

within the EU by virtue of the fact that most limitations introduced under it are to be adopted by Member States at their discretion.

Hence it may be argued that Recital 32 read with Article 5 of the Copyright Directive may be challenged upon the basis that it constitutes a derogation from the fundamental freedoms guaranteed under Article 10 of the ECHR in a manner that is not proportionate to the legitimate aim of the provision.

Thus it may be considered that the possibility exists for Member States to circumvent the impediment placed by the EC Copyright Directive and to enact a broad-based public interest exception to copyright within their domestic legal systems.

## ***B. The Berne Convention and the Three-Step Test***

All EU Member States are also signatories to the Berne Convention. The EU being a Member State of the World Trade Organization, all EU Member States are bound by the TRIPS Agreement<sup>145</sup> and hence have adhered to the Paris Act of the Berne Convention of 1971.<sup>146</sup>

Thus the provisions of the Berne Convention Paris Act with regard to the the limitation of copyright, particularly Article 9 (2) are binding upon the EU legal framework as well as the domestic legal frameworks of the individual Member States.

As such the “three-step test” to copyright limitations under Article 9 (2) has also been incorporated into several of the EC Directives on Copyright law, namely the Computer Programs Directives, the Database Directive, the Rental Rights Directive and as mentioned earlier the Copyright Directive.

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145 Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) (Annex 1C to the Agreement Establishing the World Trade Organization), [http://www.wto.org/english/docs\\_e/legal\\_e/27-trips.pdf](http://www.wto.org/english/docs_e/legal_e/27-trips.pdf).

146 Thomas Dreier *Berne Convention for the Protection of Literary and Artistic Works in Concise European Copyright law* Thomas Dreier and P Bernt Hugenholtz (eds.) 9 Kluwer Law (2006).

It has also found expression in many of the international agreements and conventions to which the EU (as well as the EU Member States individually) have acceded. For example Article 13 of the TRIPS Agreement, Article 10 (2) of the WIPO Copyright Treaty (WCT) and Article 16 of the WIPO Performances and Phonograms Treaty (WPPT) all incorporate the three step test in some form.

### *1. The Three-Step Test*

The three-step test which was first introduced through the Berne Convention was enacted upon the need to achieve two contradictory goals in the harmonization of international copyright law.

- a) To safeguard the general right of reproduction against the corrosive effect of potentially wide-ranging national limitations by the introduction of a framework within which limitations to copyright could be imposed under domestic laws.
- b) To avoid encroaching upon the margin of freedom enjoyed by member countries in imposing limits to copyright granted under the domestic legal frameworks. This was achieved by introducing a fairly open-ended norm upon which limitations maybe constructed, in place of a restrictive list of permissible criteria. Thus, legislatures of Member States are bound under the Berne Convention as well as under subsequent instruments into which the test has been incorporated to ensure that limitations to copyright must be imposed in compliance with the three-step test.

The need to achieve these paradoxical goals necessitated that the test be framed in somewhat vague and possibly ambiguous terms, which makes it subject to conflicting interpretations at times.

The three-step test under Article 9 (2) of the Berne Convention is worded as follows,

*“It shall be a matter for legislation in the countries of the Union to permit the reproduction of such works **in certain special cases**, provided that such reproduction does not **conflict with the nor-***

***mal exploitation of the work and does not unreasonably prejudice the legitimate interests of the author.***”

Thus the test incorporates three cumulative criteria in determining the compliance of a copyright limitation with the Berne Convention.

1. Basic rule: the limitations introduced to copyright must relate to “certain”, “special” cases.

Conditions delimiting the basic rule:

2. The limitation should not conflict with the normal exploitation of the work.
3. The limitation should not prejudice the legitimate interests of the author.<sup>147</sup>

It is significant to note that although the Berne Convention makes the three-step test applicable only in relation to the reproduction right Article 16 of the WPPT, Article 10 (2) of the WCT and Article 13 of the TRIPS Agreement extends it to all categories of exclusive rights protected under these instruments.

In fact as interpreted by the WTO Panel in its decision on s.110 (5) of the United States Copyright Act, Article 13 of the TRIPS Agreement extends to all exclusive rights protected under the Agreement including those rights preserved under the Berne Convention<sup>148</sup> which have been incorporated into the TRIPS Agreement under Article 9 (1).

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147 Martin Senftleben *Copyright Limitations and the Three-Step Test* 131 Kluwer Law (2004).

148 This is however with the exception of moral rights preserved under Article 6bis of the Berne Convention which has been expressly excluded from the TRIPS Agreement. It is noted however that that since no similar exclusion can be found under the WCT, it is possible to argue that the three-step test as preserved under the WCT would apply in relation to the moral rights granted under Article 6bis of the Berne Convention. Nor does the three-step test apply to the economic rights vested in performer’s producers and broadcasting organizations under the TRIPS Agreement. *Vide* Article 14 (6); Haochen Sun. “Overcoming the Achilles Heel of Copyright Law” 5 NW. J. TECH. & IN-TELL. PROP. 265 at page 275.

The Panel determined that the ‘minor exceptions doctrine’ introduced with regard to the public performance right under Articles 11*bis*(1) and 11(1) of the Berne Convention had been carried onto the TRIPS Agreement under Article 9 of the Agreement. Hence they concluded that the three-step test as incorporated under Article 13 of the Agreement would apply in relation to limitations to the reproduction right as articulated in the Berne Convention *as well as* to limitations and exceptions placed on the public performance, in accordance with the minor exceptions doctrine.<sup>149</sup>

The three-step test directly constrains the ability of member states to introduce limitations to copyright which are not in compliance with the above criteria. As Geiger points out,

*“It would not only be the legislator’s freedom of adaptation of the system of exceptions that would be “limited” by the imprecise rule of the three- step test but, also the judge’s discretionary power.”*<sup>150</sup>

The issue arises therefore as to whether the test can impose a barrier to the introduction of a broad and open ended public interest exception to copyright.

In this regard the decision delivered by the World Trade Organization Panel on *United States-Section 110 (5) of the US Copyright Act*<sup>151</sup> is of considerable relevance as this is the first instance in which a definition of the criteria of the test was offered at the international level.

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149 WT/L/160/Rev. 1 para. 6.35.

150 Christophe Geiger, *The Role of the Three-Step Test in the Adaptation of Copyright Law to the Information Society*. E-Copyright Bulletin. January-March 2007. [http://portal.unesco.org/culture/en/files/34481/11883823381test\\_trois\\_etapes\\_en.pdf/test\\_trois\\_etapes\\_en.pdf](http://portal.unesco.org/culture/en/files/34481/11883823381test_trois_etapes_en.pdf/test_trois_etapes_en.pdf).

151 Report of the Panel on *United States-Section 110 (5) of the US Copyright Act*. 15 June, 2000. (WT/L/160/Rev. 1).

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.