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### Copyright, Limitations and the Three-step test. An Analysis of the Three-Step Test in International and EC Copyright Law

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# Chapter 1

## Introduction

When a WTO Panel reporting on section 110(5) of the US Copyright Act embarked on a detailed interpretation of article 13 TRIPs in 2000,<sup>1</sup> a provision of international copyright law was brought into the limelight which had not attracted much academic attention before:<sup>2</sup> the so-called 'three-step test' in international copyright law. Silently, this magic formula,<sup>3</sup> consisting of three abstract criteria, had become widespread in international copyright law by making its way not only into the Berne Convention but also the TRIPs Agreement and the WIPO 'Internet' Treaties.<sup>4</sup> Nowadays, it is enshrined in article 9(2) BC, 13 TRIPs, article 10 WCT and 16(2) WPPT alike.<sup>5</sup> The fundamental problem which the three-step test concerns is the delicate balance between grants and reservations of copyright law. Viewed from a functional perspective, it sets limits to limitations on exclusive rights.

Traditionally, this is one of the most controversial issues of international copyright law. A country's specific system of limitations, in general, seems to be a sacrosanct feature of domestic copyright laws<sup>6</sup> which is always protected from any corrosive effect to the greatest extent possible at the international level.<sup>7</sup> Every time an amendment of international copyright law gives rise to the question of permissible limitations, a wide variety of currently existing exemptions is brought to the fore which are all declared indispensable for reacting adequately to a country's specific social, cultural and economic needs. At the 1967 Stockholm Conference for the revision of the Berne Convention, however, the philosopher's stone for solving the problem of permissible limitations appeared to have been found. To pave the way for the formal recognition of the general right of reproduction *jure conventionis*, the abstract formula, known today as the three-step test, was devised and introduced in international copyright law. Pursuant to article

<sup>1</sup> For the Panel's report, see WTO Doc. WT/DS160/R, dated 15 June 2000. Just three months earlier, another WTO Panel reporting on Canada's patent protection regime of pharmaceutical products had devoted attention to article 30 TRIPs, the three-step test of the TRIPs' patent section. See WTO Doc. WT/DS114/R, dated 17 March 2000. See for a detailed discussion of the application of the three-step test in these two WTO dispute settlement cases Ficsor 2002b.

<sup>2</sup> More detailed comments on the three-step test are scarce. However, see Desbois/Francon/Kerever 1976, 203-207; Collovà 1979; C. Masouyé 1981, 58-60; Ricketson 1987, 479-489 and 1999; Frotz 1986; du Bois 1997; Gervais 1998, 88-91; Heide 1999.

<sup>3</sup> This characterisation is used by Visser 2001, 15.

<sup>4</sup> The WIPO Copyright Treaty and the WIPO Performances and Phonograms Treaty.

<sup>5</sup> Cf. the overview given by Davies 2002, 279-281.

<sup>6</sup> Cf. Hoeren 2000, 516, who speaks of 'sakrosankten Orten nationaler Heiligtümer'.

<sup>7</sup> Examples of this phenomenon will be given in chapter 3. See chapter 5 for the problems raised by this tendency in the context of the Copyright Directive 2001/29/EC.

9(2) BC, unauthorised reproductions of copyrighted works may be permitted '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'. This provision constituted the first three-step test in international copyright law.

As already indicated above, international policy-makers have embraced this abstract rule. In 1994, it reappeared in article 13 of the TRIPs Agreement. In 1996, it was also embodied in the WIPO 'Internet' Treaties – as a regulatory instrument determining the shape of copyright limitations to come in the digital environment.<sup>8</sup> The gradual infusion of international copyright law with the three-step test begs the question of its precise meaning. Is it capable at all of fulfilling the extensive tasks which have explicitly been assigned to its catalogue of abstract criteria? Or is it only a fig leaf for the helplessness of international policy makers? In the European Union, there is all the more reason for inquiring into the regulatory substance of the three-step test because Directive 2001/29/EC of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society (Copyright Directive) also contains its three abstract criteria. Thus, the impact of the three-step test on the traditional set of limitations and new exemptions to come must necessarily be clarified.

To accomplish this task, a synthetic approach is pursued here. The three-step test is regarded and treated as one uniform instrument of international copyright law. Pursuant to this conception, the different provisions embodying the three-step test are to be qualified as limbs of the same unitary body. As such, they add different connotations and may assign different functions to the three-step test which must be analysed in detail. The specific value of the outlined synthetic method lies in its considerable potential for revealing the general structure and functioning of the three-step test rather than overemphasising the peculiarities of each single context in which the three-step test has been embedded. The ensuing examination can accordingly also be put to good use in the realms of other disciplines of intellectual property law in which provisions based on the three-step test of copyright law are to be found as well.<sup>9</sup>

Nevertheless, in the course of the ensuing inquiry, sufficient attention will be devoted to the specific role which the three-step test plays in the Berne Convention, the TRIPs Agreement and the WIPO Copyright Treaty. The following, introductory chapter 2, however, first of all seeks to delineate the copyright balance between exclusive rights of authors and limitations imposed on these rights, against the backdrop of copyright's two legal traditions – the common law system and the civil law system. The reconciliation of the divergent interests of authors and users is the

<sup>8</sup> See the agreed statement concerning article 10 WCT. WIPO Doc. CRNR/DC/96.

<sup>9</sup> See, for instance, article 30 TRIPs. Cf. in this respect the interpretation of article 30 TRIPs by the WTO Panel – Patent 2000, §§ 7.39-7.84. Although dealing with a patent case, the Panel did not hesitate to consult material concerning article 9(2) BC. See *ibid.*, § 7.72.

central field of application of the three-step test. Therefore, the delicate balance between grants and reservations of copyright law must be inspected closely before turning to the interpretation of the three-step test. The ensuing chapter 3 then explains in depth the contextual background to the incorporation of the three-step test into the Berne Convention, the TRIPs Agreement and the WIPO 'Internet' Treaties. It is necessary to sift through relevant conference material to lay sufficient groundwork for an appropriate analysis of the role the three-step test plays in international copyright law. It yields valuable insights into the notions and considerations underlying the test, thereby reflecting the different connotations the test has acquired since its introduction at the 1967 Stockholm Conference.

Vested with this information, a precise analysis of the structure and functioning of the three-step test, as well as a detailed interpretation of each of its criteria, will be conducted in chapter 4. Accordingly, it forms the centre of gravity of this book. It will be examined which limitations can be qualified as 'certain special cases' (criterion 1); when a 'conflict with a normal exploitation' arises (criterion 2), and how to avoid an 'unreasonable prejudice to the legitimate interests of the author' (criterion 3). An appropriate abstract standard of review will be developed for each criterion, the impact of which on different types of limitations will be demonstrated by giving numerous examples. Afterwards, the results of the interpretative analysis will be employed in chapter 5 to clarify the meaning of the three-step test in the context of the European Copyright Directive. All limitations permitted under the Directive will be scrutinised in the light of each criterion of the three-step test. The results of the examination of the three-step test will be summarised in chapter 6. before ultimately presenting in chapter 7 several concluding remarks on the potential future alignment of copyright law with the specific needs of authors and the desirable amendment of the rules governing limitations on exclusive rights in international copyright law.

