

AFRICA UNIVERSITY

(A UNITED METHODIST-RELATED INSTITUTION)

THE APPLICATION OF THE ‘THREE-STEP-TEST’ AND ITS POLICY  
IMPLICATIONS IN UGANDA: A CASE OF COPYRIGHT AND  
NEIGHBORING RIGHTS ACT, 2006.

BY

JOSEPH KASULE

A DISSERTATION SUBMITTED IN PARTIAL FULFILMENT OF THE  
REQUIREMENTS FOR THE DEGREE OF MASTER IN INTELLECTUAL  
PROPERTY IN THE COLLEGE OF BUSINESS, PEACE, LEADERSHIP AND  
GOVERNANCE

2021

## Abstract

The different Limitations of or Exception to copyright (L&Es) do not extinguish the underlying bundle of exclusive rights conferred to the rights holder and for this reason they need to be limited in scope. The application of the ‘Three-Step-Test’ in the copyright law provides a mechanism that attempts to strike a balance between the increasingly complex interests of copyright owners and those of others in the copyrighted works by setting a predefined scope to these L&Es. An exploratory case-study using a qualitative research approaches was conducted to philosophically examine this application and its policy implications to the copyright system in Uganda. The copyright law considered for the study was the Copyright and Neighboring Rights Act, 2006 of Uganda. The study findings revealed that the ‘Three-Step-Test’ was only partially applied under the broad ‘fair uses of protected works’ exception which is the general exception provision on copyright L&Es in the copyright law of Uganda. From the results, the L&Es in the copyright law of Uganda can be broadly classified into four groups on the aspects of, 1) ownership, or 2) exploitation, or 3) enforcement and or 4) liability following an infringement. This classification is as per the general aspects/elements of copyright and neighbouring rights impacted on by the institution of the different forms of L&Es. It also emerged that [policy] implications of the application of the ‘Three-Step-Test’ to the copyright policy landscape of [Uganda] are contextual and the effect differed from context to context. Results showed that the policy implications were different when the ‘Three-Step-Test’ was applied in the current policy landscape which is characterized with specific statutory L&Es, an enumerated fair use doctrine and bits of fair practices/dealings contained in the general fair use doctrine. They also showed that the policy implications would totally be different when the ‘Three-Step-Test’ was applied in the copyright law of Uganda as the sole regulating doctrine of the L&Es. From the study findings, it emerged one has to explore the questions of ‘where the utility in the application of ‘Three-Step-Test’ is?’ and ‘where the utility effect from the application of ‘Three-Step-Test’ is?’, to understand what the different policy implications would be following such application. In conclusion, in an already open-ended copyright system of L&Es like one for Uganda that applies majorly the fair use doctrine in the copyright laws to set the appropriate checks and balances. The subsequent incorporation or scaling of the application of the ‘Three-Step-Test’ in the copyright system might not have any substantial effect in the existing access to and exploitation patterns of the protected works as it would have in a closed system all, other factors kept constant.

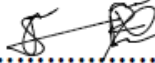
**Keywords:** Exceptions, Copyright, Limitations, Policy implications, and Three-Step-Test.

## Declaration

I Kasule joseph declare that this dissertation is my original work except where sources have been cited and acknowledged. The work has never been submitted, nor will it ever be submitted to another university for the award of a degree.


**Joseph Kasule**

Student's Full Name

 03rd . June. 2021  
.....  
Student's Signature (Date)

**Mrs. Maureen Jandwa**

Main Supervisor's Full Name

 | 3 June 2021  
Main Supervisor's Signature (Date)

## **Copyright**

No part of the dissertation may be reproduced, stored in any retrieval system, or transmitted in any form or by any means for scholarly purposes without prior written permission of the author or Africa University on behalf of the author.

## **Acknowledgment**

I am so grateful to myself. A special thanks to my supervisor Mrs. Maureen Jandwa who motherly walked, guided, and directed me through the research and dissertation writing process. I am grateful for the scholarship opportunity that enabled me to participate in the reputable program organized by WIPO, ARIPO, and Africa University, with the assistance of the Government of Japan on behalf of Uganda.

I am also thankful to Mr. George Mandewo, MIP coordinator, for the constant encouragement during the dissertation writing. My special gratitude to the URSB colleagues Alice, Julius, Raymond, Patricia, Alison, Juliet, Mr. Alfred Mugisha the DRG/FA, and Mercy K. Kainobwisho the RG for the support and enabling learning environment.

A special shout out to my family (daddy who saw that I get all the basic education I need as a young man, mummy for her unconditional love, support, and care, my sisters and brothers for believing in me that I can do it even better) and my friends Victoria and Yvonne you guys are the best. To all others thank you.

## **Dedication**

Dedicated to myself and to everyone that will read it.

## **List of Acronyms and Abbreviations**

ARIPO	African Regional Intellectual Property Organization
AUREC	Africa University Research Ethics Committee
BTAP	Beijing Treaty on Audiovisual Performances
DRG/FA	Deputy Registrar General Finance and Administration
IP	Intellectual Property
L&Es	Limitations and Exceptions
MIP	Master in Intellectual Property
RG	Registrar General
SCCR	Standing Committee on Copyright and Related Rights
TRIPS	Trade-Related Aspects of Intellectual Property Rights
ULRC	Uganda Law Reform Commission
URSB	Uganda Registration Services Bureau
VIP	Visually Impaired, or Otherwise Print Disabled
WCT	WIPO Copyright Treaty
WIPO	World Intellectual Property Organization
WPPT	WIPO Performances and Phonograms Treaty
WTO	World Trade Organization

## **Definition of key terms**

**Exceptions:** will refer to outright exemptions from copyright liability in a specific situation.

**Limitation & Exceptions (L&Es):** should be understood as creating defenses to infringement claims or legal rights to engage in specified conduct that is contested

**Limitation:** refers to conditions on the exercise of copyright creating a liability rule, so that acts are permissible but subject to an obligation to pay for the use, that is transforming an exclusive right into a right to remuneration (e.g. a compulsory or statutory license).



## Table of content

Abstract .....	ii
Declaration .....	iii
Copyright .....	iv
Acknowledgment .....	v
Dedication .....	vi
List of Acronyms and Abbreviations .....	vii
Definition of key terms .....	viii
Table of content.....	ix
List of Tables.....	xiv
List of Figures .....	xv
List of Appendices .....	xvi
<b>CHAPTER 1 INTRODUCTION .....</b>	<b>1</b>
1.1    Introduction .....	1
1.2    Background to the Study .....	1
1.3    Statement of the Problem .....	6
1.4    Aim and Objectives.....	7
1.4.1    Specific objectives .....	7
1.5    Research Questions .....	8
1.6    Assumptions.....	8

1.7	Significance of the Study .....	9
1.8	Delimitation of the Study .....	9
1.9	Limitation of the Study .....	10
<b>CHAPTER 2 REVIEW OF RELATED LITERATURE .....</b>		<b>11</b>
2.1	Introduction .....	11
2.2	Theoretical framework.....	11
2.3	Relevance of this theoretical frame to the study .....	11
2.4	Current scope and classification of L&Es to copyright .....	12
2.5	The ‘Three-Step-Test’ in the copyright system.....	13
2.5.1	Application of the ‘Three-Step-Test’ .....	14
2.6	The ‘Three-Step-Test’ and policy formulation.....	15
2.7	Summary.....	16
<b>CHAPTER 3 METHODOLOGY .....</b>		<b>17</b>
3.1	Introduction .....	17
3.2	The research design.....	17
3.3	Population and sampling .....	17
3.4	Data collection instruments.....	18
3.5	Pilot study.....	18
3.6	Data collection procedures.....	19
3.7	Analysis and organization of data .....	19

3.8	Ethical consideration.....	20
3.8.1	Before conducting the study.....	20
3.8.2	Beginning the study .....	20
3.8.3	Collecting the data.....	21
3.8.4	Analyzing data, reporting, sharing, and storing data .....	21
3.9	Summary.....	21
<b>CHAPTER 4 DATA PRESENTATION, ANALYSIS, AND INTERPRETATION</b>		<b>22</b>
4.1	Introduction .....	22
4.1.1	Data sources, participants, and presentation approach.....	22
4.2	Data Presentation and Analysis .....	22
4.2.1	The scope and classification of L&Es in the Act.....	23
4.2.1.1	The current scope of exceptions to copyright in the Act.....	23
4.2.1.1.1	Exceptions in the Act created by the use of the word “except” .....	24
4.2.1.1.2	Exceptions in the Act created by applying “but” clause.....	25
4.2.1.1.3	Exceptions in the Act created through the “unless”, “unless otherwise” or “otherwise than” clauses .....	26
4.2.1.2	The current scope of limitations to copyright in the Act.....	28
4.2.1.2.1	Limitations in the Act on the side of the rights holders .....	29
4.2.1.2.2	Limitations in the Act on the side of the “others” .....	33
4.2.2	Classification of the L&Es to copyright in Act.....	35

4.2.3	The application scope of the ‘Three-Step-Test’ in the Act .....	37
4.2.4	The copyright policy landscape of Uganda and the application of the ‘Three-Step-Test’ .....	39
4.2.4.1	The policy implications of the ‘current’ application scope of the ‘Three-Step-Test’ in the Act .....	39
4.2.4.2	The implications of the application of the ‘Three-Step-Test’ to the copyright policy landscape of Uganda. ....	41
4.2.4.2.1	Where would the utility effect from the application of the ‘Three-Step-Test’ reside and with whom .....	42
4.2.4.2.1.1	The utility in the effect bore from the application of the ‘Three-Step-Test’ .....	44
4.2.4.2.2	The application of the ‘Three-Step-Test’ and the copyright policy landscape of Uganda: Context 1 .....	46
4.2.4.2.3	The application of the ‘Three-Step-Test’ and the copyright policy landscape of Uganda: Context 2 .....	49
4.3	Discussions and Interpretation.....	50
4.4	Summary.....	52
<b>CHAPTER 5 SUMMARY, CONCLUSIONS AND RECOMMENDATIONS .....</b>		<b>55</b>
5.1	Introduction .....	55
5.2	Discussion .....	55

5.2.1	The current scope of L&Es to copyright- the proxy indicator of the application of ‘Three-Step-Test’ in the Act, and their classification.....	55
5.2.2	The extent of application of the ‘Three-Step-Test’ in the Act .....	56
5.2.3	The implication of the application of the ‘Three-Step-Test’ to the copyright policy landscape of Uganda.....	58
5.3	Conclusions .....	60
5.4	Implications.....	61
5.5	Recommendations .....	62
5.6	Suggestions for Further Research .....	63
	References .....	64
	APPENDICES .....	69

## **List of Tables**

Table 1: Limitations in the Copyright and Neighbouring Act, 2006 of Uganda on the side of the rights holders .....	30
Table 2: Classification of the L&Es to copyright in the Copyright and Neighbouring Rights Act, 2006 of Uganda.....	35

## **List of Figures**

Figure 1: Kasule taxonomy showing the utility in the application of three step test vs. the application of L&Es to copyright law .....	45
--	----

## **List of Appendices**

APPENDIX 1: Questionnaire Survey Instrument.....	69
APPENDIX 2: Interview guide.....	81
APPENDIX 3: Informed Consent.....	82
APPENDIX 4: AUREC Approval Letter.....	84



## **CHAPTER 1 INTRODUCTION**

### **1.1 Introduction**

This chapter of the dissertation presents the background to the study, problem statement, research objectives, questions assumptions, significance, delimitation, and limitations to the study.

### **1.2 Background to the Study**

According to Senftleben (2004) and Schonwetter (2006) the ‘Three-Step-Test’ is a policy tool and can be applied at different levels either at legislation/policy formulation or implementation or evaluation of these legislations/policies in respect to the limit of limitations and exceptions (hereinafter L&Es) at national level. The test emerged in international copyright law as a counterweight to the formal recognition of a general right of reproduction at the 1967 Stockholm Berne Convention Revision conference (Geiger, Gervais, & Senftleben, 2015).

In attempts to strike a balance between the increasingly complex interests of the copyright holders, on one hand, and those of others, on the other. L&Es in copyright law are increasingly handy because they permit more uses of works under copyright protection without the rights owner’s consent. Since often for any copyrighted work, it is only the author (depending on if he/she is also the owner) or the rights owner (if he/she is not also the owner) who is expected to allow a third party to use the work but with L&E a third party/others can use the work without the author's consent in certain situations like personal use, quotations, etc.

Unfortunately, the appropriate scope and function of L&Es in copyright law is a controversial issue (Griffiths, 2009). At the heart of this controversy, lies the fact that, over time, the scope and outlook of the copyright concept as a property right have substantially changed (International Bureau of WIPO, 2004; Uganda Law Reform Commission (ULRC), 2004; Gervais, 2008; Kawooya, Kakungulu, & Akubu, 2010). This is attributable to socio-economic and political changes on the one hand, and rapid strides in technological development on the other. It is extremely broad now, both in terms of eligible subject matter and in terms of exclusivity in favor of the owner (Michaux, 2018). This is observed to have skewed the balance in the copyright system between the interest of the copyright holder and that of others towards the rights holders.

Copyright plays a vital role in the promotion of scientific progress, cultural, social, and economic development (Tabaro, 2005; Fischman-Afori, 2012). Therefore, because of this vital role a new equilibria, within the copyright system that according to Ouma (2010) confers a bundle of non-absolute exclusive legal rights and concerning other bodies of law, is being advocated for to balance such protection with other important values in the society (World Intellectual Property Organization (WIPO), 2011; Geiger, Gervais, & Senftleben, 2013). The new equilibria is to open up new avenues to manage these diverging and often conflicting interests. Proponents of this new equilibria contend that copyright laws should permit more uses without the rights owner's consent (Leval, 1990; Madison, 2004; Fischman-Afori, 2012; Michaux, 2018).

This evident need to manage these diverging interests through ensuring the continuation of certain forms or manner/ways of exploitations of works under copyright without the copyright owner's consent to counter the weight of exclusive rights conferred onto the

rights holder by the copyright protection yielded the present-day L&Es to copyright. Since legislators cannot possibly foresee this evolution and its implications to the copyright ecosystem nor can legislatures be expected to amend the law every time some new developments in how work is protected, accessed, or exploited by others raises questions not easily answerable under the existing statutory legal framework (Samuelson, 2017).

An account shows that due to the widely diverging and ever-evolving interests in the protection of, access to and exploitation of protected works (Campidoglio, Frattolillo, & Landolfi, 2009), different nations and regional blocks instituted dissimilar L&Es into their copyright laws (Fischman-Afori, 2012; Michaux, 2018). This consequently resulted in a dual need, first to have L&Es to rights instituted at different levels to provide flexibility in their laws to accommodate different interests to continue to evolve and second to harmonize these L&Es at all levels. With the harmonization of L&Es to desirable, the creation of a universally maximum acceptable standard of formulating L&Es to rights became apparent (Fischman-Afori, 2012) and remains urgently needed to converge these different interests (Gervais, 2008; Senftleben, 2010; Geiger, Gervais, & Senftleben, 2015).

In this context, the so-called ‘‘Three-Step-Test’’ - a general clause introduced at the 1967 Stockholm Conference for the revision of the Berne Convention as Article 9(2) of the Berne Convention to regulate the divergent applicable L&Es to the formally recognized general right of reproduction- has been an epitome of attention from copyright policymakers, courts and scholars (Griffiths, 2009). Some scholars like Geiger, Gervais, & Senftleben (2013) argue that this was not to restrict the ability of individual legislators to create the L&Es to copyright and neighboring rights which can be used to balance

interests between copyright holders and others but intended it to serve as a flexible balancing tool offering national policymakers sufficient breathing space to satisfy their national economic, social and cultural needs.

By way of Article 9(2) of the Berne Convention for the protection of literary and artistic works, it was made a matter for legislation in the countries party to the Berne Convention to permit the reproduction of such works in certain special cases, provided that such reproduction does not conflict with a normal exploitation of the work and does not unreasonably prejudice the legitimate interests of the author. In other words, countries party to the convention are not compelled to adopt limitations to copyright at all, however, in the event of limitations being adopted, they should not exceed the 'Three-Step-Test' threshold (Fischman-Afori, 2012).

Since its conception, this clause has been applied in the formulation of different copyright-related international instruments such as the 1994 Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) (Articles 9, 13, 26.2, and 30). The 'Three-Step-Test' clause was also applied in the 1996 World Intellectual Property Organization (WIPO) 'Internet' Treaties that is in Articles 10(1) and (2) of the WIPO Copyright Treaty (1996); article 16(2) of the WIPO Performances and Phonograms Treaty (1996), Article 13(2) of the Beijing Treaty on Audiovisual Performances of 2012, and Article 11 of the Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired, or Otherwise Print Disabled (VIP Treaty) of 2013 [and in several European Union Copyright Directives] with its coverage expanded to apply to all copyright rights away from the narrow confines of the reproduction right in the copyright

system as well as to other industrial property rights but with different wording in most of the times it reappeared (Gervais, 2008).

At the national level, a 2018 international report that examined the balance between the interests of copyright owners, on one hand, and those of others like the users of their work on the other, indicated that there is a general appreciation of the importance of the ‘Three-Step-Test’ in guiding the formulation, adoption and application of L&Es to the copyright and neighboring rights in all of the countries in which the study was conducted (Michaux, 2018). The report indicated that even when the test intends to serve as a guide in the harmonization of L&Es to a certain extent in all of these countries, there is a significant difference in how the test is applied and interpreted every time it’s used to assess whether a certain use/act grounded by the L&Es does not infringe on the copyright holder’s rights. To some scholars like Fischman-Afori, (2012) this test for L&Es is rather narrow and restrictive while to Geiger, Gervais, & Senftleben, (2013; 2015) this abstract criteria called the ‘Three-Step-Test’ offers room for different interpretations in application this reducibly implies different policy implications and lots of policy space according to latter party in this argument concerning the meaning of the test.

Relatedly, Robin Wright (2009) asserts that adopting an interpretive methodology to the assessment of the L&Es like normatively interpreting the ‘Three-Step-Test’ to take into account the broader public policy basis/goal of the exception or limitation in question may assist with ensuring that the wider social policy intentions of legislators form part of a balanced implementation of the test unlike when an economic approach like the one said to be adopted in the World Trade Organization (WTO) panel interpretation of the ‘Three-Step-Test’ in resolving the dispute between the EU and the US over section 110(5) of the

US Copyright Act or when a restrictive approach to the test is taken instead. Robin Wright like Geiger, et al. (2013; 2015) and other scholars also notices that suddenly, due to the interpretation of the WTO panel in a decision dated 15 June 2000, the application of the ‘Three-Step-Test’ has become one of the main, if not the main issue, when trying to find a fair balance of interest in copyright law and policy. From this, one can say the application of ‘Three-Step-Test’ has become the stick and carrot in the copyright system.

It was against this background, that the time was ripe to study the application of the ‘Three-Step-Test’ in the national copyright and neighboring rights and its policy implications in developing countries like Uganda.

### **1.3 Statement of the Problem**

Existing literature on the ‘Three-Step-Test’ tends to converge to the assertion that the test is vague or inconsistent (Griffiths, 2009; Geiger, Gervais, & Senftleben, 2013; Geiger, Gervais, & Senftleben, 2015; Edwald, 2016; Michaux, 2018). Observable from this literature is that much of it in the copyright system tends to limit its analysis of the test to a comparison of the different steps of the test with each other. Relatedly, some scholars like Christie & Wright, (2014) believe that such an approach is valuable, but it simply does not provide the full picture because it tends to make the ‘Three-Step-Test’, its application and utility seem abstract yet the test is an indispensable practical tool in the copyright system that attempts to strike a balance between the increasingly complex interests of copyright owners and those of others.

What is currently missing are studies that examine the application of the test in given copyright and neighbouring rights legislation and its policy implications. Since in the

ongoing debates and perennial struggles which intersect with other rights other than copyright, prominence of the ‘Three-Step-Test’ as the maximum calibration threshold of national legitimate L&Es in bringing the desired equilibrium will truly be indispensable in discussions and in cases where L&Es must be interpreted and applied to assess if specific exploitation of works by users is entitled to benefit from the exception they claim.

This study sought to fill that gap, by exploring and elucidating the policy implications from the application of the ‘Three-Step-Test’ to L&Es in the copyright and neighbouring rights Act, 2006 of Uganda in attempts to balance the increasingly complex interests of copyright owners and those of others in Uganda.

#### **1.4 Aim and Objectives**

This case study aimed to philosophically examine the application of the ‘Three-Step-Test’ and its policy implications to the copyright system in Uganda in attempts to strike a balance between the increasingly complex interests of copyright holders and those of others in copyrighted works.

##### **1.4.1 Specific objectives**

The objectives of the study were to:

1. To classify the current scope of limitations and exceptions to copyright as the proxy indicator of the application of ‘Three-Step-Test’ in the Copyright and Neighboring Rights Act, 2006 of Uganda,
2. To explore the application scope of the ‘Three-Step-Test’ in the Copyright and Neighboring Rights Act, 2006 of Uganda,

3. To investigate the implication of the application of the ‘Three-Step-Test’ to the copyright policy landscape of Uganda.
4. To propose recommendations based on the findings of the study.

### **1.5 Research Questions**

1. What is the current scope of limitations and exceptions to copyright as the proxy indicator of the application of ‘Three-Step-Test’ in the Copyright and Neighboring Rights Act, 2006 of Uganda, and how can they be classified?
2. To what extent has the ‘Three-Step-Test’ in the Copyright and Neighboring Rights Act, 2006 of Uganda been applied and what are the policy implications?
3. What does the application of the ‘Three-Step-Test’ imply to the copyright policy landscape of Uganda?
4. What recommendations can be drawn from the findings of the study?

### **1.6 Assumptions**

The study assumed that, permissible L&Es to copyright in national copyright systems act as a proxy indicator of the application of ‘Three-Step-Test’ in copyright law to create limitations on the users’ rights born from the permissible national exceptions to copyright protection.

That, the ‘Three-Step-Test’ in the Berne Convention was transposed into current Uganda’s copyright eco-system through the TRIPS agreement which Uganda is a party to [this was based on the assumption that the researcher’s interpretation of Article 9 of the TRIPS Agreement was right].



## **1.7 Significance of the Study**

The merits of this study were in the fact that a functional copyright system can satisfy domestic social, cultural, and economic needs. A study that explores the balance of interests in a copyright system resultantly contributes to the creation of this functional system.

Drawing from Goldstein's (2003) views, this study did not only further contribute to the existing literature that seeks to answer the unresolved philosophical question on whether copyright is to be regarded as an author's right, giving the originator a claim on every market in which consumers will pay for copies or it's a user's right, entitling them to enjoy a copy free unless the author and/or his publisher can show that, if they are not paid, they will have no incentive to create and publish new works but also the findings provided information that can be used to further develop Uganda's copyright landscape.

The study findings highlighted to users of copyrighted works to what extent they could use such work in Uganda in respect to the current copyright Act.

## **1.8 Delimitation of the Study**

The study was mostly guided by the literature on the 'Three-Step-Test' generated after the TRIPS Agreement came into force. The study hinged on the application of the 'Three-Step-Test' as contained in the copyright law of Uganda side by side with international treaties such as the TRIPS Agreement and the Berne Convention.

In addition, the study took cognizance of the other copyright treaties which have the 'Three-Step-Test' provisions. This study was carried out in Uganda confining the

examination to the application of the ‘Three-Step-Test’ as applied to the current copyright Act of Uganda using the L&Es therein as a proxy indicator of the ‘Three-Step-Test’ application in the context of policies promoting research activities and satisfying domestic social, cultural and economic and in terms of costs, consequences, and optionality.

### **1.9 Limitation of the Study**

Due to time and financial constraints amidst COVID-19; exploratory cross-sectional techniques were applied yet policy implications of a given phenomenon trend to have a longitudinal effect. To avert this shortfall, only experts in the field of study with a minimum of three years were interviewed using in-depth interviews. This enabled the researcher to collect data with longitudinal attributes since the participants shared their lived experiences and perspective. Three-step test

## **CHAPTER 2 REVIEW OF RELATED LITERATURE**

### **2.1 Introduction**

Organized objective by objective, this chapter serves to give a detailed overview of related literature to the study topic.

### **2.2 Theoretical framework**

For copyright and neighboring rights to be justified, Moore (2003) posits that systems of these rights should be grounded in theory. Several schools of thought exist on this. However, the theoretical framework of the study shall be confined to Locke's Theory of Property Rights and the Personality Theory of Hegel. The choice was based on evidence of their usefulness in past studies similar to the current study. Studies such as Saleena (2011); Guibault (2002); and Senftleben, (2004) all applied the two theories. As well as the justifications advanced for Locke's theory by Tuckness (2020) and those advanced for the personality theory by scholars like Drahos (1996), Schroeder (2006), and Yoo (2019).

### **2.3 Relevance of this theoretical frame to the study**

This study mashes up the propositions advanced in Locke's theory of property rights with those in the personality theory of Hegel. Unlike Locke who justifies the creation and protection of IP in the productions in the artistic, literary, and scientific domain, suggesting that protection comes with certain restrictions when he vies that 'leave as much as another can make use of'. Hegel contends that the beginnings of coping with such restrictions are the beginning of property. From this framework and in the perspective of the study it can be drawn that copyright and neighbouring rights protection has to first

exist, and its existence brings with it restrictions like Locke highlights and in the need to leave as much as another can make use of, one can find crucial social and egalitarian strands which the ‘Three-Step-Test’ attempts to bring in the copyright system.

This consequently unfolds Hegel’s argument that property ceases to be just the extension of personality and becomes the subject matter of contract. Contract law draws in the state. Thus the property becomes the subject matter of interaction between personalities and the state. In the lens of the study, it can be loosely said that the restrictions on the property are because of regulation by the state through the application of the ‘Three-Step-Test’ to these restrictions to the property rights to ensure the labourers enjoy the fruits of their labour as Locke theory requires with preservation of their moral claims too.

This suggested theoretical framework explains the origin of the debate for balancing the diverging interest in copyrighted works by drawing to the fact that it’s from the interests of the labourer in their works that debates of fair balance ensue.

## **2.4 Current scope and classification of L&Es to copyright**

The appropriate scope of L&Es in copyright law is a controversial issue (Griffiths, 2009). In as much as several studies have been conducted to establish the current scope of L&Es there is in international, regional, and national copyright laws none has exhaustively demarcated the scope, these have been just field-specific. For example L&Es for teaching in Africa (Fometeu, 2009), L&Es for Educational Activities (Seng, 2016); and L&Es for Educational and Research Activities (Seng, 2019).

Other studies show that L&Es can broadly be classified as L&Es for educational activities; libraries and archives; persons with disabilities; religious, social, and cultural purposes, and digital technology such as for use of computer programs, temporary use of digital works, reverse engineering, and statutory safe harbors to the liability of online service providers. This classification is also not inclusive of all possible L&Es to copyright because they are industry-specific (WIPO, 2010).

Relatedly, Gervais, (2008) suggests a five-point checklist onto which the categorization of L&Es may be done: 1) by type of users; 2) by type of use; 3) by type of country; 4) by type of authors; and finally, by type of work. In Gervais, (2008) approach just like the questionnaire in the 2010 report on the questionnaire on L&Es, he makes no classification based on the type of right because he asserts that such a categorization would be useless. Since, a single-use can involve several rights, say uploading material to the internet may involve the right of reproduction, distribution, and adaptation, etc., and that copyright has overlapping protection layers since most works build on the other thus making it illusory to expect that individual consumers can break them down.

## **2.5 The ‘Three-Step-Test’ in the copyright system**

The exploitation and enjoyment of property rights in works of the intellect is non-excludable and non-rivalry (Guibault, 2002; Senftleben, 2004). At any one moment, innumerable persons can use and enjoy intellectual productions in such works without decreasing their potential to be enjoyed and communicated to the next persons. These characteristics can make creators of such products vulnerable to the inability of recouping their different costs of expression (Fisher, 1987). The copyright system sets forth several

legal non-absolute proprietary rights for a limited duration of time (Ouma, 2010) to correct this market inefficiency to ensure that holders of the property rights in these works can control the use and the enjoyment for a certain period (Samuelson, 2017). At the interface of this to create breathing space for socially valuable ends, is the ‘Three-Step-Test.

### **2.5.1 Application of the ‘Three-Step-Test’**

To one end the ‘Three-Step-Test’ ensures that the L&Es extended to exploitation and enjoyment of intellectual works by the national laws do not encroach upon proprietary holders’ rights (Geiger, Gervais, & Senftleben, 2013). On the other end, scholars like Geiger et al., (2013) and Samuelson (2017) observe that the ‘Three-Step-Test’ is intended to serve as a flexible balancing tool offering national policymakers sufficient breathing space to satisfy economic, social, and cultural needs. In other words, it is a control mechanism applied in specific cases to safeguard the delicate balance between grants and reservations of copyright law by setting limits to L&Es on holders' rights. These scholars also point to arguments that it's only an abstract test for courts and that others propose a new interpretation and thus new ways in which the test should be applied. Closely related to this diversity of views on the practical application of the ‘Three-Step-Test’, other scholars have argued that it is only the last two steps that can be practically applied as arguably every L&E is special (Edwald, 2016).

In a nutshell, the test as a policy tool “sets limits to limitations [and exceptions] on exclusive rights” (Senftleben, 2004) and allows limitations in certain special cases; that do not conflict with the normal exploitation of the work; and that do not unreasonably prejudice the legitimate interests of the author or right-holder (Schonwetter, 2006).

However, Ricketson (2003) and Schonwetter (2006) claim that neat as this dichotomy may appear there is a conceptual difficulty regarding its proper application. As a consequence of this recognizable vagueness in both interpretation and application, Ricketson (2003) and Griffiths, (2009) conclude that matter needs further examination.

## **2.6 The ‘Three-Step-Test’ and policy formulation**

Gervais(2008) asserts that as a result of the paradigmatic nature of the ‘Three-Step-Test’ which is a unit in the copyright system that normatively seeks to balance between protection and access, the policy focus is not whether a technical restricted act (reproduction, adaptation, communication, etc.) has taken place, but: (a) whether revenue will be (demonstrably) lost because of lost (normal, i.e. reasonably expected) commercial transactions; and (b) whether the loss is proportionally justified on public policy grounds. Likewise, Mossoff (2005) observed that the fundamental issue in the policy debate is not legal nor is it political but rather conceptual.

Merges (2011) indicates that optimal policy in the IP field involves more than simply providing a clear set of property rights and then getting the government out of the way. He argues that property right like all rights permits private individuals to bring the power of the state guided by the legal system to bear against other citizens. This gives the state the duty to not only monitor the initial conditions of appropriation but also to track how these rights are assembled and deployed and what consequences -both economic and social- follow from their use in specific settings. To this end, the ‘Three-Step-Test’ brings a self-regulating system.

Therefore, at the intersection of the ‘Three-Step-Test’ and policy is the need to counter the stealing of the fruits of one’s labors or indirectly interfering with the use of the property in a way that one may lose or loses the ability to use, control, or dispose of the values that he has created.

## **2.7 Summary**

The copyright system is grounded in theory to justify the grant, protection, and enforcement. The literature was guided by Locke’s theory of property rights and the personality theory of Hegel. The evolution of the ‘Three-Step-Test’ in the copyright system leaves a debate of what exactly it seeks to do and how it’s interpreted and applied. Questions like is it applied by only policymakers, or courts, or copyright users, or by all remain controversial just like what the appropriate scope of L&Es is. To understand the application of the ‘Three-Step-Test’, the matter needs further examination and hence this study.



## **CHAPTER 3 METHODOLOGY**

### **3.1 Introduction**

This chapter outlines the research design, population and sampling, data collection instruments, pilot study, data collection procedures, analysis and organization of data and ethical considerations, and a summary.

### **3.2 The research design**

This study employed an exploratory case-study research design using a qualitative research approach to address the phenomena under study.

The qualitative research approach was appropriate for the study because it made it possible for the researcher to learn throughout the process and make adjustments upon critical reflection while answering the and how of the research questions. A case study was adopted and a single case was examined because the focus was on describing the phenomena as comprehensively as possible.

### **3.3 Population and sampling**

The unit of study was the elements of the Copyright and Neighbouring Rights Act, 2006 of Uganda. To maximize the possible outcomes of the study, the participants were purposively selected and a snowball sampling technique was used.

To this end, long-serving government officers at the copyright offices, IP professionals (copyright attorneys), and public policymakers made up the targeted population. The actual number of participants in the sample was determined by the point of data saturation

(Guest, Namey, & Chen, 2020). The eligibility criteria for participants were; that a person has to have three years of experience in the IP industry and IP Policymaking because existing literature shows that the attorneys, IP policymakers, and the courts apply the test and the users of works benefit from the application effect.

### **3.4 Data collection instruments**

Checklists composed of keywords, an open-ended questionnaire, and an interview guide were used for data collection. An interview guide was developed to address the study questions while the open-ended questionnaire on L&Es prepared by the secretariat of the Standing Committee on Copyright and Related Rights (SCCR) at WIPO and endorsed by the member states during the 19<sup>th</sup> session of the SCCR (WIPO, 2010); was adapted to suit the study.

### **3.5 Pilot study**

The interview guide schedule was pretested on IP experts to ensure conformity to Gill, Stewart, Treasure, & Chadwick's (2008) observation, that questions should be easy to understand, focused open-ended, and not multi-dimensional. All necessary amendments were incorporated, the schedule was once more sent to the same experts for previewing, and consequently, the schedule was given its final shape and made ready for use. The questionnaire was not pretested because it had been substantively reviewed at the 18<sup>th</sup> and 19<sup>th</sup> sessions of the SCCR (WIPO, 2010).

### **3.6 Data collection procedures**

The research data was collected sequentially. First, the Copyright and Related Rights Act, 2006 was surveyed through desk research using the adapted questionnaire. Thereafter, key informant interviews were conducted with the participants in a follow-up manner to supplement data already gathered from the documents.

This allowed the researcher to ask follow-up questions and gather deeper knowledge of the phenomena under study (Gill, Stewart, Treasure, & Chadwick, 2008; David & Sutton, 2010). When the data saturation point was reached, the researcher ceased data collection.

### **3.7 Analysis and organization of data**

Logical and analytical reasoning was used to examine each component of the study. The ensuing qualitative data were resolved and analyzed manually by the researcher and not with qualitative data analysis software. This was after due consideration of several factors such as the type and amount of data the researcher needed to analyze, and the time required to master the software.

An iteration of content analysis, narrative analysis, and framework analysis was done to read and revise the qualitative data as it emerged. During the content analysis of the data, the researcher categorized, classified, summarized, and tabulated the data. Under the narrative analysis, the researcher reformulated the stories presented by the key informants taking into account the context of each case and different experiences of each key

informant. While during the framework analysis the researcher familiarized, identified, coded, charted, mapped, and interpreted the data.

The findings were presented according to the study objectives and in close reference to the Africa University Board-approved graduate studies regulations 2014 and revised in October 2016.

### **3.8 Ethical consideration**

Mantzorou, et al., (2011) opinionates that ethics concern what is wrong and what is right when conducting research. To this end, all researchers, regardless of research designs, sampling, techniques, and choice of methods, are subject to ethical considerations (Creswell J. W., 2014 ).

#### **3.8.1 Before conducting the study**

The researcher through due process obtained clearance from Africa University Research Ethics Committee (AUREC) under approval number AUREC1868/21. There was no need for site approvals.

#### **3.8.2 Beginning the study**

The researcher contacted the targeted participants and sought their voluntary consent to participate in the study (Creswell & Creswell, 2018). A triangulation of theories and research methods was employed to ensure the validity and reliability of the data collected and the credibility of the findings (Noble & Heale, 2019).

### **3.8.3 Collecting the data**

To ensure trustworthiness, the researcher rigorously adhered to procedures outlined by Yıldırım & Şimşek, (2011). The researcher ensured that the interview process followed the stated interview protocol (Creswell & Creswell, 2018). Audits were conducted to determine whether mistakes were made in the data collection before analyzing the data (Marczyk, DeMatteo, & Festinger, 2005).

### **3.8.4 Analyzing data, reporting, sharing, and storing data**

The researcher ensured that multiple perspectives and emerging contrary findings were reported in cases where such came up; composite stories were used to conceal identity; the data collected and the tools used will be stored for 5years (Creswell & Creswell, 2018).

## **3.9 Summary**

The study applied an exploratory case-study research design using a qualitative research approach, the sample was selected using non-probabilistic techniques and the size was determined by data saturation.

## **CHAPTER 4 DATA PRESENTATION, ANALYSIS, AND INTERPRETATION**

### **4.1 Introduction**

This Chapter presents research findings, the analysis, and interpretation of these findings and presents a summary of both the findings and related discussions.

#### **4.1.1 Data sources, participants, and presentation approach**

This case study aimed to philosophically explore and elucidate the application of the ‘Three-Step-Test’ in the copyright and neighbouring rights and its policy implications to the copyright system in Uganda in attempts to strike a balance between the increasingly complex interests of copyright holders and those of others in copyrighted works.

Thirteen (13) potential key informants were identified to have met the eligibility criteria set in the methodology chapter. All of them were requested to voluntarily participate in the study and fortunately, all accepted. Probably due to the complexity and shallowness of the matter under discussion, the point of data saturation point was reached after interviewing 7 key informants thus data from only them were considered for the study.

### **4.2 Data Presentation and Analysis**

The presentation and analysis in the section were done objective by objective and question by question using the major themes that emerged as the data was being resolved.

#### **4.2.1 The scope and classification of L&Es in the Act**

The findings show that the Act has several L&Es which extend to different copyright law aspects including but not limited to exclusive rights conferred to authors, or the holders of the copyright or their successor in title with or without death, or their agents; and to other persons such as the performers, producers of sound recording and audio-visual and broadcasting companies for their auxiliary role upon satisfying certain conditions.

##### **4.2.1.1 The current scope of exceptions to copyright in the Act.**

The findings from the survey of the Act reveal that the Act provides for general principles to copyright short of which may amount to copyright liability, and the number of exceptions to such copyright liability through the ordination of rights, ownership, exploitation, and enforcement of these rights are specified. They also show that these multifaceted exceptions are created in terms of different situations and circumstances and their scope is defined by way of or use/application of phrases, clauses, and/or words like *“in course of employment by another person”*, *“on commission by another person or body”*, *“under the direction or control of the government or a prescribed international body”*, *“assignment of license”*, *“transfer of a copyright”*, *“remuneration”*, *“contracts”*, *“unless”*, *“but”*, *“except”*, *“without”*, *“exceptional”* or a combination of words such *“otherwise than”* and *“unless otherwise”* to the different elements of copyright.

#### **4.2.1.1.1 Exceptions in the Act created by the use of the word “except”**

The survey findings indicated that the word “*except*” is mostly used to create exceptions in form of situations/circumstances where copyright cannot be enforced that is to say copyright principles are momentarily frozen or inoperative.

The analysis of the findings shows that in the Act, ideally all forms of exploitation or/and substantive copying/reproduction of one’s work without their authorization - except in situations of incidental or accidental reporting of current events by means of media or other means as highlighted in Section 10(1)(a) and Section 15(g); except in circumstances where it’s not practicable to do so as pointed out in Section 10(1)(b) Section 23(1)(b) and Section 27(b); except for ephemeral recoding by the broadcasting company Section 16(1) subject to Section 16(2-6); except in situations where the broadcasting or communication is made from a previously authorized fixation or the transmission has been authorized by a broadcasting company that transmitted the first performer as highlighted in Section 22(1)(b)(i-ii) and except circumstances where the fixation used to make the broadcast is made without authorization; or the broadcast is initially fixed in accordance with the provisions of this Act but the reproduction is made for purposes other than those specified as pointed out in Section 32(c); - would likely amount to infringements.

Findings also revealed that “*except*” creates exceptions to the ownership and ability to enforce copyright in uses/acts that would ideally not call for any enforcement. Results show that in the Act, moral rights are not assignable to any person, however, the use of the word “*except*” in Section 10(3) and Section 23(2) creates an exception to this by providing that moral rights can be assigned to any person for purposes of enforcing them.



They also show that in Section 34(b), the word “except”, makes it possible for the holder(s) of neighbouring rights to enforce their rights where more than short excerpts of performance, sound recording or audio-visual performance fixation or broadcast are used in reporting of the current event(s).

#### **4.2.1.1.2 Exceptions in the Act created by applying “but” clause**

From the survey of the Act, results show that several exceptions to copyright are created by applying “*but*” on the different elements of copyright and that this creates exceptions mostly in form of alternatives. Further, analysis revealed that the alternatives are in the conditions necessary for ownership (Section 14), duration of protection (Section 13(4)), authorization as well to the way copyright is exploited (Section 28(7), 44(3), and 44(6)). Findings also show that in some cases the “but” created exceptions are used to supplement exceptions in copyright enforcement pointed out in the above section and that this show in Section 32(c)(ii) where reproduction of a broadcast fixation is made for purposes other than those specified but the broadcast was initially fixed under the provisions of this Act, a broadcasting company shall not have the right to prohibit the reproduction of such fixation of its broadcast.

The survey findings further indicated that Section 13(4) provides an exception in how the duration of protection can be calculated by pointing out circumstances where the economic rights in the work initially protected from the date of its first publication can then be protected for the much longer-term that is to say protected during the lifetime of the author plus fifty years after the death of that author. That Section 14 provides for an alternative exception to section 4 of the Act - subject to Section 8 which specifies that

work created in exceptional circumstances such as ‘*in the course of employment by another person, ‘on commission by another person or body’ and ‘under the direction or control of the Government or a prescribed international body’*, copyright/economic rights in respect to that work may not vest in the author; - provides that copyright (both economic and moral rights) in an original reduced to material form in whatever method, in general, belongs to the author.

Findings show that section 14 provides for circumstances through which economic rights in the work can belong to a person other than the author through an assignment of license or transfer. Section 14(7) specifies that unless the contrary is indicated in the will, where work is not published before the death of the testator, the economic rights in the work shall, on publication of the work, belong to the person to whom the work is bequeathed. That, section 28(7) advances payment of an equitable remuneration by the user(s) to the producer and the performer as an exception/alternative to the need of acquiring authorization of the producer where a sound recording or audio-visual fixation for commercial advertisement or its reproduction is used for broadcasting or any other form of communication to the public. That, section 44 creates exploitation exceptions by providing for a renewable license in sub-section 3 which, when issued by an agent, the owner cannot impose extra conditions.

#### **4.2.1.1.3 Exceptions in the Act created through the “unless”, “unless otherwise” or “otherwise than” clauses**

The results from the survey revealed that the application of the words “*unless*”, “*unless otherwise*” or “*otherwise than*” to the different aspects of copyright in particular, to

terms/definition of copyright concepts, ownership, exploitation/authorization, and enforcement criteria creates several exceptions to the principles of copyright in form of new guiding conditions to their interpretation (Section 2); to the determination of ownership (Section 8(2)); to the assignment of license or transfer (Section 14(6) & (7)); to fair use (Section 15(1)(e)), to the issuing a license (Section 18(2)), to actions authorized (Section 24), to remuneration (Section 31(1-2)), to civil remedies (Section 45(5)) and infringements (Section 46(1)(a)).

Findings indicated that, in respect to the terms/definitions of copyright concepts and in consideration of the application of “*unless the context otherwise requires*” to the general rule of determining what “*copy*” means, created an exception by specifying conditions to be considered when determining what constitutes a copy in works such as architectural work. Results revealed that Section 2 provided that an object is not a copy of an architectural work unless it is a building or a model. Relatedly, contrary to Section 4 which vests copyright protection in creators, the survey findings indicated that Section 8(2) specifies that where work is created within the stipulated schedule of the work of an employee and under the direction or control of the Government or a prescribed international body, the copyright in respect of that work shall vest in the Government or international body unless agreed otherwise.

Deductible from this is that the resulting exceptions from the application of “*unless*” in regards to the definition of copyright terms/concepts and the conditions of the assignment of license or transfer, fair use, issuing a license, actions authorized, and remuneration broadly relate to copyright exploitation/authorization exceptions. While the application of

words such as “*unless*”, “*unless otherwise*” or “*otherwise than*” to elements of civil remedies and situations of infringement creates several copyright enforcement exceptions.

#### **4.2.1.2 The current scope of limitations to copyright in the Act**

In as much as the expiry of the term of protection and existence of the economic rights subject to exceptions to some elements of copyright, limit the extent and the possibility to which such rights can be enforced. The survey findings reveal that like the exceptions, limitations moderate how much the copyright holders and others can do with a given piece of work in Uganda. The analysis shows that there are several limitations to the different aspects of copyright and/or copyright-protected works in Uganda. That is to say, how much one can do something with such rights and/or copyright-protected works, or how much one is unable to do something with such protected works and/or rights while they (protection and/or rights) still subsist.

The findings, also indicated that broadly the scope of these limitations embedded into Uganda’s mixed system of L&Es can be divided into two and defined by limitations that exist on the side of right holders and those on the side of others (users and administrators of these rights). Analysis of the findings revealed that these are multidimensional depending on the purpose and character of the use, nature of the protected work, the portion used concerning the protected work as a whole, and effect of the use upon the potential market for the value of protected works.

The thematic analysis of the findings divulges that in the Act, on the side of right holders, limitations are mainly in form of restrictions on the exclusive right to consent/authorize other persons to make a derivative work, reproduce, fix, duplicate, extract, imitate, import,

perform, broadcast, communicate, distribute or make available to the public the original or copies of the work through sale or other means of transfer of ownership into Uganda and in form of restrictions on enforcement of exclusive rights in cases where other persons carryout/engage in such acts without the right holder(s)' consent/authorization. While on the side of others, limitations are mainly in form of restrictions to the exploitation of the protected works with or without the right holders' consent/authorization from the right holder(s) and restrictions to copyright liability directed to them.

#### **4.2.1.2.1 Limitations in the Act on the side of the rights holders**

The survey findings revealed that in the Act, limitations to copyright and neighbouring rights on the rights holders side come dressed as restrictions to their exclusive rights to authorize different forms of exploitation and restrictions to their ability to enforce these rights in given circumstances where others exploit such works without their consent or authorization. Findings also showed that these restricting conditions, situations, or circumstances defined the scope of limitations on the side of the right holders in the Act. That these limitations presented themselves mainly with words/phrases such as “*without*” in section 32(1(c) (i)), “fair use of work protected by copyright” in Section 15, and direct use of the term limitation in section 34.

In regards to the restrictions to the right holders' exclusive rights to authorize different forms of exploitation, the findings showed that the broadcasting company's right to authorize or prohibit the reproduction of a fixation of its broadcast is restricted by the condition which necessitates that the fixation used to make the broadcast should be made with authorization from the rights owner. That, in such circumstances and without such

authorization as illustrated in section 32(1)(c) (i)), a broadcast company has no right to authorize or prohibit the reproduction of a fixation of its broadcast. Relatedly, findings further revealed that, the Act in section 15, 34, and 46 as highlighted in the table below- provides for another limitation in form of restrictions to the right holders' ability to enforce their rights in limited circumstances where others use works protected by copyright without their consent or authorization which is evaluated on four factors such the purpose and character of the use(whether it is a commercial nature or for non-profit), nature of the protected work, amount and substantiality of the portion used in relation to the protected work as a whole; and the effect of the use upon the potential market for the value of the protected work.

**Table 1: Limitations in the Copyright and Neighbouring Act, 2006 of Uganda on the side of the rights holders**

<b>Purpose and character of the use</b>	<b>Nature of the protected work</b>	<b>Amount and substantiality of the portion used in relation to the protected work as a whole</b>	<b>Effect of the use upon the potential market for the value of the protected work</b>	<b>Section of the Act</b>
Private personal use only	The production, translation, adaptation, arrangement, or other transformation of the work	No qualitative or quantitative limits specified	Not specified	15(1)(a); 34(a); 46(1(a))
Quotation	Published work, Performance, Sound recording, Audio-visual fixation or Fixation or Broadcast	To extent of use should not exceed what is justified for the purpose of the work in which the quotation is used	Open (in so far as the use is Compatible with fair use)	15(1)(b); 34(d)

<b>Purpose and character of the use</b>	<b>Nature of the protected work</b>	<b>Amount and substantiality of the portion used in relation to the protected work as a whole</b>	<b>Effect of the use upon the potential market for the value of the protected work</b>	<b>Section of the Act</b>
		Or Short excerpts of a performance, sound recording, audio-visual fixation or fixation or Broadcast, which is justified by the informative purpose of the quotations.		
Educational purposes /Teaching purposes	Published work or Any other format of work	To the extent justified for the purpose by way of illustration in a publication, broadcast or sound or visual recording	Open (in so far as the use is compatible with fair practice)	15(1)(c); 15(1)(d); 15(1)(k); 34(c)
Reporting on current events or information	Any work that can be seen or heard	To the extent justified for the purpose when reporting on current events or No more than short excerpts of performance, sound recording, or audiovisual performance fixation or broadcast are used	Not specified	15(1)(f); 34(b); 15(1)(h);
For the public library, a non-commercial documentation center, a	Any literary, artistic or scientific work	Open provided the reproduction and the copies made do not conflict with the normal	Open provided the reproduction and the copies made do not conflict with the normal	15(1)(j)

<b>Purpose and character of the use</b>	<b>Nature of the protected work</b>	<b>Amount and substantiality of the portion used in relation to the protected work as a whole</b>	<b>Effect of the use upon the potential market for the value of the protected work</b>	<b>Section of the Act</b>
scientific institution or an educational institute		exploitation of the work reproduced and do not unreasonably affect the right of the author in the work;	exploitation of the work reproduced and do not unreasonably affect the right of the author in the work;	

Source: Analyzed Primary Qualitative data collected from the survey of the Act by the Researcher

The table indicates that these manifest significantly in Section 15 and their scope sketches as far as reproductions for the public library, a non-commercial documentation center, a scientific institution, or an educational institute; reproduction and communication to the public when reporting on current events or information; work used for educational purposes/teaching purposes; to quotation and private personal use only.

The findings analysis also revealed that where the copyright owner assigns or transfers or bequeath his or her economic rights in a copyright to another person in a whole whether by oral or written means or inferred from the conduct or circumstances as provided in Section 14, their economic rights in the piece(s) of work in question shall be considered to have exhausted and the ability to call the infringement card shall be restricted to cases of contravening of their moral rights only.



#### **4.2.1.2.2 Limitations in the Act on the side of the “others”**

The findings indicated that; the scope of limitations to copyright in the Act on the side of the “others” is wider than for those on the side of the right holders and sketch to several aspects of copyright exploitation. That these are, restrictions on the assignment of license or transfer of a copyright as in Section 14(5-6) subject to the guidance provided in Section 18 on the scope and condition of non-exclusive licence, the limits in Section 19 on the conditions for a non-exclusive licence to translate published work or text of an audio-visual fixation - as required by section 44 and where applicable as per section 35,36,37 and 38 specifying what a contract shall look like; restrictions on actions authorized without a specific contract provision as specified in section 24; and restrictions from who to get authorization in instances of co-performance as provided in 25; restrictions on the reproduction, distribution or making available to the public a sound recording or audio-visual fixation as specified in Section 28(5) and defined in Section 28(6)- that can be broadly called restrictions to the exploitation of the protected work with or without the right holders consent or authorisation from the right holder(s).

Analysis of the findings revealed that, several fair uses of the protected works as shown in Section 15 and outright limitations on neighbouring rights as indicated in section 34 as well as restriction of rights infringement to situations/circumstances where without a valid transfer, license, assignment or any other authorization required by the Act a person deals with any work or performance contrary to the permitted free use and in particular where that person does or causes or permits another person to override the restrictions to the exploitation of protected works on the side of the other and to use of a piece of work in a manner contravening the moral rights as specified in section 46 can be broadly called

limitations to copyright on the side of others in form of and restrictions to copyright liability directed to them.

Correspondingly, the analysis of the different limitations to copyright demonstrated that on the side of the others in respect to the primary or secondary copyright liability directed to them(‘others’), in Uganda as provided by the Act, offences and penalties are restricted to only persons who without the authorisation of or “valid” licence from the rights owner or their agent overrides the restrictions on the exploitation of the protected work as specified in section 47(1) and 47(7)(b-c); or to those who contravened the producer’s rights in section 47(2); or to the occupier of the premises in question where a work is communicated to the public on the premises of an occupier or by the operation of any apparatus which is provided by or with any consent of the occupier as explained in section 47(3) and section 47(8); or to persons who during trade sell or buy or import any apparatus, article, machine or thing with knowledge it is to be used for making infringing copies of work as specified in section 47(4); or to any person who does any act to make other people believe that he or she is the author or performer of a piece of work as highlight in section 47(6); to persons who without lawful authorisation remove or alter any electronic moral rights information, distribute as indicated in section 47(7)(a).

Furthermore, subject to section 49(2), the results from the examinations of the Act indicated that where the primary or secondary copyright liability is directed to a body of persons or a partnership or other body not being a body corporate, section 49(1) provides that offenses and penalties will be shouldered by every director and secretary of the body or every partner or member.

#### 4.2.2 Classification of the L&Es to copyright in Act

The examination of the Act reveals that it currently provides for a mixed system of L&Es; that is a specific statutory L&Es such as Section 14(1(b), 17, 19(1), and 44(1) all related to licenses, and an open system of L&Es such as fair use in section 15. The analysis of these L&Es identified in section 4.2.1.2 and 4.2.1.3 of this report; shows that L&Es can be broadly classified as per the general aspects/elements of copyright and neighbouring rights impacted on by the institution of the different forms of L&Es. The analysis reveals that this can be into four groups on the aspects of, 1) ownership, or 2) exploitation, or 3) enforcement or 4) liability following an infringement. Findings also revealed that these elements in these groups tend to overlap and can further be disaggregated by who the different L&Es target that is to say either the rights-holder(s) or others. That, others can furthermore be broken down into two groups, that of users and administrators.

**Table 2: Classification of the L&Es to copyright in the Copyright and Neighbouring Rights Act, 2006 of Uganda**

Aspects/elements of copyright and neighbouring rights impacted by L&Es.	Limitations or Exceptions	Who does the L&Es target		
		Rights Holder(s)	Others	
			Users	Administrators
<i>Ownership</i>	Exceptions	8; 10(3); 12; 13(4); 14; 23(2);		all
	Limitations	3; 4; 10; 13; 26; 28(8); 32(2)		all

Aspects/elements of copyright and neighbouring rights impacted by L&Es.	Limitations or Exceptions	Who does the L&Es target		
		Rights Holder(s)	Others	
			Users	Administrators
<i>Exploitation</i>	Exceptions	2; 10(3); 14; 15; 22(1)(b)(i-ii); 23(2); 28(7); 32(c); 34; 44(6)	2; 10(1)(a-b); 14; 15; 16(1); 18(2); 23(1)(b); 24 27(b); 28(7), 31(1-2); 34; 36; 37; 38; 44	all
	Limitations	15; 25; 28(5-6); 32(1(c) (i)); 34	10(2); 12; 14(5-6) ; 15; 18; 19;24; 36; 37; 38; 44	all
<i>Enforcement</i>	Exceptions	2; 8; 10(3); 13; 14; 15; 23(2); 26; 28(7-8); 32(2); 44; 45(5); 46(1)(a)		all
	Limitations	14; 15; 34; 46		all
<i>Liability following infringement</i>	Exceptions			all
	Limitations		47(1); 47(3-4); 47(6-8); 49(2)	all

Source: Analyzed Primary Qualitative data collected from the survey of the Act by the Researcher

From the above classification and disaggregation, on the side of the **rights holder(s)**, the current L&Es fall in all the classification groups except in a group on the aspects of liability following infringement which is currently encompassing only a few limitations to the copyright and neighbouring right liability on the side of users. In other words, the current limitations deal with which kind of users of the protected works cannot be held accountable in instances of copyright and neighboring rights infringement. This implies that the current scope of L&Es in the Act does not encompass exceptions or limitations in

the digital environment terms of statutory safe harbors to a party that can be held liable for copyright infringement of a third party in a digital space, and reverses engineering.

On the side of **others**, the classification indicates that administrators of these rights are targeted by all L&Es in the four groups. This signifies that administrators as per the L&Es continuum, lay on the thin line between access of protected works by the different users and protection for these works and that all L&Es provided for in the Act merge at their interpretation and use. While for the side of users (of protected works), results showed that no ownership and enforcement L&Es are targeting them and that this is because such L&Es are a preserve of the rights-holder(s) even though the administrators oversee them too. Findings also showed that the same applied to the exceptions to liability following an infringement; that the users mostly enjoy and are targeted by L&Es related to exploitation and those related to the liability following an infringement.

#### **4.2.3 The application scope of the ‘Three-Step-Test’ in the Act**

In face of the extent to which the ‘Three-Step-Test’ has been applied in the Act, the survey explored the Act to establish whether the test was applied to all the exclusive rights, where it was applied, the practical aspects of the test, what actions are permissible based on the ‘Three-Step-Test’ and its current scope.

The findings revealed that, the ‘Three-Step-Test’ is not Uganda’s general L&Es provision and that it is only partially applied under the broad fair uses of work protected in section 15 which is the general provision on copyright L&Es in the copyright law of Uganda.

The application is partial in two senses. One, the findings showed that when the ‘Three-Step-Test’ is applied, it manifests in a national statute as a two-step test by no longer requiring for certain special cases but rather requiring that the reproduction and the copies made do not conflict with the normal exploitation of the work reproduced and do not unreasonably affect the right of the author in the work which also signifies a slight change in the technical language used. Two, the findings indicated that the ‘Three-Step-Test’ as applied in the Act only features in Section 15(j) and encompasses only the exclusive right of reproduction of a literary, artistic, or scientific work and not any other exclusive economic right granted by the Act.

From the practical aspect, the comparative analysis of the findings with the different forms of the ‘Three-Step-Test’ in different international treaties, revealed that the current style of the ‘Three-Step-Test’ in the Act is similar to that of the Berne Convention as incorporated in Article 9(2). The findings also showed that in section 15(j), in respect to the application of the ‘Three-Step-Test’, the form of reproduction of the protected works is restricted to a specific and closed group of users and that such reproduction can only be done by either a public library or a scientific institution or an educational institute or a non-commercial documentation center for any purpose or/and any patron uses provided such reproduction and the copies made do not conflict with the normal exploitation of the work reproduced and do not unreasonably affect the right of the author in the work.

#### **4.2.4 The copyright policy landscape of Uganda and the application of the ‘Three-Step-Test’**

This section presents findings on the possible policy implications of the current application scope of ‘Three-Step-Test’ as explored in section 4.2.2 of this report. This section presents the findings and insights from the investigation of some of the possible implications of the application of the ‘Three-Step-Test’ to the copyright policy landscape of Uganda drawn from Key informants.

##### **4.2.4.1 The policy implications of the ‘current’ application scope of the ‘Three-Step-Test’ in the Act**

When the key informants were specifically asked about what the current application scope of the ‘Three-Step-Test’ in the Act implied to the *protection of, access to, and exploitation of protected works* in face of the national policy objectives aimed at promoting research activities and satisfying domestic social, cultural and economic and in terms of costs, consequences, and optionality.

Their responses were mixed. Some of them asserted that the current application scope of the ‘Three-Step-Test’ in the Act has no effect on the current exploitation and protection patterns in the copyright system of Uganda. While others expressed a belief that the scope of application would have better policy effects or results if it was expanded to include all the exclusive rights of the rights holders as the different international treaties currently provide. But the latter also atoned a general agreement with the former category of views that came from key informants that believed that there was no effect by advancing that the current application scope of the ‘Three-Step-Test’ in an open-ended copyright system

such as Uganda's which uses the fair use doctrine, would most likely have no effect on the existing copyright exploitation and protection patterns.

For those that had held that it had no effect on the current exploitation and patterns, results from the analysis of their qualitative data further indicated that they referenced their submission on the current status quo in the copyright system of Uganda which to them is characterized by high levels of piracy and lack of respect for IP rights, copyright and neighbouring rights inclusive. Results also revealed that such key informants also held a belief that in terms of cost and consequences, the reality is that the current 'Three-Step-Test' application scope has no effect to it and that they averred that very many users in Uganda were never mindful of copyright or neighbouring rights provided the copy they got served their intended needs or desires.

In terms of optionality, results for the theme analysis showed that all key informants concurred and indicated that the current legislation despite its insufficiencies it provided enough room for options to consider in administering permissible or enumerated list of uses that don't require authorization. Relatedly, from the theme analysis, it also emerged that a few key informants pointed out that the Act provided several fair use factors one can use to determine whether the use made of a work in any particular case is fair.

As for the determination of policy consequences, it emerged out from the data analysis that most of the key informants remained silent on it indicating that;

*There was no precedent to the best of their knowledge*



While a few that answered suggested that reference should be made to the case-law of Uganda in regards to copyright. Unfortunately, findings from the search on the existing copyright case law in Uganda from the Uganda Legal Information Institute an organization that provides free legal information service provided by the Law Reporting Unit of Uganda indicated that not more than 28 judgments on copyright cases existed in Uganda, and among the 28 cases, only two cases directly explored copyright principles directly related to the ‘Three-Step-Test’. These two cases explored the factors in the fair use doctrine the cases are *Katatumba v Anti-Corruption Coalition Uganda* (Civil Suit-2011/307) [2014] UGCommC 107 (18 August 2014) and *Ssebagala v MTN (U) Ltd & Anor* (Civil Suit-2012/283) [2015] UGCommC 42 (06 March 2015).

Therefore, from the existing copyright case law which bases analysis on fair use, it’s indeterminate whether the current scope of application of the ‘Three-Step-Test’ has verifiable policy consequences which can be found in the case law as suggested by the key informant.

#### **4.2.4.2 The implications of the application of the ‘Three-Step-Test’ to the copyright policy landscape of Uganda.**

When the key informants were specifically asked about what the implications of the application of the ‘Three-Step-Test’ to the copyright policy landscape of Uganda were. The deliberations broadly took a shape of ‘where would the utility effect from the application of the ‘Three-Step-Test’ reside and with whom. All the key informants tackled the question by framing their responses based on their perceived would be utility in the application, while deciding on the different possible implications.

From the analysis of the ensuing data, it emerged that the key informants strongly believed that regardless of whom the utility effect from the application of the ‘Three-Step-Test’ to the copyright policy landscape of Uganda resided. That the context of the application of the ‘Three-Step-Test’ was a major determining factor of the possible implications. A review of the themes generated indicated that their views on the possible implications diverged at the point of considering the ‘context of application’.

The two major views on the issue of context to consider in exploring the possible implications were identified. The analysis of themes under the context of the application, it emerged that the first context of the possible implications was when the application of the test is made to the current policy landscape which is characterized with specific statutory L&Es, an enumerated fair use doctrine, and bits of fair practices/dealings contained in the general fair use doctrine. The other context of the possible implications was when the application of the ‘Three-Step-Test’ is taken to mean that the ‘Three-Step-Test’ is now the sole regulating doctrine of the L&Es in copyright law of Uganda.

The findings are presented using these three major blocks of themes that emerged from the analysis of the qualitative data gathered from the different interviews.

#### **4.2.4.2.1 Where would the utility effect from the application of the ‘Three-Step-Test’ reside and with whom**

From the data analysis, it emerged out that the possible implications anchored on the contention between with whom, the utility and/or the utility effect of the ‘Three-Step-Test’ when applied to the copyright policy landscape of Uganda, it would apply to, and to

whom will it be most relevant to, or put differently whom the effects of the application of such test will be targeting.

The results revealed that some of the key informants contended that the application of the ‘Three-Step-Test’ would serve to the benefit of *anyone*. The results also indicated that these reasoned that following the application, anyone would technically be free to use the protected works in any manner they deemed so fit provided that they were within the limits set by the test.

Results also showed that some departed from this view and asserted that *rights holders* would be the ones to smile about this application since it would institutionally deter anyone from conflicting the economic exploitation of their protected works as well as causing any unreasonable prejudice to their legitimate interests. This group of key informants held that the current requirement in Section 15(1)(j)(ii) of ‘*do not unreasonably affect the right of the author in the work*’ is shallow. They also contended that application of the ‘Three-Step-Test’ as contained in article 13 of the TRIPS agreement by incorporating it in the provisions of the Act would to them be more useful to rights holders than anyone else.

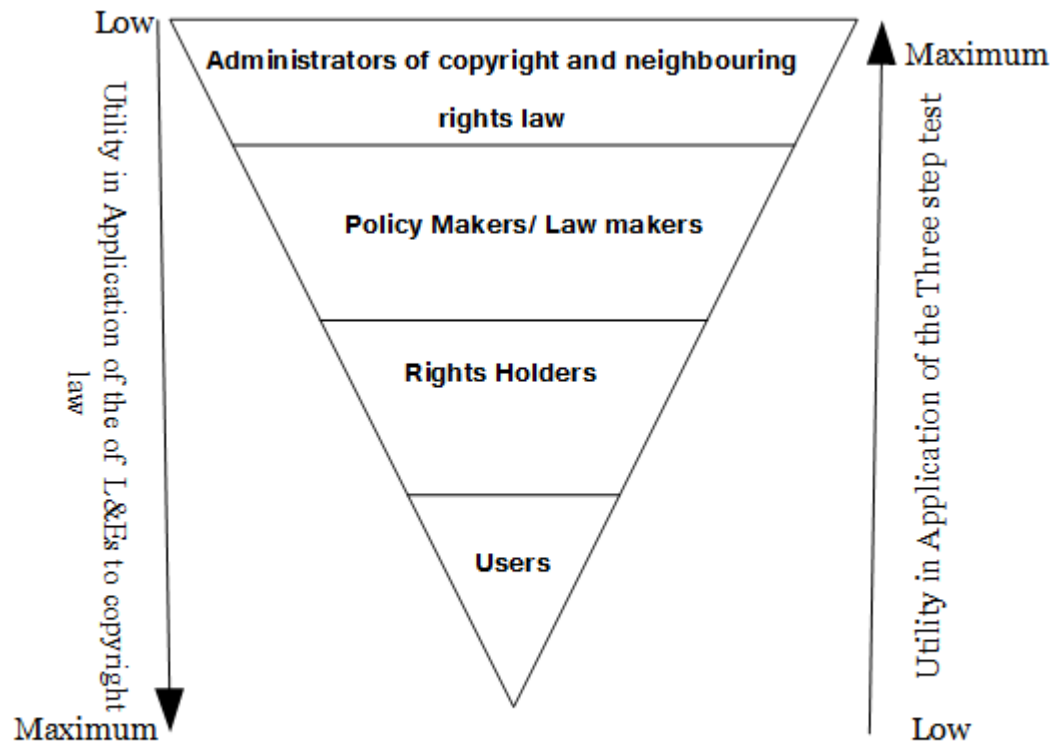
While others indicated that it would be most relevant to administrators of copyright law in Uganda. This group of key informants collectively contended that the application of the ‘Three-Step-Test’ would primarily be useful to the administrators of copyright law due to its openness to secondary interpretation and yet also double-barreled. Very few of the key informants indicated that the ‘Three-Step-Test’ was a just policy tool in their answers.

For all the key informants their answers were a combination of either two or three elements of these general categories pointed out above that is the administrators of copyright, rights holders, policymakers, and anyone using the copyright-protected works. This implies that in their different permutations of these categories, none of them had a complete mention of all of the 4 broad categories identified.

#### **4.2.4.2.1.1 The utility in the effect bore from the application of the ‘Three-Step-Test’**

The utility in the effect bore from the application of the ‘Three-Step-Test’ to the copyright landscape of Uganda was indicated differently according to their combination of categories during the in-depth interviews as shown by the results already presented. The attempt to collectively group these different reported ‘Three-Step-Test’ utility combinations resulted in different hierarchical classifications of the administrators of copyright, rights holders, policymakers, and anyone using the protect work as the four major groups to benefit from such as application. At the intersection of these different possible hierarchical classifications which were based on the reported and perceived utility effect of the application of the ‘Three-Step-Test’ to the copyright landscape of Uganda by the key informants is illustrated below.

**Figure 1: Kasule taxonomy showing the utility in the application of three step test vs. the application of L&Es to copyright law**



Kasule taxonomy showing the utility in the application of the Three step test  
Versus the application of Limitations and/or Exceptions to copyright law

**Source:** Analyzed Primary Qualitative data collected by the Researcher from Key-informant interviews.

The figure represents the analytical converging point of the diverging views of the different key informants interviewed and shows that the expected *utility* in the application of the ‘Three-Step-Test’ is lowest at the users’ level and maximum at the administrator of copyright and neighbouring/related rights’ level and the reverse is true for the application of L&Es in the copyright law. In contrast to this revelation, it was also observed that the *utility effect* from the application of the ‘Three-Step-Test’ resides most with the users who

are the beneficiaries of the ‘Three-Step-Test’ application in terms of the different permissible actions the application creates as L&Es to exclusive copyright and neighbouring rights.

This also suggests that at whichever level in the Kasule taxonomy above, one is, they would enjoy the utility effect from the application of the ‘Three-Step-Test’ and that the utility in any application of either L&Es or the ‘Three-Step-Test’ resides with them at that given level. By implication, therefore, a distinction should be made between *utility in application* and *utility effect from the application*.

#### **4.2.4.2.2 The application of the ‘Three-Step-Test’ and the copyright policy**

##### **landscape of Uganda: Context 1**

This section presents findings on the possible implications when the application of the ‘Three-Step-Test’ is made to the current policy landscape which is characterized with specific statutory L&Es, an enumerated fair use doctrine, and bits of fair practices/dealings contained in the general fair use doctrine.

The investigative exploration focused on issues of ownership (*which encompassed protection of copyright-protected works*), exploitation (*which encompassed protection of, and access to copyright-protected works*), enforcement, and copyright liability issues in the context of policies promoting research activities and satisfying domestic social, cultural and economic needs. As a result, several mixed responses were noted during the analysis of the data obtained and equally several themes emerged. However, only the major revelations from these themes are presented.

When the different themes which related to this context were analyzed it emerged that almost all of the key informants held that the extended application of the three steps to all the economic rights that were provided for in the Act would have no practical potential to affect any of the above aspects of the copyright system. These key informants asserted that this was exclusively due to a mix of well-documented insufficiencies in Uganda's IP system which they cited out as the existence of inadequate IP awareness, limited access to and availability of quality IP services, and substantial costs associated. They also observed that due to these factors that act as real impediments to the use of L&Es for any intended purpose, a change such as this in the national regulation of L&Es to copyright cannot have a verifiable practical effect.

Results showed that relatedly, some other key informants held that;

Uganda currently lacks a sufficient case law to evaluate the current copyright legislation deficiency from a legal perspective and she (Uganda) is already faced with enforcement challenges due to a deliberate lack of respect for IP copyright inclusive amongst the population who are the users of the protected works. Key informant No. 3

Based on this observation the key informant argued that they strongly believed that even if the application of the 'Three-Step-Test' was extended to all exclusive rights one would not currently tell the probable effect to the exploitation patterns of copyright-protected works of such action with the current status quo in the copyright system.

Results from the analysis also indicated one of the key informants informatively explored the possibility in his response and express a strong belief that the application of the 'Three-

Step-Test’ to the copyright policy landscape of Uganda by way of extending its scope to cover all the copyright exclusive rights would at least, in theory, have an effect on how unauthorized exploitations of copyright-protected works in Uganda can be evaluated against the legitimacy of the rights holders action to enforce his or her rights. To him, this would consequently also affect what unauthorized exploitations can be enforced.

A further review of this theme also indicated this key informant also believed that such extension can make the current policy landscape one of the most outward-looking in the world. According to him the copyright policy landscape of Uganda would have about four (4) layers of check and balance. Which he identifies as

A layer of the specific statutory limitations and exception, a layer of fair use, a layer on fair dealings/practice, and a layer of the ‘Three-Step-Test’ all in one. Where both fair use and ‘Three-Step-Test’ are fully maximized. Key informant No.5

He observes that following the extended application of the three steps the policy landscape would be characterized by dual open-ended copyright legislation as it would have both the statutory four open-ended factors and as well as the two steps from the application of the ‘Three-Step-Test’ in the copyright Act. All available for use, perhaps in a complementary manner in the determination of the deemed qualitative and quantitative limits in any unauthorized exploitation or contended uses.

Findings showed that this key informant further notes that with such provisions all in one, by implication the judges would have to choose any one of the two to decide whether or not a particular use or unauthorized exploitation is permissible or not; or the addition of



the ‘Three-Step-Test’ as a general provision on copyright L&Es would require that there may be a clause in the Copyright Act that states such as...

‘.....works not enumerated in any categories of permissible use or practice may be used in cases where there is no conflict with the normal exploitation of copyrighted works and does not prejudice the legitimate interest of the copyright holder.’ As stated by Key informant No.5.

Results further indicated that even though he was optimistic about the possible and resultant openness in the copyright system, he shared the pessimistic view that the extended application of the ‘Three-Step-Test’ in the current copyright system with its prevailing status present; such extension would not have any verifiable effect until perhaps tested in the courts of law.

Findings also indicated that few of the key informants held that the extended application of the ‘Three-Step-Test’ would technically amount to no effect. They asserted that openness offered by the fair use factors provided for in the Act is the same openness the application of the ‘Three-Step-Test’ would offer when incorporated in the Act.

#### **4.2.4.2.3 The application of the ‘Three-Step-Test’ and the copyright policy**

##### **landscape of Uganda: Context 2**

When the same investigative exploration criteria like the one applied in the previous sub-section in context 1 in section 4.2.3.2.2 of this report, but eliciting responses in consideration to the application of the ‘Three-Step-Test’ as the sole regulating doctrine of the L&Es in copyright law of Uganda. All the key informants held onto their previous

submissions stating that the same would apply. Results from the data analysis showed that they implied that even where the application of the ‘Three-Step-Test’ is taken to mean that it is now the sole regulating doctrine of the L&Es in copyright law of Uganda no practical differences in respect to ownership, exploitation, enforcement, and copyright liability issues in the context of policies promoting research activities and satisfying domestic social, cultural and economic needs for the same reasons highlighted out in context 1 above.

Key informant No.5 noted that as a difference this would amount perhaps to a single layer of check and balance in the copyright system. But the openness would substantially remain the same because the markup is related to that of the four fair use statutory factors applied in the determination of the fair use in a given use.

### **4.3 Discussions and Interpretation**

The data presented and analyzed in the above sections, tables and figure provided answers to the research questions. The discussions and interpretations of the results in the following sections provides insight into the results of this research in accordance with the aim and specific research objectives. The aim of the study was to philosophically explore and elucidate the application of the ‘Three-Step-Test’ and its policy implications to the copyright system in Uganda in attempts to strike a balance between the increasingly complex interests of copyright holders and those of others in copyrighted works. The first objective was to review and classify the current scope of limitations and exceptions to copyright as the proxy indicator of the application of ‘Three-Step-Test’ in the Act, the second was to examine the application scope of the ‘Three-Step-Test’ in the Act, and its policy implications, the third objective was to investigate the implication of the

application of the ‘Three-Step-Test’ to the copyright policy landscape of Uganda. These discussions hereby provide the grounds for the conclusions, implications and recommendations made in chapter 5 of this research.

The theory generated from the exploration of the study objectives shows in attempts to strike a balance between the increasingly complex interests of copyright holders and those of others in copyrighted works, the L&Es to copyright in Uganda extend to not only the exclusive rights conferred to the right holders but to all aspects of copyright and neighbouring rights. This means that in the face of the study objectives and the findings, L&Es that strike the sought balance have to sketch to issues dealing with ownership, exploitation, enforcement and liability following an infringement. This will inevitably influence the scope of the L&Es.

From the results it’s deducible that application of the ‘Three-Step-Test’ in the Act sets limits to the scope of L&Es by confining them to exclusive rights of the right holders in Uganda’s case to the right of reproduction. Whereby the language of application of ‘Three-Step-Test’ in the Act requires that the reproduction done by either a public library or a scientific institution or an educational institute or a non-commercial documentation center and the copies made do not conflict with the normal exploitation of the work reproduced and do not unreasonably affect the right of the author in the work. The policy implication from this is that the copyright exceptions from the application of the ‘Three-Step-Test’ in the Act are enjoyed and applicable to a closed group of persons.

Furthermore, the theory generated from the study findings suggests that the utility effect in the application of the ‘Three-Step-Test’ in the Act is the creation of L&Es which are

enjoyed most by the users and that the utility in the application of the ‘Three-Step-Test’ in the Act lies with the policy makers and the administrators of the copyright law since this offers a valuable tool to balance the different interests of the Rights holders and others. With respect to the current copyright land scape the effect its application remains highly contextual and currently unverifiable.

#### **4.4 Summary**

This chapter presented and discussed findings to the first three study questions. From this presentation it is observed that after the different statutory limits to the subsistence of enforceable copyright in Uganda are overcome the Act provides for several L&Es in the current mixed system of L&Es which are not confined to only exclusive rights but wide-reaching to all elements/aspects of Copyright law.

That, the current scope of exceptions in the Act, is multifaceted and defined by the different situations and circumstances created by way of or use/application of phrases, clauses and/or words like “in course of employment by another person”, “on commission by another person or body”, “under the direction or control of the government or a prescribed international body”, “assignment of license”, “transfer of a copyright”, remuneration, contracts, unless, but, except, without, exceptional or a combination of words such otherwise than and unless otherwise to the different elements of copyright.

That, the limitations to copyright have a dual effect by moderating how much the copyright holders and others can do with a given piece of work in Uganda; That their scope as embedded into Uganda’s mixed system of L&Es is divided into two and is defined by limitations that exist on the side of the right holders and those on the side of

the others (users and administrators of these rights) which are multidimensional depending on the purpose and character of the use, nature of the protected work, the portion used in relation to the protected work as a whole, and the effect of the use upon the potential market for the value of the protected works.

That on the side of the right holders, the limitations to copyright are mainly inform of restrictions on the exclusive right to consent/authorize other persons to make a derivative work, reproduce, fix, duplicate, extract, imitate, import, perform, broadcast, communicate, distribute or make available to the public the original or copies of the work through sale or other means of transfer of ownership into Uganda and in form of restrictions to the enforcement of these exclusive rights in cases where other persons carryout/engage in such acts without consent/authorization from the right holder(s). While on the side of others the limitations are mainly in form of restrictions to the exploitation of the protected work with or without the right holders' consent or authorization from the right holder(s) and restrictions to copyright liability directed to them.

That, the L&Es in the Act, can be classified into four groups, 1) on the aspects of ownership, or 2) on the aspects of exploitation, or 3) on the aspects of enforcement or 4) on the aspects of liability following an infringement and that elements of these groups tend to overlap and can further be disaggregated by who the different L&Es target that is to say either the rights-holder(s) or others. Where others can furthermore be broken down into two groups, that of users and that of administrators.

That, the application of the 'Three-Step-Test' in that copyright statute of Uganda has only been partial under the broad fair uses of protected work provision in section 15 of the Act

which is the general copyright L&Es provision in the copyright law of Uganda taking a style similar to that of article 9(2) of the Berne Convention though the form of reproduction of the protected works is restricted to a specific and closed group of users.

That, the [policy] implications of the application of the ‘Three-Step-Test’ to the copyright policy landscape of Uganda are contextual and the effect differed from context to context and that exploration of the questions where the utility in the application of three steps is and where the utility effect from the application is; provided insights to answering the question of what are the [policy] implications in the application of the three steps in Uganda would be in any of the contexts.

## **CHAPTER 5 SUMMARY, CONCLUSIONS AND RECOMMENDATIONS**

### **5.1 Introduction**

This chapter presents the discussions on the major findings, conclusions, implications, and recommendations, and potential areas of further research.

### **5.2 Discussion**

This section presented based on the study questions contrasts, compares and interprets the key study findings with the existing literature.

#### **5.2.1 The current scope of L&Es to copyright- the proxy indicator of the application of ‘Three-Step-Test’ in the Act, and their classification**

The findings established that the scope of L&Es to copyright generally encompasses all aspects of copyright and neighbouring rights as incorporated in the Act and they are not limited to only aspects of exclusive rights. Except where and when a consideration of the three test step test is made. This inline with the TRIPS agreement since the test as per Article 13 of TRIPS obliges member states to confine limitations or exceptions to exclusive rights when it comes to the application of the test.

The findings also indicated that L&Es are multilayered. This understanding of L&Es as a multilayered phenomenon differs from the bracket consideration of L&Es which does not make the express distinction of which L&Es it refers to. The question that remains answered in the existing L&Es copyright text is when they refer to L&Es do they mean the general L&E to all aspects of copyright law that includes L&Es to exclusive rights or by use of L&Es they mean the L&Es only specific to exclusive rights in the protected

works. These findings contradict the existing common tendency and understanding expressed in several copyright texts such as Seng (2016; 2019), of considering L&Es to copyright as a unit that cannot be broken into pieces.

This inventive classification of the L&Es in the national statute also contradicts with Gervais', (2008) suggested five-point checklist onto which the categorization of L&Es may be done that is 1) by type of users; 2) by type of use; 3) by type of country; 4) by type of authors; and finally, by type of work. In as much as this inventive classification is not in direct harmony with this categorization, it can be argued that the classification of L&Es by the different aspects of copyright as presented in the national statute is a high/first-order classification that can absorb such categorization as a second-level classification.

Nevertheless, these study findings and the apparent contradiction and conversion of certain elements of the school of thought resonate directly with the existing school of thought advanced by Griffiths (2009), that the appropriate scope and perhaps the understanding of L&Es in copyright law is a controversial issue.

### **5.2.2 The extent of application of the 'Three-Step-Test' in the Act**

The findings in section 4.2.3.2 of this report which indicated the 'Three-Step-Test' took a shape of two step test when applied in the national copyright legislation are consistent with Edwald (2016) view that it is only the last two steps of the 'Three-Step-Test' that can be practically applied as arguably every L&E is special. However, the evaluation of the two-step test as presented in the Act in respect to the different international copyright-



related instruments also indicated that it regains the “certain special case” step to again become a ‘Three-Step-Test’.

This is because section 15(j) where it’s applied is for a clearly defined purpose and justified by public policy on the promotion of educational activities that are an individual and limited application or purpose and this application is equally narrow in a quantitative as well as a qualitative sense. That is to say, the extent to which the ‘Three-Step-Test’ is applied in the Act is at face value consistent with all the international standard of the ‘Three-Step-Test’ as per the 2000 WTO panel decision concerning section 110(5) of the US Copyright Act. ‘Three-Step-Test’ is a standard that obliges states like Uganda, to confine to L&Es 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 author/right holders and not all aspects of copyright law. But at the same time leaving the states with the autonomy to decide which exclusive rights to consider.

The deduction from the above is that this requirement limits the scope of the application of the ‘Three-Step-Test’ to the L&Es in copyright law that deal specifically with the exclusive rights. This however does not limit the possible scope of L&Es in the national statutes of copyright and neighbor rights. If anything it only limits the scope of application of the ‘Three-Step-Test’ to L&Es on exclusive rights and by this its no surprise that some countries such as the Philippines, [just like Uganda] have the ‘Three-Step-Test’ incorporated in the national statutes on top of the fair use principles (Seng, 2009) and others like South Korea recently amended their copyright law to incorporate the ‘Three-Step-Test’ with fair use clause (Cho, 2013).

While according to renowned ‘Three-Step-Test’ scholar at VU University Amsterdam, Senfleben (2010) the time was ready ripe close to a decade ago to debate the introduction of fair use doctrine based on the ‘Three-Step-Test’ to seize numerous important opportunities for cultural, social and economic development.

Consistent with this view, the findings indicated that in the copyright Act of Uganda the test is confined to the exclusive right of reproduction [but in a closed manner] in the broad remit of the fair use provision, the confinement of the test to the exclusive right of reproduction regardless of the conditions attached makes it fully compliant with the test as incorporated in Article 9(2) of the Berne convention and partially with all other international treaties that scaled the application of the test to all other exclusive rights limitations or exceptions.

### **5.2.3 The implication of the application of the ‘Three-Step-Test’ to the copyright policy landscape of Uganda**

The findings indicated that the implications of the application of the ‘Three-Step-Test’ to the copyright policy landscape of Uganda ranged from it having no practical effect to having a landmark effect when certain contexts or underlying conditions are eliminated. This finding echoes Merges (2011) claim that optimal policy in the IP field involves more than simply providing a clear set of property rights and then getting the government out of the way.

With the findings indicating that the question of ‘where the utility in and the utility effect from the application of [.....anything such the ‘Three-Step-Test’ ] resides and with whom could substantially help shape and equally frame policy debates on the possible

implications whenever any given context is being considered and that the question has the elasticity to create different insightful scenarios in a single context which can be useful for any policy debate since the perceived utility is not uniform. This line of thought resonates with both Torjman's (2005) contextual assertion and Mossoff's (2005) conceptual argument on public policy for addressing selected public concerns. This question also closely avers to Gervais's (2008) observation that from the policy perspective one oughts to look at how many dollars will be lost and whether a compensation mechanism should be put in place.

Therefore, drawing from a policy perspective and the study findings, the openness in 'Three-Step-Test' to the L&Es concerning exclusive rights [of copyright] in an ideal world provides self-regulating criteria as intoned by Merges (2011), in any functional copyright system. Since the different limitations or exceptions do not extinguish the underlying rights and for that reason they need to be limited in scope, the application of the 'Three-Step-Test' may serve to provide an alternative to public/state regulation of the different forms of copyright and neighbouring rights exploitation of the exclusive rights.

However, the 'Three-Step-Test' alone can be shallow an alternative because self-regulation is rarely completely de-coupled from a public authority. Instead, a public authority is often activated to coagulate self-regulatory measures across the different stages of the policy process. To this end, it can be argued that the test is then more a control and command policy tool than it can be a self-regulatory mechanism when used. Where the command is set at the international level and the control is enforced at the national level.

### 5.3 Conclusions

Based on the study questions, study findings, discussions, and interpretation of key findings in relation to the existing literature, the following can be concluded;

That, the current scope of L&Es to copyright as the proxy indicator of the application of ‘Three-Step-Test’ in the Copyright and Neighboring Rights Act, 2006 of Uganda is shallow but the openness incorporated in the Act by the four statutory factors for determining whether the use made of a work in any particular case is fair use and the open-mindedness by the partial application of the ‘Three-Step-Test’ and fair practices make it out looking in the current digital environment which the Act does not address explicitly.

That, the most comprehensive higher-level classification of the L&Es to copyright at a national level as they are applied in national statutes is a taxonomy that considers the different major aspects of their copyright and neighbouring rights. For example, by making cataloging of L&Es as provided in the national statute by those related to ownership, exploitation, enforcement, and copyright liability following an infringement.

That, in an already open-ended copyright system of L&Es such as those that apply majorly the fair use doctrine in the copyright laws in attempts to set appropriate checks and balances, the subsequent incorporation or scaling of the ‘Three-Step-Test’ might not have any substantial effect in the existing access to and exploitation patterns of the protected works as it would in a closed system other factors kept constant.

## 5.4 Implications

When reference is made to the L&Es to copyright distinction between general L&Es in copyright law and the ‘Three-Step-Test’ style of L&Es which are confined to exclusive rights of the rights holder should be made. Making such a conceptual distinction between the two will contextualize the debate and solve the technical difficulties that arise when two are synonymously used to refer to each other.

The openness in the general system regulating L&Es to the copyright-protected works at a national level can offer a very flexible alternative in copyright law to embrace new developments. However, when it’s about adding another layer of openness in the national copyright system the contextual factors existing in the state in question influence the would-be utility in and the utility effect from the application of such openness.

The Kasule taxonomy showing the utility in the application of the ‘Three-Step-Test’ versus the application of limitations and/or exceptions to copyright suggests that the expected utility in the application of the ‘Three-Step-Test’ is lowest at the users’ level and maximum at the administrator of copyright and neighbouring/related rights’ level and the reverse is true for the application of L&Es in the copyright law. While the **utility effect** from the application of the ‘Three-Step-Test’ resides most with the users who are the beneficiaries of the ‘Three-Step-Test’ application in terms of the different permissible actions the application creates as L&Es to exclusive copyright and neighbouring rights. This implies that it’s the administrators that use the ‘Three-Step-Test’ most and it’s the users that use the resulting limitation and exceptions from that application.

## 5.5 Recommendations

1. When exploring the possible implications of the application of any regulatory mechanism to the proposed L&Es to the exclusive rights of rights holders, the utility nomenclature advanced in the ‘Kasule taxonomy on the utility of application of [.....anything such as the ‘Three-Step-Test’ or the fair use doctrine]’ which seeks to explain the utility in and utility effect from a given application should be used to elucidate different implications.
2. The current national copyright systems should urgently be strengthened to ensure that it’s more vibrant, functional and ready to address the currently unmet needs of the rights holders in regards to the protection of their rights; as well as to address the current need of different L&Es to copyright relevant in the fast-evolving digital environment. Therefore, the development of a well consulted and mapped out comprehensive multi-sectoral national copyright and neighbouring rights protection, commercialization and enforcement strategy which builds on the national intellectual property policy will be required to provide the strategic direction. To enable the development of a strong and inclusive foundation that is necessary to lead a generation the respects and values intellectual property rights such as copyright; that will sustainably and continuously change the current status quo in the protection, commercialization, and enforcement of copyright in Uganda.
3. It is also recommended that only countries with a closed system of L&Es should consider introducing fair use or fair dealing together with the ‘Three-Step-Test’ at the same. While those with enumerated lists of permissible uses should consider introducing a ‘Three-Step-Test’ in a manner such as ‘works not enumerated in

any categories of permissible use or practice may be used in cases where there is no conflict with the normal exploitation of copyrighted works and does not prejudice the legitimate interest of the copyright holder’.

## **5.6 Suggestions for Further Research**

This exploratory research on policy implications from the application of copyright contested concepts such as the ‘Three-Step-Test’ is the first of its kind as there has not been any literature in Uganda and Africa regarding such. The research findings open the discussions on the possible scaling of the application of the ‘Three-Step-Test’ to all exclusive rights in national copyright statutes. A future survey anywhere could consider testing the proposed Kasule taxonomy on the utility of application of in-depth in the context of where the national statutes are either a kind that provides for a limited number of specific statutory limitations or exceptions (i.e is a closed system).

The new conceived Kasule taxonomy on the utility of application of [.....anything such as the ‘Three-Step-Test’ or the fair use doctrine] can also be tested if it can become an evaluation tool for policymakers to decide on which mechanism of L&Es to copyright that can be adopted whenever a state wants to choose the doctrine most application in its context in respect to different policy objectives the copyright system seeks to fulfill.

Further studies can also explore the application of the ‘Three-Step-Test’ outside the copyright legislation perhaps its application in the courts of Uganda.

## References

- Campidoglio, M., Frattolillo, F., & Landolfi, F. (2009). The Copyright Protection Problem: Challenges and Suggestions. *2009 Fourth International Conference on Internet and Web Applications and Services*, (pp. 552-526). doi:10.1109/ICIW.2009.84.
- Cho, J. (2013, 02 28). *NEWLY IMPLEMENTED KOREAN FAIR USE AND THE THREE-STEP TEST*. Retrieved from <https://infojustice.org/archives/28766>
- Christie, A. F., & Wright, R. (2014). A Comparative Analysis of the Three-Step Tests in International Treaties. *Max Planck Institute for Innovation and Competition*, IIC 45: 409-433 DOI 10.1007/s40319-014-0202-2.
- Creswell, J. W. (2014 ). *Research design: qualitative, quantitative, and mixed methods approaches 4th ed*. Thousand Oaks, California: SAGE Publications, Inc.
- Creswell, J. W., & Creswell, J. D. (2018). *Research Design: Qualitative, Quantitative, and Mixed Methods Approaches (Fifth Edition)*. Los Angeles/ London/ Singapore/Washington DC/ Melbourne: SAGE publishers.
- David, M., & Sutton, C. D. (2010). *Social Research An Introduction Second Edition*. SAGE Publications Ltd.
- Drahos, P. (1996). *A Philosophy of Intellectual Property*. Aldershot and Burlington: Dartmouth Publishing Company Limited and Dartmouth Publishing Company.
- Edwald, J. (2016). *The Three-Step Test of International Copyright Law: Is Fair Use the Key to Balancing Interests in the Digital Age?*  
<https://www.semanticscholar.org/paper/The-three-step-test-of-international-copyright-law-Edwald/574c98a4f2bec1c1e3d2a58f533410abd2cae67d>.
- Fischman-Afori, O. (2012). The Evolution of Copyright Law and Inductive Speculations as to its Future. *Journal of Intellectual Property Law*, Volume 19, Issue 2, 233-257.
- Fisher, W. (1987). Retrieved from <https://cyber.harvard.edu/people/tfisher/iptheory.pdf>
- Fometeu, J. (2009). *Study on Limitations and Exceptions for Copyright and Related Rights for Teaching in Africa (SCCR/19/5)*. Geneva: World Intellectual Property Organization.
- Fouka, G., & Mantzorou, M. (2011). What are the Major Ethical Issues in Conducting Research? Is there a Conflict between the Research Ethics and the Nature of Nursing? *Health Science Journal*, 3-14.
- Geiger, C., Gervais, D., & and Senftleben, M. (2013). "The Three-Step Test Revisited: How to Use the Test's Flexibility in National Copyright Law.". *Joint PIJIP/TLS Research Paper Series*, PIJIP Research Paper no. 2013-04.



- Geiger, C., Gervais, D., & Senftleben, M. (2015). Understanding the 'three-step test'. In *International Intellectual Property: A Handbook of Contemporary Research* (pp. 167-189).
- Gervais, D. J. (2008). Making Copyright Whole: A Principled Approach to Copyright Exceptions and Limitations – 5. *University of Ottawa Law & Technology Journal*, Vol. 5, Nos. 1&2, 2008.
- Gill, P., Stewart, K., Treasure, E., & Chadwick, B. (2008). Methods of data collection in Qualitative research: Interviews and Focus groups. *British Dental Journal*, 204: 291-295.
- Goldstein, P. (1998). *International Copyright: Principles, Law, and Practice*. Oxford University Press.
- Goldstein, P. (2003). *Copyright's Highway From Gutenberg to the Celestial Jukebox. Revised Edition*. Stanford, California: Stanford University Press.
- Grant, C., & Osanloo, A. (2014). Understanding, Selecting, and Integrating a Theoretical Framework in Dissertation research: Creating the Blueprint for your 'House'. *Administrative Issues Journal; Connecting Education, Practice and Research*, 12-26 DOI:10.5929/2014.4.2.9.
- Griffiths, J. (2009). THE "THREE-STEP TEST" IN EUROPEAN COPYRIGHT LAW – PROBLEMS AND SOLUTIONS. *Queen Mary School of Law Legal Studies*, The Intellectual Property Quarterly, Forthcoming, Research Paper No. 31/2009 1-23 Available at SSRN: <http://ssrn.com/abstract=1476968>. Retrieved from <http://ssrn.com/abstract=1476968>
- Guest, G., Namey, E., & Chen, M. (2020). A simple method to assess and report thematic saturation in qualitative research. *PLoS ONE*, 15(5): e0232076 DOI:10.1371/journal.pone.0232076.
- Guibault, L. (2002). *Copyright Limitations Contracts. An Analysis of the Contractual Overridability of Limitations on Copyright*. Unpublished Ph.D. thesis submitted to Dalhousie University School of law.
- Hermann, R. M. (2011, 12 21). Retrieved from <https://www.ip-watch.org/2011/12/21/ip-experts-focus-on-3-step-test-in-copyright-debate-way-forward/>
- Hilty, R., Geiger, C., & Griffiths, J. (2008). Towards a Balanced Interpretation of the "Three-step Test" in Copyright law. *European Intellectual Property Review*, (12)489-496.
- Hughes, J. (1988). The Philosophy of Intellectual Property. *77 Georgetown L.J.*, 287, 330-350.
- International Bureau of WIPO. (2004). Chapter 2: Fields of Intellectual Property Protection. In WIPO, *WIPO Intellectual Property Handbook: Policy, Law, and*

- Use (Second Edition)* (Vol. WIPO PUBLICATION NO. 489 (E), pp. 40-67). Geneva: World Intellectual Property Organization (WIPO).
- Kawooya, D., Kakungulu, R., & Akubu, J. (2010). Chapter 9: Uganda. In J. d. Beer, *Access to knowledge in Africa: The role of copyright*. UCT Press in association with the International Development Research Centre, the Shuttleworth Foundation, and the LINK Centre, Graduate School of Public and Development Management (P&DM), University of the Witwatersrand.
- Leval, P. N. (1990). Toward a Fair Use Standard. *Harvard Law Review*, Vol. 103, No.5 (pp.1105-1136).
- Madison, M. J. (2004). A Pattern-Oriented Approach to Fair Use. *William & Mary Law Review*, 1525- 690, <https://scholarship.law.wm.edu/wmlr/vol45/iss4/5>.
- Maftai, J., & Licută, C. V. (2012). Interpretation of Treaties. *ACTA UNIVERSITATIS DANUBIUS (JURIDICA)*, Vol. 8, no. 2/2012.
- Marczyk, G., DeMatteo, D., & Festinger, D. (2005). *Essentials of Research Design and Methodology*. Hoboken, New Jersey: John Wiley & Sons, Inc.
- McLachlan, C. (2005). THE PRINCIPLE OF SYSTEMIC INTEGRATION AND ARTICLE 31(3)(C) OF THE VIENNA CONVENTION. *International and Comparative Law Quarterly*, ICLQvol 54, April 2005 pp 279-320 doi:0.1093/iclq/lei001.
- Merges, R. P. (2011). *Justifying Intellectual Property*. Cambridge, Massachusetts: Harvard University Press.
- Merrill, T. W. (1998). Property and the Right to Exclude. *Nebraska Law Review*, Volume 77 Issue 4 Article 7.
- Michaux, B. (2018). Part II Copyright Limitations and Exceptions Chapter 13 International Report. In I. L. (LIDC), & P. K. Bruce Kilpatrick (Ed.), *Antitrust Analysis of Online Sales Platforms & Copyright Limitations and Exceptions, LIDC Contributions on Antitrust Law, Intellectual Property and Unfair Competition*, (pp. 291-329). Gewerbestrasse: Springer International Publishing AG.
- Ministry of Justice and Constitutional Affairs (MoJCA). (2019). *National Intellectual Property Policy*. Kampala: The Republic of Uganda.
- Moore, A. D. (2003). Intellectual Property: Theory, Privilege, and Pragmatism. *Canadian Journal of Law & Jurisprudence*, 16(2) pp.191-216 DOI: 10.1017/S0841820900003696.
- Mossoff, A. (2005). Is Copyright Property? *San Diego Law Review*, 42, 29-44.

- Noble, H., & Heale, R. (2019). Triangulation in research, with examples. *Evid Based Nurs*, 22(3): 67-68 DOI: 10.1136/ebnurs-2019-103145.
- Nozick, R. (1974). *Anarchy, State, and Utopia*. New York: Basic Books.
- Ouma, M. N. (2010). *Enforcement of copyright in the music industry: A critical analysis of the legal and institutional framework on enforcement in Sub Saharan Africa*. Queen Mary University of London.
- Proudhon, P. (1994). *What is property? An inquiry into the principles of Right and Government, D.kelly and B.Smith (Trans)*. New York: Cambridge University Press.
- Ricketson, S. (2003). Standing Committee on Copyright and Related Rights Ninth Session Geneva June 23 to 27, 2003. *study on Limitations and Exceptions of Copyright and Related Rights in the Digital Environment*. Geneva: WIPO.
- Saleena, K. B. (2011). *Exceptions and Limitations to Intellectual Property Rights with special reference to Patent and Copyright law*. Unpublished Thesis Submitted to Cochin University of Science and Technology for the award of the degree of Doctor of Philosophy in the Faculty of Law.
- Samuelson, P. (2017). Chapter 1: Justifications for copyright limitations and exceptions. In R. L. Okediji, *Copyright law in age of Limitations and Exceptions* (pp. 12-59). Cambridge University Press <https://doi.org/10.1017/9781316450901.003>.
- Schonwetter, T. (2006, 7 31). *The three-step test within the copyright system*. Retrieved from <http://pcf4.dec.uwi.edu/viewpaper.php?id=58&print=1>
- Schroeder, J. L. (2006). Unnatural Rights: Hegel and Intellectual Property. *University of Miami Law Review*, 60(453), 453-503.
- Senftleben, M. (2004). *Copyright, Limitations, and the Three-step test. An Analysis of the Three-Step Test in International and EC Copyright Law*. Den Haag: Kluwer Law International.
- Senftleben, M. (2010). The International Three-Step Test: A Model Provision for EC Fair Use Legislation. *JIPITEC*, 1 (67), para. 1.
- Seng, P. D. (2009). *WIPO study on the copyright and exceptions for the benefit of educational activities for Asia and Australia SCCR/19/7*. Geneva: WIPO Standing Committee on Copyright and Related Rights.
- Seng, P. D. (2016). *Study on Copyright Limitations and Exceptions for Educational Activities*. Geneva: World Intellectual Property Organization.
- Seng, P. D. (2019). *Educational Activities Copyright Exceptions: Typology Analysis (SCCR/38/8)*. Geneva: World Intellectual Property Organization.

- Tabaro, E. (2005). *Copyright law reform in Uganda: addressing international standards at the expense of domestic objectives*. Kampala: Advocates Coalition for Development and Environment (ACODE).
- Torjman, S. (2005). *What is Policy?* Ottawa, Ontario: The Caledon Institute of Social Policy.
- Tuckness, A. (2020). Retrieved from <https://plato.stanford.edu/entries/locke-political/#Prop>
- Uganda Law Reform Commission (ULRC). (2004). *A study report on copyright and neighbouring rights law*. ULRC Publication 9, at 18-19.
- Vaidhyathan, S. (2003, January 18). *Copyrights and Copywrongs: The Rise of Intellectual Property and How it Threatens Creativity*. New York University Press. Retrieved from [https://www.salon.com/tech/feature/2003/01/17/copyright\\_3/](https://www.salon.com/tech/feature/2003/01/17/copyright_3/)
- Waldron, J. (1979). Enough and as Good Left for Others. *Philosophical Quarterly* (1950-), 29 (117), 319-328 DOI: 10.2307/2219447.
- World Intellectual Property Organisation (WIPO). (2010). *Updated Report on the Questionnaire on Limitations and Exceptions (SCCR/21/7)*. World Intellectual Property Organisation (WIPO).
- World Intellectual Property Organization (WIPO). (2011, FEBRUARY). AN INTERVIEW WITH LAWRENCE LESSI. *WIPO MAGAZINE ISSUE 2011/1*, pp. 4-6.
- World Trade Organization (WTO). (2000). *WT/DS160/R United States Section 110(5) of the U.S. Copyright Act Report of the Panel*. [https://www.wto.org/english/tratop\\_e/dispu\\_e/1234da.pdf](https://www.wto.org/english/tratop_e/dispu_e/1234da.pdf): WTO. Retrieved from [https://www.wto.org/english/tratop\\_e/dispu\\_e/cases\\_e/ds160\\_e.htm](https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds160_e.htm)
- Wright, R. (2009). The “Three-Step Test” and the Wider Public Interest: Towards a More Inclusive Interpretation. *The Journal of World Intellectual Property*, 12: 600-621. [Available on <https://onlinelibrary.wiley.com/doi/epdf/10.1111/j.1747-1796.2009.00378.x> accessed on 10/03/2020].
- Yıldırım, A., & Şimşek, H. (2011). *Sosyal Bilimlerde Nitel Araştırma Yöntemleri [Qualitative research in social science]*. Ankara: Seçkin Yayınları.
- Yoo, C. S. (2019). Rethinking Copyright and Personhood. *University of Illinois Law Review*, 2019(3), 1039-1078.

## APPENDICES

### APPENDIX 1: Questionnaire Survey Instrument

#### *Part I: General*

1. Does your national statute provide for a limited number of specific statutory limitations and exceptions, an open system of limitations and exceptions (such as fair use or fair dealing) or a mix of both systems?

- ☐ Specific  
☐ Open  
☐ Mixed  
☐ Others, please

describe: \_\_\_\_\_

2. Does your national statute include the 'Three-Step-Test' as a general provision on copyright limitations and exceptions?

- ☐ Yes  
☐ No  
☐ Partially, please

describe: \_\_\_\_\_

3. Does your national statute provide limitations and exceptions as free uses (there is no need for authorization or for payment of remuneration)?

- ☐ Yes  
☐ No

If yes, please

describe: \_\_\_\_\_

4. Does your national statute include limitations and exceptions based on statutory licenses (direct permission granted by the law against remuneration)?

- ☐ Yes  
☐ No

If yes, please

describe: \_\_\_\_\_

5. Does your national statute include limitations and exceptions based on compulsory licenses (obligation of the rights owners under the law to grant licenses against remuneration)?

- ☐ Yes  
☐ No

6. Does your national statute include specific limitations or exceptions permitting the use of copyrighted works for private or personal purposes, without previous authorization of the copyright or related rights owner?

- ☐ Yes  
☐ No

Please

describe: \_\_\_\_\_

7. Does your national statute allow parties to agree in licensing agreements or other binding contracts not to engage in conduct that would otherwise be permitted under the national statute's exceptions and limitations?

☐ Yes

☐ No

If yes, please

describe:\_\_\_\_\_

8. Does your national statute subject the exercise of limitations and exceptions to the condition of a lawful or authorized source requirement (for instance, that copies are made from a lawful source)?

☐ Yes

☐ No

If yes, please

describe:\_\_\_\_\_

9. Does your national statute protect technological measures?

☐ Yes

☐ No

10. Does your national statute protect rights management information?

☐ Yes

☐ No

11. Does your national statute provide specific mechanisms to ensure that limitations or exceptions continue to apply despite the existence of any technological measures implemented by the copyright or related rights owners?

☐ Yes

☐ No

If yes, please

describe:\_\_\_\_\_

12. Does your national statute provide that certain limitations or exceptions prevail over the prohibitions on the act of circumventing technological protection measures or rights management information?

☐ Yes

☐ No

If yes, please

describe:\_\_\_\_\_

13. Does your national statute include limitations and exceptions especially for the use of computer programs?

☐ Yes

☐ No

Please

describe:\_\_\_\_\_

14. Does your national statute provide limitations and exceptions for the temporary use of digital works?

☐ Yes

☐ No

Please

describe: \_\_\_\_\_

15. Does your national statute include limitations and exceptions, or statutory safe harbors (statutory safe harbor refers to any statutory enactment which provides that a person will not be liable upon taking certain measures), for the activities of the service providers of digital transmission of works?

☐ Yes

☐ No

Please

describe: \_\_\_\_\_

16. Does your national statute provide that certain limitations or exceptions prevail over the prohibition on the acts of trafficking with devices or providing services that allow the circumvention of technological protection measures or rights management information?

☐ Yes

☐ No

If yes, please

describe: \_\_\_\_\_

## ***Part II: Limitations and Exceptions related to Educational Activities***

17. Does your national statute provide specific limitations and exceptions for educational purposes?

☐ Yes

☐ No

Please list

them: \_\_\_\_\_

18. In case of affirmative answer to the previous question, what kind of activities are those limitations and exceptions related to?

☐ Face-to-face activities

☐ Distance education

☐ Both

Please list

them: \_\_\_\_\_

## ***On performances***

19. Does your national statute provide specific limitations and exceptions allowing performances for educational purposes, such as performances by teachers in classrooms or school concerts?

☐ Yes

☐ No

If yes, please

describe:\_\_\_\_\_

20. Does your national statute provide for any specific requirement regarding the qualitative or quantitative limits and nature of the works or objects of related rights covered by the specific limitations and exceptions allowing performances for educational purposes?

☐ Yes

☐ No

If yes, please

describe:\_\_\_\_\_

21. Who is eligible to engage in activity covered by the specific limitations and exceptions allowing performances for educational purposes? (more than one option can be selected)

☐ Teachers

☐ Students

☐ Educational institutions

☐ Others. Please

describe:\_\_\_\_\_

22. In case educational institutions are eligible to engage in activities covered by specific limitations and exceptions allowing performances for educational purposes, does your national statute establish conditions regarding their nature? (more than one option can be selected)

☐ For-profit

☐ Not-for-profit

☐ Public

☐ Private

☐ Others. Please

describe:\_\_\_\_\_

### ***On reproduction***

23. Does your national statute provide targeted limitations and exceptions allowing reproduction for educational purposes?

☐ Yes

☐ No

If yes, please

describe:\_\_\_\_\_

24. What kind of reproduction is covered by those limitations and exceptions? (more than one option can be selected)

☐ Reprography

☐ Digital copying

☐ Others. Please

describe:\_\_\_\_\_



25. Do the limitations or exceptions allowing reproduction include the preparation of course packs, compilations or anthologies?

☐ Yes

☐ No

If yes, please

describe:\_\_\_\_\_

26. Does your national statute provide remuneration for the exercise of the specific limitations and exceptions allowing reproduction for educational purposes?

☐ Yes

☐ No

If yes, please

describe:\_\_\_\_\_

27. Does your national statute provide for any specific requirement regarding the qualitative or quantitative limits and nature of the works or objects of related rights covered by the specific limitations and exceptions allowing reproduction for educational purposes?

☐ Yes

☐ No

If yes, please

describe:\_\_\_\_\_

28. Who is eligible to engage in activities covered by the specific limitations and exceptions allowing reproduction for educational purposes? (more than one option can be selected)

☐ Teachers

☐ Students

☐ Educational institutions

☐ Others. Please

describe:\_\_\_\_\_

29. In case educational institutions are eligible to engage in activities covered by the enumerated limitations and exceptions allowing reproduction for educational purposes, does your national statute establish conditions regarding their nature? (more than one option can be selected)

☐ For-profit

☐ Not-for-profit

☐ Public

☐ Private

☐ Others. Please

describe:\_\_\_\_\_

30. Does your national statute subject the limitations and exceptions on reproduction for educational purposes to the use of technological measures?

☐ Yes

☐ No

If yes, please

describe:\_\_\_\_\_

***On translations***

31. Does your national statute provide specific limitations and exceptions allowing translations for educational purposes?

☐ Yes

☐ No

32. Does your national statute provide remuneration against the exercise of specific limitations and exceptions allowing translations for educational purposes?

☐ Yes

☐ No

If yes, please

describe:\_\_\_\_\_

33. Does your national statute provide for any specific requirement regarding the extent and nature of the works or objects of related rights covered by the enumerated limitations and exceptions allowing translations for educational purposes?

☐ Yes

☐ No

If yes, please

describe:\_\_\_\_\_

34. Who is eligible to engage in activities covered by the specific limitations and exceptions allowing translations for educational purposes? (more than one option can be selected)

☐ Teachers

☐ Students

☐ Educational institutions

☐ Others. Please

describe:\_\_\_\_\_

***On making available in digital networks***

35. Does your national statute provide specific limitations and exceptions for making available in digital networks for educational purposes?

☐ Yes

☐ No

36. Does your national statute include any other specific limitations or exceptions related to educational purposes that have not been covered above?

☐ Yes

☐ No

37. Are there impediments to the use of limitations and exceptions for educational purposes (international constraints, capacity building, lack of information about the limitations and exceptions, etc.)?

☐ Yes

☐ No

If yes, please  
describe:\_\_\_\_\_

***Part III: Limitations and Exceptions related to Libraries and Archives***

38. Does your national statute contain any limitations or exceptions that permit copying by libraries and/or archives for purposes of preservation or replacement?

☐ Yes

☐ No

Please  
describe:\_\_\_\_\_

39. What types of works may be reproduced for these purposes?

Please  
describe:\_\_\_\_\_

40. Does your national statute establish qualitative or quantitative limits for these purposes?

☐ Yes

☐ No

Please  
describe:\_\_\_\_\_

41. What other conditions must be met in order for such reproduction to be authorized?

Please  
describe:\_\_\_\_\_

42. Does your national statute contain any limitations or exceptions that permit copying by libraries or archives for patron use?

☐ Yes

☐ No

Please  
describe:\_\_\_\_\_

43. What types of works may be reproduced for these purposes?

Please  
describe:\_\_\_\_\_

44. Are there impediments to the use of limitations and exceptions related to the activities of libraries and archives (international constraints, capacity building, lack of information about the limitations and exceptions, etc.)?

☐ Yes

☐ No

If yes, please  
describe:\_\_\_\_\_

45. Does your national statute establish qualitative or quantitative limits for these purposes?

☐ Yes

☐ No

Please

describe: \_\_\_\_\_

46. What other conditions must be met in order for such reproduction to be authorized?

Please

describe: \_\_\_\_\_

47. Does your national statute contain any limitations or exceptions that permit libraries to reproduce and/or distribute works (either reprographic and/or digital) for the purposes of interlibrary lending?

☐ Yes

☐ No

Please

describe: \_\_\_\_\_

48. Does your national statute contain any limitations or exceptions that permit any other organizations (such as museums or educational institutions) to reproduce or distribute works for archival, preservation, or replacement purposes?

☐ Yes

☐ No

Please

describe: \_\_\_\_\_

***Part IV: Limitations and Exceptions for Persons with Disabilities***

49. Does your national statute contain any limitations or exceptions that permit reproduction, distribution, and/or other form of utilization of works for persons with print disabilities or visually impaired persons, including the reading impaired?

☐ Yes

☐ No

Please

describe: \_\_\_\_\_

50. Does your national statute specify the formats (for instance, Braille or large print) that fall under this exception?

☐ Yes

☐ No

Please

describe: \_\_\_\_\_

51. What other conditions must be met in order for such uses to be authorized?

Please

describe: \_\_\_\_\_

52. Does your national statute contain any limitations or exceptions that permit the importation and/or exportation of material accessible to persons with print disabilities or visually impaired persons, including the reading impaired?

☐ Yes

☐ No

Please

describe: \_\_\_\_\_

53. Does your national statute contain any limitations or exceptions that permit reproduction, distribution, and/or other form of utilization of works for deaf persons?

☐ Yes

☐ No

Please

describe: \_\_\_\_\_

54. Does your national statute specify the formats that fall under this exception?

☐ Yes

☐ No

Please

describe: \_\_\_\_\_

55. What other conditions must be met in order for such uses to be authorized?

Please

describe: \_\_\_\_\_

56. Does your national statute contain any limitations or exceptions that permit the importation and/or exportation of material accessible to the deaf persons?

☐ Yes

☐ No

Please

describe: \_\_\_\_\_

57. Does your national statute contain any limitations or exceptions that permit reproduction, distribution, and/or other form of utilization of works for persons with any other disabilities?

☐ Yes

☐ No

Please

describe: \_\_\_\_\_

58. Does your national statute specify the formats that fall under this exception?

☐ Yes

☐ No

Please

describe: \_\_\_\_\_

59. What other conditions must be met in order for such uses to be authorized?

Please

describe: \_\_\_\_\_

60. Does your national statute contain any limitations or exceptions that permit the importation and/or exportation of material accessible to persons with any other disabilities?

☐ Yes

☐ No

Please

describe:\_\_\_\_\_

61. Does your country have plans to include or modify the specific exceptions related to persons with print disabilities, visually impaired persons or other persons with disabilities?

☐ Yes

☐ No

If yes, please

describe:\_\_\_\_\_

62. Are there impediments to the use of the limitations and exceptions for persons with disabilities (international constraints, capacity building, lack of information about the limitations and exceptions, etc.)?

☐ Yes

☐ No

Please

describe:\_\_\_\_\_

***Part V: Religious, social, and cultural exceptions***

63. Does your national statute provide limitations and exceptions for religious, social, and cultural purposes?

☐ Yes

☐ No

64. In the case of an affirmative answer to the previous question, what kind of activities are those limitations and exceptions related to?

☐ Religious activities

☐ Cultural Activities

☐ Social Activities

65. Does your national statute subject the exercise of limitations and exceptions for religious purposes to the condition of the nature of the religious activities?

☐ Yes

☐ No

If yes, please describe:

66. Does your national statute provide remuneration for the exercise of limitations and exceptions for religious purposes?

☐ Yes

☐ No

If yes, please describe:

67. Does your national statute subject the exercise of limitations and exceptions for religious purposes to any specific requirement regarding the extent and nature of the works or objects of related rights?

☐ Yes

☐ No

If yes, please describe:\_\_\_\_\_

68. Does your national statute subject the exercise of limitations and exceptions for cultural purposes to the condition of the nature of the cultural activities?

☐ Yes

☐ No

If yes, please

describe:\_\_\_\_\_

69. Does your national statute provide remuneration for the exercise of limitations and exceptions for cultural purposes?

☐ Yes

☐ No

70. Does your national statute provide for any specific requirement regarding the extent and nature of the works or objects of related rights covered by the limitations and exceptions for cultural purposes?

☐ Yes

☐ No

If yes, please

describe:\_\_\_\_\_

71. Does your national statute subject the exercise of limitations and exceptions for social purposes to the condition of the nature of social activities?

☐ Yes

☐ No

If yes, please

describe:\_\_\_\_\_

72. Does your national statute provide remuneration for the exercise of limitations and exceptions for social purposes?

☐ Yes

☐ No

73. Does your national statute subject the exercise of limitations and exceptions for social purposes to any specific requirement regarding the extent and nature of the works or objects of related rights?

☐ Yes

☐ No

If yes, please

describe:\_\_\_\_\_

***Part VI: Other questions on digital technology***

74. Does your national statute provide any limitations or exceptions for reverse engineering?

☐ Yes

☐ No

If yes, please

describe:\_\_\_\_\_

75. Does your national statute impose any kind of liability (direct, indirect, or secondary) according to which a party can be held liable for the copyright infringement of third parties under certain circumstances (such as when that party has the ability to control an infringer's actions or contributes to a third party's infringing actions)?

☐ Yes

☐ No

If yes, please

describe:\_\_\_\_\_

***Part VII: General questions to cover areas left out in Part I to VI***

76. Are the following limitations or exceptions included in your national statute?  
(More than one option can be selected)

☐ Right of quotation

☐ News reporting

☐ Ephemeral Copies

☐ Incidental Uses

☐ Government Uses

☐ Non-Voluntary License for Broadcasting

☐ Non-Voluntary license for mechanical reproduction of musical works

Please

describe:\_\_\_\_\_



## **APPENDIX 2: Interview guide**

1. What do you think about the limitation and exceptions in the Copyright Act of Uganda and tell me more about this, who do you think benefits from them?
2. In your evaluation of the limitation and exceptions provided in the Act, do you consider them complete, please describe more or if it's lacking in some aspects? Please identify those areas.
3. Do you think limitations and exceptions should be limited in scope? Why is that so?
4. Who do you think benefits from the application of the 'Three-Step-Test' to the limitation and exceptions in the Copyright Act of Uganda? Why do you say so?
  - a. Are there any others that benefit? Why do you think so?
5. What is the implication of the current scope of the 'Three-Step-Test' to the Copyright policy landscape of Uganda in respect to the *protection of, access to, and exploitation of protected works in Uganda*? What would be the effect if the scope was scaled?
6. How does the current National IP policy address the 'Three-Step-Test' concept as used in copyright law? And how does it implement it?

### **APPENDIX 3: Informed Consent**

My name is Kasule Joseph, a Masters in Intellectual Property (MIP) student at Africa University in Mutare, Zimbabwe. I am carrying out a study on The Application of the 'Three-Step-Test' And Its Policy Implications in Uganda: A Case of Copyright and Neighboring Rights Act, 2006. I am kindly asking you to participate in this study by answering a few questions.

This case study aims to explore and elucidate the policy implications of the application of the 'Three-Step-Test' to limitations and exceptions in the copyright law of Uganda. You are among the few study participants and you were selected because of your exposure and knowledge of the study subject matter.

Participation is voluntary and there will be no benefits/compensation for participation. Any information that is obtained in the study that can be identified with you will not be disclosed without your permission. Names and any other identification will not be asked for in the question. If you decide not to participate in this study, your decision will not affect my future relationship with you. If you choose to participate, it is expected that this will take about 40 minutes at maximum and you are free to withdraw your consent and to discontinue participation without penalty.

Before you consent verbally to or sign this form, please ask any questions on any aspect of this study that is unclear to you.

If you have decided to participate in this study, please consent verbally to or sign this form as an indication that you have read and understood the information provided above and have agreed to participate.

-----

Name of Research Participant (please print if applicable)

Date

-----

Signature of Research Participant

If you have any questions concerning this study or consent form beyond those answered by the researcher including questions about the research, your rights as a research participant, or if you feel that you have been treated unfairly and would like to talk to someone other than the researcher, please feel free to contact the Africa University Research Ethics Committee on telephone (020) 60075 or 60026 extensions 1156 email [aurec@africau.edu](mailto:aurec@africau.edu)

Name of Researcher -----

Thank you

## APPENDIX 4: AUREC Approval Letter



### AFRICA UNIVERSITY RESEARCH ETHICS COMMITTEE (AUREC)

P.O. Box 1320 Mutare, Zimbabwe. Off Highway, Road, Old Mutare. Tel: (+263-20) 60075/60026/61611 Fax: (+263-20) 61785 website: www.africau.edu

Ref: AU1868/21

22 January, 2021

Joseph Kasule  
C/O CBPLG  
Africa University  
Box 1320  
Mutare

RE: THE APPLICATION OF THE 'THREE-STEP-TEST' AND ITS POLICY IMPLICATIONS IN UGANDA. A CASE OF COPYRIGHT AND NEIGHBORING RIGHTS ACT, 2006

Thank you for the above titled proposal that you submitted to the Africa University Research Ethics Committee for review. Please be advised that AUREC has reviewed and approved your application to conduct the above research.

The approval is based on the following.

- a) Research proposal
- b) Data collection instruments
- c) Informed consent guide
- **APPROVAL NUMBER** AUREC1868/21  
This number should be used on all correspondences, consent forms, and appropriate documents.
- **AUREC MEETING DATE** NA
- **APPROVAL DATE** January 22, 2021
- **EXPIRATION DATE** January 22, 2022
- **TYPE OF MEETING** Expedited  
After the expiration date this research may only continue upon renewal. For purposes of renewal, a progress report on a standard AUREC form should be submitted a month before expiration date.
- **SERIOUS ADVERSE EVENTS** All serious problems having to do with subject safety must be reported to AUREC within 3 working days on standard AUREC form.
- **MODIFICATIONS** Prior AUREC approval is required before implementing any changes in the proposal (including changes in the consent documents)
- **TERMINATION OF STUDY** Upon termination of the study a report has to be submitted to AUREC.



Yours Faithfully

*Mary Chinzou*

MARY CHINZOU – A/AUREC ADMINISTRATOR/CHAIRPERSON, AFRICA UNIVERSITY RESEARCH ETHICS COMMITTEE