CHAPTER FOUR

IMPACT OF THE THREE-STEP TEST UNDER THE BERNE CONVENTION AND THE TRIPS AGREEMENT ON ACCESS TO EDUCATION IN DEVELOPING COUNTRIES

4.1. INTRODUCTION

This chapter explores the general exception to copyright, or commonly referred to as the three-step test. In particular, this chapter examines whether the three-step test can be used to promote bulk access to printed educational material. To this end, the chapter traces the origins of the three-step test and reasons for its introduction in the Berne Convention at the Stockholm Conference (and later in the TRIPS Agreement). The chapter also examines the existing national limitations at the time of the Stockholm Conference, analyses the nature and meaning of the three-step test as it relates to access to educational material and its implication on the amount of works that can be used without the permission of the copyright owner. The chapter provides a detailed analysis of intention of the drafters of the three-step test and the judicial practice relating to the test before the WTO dispute settlement panel. Finally, the chapter makes a synthesis of the usefulness of the three-step test for access to educational materials in developing countries.

4.2. THE INTRODUCTION OF GENERAL EXCEPTION TO COPYRIGHT IN INTERNATIONAL COPYRIGHT LAW

Article 9(2), which was added to the Berne Convention during the 1967 revision Conference at Stockholm,1 was intended to institute a general exception to the reproduction right. Prior to the Stockholm Conference, the Berne Convention did not contain a general provision recognizing reproduction rights. Union Members were free to impose whatever restrictions they wished on reproduction rights, or even deny the protection altogether. In practice, reproduction rights were universally recognised under national legislation, but exceptions to these rights varied considerably from country to country.

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1 All documents relating to the revision of the Berne Convention in 1967 are found in Records of the Intellectual Property Conference of Stockholm, 1967, supra.
Some were quite widely drawn, particularly in those countries which were less culturally developed, while other countries like France and Germany which were more culturally developed provided narrower exceptions. Consideration of recognition of the right of reproduction in the Berne Convention started well before the Stockholm Conference. However, it was acknowledged that if a reproduction right was recognized in the Berne Convention, there existed a need for exceptions to that right. It was reported that the Study Group:

[R]eached the conclusion in its 1964 report that a provision on the right of reproduction should be proposed. This prerogative has a fundamental place in the legislation of countries of the Union; the fact that it is not recognized in the Convention would therefore appear an anomaly. The Study Group noted, however, that if a provision on the subject was to be incorporated in the text of the Convention, a satisfactory formula would have to be found for the inevitable exceptions to this right.

The challenge at the time was (and, as we shall demonstrate, still is) how to find a satisfactory formula for copyright limitations and exceptions. The differences in levels of protection served to caution that, in the event the Convention contained a general right of reproduction, then it was important this right does not encroach upon the exceptions already embodied in national law. In this connection, the Study Group observed:

On the one hand, it was obvious that all the forms of exploiting a work which had, or were likely to acquire, considerable economic or practical importance must in principle be reserved...

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2 For example the Finnish law of 8 July 1961, articles 11-21; the Maltese Copyright Act 1967, sections 7, 9 and 10; the Indian Copyright Act 1957, section 52.
3 Article 41 of the French Copyright Law of 1957; Article 53 and 54 of the German Law on Copyright and Neighbouring Rights (Copyright Law) of September 9, 1965, which entered into force on January 1, 1966, shortly before the Stockholm Revision Conference, restricted reproductions to strictly personal use. Only small parts of the work or single articles from a newspaper or periodical could be reproduced. Copying of large quantities could only be done against payment of remuneration to the copyright holder. (For the influence of German courts on this provision of the German Act, see Senttlenben, supra, p. 54). It is not surprising that at the Stockholm Conference, the Federal Republic of Germany (FRG) proposed that the wording of the three-step test should include a direct reference to the author’s right to remuneration. (See Records of the Intellectual Property Conference of Stockholm, 1967, supra, vol. I, Minutes of the Main Committee I, p. 618.) The German proposal was not approved. However, Ulmer, the German Chairman of the Main Committee I explained the rational of paying equitable remuneration. ‘In the case of photocopies made by industrial firms, it could be assumed that there would be no “unreasonable” prejudice to the legitimate interests of the author if the national legislation stipulated that adequate remuneration should be paid.’ Records of the Intellectual Property Conference of Stockholm, 1967, supra, vol. I, Minutes of the Main Committee I, World Intellectual Property Organization, Geneva, 1971, p. 883.
4 The “Study Group” refers to the group set up to prepare for the Stockholm Conference. The Study Group was composed of the Swedish Government and the BIRPI.
5 Records of the Intellectual Property Conference of Stockholm, 1967, supra, Vol. I, Conference Documents, (Document S/1), p. 111 (emphasis added). What was not clear at the time of the proposal is what would be the measure of a satisfactory formula. The logical understanding of this would be that it would have to be satisfactory from the point of view of the authors, after all, this is the objective of the Berne Convention; to protect the rights of authors in as effective and uniform a manner as possible. (See Berne Convention, Preamble.)