Declaration on the "Three-Step Test"

Where do we go from here?

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Abstract: The "Declaration on a balanced interpretation of the 'Three-Step Test'" as such cannot solve the problem of lacking limitations; however, it emphasizes that the existing international legislation does not prohibit further amendments to copyright law. Nations that dispose of the political will are in a position to introduce new limitations. In addition, further international agreements focusing on new limitations may be negotiated among those countries that are ready to do so.

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1 It is difficult to predict what the impact of the "Declaration on a Balanced Interpretation of the 'Three-Step Test'" will be in the long run, but at least we can observe that this Declaration has become very well known in a very short period of time. However, I have come to realize during a number of discussions that the starting point of the intention of the Declaration was not always very clear. In view of that, I would like to start my short presentation with a brief summary of some of the Declaration's parameters to make sure that we are all talking about the same thing.

2 Most importantly, the Declaration accepts that copyright law produces important incentives for the creation and dissemination of new works. At the same time, the Declaration presupposes that copyright law aims to benefit the public interest. The public interest, however, is not well served if copyright law neglects the interests of individuals and groups in society when establishing incentives for right holders only. The Declaration therefore pleads for a balance of all interests involved. In that respect, it is substantially anchored in some provisions of international legislation. First and most relevant Article 7 TRIPS calls for the balancing of rights and obligations to the mutual advantage of producers and users. Additionally, Article 8 TRIPS not only focuses on the public interest but also on the potential abuse of IP rights. Likewise, the preamble of the WCT explicitly recognizes the need for a balance of interests between authors and the larger public, which ultimately leads to the requirement of exceptions and limitations.

3 Having said that, the core topic of the Declaration comes into play: The "Three-Step Test" – as it is contained in certain international treaties – aims at the prevention of a too-excessive application of limitations and exceptions. However, the problem of an excessive application of limitations and exceptions is only one side of the coin. The other side is that an application of limitations and exceptions also can be unduly narrow or restrictive. For this reason, the Declaration aims for an interpretation of the „Three-Step Test" that makes sure that limitations and exceptions do indeed have the ability to achieve an effective balance of interests of all parties involved. This is not yet assured since there are a number of national court decisions on the one hand and WTO panel reports on the other; they mostly interpret the "Three-Step Test" in a very problematic manner. Against that background the Declaration clarifies the

relevance, the scope and the limits of the "Three-Step Test" – but nothing more. It fully recognizes, for instance, that the „Three-Step Test" plays different roles in different national or different legislative systems. And it explicitly does not address certain issues, which is probably quite often misunderstood.

4 First and foremost, the Declaration does not challenge existing international legislation – neither the existence of the "Three-Step Test" as such nor the wording of the provisions in question. It merely provides a guideline for an appropriate interpretation of the "Three-Step Test". Secondly, the Declaration does not aim for a harmonization or alignment of different domestic systems. Thirdly, and in particular, the Declaration does not impact the flexibility provided by those legal systems that are based on a fair use approach.

5 The Declaration as such is very short; it consists of a preamble, certain "clarifications" (in the sense of aids for interpretation) and it states six final conclusions. [Please note: The full text of the Declaration is added to this volume]. In view of the limited time available here, we will not enter into a discussion of these conclusions but directly focus on the question: "Where do we go from here" – what is the best way forward?

6 As we mentioned above, the Declaration has been met with widespread acceptance; I think it is safe to say that colleagues from all over the world have approached us with the request for permission to translate the Declaration into their own languages (such as Japanese, Chinese, Portuguese or Italian; see www.ip.mpg.de/ww/de/pub/aktuelles/declaration_on_the_three_step_/declaration.cfm). However, the Declaration has also been criticized quite often – precisely for not addressing certain issues. Notably the representatives from threshold countries (such as e.g. Brazil) argue that the Declaration would not help their situation if limitations were missing in their national law. In fact, one may ask the question whether or not one should go one step further.

7 I think one can discuss this question under a number of aspects. I would like to address three of them here: First of all, we may strive for a better world, a world with a more appropriate copyright law system, at least on a theoretical level. Secondly, we may discuss how to implement such a better world on the level of international copyright legislation. Thirdly, we may – and should in view of the general scope of this conference – focus on the European level and discuss possible amendments of the Acquis Communautaire.

8 Striving for a better world in copyright law is nothing new; this has been the ambition of many legal researchers and of a number of academic projects. One of these projects is the "Wittem Project" from which a "Draft European Copyright Code" resulted – some of you might be familiar with the project, others have even been involved, like Thomas Dreier and me. We both had the privilege to deal with perhaps the most important part, namely the limitations and exceptions to copyright. [Please note: The full text of the Code is added to this volume].

9 Of course there are many other interesting approaches and reflections, and I only mention the "Wittem Project" as pars pro toto. However, what we find particularly interesting about the "Wittem" approach is that we tried to find a compromise: On the one hand the proposal is based on an explicit catalogue of limitations; on the other hand, however, we saw that such a catalogue would not be sufficient. Therefore, we introduced a kind of opening clause, which extends the scope of application of the catalogue.

10 Basically we formed four categories of limitations, each of them focusing on a specific rationale for introducing certain limitations:

- Uses with minimal economic significance;
- Uses for the purpose of freedom of expression and information;
- Uses permitted to promote social, political and cultural objectives;
- Uses for the purpose of enhancing competition.

11 In every category the proposal explains in quite a detailed manner which permitted uses there could be by explicitly mentioning concrete examples. We cannot go into detail here, but the most important aspect in this context certainly is the already mentioned opening clause stating that beyond the uses explicitly allowed, further uses would be permitted under certain conditions.

12 The charming thing about this opening clause is that it does to some extent turn the "Three-Step Test" into a positive reading. At the same time it does not replace the traditional continental European approach; it does not lead to a mere "fair use-system" without any guidelines (which, by the way, is also not the U.S.-American approach). Rather, the range of the opening clause is limited by referring to concretely enumerated limitations. In other words, the application of the opening clause requires an analogy of sorts to existing statutory provisions.

13 In addition, the suggested provision for an opening clause clarifies the "Three-Step Test", on the one hand by mentioning the different types of right holders (namely original and subsequent); on the other hand it includes the interest of third parties, which is missing in all versions of the copyright "Three-Step

Test". Therewith, the provision comes in line with the "Three-Step Test" provisions we know from industrial property law.

14 Now, assuming that we might agree on an amendment of copyright legislation – either based on the "Wittem" approach or on another one – the question obviously is what leeway we might have for legislative action. This question arises on both the international and European levels.

15 On the international level, one option would of course be to introduce mandatory limitations in addition to the (only) one we already have, namely the right to quotation. However, it is difficult to imagine that such a way forward would be accepted. Countries requesting more limitations, for instance by calling for an amendment of the WIPO treaties, most probably would be blocked, notably by the U.S., but certainly also by European countries and by the EU as such.

16 However, changing existing international treaties is probably not the only way forward available to us. Countries desiring more limitations are free to help themselves. If the "Three-Step Test" is interpreted correspondingly in the Declaration, the introduction of new – and even mandatory – limitations on the level of national legislation is indeed allowed. In fact, doing so might sufficiently help in the situation of the countries concerned, similar to the possibility of a – unilateral – introduction of compulsory licenses in patent law in view of individual national purposes of the countries concerned. Why shouldn't they be able to do so in copyright law?

17 But the countries concerned could even go one step further. Article 20 of the Berne Convention allows for "Special Agreements Among Countries of the Union", provided that such provisions are not contrary to the Berne Convention. This is indeed the case – at least if we believe in the Declaration and if we conclude from it that the "Three-Step Test" does not hinder the introduction of new limitations under certain conditions which are elaborated in the Declaration.

18 Focusing on Europe, we all know that basically all problems of insufficient limitations are based in the InfoSoc Directive of 2001; pursuant to its Recital 32, the enumeration of these limitations is exhaustive. Additionally, the relevance of Article 5 Paragraph 5 of the Directive – containing the European version of the "Three-Step Test" – is highly disputed. In view of that, we essentially have three options (or possibly four):

- We may aim at an amendment of the InfoSoc Directive. This, however, seems to be a rather unrealistic approach. High representatives of the Commission explicitly – and probably rightly – say that once they reopen this "Pandora's Box" it would never be possible to close it again. We may understand this dread if we remember the history of the Directive. It took years to conclude, and there is hardly any likelihood that the current 27 Member States would find a similar compromise again in the form we have it today (which, by the way, is by no means satisfying).

- At the same time there is a growing awareness that we have a dangerous lack of differentiation in copyright law. The Green Paper on Copyright in the Knowledge Economy reveals that the Commission might be willing to seize that challenge to some extent. The question is, however, whether this awareness as such helps. In fact, contrary to the request to amend the InfoSoc Directive, the Commission seems not to object to the suggestion that the InfoSoc Directive to some extent might be "overruled" by establishing more specific Directives insofar as specific concerns can be addressed. In other words, our community – the academic community – might be well advised to work out more concrete approaches in that respect, addressing particularly problematic fields of copyright law.

- Thirdly, we have one further problem area on the European level: the issue of enforcement. Regarding these activities of the European legislature, the academic community has quite successfully thwarted certain proposals of the Commission. Today, we have one Directive (2004/48) focusing on civil enforcement. This Directive, however, essentially has been scaled back compared to the initial proposals of the Commission. The other branch – the Commission's proposals focusing on a harmonization of criminal sanctions – is not included in the existing Directive, but has not been forgotten in the meantime; on the contrary, a new proposal from the Commission is expected before the summer break this year. Beyond that, fuel has constantly been added to the fire by the ACTA negotiations, in other words, the field of enforcement still is in motion, which, however, may also give rise for some hope with regard to limitations. In fact, limitations to copyright law at the end of the day are limitations to the enforcement of these rights; limitations ultimately are part of the "ceilings" discussion we currently have in order to limit the scope of IP protection.

19 There may of course be a fourth option, namely a unified EU copyright law. This would indeed be my favorite approach, and we do in fact deal with certain projects in that respect at the Max Planck Institute; however, I do not believe that this option will become viable in the near future.

20 To conclude, there are quite a number of options in taking further steps. It is of course true that the Declaration as such cannot solve the problem of lacking limitations. However, it at least clears the way forward. It emphasizes that based on existing international legislation nothing prohibits further amendments to copyright law. On the national level, this is an option for those countries which dispose of the political will to introduce new limitations (and which are not bound by the European InfoSoc Directive); on the European level, amendments are possible if we are willing to overcome the discussed "blockade" caused by the InfoSoc Directive. And even on the international level, further agreements may be negotiated – which also may happen without the participation of the U.S. or the EU.

21 To put it in a nutshell: If you believe in what the Declaration states, the problems we face today lie neither in international copyright law in general nor in the „Three-Step Test" in particular. They simply lie in the lack of political will on the part of the stakeholders.

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