

KEI workshop on a
WTO Declaration on the
TRIPS Agreement and the copyright
3-step test

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- Current problems
- Why interpretation is important
- Re-claiming the 3ST

Current problems

- Interpretation
- Expansion
- Ubiquity
- Complexity

Current problems

Expansion

Scope has expanded from interests of creators to the economic interests of copyright industry

BC: ‘...the legitimate interests of the author.’

TRIPS: ‘...the legitimate interests of the right holder.’

Scope of the rights to which the 3ST applies has expanded

- Berne Convention: right of reproduction (general exceptions)
- TRIPS: ‘exclusive rights’ (Berne and rental)
- WCT: ‘any limitations of or exceptions to rights’ (Berne+ and communication to the public)

Current problems

Ubiquity

Reach has extended from Berne to international treaties

- TRIPS Article 13
- WCT Article 10(1)(2)/WPPT Article 16(2)
- Beijing (Article 13(2))
- Marrakesh Treaty (Article 11)

To regional laws e.g. EU Infosoc directive, Andean Pact

To multi-lateral and bi-lateral trade agreements e.g. TPP

To national laws e.g. France, Portugal, China, Australia, WIPO draft law (2005)

Current problems

Complexity

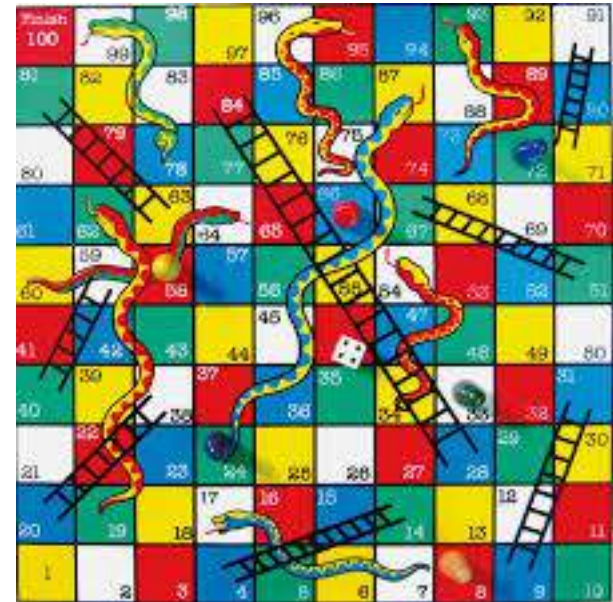
For most people, it's complicated.

The exceptions to which the 3ST applies depend on international obligations, any regional agreements, any trade agreements.

Drafting TLIB. We did not include 3ST as an express overall provision as it would indirectly expand the rights of rightholders, especially for related rights.

A chart to illustrate, or a calculator (like public domain calculator)?

It matters because the complexity works against us.



A game of snakes and ladders

Current problems

Interpretation 1/4

Scope, ubiquity and complexity make interpretation very important

1967 Stockholm Revision: 3ST counterweight to formal recognition of general right of reproduction

“...intended to encompass a wide range of exceptions and to serve as flexible framework for the adoption of L&Es” (Senftleben, 2004)

Current problems

Interpretation 2/4

Agreed Statement to Article 10 of the WCT: 'permits parties to carry forward and appropriately extend into the digital environment L&Es in their national laws'

1996 WIPO Diplomatic Conference, L&Es focus of discussion:

*"...When a high level of protection is proposed, there is a reason to balance such protection against other important values in society. Among these values are **the interests of education, scientific research, the need of the general public for information to be available in libraries** and the interests of persons with a handicap that prevents them from using ordinary sources of information."*

Current problems

Interpretation 3/4

Member states on safeguarding flexibility:

- US sought to safe guard fair use (CRNR/DC/102, 488)
- Denmark: new rules could become “straight jacket” for existing exceptions in areas that were essential to society (CRNR/DC/102, 489)
- Many delegations opposed the later version of Article 10(2) WCT (which subjects Berne exceptions to three-step test) – including Denmark, Sweden and New Zealand.
- Singapore described the second paragraph of Article10(2) as *“inconsistent with the commitment to balance copyright laws, where exceptions and limitations adopted by the Conference were narrowed, and protection made much broader.”* (WIPO CRNR/DC/102, 492)

Current problems

Interpretation 4/4

- When did 3ST become a tool to restrict interpretation of the exceptions?
- WTO panel decision (2000), that focused on the economic aspects?
- 2002: Ricketson - many Australian exceptions failed the three step test e.g. reproduction of manuscripts and unpublished theses, Section 51(2).
- 2015: Debates at WIPO - 3ST is an accusation against proposals on L&Es

Why interpretation is important

- **Ubiquitous**: it's no longer a 'mere drafting tool for legislators'.
- **Complex** - complexity suits copyright maximalists
- **Protect** how L&E are interpreted and applied - fundamental means by which the public gets access to copyrighted content
- Pushback on interpretation **reduces harm** caused by spread
- **Cross-cutting copyright reform** issue

Re-claiming the 3ST

“The three-step test can serve as a source of inspiration for national law makers seeking to institute flexible exceptions and limitations at the domestic level”

The 3ST Revisited PIJIP Research Paper (2013). C. Geiger,
D. Gervais, M. Senftleben



Thank you
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