

UNCTAD-ICTSD Panel Discussion
at WIPO SCCR – 29 May 2009

**LIMITATIONS AND EXCEPTIONS TO COPYRIGHT –
RECENT DEVELOPMENTS AND THE WAY FORWARD**

**The Munich Declaration on a
Balances Interpretation of the
“Three-Step Test” in Copyright Law**

Prof. Dr. Reto M. Hilty
Division Intellectual Property and Competition Law

Max Planck Institute for Intellectual Property,
Competition and Tax Law



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The Munich Declaration on a Balances Interpretation of the “Three-Step Test” in Copyright Law



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- **Why a Declaration?**
- **Aims of the Declaration**
- **Issues not Addressed**
- **Core Issues of the Declaration**
- **The Way Forward?**

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■ Why a Declaration?

Article 7 TRIPS – Objectives

The protection and enforcement of intellectual property rights should contribute to the promotion of technological innovation and to the transfer and dissemination of technology, **to the mutual advantage of producers and users** of technological knowledge and in a manner conducive to social and economic welfare, **and to a balance of rights and obligations.**

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■ Why a Declaration?

WCT – Preamble

...

Emphasizing the outstanding significance of copyright protection as an incentive for literary and artistic creation,

Recognizing the **need to maintain a balance** between the **rights of authors** and the **larger public interest**, particularly education, research and access to information...

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■ Why a Declaration?

WCT Article 10 – Limitations and Exceptions

(1) Contracting Parties may, in their national legislation, provide for limitations of or exceptions to the rights granted to authors of literary and artistic works under this Treaty **in certain special cases** that do **not conflict with a normal exploitation of the work** and do **not unreasonably prejudice the legitimate interests of the author***.

* Article 13 TRIPS: “... **interests of the right holder**”

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■ Core Issues of the Declaration

1. The Three-Step Test constitutes an indivisible entirety.

The three steps are to be considered together and as a whole in a comprehensive overall assessment.

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■ Core Issues of the Declaration

- TRIPS Art. 13:
(Copyrights) “... do not unreasonably prejudice the legitimate interests of the **right holder**“
- TRIPS Art. 17:
(Trademarks) “... provided that such exceptions take account of the legitimate interests of the **owner of the trademark** and of **third parties**“
- TRIPS Art. 26 (2):
(Designs) “... legitimate interests of the **owner of the protected design**, taking account of the legitimate interests of **third parties**“
- TRIPS Art. 30:
(Patents) “... legitimate interests of the **patent owner**, taking account of the legitimate interests of **third parties**”

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■ Core Issues of the Declaration

2. The Three-Step Test does not require limitations and exceptions to be interpreted narrowly. They are to be interpreted according to their objectives and purposes.

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■ Core Issues of the Declaration

3. The Three-Step Test’s restriction of limitations and exceptions to exclusive rights to certain special cases does not prevent
 - (a) legislatures from introducing open ended limitations and exceptions, so long as the scope of such limitations and exceptions is reasonably foreseeable; or
 - (b) ...
where possible within the legal systems of which they form a part.

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■ Core Issues of the Declaration

3. The Three-Step Test’s restriction of limitations and exceptions to exclusive rights to certain special cases does not prevent

(b) courts from

- applying existing statutory limitations and exceptions to similar factual circumstances *mutatis mutandis*; or

- creating further limitations or exceptions, where possible within the legal systems of which they form a part.

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■ Core Issues of the Declaration

4. Limitations and exceptions do not conflict with a normal exploitation of protected subject matter, if they
 - are based on important competing considerations or
 - have the effect of countering unreasonable restraints on competition, notably on secondary markets,particularly where adequate compensation is ensured, whether or not by contractual means

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■ Core Issues of the Declaration

5. In applying the Three-Step Test, account should be taken of the interests of original right holders, as well as to those of subsequent right holders.

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■ Core Issues of the Declaration

6. The Three-Step Test should be interpreted in a manner that respects the legitimate interests of third parties, including
 - interests deriving from human rights and fundamental freedoms;
 - interests in competition, notably on secondary markets; and
 - other public interests, notably in scientific progress and cultural, social, or economic development.

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