

**COPYRIGHT AND DEVELOPING COUNTRIES:
A BALANCING EXERCISE**

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Striking the correct balance between access and incentives is the central problem in copyright law¹

Copyright law has always placed emphasis on balancing the interest of copyright owners in receiving fair reward for their creativity on the one hand and the interest of the public in having reasonable access to copyright works on the other. Rewarding creators is important as a means to encourage further creativity and, thereby, promote progress in the arts and science for the benefit of the public. At the same time, the public interest in access to copyright works is vital so that information can be shared and built upon to create new works, again for the social goal of advancing the arts and science for the benefit of the broader community. This balancing process is an exercise aimed at achieving an optimal degree of copyright protection which appropriately rewards creativity while not deterring the creativity of others in the community.

Throughout the history of copyright, the need to strike a balance has always been acknowledged, although the process has not been an easy one. The balancing exercise existed as early as the first copyright statute, which is the English Statute of Anne 1709. That piece of copyright legislation required copies of works to be deposited with nine important libraries throughout England as a condition of protection. Today, national copyright statutes have adopted a number of ways to strike a balance between the interest of creators and the broader community. One way is through the implementation of a series of limitations and exceptions to the exclusive rights of copyright owners. Of these, the most important is the fair dealing provision which excludes copyright from the realm of the exclusive rights of copyright owners.² Thus, while copyright owners have exclusive rights in their works, they are not conferred with all possible rights in relation to their works. Another way of achieving the balance is through the idea/expression dichotomy, that is, copyright does not protect ideas but the expression of those ideas. Yet another way is by excluding certain works from copyright protection, such as official texts of a legislative nature or judicial decisions. The basis for this exclusion is that such materials should be readily available to the general public. A further way of balancing is by statutorily allowing the use of copyright works subject to the payment of compensation to the copyright owner, more commonly termed as 'compulsory licence'. In addition, copyright statutes grant copyright protection for a limited period of time, after which the work enters the public domain.

At the international arena, there is a trend towards expanding and strengthening copyright protection in favour of copyright owners as well as harmonising standards worldwide, regardless of the level of development of the countries concerned. The coming of the digital age, which has enabled the unauthorised, high quality reproduction of copyright works to take place easily, has resulted in copyright industries exerting pressure to increase the levels of copyright protection and also to extend protection to new works. Thus, the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) enlarged the minimum substantive provisions standard laid down in the Berne Convention for the Protection of Literary and Artistic Works (Berne Convention). New minimal substantive provisions were introduced for the protection of computer programs as literary works. Also, broader protection was granted to databases, sound recordings, performers and broadcasting organisations. In addition, there were new protection for rental rights for computer software and cinematographic works. Article 9(1) of the TRIPS Agreement incorporated by reference Article 1 through 21 of the Berne Convention and, therefore, Member States of the TRIPS Agreement are required to comply with those provisions of the Berne Convention and also with other new substantive provisions laid down in the Agreement. The World Intellectual Property Organisation's Internet treaties, namely, the Copyright Treaty (WCT) and the Performances and Phonograms Treaty (WPPT), which were adopted by WIPO at a diplomatic conference in 1996, were brought into existence to respond to the effects of new technologies on copyright protection. The treaties deal with issues such as rights over the storage and transmission of works in digital systems and

¹ Landes, WM & Posner, RA, *An Economic Analysis of Copyright Law* (1989) 18 J Legal Stud 325 at 326.

² The concept of using a work fairly was developed through case law and arguably originated from the English case of *Cary v Kearsley* (1802) 4 Epinasse 168. This common law concept eventually found its way into the statute book with the enactment of the English Copyright Act 1911, under which it was labelled as 'fair dealing'. See too n 4 below.

technological protection measures. Further, in the post-TRIPS era, bilateral trade agreements, particularly those involving the United States, have raised the levels of copyright beyond those required by multilateral treaties. These are new challenges which threaten the fragile balance between copyright owners and users. Despite the movement to strengthen copyright protection upwards, the multilateral instruments continue to retain the fundamental balancing principle of copyright law. The provisions dealing with the balancing of rights provide certain flexibilities that are critical for countries to ensure that copyright protection effectively protects both the copyright owners' and public's interest. However, there has been no consideration at the international level on how to balance the expansion and strengthening of copyright protection with more well-defined flexibilities.

Given that most countries within the ASEAN region are developing countries, have different philosophical ideals about the copyright system and are net importers and users of copyright works, it is incumbent on the government of those countries to establish appropriate copyright protection which will ensure the proper balance of providing incentives to creators and ensuring access to information. A consideration of where the balance should lie in the context of each country is therefore important. In this age of digitisation and globalisation, the needs of developing countries to have reasonable access of copyright works are increasingly acute.³ This paper focuses on an important aspect of the balancing exercise, which is the fair dealing exception to copyright. It surveys generally the fair dealing exception in the five developing ASEAN countries, namely, Malaysia, Thailand, the Philippines, Indonesia and Brunei Darussalam. The first part of the paper discusses the concept and importance of fair dealing provisions in copyright law. The second part of the paper discusses the fair dealing provisions in the multilateral treaties on copyright. It also discusses a related matter, which is the three-step test contained in Article 9(2) of the Berne Convention and now incorporated by reference in the TRIPS Agreement. The third part surveys the scope of the fair dealing provisions in the abovementioned five countries. It should be noted that some of the five countries surveyed do not contain express fair dealing provisions in their copyright statutes but instead engage the three-step test contained in Article 9(2) of the Berne Convention. Even within those countries with fair dealing provisions, the scope varies. This is probably a result of differing national jurisprudence. Finally, the last part will provide some concluding thoughts.

The Fair Dealing Exception

The fair dealing exception, which is sometimes referred to as fair use or fair practice, sets out certain acts that may be carried out in relation to copyright works without infringing the exclusive rights of the copyright owner. The fair dealing exception is a means of balancing the competing interest of copyright owners and the public. In other words, the exception is a recognition that the exclusive rights granted by copyright law should extend only so far as is necessary to foster progress in the arts and science. The central concept of the doctrine is an assessment of the fairness of the use of the copyright work by balancing a number of factors. In many countries, the fair dealing exception often relates to reproduction to copyright works for non-commercial purposes, such as education, research, private use, archival and library use, journalism, criticism and parody. However, the scope of the fair dealing doctrine varies from country to country. To a large extent, whether an exercise is a fair dealing is a subjective matter which depends on the facts of each case, such as the nature of the work or subject matter, the amount and substantiality of the portion copied and the possibility of obtaining the work within a reasonable time.

In some jurisdictions, however, there are legislative guidelines as to what activity amounts to fair dealing or use. For instance, section 107 of the United States Copyright Act 1976 (17 US Code), provides four non-exclusive guidelines for the courts to consider in deciding whether the use of a work is within the permissible limits so as to constitute fair use. This section which is a codification of the judiciary's historical approach to the fair use doctrine⁴ provides that:

Notwithstanding the provisions of sections 106 and 106A, the fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified by that section, for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright. In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include:

- (1) *the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;*

³ In 2006, the non-governmental organisation, Consumers International, published a report entitled 'Copyright and Access to Knowledge: Policy Recommendations on Flexibilities in Copyright Law', which examined the copyright provisions relating to the access to knowledge in 11 countries in the Asia Pacific region, all of which were either developing or least developed countries. The report made a number of recommendations to assist those countries to strike a balance in their copyright law. The report is available at <http://www.consumersinternational.org>.

⁴ The fair use doctrine is thought to have been enunciated for the first time in the United States by Justice Story in *Folsom v Marsh*, 9 F Cas 342 (CCD Mass 1841).

- (2) *the nature of the copyrighted work;*
- (3) *the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and*
- (4) *the effect of the use upon the potential market for or value of the copyrighted work.*
- (5) *The fact that a work is unpublished shall not itself bar a finding of fair use if such finding is made upon consideration of all the above factors.*

In the United Kingdom, fair dealing is only permitted for the purposes specifically mentioned in the Copyright, Designs and Patents Act 1988. Outside these purposes, the fair dealing exception does not apply even though the dealing may be considered fair. Such a restrictive approach renders the scope of the fair dealing exception different from that in the United States where the defence of fair use is expressed in general terms. In *Hubbard v Vosper*,⁵ Lord Denning provided a number of factors which the court should consider in determining fair dealing:

You must first consider the number and the extent of the quotations ... Then you must consider the use made of them. If they are used as a basis of comment, criticism or review, that may be fair dealing. If they are used to convey the same information as the author, for a rival purpose, they may be unfair. Next, you must consider the proportions. To take long extracts and attach short comments may be unfair. But short extracts and long comments may be fair. Other considerations may come to mind also. But ... it must be a matter of impression.

The fair dealing provisions in the United Kingdom are in respect of research or private study,⁶ reporting of current events,⁷ and review or criticism.⁸ In *ProSieben Media v Carlton Television*,⁹ the court held that the specific purposes for the fair dealing exception should be construed liberally.

In Australia, the Copyright Act 1968 provides for fair dealing exceptions in respect of literary, dramatic, musical or artistic works or audio-visual items if the act is done for the purpose of research or study,¹⁰ criticism or review,¹¹ parody or satire,¹² reporting of news,¹³ and judicial proceedings or the giving of professional legal advice.¹⁴ The abstract nature of the fair dealing concept was acknowledged by Conti J in *TCN Channel Nine Pty Ltd v Network Ten Ltd*¹⁵ where he stated that:

*Fair dealing involves questions of degree and impression; it is to be judged by the criterion of a fair minded and honest person, and is an abstract concept. Fairness is to be judged objectively in relation to the relevant purpose ... in short, it must be fair and genuine for the relevant purpose.*¹⁶

The Fair Dealing Doctrine in International Copyright

The Berne Convention, the Rome Convention, the TRIPS Agreement, the WCT and WPPT form the overall framework for multilateral copyright and related rights protection. Each of these instruments contains provisions which are designed to balance the rights of the copyright owners and the public. The TRIPS Agreement, which is the most important global treaty on intellectual property, reaffirms this balance in its Article 7. That article provides that the objective of intellectual property protection and enforcement should be for the mutual advantage of producers and users

⁵ [1972] 2 QB 84 at 94.

⁶ Copyright, Designs and Patents Act 1988, section 39.

⁷ Section 30(2).

⁸ Section 30(1).

⁹ [1999] FSR 610.

¹⁰ Copyright Act 1968, sections 40 and 103(C).

¹¹ Sections 41 and 103A.

¹² Section 41A.

¹³ Section 42 and 103B.

¹⁴ Sections 43 and 104.

¹⁵ (2001) 50 IPR 335 at para 66.

¹⁶ In May 2005, the Attorney-General's Department invited comments on several issues relating to fair use and other copyright exceptions in the digital age. One of the issues was whether a general exception based on fair use similar to those in the US or specific exceptions might be more appropriate. In the end, it was decided, among others, not to adopt the US style of fair use but to expand and amend existing provisions: www.ag.gov.au/agd/WWW/MinisterRuddockHome.nsf/Page/Media_Releases_2006_Second_Quarter_14_May_2006_-_Major_Copyright_Reforms_Strike_Balace_-_0882006.

of technological knowledge and in a manner conducive to social and economic welfare, and to a balance of rights and obligations. In the context of copyright, Article 9(1) of the TRIPS Agreement incorporates Article 1 through 21 of the Berne Convention.

The Berne Convention provides for general and specific exceptions to the rights of the copyright owner. Article 9(2) allows 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'. Under this article, the three conditions must be complied with before an exception or limitation may be crafted in a copyright legislation.

In a similar fashion, Article 13 of the TRIPS Agreement states that:

Members shall confine limitations or exceptions to exclusive rights to certain cases which do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interest of the right holder.

However, unlike Article 9(2) of the Berne Convention, Article 13 of the TRIPS Agreement is more demanding because it does not confine the exceptions or limitations to the reproduction right alone but applies to all of the copyright owner's exclusive rights. The three conditions in Article 13 are:

- i. the limitations or exceptions must be confined to certain special cases;
- ii. it should not conflict with a normal exploitation of the work;
- iii. it should not unreasonably prejudice the legitimate interest of the copyright owner.

As a result of the difference in the wording of Article 9(2) of the Berne Convention and Article 13 of the TRIPS Agreement, a question has arisen as to the scope of Article 13 of TRIPS. One view is that Article 13 mandates that all the exceptions are restricted to the three-step test. Another view, which is the preferred view, is that only the general exceptions are subject to the three-step test but not the specific exceptions mentioned in the Berne Convention, such as Article 10 and Article 10bis.¹⁷

Articles 10 and 10bis of the Berne Convention deal with uses of copyright works which are excluded from the legitimate scope of the copyright owner's exclusive rights. For instance, Article 10(1) allows quotations to be made from a work which has already been made available to the public provided that it is compatible with fair practice and consistent with the purpose for which the quotation is made. In contrast, there are provisions in the Berne Convention which do not allow the copyright owner to control whether or not the work is used but entitle the copyright owner to remuneration in the event the work is used by another entity. These provisions are typically in the form of compulsory licensing and may be found in provisions such as Articles 11bis(2) on broadcasting rights, Article 13 on the right of recording of musical works and the Appendix to the Convention which establishes a system of compulsory licences.

Article 10(1) of the Berne Convention is worded in a mandatory form and provides as follows:

It shall be permissible to make quotations from a work which has already been lawfully made available to the public provided that their making is compatible with fair practice, and their extent does not exceed that justified by the purpose, including quotations from newspaper articles and periodicals in the form of press summaries.

Pursuant to this article, the making available of the work to the public may be by any means, including the dramatic or musical performance of the work or through broadcast.¹⁸ The making of the quotation must be compatible with fair practice. The quotation may be made for any purpose so long as it does not exceed that justified by the purpose.

Article 10(2) of the Berne Convention allows countries to have laws that permit the reproduction of works to be used as illustration in publications, broadcasts or sound or visual recordings for teaching purposes. It provides as follows:

It shall be a matter for legislation in the countries of the Union, and for special agreements existing or to be concluded between them, to permit the utilization, to the extent justified by the purpose, of literary or artistic works by way of illustration in publications, broadcasts or sound or visual recordings for teaching, provided that such utilization is compatible with fair practice.

As in Article 10(1), the use must be compatible with fair practice. Article 10(3) requires that the source and the name of the author of the copyright works be mentioned when the work is being used.

¹⁷ *Ibid.*, at 26.

¹⁸ See Sam Ricketson, *The Berne Convention for the protection of literary and artistic works: 1886-1986* (London, Centre for Commercial Law Studies University of London, 1987) at para 9.22.

Article 10bis(1) of the Convention allows countries to make laws which permit the reproduction by the press or the broadcasting or communication of a work. The purpose of the provision is to facilitate the free flow of information.¹⁹ Article 10bis(1) states that:

It shall be a matter for legislation in the countries of the Union to permit the reproduction by the press, the broadcasting or the communication to the public by wire of articles published in newspapers or periodicals on current economic, political or religious topics, and of broadcast works of the same character, in cases in which the reproduction, broadcasting or such communication thereof is not expressly reserved. Nevertheless, the source must always be clearly indicated, the legal consequences of a breach of this obligation shall be determined by the legislation of the country where protection is claimed.

Article 10bis(2) further allows countries to determine the conditions under which the reporting of current events may be conducted via specified means. It provides that:

It shall also be a matter for legislation in the countries of the Union to determine the conditions under which, for the purpose of reporting current events by means of photography, cinematography, broadcasting or communication to the public by wire, literary or artistic works seen or heard in the course of the event may, to the extent justified by the informatory purpose, be reproduced and made available to the public.

The means of reporting that are covered by the provision are photography, cinematography, broadcasting and communication to the public by wire. It attempts to balance the need of reporters to provide comprehensive account of current events by taking pictures or recording such events, and the interest of copyright owners whose works may be captured incidentally by such recording.²⁰

The WCT and WPPT, which set the framework for a global digital copyright regime, also recognise the need to maintain a balance between the rights of copyright owners and the larger public interest, particularly in education, research and access to information.²¹ General limitations and exceptions in the form of a three-step test identical to Article 9(2) of the Berne Convention are found in Article 10 and Article 16 respectively of the treaties.

Fair Dealing Provisions in Selected ASEAN Countries

All the five countries surveyed are members of the TRIPS Agreement and the Berne Convention, although their dates of accession vary drastically. Thailand was the first to accede to the Convention in 1931 and Brunei Darussalam in 2006. The copyright statutes of these countries demonstrate that whether or not the fair dealing doctrine is applied is basically the choice of the national legislature. For instance, in Indonesia, the legislature employs the three-step test of the Berne Convention instead of the fair dealing doctrine in the copyright statute. In the Philippines, the fair use requirement is further subjected to the three-step test in certain situations.

(i) Malaysia²²

The exceptions and limitations to the exclusive rights of the copyright owner are provided for under section 13(2) of the Copyright Act 1987. These include section 13(2)(a) which deals specifically with fair dealing. Apart from that section, section 9(4) of the Act permits the reproduction of the typographical arrangement of a published edition of a literary, artistic or musical work for the purposes of research, private study, criticism, review or the reporting of current events if such reproduction is compatible with fair dealing. Both provisions impose the requirement of acknowledgement of the source of the work if the use is public. However, where the use is for non-profit research, private study and reporting of current events by means of a sound recording, film or broadcast, there is no requirement of acknowledgement.

Pursuant to section 13(2)(a), the copyright owner does not have the right to control the doing of any of the acts which are within his exclusive rights if those acts are done by way of fair dealing for purposes of non-profit research, private study, criticism, review or the reporting of current events. The section further provides that if the use of the work is public, it must be accompanied by an acknowledgement of the title of the

¹⁹ *Ibid.*, at para 9.35.

²⁰ Okediji, Ruth L, 'The International Copyright System: Limitations, Exceptions and Public Interest Considerations for Developing Countries' at 13 available at www.unctad.org/en/docs/iteipc_200610_en.pdf.

²¹ The Preamble to both treaties expressly recognises the need to maintain a balance between the rights of authors and the larger public interest, particularly education, research and access to information, as reflected in the Berne Convention.

²² For a detailed account of the statutory exceptions in Malaysian copyright law, see Khaw, LT, *Copyright Law in Malaysia*, 2nd ed (Kuala Lumpur, Malayan Law Journal, 2001) at Chapter 7. The fair dealing principle is discussed at 189 to 203. See also, Khaw, LT, 'Copyright Law in Malaysia: Does the Balance Hold?', Inaugural Lecture delivered at the Faculty of Law, the University of Malaya on 20 July 2004 and published at (2004) 31 JMCL 23.

work and its authorship. There is no definition in the Act as to the term 'fair dealing' and neither is there any guideline to assist in the determination of whether any act amounts to fair dealing. In the absence of this, it is usual practice to refer to English decisions since the Malaysian copyright statute has its origins in the United Kingdom copyright laws.²³ The acts permitted under section 13(2)(a) must be for the purposes of non-profit research, private study, criticism, review or the reporting of current events. In other words, acts which do not fall within one of the specified purposes are outside the ambit of section 13(2)(a). So far, there has been no local decision on the scope of section 13(2)(a) or how fair dealing in the Act is to be assessed.

In the context of study and research, the exception only applies to 'private study' and 'non-profit research'. The words 'private study' suggest that the study must be undertaken by the person conducting the study so that a person who merely conducts activities to facilitate the private study, such as a publisher of a book or a teacher preparing materials for use by his students is not entitled to rely on section 13(2)(a).²⁴ Further, unlike research which must be conducted for a non-profit purpose, it is unclear whether the study must be carried out for a non-profit or non-commercial purpose.²⁵

With regard to the reporting of current events, section 13(2)(a) only applies if the subject of the report is a 'current event'. The section is not concerned with the reporting of news which is wider in scope and which may not necessarily be related to current events.²⁶ Thus, the reporting of news which do not relate to current events are outside the ambit of this provision.

To date, the scope of the exceptions under section 13(2)(a) has not been tested in court, which makes it difficult to assess whether they are adequate in addressing the balance between right holders and the public in Malaysia.

This issue of balance is also critical in relation to what is known as the anti-circumvention provision of the Copyright Act 1987. Section 36(3) provides for the protection of technological measures used by copyright owners in exercise of their rights or to restrict unauthorised acts in respect of their works. The subsection makes it a copyright infringement for any person to circumvent any such measures.²⁷ The scope of this subsection is still unclear, and in particular, its relationship with the fair dealing provision. Assuming a user is able to avail himself of the fair dealing provision for private study or non-profit research in relation to a copyright work, would he be entitled that defence if he bypasses or circumvents a technological measure applied to the work? Arguably, he may not as the subsection does not appear to provide for circumstances where any technological measures may be circumvented for any of the permitted acts section 13(2). The failure of section 36(3) to provide for permitted acts would prevent access to works for any of the legitimate purposes such as fair dealing for research, private study etc,²⁸ and would in effect nullify legitimate access under any of the exceptions under section 13(2) once a technological measure has been installed, thereby affecting the balance that copyright law seeks to achieve.

(ii) Thailand

The current copyright statute of Thailand is the Copyright Act BE 2537 (1994) which came into force in 1995. It repealed the Copyright Act BE 2521 (1978). Of the five countries surveyed in this paper, Thailand has the earliest copyright law which was first enacted in 1892 with the proclamation of the Announcement of the Royal Library. The current Copyright Act BE 2537 was enacted as a result of changes taking place in the international and national scene. In particular, the current Act was enacted to meet Thailand's international obligations so as to secure the nation's interest in international trade and relations. At the same time, the Act took into account the Thai government's concern to promote the creation of work in the literary and other fields. Thus, the reason for the Act was stated as follows:

Whereas the Copyright Act BE 2521 has been long in force, the provisions therein become inconsistent with the changing internal and external circumstances particularly the development and expansion of domestic and international economy, trade and industry, the copyright protection measures therefore should be improved to be more efficient to accommodate those changes and to

²³ *Ibid.*, at 189.

²⁴ *Ibid.*, at 196.

²⁵ *Ibid.*, at 197.

²⁶ *Ibid.*

²⁷ The subsection was modelled on article 11 of the WCT.

²⁸ A similar situation occurred with respect to copyright in published editions. Prior to 1990, no exceptions were made to the right of the copyright owner of a published edition to control the reproduction of the edition. The CA 1987 was subsequently amended to permit fair dealing to be made with respect to published edition in the form of s 9(4) and (5). It is, however, argued that the subsection as currently worded may not reflect the intention of the legislature in this regard: Khaw, *supra* n 22 at para 7.1.4.

promote the increasing creation of work in literary domain and other relevant fields. This Act so be enacted and come into force since March 21, 2538.

Thailand's international obligations under the Berne Convention and the TRIPS Agreement played a significant role in determining the exceptions to copyright infringement. There were three major changes which the current Act made with regard to the exceptions to copyright.²⁹ First, the current Act provides a general framework for considering the exceptions to copyright infringement, unlike the 1978 Act which laid down specific exceptions only. Secondly, the current Act includes a provision on exceptions for the use of computer programme. Thirdly, the Act narrows down the exceptions to copyright infringement, thereby conferring more protection to the copyright owner.

Section 32 enumerates a number of uses which do not amount to copyright infringement. The first part of the section begins with a general statement that it is not an infringement of copyright if the act does not conflict with the normal exploitation of the copyright work by the copyright owner and does not unreasonably prejudice the legitimate rights of the copyright owner. The section then provides a list of acts which are not infringement of copyright. On a literal interpretation, it would appear that those acts are non-exclusive so that other acts which do not fall within the list but comply with the three-step test of section 32 are also excluded from copyright infringement. Admittedly, such other acts would be rare. The fair dealing requirement is not expressly stated in the statute although it is accepted that the exceptions are based on the concept of fair dealing.³⁰ The exceptions to copyright infringement mentioned in the Act are as follows:

Section 32:

- (1) research or study of the work which is not for profit*
- (2) use for personal benefit or the benefit of himself and other family members or close relatives*
- (3) comment, criticism or introduction of the work with an acknowledgement of the ownership of copyright in such work*
- (4) reporting of the news through mass media with an acknowledgment of the ownership of copyright in such work*
- (5) reproduction, adaptation, exhibition or display for the benefit of judicial proceedings or administrative proceedings by authorised officials or for reporting the result of such proceedings*
- (6) reproduction, adaptation, exhibition or display by a teacher for the benefit of his teaching provided that the act is not for profit*
- (7) reproduction, adaptation in part of a work or abridgement or making a summary by a teacher or an educational institution so as to distribute or sell to student in a class or in an educational institution provided that he act is not for profit*
- (8) use of the work as part of questions and answers in an examination*

Section 33: exception with respect to citation, quotation, copy, emulation or reference in part provided that it is accompanied by an acknowledgement of the copyright owner.

Section 34: exception with respect to use by librarians for non-profit purposes

Section 35: exception with respect to the use of a computer programme for specific purposes mentioned in the section.

Section 36: exception with respect to performance of dramatic or musical work.

Acknowledgement of the source of the work is expressly required for uses which are within the ambit of sections 32(3), 32(4) and 33. Acknowledgement of the copyright owner in the computer programme is also required for the reporting of news through mass media, as provided in section 35(3). Apart from these exceptions, the Thai Copyright Act BE 2537 provides for other specific exceptions which are not expressly stated as being subject to the three-step test. For instance, section 36 deals with the public performance of dramatic or musical work, section 37 deals with exceptions regarding artistic works which are openly located in public places and section 38 deals with exceptions with respect to architectural work.

²⁹ See Subhapholsiri, F, 'Copyright' available at www.ipthailand.org/dip/IP_Infor_v2/Table.doc.

³⁰ Pitiyasak, S, 'Does Thai Law Provide Adequate Protection for Copyright Infringement on the Internet?' [2003] EIPR 6.

The scope of the exception for research or non-profit study in section 32(1) was discussed by the Thai Supreme Court in the landmark case of *Public Prosecutor & Prentice Hall, Inc v Gonokchai Petchdawong*.³¹ In that case, the defendant, who operated a photocopying and book-binding business, had photocopied books in which copyright belonged to the plaintiffs. A total of 43 photocopied sets of books were found in the defendant's premises. In defence, the defendant sought to rely on section 32(1) of the Copyright Act BE 2537, arguing that he had reproduced the works after being hired by students to do so. However, the defendant could not substantiate his claim that the work was on hire. The court held that the exception in section 32(1) should be available only to students or persons who carry out the reproduction of a copyright work themselves for their own non-profit research or study. The reproduction of copyright works for educational purposes should be limited to only a part of the book. However, the court did not give guidance on what constitutes limited reproduction, such as the proportion of a work that may be copied. However, it is clear that making the entire copy of a copyright work is contrary to the normal exploitation of the copyright owner and unreasonably prejudices the legitimate interest of the copyright owner.

(iii) Indonesia

The Indonesian copyright law is governed by the Copyright Act No. 19 of 2002. The 2002 Act replaced the 1997 Copyright Law No.12/1997 to overcome three difficulties. First, the need to overcome the weaknesses or deficiencies based on former experience in implementing the law. Secondly, to adapt to international conventions on copyright, such as the Berne Convention, WCT and WPPT. Thirdly, to adapt to the norms regulated in the TRIPS Agreement.³²

Prior to the 2002 Act, the copyright law of Indonesia stipulated that reproduction of at most 10% of a copyright work did not amount to infringement if the source was acknowledged. However, it was found that this form of quantitative measurement was difficult to ascertain. In the 2002 Act, a qualitative measurement was incorporated, that is, so long as the use of the copyright work did not cause loss to its copyright owner's reasonable interest. Thus, the legality of a use is assessed with reference to the copyright owner's interest, that is, the level of economic injury.³³ With the new law, the reproduction of a substantial part of a copyright work, though less than 10% of the whole work, may amount to infringement of copyright. The fair dealing concept is not expressly mentioned in the statute. A number of specific exceptions are subject to the three-step test. These are:

Article 15(a): the use of copyright works for education, research, writing, review, criticism

Article 15(c)(2): reproduction of a whole or part of a copyright work for the purpose of non-profit performance for the following purpose

15(c)(2)(a): education, art and Braille literature

15(c)(2)(b): limited reproduction by public libraries, educational institutions or non-commercial documentary centres in carrying out their activities

15(c)(2)(c): reproduction of a computer programme for the purpose of private use

15(c)(2)(d): making of copies of a computer programme, the physical copy of which is owned by the maker, for personal use.

All these exceptions are subject to the requirement that the source of the copyright work is acknowledged and the acts are for non-commercial purposes.

(iv) Philippines

The Philippines copyright law is embodied in the Intellectual Property Code, which is officially known as Republic Act No. 8293. To a certain extent, its copyright law is modelled on the United States copyright law.

Section 184.1 provides a detailed list of 11 specific exceptions. Of these, the following acts are subject to the fair use restrictions:

(a) Section 184.1(b): the making of quotations from a published work if they are compatible with fair use and only to the extent justified for the purpose

³¹ Case No: 5843/2000.

³² Budi, Henry Soelistyo, 'Copyright Issues in Indonesia', paper presented at the 2nd International Conference of the Korean Studies Association of Southeast Asia: Strategic Cooperation and Development in Research and Education, University of Malaya, Malaysia on 29 January 2007 – 1 February 2007.

³³ *Ibid.*

- (b) Section 184.1(e): the inclusion of a work in a publication, broadcast, or other communication to the public, sound recording or film if such inclusion is made by way of illustration for teaching purposes and is compatible with fair use
- (c) Section 184.1(h): the use made of a work by or under the direction or control of the Government, by the National Library or by educational, scientific or professional institutions where such use is in the public interest and is compatible with fair use

Section 185.1 provides for the fair use of a copyright work for criticism, comment, news reporting, teaching including multiple copies for classroom use, scholarship, research, and similar purposes. Decompilation to achieve the inter-operability of an independently created computer programme with other programmes may also constitute fair use. In determining whether the use made of a work is fair use, the factors to be considered include:

- (a) the purpose and character of the use, including whether such use is of a commercial nature or is for non-profit education purposes;
- (b) the nature of the copyright work;
- (c) the amount and substantiality of the portion used in relation to the copyright work as a whole; and
- (d) the effect of the use upon the potential market for or value of the copyright work.

Acknowledgement of the source of the copyright work is required for uses which fall under sections 184.1(b) and 184.1(e). Unlike the copyright statutes of the other four countries surveyed in this study, the Philippines copyright statute has enumerated the factors which must be taken into account in determining fair use. Those factors are identical to the United States copyright law. Apart from being subjected to the fair use requirement, section 184.1 is further constrained by the three-step test. This is expressly provided in section 184.2.

(v) Brunei Darussalam

The copyright law of Brunei Darussalam is governed by the Emergency (Copyright) Order 1999. Section 33(1) allows for fair dealing with a literary, dramatic, musical or artistic work for the purpose of research or private study. There is no express requirement for acknowledgement of the source of the work. Section 33(2) provides that fair dealing with the typographical arrangement of a published edition for the purpose mentioned in subsection (1) does not infringe any copyright in the arrangement. Section 33(3) provides that copying by a person, other than the researcher or student himself, is not fair dealing if:

- (a) in the case of a librarian, or a person acting on behalf of a librarian, he does anything which regulations under section 44 would not permit to be done
- (b) in any other case, the person doing the copying knows or has reason to believe that it will result in copies of substantially the same material being provided to more than one person at substantially the same time and for substantially the same purpose.

Section 33(3)(a) and (b) preclude the possibility of the availability of fair dealing defence being for research done for commercial purposes. Section 34(1) provides that fair dealing with a work for the purpose of criticism or review does not infringe copyright in the work provided that it is accompanied by a sufficient acknowledgement. Section 34(2) provides that fair dealing with a work for the purpose of reporting current events does not infringe any copyright in the work provided that it is accompanied by a sufficient acknowledgement.

Concluding Thoughts

Striking a proper balance between the interest of the public to reasonable access of knowledge and the interest of copyright owners to be rewarded for their works is necessary if the copyright system is to achieve its objective of promoting the arts and science. Without a proper balance, the copyright system will not only be detrimental to the public but will also, in the long run, result in the inability of the public to reward copyright owners appropriately.

The responses of international copyright instruments to copyright concerns arising from digitisation and globalisation have distorted the balance in the copyright system. Developing and least developed countries, whose capacity to reasonable access of knowledge is far weaker than that of the developed countries, are the parties most affected by the current upward trend of broadening and strengthening the rights of copyright owners. Given that the pressure exerted by copyright industries in developed countries have taken precedence over the needs of developing and least developed countries in the multilateral negotiations of international copyright protection, it is incumbent upon the

government of developing and least developed countries to consider and implement the flexibilities available in a manner that optimally stimulate local creativity.

The fair dealing doctrine is one of the most important ways for developing and least developed countries to maximise the flexibilities available on exceptions to copyright infringement. This survey demonstrates that the scope and nature of the fair dealing provisions differ from country to country. This is likely a result of differences in importance placed on the different types of copyright works. Also, the level of economic and technological development of the countries concerned plays an important role in this respect. Nevertheless, given that ASEAN is a regional economic grouping, it is submitted that the countries could design a set of common objectives to assist in the maximum implementation of the available flexibilities so as to optimally promote local and regional creativity.

Generic drug A pharmaceutical product which is identical to a patented product which is used as a reference product... (1) (2)

QUESTIONS

1. The objective of this paper is to examine the impact of patent law on the development of generic drugs in Indonesia. It focuses on two issues: (1) How do patent laws affect drug prices? (2) What strategies are available to improve access to medicines in Indonesia? ... (1) (2)