

TOWARDS A BALANCED INTERPRETATION OF THE “THREE-STEP TEST” IN COPYRIGHT LAW

From its modest origin as confirmation that countries of the Berne Union are entitled to permit the reproduction of copyright 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”,¹ the scope of the so-called “three-step test” has been steadily extended within the law of copyright and related rights. At an international level, it is now incorporated in modified form in the TRIPS Agreement² and the WIPO Treaties.³ Under these Agreements, the “test” is applied to the full range of authors’ rights and other related subject matters, and not simply to the author’s reproduction right. As a consequence of these international developments, and in response to its adoption in certain supranational legal instruments,⁴ the “test” is now also explicitly incorporated in the national laws on copyright and related rights in many jurisdictions around the world. In some jurisdictions, it not only functions as a pre-legislative constraint, but also governs the judicial interpretation of exceptions and limitations.

The role of exceptions and limitations in the law of copyright and related rights in today’s rapidly changing technological and commercial context has come under increasing scrutiny. In such policy discussions, the perceived requirements of the “three-step test” often assume central significance. However, the impact of the “test” is problematic, as its meaning remains uncertain and it has been interpreted in a manner that may lead to it functioning as an undesirable fetter on decision-making freedom. At international level, the only detailed analysis to date of the meaning and scope of the “test” has been provided by the WTO Panel, in its decision on section 110(5) of the United States’ Copyright Act 1976.⁵ In that Report, the Panel’s reading of Article 13 of TRIPS⁶ was self-avowedly economic in focus and leaves

¹ Berne Convention for the Protection of Literary and Artistic Works, Art 9(2).

² TRIPS Agreement, Art 13.

³ WIPO Copyright Treaty, Art 10; WIPO Performances and Phonograms Treaty, Art 16(2).

⁴ Notably within the European Community. See Council Directive 91/250/EEC of 14 May 1991 on the legal protection of computer programs, Art 6(3); Council Directive 92/100/EEC of 19 November 1992 on rental right and on certain rights related to copyright in the field of intellectual property, Art 10(3) (Directive subsequently codified in Directive 2006/115), Art 10(3); Directive 96/9/EC of the European Parliament and of the Council of 11 March 1996 on the legal protection of databases, Art 6(3); Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society, Art 5(5).

⁵ Report of the WTO Panel, 15th June 2000, WT/DS160/R.

⁶ “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” (TRIPS Agreement, Art 13).

limited scope for states to balance the protected economic interests of right-holders with countervailing interests of fundamental public importance. The potential that this interpretation of the „three-step test“ has for interfering with policy choices has also been evident in national courts.⁷

The prevalence of this restrictive understanding of the impact of the “three-step test” is problematic for a number of reasons. First, as a result, the policy balance is pre-set in a manner that precludes the legislature and the judiciary from responding flexibly and appropriately to changes in social, cultural or commercial conditions or to developments in technology. Secondly, law-makers are prevented from taking fully into account important interests – including interests such as access to information and the promotion of competition – that are, to some extent, in conflict with the economic interests of a right-holder. Thirdly, under an approach focusing exclusively on the interests of economic right-holders, the potentially divergent interests of creators or performers may not be properly taken into account. Furthermore, the dominant understanding of the three-step test as a strong restriction upon legislators and courts has considerable rhetorical force. The argument that a particular policy choice cannot be adopted because it would “conflict with the three-step test” is increasingly heard. Such claims are always highly contentious; particularly as the true requirements of the highly abstract and imprecise “three-step test” remain extremely uncertain.

Against that background, in a research project co-ordinated jointly by the Max Planck Institute for Intellectual Property and the School of Law at Queen Mary, University of London, a group of European copyright scholars came together to discuss the difficulties outlined above and to consider the possibility of agreeing a Declaration serving to address them by confirming the legitimacy of a more balanced interpretation of the “three-step test”. The resulting Declaration⁸ aims to restore the “three step test” to its original role as a relatively flexible standard precluding clearly unreasonable encroachments upon an author’s rights without interfering unduly with the ability of legislatures and courts to respond to the

⁷ See, for example, *Mulholland Drive*, French Supreme Court, February 28, 2006, (2006) 37 I.I.C. 760, reversing Paris Court of Appeal, April 22, 2005, (2006) 37 I.I.C. 112. Although in some other instances, courts have interpreted the „test“ much more flexible. See, for example, *Re the Supply of Photocopies of Newspaper Articles by Public Library* (Case I ZR 118/96) [2000] ECC 237 (BGH, German Federal Supreme Court).

⁸ See „Declaration on a Balanced Interpretation of the Three-Step Test in Copyright Law”, IIC 2008, 707; C. Geiger, J. Griffiths and R.M. Hilty, “Towards a Balanced Interpretation of the ‘Three-step test’ in Copyright Law” 2008 EIPR 489.

challenges presented by shifting commercial and technological contexts in a fair and balanced manner. It emphasises that the “test” functions as an indivisible entity and that, accordingly, one particular “step” cannot function as a “show-stopper.”

The Declaration is not a manifesto drawn up by anti-copyright activists. It has been drafted following careful debate amongst scholars of copyright law drawn from a number of different jurisdictions and with differing individual views on copyright law and policy. It has the limited aim of redressing the prevailing, and unnecessarily restrictive, interpretation of the “three-step test” in the law of copyright and related rights. It was launched at the last annual conference of the International Association for the Advancement of Teaching and Research in Intellectual Property (ATRIP) in Munich and has been translated into, and published in, a number of different languages⁹ The problem that it seeks to address is certainly not purely European in impact and we are hopeful that the Declaration’s publication in Japanese can make a significant contribution to the exciting debate concerning the appropriate scope of the copyright exceptions and limitations that is currently occurring in Japan. If the Declaration can make a valuable contribution to this debate, we hope very much to continue our collaboration with Japanese colleagues who are interested in the pursuit of a well-balanced copyright law and policy. In this respect, we would like to express our profound gratitude to Mr Keiji Sugiyama, attorney at-law-of Japan and Mr Tomoki Ishiara, attorney at-law-of Japan for their important work in translating the Declaration and ensuring its publication in Japan.

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⁹ In the Netherlands (Auteurs-,Media- & Informatierecht (AMI) 2009, 8), in Germany (GRUR International 2008, 822), in France (Propr. intell. 2008, 399), in Belgium (Auteurs et Médias 2008, 516), in Spain (Actas de derecho industrial y derecho de autor 2007-2008, Vol. 28, 1509), in Italy (Diritto informazione e informatica 2009, 159), in Portugal (Direito da Sociedade da Informação), and in Brazil (Revista Trimestral de Direito Civil July-September 2008, Vol. 35, 239).

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