

STM Briefing Note on the 3-step test

The Berne Convention, as the world's leading copyright treaty, provides not only for international protection of copyright itself, but also makes provision for exceptions to copyright. Article 9(2) of The Berne Convention contains a crucial "3-Step Test", which is a fundamental yardstick for copyright exceptions worldwide. It has been repeated more or less verbatim in Article 13 of the TRIPS (Trade Related Aspects of Intellectual Property) Treaty, regulated by the World Trade Organisation, and Article 10 of the UN's World Intellectual Property organisation (WIPO) Copyright Treaty. Most recently, it is included as an overriding requirement for exceptions at Article 5.5 of the EU Copyright Directive. In its most recent version, it provides that all relevant countries may legislate for local exceptions to copyright in their territories, but only provided that reproduction:

- 1 is limited to certain special cases,
- 2 does not conflict with a normal exploitation of the work, and
- 3 does not unreasonably prejudice the legitimate interests of the rightholder.

All three tests must be passed. The first (often overlooked) permits exceptions for clearly defined groups (such as visually impaired people), but arguably not for vague or over-broad categories such as internet users or students. The second two broadly rule out any form of commercial use threatening or competing with normal publication, and are increasingly important tests for Fair Use and Fair Dealing. This is a key yardstick for countries implementing the recent EU Copyright Directive, and STM, with other publishing organisations, is vigilant to ensure that these standards are met.

STM members can help us to ensure that national copyright laws do not fail the 3-step test. Here is what you can do:

- Be alert to any new or proposed national copyright laws or exceptions. Notify STM if in doubt.

- Ask whether exceptions apply only to "special cases" - clear categories such as dis-abled people - or are they dangerously vague? Is there a danger they might author-ise Internet copying? Consider whether any form of direct or indirect commercial use would be permitted, harming "normal exploitation" by you - such as a rival document delivery service (particularly if it seems to legalise digital delivery).
- Let us know if the new law might in any other way "unreasonably prejudice" your (or your authors') rights or interests.

Local courts, and international appeal courts such as TRIPS tribunals or the European Court of Justice, must apply the 3-step test now to find whether an exception is permissible or not, and clear evidence of non-compliance will be needed.

STM believes that this international test is of growing importance in an Internet world. STM publishers are rightly making available more and more content via digital delivery, but it is es-sential that they should be able to do so in conditions of security which the Net, by itself, cannot always provide. Only internationally-respected copyright laws can provide this, and this means that any exceptions to copyright must be carefully phrased, for the avoidance of any doubt, and clearly made subject to the 3-step test.

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