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SESSION 2: COPYRIGHT

THE "THREE-STEP TEST" *DE LEGE LATA – DE LEGE FERENDA* (OUTLINE)

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Recently it has become fashionable in certain academic circles to raise doubts about the "three-step-test" for the application of exceptions of and limitations on IP rights. It is either alleged that the test is badly construed and, therefore, should be "fixed," or that during its more than 40-year-long carrier it has not been applied adequately by legislators, governments, courts, dispute-settlement bodies, etc., and thus a completely new, "more balanced" interpretation should be adopted.

The position of those academics who suggest a new, "more balanced" interpretation of the test was summed up in July 2008 in Munich by those who were present at an ATRIP conference. The Munich Declaration suggests a new interpretation of the three-step test:

> "When correctly applied, the Three-Step Test requires a comprehensive overall assessment, rather than the step-by-step application that its usual, but misleading, description implies. No single step is to be prioritized. As a result, the Test does not undermine the necessary balancing of interests between different classes of rightholders or between rightholders and the larger general public. Any contradictory results arising from the application of the individual steps of the test in a particular case must be accommodated within this comprehensive, overall assessment. The present formulation of the Three-Step Test does not preclude this understanding. However, this approach has often been overlooked in decided cases.

The paper, by applying Articles 31 and 32 of the Vienna Convention on the Law of Treaties, proves that, although as a result of the application of the test, legislators and courts may reach an overall assessment about the applicability of an exception or limitation, *de lege lata* it is inevitable to apply the three-step test truly step by step, and that it is only justified to proceed to a next step if an exception or limitation has successfully passed the previous one. Therefore, what the Declaration suggests is not a new interpretation; it is rather a *de lege ferenda* proposal to change the test.

The Munich Declaration refers to three decisions which, according to, it have "overlooked" what is suggested in the Declaration as a new "balanced interpretation;" namely, the WTO panel report WT/DS114/R of 17 March 2000 (*Canada – Patents*) the WTO panel report WT/DS160/R, 15 June 2000 (*USA – Copyright*) and the decision of the French Supreme Court, 28 February 2006 in the *Mulhollad Drive* case.

The paper analyses the three conditions of the test – mainly from the viewpoint of copyright – in the light of these decisions by applying the rules of the Vienna Convention on the interpretation of treaties. It states that, although there are some differences in respect of certain aspects of the test, and although not all potentials of the test has been used yet, the decisions are basically correct – and that they are undoubtedly correct from the viewpoint of the application of the three-step test in accordance with the relevant international norms: step by step.

The paper presents the following interpretation of the three steps:

First step: "in certain special cases." It is a both quantitative and qualitative-normative condition. No exception or limitation is allowed that is not limited in scope and is not based on a sound legal-political justification. The special cases should be determined in a way that this condition is fulfilled; this may be achieved also on the basis of the "fair use" and "fair dealing doctrines with a due combination of statutory provisions and well-established case law.

Second step: "[no] conflict with a normal exploitation." It is a both descriptive and normative condition. No exception or limitation is allowed that would conflict with any form of employing a right for extracting economic value from it likely to acquire considerable importance and that, as a result, would enter into economic competition with the employment of the right (undermining its application in the market). It may also be regarded as a normative condition in a more narrow sense according to which the employment of the right must be in accordance with the basic objectives of protection of copyright (and should not take the form of misusing copyright, e.g., by locking up information indispensable for public security or unfairly eliminating competition).

Third step: "[no] unreasonable prejudice to the legitimate interests of authors/owners of copyright." The term "legitimate interest" has a legal positivist basis, but it has also a normative connotation. Although a word by word grammatical interpretation is also justified in its case, the condition of no prejudice to legitimate interest of authors/owners of copyright may only be duly interpreted if it is considered as a unique complex concept where the reasonableness and the legitimacy aspects have an inseparable interrelationship. It is this third step where a balance between the public interest to protect copyright as an indispensable incentive for creativity, on the one hand, and other public interests along, on the other hand, along with the related legitimate interests of authors, other owners of copyright, users and the general public may and should be duly established.

The paper expresses the view that not only the legislators should be regarded as addressees of the three-step test, but – at least, as regards the second and third steps – also the courts.

It is pointed out that the test is sufficiently flexible without being vague. It offers broad latitude to national legislators and jurisprudence, but also determines the conditions and limits thereof. If the potentials of the test is duly taken into account and exploited, it is equally suitable to determine the desirable scope and reasonable application of exceptions and limitations in the digital environment.

For this reason, the mainly *de lege ferenda* suggestions of the Munich Declaration are not necessary for a "balanced interpretation" of the test, for establishing adequate balance of interests in respect of copyright and related rights. It is fortunate that this is so, since it would hardly be a realistic idea to revise, in the foreseeable future, the relevant international norms.

The test is not broken; it should not be fixed; it should just be duly applied as a test in three steps, fully taken into account its "user's guide" – provided by the text of the relevant provisions, the objectives and context of the treaties concerned, and the other sources of interpretation the application of which is prescribed by the Vienna Convention of the Law of Treaties.

[End of outline]