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The "Three-Step Test" and the Wider Public Interest: Towards a More Inclusive Interpretation

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Intellectual property law aims to protect the public interest in two often-contradictory ways: by granting exclusive rights to encourage creativity and by limiting those rights in certain situations for socially beneficial purposes. The Three-Step Test in international intellectual property treaties aims to ensure that limitations and exceptions to intellectual property rights do not inappropriately encroach upon the interests of rights holders. This article examines the interpretation of the Three-Step Test as included in the Agreement on Trade-Related Aspects of Intellectual Property Rights for copyright and patents by two World Trade Organization dispute-resolution panels and by other commentators. It looks at how these interpretations have dealt with the public policy motivations underlying limitations and exceptions to exclusive rights, and considers the ways in which the public policy intentions that underlie decisions by national legislators to adopt the limitations and exceptions to intellectual property rights can be considered in each step of the test. The conclusion reached is that the Three-Step Test contains the potential to allow both aspects of the public interest to be considered as part of an inclusive interpretation.

Keywords copyright; patent; public interest; Three-Step Test

The notion of the "public interest" in intellectual property law contains a contradiction that tends to polarize debate. The long history of national legislation and international treaties for the protection of the rights of authors and other rights holders has established that there is a public interest in the provision of exclusive intellectual property rights to encourage innovation and further creativity by enabling their effective economic exploitation. However, these instruments also include provisions that recognize a public interest in the derogation of those rights in certain situations to encourage wider social access to and use of knowledge, information and cultural products.[1] Intellectual property law therefore promotes the public interest via two different and inherently contradictory mechanisms: creating rights that operate to exclude use by anyone other than the designated owner but also permitting socially valuable uses in certain limited situations. The appropriate extent of each is determined by national policy considerations and regulated by international law.

This policy contradiction creates a tension in the interpretation of intellectual property legislation and the international treaties that govern national intellectual property laws. Intellectual property rights owners argue that they should be

provided with the widest possible protection of their rights. However, representatives of user interests contend that important social value can also arise from limiting these rights in certain circumstances to provide public benefits in areas such as private use, freedom of speech, research, public health or education. Both positions aim to protect the public interest but legislation drafted to enhance the benefits provided by one may potentially impede the benefits provided by the other.

Standing at the centre of this debate over the most appropriate way for intellectual property laws to support the public interest is the Three-Step Test now included in a number of international treaties. The test governs the internationally agreed scope of exceptions and limitations to intellectual property rights. First introduced in 1967 into the Berne Convention for the Protection of Literary and Artistic Works (Berne Convention) in relation to the reproduction right in copyright law, it has now been incorporated into a number of international intellectual property treaties that deal with a broad range of rights, most notably within the provisions dealing with different intellectual property rights in the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS). The test protects the rights of intellectual property owners by placing restraints on the scope of exceptions and limitations to intellectual property rights that members are permitted to include in their national legislation. However, its existence also confirms that the exclusive rights granted by intellectual property legislation are not absolute.

The interpretation of the Three-Step Test is therefore a highly contested area in international intellectual property debates. While this conflict is often credited, perhaps incorrectly, with ensuring a proper ''balance'' within intellectual property law between the interests of rights owners and the interests of users of the material (Burrell and Coleman, 2005, pp. 187–91), in practice the reaction to any interpretation of the test is characterized by intense lobbying by or on behalf of rights holders as well as user groups. In addition, there is limited judicial precedent supporting an agreed interpretation of the test. The interpretations made have focused predominantly on providing appropriate protection for the economic interests of rights holders. However, there has been less detailed discussion concerning in what circumstances or to what extent exceptions or limitations introduced to provide wider public or social benefits *should* be permitted to derogate from the interests of rights holders (Griffiths, 2006).

Outline

The inclusion of the Three-Step Test in TRIPS in 1994 has led to its examination in a number of World Trade Organization (WTO) dispute-resolution panel reports. These have dealt with the test as applied to copyright, patents and trademarks. In *Canada—Patent Protection of Pharmaceutical Products* (Patent Case) in March 2000 a complaint by the European Communities and their member states (EC) led to an examination of whether certain exceptions contained in Canadian patent law complied with the Three-Step Test in TRIPS, article 30. In June of the same year, in

United States—Section 110(5) of the US Copyright Act (Copyright Case), a complaint by the EC against exceptions contained in section 110(5) of the US Copyright Act led to an assessment of the compliance of the US legislation with TRIPS, article 13. In 2005, a complaint by the United States and Australia regarding the non-compliance of certain EC regulations relating to trademarks and geographical indications for agricultural products and foodstuffs led to a panel report: *European Communities—Protection of Trademarks and Geographical Indications for Agricultural Products and Foodstuffs* (Trademark Case) that included a discussion of compliance by the EC with TRIPS, article 17. The test is now also included in some national legislative instruments and there is a significant amount of academic commentary concerning its interpretation.

This article will explore how arguments about the social benefits arising from public policy considerations that extend beyond the specific interests of rights holders have entered the debate surrounding interpretation of the Three-Step Test. The first section provides background information about the incorporation of the Three-Step Test into the international intellectual property treaties including how the test first entered the treaties and why the drafters were prepared to allow nations to provide exceptions to intellectual property rights in certain situations. The following section examines the two WTO cases that dealt with the Three-Step Test in relation to patents and copyright. These have been chosen because of the similarity of the structure of the tests in articles 13 and 30 of TRIPS and the Berne Convention, article 9(2).[2] The discussion focuses on the role played by the wider public policy rationales underlying the provision of the exceptions in arguments made by the respondent nations and in the interpretation of the test undertaken by the panels. In both these cases, the respondent nations argued that the disputed provision had a legitimate public policy rationale, which should be taken into account when using the Three-Step Test to determine its validity. The section considers how and at what point these arguments were examined by the panels and what, if any, impact they had on the final interpretation of the test.

In the final section, the test itself is examined step by step to determine in which sections of the test as worded in TRIPS, articles 13 and 30 there is potential for wider public interest considerations to be taken into account under each of the three criteria. It looks at how each limb of the test was interpreted by both the WTO panels and by the commentators and explores where and how the public policy rationale for an exception can potentially play a role in the interpretation of each step.

The article concludes that a public policy rationale focused on the provision of social benefits can validly form part of consideration within each step of the Three-Step Test and to do so could lead to a more compelling interpretation of the test that takes both sides of the public interest supported by intellectual property law into account. This discussion has important public policy implications as digital technologies now pose both challenges and opportunities for those engaged with the production and use of intellectual property products. The expansion of the activities

of public service institutions such as libraries and museums into the digital world alongside the development of commercial digital delivery business models for intellectual property products will continue to challenge the effectiveness of the test and its ability to provide an appropriate balance between such activities. In addition, the Three-Step Test is now increasingly being incorporated into domestic legislation,[3] which means that its interpretation is no longer only of concern to those engaged in the arcane world of treaty interpretation, but can have an impact on the daily activities of citizens.

The Three-Step Test

In 1967, a general right of reproduction was introduced into the Berne Convention. (article 9(1)). A reproduction right was already a part of the majority of national copyright laws[4] (Ricketson, 2002, p. 23), but the proposal for the explicit inclusion of a general right in the treaty for the first time created a debate about the circumstances in which national legislators should be permitted to provide exceptions or limitations to the new right.

The study group developing the preparatory documents for the revision of the Berne Convention in Stockholm in 1967 observed that:

> ... on the one hand, it was obvious that all the forms of exploiting a work which had, or were likely to acquire, considerable economic or practical importance must in principle be reserved to the authors; exceptions that might restrict the possibilities open to authors in these respects were unacceptable. On the other hand, it should not be forgotten that domestic laws already contained a series of exceptions in favour of various public and cultural interests and that it would be vain to suppose that countries would be ready at this stage to abolish these exceptions to any appreciable extent (Document S/1, Records 1967, pp. 111–2).

Existing exceptions in national legislation included provisions relating to a range of uses such as, public speeches, quotations. school books, newspaper articles, private use, reproduction by photocopying in libraries and reproduction for the use of the blind (Document S/1, Records 1967, p. 112). The study group considered that it would not be appropriate to include a full list of permitted exceptions in the convention, as this could ''encourage the adoption of all the exceptions allowed and abolish the right of remuneration'' and also could ''never cover all the special cases existing in national legislation'' (Document S/1, Records 1967, p. 112). Instead, they determined to find:

> ... a formula capable of safeguarding the legitimate interests of the author while leaving a sufficient margin of freedom to the national legislation to satisfy important social or cultural needs (Document. S/1, Records 1967, p. 113).

As a result, a provision was added outlining the general terms under which national legislators would be permitted to allow an exercise of the reproduction right by someone other than the author. The final agreed provision became known as the Three-Step Test. It provided that national legislation could permit the reproduction of works protected by the convention:

> ... 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 (Berne Convention, article 9(2)).

This first iteration of the test, with minor wording changes, has since been adopted and expanded to apply to a broader range of rights through its inclusion in TRIPS (articles 13, 17, 26(2), 30), the World Intellectual Property Organization (WIPO) Copyright Treaty (WCT) (article 10) and the WIPO Performances and Phonograms Treaty (WPPT) (article 16).

The inclusion of the test in TRIPS reflects both the desire of the members to ''promote effective and adequate protection of intellectual property rights'' and the objectives and principles of the instrument as contained in articles 7 and 8. TRIPS, article 7 notes that the protection of intellectual property rights should contribute to the ''transfer and dissemination of technology'' to benefit both producers and users of technical knowledge ''in a manner conducive to social and economic welfare''. TRIPS, article 8 refers to the necessity of adopting ''measures necessary to protect public health and nutrition'', to promote the public interest in sectors important to a nation's socioeconomic and technological development and to avoid the restraint of trade. The test is now well established as part of these multilateral agreements and plays a key role in international intellectual property and trade agendas.

WTO Panel Interpretations

The inclusion of the Three-Step Test in TRIPS in relation to copyright, trademarks, industrial design and patents means that the test now functions in the context of international trade and is subject to the binding dispute-settlement mechanisms of the WTO. The two WTO dispute-resolution cases discussed in this article considered the test as included in TRIPS, article 13 relating to copyright that reads:

> 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 (TRIPS, article 13)

and article 30 that relates to patents:[5]

> Members may provide limited exceptions to the exclusive rights conferred by a patent provided that such exceptions do not unreasonably conflict with a normal exploitation of the patent and do not unreasonably

> prejudice the legitimate interests of the patent owner, taking account of the legitimate interests of third parties (TRIPS, article 30).

These provisions adopt slightly different wording from article 9(2) of the Berne Convention[6] reflecting the different contexts in which the test operates in TRIPS. In both these cases, the WTO panels undertook interpretation of the text in line with article 31(1) of the Vienna Convention on the Law of Treaties (Vienna Convention) (Patent Case, paragraphs 4.30, 7.13; Copyright Case, paragraph 6.43).

> A treaty is to be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose (Vienna Convention, article 31(1)).

In both the disputes the defendant nations argued that an important social benefit flowed from the disputed exceptions included in their national legislation. In the Patent Case, the panel was required to determine whether two exceptions that allowed certain uses of the patent by parties other than the patent owner during the patent term provided in the Canadian Patent Act 1985 were compliant with article 30 of TRIPS. In the Copyright Case, the panel examined whether or not section 110(5) of the US Copyright Act that permitted limited public performance of broadcasts in certain settings complied with article 13 of TRIPS. In both cases, the wider public benefit arising from the challenged exception was one of the factors used by the defendant nation to argue that the exception in question was compliant with the Three-Step Test.

Canadian Patent Case

The Patent Case in 2000 delivered the first report by a WTO panel dealing with an interpretation of the Three-Step Test. It involved a dispute between the EC and Canada that inquired into whether two exemptions in the Canadian Patent Act 1985, the ''regulatory review'' exception (section 55.2(1)) and the ''stockpiling exception'' (section 55.2(2)), were compliant with TRIPS, article 30. The ''regulatory review'' exception provided that it was not a patent infringement to ''make, construct, use or sell'' a patented invention if done as part of the development or submission of information required under any law regulating the ''manufacture, construction, use or sale of a product'' (Canadian Patent Act 1985, section 55.2(1)). This was intended to allow generic pharmaceutical manufacturers to undertake the preparation needed to meet regulatory review requirements before a patent had expired thus allowing them to take a generic drug to market immediately upon expiry. The ''stockpiling'' exception allowed for the same acts to be undertaken for the purposes of ''the manufacture and storage of articles intended for sale after the date on which the term of the patent expires'' (Canadian Patent Act 1985, section 55.2(2)). Canada argued that these exceptions had been introduced to allow generic manufacturers to compete freely with the patentee after a patent expired, thus protecting public health by promoting access to cost-effective, generic medicines

(Patent Case, paragraph 4.10). Its aim was to ensure that patentees were not able ''to exploit time-consuming regulatory review systems . . . in order to extend the term of patent protection and to gain a windfall monopoly'' (Patent Case, paragraph 4.12).

The EC challenged the validity of these exceptions, claiming that Canada was in breach of its TRIPS obligations relating to patentable subject matter, the rights conferred on the owner of a patent (articles 27.1 and 28.1) and the requirement in article 33 that the term of patent protection should not end before 20 years from the filing date. Canada responded that the provisions in question complied with the requirements of the Three-Step Test for exceptions to patent rights in article 30 and did not reduce the minimum term of protection required under article 33 (Patent Case, paragraphs 3.1–3.2).

From the outset, Canada argued that the exceptions provided a public value for Canadian society and that TRIPS contemplated members adopting measures that introduced limited exceptions that would prevent a patent monopoly extending beyond its specific term. It explained that the exceptions were provided:

> . . . in the interests of promoting full competition in regulated-product markets after the expiry of that term and of realizing the cost-saving benefits that competition in those markets (particularly the health care products market) conferred on society (Patent Case, paragraph 4.12).

In response, the EC argued that:

> . . . the TRIPS negotiating parties had taken societal interests into consideration when agreeing on the balance of interests which were enshrined in the TRIPS Agreement. Consequently, individual WTO members could not now rebalance these interests unilaterally by modifying the level of protection provided for in the Agreement (Patent Case, paragraph 4.30).

Canada asserted that TRIPS allowed for broader public interest considerations to be taken into account when framing valid exceptions, on condition that the rights of the patent owners were preserved. The EC argued that exceptions should not reduce the economic returns of patent owners and that any *de facto* period of economic returns, which was available after the expiry date of a patent due to regulatory review delays, had been built into the TRIPS system intentionally. The EC contended that ''[i]t was one of the major features of TRIPS that its implementation was in principle neutral *vis-à-vis* societal values'' (Patent Case, paragraph 4.30). This meant that public policy considerations could not be invoked to justify measures such as Canada had adopted, because these had already been taken into consideration when negotiating the final text of the agreement (Patent Case, paragraph 7.25).

In its report, the panel concluded that:

> . . . Article 30's very existence amounts to a recognition that the definition of patent rights contained in Article 28 would need certain

> adjustments. On the other hand, the three limiting conditions attached to Article 30 testify strongly that the negotiators of the Agreement did not intend Article 30 to bring about what would be equivalent to a renegotiation of the basic balance of the Agreement (Patent Case, paragraph 7.26).

It found that section 55.2(2), the ''stockpiling exception'', was not a ''limited exception'' as required under the first limb of the test in article 30 as it constituted ''a substantial curtailment of the exclusionary rights required to be granted to patent owners under article 28.1 of TRIPS'' (Patent Case, paragraph 7.36).[7] However, it determined that section 55.2(1), the ''regulatory review'' exception, *was* a permitted exception as it met each of the requirements of the Three-Step Test in article 30 (Patent Case, paragraphs 7.44, 7.57, 7.73).[8] This exception, unlike section 55.2(2), was considered sufficiently narrow in scope to meet the requirements of step one of the test, because the extent of any curtailment of article 28.1 rights that may result was limited by the requirements of the regulatory approval process (Patent Case, paragraph 7.45).

US Copyright Case

The Copyright Case, a dispute between the EC and the United States, was brought before a WTO panel in 1999 requiring an interpretation of the Three-Step Test in TRIPS, article 13. The dispute concerned section 110(5) of the US Copyright Act as amended by the Fairness in Music Licensing Act enacted on 27 October 1998. The provision permitted the public performance or display of musical works delivered via a broadcast in certain retail and food or drinking establishments, subject to size and audio-visual equipment limitations.

The provision had originally been intended to ''exempt from copyright liability anyone who merely turns on, in a public place, an ordinary radio or television receiving apparatus of a kind commonly sold to members of the public for private use'' (Copyright Case, paragraph 2.5). When amended in 1998, the section was divided into two parts. The first retained the original exemption allowing display of a work on a single receiving device but was restricted to a very narrow type of work (the communication of a transmission embodying a performance or display of a work other than non-dramatic musical works, i.e. music that is part of an opera, operetta, musical or other similar dramatic work when performed in a dramatic context)—referred to as the ''homestyle'' exemption. The second was a much broader provision exempting retail and food and drinking establishments that complied with certain specified size and audio-visual equipment restrictions from copyright infringement when displaying a transmission of non-dramatic musical works (a much larger potential category of works)—referred to as the ''business'' exemption.

The panel determined that for the exception to be valid it must comply with the Three-Step Test in article 13.[9] The EC argued that section 110(5) did not comply

with article 13 because step one of the test required that there be a ''special public policy or other exceptional circumstance'' that would make it inappropriate or impossible to enforce the exclusive rights conferred by the convention and that the sections in question did not pursue such legitimate public policy objectives (Copyright Case, paragraph 6.105). In response, the United States argued that TRIPS only required that an exception had a specific policy objective:

> It does not impose any requirement as to the legitimacy of the policy objectives that a particular country might consider special in the light of its own history and national priorities (Copyright Case, paragraph 6.106).

The United States claimed that the provisions had a specific public policy objective that was ''fostering small businesses and preventing abusive tactics by CMOs'' (collective management organizations) (Copyright Case, paragraph 6.115).

The panel concluded that the wording of article 13 did not require a legitimate public policy for an exception to comply with the first limb of the test (Copyright Case, paragraph 6.111). However, it noted that:

> ... public policy purposes stated by law-makers when enacting a limitation or exception may be useful from a factual perspective for making inferences about the scope of a limitation or exception or the clarity of its definition (Copyright Case, paragraph 6.112).

It found that the limited ''homestyle'' exemption in section 110(5)(A) met the requirements of the test in article 13, but that the wider ''business'' exemption in section 110(5)(B) did not. The arguments taken into account included the potential for economic loss to rights holders now or in the future (Copyright Case, paragraphs 6.184–6.186), the number of rights holders likely to be affected (Copyright Case, paragraphs 6.206, 6.215) and the existence of any mechanism for licensing the rights in question (Copyright Case, paragraph 6.216). The panel reiterated that when interpreting step one of article 13 it was not required to ''pass value judgement on the legitimacy of an exception or limitation''. It noted the intention contained within the Berne Convention to allow for the possibility of providing minor exceptions ''as long as they are *de minimis* in scope'' (Copyright Case, paragraph 6.158) and concluded that the ''homestyle'' exemption met the requirement in step one that a valid exemption be ''well-defined and limited in its scope and reach'' (Copyright Case, paragraph 6.159). The panel did not make a judgement on the legitimacy of the specific public policy intentions of the US legislators; however, it noted that the claimed public policy objectives and the legislative history ''could be of subsidiary relevance for drawing inferences about the scope of an exemption and the clarity of its definition'' (Copyright Case, paragraphs 6.156–6.159).

Public Policy and a Step-by-Step Interpretation

Interpretation of the Three-Step Test has customarily been undertaken by addressing each of the three limbs of the test separately and sequentially from one to three (Patent Case, paragraph 7.20). Failure to meet the criteria in any one of the steps will result in the overall test not being satisfied (Ginsburg, 2001, p. 12; Knights, 2000, p. 3). The result is that if arguments concerning the public policy intentions of legislators introducing the exception are not considered as part of the interpretation at each step, it is possible that these issues could be completely excluded from the overall evaluation, particularly if they are not taken into account in step one. This has the potential to eliminate consideration of the anticipated wider social benefits of an exception from the test completely. However, each limb of the test does contain the potential for some consideration of the broader public policy basis of the exception or limitation in question and adopting an interpretive methodology that takes this into account may assist with ensuring that the wider social policy intentions of legislators form part of a balanced implementation of the test.

The two WTO disputes discussed here were decided predominantly on the basis of likely economic harm to rights owners and the fact situations did not lend themselves specifically to a deeper consideration of the value of the wider public interest concerns being promoted by the governments in question. It may not be appropriate for a WTO panel to pass value judgements on such issues (Copyright Case, paragraphs 6.112, 6.157). However, it is suggested that wider public interest considerations should not be completely excluded from the interpretation of the Three-Step Test, even if an interpreter is not required to rule on their legitimacy.

In July 2008, a group of experts in copyright law from Europe and the United States signed a declaration at the International Association for the Advancement of Teaching and Research in Intellectual Property, calling for a more balanced interpretation of the Three-Step Test in copyright law (Ermet, 2008). The declaration stated that:

> The public interest is not well served if copyright law neglects the more general interests of individuals and groups in society when establishing incentives for right holders (Geiger *et al.*, 2008, p. 2).

It calls for a new interpretation of the Three-Step Test and argued that the test requires ''... a comprehensive overall assessment, rather than the step-by-step application that its usual, but misleading, description implies'' (Geiger *et al.*, 2008, p. 2). The declaration argues that this would ensure that an interpretation of the test did not result in an inappropriate balance between the interests of rights holders and those of the larger general public. To some extent, this argument is justified by the practices undertaken by WTO panels to date, as there is already a tendency for facts and arguments used in the interpretation of each step under consideration to cross over between the three steps.

However, there may also be an opportunity for working towards a more balanced and equitable outcome by adopting an interpretation at each step of the

test that seeks to ensure that the legislators' social policy intentions are not excluded from consideration in any step. Interpretations undertaken in the two WTO cases discussed here demonstrate how the interpretation of the ordinary meaning of the words in each of the steps has the potential to accommodate a consideration of the public policy intentions underlying exceptions and limitations. To do this may help to avoid the potential for a particular interpretation to exclude completely any consideration of the wider social benefit intentions of legislators from the interpretation.

The following section will examine each of the three steps of the test and explore where and how wider social policy intentions can be taken into account in an interpretation of that step. The steps are considered here in reverse order, starting with step three, in which the ordinary meaning of the words appears to provide the greatest scope for the public policy intentions underlying an exception or limitation to form part of the interpretation.

Step Three—No Unreasonable Prejudice to Legitimate Interests

The third criteria of the Three-Step Test aims to protect the economic and non-economic interests of rights holders from an over-reaching exception or limitation by providing that, in addition to the prohibition against a conflict with ''normal exploitation'' in step two, there is appropriate protection of a rights holder's interests beyond what is considered normal exploitation. In TRIPS, articles 13 and 30, step three requires that the exceptions or limitations in question, ''do not unreasonably prejudice the legitimate interests'' of the right holder (article 13) or the patent owner (article 30). In article 30, the provision includes a further requirement also to take account of ''the legitimate interests of third parties''.

In this step, the use of the limiting words ''legitimate'' and ''unreasonable'' indicates that the rights of owners are not absolute and, in certain situations, some derogation of those rights could be considered legitimate. This wording acknowledges that it may be acceptable for an exception or limitation to cause some prejudice to the interests of a rights holder, as long as this does not extend to an unreasonable level, and also that a rights holder will not be able to insist on the protection of illegitimate interests. The panel in the Patent Case discussed interpretation of the term ''legitimate interests'' as follows:

> To make sense of the term ''legitimate interests'' in this context, that term must be defined in the way that it is often used in legal discourse—as a normative claim calling for protection of interests that are ''justifiable'' in the sense that they are supported by relevant public policies or other social norms (Patent Case, paragraph 7.69).

It noted that the negotiating history of both article 9(2) of the Berne Convention and article 30 of TRIPS showed that those drafting the text of the test had

referred initially to an illustrative list of permissible socially valuable exceptions (Ricketson, 2002, p. 24) and also referred to the existence of ''one of the most widely adopted article 30 type exceptions in national patent laws''—the use of a patented product for scientific experimentation (Patent Case, paragraph 7.69). This indicated that whereas rights holders must be protected from unreasonable harm to their interests, to receive this protection the interests claimed must be justifiable and ''supported by relevant public policies or other social norms'' (Patent Case, paragraph 7.69). The panel concluded that it was appropriate for ''normative claims of interest'' to play a part in the interpretation of step three of the test. When attempting to determine whether a patent owner had a ''legitimate interest'' in having access to a *de facto* period of market exclusivity resulting from regulatory delays in obtaining marketing approval, the panel noted that the ''community of governments was obviously still divided over the merits of such claims'' (Patent Case, paragraph 7.82) and therefore in this situation the public policy issues were unresolved:

> The Panel believed that Article 30's ''legitimate interests'' concept should not be used to decide, through adjudication, a normative policy issues that is still obviously a matter of unresolved political debate (Patent Case, paragraph 7.82).

However, this suggests that if the exception had been supported by clearly accepted public policy purposes and social norms, this would have been taken into account as part of the panel's evaluation of legitimate interests.

In the Copyright Case, the panel took a legal positivist approach when determining whether the provision was compliant with article 13. It used economic data on market conditions submitted by the parties to decide if any prejudice caused to the legitimate interests of the rights holder as a result of the exception reached ''a level beyond reasonable'' (Copyright Case, paragraphs 6.225–6.226). However, the panel also noted that this was not to say ''that legitimate interests are necessarily limited to this economic value'' (Copyright Case, paragraph 6.227) and that ''legitimate'' also has a normative connotation:

> ... in the context of calling for the protection of interests that are justifiable in the light of the objectives that underlie that protection of exclusive rights (Copyright Case, paragraph 6.224).

It has been suggested that it would be possible to merge the different approaches taken by the copyright and patent panels in this step of the test and ''to follow a normative approach *including* the legal interest in the full enjoyment of exclusive rights'' to allow a balancing of all interests involved (Senftleben, 2006, p. 434). Ginsburg has argued that ''the same normative concerns that advocate against a purely economic evaluation of ''normal exploitation'' in step two of the test should similarly inform the analysis of whether a right holder's interests are ''legitimate''" in step three (Ginsburg, 2001, p. 15). She notes that while an author

has a legitimate interest in being paid for a use, they have ''a less legitimate interest in preventing it altogether'' (Ginsburg, 2001, pp. 15–16). Ricketson also notes that:

> ... the adjective ''legitimate'' implies that there is a ''proper'' sphere of application for authors' interests, and that this should not be overreaching or pursued regardless of other considerations (Ricketson, 2002, p. 39).

The third criterion of the test therefore focuses most predominantly on the non-economic interests of rights holders and in article 30 also takes into account the legitimate interests of third parties. The normative interpretive approach adopted by the panel in the Patent Case took into account ''relevant public policies or social norms'' (Patent Case, paragraph 7.69), an approach which was also adopted by the panel in the Trademark Case (Senftleben, 2006, p. 434). The Copyright Case panel noted the lack of specific reference in article 13 to the legitimate interests of third parties; however, it still indicated that an economic analysis formed only part of a wider analysis of legitimate interests in this step. So both WTO panels have acknowledged scope for the inclusion of wider social value policy considerations in the interpretation of step three of the test. However, the cases provide little guidance on what might constitute an appropriate measure of ''legitimate'' rights or ''unreasonable'' prejudice in future situations.

Step Two—No Conflict with Normal Exploitation

The requirement in step two of the test is that there must be no conflict (or in article 30 no unreasonable conflict) with the ''normal exploitation'' of a work. Achieving an appropriate definition of ''normal exploitation'' is potentially problematic in light of the shifting nature of the market and technologies and the social context surrounding the use of intellectual property. In addition, any definition of ''normal exploitation'' is to some extent itself defined by what rights are available for exploitation because they are not already limited by the existence of an exception (Goldstein, 2001, pp. 295–6).

In the Copyright Case, the panel noted that the definition of ''normal exploitation'' could have both the empirical connotation of ''regular, usual, typical or ordinary'' and a more normative definition such as ''conforming to a type or standard'' (Copyright Case, paragraph 6.166). It aimed to develop an interpretation that gave ''meaning and effect to both connotations'' (Copyright Cases, paragraph 6.166). However, the final interpretation adopted relied primarily on a quantitative analysis of economic impact, initially determining that an exception conflicts with ''normal exploitation'' if:

> ... uses, that in principle are covered by the right but exempted under the exception or limitation, enter into economic competition with the ways that right holder[s] normally extract economic value from that right to the work (i.e., the full copyright) and thereby deprive them of significant or tangible commercial gains (Copyright Case, paragraph 6.183).

To include the second or more normative connotation of the term in its interpretation, the panel also examined the potential future effects of the exception on the market by considering, in addition, ''those forms of exploitation which with a certain degree of likelihood and plausibility, could acquire considerable economic or practical importance'' (Copyright Case, paragraph 6.180). The panel did not make any further normative evaluation of the type or standard of exploitation that an owner *should* be able to exploit. Ginsburg has suggested that this was possibly because:

> ... the case ... did not present significant normative difficulties, since the pork barrel exceptions at issue did not further speech, scholarship, or other creative activities often fostered by copyright exceptions (Ginsburg, 2001, p. 14).

By comparison, the panel in the Patent Case did include a normative evaluation in the interpretation of what constituted a ''normal exploitation'' of the rights in question. The key question it addressed when evaluating the validity of the ''early working'' exception in section 55.2(1) was whether the additional period of market exclusivity that would be available to patent owners *after* the term of the patent (if competitors were not permitted to take steps to obtain market approval during the term of the patent) should be considered part of an owner's ''normal exploitation'' (Patent Case, paragraph 7.52). The panel considered that the definition of ''normal'' could refer to either an empirical conclusion about what is regular or usual or to a more normative standard of entitlement and the term was used in article 30 in a way that combined the two (Patent Case, paragraph 7.54). In evaluating what was a regular or usual exploitation (i.e. the empirical connotation of normal), the panel determined that any additional period of *de facto* market exclusivity was ''not a natural or normal consequence of enforcing patent rights'' (Patent Case, paragraph 7.57) as such a period was not available to the majority of patent owners for whom there was no marketing regulation. Rather it was:

> ... an unintended consequence of the conjunction of the patent laws with product regulatory laws, where the combination of patent rights with the time demands of the regulatory process gives a greater than normal period of market exclusivity to the enforcement of certain patent rights (Patent Case, paragraph 7.57).

When examining the normative connotation of normal, the panel considered whether the exercise of this area of exploitation was ''normal in the sense of being essential to the achievement of the goals of patent policy'' (Patent Case, paragraph 7.58). Thus, rather than widening the scope of ''normal exploitation'' by adding the impact of potential future markets as in the Copyright Case, the patent panel permitted either an empirical or a normative evaluation to be determinative and required a claim of normal exploitation to be ''justified in the light of the policy objectives underlying the grant of exclusive rights'', rather than merely resulting

from any possible exercise of exclusive rights (Senftleben, 2006, p. 424). As the EC had not provided evidence that either most patent owners extracted value from the *de facto* period of market exclusivity or that for them to do so was essential to the achievement of patent policy goals, the exception was held not to conflict with ''normal exploitation'' (Patent Case, paragraph 7.58). The panel therefore did not go on to consider what would have made any such conflict ''unreasonable''.

The panel in the Copyright Case noted that the very existence of article 13 meant that the definition of ''normal exploitation'' could not extend to every possible form of commercial exploitation:

> . . . not every use of a work, which in principle is covered by the scope of exclusive rights and involves commercial gain, necessarily conflicts with a normal exploitation of that work. If this were the case, hardly any exception or limitation could pass the test of the second condition and Article 13 might be left devoid of meaning, because normal exploitation would be equated with full use of exclusive rights (Copyright Case, paragraph 6.182).

However, the interpretation of step two of the test still remains somewhat ''open ended and uncertain'' (Ricketson, 2002, p. 36). Neither the wording of the test, nor the considerations undertaken by the WTO panels give a clear indication of to what extent normative policy considerations should be taken into account when determining what would be considered normal exploitation.

Commentators have adopted differing positions on the inclusion of normative factors in an interpretation of step, two of the test. Ricketson has suggested that any interpretation of the second step, as contained in article 9(2) of the Berne Convention, should be viewed against the wider context of the treaty and include an investigation of non-economic normative considerations including ''whether this particular kind of use is one that the copyright owner *should* control'' (Ricketson, 2002, p. 35).

Ginsburg has noted that if the analysis of ''normal exploitation'' is limited to the more strictly empirical definition relied upon by the panels in the WTO cases and a more normative analysis does not form part of the interpretation:

> . . . there is a risk that even traditionally privileged uses, such as scholarship or parody, could be deemed ''normal exploitations,'' assuming copyright owners could develop a low transactions cost method of charging for them (Ginsburg, 2001, p. 14).

The focus in step two of the test on the level of actual or potential economic harm to the copyright owner remains the key criteria used to determine any conflict with ''normal exploitation'' (Senftleben, 2004, p. 194). However, despite the fact that the two WTO cases provide only limited guidance on the requirements of the normative connotation of the term ''normal exploitation'', both panels indicated that such an assessment also plays a part in an analysis of the step. The extent to

which normative considerations are considered an appropriate part of any determination may depend on the specific facts of a case. However, the conclusion of the patent panel suggests flexibility surrounding the need to consider the policy underpinnings of an exception or limitation in the interpretation of this step. The constantly changing nature of what is considered normal exploitation in the contemporary environment also suggests that any definition may not remain fixed and that ''value judgements will need to be made which will clearly vary according to the society and culture concerned'' (Ricketson, 2002, p. 36).

Step One—Special Case

The first criterion of the Three-Step Test is worded differently in TRIPS, articles 13 and 30. Whereas step one of the copyright provision in article 13 refers to the exception consisting of a ''special case'', the wording in article 30 relating to patents requires that the exception be ''limited''. The WTO panels examining this criterion both sought to ''measure the extent to which legal rights were curtailed by the limitation in question'' (Senftleben, 2006, p. 420) and determined that only a small diminution of the rights would be permissible. The panel in the Copyright Case considered that the word ''certain'' meant that the scope of the exception must be known and particularized and that the word ''special'' added an additional requirement that the exception should be narrow in both a quantitative and a qualitative sense (Copyright Case, paragraphs 6.108–9). In the Patent Case, the panel determined that ''the word ''limited'' must be given a meaning separate from any limitation implicit in the word ''exception'' itself'' and therefore must ''connote a narrow exception—one which makes only a small diminution of the rights in question'' (Patent Case, paragraph 7.30). Neither panel undertook a normative evaluation of the legitimacy of the exceptions in question (Senftleben, 2006, p. 421). The Copyright Case panel specifically rejected the proposition that exceptions ''must be justified in terms of a legitimate public policy purpose in order to fulfill the first condition of the article'' (Copyright Case, paragraphs 6.111–2).

Some commentators, however, have pointed to a connection between the requirement in some versions of step one of the Three-Step Test that limitations or exceptions be confined to ''certain special cases'' and the need for a legitimate public policy objective underlying a decision by legislators to restrict the rights of rights holders (Ficsor, 2002, p. 133). When commenting on the test as included in the Berne Convention in 1987, Ricketson stated:

> ... there must be something ''special'' about this purposes, ''special'' here meaning that it is justified by some clear reason of public policy or some other exceptional circumstance (Ricketson, 1987, p. 482).

However, he later noted that in the test as incorporated into TRIPS, there was no requirement that a ''certain special case'' have an underlying public policy justification (Ricketson, 2002, p. 31; 2003, p. 22).

Other commentators, however, do consider that a legitimate public policy rationale for an exception forms part of step one of the test. Senftleben notes that while he believes the panel in the Copyright Case was correct in avoiding ''inappropriate panel ''activism''" (Senftleben, 2004, p. 145) by declining to rule on the validity of the specific domestic policy rationale in that case, he still considers the existence of a justifiable reason underlying an exception plays a key role in the interpretation of what constitutes a ''special case'' for the purposes of step one:

> The legislative decision to set limits to the author's exclusive rights must be a reaction to an understandable need for the reconciliation of the user interest at stake with the author's legitimate interests. ... In sum, a limitation that rests on a rational justificatory basis making its adoption plausible constitutes a special case in the sense of the three-step test (Senftleben, 2004, p. 152).

Gervais notes that Ricketson's initial position on the Berne provision was solidly anchored in the history and the text of the Berne Convention and considers that as ''few countries will act in a purely arbitrary way'':

> Any exception to copyright is arguably ''special'' because any exception short of a complete repeal of the Copyright Act would arguably be ''limited in its field of application'' (Gervais, 2005, pp. 14–16).

On the other hand, it has been suggested that to consider the legitimacy of the public policy rationale underlying an exception in step one could inappropriately place an interpreter in the position of ''evaluating the merits of local policy determinations'' (Ginsburg, 2001, p. 12). Also, the list of national exceptions that were in existence when the Three-Step Test was first introduced into the Berne Convention could not themselves necessarily claim ''persuasive policy underpinnings'' and therefore it is arguable that under current interpretations of the test: ''''special cases'' can include unworthy as well as laudable exceptions, so long as they are sufficiently narrow'' (Ginsburg, 2001, p. 12).

The proper role for consideration of the public policy intentions underlying an exception in the interpretation of step one of the test therefore remains contested, with the panels in both the copyright and patent cases rejecting any requirement for a normative evaluation of the legitimacy of the public policy purposes underlying the exceptions. However, the copyright case panel stated that:

> ... public policy purposes stated by law-makers when enacting a limitation or exception may be useful from a factual perspective for making inferences about the scope of a limitation or exception or the clarity of its definition (Copyright Case, paragraph 6.112).

In addition, the panel in the Patent Case undertook a global assessment of factors influencing the scope of an exception (Senftleben, 2006, p. 421). This suggests that, in certain situations, the policy intentions of legislators may be

relevant. While the terms of step one of the test may not explicitly require interpreters to pass judgement on the legitimacy of the public policy decision underlying the exception, taking the intentions of the legislators into account is likely to provide a more comprehensive understanding of the context in which the text is operating. A particular case may be more or less compellingly ''special'' or an exception more or less demonstrably ''limited'' if its policy underpinnings are taken into account as part of the evaluation.

Incorporating the Wider Public Interest

This discussion demonstrates that the Three-Step Test, particularly as incorporated into TRIPS in articles 13 and 30, does contain the potential for some resolution of the conflict between the two different forms of public interest supported by intellectual property law. If the wider social benefit intentions of legislators play a part in the interpretation of all three limbs of the test, while each step is still evaluated primarily to avoid any inappropriate incursion onto the legitimate interests of rights holders, this could potentially lead to a more inclusive overall interpretation of the test. Such an evaluation would not require a radical departure from existing interpretive precedent, but may mean that consideration of the wider social benefits offered by an exception or limitation is less likely to be completely removed from an interpretation of the test due to the sequential step by step methodology and the uncertainty surrounding the interpretation of step one. The wider social benefit of a proposed exception or limitation can potentially play a legitimate role in the interpretation of each step of the test but will not necessarily be sufficiently persuasive to override a stronger case for the protection of an owner's intellectual property rights as determined within each of the steps.

In relation to *step three* of the test as contained in TRIPS articles 13, 30, the panels in both the WTO cases noted that to be considered legitimate, the interests of rights holders must be justifiable in a normative sense. If there is a sufficiently persuasive public policy justification for an exemption or limitation, this may assist with evaluating the legitimacy of the interests claimed by rights holders and whether any potential prejudice to those interests caused by the exception would be considered unreasonable.

In the definition of ''normal exploitation'' in *step two* both panels considered that the normative connotation should be taken into account as well as or as an alternative to empirical considerations when interpreting the term. If an approach such as that taken by the panel in the Patent Case allowing either a normative or a qualitative evaluation to be determinative was to be adopted, this would allow for the possibility that in appropriate situations a public interest purpose ''might provide sufficient non-economic normative consideration to outweigh considerations of an economic kind'' (Ricketson, 2003, p. 75).

The role of wider social policy benefit considerations in *step one* of the test remains more contentious. It has been specifically discounted as a necessary

requirement for a legitimate ''special case'' by the panel in the Copyright Case; however, it was accepted as part of the factual matrix that may be used to evaluate the appropriate scope or clarity of the exemption. There is argument from commentators based on reference to the preparatory documents of the treaties that a sound public policy justification should play a role in the determination of whether an exception constitutes a ''special case'' (Ficsor, 2002, pp. 129–33; Senftleben, 2004, p. 152). The suggestion that taking public policy justifications for an exception into account under step one of the test would create ''unnecessary complexity'' (Ricketson and Ginsburg, 2006, p. 767) does not address the possibility that not to do so could potentially result in the complete exclusion of any consideration of the wider social benefits of an exception from the test if the interpretation does not proceed to steps two and three. It appears appropriate that any interpretation of the Three-Step Test should take into account both aspects of the public interest that the provision was designed to protect and ensure that neither is excluded from the debate.

Ficsor has commented in relation to exceptions in the Berne Convention that:

> The text and the negotiating history of the Convention show that specific public and cultural policy purposes not only have served for the adoption of these provisions, but also that they must be kept in mind constantly in the application thereof (Ficsor, 2002, p. 131).

Ensuring that normative considerations play a part in the interpretation of each step of the Three-Step Test could contribute to a more inclusive discussion of the most appropriate way for intellectual property legislation to support both aspects of the ''public interest''. This is likely to have important social policy as well as commercial implications in the contemporary international intellectual property environment where the Three-Step Test plays an increasingly prominent role.

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Notes

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1 In the closing speech of the Conference for the Protection of Authors' Rights on 18 September 1884, Federal Councillor Numa Droz, president of the conference, stated that ''limitations on absolute protection are dictated, rightly in my opinion, by the public interest''.

2 A discussion of the test for trademark exceptions contained in TRIPS, article 17 differs from the test as it relates to patents and copyright because the wording of article 17 does not refer to conflict with normal exploitation or unreasonable prejudice to the legitimate interests of the might owner. It also includes a requirement to take account of the legitimate interests of third parties (Trademark Case, paragraph 7.649).
The panel in the Trademark Case drew upon interpretations adopted in the Patent Case and the Copyright Case but emphasized the need to interpret article 17 ''according to its own terms''. The difference in wording and interpretation between article 17 and articles 13 and 30 of TRIPS may be a relevant subject for further examination.

3 Australian Copyright Act 1968 (Cth) section 200AB; Directive 2001/29/EC of the European Parliament of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society [2001] OJ L167/10, article 5(5).

4 ''This prerogative has a fundamental place in the legislation of the countries of the Union; the fact that it is not recognized in the convention would therefore appear to be an anomaly'' (Document S/1, Records 1967, p. 111).

5 The three-step test is also included in TRIPS in article 17 in relation to trademarks and in article 26(2) in relation to industrial designs.

6 Article 9(2) of the Berne Convention is also incorporated into TRIPS by article 9(1) which requires that members comply with articles 1 through 21 of the Berne Convention.

7 The panel asserted in relation to the interpretation of the Three-Step Test that ''The three conditions are cumulative, each being a separate and independent requirement that must be satisfied. Failure to comply with any one of the three conditions results in the article 30 exception being disallowed'' (Patent Case, paragraph 7.20). Therefore, as the stockpiling exception did not comply with step one, it was not necessary to investigate its compliance with steps two and three to decide that the exception was inconsistent with Canada's obligations under article 28.1 of TRIPS (Patent Case, paragraph 7.38).

8 The panel determined that the ''regulatory review'' exception was compliant with the three-step test because, first, it was a ''limited exception'' as required under step one as this step did not require the panel to address the issue of economic impact (this was addressed in different contexts in steps two and three) and the exception only allowed for a narrow curtailment of the patentees rights. Second, the exception did not conflict with a normal exploitation of the patent owners, rights, as a *de facto* period of market exclusivity arising from the regulatory process could not be considered part of ''normal'' exploitation of a patent. Third, there had not been prejudice to the legitimate interests of the patent owner, as it was not legitimate to claim that a patentee's interests extended to

a *de facto* period of market exclusivity occasioned by regulatory delays (Patent Case, paragraphs 7.40–7.84).

9 The EC had initially argued that article 13 should not be used to test the US exception as it only applied to the exclusive rights newly introduced in the TRIPS agreement itself (Copyright Case, paragraph 6.34). However, the United States argued that article 13 also applied to exceptions to all the exclusive rights incorporated into the agreement as part of the Berne Convention, which included the right of public performance (Copyright Case, paragraph 6.94). The panel accepted the US argument and, in addition, concluded that valid exceptions were not necessarily limited to non-commercial uses or to the exceptions that had been in existence before 1967 (Copyright Case, paragraph 6.93).

References

Burrell, R. and Coleman, A. (2005) *Copyright Exceptions: The Digital Impact*. Cambridge University Press, Cambridge.

Canada—Patent Protection of Pharmaceutical Products, WTO Doc WT/DS114/R (2000), 17 March, Report of the Panel.

Ermet, M. (2008) 'IP Experts Sign Declaration Seeking Balanced Copyright Three-Step Test', *Intellectual Property Watch* [online], 24 July. Available at ⟨http://www.ip-watch.org/weblog/index.php?p=1172⟩ [Accessed April 2009].

European Communities—Protection of Trademarks and Geographical Indications for Agricultural Products and Foodstuffs, WTO Doc WT/DS174/R, WT/DS290/R (2005), Report of the Panel.

Ficsor, M. (2002) 'How Much of What? The 'Three-Step Test' and its Application in Two Recent WTO Dispute Settlement Cases', *Revue Internationale du Droit d'Auteur*, 192(April), 111–251.

Geiger, C., Hilty, R. M., Griffiths, J., Suthersanan, U., Benabou, V. L., Bently, L., Dreier, T., Dusollier, S., Ghidini, G., Ruse-Khan, H. G., Hugenholtz, B., Kallinikou, D., Koelman, K., Kur, A., Makeen, M., Mizaras, V., MacQueen, H., Nilsson, G. O., Peukert, A., Reichman, J., Rosen, J., Schovsbo, J., Senftleben, M., Siiriainen, F., Torremans, P. L. C., Traple, E., Vivant, M., Weber, R., Westkamp, G., Xalabarder, R. (2008), *Declaration: A Balanced Interpretation of the 'Three-Step Test' in Copyright Law*, July. Available at ⟨http://www.ip.mpg.de/shared/data/pdf/declaration_three_steps.pdf⟩ [Accessed April 2009].

Gervais, D. J. (2005) 'Towards a New Core International Copyright Norm: The Reverse Three-Step Test', *Marquette Intellectual Property Law Review*, 9, 1–26.

Ginsburg, J. C. (2001) 'Toward Supranational Copyright Law? The WTO Panel Decision and the ''Three-Step Test'' for Copyright Exceptions', *Revue Internationale du Droit d'Auteur*, 187, 3–65.

Goldstein, P. (2001) *International Copyright: Principles, Law and Practice*. Oxford University Press, Oxford.

Griffiths, J. (2006) 'The ''Three-Step Test''—Its Relationship with the Common Law Concepts of ''Fairness'' and ''Public Interest''', in ''Rethinking the Three Step Test'', discussion paper for a workshop conducted in Paris, ULIP, 16 February.

Knights, R. (2000) 'Limitations and Exceptions under the ''Three-Step Test'' and in National Legislation—Differences between the Analog and Digital Environments'. Paper presented at the WIPO Regional Workshop on Copyright and Related Rights in the Information Age, Montevideo, 13–14 September.

Ricketson, S. (1987) *The Berne Convention for the Protection of Literary and Artistic Works: 1886–1986*. Kluwer, London.

Ricketson, S. (2002) *The Three-Step Test, Deemed Quantities, Libraries and Closed Exceptions*. Centre for Copyright Studies, Strawberry Hills, NSW.

Ricketson, S. (2003) *WIPO Study on Limitations and Exceptions of Copyright and Related Rights in the Digital Environment*, WIPO Standing Committee on Copyright and Related Rights, SCCR/9/7. Available at ⟨http://www.wipo.int/edocs/mdocs/copyright/en/sccr_9/sccr_9_7.doc⟩ [Accessed April 2009].

Ricketson, S. and Ginsburg, J. C. (2006) *International Copyright and Neighbouring Rights: The Berne Convention and Beyond*. Oxford University Press, Oxford.

Senftleben, M. (2004) *Copyright, Limitations and the Three-Step Test: An Analysis of the Three-Step Test in International and EC Copyright Law*. Kluwer Law International, The Hague.

Senftleben, M. (2006) 'Towards a Horizontal Standard for Limiting Intellectual Property Rights?—WTO Panel Reports Shed Light on the Three-Step Test in Copyright Law and Related Tests in Patent and Trademark Law', *International Review of Intellectual Property and Competition Law (IIC)*, 37, 407–38.

United States—Section 110(5) of the US Copyright Act, WTO Doc WT/DS160/R (2000), 15 June, Report of the Panel.