

# Three-Step Test & European Economic Constitutional Law



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# Three-Step Test in International Law



- Everybody knows it...  
...and almost everybody (in the academia) hates it!
- Article 9(2) of the Berne Convention
- Article 13 TRIPS (copyright):  
“*Members shall confine limitations or exceptions to exclusive rights to **certain special cases** which **do not conflict with a normal exploitation** of the work and **do not unreasonably prejudice the legitimate interests of the right holder.**”*
- Also Article 17, 26(2) and 30 TRIPS, Article 10 of the WIPO Copyright Treaty etc. → different wordings & interpretations
- The *institutional mechanism* brought about by the TRIPS Agreement (and the WTO) is the real change (cf. the ECHR)!

# Three-Step Test in EU Law



- Article 6(3) of Software Directive 91/250/EEC;
- Article 6(3) of Database Directive 96/9/EC
  - Advocate General *Stix-Hackl* in cases C-203/02, *The British Horseracing Board*; C-338/02, *Fixtures Marketing v. Svenska Spel* and C-444/02, *Fixtures Marketing Ltd v OPAP*.
- Article 5(5) of Information Society Copyright Directive 2001/29/EC
  - EUC (and AG) in case C-5/08 *Infopaq*
- Some MSs implemented the test while others didn't
- Three-step test part of internal constitutionalization of IP (and hence *New Constitutionalism*)

# Contents of the Three-Step Test (WTO)



- WTO Panel, Section 110(5) of the US Copyright Act:
  - Conclusion of a study group preparing the 1967 Stockholm Conference for the Revision of the Berne Convention: “*all forms of exploiting a work, which have, or are likely to acquire, considerable economic or practical importance, must be reserved to the authors*”.
  - Part of **normal exploitation** and thus outside any potential exceptions: also forms of exploitation which, “*with a certain degree of likelihood and plausibility, could acquire considerable economic or practical importance.*”
  - An exception would be in harmony with **normal exploitation** should it be confined “*to a scope or degree that does not enter into economic competition with non-exempted uses.*”
  - **Unreasonable prejudice to the legitimate interests of the right holder** if an exception “*causes or has the potential to cause an unreasonable loss of income to the copyright owner*”.

# Contents of the Three-Step Test (EU)



- EUC (Fourth Chamber) in case C-5/08 *Infopaq*:
  - Exemption in Article 5(1) must be interpreted in the light of Article 5(5) → strict/narrow interpretation.
- AG *Trstenjak* in *Infopaq*:
  - Recital 44 to Directive 2001/29: the exceptions and limitations provided for by the Directive must be applied in a manner consistent with international obligations → Article 5(5) of Directive 2001/29 must be interpreted taking account of those international treaties.
  - The reproduction of extracts from newspaper articles affects the normal exploitation of those newspapers
  - The extracts are produced for a large number of articles → an unreasonable prejudice to the legitimate interests of the rightholders.
- Interpretation of the steps similar to the WTO-model
- Operational relevance in the interpretation of IP exceptions
- Interpretations on the MS-level have differed considerably

# Scholarly Critique and Solutions Proposed by Others



- Interpretation of the test on the WTO-level is not balanced, especially so with regard to copyright
- The three steps should be interpreted as a whole.
- An analysis starting from the third step which enables balancing the interests involved followed by the “*normal exploitation*” test construed as the core of the exclusive rights and followed by the test of “*certain special cases*”, also interpreted flexibly
- The test should not be used to construe limitations and exceptions narrowly
- Fundamental rights should be integrated in TRIPS

# My Further Critique (economic)



- New works tend to compete with the existing ones → exceptions and limitations may always be seen to create economic prejudice to the rights of the copyright owner
- Societal value of the exception/limitation neglected
- Effects of a limitation on the incentive of the copyright owner to create in the first place neglected
- The social gains from a limitation may far exceed the potential loss of the copyright owner
- The copyright owner may become overcompensated in the absence of a limitation
- Excluding the limitation by recourse to the three-step test could produce deadweight loss

# My Further Critique (constitutional)



8

- In the WTO-framework the test is applied in a trade-related context leaving aside other rationales of IP protection and the interests, values and norms underlying the limitations and exceptions → *the three-step test establishes a judicial review for exceptions based on single-sided proprietarian values*
- IP law cannot avoid the requirement of conformity with fundamental rights protection by establishing an internal test intended to limit the scope of exceptions and limitations often securing fundamental rights
- The interpretations of IP law have to be in conformity with fundamental rights even after the application of the three-step test

# Proposed Solutions (EU & MS levels)



- On the EU and MS levels, the test itself should be interpreted in the light of the applicable fundamental rights instruments which do not place certain protected values hierarchically beyond others, but require their weighing in context
- Both national and European-level courts have an *obligation* to interpret directives and the corresponding national laws, international treaties and primary Union law in conformity with fundamental rights protection.
  - This obligation extends to the three-step test as part of WTO law, EU directives and their implementations (See *Promusicae* and *Kadi*, EUC)
- The operation of the test on both EU- and domestic levels could differ substantively from the existing interpretations of the similar test functioning on the WTO-level.

# Proposed Solutions (WTO)



- **Simply embracing fundamental rights on the WTO-level is problematic**
  - No fundamental rights standards in the *WTO acquis*
  - Adding fundamental rights norms to TRIPS unlikely & would not change the trade-logic and economic bias
- **The fact remains that the WTO is trade-centred!**
  - Its panels do not represent expertise in fundamental rights law
  - Its norms do not reflect a fundamental rights dimension

# Proposed Solutions (WTO) 2



- The WTO panels should leave a *broad margin of appreciation* for Members when they have made a reasonable claim that the exception under scrutiny relates to fundamental rights
- Based on the international law doctrine of margin of appreciation and the specific impact of human rights on treaty interpretation
- The proposal would turn the effects of the doctrine upside-down → instead of limiting the universality and penetration of fundamental rights (ECtHR), it **would subject the WTO dispute settlement organs under an obligation to exercise restraint and flexibility when the exceptions relate to fundamental rights**

# Proposed Solutions (WTO) 3



- As the three-step test is formulated as a flexible standard-type discretionary norm, it is particularly suitable to the application of the doctrine of margin of appreciation
  - Provides limited conduct-guidance and should preserve a significant zone of legality within which the WTO Members are free to decide about exceptions and limitations
- Provided the Member makes a reasonable, good-faith claim that the limitation or exception is based on the protection of fundamental rights, the WTO dispute settlement organ should show judicial restraint and accept that the limitation or exception is within the zone of legality
- The WTO Panel would not need to enter into substantive fundamental rights analysis, but merely recognise the limits of the *WTO acquis* reflecting trade and economic rationality only

# Proposed Solutions (WTO) 4



- As the doctrine of margin of appreciation may be seen as a general doctrine of international law, it could guide in the application of the three-step test without any changes in the *WTO acquis*
- To an extent human rights law requires its integration in the *WTO acquis*, *building on the doctrine of margin of appreciation could constitute the most realistic and least problematic way for the WTO dispute settlement organs to embrace it*

# Thank you!



1  
4



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