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# **INTERNATIONAL AGREEMENT AND DEVELOPMENT FOR THE DEVELOPMENT OF RIGHTS OF PERSON WITH DISABILITY UNDER COPYRIGHT LAW**

AUTHORED BY - DIGSHIKHA PRIYADARSHANI<sup>1</sup> & PALLAV MITTAL<sup>2</sup>

## **Introduction**

Marrakesh Treaty deals specifically with the persons, who are blind, visually impaired and person who is print disabled. Under Art. 1 of the treaty it has been provided that the treaty does not affect the other international treaty and does not derogate the right conferred by the treaty on the contracting parties. Under the copyright regime of IPR there are several treaties, convention and international agreement has been adopted and enforced by the countries including India for the better protection of the copyright work and to provide minimum standers for the protection of the copyright work in IPR regime. Berne Convention for the protection of the literary and Artistic Work, 1886, WIPO Copyright Treaty, 1996, WIPO Performance and Phonogram Treaty, 1996, TRIPS Agreement, Budapest Convention and ICANN principles, these are treaties and conventions which deals with the basic principles of the copyright and provide minimum standers of protection as well as provide special provision for the fair use of the copyright work.

The reason for the special provision of fair use in the conventions and treaties to protect the human right of the person which include right to information and freedom of speech and expression. These rights are basic civil and political rights and economic, political and cultural rights. To avoid discrimination on the basis of the physical disability of the person, so that the person can get equal opportunity to explore his or her ability and get fair chance to express his views, fair use is there in copyright law.

Under the Berne Convention there is “three step test” which explain the conditions when no copyright violation accrue if copyright work has used. WCT, 1996 provide accessibility of the

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work to the public in all possible formats. Budapest Convention and ICANN Principles deal with the technology development and availability of technology to all the persons without discrimination on the basis of their physical capabilities.

### **Berne Convention:**

The Berne Convention for the Protection of the Literary and Artistic Work, 1886 deals with the rights of the author and protection of the work. It is based on the three principles, and provides minimum standards for the protection of the work and rights of the author. It also contains special provision for the developing nations so that they can use them. The three basic principles describe as follows:

1. Principle of national treatment

According to this principle the author or the work originating in the one contracting party should be given the same protection to the work of the other contracting party state as it is originated in the same state. Similar protection should be given to the work of all contracting party state of the Berne Convention.

2. Principle of automatic protection

The protection which is to be provided to the work should be without any condition or any conditional formalities. Once the protection is provided by the one contracting party it should be given and respected by the other contracting party of the Berne Convention.

3. Principle of independence of protection

Protection is independent of the existence of protection in the country of origin of the work (principle of "independence" of protection). If, however, a Contracting State provides for a longer term of protection than the minimum prescribed by the Convention and the work ceases to be protected in the country of origin, protection may be denied once protection in the country of origin ceases<sup>3</sup>.

### **Three Step Test:**

The three step test was first incorporated in International Copyright law in the year of 1967 in the Stockholm Berne Convention Revision. In the same Revision Conference general reproduction rights are also introduced. The test is incorporated Art. 9 (2) of the convention which contains the following provisions:

“It shall be a matter for legislation in the countries of the Union to permit the reproduction of such

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<sup>3</sup>[https://www.wipo.int/treaties/en/ip/berne/summary\\_berne.html](https://www.wipo.int/treaties/en/ip/berne/summary_berne.html), Summary of the Berne Convention for the Protection of Literary and Artistic Works (1886)

works in certain special cases, provided that such reproduction does not conflict with a normal exploitation of the work and does not unreasonably prejudice the legitimate interests of the author.” The test has important feature that it intent to guide the nation to incorporate the provisions of the test in their domestic laws. It is introduction of provision of the international law into the municipal laws of the country. By the language of Art. 9 (2) clearly mentioned that legislation of the countries of union which means that contracting parties must make domestic laws with the compliance of the provision of the same. The procedure for the implementation of the test is not specified in the convention there for the implementation of the provision of the test is depends upon the domestic legislative procedure of the state. It is not a rule to implement the provision but a case by case basis procedure to provide exception in the local laws of the state. The most of the provisions of the Berne Convention is incorporated in various International convention including TRIPS, therefore no separate rules or provisions are required for the implementation of the Three step Test in those convention. For example, E&Ls (e.g., compulsory licensing) in the field of cable distribution (Berne Article 11*bis* (2)) and sound recordings (Berne Article 13(1)) are self-contained<sup>4</sup>.

The Berne Convention allows certain limitations and exceptions on economic rights, that is, cases in which protected works may be used without the authorization of the owner of the copyright, and without payment of compensation. These limitations are commonly referred to as "free uses" of protected works, and are set forth in Articles 9(2) (reproduction in certain special cases), 10 (quotations and use of works by way of illustration for teaching purposes), 10*bis* (reproduction of newspaper or similar articles and use of works for the purpose of reporting current events) and 11 *bis* (3) (ephemeral recordings for broadcasting purposes)<sup>5</sup>.

The language of the three step test is allow the contracting parties to implement it as an exception and limitation in such a way that the observance of it in local civil as well as common law can accept it. Therefore implementation of this principle is problematic and technical issue. The countries were not concerned about the test as for the fair use, and ignored about the test. In June 2000 the scenario has changed and steps taken for the enforcement of the test. In 2000 the WTO Dispute Settlement Penal has found that the U.S. had violated the provision of the

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<sup>4</sup>Christophe Giger, Daniel Gervais and Martin Senftleben, Understanding Three Step test, <https://www.researchgate.net/publication/298519957>

<sup>5</sup> [https://www.wipo.int/treaties/en/ip/berne/summary\\_berne.html](https://www.wipo.int/treaties/en/ip/berne/summary_berne.html)

Art. 13 of the TRIPS Agreement which is three step test in the agreement<sup>6</sup>. It had observed by the WTO Panel that the three step test has to taken seriously and the legislator should maintain the limit for the exception and limitation in their laws. Due to the liberal interpretation by the WTO Dispute Settlement Panel this three step test became the main issue in dealing with the fair use of work and protection of the rights and interest of the author under Copyright law.

### **Three Step test in WIPO Copyright Treaty**

The preamble of WCT support the three step test. It affirm the essential requirement of the balance between the right of the author and the larger public interest in relation to the research, education, and access to information<sup>7</sup>.

In relation to the balance between right of the author and access of information and education exception can be provided in the local laws of the country for the betterment of the right of the person with disability. As right to education and access to information is basic human right of the person for which human being is entitled without any discrimination. Therefore, special provision should be provided to such person who are disabled to access information in available resources. Therefore this part of the preamble also support the natural right of the human being which is civil and political right of the person.

UDHR and ICCPR also support the right of the person to right to education and access of information as an essential part of right to life and freedom of expression. These two international documents are parts of Bill of right and react as foundation and gronnorm of any international treaty and convention.

The understanding of the three-step test as a flexible framework for the adoption of E&Ls at the national level emerges quite clearly in the WIPO Internet Treaties<sup>8</sup>, and specifically in the Agreed Statement concerning Article 10 of the WCT, which announces

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<sup>6</sup> [https://www.wto.org/english/news\\_e/news00\\_e/1234da.pdf](https://www.wto.org/english/news_e/news00_e/1234da.pdf), WTO, WT/DS160R, June 15, 2000, United State Section 110(5) of the Copyright Act, Report of the Panel.

<sup>7</sup> WIPO Copyright Treaty, pmb., Dec. 20, 1996, 2186 U.N.T.S. 121, 36 I.L.M. 65; see also WIPO Diplomatic Conference on Certain Copyright and Neighboring Rights Questions, Geneva, Dec. 2–20, 1996, Basic Proposal for the Substantive Provisions of the Treaty on Intellectual Property in Respect of Databases to Be Considered by the Diplomatic Conference, art. 12 n.12.09, WIPO Doc. CRNR/DC/4 (Aug. 30, 1996) [hereinafter WIPO Diplomatic Conference, Basic Proposal] (discussing the need for balance in similar language as the preamble)

<sup>8</sup> See WIPO Copyright Treaty, supra note, (“Recognizing the Need to Maintain a Balance Between the Rights of Authors and the Larger Public Interest.”); see also World Intellectual Property Organization Performances and Phonograms Treaty pmb., Dec. 20, 1996, S. TREATY DOC. No. 105-17, 2186 U.N.T.S. 203 (1997)

“It is understood that the provisions of Article 10 permit Contracting Parties to carry forward and appropriately extend into the digital environment limitations and exceptions in their national laws which have been considered acceptable under the Berne Convention. Similarly, these provisions should be understood to permit Contracting Parties to devise new exceptions and limitations that are appropriate in the digital network environment. It is also understood that Article 10(2) neither reduces nor extends the scope of applicability of the limitations and exceptions permitted by the Berne Convention”<sup>9</sup>.

Berne convention is provides origin for the three step test as an exception to the right of the author in certain special cases subjected to the domestic legal provision of the contracting parties of the convention. But since it is an old one and at that point of time technology had not grown up. Mostly literary and artistic work was in form of paper because technology was not known to the people and it cost very high. Therefore, it does not have application in digital and technology platform. Later with the advent of the technology in human life and dependency of the human being on the technology, enhanced, the need of the protection of the right of the author shall be seem necessary at the technology. With the change of the environment of the copyright regime technology also asserted to it. Therefore, infringement of the right of the author also caused at the technology.

Therefore to protect the right of the author at environment of the technology, WCT enforced by the international community. International community expressed the intention and the concern towards the technological environment, as well as it shared the recognition of the flexibility and exception and limitation in technology. It applies the three step test at the technological environment to make available the recourses, education and access to the information. This provision of the WCT also related to the Marrkesh Treaty, as mentioned in the previous chapter.

The application of the test on the technology to make available content and its accessibility to all again reaffirms the principles of human right which are equality, freedom and non discrimination. It nurtured the human right document such as UDHR, ICCPR etc.

The basic proposal of the WCT expresses that when a high level of protection is proposed, there is reason to balance such protection against other important values in society. Among

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<sup>9</sup> WIPO Copyright Treaty, supra note 7.

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<sup>10</sup>.

The Minutes of Main Committee I in its deliberations concerning E&Ls in the WCT/WPPT context mirror this determination to shelter a number of key use privileges. The U.S. delegation, for example, sought to safeguard the fair use doctrine<sup>11</sup>. Denmark feared that the new rules under discussion could become “a ‘straight jacket’ for existing exceptions in areas that were essential for society.”<sup>12</sup> Many delegations opposed a version of Article 10(2) of the WCT that would have subjected extant E&Ls under the Berne Convention to the three-step test potentially in a new way.<sup>13</sup> Korea unequivocally suggested the deletion of Paragraph 2<sup>14</sup>—a proposal that was approved by a number of other delegations. Singapore, for instance, elaborated that the second paragraph was “inconsistent with the commitment to balance copyright laws, where exceptions and limitations adopted by the Conference were narrowed, and protection was made broader.”<sup>15</sup>

### **Beijing treaty:**

Although it is stated in previous chapter that the Marrakesh Treaty *historical* also because it seems to have been the closing act of a restless decade in the field of the international copyright relations, the “Marrakesh miracle” could not have taken place without the momentum created by the “Beijing spirit.” The success of the adoption of the Beijing Treaty on Audiovisual Performances (BTAP) and the Marrakesh Treaty within a year was due exactly to the neutralization – hopefully, it can be said: the elimination – of the unnecessary extraneous agendas which had been based on the above-mentioned badly-founded legends about the international copyright system. This may be particularly duly characterized by what has happened to the two most aggressively promoted legends: namely, first, that the three-step test is an obstacle to the establishment and maintenance of an adequate balance of interests and,

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<sup>10</sup> WIPO Diplomatic Conference, Basic Proposal, *supra* note 7, art. 12 n.12.09

<sup>11</sup> See WIPO Diplomatic Conference on Certain Copyright and Neighboring Rights Questions, Geneva, Dec. 2–20, 1996, Summary Minutes, Main Committee I, para. 488, WIPO Doc. CRNR/DC/102 (Aug. 26, 1997) [hereinafter WIPO Diplomatic Conference, Aug. 26, 1997, available at [https://www.wipo.int/meetings/en/details.jsp?meeting\\_id=3010&la=EN](https://www.wipo.int/meetings/en/details.jsp?meeting_id=3010&la=EN), also see [www.wipo.int/export/sites/www/treaties/en/documents/prep-docs/1996\\_dec\\_Geneva\\_348-vol1-en.pdf](http://www.wipo.int/export/sites/www/treaties/en/documents/prep-docs/1996_dec_Geneva_348-vol1-en.pdf)

<sup>12</sup> *Id.*

<sup>13</sup> *Id.*

<sup>14</sup> See *id.* para. 491 (arguing that Paragraph 2 is redundant and would overly burden contracting states) [https://www.wipo.int/meetings/en/details.jsp?meeting\\_id=3010&la=EN](https://www.wipo.int/meetings/en/details.jsp?meeting_id=3010&la=EN)

<sup>15</sup> See *id.* para. 492 [https://www.wipo.int/meetings/en/details.jsp?meeting\\_id=3010&la=EN](https://www.wipo.int/meetings/en/details.jsp?meeting_id=3010&la=EN)

therefore, its scope of application should be narrowed through some “re-interpretation” and, second, that the application and protection of technological measures (TPMs) do not make it possible for the beneficiaries to benefit from limitations and exceptions necessary for the public interests<sup>16</sup>.

In Beijing, the provisions of the existing international treaties both on the three-step test and the protection of TPMs were included into the BTAP in a *mutatis mutandis* manner in the same way as they appear in the two WIPO “Internet Treaties” (the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT)), rejecting by this the ideology-based (but also special-interests-driven) theories and attacks against them<sup>17</sup>. It has also been clarified how it is possible to grant adequate protection for TPMs and at the same time to make the application of limitations and exceptions possible in due balance – under the control of the three-step test. Since, thus, the issue of TPMs had been satisfactory settled in Beijing, the scope of application of the three-step test became the focus of negotiations in Marrakesh<sup>18</sup>, but the Diplomatic Conference has confirmed again that the existing international norms offer a solid basis for adequate balance of interests, with the three-step test as an indispensable guarantee for both allowing the necessary limitations and exceptions and controlling their reasonable application.

#### **WTO panel on case of 110 (5):**

According to the WTO dispute-settlement panel, the first condition of the test (namely the requirement of a “certain special case”, implies that “an exception or limitation in national legislation must be clearly defined”

(which corresponds to the requirement of a “certain” case) and then that it has “an individual or limited application or purpose” (which corresponds to the requirement of a “special” case). The WTO panel drew a distinction between the words “certain” and “special.” It interpreted the term “certain” to mean that an E&L had to be clearly defined, though there was no need “to identify explicitly each and every possible situation to which the exception could apply, provided that the scope of the exception was known and particularised.”<sup>19</sup> On its merits, the

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<sup>16</sup>Dr. Mihály J. Ficsor, COMMENTARY TO THE MARRAKESH TREATY ON ACCESSIBLE FORMAT COPIES FOR THE VISUALLY IMPAIRED Dr. Mihály J. Ficsor

<sup>17</sup>Ibid, available at <http://www.copyrightseesaw.net/en/papers?page=3>

<sup>18</sup> Ibid note 44, available at <http://www.copyrightseesaw.net/en/papers?page=3>

<sup>19</sup> See Report of the Panel, 15 June 2000, WTO Document WT/DS160/R, online available at [www.wto.org](http://www.wto.org), para. 6.108.

panel thus regarded the word “certain” as requiring a sufficient degree of legal certainty.<sup>20</sup>

For the explanation of the term special the court found that the scope of limitation and exception is narrow and need a eider interpretation. In the panel’s view, the qualitative aspect of speciality did not mean that an E&L must necessarily serve a special purpose to be qualified as a special case under article 13 TRIPS<sup>21</sup>.

Under the copyright law the limitation and the exception shall be used in a manner that reflect the wider connotation of the need of law. There shall not be scope for any prejudice in the law.

After the section110 (5) ace in the USA the scope of limitation and the exception became wider which also provide minimum stander to the protection of copyright work. The three step test is promote reasonableness and justification in promotion of balance between the rights of author and interest of public.



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<sup>20</sup> The panel held, for instance, that the term “homestyle equipment” was sufficiently clear and that detailed technical specifications were not necessary. See WTO Panel, *ibid.*, para. 6.145.

<sup>21</sup> See WTO Panel, *ibid.*, para. 6.112. Cf. J.C. Ginsburg,