Changing Nature of Copyright Law: Impact on Information Access

Abstract

Copyright law grants the right holders the exclusive rights in order to prohibit the unauthorized use on one hand and on the other hand, it provides the public the exceptions to and limitations on copyright, as generally called “fair use”, in order to cut down the right holders’ exclusive rights. Due to the rapid change of technology, the balancing interests between the right holders and users are affected. The right holders create a technical protection device, Digital Right Management (DRM), to control unauthorized access in the digital environment. Nevertheless, DRM becomes a challenging issue for the core purpose of the fair use doctrine, especially information access of educational institutions, libraries, and information and knowledge society.

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Introduction

Copyright provides ownership of intellectual property in which an author secures certain exclusive rights to an original works for a limited time. Copyright can be bought and sold, inherited, or otherwise transferred. In order to cut down right holders’ monopoly, copyright provides exceptions and limitations to these exclusive rights, or generally known as “fair use”. The exceptions to and limitations on copyright allow individuals, under certain conditions, to use a work without requiring authorization from the owners of the copyright. Therefore, in this situation, the exclusive rights granted to authors or their assignees under copyright law do not apply.

The first and foremost purpose of creating the exceptions to and limitations on copyright is to foster learning and innovation by granting the lawful rights to the right users to access information without the right holders’ consent if reasonable portion of such reproduction of copyright work is made. From this vital reason, fair use plays an important role to help people, especially the users in developing countries, to acquire knowledge regardless the cost of access to such copyright works. Although the provisions regarding exceptions to and limitations on copyright vary from country to country, the core purpose of these provisions should be maintained in copyright regime. This is because it is generally accepted that the exceptions to and limitations on copyright is an instrument to balance the interests between the right owners and the public at large.

Notwithstanding, at present, the development of digital media has considerably modified the balance that had been struck. It is proposed that copyright law should be effectively amended so that it can prevent copyright materials from being widely disseminated with high technology that may violate the rights of the owners. Also, the exceptions to and limitations on copyright, an essential means of striking the right balance, are liable to decrease, both through the effects of the law and through the growing use of technology. In conclusion, two interesting questions are raised up: What happens to the nature of copyright law? and What is the impact of the change? The content of this article will give the responses to them. It includes the nature of copyright law, changing nature of copyright law, and technological impact on copyright law, specifically the impaired access to information.
Nature of Copyright Law

The primary objective of copyright is to grant valuable as well as enforceable rights to authors and encourage them to produce literary works of benefits to the world (Davies 2002: 67-68). For this reason, the authors receive a fair return of their creative labor. Meanwhile, the public receives the benefits of literature, music, and other kinds of creative works that might not be otherwise created or disseminated. In this aspect, while the authors’ exclusive rights are being exercised, the public is enriched by getting access to creative works with the permission of the authors. Additionally, the public benefits from the limited scope and duration of the rights granted (Goldstein 2001: 43). In each country, the copyright legislation has been revised and developed many times in order to effectively keep the role of balancing interests between the right holders and the users.

In principle, the copyright owners hold the exclusive rights until the term of protection ends. After the expiry of copyright, the work falls into the public domain and the public can freely access the work. In practice, the public may need to access and use the works during the term of protection. Here, although the public can use copyright materials with the permission of the authors while they are protected, some problems still occur. This is because the authors’ permission often causes royalty fees which are expenses paid for the authors’ permission. In addition, the duration of copyright protection can be quite long, so the public hardly benefits from the creation should it have to wait that long. Moreover, the exercise of the rights, particularly the reproduction rights, in relation to copyright works is subject to a number of significant restrictions in favor of the public. As a result, the exceptions to and limitations on copyright are provided.

Fair use, or the exceptions to and limitations on copyright, includes the exclusion from copyright protection of certain authorization. There are two basic types of limitations: (a) compulsory licenses, and (b) fair categories of works. Concerning the first type, compulsory licenses do require that compensation be paid to the right owners for non-authorized exploitation. In regard to the second type, there is no obligation to compensate the right owners for the use of the work without authorization. These are some examples: works that are not fixed in tangible form, texts of laws as well as court and administrative decisions, and
particular acts of exploitation*. The exceptions to and limitations on copyright vary from country to country. Generally, taking selected copyright works without the authors’ consent is allowed when this is done for educational and non-commercial purposes.

The establishment of “fair use” in the copyright system is advantageous for many reasons. Firstly, it aims to balance the interests of the copyright owners and the interests of the public. The regime allows the public to use the works within the scope drawn by the law even during the term of protection. The works, then, will be useful, not only to the copyright owners, but also to the public to some certain extent. The equilibrium of interests, of course, responds to the intent of the copyright system to stimulate the creation of original works for the benefits of society.

Secondly, in order to keep pace with the rapid technological change, fair use facilitates our world by promoting global communication and spreading out knowledge. Should fair use disappear, technical discussions of significant issues will be restrained. This will obviously be true, especially, on the Internet as Internet users may not be able to discuss some issues of their interest. Additionally, many Internet service providers may conduct a content censorship of the subscribers’ websites, e-mail messages, or chat room discussions due to fear of liability. This can be emphasized by the statement of several educational institutions that, “As technology and society’s use of it continues to evolve, the need of the library, scholarly and educational communities for an appreciation of both information proprietors’ rights and user privileges like fair use is expected to intensify” (Steinhardt 2000).

Thirdly, the exceptions to and limitations on copyright help foster knowledge, creativity, and innovation. Within an educational fence, fair use greatly promotes education. It provides educators, researchers, and teachers a determined factor concerning the purpose and character of the use whether such use is a commercial nature or for non-profit educational purposes. Some scholars said that many teaching materials, namely textbooks and instructional films, may be unavailable, too expensive, or even not produced because of legal liability. On the

* Examples of fair use include:

- a quotation from a protected work, provided that the source of the quotation and the name of the author are mentioned, and that the extent of the quotation is compatible with fair practice;
- use of works by way of illustration for teaching purposes; and
- use of works for the purpose of news reporting.
contrary, with the application of fair use, teachers are empowered to make use of copyright materials for their teaching development and help new generations appreciate aspects of the world culture without undue fear of lawsuits (Correa [n.d.]). This is because fair use helps ensure that new knowledge and technologies can be developed and used without anxiety of an intellectual property lawsuit if such acts are deemed as fair. Interestingly, with the adoption of fair use in our society, many such intelligent and technological advances will be developed in a further inventive step regardless fear for being claimed from potential legal liability. Obviously, this can result in today's varieties of inventions and products, for instance.

Finally, on a panoramic view, fair use helps decrease the gap between developed and developing countries. It is a defense against accusations of copyright infringement for people whose use of a copyright work is reasonably deemed as fair use (Copyright Crash Course 2005). Therefore, the exceptions to and limitations on copyright are so crucial for the public, especially for people who are in developing countries and least developed countries since they can access information without seeking for the right holders' permission. It is likely to believe that while developed countries are the information providers, the developing countries and least developed countries are information consumers. Certainly, most people in these countries are unable to afford the expensive copyright works. The best option to access such copyright works is to adopt the copyright exceptions, which help cut down the power of the right holders' monopoly on their works. Consequently, fair use facilitates the access and use of copyright works, so the transfer of knowledge within the fair use scheme is acceptable for further growth of the countries, especially for the developing and least developed ones. To illustrate this more clearly, Thailand, as a developing country, is described.

In Thailand, it appears that access to educational materials is a major requirement in order to encourage knowledge transfer. Thailand mostly imports copyright textbooks from developed countries and then translates them into Thai. However, there are complaints that the imported textbooks are expensive which means they are sometimes unaffordable. Many libraries still struggle to meet the ever-increasing prices of books and journals. Their budget for books has not managed to keep pace with the increase in prices. As a result, the exceptions to and limitations on copyright are important tools to allow Thai people to make use of copyright materials for the purpose of research or study, without the right holders' permission or the compensation for the reproduction of copyright works.
Changing Nature of Copyright Law

The copyright regime traditionally strikes a delicate balance between the interests of authors and other right holders in the control and exploitation of their works on the one hand, and the society’s competing interests in the free flow of information and the dissemination of knowledge, on the other hand. However, the copyright balance has never been under as much strain as it is today. The customary lines between creators and users of copyright materials and between private and public acts of use are gradually fading away (Litman 2001: 47). A main reason to the changing nature of copyright law is the advancement of new technologies. In fact, copyright has evolved to deal with new technologies since the past. Photography, sound recordings, and broadcasting have all posed some challenges for copyright law and theory, for both the reasons of evolving notions about what “authorship” is and technological reasons. Nevertheless, previous new technologies have not threatened the viability of the core concepts of copyright law (Black 2002: 38-39), compared to digital technology.

The use of digital technology is indeed modifying the production, distribution, and consumption patterns of copyright works. The advent of the photocopy machine marked the modern age in copying, where copyright works were easy and fast to reproduce. Significantly, people now get access to a wide range of technologies, so they can do home sound and video recording. Perhaps, the greatest threat of all to copyright, however, is the computer, the ultimate copying machine.

The development of new technologies emphasizes the importance of the enforcement of legislation related to intellectual property rights in general and of copyright in particular. Authors, right holders, and politicians are called upon to respond to this technological development. They view copyright law as an essential instrument of cultural and economic control in the digital environment, an instrument, however, which requires precise tuning in order to contend with the changing technological possibilities of exploiting protected works. Legislation must provide sufficient legal certainty to promote creative activities and investments. It must be able to prevent the wide dissemination of copyright materials with sophisticated technology that may violate the rights of the owners.

In the digital era, apart from the probable imbalance on the right owners’ interests as mentioned, exceptions to and limitations on copyright, an essential tool on the users’
interests, are liable to decrease, both through the effects of the law and through the growing use of contracts and of technology in applying copyright. The efforts of copyright protection do not focus only on reproduction but may include access prohibition in respect of copyright materials distributed electronically. This brings an inappropriate response to the changed information paradigm and it causes a major challenge to the information society in keeping a balance between copyright and access to information.

In the digital environment, a strengthening of copyright law in the digital context, therefore, must not lead to the exclusion of users making use of copyright works lawfully. Copyright law must be effectively amended so that it can keep up with the digital environment in order to maintain the interests of the right holders and, at the same time, of the users by encouraging their access to knowledge. Fair use should not be only preserved as important but also devised with greater expectations of access and diffusion given the new technological developments. Thus, striking an appropriate balance between the right holders and users in the digital age must be considered than in the age of analogue.

**Technological Impact on Copyright Law: Impaired Access to Information**

Due to the effort on protecting their copyright works from being infringed, the right holders and creators have designed the Digital Rights Management (DRM) system to prevent unauthorized redistribution of their copyright works by the users. Such system is effectively workable to protect the copyright holders’ exclusive copying and distribution rights by preventing someone from gaining access to a work. Although it can be arguable that the systems can obviously harm a core purpose of the exceptions to and limitations on copyright, which are granted to striking a balance between the right holders and the public at large, some of the stakeholders are of opinions that it is all right to adopt the system. This is not surprising since some right holders, publishers, and authors view that fair use is a helpful mechanism to be claimed whenever an inappropriate reproduction of copyright works is done in order to avoid the copyright infringement. However, in fact, it is misleading to claim that fair use doctrines allow the destruction of intellectual and cultural property (Steinhardt 2000).

What is Digital Rights Management? How can it restrict people to access information? How does it impact the application of fair use? Before giving the answers to these questions,
firstly, it is vital to comprehend that fair use is not a “problem” as many of some stakeholders, especially creators and right holders, suggest. The fundamental goal of copyright laws is to prevent the unfair exploitation of right holders’ works. Meanwhile, there are exceptions to and limitations on copyright in both civil and criminal law systems granted in order to enhance the public's appreciation of intellectual and cultural property in the society. The doctrine of fair use, a role model of copyright exceptions, represents a partial and time-honored solution to this dilemma, no matter what the existing exception doctrine is named and whether the country that applies it is a Berne Convention member or not.

Digital Rights Management or DRM is a systematic approach to intellectual property protection for digital media that can be used by the right holders or stakeholders of intellectual works in order to restrict the usage of digital devices, such as serial numbers, codes, passwords, or keyfiles (Hinkes 2007). It is created as a method of controlling access to copyright materials for a variety of content in digital formats. The purpose of DRM is to be used for piracy protection in content distribution and provide access to encrypted content only on the hardware identified in a digital license. However, this hardware locking restricts fair use, namely by preventing copying content for private use. This is because according to the restrictive system of DRM in preventing unauthorized reproduction of copyright works, the accessibility and affordability of information are continuously restrained.

Undoubtedly, copyright balancing has become a critical issue, especially nowadays when digital practices have put challenge on policies and practices. Although the courts have struggled with the balancing act and tipped it in favor of users’ rights when copyright law cannot effectively involve a balance between the rights of both creators and users owing to fast-evolving digital technology (Tassel 2006: 15), it is worth discussing some issues relevant to the technological impact on copyright law, specifically the impaired access to information. Here, three positions are illustrated: educational institutions, libraries, and information and knowledge society.

The Challenges of Educational Institutions

The Internet and availability of computers and digitizing equipment provide ready access to great reservoirs of information and knowledge. Such new technologies also allow academic community to transfer, copy, and digitize learning materials faster and easier than
ever (Carter 1996: 4). These are some of the benefits emerging technologies bring for today's education. However, there is the other side of the coin. Teachers and, particularly, students often do not understand how much leeway they have in using other people's works. The law may seem confusing, ambiguous, and unclear. The grey line between legal reproduction and illegal reproduction is very delicate. It is sometimes hard to acknowledge as to whether such reproduction is done for commercial or non-commercial use. Some teachers and students, either from a false sense of security or lack of awareness, engage in illegal use or retention of materials (Chase [n.d.]).

Due to being a knowledge storehouse, inappropriate reproduction done in educational institutions regardless intentionally or unintentionally can unreasonably prejudice the legitimate of the right holders' interests. Inevitably, DRM is implemented to set technical barriers to copying or sharing digital works, in ways that conflict with educational and other institutional missions. It has a substantial detrimental impact on the ability of educators, students, and researchers to access digital information and technology. Fair use for teaching or research purposes is, thus, not absolutely allowed.

Apart from what has been mentioned, distance education is another issue affected. Distance education is a key means of providing access to education in the developing world (International Telecommunications Union 2005). Many developing countries are still struggling to establish reasonable access to primary education. With the enormous capital and infrastructure costs associated with on-campus higher education, it is essential to allow developing countries to be eligible to obtain a greater access to education (International Telecommunications Union 2005). Definitely, distance education is as one of the solutions created in line with the purpose of fair use exceptions. Laws on copyright and related rights namely the Teach Act in the US, and in Europe, often provide special rights and a variety of exceptions to distance educators (World Intellectual Property Organization. Standing Committee on Copyright and Related Rights 2009). Owing to the adoption of DRM, distance education is undermined by the cost of providing instructional materials as well as by the technical barrier to store, transmit, and use distance learning. It will be a particularly difficult problem for distance education, which must inevitably rely upon digital materials.

In fact, in the academic boundary, reasonable access to copyright culture is needed for the dissemination of knowledge, discovery of new theories, and production of innovation as well as research. It is, thus, important to revisit the reasons why fair use principles were created in the first place in both international copyright conventions and domestic laws when
considering any amendments or acts in regard to copyright. Additionally, public awareness on copyright issues should be timely taken into account rather than applying a provision concerning a restrictive information access control.

The Problems of Libraries

One of the non-profit organizations which is seriously affected in the digital environment, namely by DRM’s access control, are libraries. For decades, libraries are a place of useful collection for common use. They have provided access to selected information resources that are required or recommended in their designated area, with materials available to users for a short loan period and perhaps with additional restrictions to ensure that all needed users, mainly in the academic context, have access to the materials.

In general, libraries or archives open to the public should not be liable for copyright infringement. Certain exceptions to and limitations on copyright are a key tool to authorize libraries the rights to reproduce single copies of entire articles or small parts of other copyright works for users without undue concern of legal liability. In addition, libraries have the rights to reproduce complete works or substantial parts of works for users if a copy cannot be obtained at a fair price. This also means that libraries can make single photocopies of entire articles, among other items, or entire works for their reserves (Eschenfelder 2008) or for requests of other libraries. Libraries have based their operations on the fair use provisions of the copyright law and it is convinced to believe that they are often thought of as beneficiaries of copyright’s fair use doctrine (American Library Association [n.d.]).

After the introduction of DRM, libraries are required to pay for standard library services like interlibrary loan and course reserves. This is because DRM authorization on an e-book, for instance, which libraries purchase the copyright may prohibit libraries from copying, sharing, loaning out e-book, or limiting how many times it has been read. Interestingly, the problem may affect the development of e-books and decisions of buying them.

Undoubtedly, we are now in the digital era which information is easy to be dispersed worldwide. Knowledge base must be transferable without the restrictive control of information access. Digital content must not be locked up behind technical barriers. Libraries must not be prevented by DRM from availing themselves of their lawful rights under the copyright law, namely fair use. In addition, they must be able to extend their services in the digital
environment so that they can continue their role of information source nurturing all aspects of development.

The Obstacles of Information and Knowledge Society

Information is very important since it is the basis of knowledge, which Debons (2008: 5) defines as “... information built out of patterns in the information...”. The value of information can be perceived economically, socially, and culturally (Feather 2004: 113). As a result, access to information should be at the key to every right, particularly the right to education; and the right to seek, receive and send information, and freedom of expression. The encouragement of learning and the sharing of information, knowledge, and ideas is an important aim of copyright law. However, there are tensions caused by technological protection measures to protect copyright works against unauthorized use, but which counter users’ legitimate rights to access such works.

Principally, fair use is necessary to our society in both developed and developing countries because it enables people to access works, information, and ideas within them. Enabling access to and use of ideas of protected materials enhances creativity and the production of new works. The elimination of fair use by the adoption of DRM and the new intellectual property rights that have been accorded to holders in the developed world will have specifically detrimental effect on developing nations (Berkman Center for Internet and Society 2006). In the new economy, no resource is more valuable than information. However, the new laws, which protect information that previously would have been available for use, are recently bringing forth the financial burden for consuming information as some DRM systems prevent people from access to the copyright works except for authorized users who have paid fees. As information is treated as a copyrightable product and increasingly becomes available only in a digital protected form, fair use and personal copying exceptions that previously guaranteed access will be technologically precluded. Consequently, it seems to be out of reach for the developing world to experience information clinched with the supervision of DRM.

The requirement of a fee-based password to access digital information can crucially hinder the transmission of knowledge in developing countries. If the publishers control or totally prevent access to copyright materials, members of the public will be unable to effectively utilize their fair practice rights. The expansion of digital protection without regard for the acquisition of knowledge will impact significantly on society’s ability to benefit from copyright materials.
Recently, these rights are too often taken away by contracts and by technological protection measures. The lack of information access can have a great impact on fair use in education and research, which eventually hurts the economic growth. Finally, the gap between developed and developing countries will be apparently widened.

It is simply said that although DRM supports copyright owners to prevent infringing uses of copyright materials, it can also prevent or restrict users from being able to access materials which have legally acquired, or materials which they can legally copy and communicate legitimate uses under certain provisions, such as fair use. DRM makes fair use exception, which is enacted, in the domestic law of each country null or void (Armstrong 2006). It seems correct to believe that DRM prohibits users to exercise fair use exception rights as fair use cannot be practically applied because of the protection by DRM. This can result in prohibiting the access of information and knowledge whereas it should be kept in mind that the success of the information and knowledge society, partly, depends on digital content being accessible.

**Conclusion**

Access to information is the foundation of a democratic society. In essence, copyright must ensure a sound balance between the proprietors’ and the society’s interests. However, there are some arguments about the fundamental nature of copyright law as to whether the legitimate rights of the copyright holders are appropriately protected, especially, in the digital environment. The rapid rise of this electronic environment has rendered many existing laws inadequate, so the copyright laws – as well as other related areas of legislation – are being updated around the world. There are some interesting mechanisms and instruments introduced in order to keep pace with the rapid change of sophisticated technology. Undoubtedly, plenty of provisions in copyright laws in many countries are promulgated in response with such mechanisms and instruments. Digital Rights Management or DRM is one of the modern mechanisms created to prevent the copyright works from unauthorized use. Access control and copy control are the two major functions designed to scan eligible permission to access the copyright works.
Many people who are concerned about the benefits of fair use principles are of views that DRM is now encroaching on the territory of exceptions for fair use. They believe that these digital measures can be used to eliminate any kind of access and copying, thus swinging the principle of balancing interests too far in other direction. DRM is, thus, a blunt instrument if, by preventing copyright infringement, it is also preventing legitimate fair practice reproduction. It is hard to refuse that DRM is still very new in the present days. It must take, perhaps, many years for the right holders, publishers, and creators in collaboration with educational institutions, libraries, and archives to develop DRM system for good practice.

In conclusion, the amendment of copyright law and creation of some measures to keep pace with the digital environment can be accepted. However, at the very least, the fair use exception should not be ignored. It should be applied to the same extent as in the analogue world, that is, although the nature of copyright law may be changed, the concept of protecting the right holders’ exclusive rights and granting the users a power of fairly cutting down the right holders’ exclusive rights should not be changed, no matter how long time passes by.
References


