MAXIMISING PERMISSIBLE EXCEPTIONS TO INTELLECTUAL PROPERTY RIGHTS

Andrew F. Christie*

Forthcoming as Chapter 7 in Kur, A. and Mizaras, V. (eds), *The Structure of Intellectual Property Law: Can One Size Fit All?* (Edward Elgar, 2011)

1. INTRODUCTION

Exceptions to intellectual property (IP) rights are of fundamental importance to achieving the policy objectives that justify the grant of IP rights. To the extent to which an IP right is considered to be "too strong", the way to "weaken" (or, to better "balance") it is through the use of an exception to it. It is not surprising, therefore, that much attention has been paid in recent times by academics and policy-makers to the issue of exceptions, and in particular to the issue of the extent to which the 'three-step test' in international treaties restrict the ability of national legislatures to introduce new exceptions to IP rights.[1]

Unfortunately, much of the published discussion on this topic suffers from a failure to properly conceptualise the nature of exceptions to IP rights. This failure is exemplified by a general tendency to talk about exceptions without defining them. The failure to properly conceptualise exceptions provides a significant constraint on the ability of commentators to provide insights about how national laws may be reformed to maximise the scope of permissible activities while remaining compliant with the TRIPS Agreement.

---

* Davies Collison Cave Professor of Intellectual Property at the Melbourne Law School, and Research Associate of the Intellectual Property Research Institute of Australia (IPRIA), University of Melbourne. This chapter is based on a presentation by the author at the 2008 Congress of the International Association for the Advancement of Teaching and Research in Intellectual Property (ATRIP), Munich, 22 July 2008, and describes research that was supported by IPRIA and by the Australian Research Council through its Linkage Project scheme as part of the project *Cultural Collections, Creators and Copyright: Museums, Galleries, Libraries and Archives and Australia's Digital Heritage* (Andrew Kenyon and Andrew Christie, LP0669566).

1 The following is a selective, but representative, sample of the more recent literature: C. Geiger, 'From Berne to National Law, via the Copyright Directive: the Dangerous Mutations of the Three-step Test' (2007) 29(12) *European Intellectual Property Review* 486; P.B. Hugenholtz and R. Okediji, 'Conceiving an International Instrument on Limitations and Exceptions to Copyright – Final Report', 2008 at http://www.ivir.nl/publicaties/hugenholtz/finalreport2008.pdf (last visited 6 March 2009); A. Kur, 'Of Oceans, Islands, and Inland Water – How Much Room for Exceptions and Limitations under the Three Step-Test?', (2008) *Max Planck Papers on Intellectual Property, Competition & Tax Law Research* No.08-04 at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1317707 (last visited 6 March 2009); S. Ricketson, *WIPO Study on Limitations and Exceptions of Copyright and Related Rights in the Digital Environment*, 2003, WIPO, Geneva (WIPO Doc. SCCR/9/7) at http://www.wipo.int/edocs/mdocs/copyright/en/sccr_9/sccr_9_7.pdf (last visited 6 March 2009); and M. Senftleben, *Copyright, Limitations, and the Three-Step Test: An Analysis of the Three-Step Test in International and EC Copyright Law* (The Hague: Kluwer Law International, 2004).

This chapter seeks to remedy some of these failures. In particular, it seeks to provide a reasoned conceptualisation of the nature of exceptions and limitations. Then, building on that conceptualisation, this chapter offers an insight into how, in a practical manner, a national legislature can maximise the scope of permissible activities in respect of IP rights while remaining compliant with the international constraints on exceptions to IP rights.

2. UNDERSTANDING EXCEPTIONS

The first step to understanding exceptions is to identify the context in which they operate. Accordingly, this section begins by explaining the hierarchy in which IP rights subsist, and by identifying the location of exceptions to those rights. It then defines an exception, and the related concept of a limitation.

2.1. Contextualising Exceptions

Put simply, in the absence of an IP right, the law does not preclude a competitor from exploiting the creation or innovation of another. Thus, the general rule is free competition. An IP right provides the owner of the IP subject matter with the entitlement of being the exclusive exploiter of that subject matter. IP rights are, therefore, an exception to the general rule of free competition. IP rights, where they do exist, are not absolute. Rather, IP rights are subject to certain exceptions. Thus, exceptions are a qualification to the exception to the general rule. By virtue of provisions in international treaties, and in particular the three-step test of the TRIPS Agreement, exceptions to IP rights are only permitted under certain conditions. Thus, the TRIPS three-step test provides a constraint on the qualification to the exception to the general rule. Exceptions can only be effected by way of national law. Thus, the form of its implementation in national legislation determines the practical effect of an exception. To be valid, this implementation must comply with the constraints on exceptions contained in the relevant international treaties.

It follows from all of this that there is a distinct hierarchy to any IP right system, as follows:

Level 1. General rule: free competition
Level 2. Exception to the general rule: intellectual property right
Level 3. Qualification to the exception: permitted act
Level 4. Constraint on the qualification: TRIPS three-step test
Level 5. Implementation of the qualification within the constraint: permitted act in national law

2.2. Defining Exceptions

Both of the words 'exception' and 'limitation' have been used in international treaties, and in some writings about those treaties, with little in the way of reasoned definition.[2] To the extent to which writers do give reasoned meanings for these terms, there is no consensus.[3] This lack of principled analysis is surprising, given the major roles that exceptions and limitations play in IP law. This section provides a reasoned definition of the terms, from first principles.

---

[2] As Hugenholtz and Okediji note: "While [international treaties] expressly refer to 'limitations and exceptions' as the object of the three-step test, surprisingly little has been written, even in the *IMRO* WTO Panel Report, on what actually constitutes 'limitations and exceptions'.": Hugenholtz and Okediji n 1above, 19.

[3] According to Kur: "Concerning the terminological aspect, no agreement or uniform practice seems to exist on the international level.": Kur n 1above, 5.

The dictionary definitions of 'limitation' include "a point or respect in which something is limited", "a limit". A 'limit', in turn, is defined as:

> one of the fixed points between which the possible or permitted extent, amount, duration, range of action, or variation of anything is confined; a bound which may not be passed, or beyond which something ceases to be possible or allowable.[4]

This provides support for the view that a limitation, properly conceived, is a *boundary* of the IP right-holder's right. That is to say, the IP right-holder's right does not extend into the space delineated by the limitation. Put another way, the limitation is an integral part of the definition of the IP right-holder's right.

An 'exception' is different. As dictionaries show, an exception is:

> something that is excepted; a particular case which comes within the terms of a rule, but to which the rule is not applicable.[5]

In terms of IP rights, an exception is a *carve-out* from the IP right-holder's right. That is to say, an exception cuts back on the IP right-holder's right, by removing a part of it, either partially (in the case of remunerated exceptions) or wholly (in the case of unremunerated exceptions). Put another way, an exception is a space into which the IP right-holder's right would extend *but for* the existence of the exception.

The general nature of limitations and exceptions to IP rights is illustrated in Figure 1.

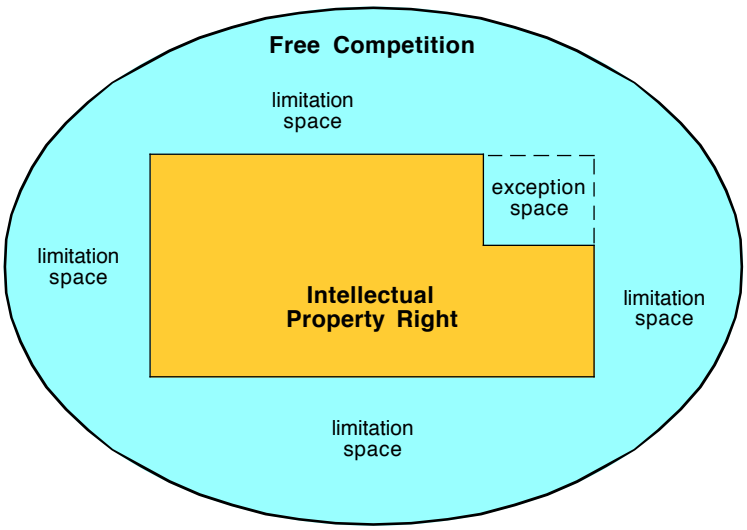

Figure 1: Nature of Limitations and Exceptions to IP Rights

Figure 1 conveys, diagrammatically, the relationship between an IP right, a limitation to an IP right and an exception to an IP right. As explained above, an IP right is an exception to the general rule of free competition. It is, in a sense, an island in a sea of free competition.[6] The

---

4 *Oxford English Dictionary* (2nd edn), 1989, Oxford University Press.

5 Ibid.

6 A number of commentators have chosen to use the metaphor of islands in an ocean for explaining their conceptualisation of exceptions and limitations to IP right-holder's rights. Kur, eg, states: "If IP rights in general are considered islands in a sea of freedom, the rules granting immunity for cetain kinds of uses ... might more adequately be described as pools of water forming within the island": Kur n 1above, 6.

boundary of the IP right (the shore of the island, so to speak) is delineated by the limitations to the right. Part of the IP right has been carved out, by an exception, from what is delineated by the limitations. This part of the right is returned to the space for free competition (it is, by analogy, land given up to the sea).

By this definition, limitations are general constraints on the scope of the IP regime. These constraints are contained in the legislation enacting the IP regime, and operate primarily by delineating the types of subject matter protected by the legislation, the types of exclusive rights provided to the protected subject matter, and the duration of the protection provided to the protected subject matter. Limitations operate at Level 2 in the hierarchy of an IP right.

Exceptions are more specific than limitations. They operate by removing liability for infringement for undertaking certain acts that would, but for the exception, be within the scope of the IP right-holder's exclusive rights. Exceptions may be remunerated or unremunerated. A *remunerated* exception is a partial carve-out of the IP right-holder's right – it removes the right-holder's entitlement to prevent use by third parties of the subject matter protected by the right, but leaves intact the entitlement to be compensated financially for any use by third parties of the subject matter.[7] An *unremunerated* exception, in contrast, is a complete carve-out of the IP right-holder's right – it removes the right-holder's entitlement both to prevent use by third parties of the subject matter and to be compensated financially for any use by third parties of the subject matter. Exceptions operate at Level 3 in the hierarchy of an IP right.

3. CONSTRAINING EXCEPTIONS

3.1. The Three-Step Test

The three-step test qualifies the permissible scope of an exception to an IP right. The test was first incorporated into international IP law through the introduction, in 1967, of Article 9(2) into the *Berne Convention for the Protection of Literary and Artistic Works of 1886* ('Berne'). Article 9(2) arose out of the debate concerning the introduction of a general right of reproduction into the text of the Berne Convention for the first time at the Stockholm Revision Conference in 1967. The issue had been discussed at the Diplomatic Conferences prior to the conclusion of the Convention in 1884 to 1886, and again in 1948, but the different definitions of a reproduction right that existed in the national legislation of participating States meant that agreement could not be reached on how it could be incorporated into the Convention. By the time of the 1967 Conference, however, the concern of participants "lay not with the proposition that there should be a general right of reproduction, but with the formulation of the exceptions that should be made to it".[8]

Therefore, it was the debate surrounding the formulation of appropriate exceptions to the new reproduction right, introduced as Article 9(1), that produced the wording of the current Article 9(2) of the Berne Convention. Article 9(2), in the form adopted by the Conference, states:

> It shall be a matter for legislation in the countries of the Union to permit the reproduction of such works in certain special cases, provided that such reproduction does not conflict

---

7 A remunerated exception is often referred to as a 'compulsory licence' or an 'obligatory licence': see, eg, Ricketson n 1above, 4. Other synonyms are 'non-voluntary licence' or 'statutory licence'.

8 S. Ricketson and J. Ginsburg, *International Copyright and Neighbouring Rights: The Berne Convention and Beyond* (2nd ed), 2006, Oxford University Press, 639 [11.19].

> with a normal exploitation of the work and does not unreasonably prejudice the legitimate interests of the author.

It is instructive to look at the drafting history of the article. The wording first proposed for Article 9(2) provided:

> … that it would be possible for national legislation to permit the reproduction of the works referred to in paragraph (1) in three cases: (a) for private use; (b) for judicial or administrative purposes; (c) in certain particular cases, provided (i) that reproduction is not contrary to the legitimate interests of the author, and (ii) that it does not conflict with a normal exploitation of the work.[9]

During the debate, a number of submissions were made to Main Committee I regarding possible changes to the proposed wording, some seeking to restrict the scope of permissible exceptions and some to extend it. The United Kingdom submitted a proposal which removed criteria (a) and (b) and grouped all the exceptions into a single formula of "in certain special cases".[10] Main Committee I adopted this proposal.

Main Committee I also adopted a proposal from the Drafting Committee suggesting that, in this new general clause corresponding to item (c) above, the "second conditions should be placed before the first, *as this would afford a more logical order* for the interpretation of the rule".[11] The reasoning behind this was:

> If it is considered that reproduction conflicts with the normal exploitation of the work, reproduction is not permitted at all. If it is considered that reproduction does not conflict with the normal exploitation of the work, the next step would be to consider whether it does not unreasonably prejudice the legitimate interests of the author. Only if such is not the case would it be possible in certain special cases to introduce a compulsory license, or to provide for use without payment.[12]

It can be seen from this reasoning that Main Committee I understood that it was possible for a particular use of a work to not conflict with the normal exploitation of the work and yet be prejudicial to the legitimate interests of the author of the work. Furthermore, by choosing to reverse the order of steps (i) and (ii) in sub-paragraph (c) of the original proposal, it may be argued that the Main Committee I understood that the converse was not possible – that is, it was not possible for a particular use of a work to conflict with a normal exploitation of the work and yet not be prejudicial to legitimate interests of the author. Such an understanding may be implied from the explanation that reversing the order "would afford a more logical order". Presumably, the new order (where the legitimate interests of the author are considered after consideration of the normal exploitation of the work) is more logical because the set of all things that conflict with the normal exploitation of a work is a sub-set of the set of all things that are contrary to the legitimate interests of the author. If consideration of the legitimate interests of the author were undertaken before consideration of the normal exploitation of the work, there would be no work left for the last step to undertake. Reversing the order of the two steps ensures that there is always some work to be done by the last step.

---

9 'Report on the Work of Main Committee I (Substantive Provisions of the Berne Convention: Articles 1 to 20)', (1967) *Records of the Intellectual Property Conference of Stockholm June 11 to July 14, 1967 Volume II*, para. 78.

10 Ibid, para. 81.

11 Ibid, para. 85 (emphasis added).

12 Ibid.

A number of other international instruments have adopted the three-step test that was introduced into the Berne Convention in 1967 as Article 9(2). This first adoption of the test occurred in 1994, in the Agreement on Trade-related Aspects of Intellectual Property Rights ('TRIPS').[13] The TRIPS Agreement adopted the three-step test as a qualification on the exceptions that may be introduced by WTO member states in respect of copyright,[14] trademark,[15] industrial design[16] and patent rights.[17] Two years later, the test was adopted to qualify the exceptions that member states could introduced in respect of the rights provided in two World Intellectual Property Organization Treaties: the WIPO Copyright Treaty 1996 ('WCT'),[18] and WIPO Performances and Phonograms Treaty 1996 ('WPPT').[19] In more recent times, the three-step test has been used in supra-national instruments, such as European Union Harmonisation Directives[20] and in bilateral Free Trade Agreements.[21]

Whether deliberately or otherwise, the three-step test has not been incorporated into these international instruments in identical form. Rather, the test has been adopted with subtle – and, in some cases, not so subtle – differences. The differences in implementation do not just occur between the different international instruments in which the three-step test has been incorporated – there are differences in implementation *within* the same instrument. For example, of the four implementations of the test in the TRIPS Agreement, only two are the same: those in Articles 26(2) and 30. Thus, there are three different implementations of the three-step test in the TRIPS Agreement.

3.2. Operation of the Three-Step Test

A full understanding of the three-step test requires both a micro-level and a macro-level analysis. A micro-level analysis – a consideration of exactly how each step operates – is beyond the scope of this article.[22] A macro-level analysis – a consideration of how the three steps operate with respect to each other – is provided below.

A superficial reading of the three-step test is that the steps are cumulative and, therefore, that each step must be satisfied if an exception is to be permitted under it. This seems incontrovertible.[23] Thus, the only exceptions permitted by the three-step test are those exceptions that are special cases, and that do not conflict with the normal exploitation of the protected subject matter, and that do not prejudice the legitimate interests of the right-holder.

What is debateable, however, is whether the steps need to be applied in a particular order –

---

13 The TRIPS Agreement is Annexe 1C to the Agreement Establishing the World Trade Organization 1994.
14 TRIPS Article 13.
15 TRIPS Article 17.
16 TRIPS Article 26(2).
17 TRIPS Article 30.
18 WCT Article 10(1).
19 WPPT Article 16(2).
20 See, e.g., 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, Article 5(5).
21 See, e.g., the Free Trade Agreement between the Government of the United States of America and the Government of Australia of 18 May 2004, Articles 17.2.5 (trademarks), 17.4.10(a) (copyright) and 17.9.3 (patents).
22 For micro-level analyses, see A. Kurn 1 above, 22-31.
23 This was the view expressed in the report of the decision of the TRIPS Dispute Settlement Panel in the case *United States – Section 110(5) of the US Copyright Act*, WT/DS160/R, 15 June 2000, at §6.87: "Failure to comply with any one of the three conditions results in the Article 13 exception being disallowed."

and, if so, what is that order.[24] It was noted above that the Main Committee I responsible for drafting Article 9(2) of the Berne Convention considered that one particular ordering of the three steps was more logical than another – namely, that consideration of the legitimate interests of the author should occur after consideration of the normal exploitation of the work. This seems to suggest that the Main Committee I considered that every use of a work that conflicts with the normal exploitation of it will be prejudicial to the legitimate interests of the author of the work; however, the legitimate interests of the author of the work go beyond the normal exploitation of the work, such that some uses of a work will be prejudicial to the legitimate interests of the author even though they do not conflict with the normal exploitation of the work.

If this reasoning is accepted – and if it is accepted as applying to the three-step test in the TRIPS Agreement and the other international treaties into which it has subsequently been introduced – there is a profound consequence on the way in which the test operates: step 2 is logically redundant. That is to say, it is only necessary to consider whether an exception satisfies steps 1 and 3. If it does, it will be permitted under the three-step test, because it will (in the eyes of Main Committee I) also not be in conflict with the requirements of step 2.

4. MAXIMISING EXCEPTIONS

Many commentators have expressed the concern that the TRIPS three-step is an undue restriction on the scope of exceptions that are permissible within any particular IP regime.[25] This concern is the motivation behind the "Declaration on a Balanced Interpretation of the 'Three-Step Test' in Copyright Law" produced by a group of European copyright academics.[26] It is also the motivation behind the call for an international treaty on mandated exceptions to copyright law.[27] There is, therefore, a desire amongst certain stakeholders to maximise the scope of permissible exceptions to IP rights. The final part of this chapter offers a conceptualisation of the three-step test that maximises the scope of exceptions permitted by the test, while remaining in compliance with existing international law.

---

[24] Senftleben, amongst others, believes that the steps must be applied in the order in which they appear in the TRIPS Agreement provisions – because, in his view, there is "a teleological line of argument" that substantiates this ordering: Senftleben n 1 above, 131. In Kur's opinion, the WTO dispute resolution panels "emphasize that the test actually does consist of three ... clearly discernible stages, which must be passed through cumulatively and in a strict order": Kur n 1 above, 22. Geiger, however, believes it is "necessary to 're-think' the three-step test and to adopt a new reading of it", under which the third step of the test would be applied first. In his view, "no text seems to forbid" applying the test in this way: C. Geiger, 'The Role of the Three-step Test in the Adaptation of Copyright Law to the Information Society', (2007) January-March *e-Copyright Bulletin* 1, 18.

[25] See, eg, P. Eckersley, 'Virtual Markets for Virtual Goods: The Mirror Image of Digital Copyright?' (2004) 18 *Harvard Journal of Law and Technology* 85, 153–158; K. Koelman, 'Fixing the Three Step Test' (2006) 28 *European Intellectual Property Review* 407, 411; R. Okediji, 'Public Welfare and the Role of the WTO: Reconsidering the TRIPS Agreement' (2003) 17 *Emory International Law Review* 819, 822–823; and T. Oriola, 'Against the Plague: Exemption of Pharmaceutical Patent Rights as a Biosecurity Measure' (2007) 7 *University of Illinois Journal of Law, Technology and Policy* 287, 321–327.

[26] 'Declaration on a Balanced Interpretation of the "Three-Step Test" in Copyright Law', (2008) 39 *IIC: International Review of Intellectual Property and Competition Law* 707.

[27] See the *Proposal by Chile on the Analysis of Exceptions and Limitations*, Standing Committee on Copyright and Related Rights, Thirteenth Session, Geneva, November 21-23, 2005 (WIPO Doc. SCCR/13/5) at http://www.wipo.int/meetings/en/html.jsp?url=http://www.wipo.int/edocs/mdocs/copyright/en/sccr_13/sccr_13_5.doc (last visited 6 March 2009). That proposal seeks to an "agreement on exceptions and limitations for purposes of public interest that must be envisaged as a minimum in all national legislations for the benefit of the community": 2.

4.1. Understanding Gervais' 'Reverse Three-Step' Test

Daniel Gervais' 2004 article 'Towards a New Core International Copyright Norm: The Reverse Three-Step Test'[28] introduces the concept of reversing the three-step test to define the full scope of what copyright law protects. As Gervais explains:

> What I suggest is reversing the test, based on the assumption that what the exception (whether fair use in domestic U.S. law or the three-step test at the multilateral level) does not allow is what in fact copyright intended to protect. Expressed in mathematical terms, if fair use is the "A" universe, then the "non-A" universe contains uses that require a license.[29]

It appears that what Gervais is proposing is that the copyright-holder's entitlement can, and should, be defined by what the three-step test does not permit. Under this approach, the scope of copyright holder's exclusive rights would be defined as:

> use that does not meet the two real steps of the Berne three-step test [i.e.] [u]se that interferes with normal commercial exploitation or unreasonably or unjustifiably prejudices the copyright holder's rights.[30]

This statement needs qualification, however. Read literally, it suggests that the scope of a copyright-holder's right is defined by that which the three-step test does not permit. Such a reading would be incorrect, however, because it fails to take account of the role of limitations. As noted in section 2 above, limitations – that is, statutory restrictions on the subject matter of protection, the nature of the exclusive rights, and the duration of protection – are the boundaries of the IP right-holder's right. It cannot be that Gervais is suggesting that these limitations can be ignored and that all one needs to do to define the scope of the copyright-holder's right is to reverse the three-step test. This cannot be so because the three-step test does not operate to determine subject matter of protection, nature of exclusive rights or duration of protection.

This author will suggest a variation on the literal reading of Gervais' reverse three-step test: reversing the three-step test defines the *minimum permissible* scope of the IP right-holder's right, assuming that the maximum permissible limitations to that right have been applied. The logic in support of this proposition is as follows. If the maximum permissible limitations have been applied to the IP right, then the scope of the IP right that remains is to be determined by the exceptions that have been applied to it. Given that the three-step test defines the maximum permissible carve-out from an IP right-holder's right, then the reverse of this test will define the minimum permissible scope of the right that remains after the maximum permissible exceptions have been applied (when the maximum permissible limitations have also been applied). This understanding of the Gervais reverse three-step test is illustrated in Figure 2.

---

[28] (2005) 9(1) *Marquette Intellectual Property Law Review* 1-35.
[29] Ibid, 28.
[30] Ibid, 29.

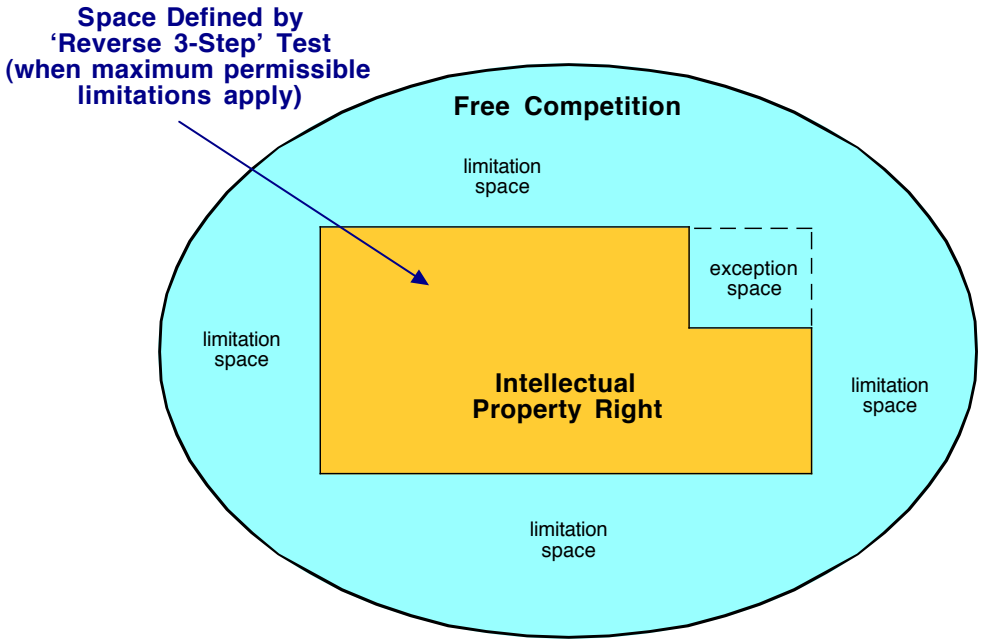

Figure 2: 'Reverse Three-Step' Test as Definition of the Scope of an IP Right

4.2. Defining the Maximum Permissible Exception

Gervais' concept of reversing the three-step test to define the scope of the copyright-holder's right, while highly interesting, is rather impractical. Although there is much to be said in favour of simplifying the exclusive entitlements of the copyright holder, national legislatures in recent times have continued the historical trend of *increasing* the number of exclusive rights of copyright, not decreasing them. It is, therefore, rather unlikely that any national legislature in the short term will adopt the reverse three-step test as the definition of the exclusive rights of the copyright-holder. Thus, the reverse three-step test is not the practical solution to the existence of unduly wide exclusive rights – or, put another way, to the existence of unduly narrow exceptions – that concern those stakeholders who have made the "Declaration" on the three-step test in copyright law or who have proposed an international treaty mandating certain exceptions in copyright law.

However, even though the reverse three-step test does not provide a useful response to that concern, a related concept does. In particular, it is argued that there is a practical way in which a national legislature can maximise the scope of permissible exceptions to an IP right-holder's right – namely, by introducing an exception that adopts the very language of the relevant three-step test. Under this approach, the three-step test moves from being a *constraint on* the scope of an exception to an IP right to being a *definition of* the scope of an exception. An exception that uses the very language of the three-step test is, by definition, a 'maximalist exception' – that is, an exception that permits the maximum activities possible while remaining in compliance with the three-step test's constraints. This role for the three-step test is illustrated in Figure 3.

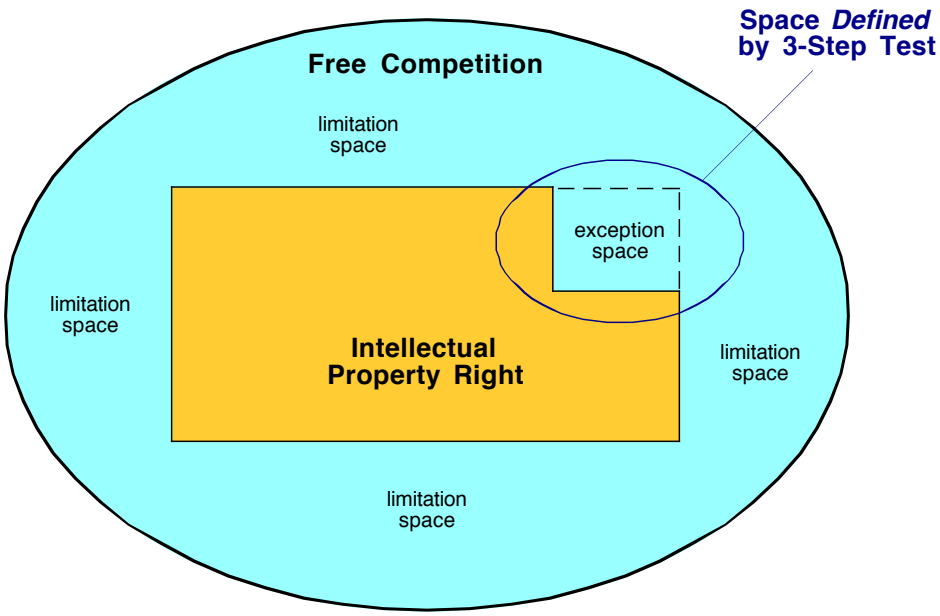

Figure 3: Three-Step Test as Definition of Maximalist Exception to an IP Right

Since most attention to date has been focussed on copyright, that regime will be used here as the example of how a national legislature can maximise the scope of permissible exceptions to an IP right-holder's right. It is to be noted, however, that an equivalent maximalist exception can easily be drafted for each of the other IP regimes.

A maximisation of the scope of permissible exceptions to copyright could be implemented in national legislation by the introduction of an exception worded along the following lines:

> In any particular case, it is not an infringement of copyright to do any act that does not conflict with a normal exploitation of the protected subject matter and that does not unreasonably prejudice the legitimate interests of the copyright owner.

An exception worded this way is, self-evidently, compliant with the relevant provisions in the international treaties,[31] since it uses the very concept of each of the three steps of the three-step test in those treaties. Further, by applying to "any act" that would otherwise be an infringement, an exception worded in this way maximises the scope of permissible activities. Unlike the 'fair dealing' provisions of United Kingdom copyright law, for example, such an exception is not limited to acts done for a particular purpose, such as for research, private study, criticism, review or news reporting.[32] An exception worded in this manner 'fills the entire space' of exceptions permitted by the three-step test.

Although the idea of incorporating the words of the three-step test into national legislation is not new,[33] the proposal above is fundamentally different in nature. The national provisions

---

[31] The relevant provisions are Berne Art. 9(2), TRIPS Art. 13 and WCT Arts 10(1) and (2).

[32] See the UK Copyright, Designs and Patents Act 1988, ss 29 and 30

[33] Various European jurisdictions have implemented the exceptions identified in Article 5 of the EU Copyright Harmonisation Directive into their national law with an express constraint along the following lines: "the exceptions enumerated ... may neither conflict with the normal exploitation of the work nor unreasonably prejudice the legitimate interests of the author": see the instances cited by Gieger n 1 above, 486. China, too, has a provision in its copyright legislation stating that the acts permitted by specific provisions of its Act

that incorporate the three-step test apply the words as a constraint on specific permitted acts – that is, they limit the scope of the existing permitted exceptions by requiring them to comply with the three-step test. The maximalist exception proposed in this chapter permits all acts that are consistent with the three-step test. Thus, whereas the incorporation of the three-step test into the national legislation of European countries and China has the effect of *further constraining* the scope of permitted acts, the incorporation of the test in the proposed maximalist exception has the effect of *expanding* the scope of permitted acts.

There is no reason in principle or in practice why a maximalist exception as proposed herein could not be implemented into a country's national legislation, in conjunction with that country's existing exceptions. When implemented with existing exceptions, the maximalist exception would operate as a 'catch-all' safety net, permitting acts that satisfy the three-step test even though there is no specific exception legislated in respect of that act. The effect of the maximalist exception, therefore, is to ensure that all otherwise infringing acts that, according international treaties, *may* be permitted by the national law *are* permitted by the national law.

5. CONCLUSION

As noted in section 4 above, much angst has been expressed in recent times about the unduly restrictive effect of the three-step test in international treaties, especially as they apply to copyright law. This has led to a declaration about how the copyright three-step should be applied, and to initiatives for an international treaty mandating the exceptions that must be provided in national copyright laws. Because these developments require a change to the status quo, there is a substantial risk they will not succeed.

There is, however, an alternative to changing the international law, which may provide the outcome sought by those concerned about the three-step test. This alternative is to take full advantage of the flexibility permitted by the existing international law. As shown above, by using the very language and concepts of the current three-step test in international treaties, it is possible to craft exceptions in national legislation that maximise the range of permitted activities while remaining compliant with the requirements of the three-step test.

"shall not impair the normal exploitation of the work concerned, nor unreasonably prejudice the legitimate interests of the copyright owner": Article 21 of the *Regulations for the Implementation of the Copyright Law of the People's Republic of China*, promulgated by Decree No. 359 of the State Council of the People's Republic of China on August 2, 2002, and effective as of September 15, 2002.