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**Council for Trade-Related Aspects of
Intellectual Property Rights**

Original: English

**INTELLECTUAL PROPERTY AND THE PUBLIC INTEREST:
THE WTO TRIPS AGREEMENT AND THE COPYRIGHT THREE-STEP TEST**

COMMUNICATION FROM SOUTH AFRICA

The following communication, dated 24 January 2020, is circulated at the request of the delegation of South Africa.

1 INTRODUCTION

1. The main purpose of this submission is to address the relationship between the World Trade Organization's (WTO) Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement) and copyright, as it relates to the three-step test on limitations and exceptions to copyright, with a view to clarifying the flexibilities to which Members are entitled, and, in particular, in fulfilling the principles and objectives of the TRIPS Agreement as set out in Article 7 and Article 8 of the Agreement.

2. A balanced interpretation of the copyright three-step test, contained in Article 13 of the TRIPS Agreement, and predicated upon Article 9.2 of the Berne Convention for the Protection of Literary and Artistic Works would ensure that WTO rules do not undermine Members' policies to promote access to knowledge, culture and development, protect human rights and otherwise promote the public interest, including through appropriate limitations and exceptions to copyright and related rights.

3. We note the contours of the three-step test, as articulated in Article 13 of the TRIPS Agreement, states that "*Members shall confine limitations or exceptions to exclusive rights to certain special cases which do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the right holder.*"

4. The objectives of the TRIPS Agreement as contained in Article 7 indicates that "*protection 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.*"

5. The implementation of principles in Article 8 of the TRIPS Agreement provide Members with safeguards in formulating or amending their laws and regulations, to "*promote the public interest in sectors of vital importance to their socio-economic and technological development, provided that such measures are consistent with the provisions of this Agreement*" and affording Members the right to adopt appropriate measures, provided that they are consistent with the provisions of this Agreement, "*to prevent the abuse of intellectual property rights by right holders or the resort to practices which unreasonably restrain trade or adversely affect the international transfer of technology.*"

6. Flexibilities afforded under Article 40 of the TRIPS Agreement to remedy anti-competitive practices in contractual licences that "*may have adverse effects on trade and may impede the transfer and dissemination of technology*" remain relevant and applicable in this regard.

7. Access to information and knowledge is fundamental to achieve many objectives, including education and scientific progress. While recognizing the need to protect the legitimate interests of authors and other right holders, we note that the TRIPS Agreement has "room to manoeuvre" with respect to the implementation of its obligations, including in the area of promoting access to knowledge, culture, education and development as well as other overarching public policy objectives.

2 APPLICABILITY OF THE THREE-STEP TEST

8. Although the relationship between the TRIPS Agreement and the three-step test for limitations and exceptions to copyright has not been the subject of in-depth scrutiny at the WTO, the Panel established to consider the United States - Section 110(5) Copyright Act case (WT/DS160/R) does provide some interpretation of Article 13 of the TRIPS Agreement in relation to Articles 11*bis*(1)(iii) and 11(1)(ii) of the Berne Convention (1971). The panel found that the three-step test requests three separate, independent and cumulative tests for copyright limitations and exceptions. There is disagreement with this interpretation among academic scholars and as is reflected in state practice. It would be useful to address the relationship between the TRIPS Agreement and the three-step test for limitations and exceptions to copyright in order to further clarify the flexibilities afforded to Members to fulfil their obligations in implementing the objectives and principles of the TRIPS Agreement.

9. The limitations that Members may provide pursuant to the provisions of the Berne Convention that have been incorporated into the TRIPS Agreement consist of so-called 'free use' (i.e. the use of a protected work is without an obligation to request authorization or the payment of remuneration) and 'non-exclusive licences' (use without authorization but with the obligation to pay equitable compensation). Outside of specific free uses, common law jurisdictions also recognize the notion of 'fair use' or 'fair dealing', which covers various free uses under international law. The use of privileges at a national level are generally based on the international copyright acquis. There are many examples of national exceptions and limitations resting on the international three-step test as can be found in the copyright laws of parties to the Berne Convention, including for example reproduction for research or teaching purposes; privileges of libraries, archives or exemption of reproduction required for administrative, parliamentary or judicial proceedings. It should be emphasized that fair use and fair dealing exceptions *per se* are not in conflict with the international three-step test, including under the more specific approach that the TRIPS Agreement takes to the three-step test under Article 13.¹

10. Samuelson and Hashimoto observe the following: *"...there is growing recognition that in an era of rapid technological change, flexible open-ended L&Es, such as fair use, can play a useful role in balancing the legitimate interests of rightsholders, subsequent creators (such as fan fiction authors), and the public (such as in making backup copies of music) in regulating various uses of copyrighted works that do not have market-destructive effects. These days, legislatures simply cannot anticipate new uses of works in digital form and decide which ones should be permitted through crafting of a specific exception. Applying fair use or a similar flexible doctrine can enable courts to weigh various factors in order to reach principled decisions."*²

11. The above-mentioned paragraph provides an important context to our ongoing discussion on the 1998 Work Programme on Electronic Commerce. In 1996, the three-step test was incorporated into the WIPO Copyright Treaty (WCT) and WIPO Performances and Phonograms Treaty (WPPT), both are collectively referred to as the WIPO Internet treaties. The Diplomatic Conference that adopted the WCT and WPPT texts, adopted the following agreed statement in respect of Article 10 of the WCT, which applies *mutatis mutandis* to Article 16 of the WPPT: *"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."*

¹ See for example Pamela Samuelson and Kathryn Hashimoto "Is the U.S. Fair Use Doctrine Compatible with Berne and TRIPS Obligations?" pp. 1 - 22 at p.14. [https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3228052 accessed 24 January 2020].

² Ad pp. 14 - 15.

12. South Africa invites Members to contribute to this discussion and to share their national approaches and experiences. We also include a range of questions that would benefit our discussion of this very important topic.

QUESTIONS:

1. Does the three-step test constitute an indivisible whole to the extent that each of the three steps are to be considered together and as a whole in a comprehensive overall assessment?
 2. What approaches have Members taken to reflect limitations and exceptions in their IP laws?
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