

Fordham Conference 2009 – Cambridge University

Session 2 – B. Web 2.0 and Exceptions & Limitations (including three-step test, fair use), Google Book Settlement, Gower's Green Paper

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1. Incentives deriving from copyright law can only be achieved if the legal protection of creators and investors is strong enough – but likewise only if there is no overprotection.
2. Overprotection is to the disadvantage of the general public – not only in view of restrictions to uses of copyright-protected works, but also in view of lacking competition.
3. The risk of providing too broad protection can hardly be eliminated by the legal requirements for protection; even subordinate creations are protected in practice.
4. The most important instruments to reduce the overprotective effects of copyright law therefore are exceptions and limitations; they allow for certain uses in certain cases.
5. Exceptions and limitations, however, are jeopardized by the three-step test, established in Art. 13 TRIPS for instance, which seems to focus on the right holder's interests only.
6. The three-step test in Art. 13 TRIPS should consider the interests of third parties, as do Arts. 17, 26 II and 30 TRIPS with regard to trademark, industrial design and patent law, respectively.
7. The interests of third parties in copyright law may derive from human rights, fundamental freedoms, issues of scientific progress, cultural, social and economic development etc.
8. There also is a general interest in workable competition; competition is most affected if copyright law leads to single source situations in cases of non-substitutable subject matter.
9. Limitations and exceptions allowing for individual uses do not enhance competition; rather competitors of right holders must be enabled to exploit protected works.
10. Legal means to empower competitors in certain anti-competitive market situations are compulsory licenses; they might experience a renaissance in copyright law.

see also:

- Declaration on a Balanced Interpretation of the "Three-Step Test" in Copyright Law, www.ip.mpg.de/ww/en/pub/news/declaration_on_the_three_step/declaration.cfm

- Comments by the Max Planck Institute on the Green Paper of the European Commission on Copyright in the Knowledge Economy, www.ip.mpg.de/shared/data/pdf/mpl - green paper on copyright in the knowledge economy-def-1.pdf

Munich, March 12, 2009