

DECLARATION ON A BALANCED INTERPRETATION OF THE "THREE-STEP TEST" IN COPYRIGHT LAW

Introductory Remarks

There are increasing concerns about the impact of the so-called "three-step test" on the law of copyright and related rights. From its relatively modest origin as a confirmation that countries of the Berne Union are entitled to permit the reproduction of copyright 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", [FN1] the scope of this legal instrument has been steadily extended. Under the TRIPS Agreement [FN2] and the WIPO Treaties, [FN3] it has been applied to the full range of authors' and related rights and has also increasingly been enshrined explicitly in national legislation. Today, the test affects all debates concerning the future of exceptions and limitations to copyright.

At the same time, the prevalent understanding of the impact of the "three-step test" has become more restrictive. The WTO Panel's interpretation of the test in its decision on Sec. 110(5) of the United States' Copyright Act 1976 was self-avowedly economic in focus and appears to leave limited scope for states to balance the interests of rightholders with countervailing interests of fundamental importance. [FN4] Domestic courts have sometimes misunderstood the requirements of the test and, as a result, have applied it in a profoundly unbalanced manner.

Against this background, in a joint project of the Max Planck Institute for Intellectual Property and the School of Law at Queen Mary, University of London, a group of experts has collaborated on a declaration that aims to confirm the legitimacy of a balanced interpretation of the "three-step test" in copyright law. The Declaration that has resulted from this collaboration is set out below. It is open for signature on the websites of the Max Planck Institute (www.ip.mpg.de) and the School of Law at Queen Mary, University of London (www.law.qmul.ac.uk).

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FN1. Berne Convention for the Protection of Literary and Artistic Works, Art.9(2).

FN2. TRIPS Agreement, Art. 13.

FN3. WIPO Copyright Treaty, Art. 10; WIPO Performances and Phonograms Treaty, Art.16(2).

FN4. Report of the WTO Panel dated 15 June 2000, WT/DS160/R.

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