‘Three-step test and Australia: right to remuneration and the concept of sterile copyright’

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Signatories to the international treaties in which the Berne three-step test is incorporated must in legislation ‘confine limitations and 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 rights holder.’

Although numerous academics have commented on the purpose and scope of the Berne three-step test, only one internatioal legal tribunal has interpreted the elements of the test – WTO Panel ruling 15/06/00 WT/DS160/R. The ruling could be argued to presumptively favour application of the test to protect the copyright owner’s maximum economic interest.

Consideration of the three-step test in the Australian context must necessrily take account of international developments. Relevantly, in 2008, the International Association for the Advancement of Teaching and Research in Intellectual Property, under the auspices of the Max Planck Institute, issued a declaration asking for ‘a balanced interpretation of the three-step test in copyright law.’

According to the declaration, domestic courts and legislatures interpreted the test ‘in a profoundly unbalanced manner’, failing to consider the ‘objectives and purposes’ of exceptions. In the same year, the European Commission released a paper on copyright in the knowledge economy which raises for discussion the application of the test.

It seems that the international law on exceptions remains plastic.

I propose, in the language of the Max Planck declaration, a ‘balanced interpretation of the three-step test’ that relies on analysis of ‘objectives and purposes’.

My premise is that traditional analysis of exceptions is flawed by the implicit presumption that the exclusive rights confer entitlement to remuneration. Belief in a right to remuneration leads to the conclusion that limitation on rights is invasive, and only to be tolerated if strictly confined. However, if it is shown that copyright owners cannot (except in the case of statutory licences) claim a right to remuneration, but must instead bargain for reward, it can be seen that the scope of the exclusive rights, as historically intended, is strictly economic. That is, they were designed to enable owners to strike commercial bargains in a market. Legislators did not intend uses outside the penumbra of the market to be subject to restraint.

The premise can be demonstrated by examination of the language of the exclusive rights and reference to the historical record, in Australia and the UK. The content of the historical record is central to the argument. What governments and legislators said (or omitted to say) supports the conclusion that they intended exclusivity to facilitate control of commercial production, and took for granted that owners had no wish or need for other control. In other words, legislation annexed the commercial domain not the whole domain. This proposition can be reconciled with the fact that

the exclusive rights *prima facie* annex the whole domain by reference to the concept of sterile copyright.
This concept posits that if a copyright use a. does not cause actual or potential commercial or market harm to the owner and b. is for a definable purpose constent with public welfare, it falls outside the penumbra of the market. Such a use renders the exclusive rights sterile in their economic application. Copyright still, undeniably, applies literally to the whole field, but in practice is confined to the market and its penumbra (a concept that captures the shadowy area between commercial and non-commercial use).

Copyright is therefore 'potent' (use is for a commercial or related purpose) or sterile (use is non-commercial and for a purpose that cannot be contrary to public welfare). If a copyright is sterile, the owner may exercise the rights to restrain use but is unable to demand remuneration.

The idea that copyright was historically intended to apply to the market and its penumbra is demonstrable from the language of legislators in passing statutes, the terms of historical statutes, the history of copyright policy-making, and the explicitly commercial pupose of statutory licensing until after 1970. The concept of sterile copyright merely gives expression to the unstated intent of copyright lawmaking over 250 years. Its secondary implication is that the formula outlined can be applied, in theory, to copyright uses at large: logically, the statutory exceptions do not state the totality of allowable unauthorised uses.