

The WTO Panel decision involved a determination as to the compatibility of the “home-style”<sup>152</sup> and “business-style”<sup>153</sup> exemptions to copyright under s.110(5)(A) and s.110(5)(B) of the US Copyright Act with Article 9(1) of the TRIPS Agreement. The determination of this issue necessarily required an inquiry as to the interpretation of the three-step test under Article 13 of the TRIPS Agreement. In this instance the Panel interpreted the three-step test under the TRIPS Agreement as follows.

## 2. *The Basic Rule: Limitations to relate to “certain” and “special” cases*

The first criterion of the test lays down the basic rule upon which limitations should be imposed. As Senftleben points out copyright limitations which are incapable of fulfilling this basic rule are inevitably doomed to fail.<sup>154</sup>

As such it is imperative to consider whether a general exception to copyright in the nature of the public interest exception does in fact comply with this basic rule.

One approach has been to interpret special cases to mean definite, fixed, non-variable limitations to copyright. According to Reinboth

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152 The so-called “homestyle” exemption, provided for in sub-paragraph (A) of Section 110(5), allows small restaurants and retail outlets to amplify music broadcasts without an authorization of the right holders and without the payment of a fee, provided that they use only homestyle equipment (i.e. equipment of a kind commonly used in private homes). *World Trade Organization. United States-s.110(5) of US Copyright Act* [http://www.wto.org/english/tratop\\_e/dispu\\_e/cases\\_e/ds160\\_e.htm](http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds160_e.htm).

153 *Id.* The so-called “business” exemption, provided for in sub-paragraph (B) of Section 110(5), essentially allows the amplification of music broadcasts, without an authorization and a payment of a fee, by food service and drinking establishments and by retail establishments, provided that their size does not exceed a certain square footage limit. It also allows such amplification of music broadcasts by establishments above this square footage limit, provided that certain equipment limitations are met.

154 Senftleben at 132.

and von Lewinski the term “certain special cases” is to be interpreted as requiring national laws to contain sufficient specifications which identify the cases to be exempted from these rights.<sup>155</sup> Unspecified wholesale exemptions are not permitted. Based upon this interpretation it is clear that the public interest exception would not succeed in passing the test, since the limitations it places upon copyright would necessarily be based upon value judgements which would not necessarily be capable of prior specific identification.

However Senftleben argues that this in fact is not the proper interpretation to be given to the term “certain special cases”. In his view the term “certain” is to be interpreted as “some special cases”. He justifies his argument by pointing out that the interpretation of the term as referring to “definite”, “fixed and non-variable limitations” would effectively go against the common law Anglo-American legal tradition which necessarily prefers to impose open-ended limitations of copyright.<sup>156</sup>

The WTO Panel decision interpreted the first criterion of the three-step test as involving the following elements.

Firstly that the exception or limitation in national legislation should be clearly defined.<sup>157</sup> Significantly however the Panel proceeded to observe that this did not require national legislatures to,

*“...identify explicitly each and every possible situation to which the exception could apply, **provided the scope of the exception is known and particularized.** This provides a sufficient degree of legal certainty.”*<sup>158</sup>

Hence it may be argued that what is in fact required under the three step test is that the limitation to be placed upon copyright should be of a defined and specified scope in order that there may be certainty

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155 Jörg Reinboth and Silke von Lewinski *The WIPO Treaties 1996- The WIPO Copyright Treaty and the WIPO Performances and Phonograms Treaty- Commentary and Legal Analysis* 124 Butterworths (1996).

156 Senftleben at 136.

157 WT/L/160/Rev. 1 Para 6.108.

158 *Id.* para. 6-108.

as to the manner in which it may be applied by courts. This does not however necessitate that there should be certainty or foreseeability as to the result that would be reached through its application.

The same argument has been made with regard to the fair use exception in the US. Several scholars have pointed out that the very flexibility of the doctrine forms an obstacle to it being “certain”.<sup>159</sup>

However as Senftleben points out the case-by-case analysis is a typical feature of the common law approach to copyright limitation. Each holding of a US Court rendered on the basis of the fair use exception clarifies whether or not a given specific use under examination maybe fair. Thus upon this argument the limitation placed by the fair use exception would be specific as regards that particular case.

Secondly it is required that an exception or limitation should be limited in its field of application or exceptional in its scope. In other words it should be narrow in a quantative as well as a qualitative sense.<sup>160</sup>

In its decision the WTO Panel while holding that the “business-style exemption” to copyright was not in compliance with Article 13 since “...a substantial majority of eating and drinking establishments and close to half of retail establishments are covered by the exemption...”,<sup>161</sup> held that the “home-style exemption” to copyright was in compliance with the three-step test since from a quantative perspective the reach of such exemption was limited to a comparably small percentage of establishments.<sup>162</sup> It thus constituted a “certain special case” within the meaning of the first criterion of Article 13.

It would appear that upon this reasoning it may be possible to argue that the public interest exception to copyright consitutes a quantatively and qualitatively sufficiently narrow doctrine so as to satisfy the three-step test under the TRIPS Agreement.

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159 Herman Cohen Jehoram *Einige Grundsatz zu den Ausnahmen im Urheberrecht* GRUR INT 807 (2001).

160 WT/L/160/Rev. 1 para. 6.109.

161 *Id.* para. 6.133.

162 *Id.* para. 6.143.

Firstly the exception would not possess an expansive reach since its application would be limited to those special cases which necessitates a balance between copyright and the legitimate interests of the public. As demonstrated by the case law in the three jurisdictions discussed above the instances that could give rise to such a consideration of competing values are not so frequent as to render the exemption to be one of an expansive scope.

On the other hand it is possible to argue that as discussed above, since the Copyright Directive already sets out quite a comprehensive list of limitations to copyright largely based upon the public interest, the public interest exception would apply largely as a supplementary doctrine to these limitations and the other statutory limitations and exceptions introduced by the national legislatures of Member States. Hence it would be possible to argue that its application is limited to a sufficiently restricted scope of instances as to make it a “certain special case” within the first criterion of the three-step test.

Thus it appears that a public interest exception to copyright containing a definite scope and operating within a well-defined framework which is applied by courts in such a way that takes the legitimate interests of the rightholder into account so as not to conflict with the normal exploitation of the work or unreasonably prejudice the legitimate interests of the author would be compliant with the three step test.