



# The Three-Step Test

*"The Three-Step Test has already established an effective means of preventing the excessive application of limitations and exceptions. However, there is no complementary mechanism prohibiting an unduly narrow or restrictive approach. For this reason, the Three-Step Test should be interpreted so as to ensure a proper and balanced application of limitations and exceptions. This is essential if an effective balance of interests is to be achieved."*

*- Max Planck Declaration*

## **What Is the Three-step Test?**

Fair use, fair dealing, and exceptions and limitations systems put limitations on the exclusive rights copyright owners have to reproduce their work for a determined time period. If the use of copyrighted content is determined to be "fair" or is within an enumerated set of exceptions and limitations, then it does not constitute an infringement. All these systems allow users to make a partial or full copy of copyrighted work, even where the copyright holder has not given explicit permission or objection to the use of the work. However, the determination of what is fair or is a use that falls within a certain legally identified exceptions and limitation, hinges on the nature of the use and the original material. Legal exceptions and limitations to copyright and the scope of fair use and fair dealing vary with each country.<sup>1</sup>

However, a great number of multilateral, regional, and bilateral trade agreements<sup>2</sup> carry language that has come to be known as the "three-step test" to define the freedom of signatory countries to create "exceptions and limitations" to copyrights. In essence, it is a way to restrict the kinds of permitted fair uses in national laws.

## **Three-Step Test Language and Scope**

The three-step test was first enacted in the 1967 revision of the Berne Convention. It provides:

*"It shall be a matter for legislation in the countries of the Union to permit the reproduction of such works [a] in certain **special cases**, provided that [b] such reproduction **does not conflict with a normal exploitation** of the work and [c] does not **unreasonably prejudice the legitimate interests of the author.**"*

<sup>1</sup> For instance, for a comparative study on exceptions for the librarians: *Study on Copyright Limitations and Exceptions for Libraries and Archives*, WIPO document SCCR/17/2, available at [http://www.wipo.int/meetings/en/doc\\_details.jsp?doc\\_id=109192](http://www.wipo.int/meetings/en/doc_details.jsp?doc_id=109192)

<sup>2</sup> See some language examples at More on the 3-step test in global copyright negotiations: <http://keionline.org/node/1568>



Most international copyright agreements since then have incorporated versions of this text. For example, versions of the test may be found in the TRIPS Agreement (Article 13), the WCT (Article 10), several EU copyright directives, and several bilateral agreements. Indeed, three-step tests may now be found in the national legislation of many countries, including France, Portugal, China, and Australia. Even when national legislation does not explicitly incorporate the test, judges sometimes rely upon it when construing and applying their nation's copyright laws.

The coverage of the different versions of the test varies somewhat. For example, whereas the Berne Convention three-step test **only** applies to exceptions and limitations to the **right of reproduction**, the three-step test contained in Article 13 of the TRIPS Agreement applies to exceptions and limitations to **any of the “exclusive rights”** associated with copyright. In addition, the language used in different agreements vary. For example, whereas the third step of the Berne Convention test (quoted above) requires that an exception or limitation (emphasis our own) “not unreasonably prejudice the legitimate interests of the **author**,” the third step of the TRIPS test requires that an exception or limitation “not unreasonably prejudice the legitimate interests of the **right holder**”. This is a change that shifts attention away from the interests of creators toward the economic interests of the companies that acquire copyrights from the original creators.

Given the prevalence of the three-step test and the long period of time in which it has existed, you might expect that the meaning of the test would be clear by now, but this is not the case. The version of the test contained in the Berne Convention has never been interpreted officially. The version contained in Article 13 of the TRIPS Agreement has only been officially interpreted once, and by a World Trade Organization (WTO) dispute resolution panel.<sup>3 4</sup> In a dispute in 2000 involving an exception to copyright for the United States, the WTO defined the three-step test narrowly and restrictively, making it difficult to justify a statutory limitation or exception to the exclusive rights of copyright, in the areas where the WTO says the test applies.

As a result, the Panel decision may have clarified the terms of reference, but it may not have made future outcomes any more predictable. The current risk is two-fold: 1) that the three-step test is extended to another fora, and more importantly, 2) that it could threaten exceptions now outside of the three-step test. The 2000 WTO interpretation has been criticized in the Max Planck Institute Declaration on a balanced interpretation of the three-step test. Additionally, in different European countries have even construed the test in inconsistent ways in functionally identical cases.

<sup>3</sup> WT/DS160/R available at [http://www.wto.org/english/tratop\\_e/dispu\\_e/1234da.pdf](http://www.wto.org/english/tratop_e/dispu_e/1234da.pdf)

<sup>4</sup> Toward Supranational Copyright Law? The WTO Panel Decision and the 'Three-Step Test' for Copyright Exceptions: [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=253867](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=253867)



Due to the uncertainty of the test and its scope, a group of prominent and influential copyright scholars have recently proposed a statement called "A Balanced Interpretation of the Three-Step Test."<sup>5</sup> This document, known as the Max Planck Institute Declaration, argues that an exception or limitation that fails to satisfy one of the three steps should not necessarily be deemed to violate the test. Rather, **all three components** of the test should be considered together in a "comprehensive overall assessment" that takes into account the threats that excessive levels of copyright protection pose to "human rights and fundamental freedoms," "interests in competition," and "other public interests, notably in scientific progress and cultural, social, or economic development" in addition to the important interests of copyright holders in seeking fair compensation. The Max Planck Institute proposal upholds the underlying purpose of copyright as a whole: seeking to balance the interests of creators with the interests of society at large in maximizing access to ideas and information.

Another interpretation, by Professors Hugenholtz and Okediji,<sup>6</sup> that has been referred to in court decisions, is: "*Limitations and exceptions that (1) are not overly broad, (2) do not rob right holders of a real or potential source of income that is substantive, and (3) do not do disproportional harm to the right holders, will pass the test.*" This proposal is grounded in a long and detailed discussion of the evolution of the three-step test and deserves careful consideration.

### **Problems With the Three-Step Test**

The evolution of the three-step test into the overriding norm of international copyright law through its incorporation into the TRIPS agreement has attracted criticism from scholars and stakeholders alike. The three-step test negates the balance between exclusivity and access that should be inherent in any mature copyright system. Its focus, as with the entire structure of minimum rights, is geared towards protecting rights of authors or, in the case of TRIPS, "right holders," over the interests of society and the general public. Cumulative application of the three steps, as its wording requires, heavily tilts the balance in favor of the right holders. Through its incorporation into the TRIPS Agreement, what was essentially a norm of international copyright has morphed into a norm of international trade law. Thereby, it has lost much of its original normative content. Finally, the test fails to take into account the justified needs of developing nations.

We are concerned that, depending on the actual text and its interpretation, the three-step test provision in trade agreements, such as the TPP,<sup>7</sup> will actually restrict fair use and other copyright exceptions and limitations crucial for the progress and access of culture, science,

<sup>5</sup> [http://www.ip.mpg.de/ww/de/pub/aktuelles/declaration\\_on\\_the\\_three\\_step\\_cfm](http://www.ip.mpg.de/ww/de/pub/aktuelles/declaration_on_the_three_step_cfm)

<sup>6</sup> <http://www.ivir.nl/publicaties/hugenholtz/finalreport2008.pdf>

<sup>7</sup> For a detailed analysis of the three-step-test within the TPP see <https://www.eff.org/deeplinks/2012/08/civil-society-groups-oppose-us-and-australia-proposal>



education, and innovation. An important general lesson may be derived from this situation: The meaning and consequence of copyright law—including international copyright agreements—is often much less clear than it appears. Many rules have not yet been interpreted authoritatively. This vagueness can create opportunities for governments to argue for and act upon interpretations that give them more freedom when shaping their own laws.

**EFF's Take:**<sup>8</sup>

We firmly believe that countries should be able to tailor copyright fair use, fair dealing, and exceptions and limitations systems to their domestic legal culture and needs, and extend such limitations into the digital environment to create new exceptions as they find appropriate. Any language of the three-step test should be construed as an open-ended framework and not a limitation or filter to such systems. Some minimum goals of an international approach to exceptions and limitations ought to be included:

- i) elimination of barriers to trade, particularly in regard to activities of information service providers;
- ii) facilitation of access to tangible information products;
- iii) promotion of innovation and competition;
- iv) support of mechanisms to promote/reinforce fundamental freedoms; and
- v) provision of consistency and stability in the international copyright framework by the explicit promotion of the normative balance necessary to support knowledge diffusion.

Thus, it is vitally important that exceptions and limitations to copyright be protected in international trade agreements. We are supportive of efforts to protect and expand the use of copyright exemptions in certain areas, such as to protect the blind, education, and the development of new Internet services. However, provisions in the TPP and similar trade negotiations that include a restrictive three-step test language may work to further entrench unbalanced copyright policy that does more harm than good.

Therefore it is critical to ensure that any language introducing the three-step test in international and national law is not so narrowly written and construed, and that it is also interpreted without prejudice to other existing limitations and exceptions that fall outside the test that are included in international conventions. In particular, we note that the Berne Convention and the Rome Convention both have several articles that specifically provide for copyright limitations and exceptions outside the framework of the three-step test.<sup>9</sup>

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<sup>8</sup> <https://www.eff.org/deeplinks/2012/07/joint-statement-civil-society-groups-us-tpp-copyright-proposal>

<sup>9</sup> Berne Exceptions not subject to 3-step test at <http://keionline.org/node/1518>