. Authors create new works by drawing from other pre-existing works and their own experiences.⁶¹ Allowing them to have absolute rights over their work would hinder overall progress by limiting the number of works that subsequent authors could draw upon. Thus, American copyright law tries to define the proper level of rights protection to provide effective copyright enforcement while still optimizing authors' contributions to society and the public domain.

On balance, this utilitarian view of our domestic copyright system would likely constrain the development of web mashups, because copyright law would prevent web mashup creators from infringing upon the content-owners' exclusive right to make derivative works.

B. Reconciling U.S. Copyright Law with U.S. Constitutional Free Expression and First Amendment Considerations

As discussed above, the American copyright system serves a practical utilitarian purpose of maximizing authors' contributions to society. However, some scholars now argue that copyright law should look beyond utilitarian and economic considerations.⁶² Copyright law should also account for notions of social justice, the public interest, free speech, and democratic values,⁶³ which are often viewed in relation to the First Amendment of the United States Constitution. This convergence of multiple interests does not mean that copyright law and the First Amendment necessarily complement each other. Indeed, the two can often conflict.

On a basic level, the First Amendment upholds free speech, while copyright law grants authors proprietary rights in their works, including the right to exclude others from using protected content.⁶⁴

59. COHEN ET AL., *supra* note 55, at 7.

60. *Harper & Row, Publishers, Inc. v. Nation Enterprises*, 471 U.S. 539, 558 (1985) (“[B]y establishing a marketable right to the use of one’s expression, copyright supplies the economic incentive to create and disseminate ideas.”).

61. Jessica Litman, *The Public Domain*, 39 EMORY L.J. 965, 966–67 (1990).

62. Wong, *supra* note 16, at 1082.

63. *Id.*

64. Neil Weinstock Netanel, *Asserting Copyright’s Democratic Principles in the Global Arena*, 51 VAND. L. REV. 217, 227 (1998).

However, by forcing copyright law to account for free speech, social values, and democratic ideals, we can imagine a system of copyright law that can operate in a manner consistent with those values. In this way, free speech and democratic values also serve as valuable limitations and exceptions that help prevent overzealous copyright enforcement.

Meanwhile, Internet technologies, such as web mashups, have also challenged the idea “that utilitarian theory is the foundation of our current copyright system.”⁶⁵ With this in mind, we can examine how web mashups might complement and promote the values and objectives of both free speech and our newly conceived notion of copyright law.

1. *Web Mashups Promote a New Form of Expression and Are Consistent with Free Speech Interests.*

Web mashups and internet technology gives companies and users the ability to “harness the enormous capabilities of the Internet to access, use, and disseminate information and content.”⁶⁶ In addition, many users are creating remixes and web mashups to comment, critique, and discuss valuable ideas with each other. In so doing, they are also forming relationships and associations with one another. They are expressing vital connections both to popular cultural expressions and also to others who share their passions.⁶⁷ Thus, this “new generation of digital natives is manipulating content online as a form of expression. . . .”⁶⁸ This particular use of the Internet has also helped spawn a remix culture, where people are not passive recipients but active creators.⁶⁹ This further comports with the assertion that digital media has become a crucial new expressive medium for society and digital forms of communication may be crucial in “enabl[ing] individuals to participate in the intellectual life of society. . . .”⁷⁰ Access to information could also help “reduce the danger of a ‘digital

65. Wong, *supra* note 16, at 1082.

66. Gervais, *supra* note 49, at 6.

67. Pat Aufderheide et. al., *Recut, Reframe, Recycle: Quoting Copyrighted Material in User-Generated Video*, 9 MEALEY’S LITIG. REP. CYBER TECH & E-COM. 37 (2008) [hereinafter Aufderheide].

68. Ho, *supra* note 31.

69. *Id.*

70. MARTIN SENFTLEBEN, COPYRIGHT, LIMITATIONS AND THE THREE-STEP TEST: AN ANALYSIS OF THE THREE STEP TEST IN INTERNATIONAL AND EC COPYRIGHT LAW 31 (2004).

divide' of society."⁷¹ Viewed in this light, web mashups serve a crucial role in encouraging democratic participation and furthering freedom of expression. Thus, web mashups can promote free speech and democratic values.

2. *Web Mashups Promote a Vibrant Public Domain and Are Consistent with Copyright Law's Revised Objectives.*

Meanwhile, web mashups can also serve copyright's revised objective of promoting a vibrant public domain while still promoting free speech and democratic objectives. The lack of a vibrant public domain will result in "a society in which people are free to speak . . . only insofar as they own the intellectual components of their communication."⁷² This scenario runs counter to the objectives of copyright, and suggests that copyright protections for rights-holders should not be so strong that they impede people's ability to speak.

However, as noted above, web mashups provide people with "a wider set of tools to express ideas and emotions differently."⁷³ Beyond that, web mashup creators can "see themselves as producers and participants in a culture, and not just recipients of it."⁷⁴ In so doing, web mashups allow their makers to express thereby a zest for participation in culture-making.⁷⁵ This interchange and sharing among members of a larger community can have positive effects on the public domain by allowing users to make full use of internet technology to be more creative and actively collaborate with others.⁷⁶ The internet and web mashups can ultimately spur the creation of new works and thereby promote the goal of the copyright system. Thus, the goals of copyright law can be achieved without conflicting with important free speech and democratic values. These values can also serve as valuable guideposts when we look at web mashups in the international context.

71. *Id.*

72. Yochai Benkler, *Free as the Air to Common Use: First Amendment Constraints on Enclosure of the Public Domain*, 74 N.Y.U. L. REV. 354, 358 (1999).

73. LESSIG, *supra* note 1, at 83.

74. *Id.* at 80.

75. Aufderheide, *supra* note 67.

76. LESSIG, *supra* note 1, at 294.

III. The Trips Agreement and the Three-Step Test: A Framework for Analysis of Web

Given that web mashup creators, as well as the content they use for their creations, come from multiple countries,⁷⁷ this analysis should invoke more than American copyright law. The United States has joined various international intellectual property agreements to have a voice in global copyright discussions and policies. These treaties and conventions include the global intellectual property treaty, TRIPS.

The TRIPS protocol comprises seventy-three articles on a broad range of subjects, whose overall objectives are to “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.”⁷⁸ Further, the Declaration on the TRIPS Agreement and Public Health emphasized that “each provision of the TRIPS Agreement shall be read in the light of the object and purpose of the Agreement as expressed, in particular, in its objectives and principles.”⁷⁹

TRIPS was written to facilitate and promote international trade.⁸⁰ Thus, like American copyright law, TRIPS is traditionally viewed according to utilitarian considerations and economic copyright rationales.⁸¹ However, just as American copyright law should account for noneconomic factors including speech and free expression, TRIPS should also take similar issues and interests into consideration. This is especially true in light of its acknowledgment of social welfare and other obligations mentioned above.⁸²

77. International workshops are held in various international cities, including Sydney and Vienna, indicating that web mashup creators come from multiple countries. *See generally*, Mashups ‘09 3rd Int’l Workshop on Web APIs and Servs. Mashups at OOPSLA (2009), <http://www.mashup-oopsla.org/> (last visited Apr. 18, 2010) [hereinafter Mashup ‘09].

78. TRIPS, *supra* note 8, art. 7.

79. Peter K. Yu, *The Objectives and Principles of the TRIPS Agreement*, 46 Hous. L. Rev. 979, 996 (2009) (citing World Trade Organization, Declaration on the TRIPS Agreement and Public Health, WT/MIN(01)/DEC/2, 41 I.L.M. 755 (2002) [hereinafter Doha Declaration]).

80. SENFTLEBEN, *supra* note 70, at 17.

81. *Id.*

82. See *supra* text accompanying note 78.

Similar to United States copyright law, it is unlikely that TRIPS was crafted with web mashups in mind. Rather, TRIPS was created for “an era that largely predated Internet commerce in trademarked goods, distribution of digitized copyrighted materials, and the informatics revolution within the patent industries.”⁸³ In the internet age, TRIPS provisions should be interpreted with some flexibility.

A. The Three-Step Test

Just as domestic copyright law allows for exceptions and limitation upon authors’ copyright protections, the three-step test provides a framework for evaluating similar copyright exceptions under TRIPS. In plain language, the three-step test permits limitations on rights-holders’ intellectual property rights: 1) in certain special cases 2) that do not conflict with the normal commercial exploitation of the work and 3) do not unreasonably prejudice the legitimate interests of the author.⁸⁴ The test is now the definitive inquiry for deciding almost all limitations or exceptions for international intellectual property rights claims.⁸⁵ Within TRIPS, the three-step test is codified for copyright rights in Article 13 and for patent rights in Article 30.⁸⁶

Previous interpretations of the three-step test have required all three factors to be satisfied before a limitation or exception could issue.⁸⁷ Under this reading, a proposed limitation or exemption fails if one of the prongs is not met.⁸⁸ While this reasoning was adopted in both of the prominent TRIPS cases,⁸⁹ significant controversy exists regarding whether the three prongs should be viewed as part of a comprehensive, overall assessment, despite the fragmented application suggested by the test’s name.⁹⁰

83. Graeme B. Dinwoodie & Rochelle C. Dreyfuss, *Designing a Global Intellectual Property System Responsive to Change: The WTO, WIPO, and Beyond*, 46 HOUS. L. REV. 1188, 1189 (2009).

84. Gervais, *supra* note 49, at 13 (referring to the basic components of the three step test prior to their interpretation in several TRIPS provisions).

85. *Id.*

86. *Id.*

87. Kamiel J. Koelman, Opinion, *Fixing the Three-Step Test*, EUR. INTELL. PROP. REV., 407-12 (2006), available at <http://ssrn.com/abstract=924174>.

88. *Id.*

89. Geiger et al., *supra* note 9, at 709 n.1 (describing how the WTO-Panel reports for WT/DS114/R and WT/DS160/R, promote or do not contest the view that all three prongs of the three-step test must be satisfied for a limitation to issue).

90. *Id.*

Numerous European scholars argue that the three factors should be weighed together when considering a potential limitation.⁹¹ They advocate for this approach because it allows adjudicating parties more discretion to fully consider relevant interests and circumstances in a case.⁹² This extra discretion makes practical sense when considering web mashups, especially since “[a]nalogue-era exceptions to copyright do not apply easily to the Internet environment.”⁹³ Finally, nothing in the present versions of the three-step test precludes the weighing of all three factors as part of an overall assessment.⁹⁴ Given the novelty of the argument concerning web mashups, the more flexible reading of the test should apply.

B. Previous Applications of the Three-Step Test in TRIPS

There have only been three dispute resolution panels, or “cases,” that have been brought under TRIPS provisions regarding limitations on intellectual property rights. While their facts bear little resemblance to our web mashups scenario, the holdings for two of those cases are instructive guideposts for our analysis and warrant a brief introduction here.

The only case invoking TRIPS’ three-step test for copyright limitations involves a claim brought by the European Community (“EC”) against the United States to challenge Section 110(5) of the United States Copyright Act.⁹⁵ Section 110(5) allowed public bars, clubs, and restaurants to play copyrighted radio and television broadcasts inside their establishments without paying royalty fees, under certain circumstances.⁹⁶ In a proceeding before the WTO’s dispute settlement body (“DSB”), the EC argued that both exemptions under Section 110(5)(A) and 110(5)(B) violated the United States’ obligations under the TRIPS agreement.⁹⁷ The United States asserted that both section 110(5)(A) and 110(5)(B) were

91. *Id.* at 4.

92. Koelman, *supra* note 87, at 411.

93. Gervais, *supra* note 49, at 25.

94. Geiger et al., *supra* note 9, at 708.

95. Panel Report, *United States – Section 110(5) of the Copyright Act*, ¶ 1.1, WT/DS160/R (Jun. 15, 2000) [hereinafter 110(5) Report].

96. *Id.* at ¶ 2.3.

97. Section 110(5)(A), termed the “homestyle” exception, allowed for the public display or performance of a work in public as long as the establishment only used equipment commonly used in private homes. Section 110(5)(B) allowed for the display of nondramatic musical works in public establishments, using more sophisticated equipment. *Id.* at ¶ 2.3, ¶ 3.3.

permissible exceptions under Article 13 of TRIPS. The DSB panel applied the three-step test in Article 13 and held that Section 110(5)(B) violated TRIPS because the exemption did not satisfy any of the prongs of the three-step test.⁹⁸ However, the DSB concluded that the “homestyle” exception in Section 110(5)(A) met the requirements of Article 13 and did not violate TRIPS.⁹⁹

In the second test case, the WTO’s DSB applied another three-step analysis in a patent rights context.¹⁰⁰ There, the EC asserted that two sections of Canada’s patent act for pharmaceuticals violated Canada’s obligations under TRIPS.¹⁰¹ Similar to the United States’ contentions in the 110(5) Report, Canada asserted that its legislation was a limited exception for patent rights that satisfied the three step test embodied in Article 30 of TRIPS.¹⁰² After extensive application of the Article 30 three-step test, the DSB concluded that one section of Canada’s patent legislation remained in compliance with TRIPS while the other violated Article 30 and was not a limited exception.¹⁰³

IV. Applying the Three-Step Test to Web Mashups

Article 13 of TRIPS allows for possible limitations upon copyright interests of rights-holders and states: “Members shall confine limitations or exceptions to exclusive rights to certain special cases which do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the right holder.”¹⁰⁴ Thus, any copyright exception for web mashups would need to remain consistent with this language. Though Article 13 contains all the factors from the three-step test and is only a single sentence, it contains several ambiguous terms that will require further examination.

98. COHEN ET AL., *supra* note 55, at 471.

99. *Id.*

100. Panel Report, *Canada – Patent Protection of Pharmaceutical Products*, 1 ¶ 1.1, 7-8 ¶ 3.1, WT/DS114/R (Mar. 17, 2000) [hereinafter Patent Report].

101. *Id.*

102. *Id.* at 8 ¶ 3.2(a) (the first factor of the three-step test in Article 30 calls for a “limited exception” to patent right protections, while Article 13 considers whether a copyright limitation falls into the category of “certain special cases.”).

103. Patent Report, *supra* note 100, ¶ 7.36, 174 ¶ 8.1 at 156.

104. TRIPS, *supra* note 8, art. 13.

A. Confinement of Exceptions to ‘Certain Special Cases’

This first prong asks, “How does one define a special case?” In the 110(5) Report, the United States argued that Article 13 offered no definition of “special case” and that the exception only needed to be “well-defined and of limited application.”¹⁰⁵ The United States further asserted that the Section 110(5)(B) exception was narrowly written to apply under very specific conditions.¹⁰⁶ For its part, the EC focused on the sheer size of the exception and argued that the exception in Section 110(5)(B) would unconditionally exempt “73 per cent of all drinking establishments, 70 per cent of all eating establishments and 45 per cent of all retail establishments.”¹⁰⁷ Such an exemption, the EC contended, would turn a limited exception into the accepted rule.¹⁰⁸ The DSB panel found the EC’s figures compelling, and decided that the limitation exempted too many users to be considered a “special case.”¹⁰⁹

A similar argument could be leveled against web mashups since the potential market for this developing technology appears promising.¹¹⁰ As with the 110(5) Panel, it would be difficult to argue that an emerging industry worth potentially billions of dollars would qualify as a “special case,” even if the exception was narrowly written. Viewed as a whole, a proposed copyright limitation for all web mashups would likely fail the first factor of the three-step test.

However, the 110(5) panel also found that the 110(5)(A) exception to be a permissible “special case” exception because it exempted a comparatively smaller percentage of establishments and mainly applied to small “mom and pop” stores.¹¹¹ A similar distinction could be drawn between web mashups created by end users or amateurs, and those created by more sophisticated commercial entities. As with the 110(5)(A) exception, the United States could assert that amateur web mashups would have less impact. This differentiation would not help larger commercial ventures like Yelp or Google, but would make a partial exemption for individuals more likely.

105. 110(5) Report, *supra* note 95, ¶ 6.103 at 32.

106. *Id.* ¶ 6.114 at 34.

107. *Id.* ¶ 6.237 at 61.

108. 110(5) Report, *supra* note 95, at ¶ 6.103.

109. *Id.* at ¶ 6.131 at 61.

110. *See supra* text accompanying note 24.

111. 110(5) Report, *supra* note 95, ¶ 6.142, 42 ¶ 6.156 at 61.

If the United States still wished to assert a copyright limitation for all web mashups, it would have to argue by analogy to the “limited exception” language in the Article 30 three-step test. In the Patent Report, Canada argued that one of its proposed exceptions was limited to the last six months of a relevant patent.¹¹² Similarly, the United States would have to settle on a copyright limitation for web mashups that would be restricted in either duration or scope. However, this argument failed to convince the Patent Report Panel, and may not work in the web mashup context.¹¹³

Thus, both three-step cases suggest that web mashups would fail the first factor of the test. However, the other factors of the three-step test should be examined before rendering any final judgment on possible exceptions for web mashups.

B. Conflict with a Normal Exploitation of the Work

The second prong regards economic concerns, and examines whether the proposed exception would hinder the rights-holder’s ability to profit from his work in their accustomed markets.¹¹⁴ Thus, a possible copyright exception would fail the second factor if it is used to limit a commercially significant market or, to enter into competition with the copyright holder.¹¹⁵

In the 110(5) Report, the DSB noted that the affected rights-holders of musical works would expect to receive royalties from the broadcasts in eating and retail establishments.¹¹⁶ There, the Panel easily concluded that the Section 110(5)(B) exemption conflicted with the rights-holders’ normal exploitation of those works. Given the web mashup market as a whole,¹¹⁷ it would be difficult to convince a DSB panel that the economic interests of the rights-holder would be served by a limitation on their copyright protections.

However, the outcome in the 110(5) Report does not translate readily to the web mashup scenario. Unlike the broadcasts in the 110(5) Report, web mashups could be a newer form of expression

112. Patent Report, *supra* note 100, ¶ 4.14 at 61.

113. Canada’s argument for a limitation comports better with the exclusivity requirements for patents, and may be less applicable to copyright law situations in general. However, the example demonstrates that a more restricted exemption may increase its chances of satisfying the first factor of the three-step test.

114. Gervais, *supra* note 49, at 16.

115. *Id.* at 16-17.

116. 110(5) Report, *supra* note 95, ¶ 6.210 at 61.

117. *See supra* text at accompanying note 24.

that a rights-holder may not have anticipated. Thus, an internet content provider may not be able to claim that he would expect compensation from a new form of expression. In this regard, the previous DSB panels did not address whether “normal exploitation” covers potential markets which are not currently claimed by the rights-holder, but may acquire considerable market importance in the future.¹¹⁸

The answer to this question is significant for web mashups and other emerging forms of digital expression. If “normal exploitation” includes all forms of exploiting a work which are likely to acquire considerable economic or practical importance,¹¹⁹ a rights-holder could claim that any new form of expression will conflict with his ability to exploit his work.

This approach would provide too much control for rights-holders in the internet context. Given current digital technology, “normal exploitation” could encompass “nearly all ways of using and enjoying works of the intellect.”¹²⁰ The second prong of the three-step test might become insurmountable because an author could veto any digital form of expression¹²¹ and render the exception clause of Article 13 meaningless.¹²² Thus, “normal exploitation” of a work must mean something less than full use of an exclusive right.¹²³

However, a rights-holder is not powerless in this situation. Many internet content providers are now aware of web mashups and can reasonably claim to expect payment if their work appears in that medium. Even if this were not the case, the 110(5) Report asserts that a right to exploit works of economic or practical importance “*must in principle be reserved to the authors.*”¹²⁴ A senior IP attorney at Google recently argued that rights-holders should embrace new forms of exploitation and benefit from new markets that might come

118. In the 110(5) Report, the DSB panel equivocates, stating that it will consider “the actual and potential effects of the exemptions in question in the current market and technological environment.” See 110(5) Report, *supra* note 95, ¶6.187 at 50.

119. Jane C. Ginsburg, *Toward Supranational Copyright Law? The WTO Panel Decision and the ‘Three-Step Test’ for Copyright Exceptions*, 187 REVUE INTERNATIONALE DU DROIT D’AUTEUR 7 (2001) (Fr.).

120. SENFTLEBEN, *supra* note 70, at 181.

121. *Id.*

122. 110(5) Report, *supra* note 95, at ¶6.167, at 44.

123. *Id.*

124. *Id.* at ¶6.181.

along.¹²⁵ He notes that a new market “may be one that you didn’t control in the same way that you did before, but that in the end, was a market that would give you new sources of revenue.”¹²⁶ This reasoning suggests that rights-holders should have the chance to expand into emerging markets for their material, as a practical matter. In this case, a limitation upon the rights-holder’s copyright protections could indeed conflict with normal exploitation of the work.

Meanwhile, the 110(5) Report suggests that, “exceptions or limitations would be presumed not to conflict with a normal exploitation of works if they are confined to a scope or degree that does not enter into economic competition with nonexempted uses.”¹²⁷ This suggests that web mashups with little commercial value should be eligible for an Article 13 exemption because they would not conflict much with the rights-holder’s normal exploitation of his material. As with the first factor of the test, noncommercial web mashups correlate strongly with amateur web mashup creators,¹²⁸ and are most likely to be granted a copyright exemption under Article 13.

However, the overall impact of this second factor on web mashups is unclear. The 110(5) Report remains ambivalent about how much control to accord rights-holders regarding the normal exploitation of their work. Rights-holders should not have absolute control. However, they should be rewarded for embracing new markets and opportunities.

C. Whether a Limitation Unreasonably Prejudices the Legitimate Interests of the Copyright Owner

This final factor of Article 13 may be the most important component of the three-step test.¹²⁹ The third factor states that any proposed limitations on copyright protections must “not unreasonably prejudice the legitimate interests of the rights-holder.”¹³⁰ As its wording suggests, some prejudice to a rights-

125. Intellectual Property Watch, *William Patry of Google*, VIMEO, <http://vimeo.com/10088856> (last updated Mar. 11, 2010) (discussing his new book, *Moral Panics and the Copyright Wars in Geneva*).

126. *Id.*

127. 110(5) Report, *supra* note 95, at ¶ 6.181.

128. See LESSIG, *supra* note 1, at 254–56.

129. SENFTLEBEN, *supra* note 70, at 287.

130. TRIPS, *supra* note 8, art. 13.

holder's interests is permitted. Only an unreasonable amount of prejudice will not be tolerated.¹³¹

In the 110(5) Report, the DSB asserted that threshold is reached if an exception or limitation could cause an unreasonable loss of income to the copyright owner.¹³² The Panel later found that the United States failed to show that the Section 110(5)(B) exception would avoid such an unreasonable loss to the rights-holder.¹³³ Conversely, the panel held that it lacked sufficient information to show an unreasonable loss to under the Section 110(5)(A) homestyle exception.¹³⁴ Using this information, one might argue that web mashups would likely fail this prong in the analysis.

However, applying the same reasoning from the 110(5) Report to this situation would yield an incorrect analysis for this third factor of the test. First, the 110(5) Report panel failed to construe Article 13 in accordance with TRIPS' objectives and must therefore consider the interests of other parties. Second, the 110(5) Report Panel only examined the copyright owner's economic losses without considering important policy issues and societal interests, as TRIPS requires. These errors could result in a lopsided balancing of interests in our web mashup scenario if they remain unaddressed.

1. TRIPS Requires Us to Consider the Interests of Third Parties When Applying the Article 13 Three-Step Test.

Though the language of Article 13 only mentions the legitimate interests of the copyright owner and says nothing about the interests of third parties, the Doha Declaration reminds us that we should view TRIPS provisions in relation to the overall objectives of the TRIPS agreement, as laid out in Article 7.¹³⁵ Indeed, Article 7 discusses "mutual advantage of producers and users . . . social and economic welfare . . . and a balance of rights and obligations."¹³⁶ Taken in context, this language strongly indicates that Article 13 should consider more than the rights-holder's concerns.

Moreover, the wording of Article 13 suggests that the interests of third parties must be considered. The third prong's focus on the legitimacy of interests and reasonableness of prejudices against the

131. SENFTLEBEN, *supra* note 70, at 226.

132. 110(5) Report, *supra* note 95, ¶ 6.229, at 59.

133. *Id.* at ¶ 6.266, at 67.

134. *Id.* at ¶ 6.271, at 68.

135. *See supra* text accompanying note 79.

136. TRIPS, *supra* note 8, art. 7.

copyright owner both indicate that a proper balance in copyright law should be reached.¹³⁷ However, such a balance only becomes possible if the justifiability of the authors' interests and users are examined.¹³⁸ Further, "a balance between the author's and the public's concerns must be found."¹³⁹ This balancing of interests fulfills one of the objectives of TRIPS and serves the public interest by remaining attentive to the needs of individual rights-holders and groups within society.¹⁴⁰

Such a reading of the three-step inquiry in Article 13 is not a novel proposition. By analogy, the Patents Report DSB invoked Article 30 of the TRIPS agreement, which forbids unreasonable prejudice to "the legitimate interests of the patent owner, taking account of the legitimate interests of third parties."¹⁴¹ In the same report, Canada also argued that general societal interests also fell "within the ambit of the term 'third parties'" and should also be considered.¹⁴² This weighing of multiple parties' interests comports with the wording in TRIPS Article 7 and the directive issued in the Doha Declaration. Moreover, Article 30's version of the three-step test mirrors the Article 13 version closely, and also provides a strong reference point on how Article 13 should be interpreted.

Admittedly, not everyone agrees with the analogy between Article 13 and Article 30. In the Patent Report, Canada argued that TRIPS' drafters intended each article to operate separately, and noted that, "[i]f the framers of the TRIPS Agreement had intended Article 30 to bear the same meaning as Article 13, they would have used the same words in each provision."¹⁴³ Canada further argued that, "[t]he fact that they did use the same language in Article 26.2, but not in Article 13 . . . was highly significant."¹⁴⁴ However, these contentions examine Articles 13 and 30 in a vacuum, without considering the underlying values of TRIPS that should be taken into account. Moreover, Canada's arguments belie the fact that it also

137. SENFTLEBEN, *supra* note 70, at 230 (authors are one set of rights-holders, but are by no means the only set considered in this analysis).

138. *Id.*

139. *Id.* at 226.

140. TRIPS, *supra* note 8, art. 7; Geiger et al., *supra* note 9, at 707, 709.

141. TRIPS, *supra* note 8, art. 30.

142. *See* Patent Report, *supra* note 100, ¶7.67, at 164.

143. *See id.* at 77.

144. *Id.*

relied heavily on TRIPS' overall objectives and cited Article 7 in the Panel Report.¹⁴⁵

Thus, in the context of web mashups, this means that we would also look beyond the interests of content owners and providers. We must also consider the interests of web mashup creators who wish to create new works, end users, and the interests of the larger society. When aggregated, the interests of society and other third parties may outweigh the interests of the rights-holder.

2. *The Interests of All Parties Should Involve More than Economic Interests.*

Having established that the third factor involves a weighing of interests between multiple parties, we then move to identifying legitimate interests for consideration by both sides. In the 110(5) Report, the panel tried to view "the exclusive rights conferred by copyright on their holders" in economic terms.¹⁴⁶ However, the panel also noted, "[t]hat is not to say that legitimate interests are necessarily limited to this economic value."¹⁴⁷ Legitimate interests may take other forms and may be supported by relevant public policies or other social norms.¹⁴⁸

We have considered several relevant public policies and societal interests within the course of this discussion.¹⁴⁹ Web mashups may represent a new way for our citizens to participate in democratic discussion and debate. Further, web mashups can foster creativity and promote the goals of free speech. People are starting to use web mashups to engage with their community and develop their own sense of personal identity. Thus, several compelling policies exist to counterbalance the interests of authors and rights-holders in this three-step inquiry. Interpreted in this light, the third factor presents the strongest arguments for a possible copyright exception for web mashups and their creators.

D. Considering the Three-Step Factors Together

The final outcome of this three-step inquiry reveals a surprisingly balanced distribution of interests. The first factor weighs strongly in favor of content providers and rights-holders. The size of the web

145. *Id.* ¶7.67, at 164.

146. 110(5) Report, *supra* note 95, ¶ 6.227, at 58.

147. *Id.*

148. SENFTLEBEN, *supra* note 70, at 230.

149. *See supra* Part II.

mashup market makes it unlikely that a blanket limitation on a rights-holder's copyright protections will qualify as a "special case" or "limited exception" under Article 13 or Article 30.

Meanwhile, the second factor presents compelling arguments for both sides. On one hand, a rights-holder should not be able to assert copyright over all new forms of expression. However, rights-holders should receive some benefit if their content appears in a newly emerging medium. With web mashups continuing to develop into a more robust industry, a content provider can make a stronger claim that a proposed exemption for web mashup creators would hinder his normal exploitation of his work. The interests for rights-holders and web mashup creators are equally matched, and could be considered a tie. However, this is not enough to justify an exemption from copyright protections. The first two factors weigh favorably for the rights-holder.

The viability of an exception from copyright protections for web mashup creators depends heavily on the third factor. The third factor presents societal interests that touch upon some of our democratic values and notions of freedom. Such important group interests may indeed justify a limitation on rights-holders and authors. Whether these societal factors are enough to issue a limitation in accordance with the three-step test will vary from country to country, and by individual. For now, I would argue that there is not quite enough to justify a full three-step limitation on copyright. While it is a close call, the first and second factors provide compelling reasons to hold off on issuing such an exception for now. In the meantime, I imagine that an exception for amateur web mashup creators and noncommercial web mashups would survive the three-step inquiry. All three factors of the test seem to allow for that possibility. However, no matter the outcome, the three-step test serves as a useful tool for identifying the relevant parties and interests to consider, and for providing important thresholds and limits to keep in mind.

Conclusion

In the end, the further development of web mashups may cast the deciding vote in determining whether a copyright exemption is proper. If web mashups develop into primarily commercial tools for consumers, the societal interests mentioned above will likely become less prominent, and the argument for a "special case" or "limited exception" may disappear altogether. Meanwhile, authors and rights-holders may find themselves in a stronger position to assert their

interests in their work. However, that assessment could change quickly if web mashups become an essential medium for speech and expression and an indispensable means of propagating our culture. Web mashups have not achieved that kind of significance to date, but perhaps time will tell.

In the larger context, this inquiry suggests that copyright law cannot rely on its old assumptions. In both the domestic and international contexts, copyright law must account for more modern social concerns. It cannot remain focused on its old economic and utilitarian roots. If we expect copyright law to remain relevant in today's digital world, we must alter our assumptions regarding what copyright law is meant to accomplish. This shift in perspective will likely require us to take an uncomfortable look at some long held copyright beliefs and maxims. For example, recent debates suggest that substantive changes or modifications to TRIPS would be extremely difficult to achieve because reopening the agreement would subject the agreement's entire contents to scrutiny.¹⁵⁰ However, it is preferable to harmonize these provisions now rather than continue to apply our outdated notions of copyright to our current digital age. The sooner we embrace such a change in our domestic and international copyright policies, the more satisfying our answers for these important questions will become.

150. Gervais, *supra* note 49, at 35 n.136.