

Abstract**Interpretation and application of the three-step test and its relationship with Article 35-3 of the copyright act**

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Any legislation to limit copyright shall observe the three-step test set forth in international treaties. If the three-step is interpreted too narrowly, the scope of limitations or exceptions to copyright that may be imposed by each country may become substantially restricted. It may also be a problem if the three requirements are interpreted as being applied sequentially and cumulatively.

The three-step test in international treaties is the norm that legislators of each country must observe. Meanwhile, judges apply the three-step test in actual cases in certain countries. If such abstract standard as the three-step test is applied directly, the risk of findings that might be arbitrary or favorable to the right holder is high. The same problem will appear as long as the legislators are not accorded broad discretion. In reality, this issue is a question of how much discretion the Panel should allow to each country's legislation at the WTO Dispute Settlement. Matters concerning limitations and exceptions to copyright are directly related to the proper balance between the right holders and the users in accordance with the socio-cultural environment of each country. Such value judgments should be made at the level of domestic laws, not WTO, and the legislators of each country should be afforded broad discretion.

While Article 35^{ter} of the Act uses the language of the two requirements of the three-step test, it is not the three-step test itself but a limitation in domestic laws. Accordingly, it is not necessary to strictly follow the existing interpretations of such two requirements in interpreting Article 35^{ter}. In light of the legislative intent to introduce a comprehensive fair use system, whether

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the requirements under Section (1) are satisfied should be determined through the comprehensive balancing of interests in consideration of the four fair use factors set forth in Section (2).

Keywords

Three-Step Test, Article 35ter, Fair Use, Limitations, Exceptions, Direct-Application, Berne Convention, TRIPs