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ABSTRACT

The exceptions for individual use give rise to interesting and fundamental concerns drawing both international and national attention. There is uncertainty in the application of the individual use exceptions both in the international copyright treaties, particularly the three-step test of the Berne Convention, and in the national copyright legislation.

To have a better understanding of this concerns, this thesis aims to: investigate whether the exceptions for individual use can still maintain the balance of interests between the copyright holders and users; analyse the contribution that international copyright agreements and national copyright legislation may have made to assist in solving the conflict of interest between right holder countries and user countries in applying the exceptions for individual use; and conduct a comparative study of the application of the individual use exceptions in developed and developing countries.

The understandings that are found within this study are informed by relevant literature and by analysis of the application of the individual use exceptions. The thesis examines the application of the individual use exceptions in the international copyright treaties, namely, the Berne Convention, the TRIPS Agreement, and the WIPO Copyright Treaty in order to determine the appropriate “balance” between the rights of owners and users in the three-step test. To explore the uncertainty in the individual use exceptions at the national level, a comparative case study is made between the exceptions for individual use in Australia, a developed country, and Thailand, a developing country.

The results of the study reveal three major answers. First, the exceptions for individual use are able to still maintain the balance of interest between right holders and users in the digital environment, if some amendments are made to keep pace with the digital environment. Secondly, to assist in the solution to the conflict of interest between right holder countries and user countries in applying the exceptions for individual use, the international copyright agreements can make a contribution by making some minor changes, mainly in the three-step test of the Berne Convention, and by continuing to provide special treatments for developing countries. Nationally, the contribution may be made by thoroughly protecting the right holders whilst also still allowing individual use by amending the copyright legislation to update to the digital age when necessary, enacting the relevant Acts, and establishing a collecting society.
Finally, from the comparison of the application of the exceptions for individual use as well as problems found and solutions proposed in developed and developing countries, in which Australia and Thailand are used as case studies, the comparison of the application of the exceptions for individual use can be divided into four categories: fair use exceptions (Australian fair dealing and Thai private use exceptions), free use exceptions, licences (Australian statutory licences and Thai compulsory licence), and limitation of legislative individual use provisions. In addition, the problem of different interpretations of the exceptions for individual use, the problem of conformity in the application of the exceptions for individual use according to the real purpose of the three-step test, which exists in Thailand, and the problem of response to the digital environment are all used as the frame for the comparison of the problems found and proposed solutions.

The findings of the study are significant as they can provide contributions to the copyright areas primarily in the legal aspect: amendment of the exceptions for individual use. In addition, they also contribute to the related aspect in the copyright areas: the economic aspect: the balance between developed and developing Countries; and the moral aspect: developing countries’ development. In addition, the thesis proposes four useful recommendations to enable the balance of interest between the right holders and the users to be maintained: amendment of the wording in the three-step test of the Berne Convention, amendment of domestic copyright law and its exceptions for individual use, encouragement of the role of collective management organisations, and raising public awareness on the issue of copyright and its exceptions for individual use.

The thesis considers the law up to 31 December 2006.
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# TABLE OF CONTENTS

Abstract ..................................................................................................................................... ii  
Certificate of Authorship of Thesis .......................................................................................... iv  
Acknowledgements .................................................................................................................. vi  
Abbreviations ......................................................................................................................... xiv  

## INTRODUCTION

1. Background of the Research ..................................................................................................1  
2. Research Questions ................................................................................................................6  
3. Research Objectives ...............................................................................................................6  
4. Contributions of the Research ................................................................................................7  
   4.1 Legal Aspect: Amendment of the Exceptions for Individual Use ...........................7  
   4.2 Economic Aspect: The Balance between Developed and Developing Countries 7  
   4.3 Moral Aspect: Developing Countries’ Development ..............................................8  
5. Research Methodology ..........................................................................................................9  
6. Research Overview ................................................................................................................9  
7. Scope and Limitations of the Research ................................................................................13  
   7.1 Specific Copyright Materials .....................................................................................13  
   7.2 Problems Limiting the Rights on the Internet ..........................................................14  
   7.3 Control Adopting of Specific Exceptions in Non-Profit Organisations ..................14  
   7.4 Comparative Study ......................................................................................................14  
   7.5 Exceptions to Related Rights .....................................................................................15  

## PART ONE: ANALYSIS OF THE CHANGING NATURE OF COPYRIGHT LAW  
AND ITS EXCEPTIONS IN DOMESTIC LAWS AND  
INTERNATIONAL CONVENTIONS ...............................................................16  

## CHAPTER 1: THE SHAPING OF COPYRIGHT LAW

1. Introduction .........................................................................................................................20  
2. The Concept of Copyright Law .............................................................................................20  
   2.1 The Historical Context of Copyright Law ..............................................................21  
   2.2 The Nature of Copyright Law ...................................................................................25  
      2.2.1 Subject Matter and Scope of Copyright Protection ........................................26  
      2.2.2 Duration of Copyright Protection ......................................................................28  
      2.2.3 Exclusive Rights .................................................................................................30
PART TWO: ANALYSIS OF THE EXCEPTIONS FOR INDIVIDUAL USE IN DEVELOPED AND DEVELOPING COUNTRIES: THE GENERALISATION FROM THE CASE STUDIES OF AUSTRALIA AND THAILAND

CHAPTER 3: ANALYSIS OF THE APPLICATION OF EXCEPTIONS FOR INDIVIDUAL USE IN AUSTRALIA

1. Introduction
2. The Nature of the Australian Copyright Law
   2.1 The Copyright Owner’s Exclusive Rights
       2.1.1 Literary, Dramatic, Artistic and Musical Works
       2.1.2 Films, Sound Recordings, Broadcasts and Published Editions
   2.2 Assigning and Licensing Rights
   2.3 Duration of Copyright
3. The Application of the Exceptions for Individual Use
   3.1 Fair Dealing
       3.1.1 Research or Study
       3.1.2 Criticism or Review
       3.1.3 Parody and Satire
       3.1.4 Reporting the News
       3.1.5 Reproduction for Purpose of Professional Advice
   3.2 Free Use Exceptions
       3.2.1 Acts Done for Purpose of Judicial Proceeding
       3.2.2 Library and Archive Exceptions
       3.2.3 Exception for the Purpose of Education
       3.2.4 Reproduction of Literary, Dramatic, and Musical Works
       3.2.5 Temporary Reproduction
       3.2.6 Reproduction of Writing on Approval Label for Containers for Chemical Product
       3.2.7 Reproduction of Computer Programs for Normal Use or Study
       3.2.8 Reproduction of Edition of Work
       3.2.9 Reproduction of Audio-Visual Items for Private, Domestic, Library and Archive Use
       3.2.10 Private Copying
CHAPTER 4: ANALYSIS OF THE APPLICATION OF EXCEPTIONS FOR INDIVIDUAL USE IN THAILAND

1. Introduction ......................................................... 143

2. The Exceptions for Individual Use in the Thai Copyright Act ........................................ 144

2.1 Overview of Copyright Law in Thailand .................................. 145

2.1.1 Origins of Copyright Law in Thailand ............................. 146
2.1.2 International Protection under Thai Copyright Law .......... 150
2.1.3 Copyright Works in the Copyright Act 1994 .................... 151
2.1.4 Rights of Copyright Owner ........................................ 154
2.1.5 Acquisition of Copyright .......................................... 156
2.1.6 Term of Copyright ................................................ 158

2.2 The Application of Exceptions to Copyright Infringement and Limitations of Exclusive Rights in Thailand .................................................. 159

2.2.1 Exceptions to Copyright Infringement ............................ 160
2.2.2 Developing Country’s Limitations to Exclusive Rights .......... 167

2.3 Modernisation of the Thai Copyright Law .................................. 170

2.3.1 Draft of the Copyright Amendment Act B.E. 2537 (A.D. 1994) ......... 172
2.3.2 Establishment of Collecting Society ................................ 174

4. Analysis of the Current Problems in the Application of the Exceptions for Individual Use ... 131

4.1 The Problem of Different Interpretations of the Exceptions for Individual Use .......... 131

4.1.1 The Different Interpretations of the Terms Used .................. 132
4.1.2 The Different Interpretations of Fairness ............................ 133

4.2 The Problem of Response to the New Environment ..................... 134

4.2.1 The Problem in Contractual Agreement ............................ 135
4.2.2 The Problem in Fair Practice for Time Shifting and Format Shifting ............. 139
4.2.3 The Problem in Educational/Research Segments ................. 140

5. Conclusion ............................................................................................................... 142
2.4 Analysis of the Current Problems in the Application of Thai Individual Use Exceptions

2.4.1 The Problem of Different Interpretations of the Exceptions for Individual Use, and the Problem of Conformity in the Application of the Exceptions for Individual Use according to the Real Purpose of the Three-Step Test

2.4.2 The Problem of Response to the Digital Environment

3. Conclusion

CHAPTER 5: A COMPARISON OF THE EXCEPTIONS FOR INDIVIDUAL USE IN AUSTRALIA AND THAILAND

1. Introduction

2. The Nature and Application of the Exceptions for Individual Use

2.1 Fair Use Exceptions

2.2 Free Use Exceptions

2.3 Licences

2.4 Limitation of Legislative Individual Use Provisions

3. The Problems Found and Proposed Solutions

3.1 The Problems Found

3.2 The Proposed Solutions Taken

3.2.1 The Proposed Solution for the Problem of Different Interpretations of the Exceptions for Individual Use, and the Problem of Conformity in the Application of the Exceptions for Individual Use according to the Real Purpose of the Three-Step Test

3.2.2 The Proposed Solution for the Problem of Response to the Digital Environment

4. Conclusion

CONCLUSIONS AND RECOMMENDATIONS

1. Conclusions Responding to the Research Questions

1.1 Question 1: Do the Exceptions for Individual Use Still Maintain the Balance of the Interests between Right Holders and Users in the Digital Environment?

1.2 Question 2: How Can International Copyright Agreements and National Copyright Legislation Find a Solution to the Conflict of Interests between Right Holder Countries and User Countries in Applying the Exceptions for Individual Use?
1.3 Question 3: What Are the Differences between Developed and Developing Countries in the Application of the Exceptions for Individual Use as well as Problems Found and Solutions Proposed? ..........................................................215

2. Recommendations Regarding Individual Use Exceptions ..........................................................215
   2.1 Amendment of the Wording of the Three-Step Test of the Berne Convention ..................216
   2.2 Amendment of Domestic Copyright Law and Its Exceptions for Individual Use ............221
   2.3 Encouragement of the Role of Collective Management Organisations .........................222
   2.4 Raising Public Awareness on the Issue of Copyright and Its Exceptions for Individual Use ..........................................................223

BIBLIOGRAPHY ................................................................................................................225

APPENDICES
Appendix 1: The Comparison of the Nature and Application of the Exceptions for Individual Use between Australia and Thailand ..........................................................241
Appendix 2: The Comparison of Fair Use Exceptions between Australia and Thailand ............243
Appendix 3: The Comparison of Free Use Exceptions between Australia and Thailand ..........246
Appendix 4: The Comparison of Licences between Australia and Thailand .............................253
Appendix 5: The Comparison of Limitation of Legislative Individual Use Provisions between Australia and Thailand ..........................................................254
Appendix 6: The Estimated Trade Losses Due to the Copyright Piracy in Thailand ............255
Appendix 7: The Summary of Copyright Piracy Rate in Asia Pacific .................................256
<table>
<thead>
<tr>
<th>Abbreviation</th>
<th>Description</th>
</tr>
</thead>
<tbody>
<tr>
<td>AUSFTA</td>
<td>The Australia-United States Free Trade Agreement</td>
</tr>
<tr>
<td>CADA</td>
<td>The Copyright Amendment (Digital Agenda) Act 2000 No. 119, 2000</td>
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<tr>
<td>CLRC</td>
<td>The Copyright Law Review Committee</td>
</tr>
<tr>
<td>DIP</td>
<td>The Department of Intellectual Property (Thailand)</td>
</tr>
<tr>
<td>FTA</td>
<td>The Free Trade Agreement</td>
</tr>
<tr>
<td>IP&amp;IT Court</td>
<td>The Central Intellectual Property and International Trade Court (Thailand)</td>
</tr>
<tr>
<td>TAFTA</td>
<td>The Thailand-Australia Free Trade Agreement</td>
</tr>
<tr>
<td>TPMs</td>
<td>Technological Protection Measures</td>
</tr>
<tr>
<td>TRIPs</td>
<td>The Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPs), Annex 1C, 1994</td>
</tr>
<tr>
<td>USFTAI</td>
<td>The US Free Trade Agreement Implementation Act 2004</td>
</tr>
<tr>
<td>WCT</td>
<td>The WIPO Copyright Treaty (WCT), December 20 1996 No. 33</td>
</tr>
<tr>
<td>WIPO</td>
<td>The World Intellectual Property Organization</td>
</tr>
<tr>
<td>WPPT</td>
<td>The WIPO Performances and Phonograms Treaty (WPPT), December 20, 1996, No 34</td>
</tr>
<tr>
<td>WTO</td>
<td>The World Trade Organization</td>
</tr>
</tbody>
</table>
INTRODUCTION

1. Background of the Research

New technologies have made multiple copying easier and faster, users can easily access and reproduce copyright materials with fewer physical controls. This means, in effect, that technological advances have made it possible for ordinary people to copy copyright material in a largely unfettered way. As a consequence, copyright has emerged as an essential tool of control.

Within the copyright system, exceptions for individual use are an integral part since they are the recognition of the users’ legitimate interests in making certain authorised uses of copyright materials. Such legitimate interests may include the protection of the users’ fundamental rights, the promotion of the free flow of information, and the dissemination of knowledge. They are an important instrument created to strike a balance between the right holders and creators in the control of their works from the copyright infringement on the one hand, and public’s interests in the acquisition of knowledge and information on the other hand. The provision of individual use is an exception that users can adopt, without the consent of the right holders, to make use of copyright materials for educational and non-commercial purposes. There is a tendency for them to misunderstand the concept of individual use.¹

The concept of individual use exception, which is mostly applied, has as its basis of Article 9(2) or the so-called three-step test in the Berne Convention for the Protection of Literary and Artistic Works, Paris Act 1971 (Berne Convention).² It is one of the most important provisions introduced in the Berne Convention during the Stockholm Revision Conference in 1967.³ Pointedly, Article 9(2) affects domestic laws as it allows signatory countries of the Berne Convention to impose the limitations on the exclusive right of reproduction under the following conditions:

1) If it is only in certain special cases;
2) If there is no conflict with the normal exploitation of the work; and
3) If it does not unreasonably prejudice the legitimate interest of the author.⁴

² The Berne Convention for the Protection of Literary and Artistic Works (Paris Act, 1971) NO 615 (E)
³ Three-Step test is defined in Article 9(2) of the Berne Convention for the Protection of Literary and Artistic Works (Paris Act, 1971) NO 615 (E)
⁴ Article 9(2) of the Berne Convention says that: 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 with a normal exploitation of the work and does not unreasonably prejudice the legitimate interests of the author.
In other words, the provision of the three-step test allows signatory countries to give users a freedom to exercise their right to reproduce the copyright materials but it must not conflict with a normal exploitation of the copyright works. Nevertheless, practically, as the three-step test can be interpreted differently, it can be inappropriately exploited as a defence to avoid the infringement.

The infringement of copyright through individual use is not purely a national issue. It interests many countries and provokes a reaction. Many developed countries have created copyright statutes to protect their copyright works. Similarly, many developing countries have considered and issued their copyright laws. Considering the basis adopted for their copyright legislation, the three-step test is applied worldwide by 160 countries.\(^5\) It does not only play a major role nationally but also internationally in many international agreements, for example, the Trade-Related Aspects of Intellectual Property Right (TRIPS Agreement),\(^6\) the WIPO Copyright Treaty\(^7\) (WCT), and the WIPO Performances and Phonograms Treaty\(^8\) (WPPT).

Despite being used as the mould in many countries, the exceptions for individual use in the Berne Convention are applied differently amongst signatory countries. This is because they are the result of a serious compromise reached over a number of diplomatic conferences and revision exercises by national delegations – between those that wished to extend user privileges and those that wished to keep them to a strict minimum. As a result, the Berne Convention leaves countries of the Union to be free to decide whether or not to implement them into their national legislation.

As the three-step test\(^9\) is not compulsory, this can pragmatically affect the implementation of the national law. Different countries have their own different copyright laws due to the varying level of wealth, economic structures, technological capabilities, political systems, and cultural traditions. In other words, the copyright law of each country is concerned only with the actions that take place within that country. This can result in the problem that one country’s law may not be consistent with others’ laws.

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\(^6\) The Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS), Annex 1C, 1994

\(^7\) The WIPO Copyright Treaty (WCT), December 20 1996 No. 33

\(^8\) The WIPO Performances and Phonograms Treaty (WPPT), December 20, 1996, No 34

\(^9\) Three-Step test is defined in Article 9(2) of the Berne Convention for the Protection of Literary and Artistic Works (Paris Act, 1971) NO 615 (E)
Since there is no such thing as an “international copyright” that will automatically protect an author’s writing throughout the entire world, the protection against unauthorised use in a particular country depends on the national law of that country. This results in the establishment of the international copyright protection to protect foreign works under certain conditions for the member countries of international agreements emerges. The three principal international conventions, mentioned in this thesis, are the Berne Convention, the TRIPS Agreement, and the WIPO Internet Treaties (WCT and WPPT). Despite many international treaties and conventions established to find the solution to the international uncertainty of the interpretation in the exceptions for individual use, the problem still exists.

Apart from the problems of the users’ misunderstanding and non-standard interpretation of the exceptions for individual use, technological changes and the development of digital media, in particular, have considerably modified the balance between the copyright holders and users. The question of defining the exclusive rights granted to authors in such a way as to accommodate both creators’ interests and the needs of the society has, therefore, arisen as a more crucial subject. The debate stems not only from the fact that limitations and exceptions on copyright have never been harmonised at the international level, but also from the fact that there is no overriding consensus on how to adapt these limitations to the digital environment. The rapid change of technology is increasing the information gap among nations. The copyright users, developing countries, struggle to access the dissemination of knowledge. Meanwhile, the copyright holders, developed countries, try to find the way to harmonise the developed countries’ requirement and prevent their copyright works and their right holders’ interests from the inappropriate reproduction from the developing countries.

Although the solution to the problem related to the changing environment is not clear, lawmakers and scholars seem to agree that the limitations that are applicable in the analogue world should not be automatically transposed into the digital environment. This is because the difficulty of the uncontrollable reproduction may increasingly grow up. Furthermore, before transposing existing limitations and exceptions or implementing new ones, a careful consideration of their relevance and their impact on the right holders’ interests should be carried out. Notably, the purposes of exceptions for individual use should guarantee sufficient

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10 The Berne Convention for the Protection of Literary and Artistic Works (Paris Act, 1971) NO 615 (E)
11 The Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS), Annex 1C, 1994
12 The WIPO Copyright Treaty (WCT), December 20 1996 No. 33, The WIPO Performances and Phonograms Treaty (WPPT), December 20, 1996, No 34
protection for creators to maintain their level of investments in the production of new works distributed on-line. At the same time, the public’s right to copy those works, including the possibility to make, in certain well defined circumstances, limited uses of those works without the right holder’s consent, should still be maintained.

With these mentioned problems regarding the exceptions for individual use, an inclination of uncertainty has increased so much that there is a question about the existence and role of the exceptions for individual use (the three-step test) which has been adopted internationally for decades. According to the literature review while this thesis is being conducted, it is found there is no research done within the copyright area on the precise topic. Some are broader, for example, on the copyright law while some are narrower, for example, on private copying and in a specific context of libraries, archives, or museums. In addition, although there are numbers of research done on the concept of fair use in the digital environment, the emphasis is placed only on the digital aspect while in fact, the exceptions for individual use are applied both in the digital and analogue environment. Moreover, many studies concentrate merely on a country or country group, mostly the developed one(s). There are only several

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studies carried out in a developing country\textsuperscript{18}. Furthermore, a few studies are carried out comparatively, such as those undertaken by Thampapillai\textsuperscript{19} and Noguchi\textsuperscript{20} in which the exceptions of Australia and US, and US and Japan were compared respectively.

In summary, to have a better understanding of the suggestions possibly leading to the solutions of the above problems and to fill the research gap, a comparative study on the exceptions for individual use in the analogue and digital settings between the developed and developing countries, like this one, is appropriate. This is because it can make a useful contribution which can be divided into three aspects – legal aspect: standardisation of the copyright regulation, economic aspect: the balance between developed and developing countries, and moral aspect: developing countries’ development. The contribution in these three aspects will be explained more thoroughly below.

Additionally, this thesis is timely to the rapid technological change in digital environment since it deals with the issue of \textit{copyright} which is crucial in the information society as can be seen through this quotation:

\begin{quote}
The shift from industrial society to information society that is dependent upon knowledge creation and the development, processing, and use of information places copyright at the very centre of economic development, because the industries that produce copyrightable works provide the central communications links and content that are used in other economic sectors of the information society.\textsuperscript{21}
\end{quote}

Apart from economic considerations, copyright and related rights are also important as a tool for social and cultural growth.\textsuperscript{22} Therefore, the result of this thesis can be helpful both to the right holders and users in many aspects in the digital environment.


Furthermore, the way this thesis looks into copyright in the digital environment is in accordance with the public interest as can be seen through the title of a recent meeting held by WIPO, \(^{23}\) “Meeting Title: Information Meeting on Educational Content and Copyright in the Digital Age”. More importantly, this is more significant if taking Nadeem’s\(^{24}\) research result about the potential of digital technology to the copyright laws and regulations into account.

### 2. Research Questions

The thesis is carried out to investigate the research problem of the international uncertainty of the exceptions for individual use. Specifically, this can be divided into these three research questions:

1) Do the exceptions for individual use still maintain the balance of the interests between right holders and users in the digital environment?
2) How can national copyright legislations and international agreements find a solution to the conflict of interests between right holder countries and user countries in applying the exceptions for individual use?
3) What are the differences between developed and developing countries in the application of the exceptions for individual use as well as the problems found and solutions proposed?

### 3. Research Objectives

The thesis is undertaken with these objectives:

1) To investigate the question whether the exceptions for individual use can still maintain the balance of interests between the copyright holders and users.
2) To analyse the contribution that international copyright agreements and national copyright legislation may have to assist in the solution to the conflict of interests between right holder countries and user countries in applying the exceptions for individual use.
3) To conduct a comparative study of the application of the individual use exceptions as well as problems found and proposed solutions in developed and developing countries.

\(^{23}\) World Intellectual Property Organization

4. Contributions of the Research

This thesis makes practical contributions in the area of copyright. These can be divided into three aspects. The primary contribution is the legal aspect, and the other two related contributions are the economic aspect, and the moral aspect, which are not particularly focus in this thesis.

4.1 Legal Aspect: Amendment of the Exceptions for Individual Use

The study reveals that the adoption of the three-step test of the Berne Convention\textsuperscript{25} is different in each country. These various interpretations can cause a gap which results in improper use of copyright material. This study’s outcome contributes to this understanding and proposes a legal solution to the problem. Scholars and lawmakers suggest an amendment of the three-step test of the Berne Convention,\textsuperscript{26} which is the basis of national copyright laws all over the world. In this way, the three-step test can be, without argument, the clear standard regulation applicable to all countries. In addition, the amendment can also help improve the regulation by enabling it to respond to the new copyright challenge in the digital environment.

Furthermore, the scope of the exceptions for individual use should be clearly interpreted so that its application in each country can be appropriate, neither too broad nor too narrow. However, the exceptions for individual use indicated in each country must not contravene the purpose of the three-step test of the Berne Convention. Additionally, from the finding in this research, each country, both developed and developing countries should amend its copyright legislation and exceptions for individual use so that the balance of the interests between right holders and users can be maintained appropriately in term of its effectiveness even in the digital environment.

4.2 Economic Aspect: The Balance between Developed and Developing Countries

The developed countries are concerned about their economic benefits as the creators or copyright holders. Their concerns result from the use of their copyright products by developing countries, especially in this digital age where reproduction of materials is so easy.

\textsuperscript{25} The Berne Convention for the Protection of Literary and Artistic Works (Paris Act, 1971) NO 615 (E)
and more convenient. In particular, their confidence in the exceptions for individual use is undermined. Meanwhile, developing countries as users, they need to import copyright materials from developed countries in order to develop their countries. They apply the exceptions for individual use as an instrument. Although both countries group have their exceptions for individual use, their application of the individual use exceptions is quite different due to their different culture, society, legal system, technology, and, especially economy. The finding from this research can suggest how the conflict between developed countries, right holder, and developing countries, users can be solved both at the national and international levels. Consequently, this can bring the benefits to developed countries for protecting their interests more appropriately and to developing countries for the use of copyright materials to develop their countries. Finally, the economy of both country groups can grow without creating a wide gap.

4.3 Moral Aspect: Developing Countries’ Development

In this research, the value of the exceptions for individual use in the balance between the interests of developed countries and those of developing countries are made clear as comparatively studied in Chapter Three and Four. The research indicates that the developing countries will experience a great impact if the exceptions for individual use are curtailed. The research also suggests that the exceptions have the potential to be effective even in the digital age but minor changes are required. Although the changes are generally concerned with the protection of the developed countries, who are usually the copyright holders, what these countries should do is to take into account the needs of the developing countries, who are usually the copyright users, as the majority of these countries cannot afford the cost of copyright materials if access is totally fee-based or licences. The findings make a moral contribution as it does not only support the prevention of copyright exploitation, but also takes the use of copyright materials in the developing world into consideration so that knowledge transfer can be achieved. This can fill the knowledge gap between developed and developing countries and can accelerate the development of the latter. This in turn can also contribute to the prevention of piracy in a sustainable way.
5. Research Methodology

This thesis adopts the framework of documentary research in the style of comparative analysis about the international uncertainty of the exceptions for individual use in copyright law between Australia and Thailand. Australia was used as a case study of a developed country while Thailand was used as a case study of developing country for the analysis in more details. The aspects that were compared are the application and current problem of the exceptions for individual use particularly in the digital environment.

Although Australia and Thailand cannot be respectively counted as a typical case for developed and developing countries, they can be used for the comparative purpose in order to explore the similarities and differences of the nature, application, problems found, and proposed solutions in respect of the exceptions for individual use between developed and developing countries. The thesis examines the changing nature of copyright law and the exceptions for individual use in digital environment to contribute to an amendment of the exceptions for individual use; a balancing interest between developed countries as the right holders and developing countries as the users; and the development of the developing world in terms of knowledge transfer.

6. Research Overview

This thesis is divided into two parts. Part One covers Chapter One and Chapter Two and discusses the nature and development of the exceptions for individual use and the role of the individual use exceptions in international copyright treaties which are universal basis of domestic copyright laws. The Chapter sets out the historical development of copyright. The passing into force of the Statute of Anne Act, which was the first copyright Act in the world, is addressed in this chapter. This copyright statute is used as the pattern of many copyright laws in the world. Additionally, this chapter also traces the nature of copyright law. The details of the purpose of copyright law, subject matter and scope of copyright protection, duration of copyright protection, exclusive rights, moral rights, copyright ownership, transfer of ownership, licensing, the exceptions and limitations to copyright and non-voluntary licensing systems are discussed in this chapter. This chapter details the nature of exceptions and limitations on copyright, however; only two significant forms of exceptions and
limitations will be presented. Those two exceptions are fair use and fair dealing exceptions. An analysis of the difference between the fair use doctrine and the fair dealing doctrine is addressed. Fair use constituted by an open limitation and exception on copyright is based on a statement rather than on an exhaustive list of acts, which do not constitute infringements.

Unlike an open system of exceptions, a closed system of exceptions to copyright is based on an enumerated set of possible defences against an action for infringement. For example, the fair dealing exceptions in Australia are confined to five purposes: research or study, criticism or review, parody or satire, reporting of news, and professional advice given by a legal practitioner, patent attorney or trade marks attorney. The Chapter also investigates copyright law in the digital environment, and changing nature of the exceptions for individual use in the digital environment.

Part One, Chapter Two analyses the exceptions for individual use in relation to the international copyright agreements. The traditional copyright exceptions in each country bear a reasonably close relationship with the three-step test of the Berne Convention set out in the international treaties—the concept of “fairness” carried with them the notion that the dealing did not conflict either with a normal exploitation of the work or with the legitimate interest of the right owner, determined by reference to the established industries. First, this chapter examines the role of the three-step test and its interpretation in other international copyright treaties and Agreements which are the three-step test within the meaning of Article 13 of the Trade Related Aspects of Intellectual Property (TRIPS), the incorporation of the three-step test in the WIPO Copyright Treaties of 1996. Secondly, the international copyright exceptions on the special treatment for developing countries are analysed. Finally, the chapter explores the application of the three-step test in the digital environment.

Part Two covers Chapters Three, Four, and Five and it deals with the analysis of exceptions for individual use in copyright conventions. Part Two appraises the comparative analysis of the uncertainty of the exceptions for individual use in the perceptions of developed and developing countries. The Chapters mainly examine the exceptions for individual use in Australia and Thailand respectively in the aspects of an application of the exceptions for individual use and the current problems found in the application of the exceptions for individual use.
A comparative analysis is also undertaken to examine the advantages and disadvantages of the exceptions for individual use in each country, and to explore if the advantageous application in one country can help solve the problems found in the other countries. One hypothesis for a solution to the problem which is examined by the author is a hybrid of statutory licensing and free use for individual purposes both for developed and developing countries.

The thesis has investigated the concern of developed countries about the application of the exceptions for individual use in developing countries. The exceptions for individual use deserve special attention because there have been rapid advances in information and communication technologies, production transformation as well as information dissemination and storage.

In addition, the chapter highlights the inappropriate application of the exceptions for individual use in the developing countries. The application of existing individual use provisions as free use was another issue of interest for the developed countries. The developing countries often made use of copyright works, without paying attention to the market value interests of the developed countries. This has a potential affect on the interests of the right owners as large amounts of copyright materials were copied without compensation in return.

Chapter Three analyses the application of the exceptions for individual use in Australia. The Chapter highlights the operation of the existing provision of fair dealing in the Copyright Act 1968. Apart from analysing the nature of the fair dealing, the Chapter examines the reviews of the copyright balance due to the technological change. The exceptions in the Copyright Act 1968 are categorised into four main groups: fair dealing; free use exceptions; statutory licences and other technology-based exceptions.

Chapter Three ends with the analysis of the two current problems found in the application of exceptions for individual use. They are different interpretations of the exceptions for individual use, and response to the new environment. There are two differences regarding to the problem found in the application of individual exceptions which are the different interpretation of the term used, and the different interpretation of fairness. Respecting the problem found in a response to the new environment, this thesis explores three major problems related to this issue namely the problem in contractual agreement, the problem in fair practice for time-shifting and format-shifting, and the problem in education/research segments.
Chapter Four examines the application of the exceptions for individual use in Thailand, as an example of a developing country. Thailand has had its copyright legislation for a long time but it is still in need of improvement to meet international standards. The chapter starts with the origins and nature of the Thai Copyright Act. Next, the chapter analyses the application of exceptions for individual use in Thailand. The applicability and concept of “fair use” as stated in section 32 of the Copyright Act, B.E 2537 (1994) has of late come under scrutiny in Thailand. Section 32(1) exempts the not-for-profit research or study of copyright work from being deemed as copyright infringement. Apart from the private use exceptions provided in the Copyright Act 1994 for the users, as a developing country, The Berne Convention has an appendix, which expressly gives Thailand the option to exercise two forms of compulsory licensing namely a compulsory licensing for translation, and compulsory licensing for reproduction. Thailand has only made a declaration in relation to the first option, namely the one on translation. Hence, the government can grant compulsory licences to translate and publish textbooks, but it cannot grant compulsory licences to reproduce and publish printed works even for systematic instructional activities including classroom use.

Chapter Five investigates the comparison of the application of the exceptions for individual use between Thailand and Australia. The comparison can be divided into two main sections: the nature and application of the exceptions for individual use, and the problems found and proposed solutions. In regard to the comparison of the nature and application of the exceptions for individual use, the comparison can be divided into four categories: fair use exceptions (Australian fair dealing and Thai private use exceptions), free use exceptions, licences (Australian statutory licences and Thai compulsory licence), and limitation of legislative individual use provisions. In the second section, the chapter focuses on the comparison of the problems found and proposed solutions which can be divided into two topics: the problems found, and the proposed solutions taken. According to the problems related to the exceptions for individual use which can be found in both developed and developing countries, the problems which can be found both in Australia, as a developed country, and Thailand, as a developing country are the problem of different interpretations of the exceptions for individual use, and the problem of response to the digital environment.

The thesis concludes that the exceptions for individual use should exist to maintain the balancing interest between the right holder and users. Yet, some minor changes to these exceptions are required to make them effectively keep pace with the digital environment.
Additionally, the thesis suggests some recommendations to strengthen the existence of the exceptions for individual use applied both internationally and nationally.

7. Scope and Limitations of the Research

As the legislation in each country is amended constantly, the law as stated in this study is that available at 31 December 2006. The Australian Copyright Act mainly used for the analysis is the Copyright Act 1968 as amended on 31 December 2006. Likewise, regarding the Thai legislation, the Copyright Act B.E. 2537 (1994) is investigated and the amendment draft 2004, pending proceedings, is also studied in the relevant topics.

In summary, this thesis investigates the concept of copyright law, particularly, the exceptions for individual use both in the analogue and digital environment. It also further examines the issue of exceptions for individual use comparatively between the developed and developing worlds. The thesis focuses the exceptions for individual use of Australia as the case for the developed world while Thailand is highlighted as the case for the developing world.

However, as copyright and the exceptions for individual use could cover a wide range of areas, it is too large to include all in a single thesis. The thesis, consequently, analyses the exceptions for individual use applied to the copyright materials as a whole in the general context. This can give a comprehensive understanding that may boost further studies to investigate some other issues in details. The issues beyond the scope of this study and some recommendations for further studies are as follows:

7.1 Specific Copyright Materials

This thesis has carefully investigated all kinds of copyright materials that are affected by the inappropriate adoption of exceptions for individual use as a whole picture. The thesis did not examine any specific categories of copyright materials. It would be worthwhile to investigate each copyright material in detail so that the problems found for each could be fully reconsidered. More importantly, both the creators and the users can protect their rights and make use of the materials legally.
7.2 Problems Limiting the Rights on the Internet

Nowadays, new challenges to the copyright exceptions from the Internet are a crucial topic. This has ranged from browsing (viewing the contents of file(s)), caching (temporarily storing web pages to speed up the next retrieval), mirroring (copying a web site as an alternate), Peer-to-Peer (P2P – from user to user in which the two major categories are file sharing and CPU sharing), and trading and exchanging of MP3 Format music files, for instance. These are the new issues which the current copyright legislation cannot be enforced effectively since there are no clear limitations in the right of information access. A further study should, therefore, be carried out to uncover the solutions.

7.3 Control Adoption of Specific Exceptions in Non-Profit Organisations

Libraries, archives, and museums are the free-based information service providers where copyright exemptions are internationally granted. As a result, reproduction and distribution can be made legally without the consent of right holders. However, the exemptions should not be used for the profits of the staff or patrons. In case of self-service copy machine, library users can make the copies by themselves without the responsibility of the organizations. This can cause the inappropriate adoption of specific exemptions as users may make the reproduction regardless of the real purpose of the exemptions. Although blanket licensing system\(^{27}\) is a proposed solution to this, it may not be the best option as compensation has to be made. This can raise a research issue to be explored so that other measures can be revealed. Thus, the adoption of specific exemptions in non-profit organisations can be controlled. Indirectly, this can also decrease an unauthorised use.

7.4 Comparative Study

This study has comparatively analysed the applications of the individual use between the developed country of Australia, and the developing country of Thailand. However, international uncertainty in the individual use provision has occurred worldwide and each country has differently applied the three-step test of the Berne Convention to its national copyright legislation. Therefore, wider research should be conducted geographically.

More interestingly, in developed and developing countries, a comparative study about the most infringed copyright works, dealing with the inappropriate use of authorised copyright works to avoid the copyright infringement in each country should be considered. This can be helpful to know the current condition and problems which can lead to the amendment of the legislation to be enforced effectively for each infringed work. In addition, economically, trading parties can recognise the list of the most infringed works of contracting parties. Consequently, fair practice and fair agreement can be made.

### 7.5 Exceptions to Related Rights

WIPO\(^\text{28}\) defines related rights or neighbouring rights as, “…other categories of owners of rights, namely, performers, the producers of phonograms and broadcasting organisations”. Although related rights are an issue closely relevant to copyright, they are beyond the scope of this thesis. However, as the number of performances, phonograms, and broadcasts have been dramatically increasing and the digital technology has the impact on these materials, a further study about the exceptions of related rights to maintain the balance between the owners of rights and users should be undertaken.

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\(^{28}\) World Intellectual Property Organization
Part One: Analysis of the Changing Nature of Copyright Law and Its Exceptions in Domestic Laws and International Conventions

Part One of this thesis mainly describes the uncertainty of the exceptions for individual use for both domestic and international copyrights. It includes two chapters which examine copyright law and the exceptions for individual use in the following aspects:

1) origins and shaping of modern copyright law;
2) exceptions for individual use in international copyright conventions; and
3) impacts of the digital environment on the three-step test

These two chapters in Part One aims to contribute to an understanding of the exceptions for the individual use from their historical context to the challenge of the technological change posed on the application of the exceptions for individual use. More importantly, they provide the background for the other two chapters in Part Two which analyse the uncertainty of the exceptions for individual use found in two national copyright law systems, one developed country and one developing country.

The origins of statutory protections of copyright lie in the Statute of Anne, the world’s first copyright law passed by the British Parliament in 1709. It was applied in the copyright legislative in each country. However, it resulted in a difference of the application among countries depend on their cultures, economies, and societies. Consequently, this difference caused some conflicts of interpretation and application of copyright in each country.

To decrease some conflicts of interpretation and application among nations, the Berne Convention, an international copyright convention, was created to harmonise the conflicts. The primary objective of copyright is to grant enforceable rights to authors to afford greater encouragement to the production of literary works of benefit to the world.

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29 The Statute of Anne, 8 Anne, ch. 19 (1710)
30 The Berne Convention for the Protection of Literary and Artistic Works (Paris Act, 1971) NO 615 (E)
In general, national copyright laws dealt with six subject matters which include a scope of copyright protection, duration of protection, exclusive right, moral rights, copyright ownership, and exceptions and limitation to copyright. Copyright protection exists in original works of authorship fixed in any tangible medium of expression.

Copyright provides ownership of intellectual property in which the author secures certain exclusive rights to an original work for a limited time. Copyright can be bought and sold, inherited or otherwise transferred. In order to cut down a right holder’s monopoly, copyright provides exceptions and limitations to these exclusive rights. The exceptions and limitations allow individuals, under certain conditions, to use a work without requiring authorisation from the owner of the copyright. The expression “limitations and exceptions to copyright” refers to situation in which the exclusive rights granted to authors, or their assignees under copyright law do not apply.

Limitations and exceptions are also all the subject of significant regulation by international treaties. These treaties have harmonised the exclusive rights which must be provided by copyright law, and the Berne tree-step test\(^31\) operates to constrain the kind of copyright exceptions and limitations which individual nation can enact. However, the nature and application of the limitations and exceptions vary from country to country. There are two basic types of limitation in this category: (1) individual use, no obligation to compensate the right holder for the use of the work without the permission; and (2) compulsory licences, requiring that compensation be paid to the right holder for non-authorised exploitation.

Compulsory licences are granted by the Berne Convention\(^32\) to allow countries to substitute licences with respect to the right of broadcasting and the right of cable distribution. Moreover, the Convention provides compulsory licences for the translation and reproduction for developing countries in order to encourage the educational development of these countries.

The three-step test in the Berne Convention is a fundamental yardstick for copyright exceptions worldwide. The three-step test authorises national legislation to permit the

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\(^{31}\) Three-Step test is defined in Article 9(2) of the Berne Convention for the Protection of Literary and Artistic Works (Paris Act, 1971) NO 615 (E)  
\(^{32}\) The Berne Convention for the Protection of Literary and Artistic Works (Paris Act, 1971) NO 615 (E)
reproduction of protected works only (1) “in certain special cases” provided the other two conditions are also fulfilled: (2) the “reproduction does not conflict with a normal exploitation of the work: and (3) such reproduction “does not unreasonably prejudice the legitimate interests of the authors”. Although the term “special”, “normal”, and “unreasonably” are open to interpretation which are given some flexibility for the Member States to apply case by case in their national legislation, these such terms can possibly cause the possible ambiguity of the interpretation and the difficulty to determine the same standard of this provision’s meaning. Striking this balance is left as a matter for national legislation. This accordingly brings different interpretations which finally result in the problems in applying the provision. As a result, some countries provide systems of compensation for right holders to protect their copyright works meanwhile provide some exceptions use by public to access such works. Additionally, the three-step test is repeated using almost precisely the same terminology in Article 13 of the TRIPS Agreement Article 10 of the WIPO Copyright Treaty (WCT).

The development of digital media has considerably modified the balance that had been struck. Copyright law must be effectively be amended so that it can prevent the wide dissemination of copyright materials with high technology that may violate the rights of the owner. More importantly, 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 contracts and technology in applying copyright.

In this digital environment, the scope of the three-step test, a major provision of individual use many conventions rely on, should be reviewed so that it can still function as a reliable model for national laws and international agreements. In the digital era, the use of the ‘normal exploitation’ of works has changed. Users make use of copyright works regardless to the interest of the right holder. This has put the purpose of the three-step test under strain. However, there is an understanding that exceptions to the reproduction right permitted under Article 9(2) of Berne may fully apply in the digital

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33 The flexibility of the open interpretation of the three-step test can possibly make national legislation more adaptable. However, the words “normal exploitation”, for instance, give no guidance as to kinds of non-economic normative considerations that may be within the scope of normal exploitation by the copyright owner. Accordingly, striking this balance is left as a matter for national legislation to consider on a case by case basis. See also Ricketson S, The Three-Step Test, Deemed Quantities, Libraries and Closed Exceptions, Centre for Copyright Studies, Strawberry Hills, NSW, 2002, p 36-38.
34 Article 13 of the Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS), Annex 1C, 1994
35 Article 10 of the WIPO Copyright Treaty (WCT), December 20 1996 No. 33
environment. This is reflected in the agreed statement to Article 1(4) of the WCT.\textsuperscript{36} Moreover, the agreed statement to Article 10 of the WCT\textsuperscript{37} on exceptions sets out the understanding that contracting parties to the treaty are permitted “to carry forward and appropriately extend into the digital environment limitations and exceptions in their national laws which have been considered acceptable under the Berne Convention”,\textsuperscript{38} that is, not only in the case of the reproduction right but also other rights.

\textsuperscript{36} Article 1(4) of the WIPO Copyright Treaty (WCT), December 20 1996 No. 33
\textsuperscript{37} Article 10 of the WIPO Copyright Treaty (WCT), December 20 1996 No. 33
\textsuperscript{38} Agreed statements were adopted explaining that the WIPO Copyright Treaty (WCT) permit contracting parties to carry forward and appropriately extend into the digital environment limitations and exceptions in their national laws that have been considered acceptable under the prevailing international instruments. These statements further explain that the clauses permit national legislators to devise new exceptions and limitations that are appropriate in the digital network environment.
CHAPTER ONE

THE SHAPING OF COPYRIGHT LAW

1. Introduction

This chapter describes the historical context and nature of copyright law. First, it presents the origins of copyright which can help us not only to appreciate the intricacies and complexity of copyright law but also to understand its purpose and the way the law maintains a balance of interests between right holders and users. The chapter then explains the nature of copyright law: subject matter and scope of copyright protection, duration of copyright protection, exclusive rights, moral rights, copyright ownership, and exceptions to infringement. Finally, the chapter ends with an investigation of the changing nature of copyright law.

2. The Concept of Copyright Law

The origins of the statutory protections of copyright lie in the Statute of Anne, the world’s first copyright law passed by the British Parliament in 1709. Prior to this, disputes over the rights to the publishing of books could be enforced by common law. Modern copyright law has been influenced by an array of older legislation, which covers the moral rights of the author who created a work, the economic rights of a benefactor who paid to have a copy made, the property rights of the individual owner of a copy, and a sovereign's right to censor and to regulate the printing industry.

Generally, the law gives owners of copyright exclusive rights to do certain things with their material essentially for the purpose of commercial exploitation. Copyright is intended to protect creative works from being used without the agreement of the owner and to provide an incentive for creators to continue to create new material. At its most general, it is literally “the right to copy” an original creation. In most cases, these rights are of limited duration. The real goal of copyright is to ensure that new knowledge will be developed and circulated through society.

2.1 The Historical Context of Copyright Law

In each country, the reasons for grants of copyright protection were much the same, arising from governmental concern over the need to control a new means of disseminating information, the need to encourage a new kind of industry, and the self-interested concern of printers, authors, and publishers to protect their works from unconstrained competition.⁴¹

In fact, the scholars of Ancient Greece and the Roman Empire were the first to be concerned about being recognised as the authors of their works, but they did not have any economic rights.⁴² It was not until the invention of printing in the late fifteenth century that a form of copyright protection was devised. The history of the establishment of copyright laws in most countries can be traced back to this development of the printing press.

The Crown recognised the importance of the new technology and maintained a close interest in it from its beginnings. While foreign printers and booksellers were initially encouraged to come to England, by the first part of the 16th century there was growing resentment over foreign competition. Statutes against foreign competition in 1523⁴³ and 1529 included printers and booksellers, and in 1533 the importation and retailing of foreign books was banned.⁴⁴

During this time, the Crown’s interest in printing moved from trade issues to censorship of material, particularly in relation to issues of religion. Under a proclamation by Henry VIII in 1538,⁴⁵ the printing of any English book was banned unless it had been examined and licensed by the King and Privy Council, a requirement that remained in effect in some form until 1694. Use of governmental bodies for censorship had obvious disadvantages in an age that was becoming increasingly resentful of royal control. The solution was simple: exercise indirect control through the grant of an exclusive charter to the printing and book trade, which would carry out royal wishes in order to benefit from monopoly status. In 1557,⁴⁶ the London Company of Stationers, a group of letter writers, illuminators, bookbinders and

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booksellers, was created to revive the protection which its members had received previously for their ‘copies’ under the old Star Chamber ordinances. Star Chamber Decrees in 1566 and 1586 gave the Stationers’ Company more specific powers in relation to control, including requiring registration of and limitations on the number of printing presses.

The scope of the Stationers’ authority began to be chipped away, when in 1653, another general printing act took away the Stationers’ Company’s responsibility for resolving disputes over exclusive rights and vested it instead with the Council of State. In 1662, Parliament passed a new printing act, based on the Star Chamber decree of 1637 and the 1649 Printing Act. Except for books published under a royal patent or licensed by the Secretary of State, published pamphlets and books were to be entered in the register of the Stationers Company as proof of ownership and censorship approval. Every copy was required to contain a statement to the effect that the work was not “contrary to the Christian faith, or to the doctrine or discipline of the Church of England or against the State and government of the realm or contrary to good life or good manners.”

The 1662 Act was renewed in 1664 and 1665, this last Act expiring in 1679. A new charter was granted to the Stationers’ Company by Charles II in 1684. A new licensing act, with a seven-year term, was passed in 1685 and extended in 1692 for two additional years.

The world was beginning to change, however. Government censorship, government-created abusive monopolies, and lack of protection for authors were becoming inconsistent with the intellectual spirit of the Age of Enlightenment. As a consequence, in 1694 the world of the licensing acts and exclusive Stationers’ rights ended. Independent printers sprang up in competition with the Stationers. For five straight years thereafter, the Stationers’ Company unsuccessfully petitioned Parliament for a new licensing act and then less active, quite impossibly regrouping to develop a new strategy.

49 Ibid.
50 Ibid.
52 The ‘Age of Enlightenment’ refers to the eighteenth century in European philosophy. It can more narrowly refer to the historical intellectual movement. The Enlightenment was a means of establishing an authoritative system of aesthetics, ethics, government, and logic, which, they supposed, would allow human beings to obtain objective truth about the universe.
Without their monopolies, London's booksellers faced an unregulated influx of cheap texts printed outside Britain, and in Scotland, that began flooding the English market. After years of lobbying Parliament by authors and members of the Conger, the world's first modern copyright statute was enacted, the Statute of Anne.  

Although the Statute of Anne created a system of monopoly rights similar in many ways to the Stationers' Company's private system, it also introduced three major changes. Unlike previous laws that gave broad monopoly power to the Stationers' Company, who would then administer a private system of copyright between Guild members, the Statute of Anne first directly outlined a public copyright system that applied to the public in general. Secondly, the Statute recognised a copyright as originating in the author, rather than a Guild member. Lastly, it placed a time limitation on the monopoly enjoyed by holders of a copyright which created a public domain for the first time. Prior to this, copyright protection lasted in perpetuity. In later years, a requirement that a copyright notice be posted on all registered works was added; at this point, innocent infringement became impossible. Specifically, the Statute of Anne granted authors of books a limited copyright of 28 years, consisting of the exclusive right to print and publish their books in England. The preamble to that Act described it as 'an act for the encouragement of learning, by vesting the copies of printed books in the authors or purchasers of such copies'.

Despite the revolutionary nature of the rights bestowed by the Statute of Anne, the law was still quite limited in scope. The 1710 law was confined to the rights of authors of books only, and, more particularly, the right to reprint. It did not include other creative works such as printing, drawing, and so on, which also over time became targets of piracy, in addition to

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54 Statute of Anne, 8 Anne, ch. 19 (1710)  
57 That is, an initial term of 14 years with an additional term of the same length. Works already published when the Statute of Anne was enacted were given a term of 21 years.  
58 The preamble continues: 'Whereas Printers, Booksellers and other Persons have of late frequently taken the Liberty of printing, reprinting and publishing, or causing to be printed, reprinted and published, Books and other Writings, without the Consent of the Authors or Proprietors of such Books and Writings, to their very great Detriment, and too often to the Ruin of them and their Families: For preventing therefore such Practices for the future, and for the Encouragement of learned Men to compose and write Books.'  
59 The adoption of this device indicates something of the way in which the status of authors had changed in the preceding century. During the following century, their position was more firmly established as the bonds of patronage were further loosened and they became independent figures in British cultural life. At the same time, this early identification of the publishers' interests with those of authors gave British copyright law, and laws derived from it, a decidedly economic or pecuniary bias which persists even today. In keeping with this approach, the early British laws required registration as a precondition for the grant of protection, and accorded this for a short term only, subject to a right of renewal.
other aspects relating to books.\textsuperscript{60} To overcome this problem a new enactment, namely, the “Engravers Act” came into existence in 1735, which gave the same rights to artists as those given to authors by the Statute of Anne 1710.\textsuperscript{61}

Nonetheless, the Statute of Anne can best be understood as a trade-regulation statute directed to the problem of monopoly in various forms.\textsuperscript{62} It dealt with the monopoly of the Stationers’ Company itself by making copyright available to all persons.\textsuperscript{63} The Statute of Anne 1710 was the first copyright statute in the world spreading to the whole English speaking world on one side\textsuperscript{64} and the “\textit{droit d’ auteur}”, the creation of France, to all Latin countries and most of continental Europe on the other.\textsuperscript{65} This development of copyright laws was completely paralleled throughout Europe from the fifteenth to the eighteenth century. Certainly, many national copyright laws mainly in common law countries were developed based on the Statute of Anne.

However, as the Statute of Anne was applied as the domestic law in each country according to the appropriateness of the enforcement of the Statute in that country, this had resulted in differences in application among countries which caused some conflicts of interpretation and application. For example, by 1886, most national copyright laws required an author to comply with some kind of formality before he/she gained protection. There were considerable differences in the nature of these requirements. As a result, there arose the Berne Convention, an international copyright convention which was used to harmonise the differences. In addition to the Statute of Anne therefore, the Berne Convention is another crucial copyright pattern that is used as the basis of legislation in all member states. For this reason, the content of the next section which describes the nature of copyright law is derived from the minimum requirements provided by this international convention for the member states to follow when they enact their copyright legislation.

\textsuperscript{61} Ibid.
\textsuperscript{64} The Statute of Anne is the direct ancestor of American copyright law. The copyright clause of the US Constitution retains the fundamental ideas of the full title of the Statute of Anne and vests Congress with the power “to promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries”. Also, the Copyright Act 1956 (UK) which is the model of the copyright law in Australia, the Copyright Act 1968 (Cth), can be traced to the Statute of Anne of 1710.
2.2 The Nature of Copyright Law

The primary objective of copyright is to grant valuable, enforceable rights to authors encourage to the production of literary works of benefit to the world.\textsuperscript{66} For this reason, the authors receive a fair return of their creative labour. Meanwhile, copyright law ultimately serves the purpose of enriching the general public by providing access to creative works. The public receive the benefit of literature, music and other creative works that might not otherwise be created or disseminated. The public also benefits from the limited scope and duration of the rights granted.\textsuperscript{67} The copyright legislation in each country has been revised and developed many times in order to effectively keep the balancing interest between the right holder and the user.

In other words, copyright law either permits or forbids specific uses of a work, thereby giving the author the ability to control who may copy, adapt, distribute, publicly perform or publicly display their work.\textsuperscript{68} As a result it is designed primarily to protect creators against any unauthorised copying of their work. Thus 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 and society’s competing interest in the free flow of information and the dissemination of knowledge.

Despite the broad similarities in national copyright regimes, great differences still remained between the provisions of the various national copyright laws: while the problems addressed might be the same, the solutions adopted were often extremely varied. In general, however, national copyright laws dealt with six subject matters which include the scope of copyright protection, the duration of protection, exclusive rights, moral rights, copyright ownership and exceptions and limitations to copyright. Consideration of these matters leads naturally to consideration of the extent to which these national laws protected foreign works and authors, and will help explain why these countries began to enter into international copyright agreements with each other.

2.2.1 Subject Matter and Scope of Copyright Protection

The subject matter of copyright protection today includes all productions in the literary, scientific and artistic domain, whatever the mode or form of expression. Copyright protection exists in original works of authorship fixed in any tangible medium of expression, now known or later developed, from which they can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or other device.

For a work to be protected by copyright law, it must be “original”. The ideas in the work do not need to be new but the form, literary or artistic, in which they are expressed, must be an original creation of the author. What that means is that the work must have been developed independently by its author, and there must have been some creativity involved in the creation. It is free and automatically safeguards the original works of art, literature, music, films, sound recording, broadcasts and computer programs from copying and certain other uses. Article 2 of the Berne Convention for the Protection of Literary and Artistic Works (the Berne Convention) contains an illustrative, non-exhaustive list of protected works, which includes “any original production in the literary, scientific and artistic domain, whatever may be the mode or form of its expression.” Works based on other works, such as translations, adaptations, arrangements of music and other alterations of a literary or artistic work, are also protected. Some categories of works may be excluded from protection; thus, member States may deny protection to official texts of a legislative, administrative and legal nature, works of applied art, lectures, addresses and other oral works.

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69 Section 101,102 of Title 17 of United States of American Copyright Act of 1976
70 For example, copyright exists in particular kinds of material by virtue of the Australian Copyright Act 1968 (Cth). A literary, dramatic, musical or artistic work must be “original” originating from the author, who is a qualified person, and reduced to a material form. Copyright does not protect you against independent creation of a similar work. It also covers published and unpublished literary, scientific and artistic works, whatever the form of expression, provided such works are fixed in a tangible or material form.
71 Article 2 of the Berne Convention for the Protection of Literary and Artistic Works (Paris Act, 1971) states that The expression “literary and artistic works” shall include every production in the literary, scientific and artistic domain, whatever may be the mode or form of its expression, such as books, pamphlets and other writings; lectures, addresses, sermons and other works of the same nature; dramatic or dramatico-musical works; choreographic works and entertainments in dumb show; musical compositions with or without words; cinematographic works to which are assimilated works expressed by a process analogous to cinematography; works of drawing, painting, architecture, sculpture, engraving and lithography; photographic works to which are assimilated works expressed by a process analogous to photography; works of applied art; illustrations, maps, plans, sketches and three-dimensional works relative to geography, topography, architecture or science.
72 Article 2(3) of the Berne Convention for the Protection of Literary and Artistic Works (Paris Act, 1971) NO 615 (E)
73 Article 2(4) of the Berne Convention for the Protection of Literary and Artistic Works (Paris Act, 1971) NO 615 (E)
74 Article 2(7) of the Berne Convention for the Protection of Literary and Artistic Works (Paris Act, 1971) NO 615 (E)
75 Article 2bis(2) of the Berne Convention for the Protection of Literary and Artistic Works (Paris Act, 1971) NO 615 (E)
In the case of *Desktop Marketing Systems Pty Ltd v Telstra Corporation Ltd*, Desktop was alleged to infringe Telstra’s copyright in the White Pages and Yellow Pages for its tree CD-ROM software products which enabled users to search variedly. Desktop took the subscriber listing data and used Telstra’s Yellow Pages headings in arranging the data. The major concern raised for the copyright protection in the case was whether the directories and headings satisfied the requirement as “original” literary works.

The Full Federal Court considered that, although the data listed in the telephone directories was considered a compilation of facts, “…copyright protection will be accorded to a compilation of facts as a reward for the author’s investment of time and money even if there be no creativity in the work…” As far as the headings used in the Telstra directories was concerned, the case was similar to that of *Lamb v Evans* where “…the Court of Appeal held that there was copyright in the headings used in a trade directory”. According to the judgement, therefore; it was deemed that Desktop had indeed infringed Telstra’s copyright.

It is understood that an original work of authorship should have arisen from the original creativity of its author and creator. In addition, an original work of authorship is also required to represent at least some degree of creativity. Basically, original works are protected by national copyright law. However, the fundamental principle of copyright law is that copyright does not protect ideas but only protects the form of expression. This principle arises directly from the nature of copyright as an author’s right. The author’s craft is the craft of expression and copyright protects the author’s craft. The idea-expression dichotomy is explicitly maintained in the Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement) which provides that “[c]opyright protection shall extend to expressions and not to ideas, procedures, and methods of operation or mathematical concepts as such”.

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76 Desktop Market Systems Pty Ltd v Telstra Corporation Ltd (2002) 55 IPR; [2002] FCAFC 112 (Full Federal Court)
78 Lamb v Evans [1893] 1 Ch 218: the obligation of confidentiality owed by employees. It is a sound principle that a man shall not avail himself of another’s skill, labour and expense by copying the written product thereof. “For the purposes of their own profit they desire to reap where they have not sown, and to take advantage of the labour and expenditure of the plaintiffs in procuring news for the purpose of saving labour and expense to themselves.”
80 Article 2 of the Trade-Related Aspects of Intellectual Property Rights (TRIPS), Annex 1C, 1994
Furthermore, the work is not considered "created" until it is fixed, tangible, permanent, or stable, and reproducible or otherwise communicable. For example, copyright does not protect the idea of making an image but it protects a taken photograph which is an expression of the idea. Although it is often difficult to distinguish an idea from an expression of the idea, fixation can make the difference as it can be protected by law. As a result, Article 2(2) of the Berne Convention\textsuperscript{81} grants a possible requirement of fixation to member states in order to require that the copyright work must be fixed in some material form in order to be protected. However, the requirement of fixation is not required under the Thai Copyright Act B.E. 2537 (A.D. 1994).\textsuperscript{82} The fixation of the copyright work is dependent on the nature of the works. Literary and artistic works are not required to be fixed in tangible forms whereas the sculpture works and photographs will be protected if they are only in a tangible form.

Moreover, copyright protection of written instructions for a manufacturing process or a manual for the operation of a machine applies only to the instructions themselves. Protection does not apply in the case of another’s use of the process or machine.\textsuperscript{83}

For similar reasons, copyright does not protect facts, whether scientific, historical, biographical or news of the day.\textsuperscript{84} Any facts that an author discovers in the course of research are in the public domain, free to all. For instance, anyone is free to use information included in a book about how the brain works, and an article about the copyright in cyberspace, provided that they express the information in their own words.

\textit{2.2.2 Duration of Copyright Protection}

Copyright protection does not continue indefinitely. The law still provides for a period of time, a duration, during which the rights of the copyright ownership exist. The period or duration of copyright normally begins with the creation of the work and duration continues until some time after the death of the author. The purpose of this provision in the law is to

\textsuperscript{81} Article 2(2) of the Berne Convention for the Protection of Literary and Artistic Works (Paris Act, 1971) NO 615 (E)
\textsuperscript{82} Section 4 of the Copyright Act B.E. 2537 (A.D. 1994)
enable the author’s successors to have economic benefits after the author’s death. \footnote{Despite these differing post-mortem periods, one contemporary French commentator, Charles Lyon-Caen, characterised the law of these countries as having three features in common: 1. they accorded the author an exclusive right throughout the remainder of his life; 2. they accorded a further period of protection following the author’s death before the work fell into the public domain; the total length of protection therefore depended upon the length of the author’s life; and 3. they gave the same rights after the author’s death to his beneficiaries or legal representatives.}

Many countries have increased the length of protection in order to encourage benefits for right holders from their copyright works much more than earlier. Notably, the expiration of copyright protection is perhaps the most important means by which a work enters the public domain and becomes available for use by the public without constraint by copyright law.

The duration of copyright protection varies according to the type of material protected. Article 7(1) of the Berne Convention\footnote{Article 7(1) of the Berne Convention for the Protection of Literary and Artistic Works (Paris Act, 1971) NO 615 (E)} states that the minimum term of protection for copyright works shall be the life of the author plus fifty years after his death. This was meant to cover the average lifetime of an author and benefit a further two generations of authors’ heirs. A similar term is extended to cinematographic works, generally applicable from the date of making such work publicly available. However, copyright in photographs and works of applied art is intended to subsist only for 25 years.\footnote{Article 7(4) of the Berne Convention for the Protection of Literary and Artistic Works (Paris Act, 1971) NO 615 (E)} The term for photographic works has now been extended to 50 years under the WIPO Copyright Treaty negotiated in December 1996.\footnote{On the 20th of December 1996, the World Intellectual Property Organisation (WIPO) Diplomatic Conference on Copyright concluded the WIPO Copyright Treaty (WCT) which is effectively a protocol to the Berne Convention. Article 9 of the WCT provides that Contracting States will not apply Article 7(4) of the Berne Convention. The effect of applying Article 9 of the WCT will be to give photographs the same minimum term of protection as other artistic works such as paintings.}

Article 12 of the TRIPS Agreement\footnote{Article 12 of the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS), Annex 1C, 1994} merely clarifies that where the term of 50 years is set other than on the basis of the life of an author, the term should commence from the date of first authorised publication of the work. Where no such publication takes place for 50 years from the making of the work, this term should be 50 years from the making of the work. The provision is meant to cover copyright owners who are legal entities. The provision is based on the same principle as Article 7(2) of the Berne Convention\footnote{Article 7(2) of the Berne Convention for the Protection of Literary and Artistic Works (Paris Act, 1971) NO 615 (E)} in relation to films. The wording of the Berne Convention, ‘made available to the public’ is considered to be more restrictive than the wording ‘authorised publication’ used in TRIPS as the former could include making the work available on radio, television or now the Internet even before formal distribution of copies to the public.\footnote{Goldstein P, International Copyright: Principles, Law, and Practice, Oxford University Press, Oxford, 2001, pp 77-79.} Thus, it is noted that TRIPS may, in certain cases,
provide a longer term of protection than the Berne Convention. In fact, most developing countries have already adopted the terms of protection specified under TRIPS for copyright.

Generally, for most works copyright lasts for the life of the author plus 50 years or 50 years after first publication. According to Thai copyright law, for example, the copyright term is the life of the author plus 50 years. When the author is a legal entity or an anonymous person, the copyright term is 50 years from the date of publication. Applied Arts (defined as drawings/paintings, sculpture, prints, architecture, photography, and drafts) have a copyright term of 50 years from the first publication. Republication of works after the expiration of the copyright term does not reset the copyright term. Publications of any agency of the Thai state mostly are public domain. There are some publications provided by the government agencies that are protected under copyright law, such as brochures, leaflets, and material used for public awareness schemes.

Recently, however, many countries have passed twenty-year extensions of copyright duration. For example, prior to the U.S.-Australia Free Trade Agreement, Australia used a "plus 50" rule for determining when a work will enter the public domain. Put simply, a "work" (ie a literary, dramatic, musical or artistic work) entered the public domain 50 years after the year of the creator's death, with exceptions. With the signing of the Free Trade Agreement in early 2005, the duration of copyright should now be understood as “plus 70", in line with the European Union and other regions. Nonetheless, this general presumption depends on whether works were published during the author's lifetime. After expiry of copyright, the work enters what is known as the “public domain”, where it can be freely used without permission.

2.2.3 Exclusive Rights

The phrase "exclusive right" means that only the copyright holder is free to exercise the attendant rights. Others are prohibited from doing so without the consent of the copyright holder. Under the Berne Convention, a nation must provide for the protection of eight rights for authors, as indicated below:

92 Copyright Act of B.E. 2537 (1994 A.D.), Section 4 governs copyright expiration terms
93 Copyright Act of B.E. 2537 (1994 A.D.), Section 4, Article 21 states the copyright term for applied art works
94 Copyright Act of B.E. 2537 (1994 A.D.), Section 7 governs works not copyrightable. The law refers specifically to Thai state rules, regulations, announcements, orders, explanations, and correspondence, and includes the constitution, laws, court decisions, examinations, and reports.
95 Sections 33 and 34 of the Copyright Act 1968 (Cth)
1) The right to authorise translations of the work;\textsuperscript{96}
2) The exclusive right to reproduce the work, though some provisions are made under national laws which typically allow limited private and educational use without infringement;\textsuperscript{97}
3) The right to authorise public performance;\textsuperscript{98}
4) The right of broadcasting, and the communication of broadcasts and public performances;\textsuperscript{99}
5) Recitation of the work, (or of a translation of the work);\textsuperscript{100}
6) The right to authorise arrangements or other types of adaptation to the work;\textsuperscript{101}
7) Right of Recording Musical Works;\textsuperscript{102} and
8) The right of making cinematographic adaptation and reproduction of works, and the right of distribution of the works thus adapted and reproduced.\textsuperscript{103}

The terms of the Berne Convention also stipulate an incentive for countries that are not part of the Union to protect work by nationals of countries of the Union. It states that where a country outside the Union does not provide adequate protection for authors, countries of the Union are entitled to not extend protection to nationals of that country, beyond that which is granted by the country.

The basic rights recognised by the Berne Convention include the exclusive rights of reproduction and public performance. In most countries, contravention of these rights can be challenged through civil and criminal proceedings.\textsuperscript{104}

Right of Translation

Article 8(1) of the Berne Convention covers a number of exclusive rights enjoyed by the author. With the use of increasingly sophisticated technology between nations, translations have assumed an ever more important place in international relations. This right, which has been

\textsuperscript{96} Article 8 (1) of the Berne Convention for the Protection of Literary and Artistic Works (Paris Act 1971) NO 615 (E)
\textsuperscript{97} Article 9 (1) of the Berne Convention for the Protection of Literary and Artistic Works (Paris Act 1971) NO 615 (E)
\textsuperscript{98} Article 11(1) of the Berne Convention for the Protection of Literary and Artistic Works (Paris Act 1971) NO 615 (E)
\textsuperscript{99} Article 11bis paragraph (1) of the Berne Convention for the Protection of Literary and Artistic Works (Paris Act 1971) NO 615 (E)
\textsuperscript{100} Article 11ter paragraph (1) of the Berne Convention for the Protection of Literary and Artistic Works (Paris Act 1971) NO 615 (E)
\textsuperscript{101} Article 12 of the Berne Convention for the Protection of Literary and Artistic Works (Paris Act 1971) NO 615 (E)
\textsuperscript{102} Article 13 of the Berne Convention for the Protection of Literary and Artistic Works (Paris Act 1971) NO 615 (E)
\textsuperscript{103} Article 14 of the Berne Convention of the Berne Convention for the Protection of Literary and Artistic Works (Paris Act 1971) NO 615 (E)
in the Convention since its commencement, allows the author to translate the work himself or to entrust it to someone who is capable of reflecting the author’s thinking faithfully in another language using a style and phraseology which allows the second language readers to fully appreciate the original.

However, limitations have been imposed on the exercise of the exclusive right of translation; compulsory licences are provided for developing countries,\(^{105}\) if the translation right is applied.

**Right of Reproduction**

The right of the owner of copyright to exclude others from making copies of his/her protected work is the most basic right in this branch of intellectual property. Therefore, the right to control this act is the legal basis for agreements between owners of copyright and publishers for the publishing of protected works. An infringement need not involve the whole of a work in question; it is also an infringement to take a substantial part of the work.\(^{106}\)

The words ‘in any manner or form’\(^{107}\) are wide enough to cover all methods of reproduction. It is simply a matter of fixing the work in some material form. This clearly includes the recording of both sounds and images.\(^{108}\) Notably, the reproduction right does not include public performance.\(^{109}\) Each of the Convention’s rights may be exercised separately.

Moreover, the Convention does not, in this Article, mention the right of distribution. This may have been because for many countries there was uncertainty about what the right of distribution entailed, though it appears in the laws of other countries. In practice, it flows from the right of reproduction. Authors, when entering into a contract about the reproduction of their work, can lay down conditions governing the distribution of copies, for example as to number of copies and as to the countries in which those copies may be sold.

\(^{105}\) Article II of the Annex to the Berne Convention for the Protection of Literary and Artistic Works (Paris Act 1971) NO 615 (E)

\(^{106}\) According to section 31 of the Australian Copyright Act 1968 (Cth), it is an infringement of copyright to carry out any of the acts in section 31 (the exclusive rights) without the permission of the copyright owner. An infringement need not involve the whole of a work in question; it is also an infringement to take a substantial part of the work.

\(^{107}\) Article 9, paragraph (1) of the Berne Convention for the Protection of Literary and Artistic Works (Paris Act 1971) NO 615 (E), ‘(1) Authors of literary and artistic works protected by this Convention shall have the exclusive right of authorising the reproduction of these works, in any manner or form.’

\(^{108}\) Article 9, paragraph (3) of the Berne Convention for the Protection of Literary and Artistic Works (Paris Act 1971) NO 615 (E)

\(^{109}\) Article 11 of the Berne Convention for the Protection of Literary and Artistic Works (Paris Act 1971) NO 615 (E)
Right of Public Performance

This provision covers only dramatrico-musical and musical works. The paragraph splits the right into two. An author has the exclusive right to authorise public performance of his/her work. This covers, first and foremost, live performances given by actors and singers on the spot. Notably, only public performance is covered. Private performance calls for no authorisation.

However, it goes on to speak of ‘including such public performance by any means or process’, and this covers performance by means of recordings. The inclusion is general and covers all recording though public performance by means of cinematographic works is separately covered.

The second part of this right covers communication by means of a public performance of the work, excluding broadcasting which is dealt with in Article 11bis.

Right of Broadcasting

The provision divides the author’s exclusive right into three rights. The first right is to authorise the broadcasting of a work and communication to the public by any other means of wireless diffusion of signs, sounds or images. This applies to both sound and television broadcasts. The second right is to authorise the broadcasting of a work to the public, either by wire or by rebroadcasting, if the communication is made by an organisation other than the original one. The third right is to authorise the broadcasting of a work to the public by loudspeaker or any other analogous instrument transmitting the broadcast of the work.

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110 Article 11, paragraph (1) of the Berne Convention for the Protection of Literary and Artistic Works (Paris Act 1971) NO 615 (E), ‘1) Authors of dramatic, dramatrico-musical and musical works shall enjoy the exclusive right of authorizing: (i) the public performance of their works, including such public performance by any means or process; ii) any communication to the public of the performance of their works. (2) Authors of dramatic or dramatrico-musical works shall enjoy, during the full term of their rights in the original works, the same rights with respect to translations thereof.’

111 Article 11, paragraph (1) of the Berne Convention for the Protection of Literary and Artistic Works (Paris Act 1971) NO 615 (E)

112 Article 14 (1) (ii) of the of the Berne Convention for the Protection of Literary and Artistic Works (Paris Act 1971) NO 615 (E)

113 Article 11bis of the Berne Convention for the Protection of Literary and Artistic Works (Paris Act 1971) NO 615 (E), ‘Broadcasting and Related Rights:
1. Broadcasting and other wireless communications, public communication of broadcast by wire or rebroadcast, public communication of broadcast by loudspeaker or analogous instruments;
2. Compulsory licences;
3. Recording; ephemeral recordings.’

114 Article 11bis of the Berne Convention for the Protection of Literary and Artistic Works (Paris Act 1971) NO 615 (E)
Notably, from Article 11bis of the Berne Convention,115 the copyright protection of the author is not distinguished from that of the broadcasting organisation. Indeed, Article 14(3) of TRIPS indicates clearly the rights of broadcasting organisations. It provides the right to the broadcasting organisation to prohibit unauthorised reproduction and communication.116 However, in the case that “Member States do not grant such right to broadcasting organisations, they shall provide owners of copyright in the subject matter of the broadcast with the possibility of preventing the above acts, subject to the provision of the Berne Convention (1971)”.117

Public Recitation

This provision provides protection for literary works that are not covered by Article 11, such as dramatic and musical works. The right was introduced into the Convention at the Brussels Revision (1984) and its wording was widened a little in Stockholm (1967) to bring the Article into line with Article 11. The wording ‘by any means or process’118 is used as in Article 11, in order to ensure that public recitation by means of a record falls within the right. Also, the provision gives the author the exclusive right to authorise any communication to the public of the recitation. As with the right of public performance, private recitation or communication remains outside its scope. In addition, following Article 11, the Convention added a second paragraph under Article 11ter covering recitation of the work in translation as well as in the original.119

Right of Adaptation

The right of Adaptation in general covers all works and all adaptations, arrangements, and other alterations of them. The wording is the same as in Article 2(3),120 which gives these derivative works the same protection as is enjoyed by the original works. This right also safeguards the rights of the authors of the latter. The two provisions are therefore closely linked.

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115 Article 11bis of the Berne Convention for the Protection of Literary and Artistic Works (Paris Act 1971) NO 615 (E)
116 Article 14(3) of the Trade Related Aspects of Intellectual Property Rights (TRIPS), Annex 1C, 1994
117 Ibid.
118 Article 11ter, paragraph (1) of the Berne Convention for the Protection of Literary and Artistic Works (Paris Act 1971) NO 615 (E), ‘(1) Authors of literary works shall enjoy the exclusive right of authorizing: (i) the public recitation of their works, including such public recitation by any means or process; (ii) any communication to the public of the recitation of their works.’
119 Article 11ter, paragraph (2) of the Berne Convention for the Protection of Literary and Artistic Works (Paris Act 1971) NO 615 (E), ‘(2) Authors of literary works shall enjoy, during the full term of their rights in the original works, the same rights with respect to translations thereof.’
120 Article 2(3) of the Berne Convention for the Protection of Literary and Artistic Works (Paris Act 1971) NO 615 (E), ‘…(3) Translations, adaptations, arrangements of music and other alterations of a literary or artistic work shall be protected as original works without prejudice to the copyright in the original work.’
In general, authors enjoyed the Convention’s right not only for their work in its original form but also for all transformations of it. Transformations could not be used in public without the author’s authority. To qualify for copyright protection, a derivative work must be different enough from the original to be regarded as a "new work" or must contain a substantial amount of new material. Making minor changes or additions of little substance to a preexisting work will not qualify the work as a new version for copyright purposes. The new material must be original and copyrightable in itself.

**Right of Recording Musical Works**

This provision includes a first paragraph expressly recognising the exclusive right to authorise the recording of such works by instruments capable of reproducing them mechanically and the public performance by means of such instruments of works thus recorded.

The author could demand that the user took out an additional licence to that required by Article 11.\(^{121}\) In other words, the author of a musical work enjoyed two rights of public performance, one for ‘live’ performance, and a quite separate one for performance by means of a recording. Since Stockholm therefore, Article 13 has just two paragraphs, one on compulsory licences,\(^{122}\) and the other on transitional provision.\(^{123}\)

This allows member countries to provide for compulsory licences to record musical works. It became clear, with the increasing public use of discs, and since public performance by this means was almost invariably covered by contract, that there was no longer any need for compulsion, and the scope of compulsory licensing could therefore be confined to the act of recording. Further, the licence to record may cover not only the music but also the accompanying words.

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\(^{121}\) Article 11 of the Berne Convention for the Protection of Literary and Artistic Works (Paris Act 1971) NO 615 (E)

\(^{122}\) Article 13, paragraph (1) of the Berne Convention for the Protection of Literary and Artistic Works (Paris Act 1971) NO 615 (E), ‘(1) Each country of the Union may impose for itself reservations and conditions on the exclusive right granted to the author of a musical work and to the author of any words, the recording of which together with the musical work has already been authorized by the latter, to authorize the sound recording of that musical work, together with such words, if any; but all such reservations and conditions shall apply only in the countries which have imposed them and shall not, in any circumstances, be prejudicial to the rights of these authors to obtain equitable remuneration which, in the absence of agreement, shall be fixed by competent authority.’

\(^{123}\) Article 13, paragraph (2) of the Berne Convention for the Protection of Literary and Artistic Works (Paris Act 1971) NO 615 (E), ‘(2) Recordings of musical works made in a country of the Union in accordance with Article 13(3) of the Conventions signed at Rome on June 2, 1928, and at Brussels on June 26, 1948, may be reproduced in that country without the permission of the author of the musical work until a date two years after that country becomes bound by this Act.’
In transitional provision, on the other hand, new recordings can be made without any payment, in countries in which the first recordings is made. The idea apparently was to prevent any attempts by the large record producers to monopolise recording work. The Convention protects the interests of record producers and gives them a reasonable time in which to produce records from their original recordings.

**Cinematographic Rights**

The author of a work has the exclusive right to authorise its cinematographic adaptation. However, the adaptation is of little account unless a finished film results. Indeed no one is going to acquire the right to adapt without acquiring also the right to record the adaptation in a form in which it can be seen, and to distribute the finished article to cinemas.

Paragraph 2 of Article 14 states that, without prejudice to the authorisation of the author of the cinematographic production, the adaptation into other artistic forms of a cinematographic production can be done subject to the authorisation of the authors of the original work.

The rights are not without limit, however, as they are specifically limited by "the private use exceptions" and several other specific limitations set forth in the Copyright Act in each country. The nature, scope and rationale of the exceptions for individual use are a key focus of this research. The exceptions for individual use will be studied in detail in Chapter Two. In Chapters Three, Four and Five, the application and nature of the exceptions for individual use will be comparatively analysed in the selected study of a developed country (Australia) and a developing country (Thailand).

Therefore, the rights bestowed by law on the owner of copyright in a protected work are frequently described as “exclusive rights” to authorise others to use the protected work. Most copyright laws define the acts in relation to a work, which cannot be performed by persons other than the copyright owner without the authorisation of the copyright owner.

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124 Article 14 of the of the Berne Convention for the Protection of Literary and Artistic Works (Paris Act 1971) NO 615 (E)
125 Article 14, paragraph (2) of the of the Berne Convention for the Protection of Literary and Artistic Works (Paris Act 1971) NO 615 (E)
2.2.4 Moral Rights

Although, the Statute of Anne had moved towards recognising and rewarding the rights of authors, based on high moral principles and glorifying the rights of individuals and their creative intellect, the Statute of Anne did not clearly provide any provisions on ‘moral rights’ for the right holder. On the contrary, moral rights were first recognised in France and Germany, before they were included in the Berne Convention for the Protection of Literary and Artistic Works in 1928. Those jurisdictions that include moral rights in their copyright statutes are called droit d'auteur states, which literally means "right of the author".

Moral rights are a specific type of intellectual property right which are personal to the author of a work. Moral rights exist in addition to economic rights such as copyright and attach to a work and remain with the author even after economic rights are transferred from the author to another party. Moral rights are different from economic rights such as copyright because they are designed to protect the author's reputation.

Article 6bis (1) of the Berne Convention requires member countries to grant authors:

- Attribution Right: the right to claim authorship of the work;
- Integrity Right: the right to object to any distortion, mutilation or other modification of, or other derogatory action in relation to, the work which be prejudicial to the author’s honour or reputation.  

Countries vary in how they interpret this requirement and include it in their domestic copyright law. There is no uniform agreement among countries as to the nature and extent of moral rights to be protected. However, it is generally recognised that moral rights can be divided into the following four categories:

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126 Article 6bis of the Berne Convention protects attribution and integrity, stating: Independently of the author's economic rights, and even after the transfer of the said rights, the author shall have the right to claim authorship of the work and to object to any distortion, mutilation or other modification of, or other derogatory action in relation to, the said work, which would be prejudicial to his honour or reputation.

127 In 1990, US Congress for the first time legislated limited moral rights of attribution and integrity to authors of narrowly defined works of visual arts. These rights, following the model suggested in the international Berne Convention for the Protection of Literary and Artistic Works, mirror rights granted to authors by most industrialised nations of the world. They guarantee to authors of so-called fine arts and exhibition photographs the right to claim or disclaim authorship in a work; limited rights to prevent distortion, mutilation, or modification of a work; and the right, under some circumstances, to prevent destruction of a work that is incorporated into a building. Moral rights are also protected indirectly by state tort, privacy and publicity laws; by the federal protection of the Lanham Act; and by the Copyright Act's protection of an author's exclusive rights in his or her derivative works, and limits on a mechanical licensee's rights to arrange an author's musical composition.

Part 1: Chapter 1

1) The right of publication (or first disclosure);\textsuperscript{129}

2) The right of withdrawal;\textsuperscript{130}

3) The right of attribution (or paternity);\textsuperscript{131} and

4) The right of integrity.\textsuperscript{132}

Notably, authors may agree not to exercise their moral rights, or to waive them, but they must do so in writing.\textsuperscript{133} Moral rights are merely granted to the author of an original work and only individuals are entitled to have moral rights. It is also possible for more than one author to possess moral rights in relation to the same work.\textsuperscript{134}

In recent years, the moral rights of Australian creators, for example, have been protected under the Copyright Act, following passage of the Copyright Amendment (Moral Rights) Act 2000.\textsuperscript{135} These changes are in line with the Berne Convention, the main international convention on copyright.

The moral rights amendments also introduced provisions relating to false attribution of authorship. The aim of the legislation is to make users aware of, and to respect, the moral rights of creators. Consequently, it is preferable for any infringement to be corrected rather than punished by way of damages.

\textbf{2.2.5 Copyright Ownership}

Ownership in Conventions and national laws are designed to delineate the identity of the owner of the work and to set forth a framework for the sharing of value that might arise from the

\textsuperscript{129} The right of publication gives the author the right to determine when a work should be revealed to the public.

\textsuperscript{130} After publication or disclosure of the work, the author can withdraw the work from publication or make modifications to the work.

\textsuperscript{131} The author is recognised as the creator of the work whenever the work is reproduced or published. This right is given even if the author has assigned ownership to it.

\textsuperscript{132} The right of integrity gives the author the right to object to any distortions, mutilations, modifications, or derogatory treatment of his or her work.

\textsuperscript{133} At the other extreme, in EU countries, moral rights apply to authors of all copyright-protected works, last in perpetuity, and may not be waived. A compromise position existed in Canada, where moral rights apply to authors of all works, last for the same duration of copyright (life-plus-50), and may be waived. France, by way of comparison, has one of the most protective moral rights regimes in the world. (The Canadian Heritage Information Network (CHIN), ‘Licensing Images: Checklist for Museums and Other Cultural Organizations’ 2002 <http://www.chin.gc.ca/English/Intellectual_Property/Licensing_Images/index.html> (10 May 2005).


\textsuperscript{135} In December 2000, the Federal Government passed the Copyright Amendment (Moral Rights) Act 2000 ("the Act") amending the Copyright Act 1968 (Cth) to include moral rights protection.
creation of a work. The general rule contained in the Berne Convention is that the creator of a work is the first owner of copyright. The exceptions to this rule are:

1. material created by employees in the course of their employment;
2. some commissioned artistic material; and
3. material made or first published by, or under the direction or control of, the Commonwealth or State Governments.  

Copyright provides ownership of intellectual property in which the author secures certain exclusive rights to an original work for a limited time. Since copyright automatically comes into being when an author fixes a work in a medium, the copyright is initially owned by that author. Copyright in a work protected under this title of initial ownership vests initially in the author or authors of the work. 

If the work is joint work, the authors are co-owners of the copyright in the work. Where the work is the product of collaboration copyright may be owned jointly. Joint copyright ownership arises when two or more authors ‘in which the contribution of each author is not separate from the contribution of the other author or the contributions of the other authors’. The rules about ownership of copyright as set out in the national copyright legislation can be varied by an agreement between the parties concerned.

Moreover, an employee can acquire ownership of a work. Section 35(4) of the Australian Copyright Act 1968 (Cth) represents a particular modification to the broad general principle contained in section 35(6) that the copyright in works created by employee authors in the course of their employment belongs to their employers.

In particular, as copyright is a form of intellectual property, like physical property, it can be bought and sold, inherited or otherwise transferred. A transfer of ownership may cover all or only some of the rights to which a copyright owner is entitled. Copyright ownership, or ownership of any of the exclusive rights, may be transferred to one or more persons.

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136 Article 5 of the Berne Convention for the Protection of Literary and Artistic Works (Paris Act 1971) NO 615 (E)
137 Section 201 of the United States Copyright Act
138 Section 10(1) of the Copyright Act 1968 (Cth)
139 Unlike Australia, the each author shares ownership of the entire work in the United States. Each can exercise any of the rights of the copyright owner and can transfer or license the work. The only duty joint owners owe to each other is to account for any profits associated with the work to the other joint owners (section 205 of the United States of America Copyright Act 1976).
140 Section 35(4) of the Copyright Act 1968 (Cth)
141 Section 35(6) of the Australian Copyright Act 1968 (Cth)
However, the transfer of rights must be in writing and must be signed by the transferor. A transfer may occur through an assignment, or exclusive licence.\textsuperscript{142} A transfer of copyright ownership may be limited in time or in place, but it must be the exclusive transfer of whatever right or rights are involved.\textsuperscript{143} Any of the exclusive rights in the work may be separately transferred and owned, and the owner of a particular right is considered the copyright owner with respect to that right.\textsuperscript{144}

Under an assignment, the right holder transfers the right to authorise or prohibit certain acts covered by one, several, or all rights under copyright. An assignment is a transfer of a property right; this means that if all the rights are assigned, the person to whom the rights have been assigned becomes the new owner of copyright.

In some countries, such as Mexico, however, the law does not recognise assignment of copyright. Nevertheless, very nearly the same practical effect as the effect of assignment can be achieved by licensing.\textsuperscript{145} Licensing means that the owners of the copyright remains the owners but authorises a third party to carry out certain acts covered by their economic rights subject to possible limitations, namely, a specific period of time and for a specific purpose.\textsuperscript{146} Licences may be exclusive, where the right holder agrees not to authorise any other party to carry out the licensed acts; or non-exclusive,\textsuperscript{147} where the copyright owner may authorise others to carry out the same acts.

2.2.6 Exceptions and Limitations to Copyright

Copyright is a compromise between the interests of right holders and users. It represents a balance between the interests at stake. The system does not depend on the right holder alone; if society grants exclusive rights, it must be to its advantage to do so, and it is through exceptions and limitations that this balance is achieved. By allowing users to use a protected work without requiring the right holder’s permission, the exceptions and limitations are a reminder that copyright

\begin{flushleft}
\textsuperscript{142} Article 3 of the WIPO Copyright Treaty: Application of Articles 2 to 6 of the Berne Convention applies after the first sale or other transfer of ownership of the original or a copy of copyright works.
\textsuperscript{143} Ibid.
\textsuperscript{144} ‘Understanding Copyright and Related Right’ no date \textless http://www.wipo.int/freepublications/en/intproperty/909/wipo_pub_909.pdf\textgreater (20 September 2006).
\textsuperscript{145} First or subsequent copyright owners can choose to license others to use their works whilst retaining ownership themselves under Section 201 of Copyright Law of the United States of America 1976.
\textsuperscript{146} ‘Understanding Copyright and Related Rights’ no date \textless http://www.wipo.int/freepublications/en/intproperty/909/wipo_pub_909.pdf\textgreater (20 September 2006).
\textsuperscript{147} Transfer of a right on a non-exclusive basis does not require a written agreement.
\end{flushleft}
is granted by society with a view to deriving cultural and scientific benefits from it. This is the philosophy underlying nearly all copyright laws, whether in common law or civil law countries. Exceptions to the rights of copyright owners have been in existence almost as long as the rights themselves. The English Statute of Anne (1710) contained no statutory exceptions but did require that deposit copies be lodged with seven important libraries as a condition of protection. The aim of this requirement was to establish a balance between copyright holders and users, that is, to protect the copyright of the right holders while, at the same time making copies of their works available to the public.

The exercise of the rights, particularly the reproduction right, in relation to copyright works is subject to a number of significant restrictions in favour of the public. Nevertheless, the provision of exceptions to and limitations on exercise of rights is often difficult to apply. This is because the limitation of reproduction right varies from country to country. The taking of selected copyright works without the author’s consent is generally allowed when this is done for educational and non-commercial purposes.

These variations of the copyright exceptions could cause conflicting views of the interpretation and application of such exceptions amongst countries. Concern about this possible conflict led to discussions in the early conferences on the Berne Convention when it was sought to reach agreement on a uniform set of rules to grant the provision of exceptions and limitations to the member states.\(^\text{148}\)

The exceptions and limitations include the exclusion from copyright protection of certain categories of works. For example, works are excluded from protection if they are not fixed in tangible form. In addition, generally, the texts of laws, court and administrative decisions are excluded from copyright protection. However, there are some countries such as the United Kingdom which grants copyright protection to court and administrative decisions if they are recorded either in writing or by other means such as by electronic means. As a result, those copyright materials will be protected as a literary work. Copyright protection would then last for life of the author plus 70 years.\(^\text{149}\)


Another category of exception and limitations concerns particular acts of exploitation, normally requiring the authorisation of the rights owner, which may, under circumstances specified in the law, be carried out without authorisation. There are two basic types of limitations in this category: (a) individual use, which carries no obligation to compensate the rights owner for the use of the work without authorisation; and (b) compulsory licences, which do require that compensation be paid to the rights owner for non-authorised exploitation.

**Individual Use**

The pre-modern copyright system had no exceptions for individual use or other public interest exceptions to the scope of publisher rights, nor did it seek to promote science, innovation, or freedom of expression, values which have given rise to individual use and other exceptions in the modern era. As previously indicated, the English Statute of Anne (1710) only required deposit copies lodged with seven important libraries as a condition of protection of the first codification of a balancing principle, that is, in return for copyright protection, copies of the work must be made available to the public.

The exceptions for individual use are optional for nations to introduce as they wish, and, in fact, have been widely adopted internationally. Importantly, exceptions for individual use do not originate in Berne at all, but appear as common practice across the laws of many nations, Berne member nations being free to develop exceptions as they see fit, as long as they fulfil the conditions of Article 9(2), the so-called three-step test. The Berne Convention contains a general rule, rather than an explicit limitation. Article 9(2) of the Berne Convention authorises national legislation to permit reproduction of protected works 'in certain special cases' which does not conflict with a normal exploitation of the work and does not unreasonably prejudice the legitimate interests of the author. The provision is cumulative, thus three conditions have to be fulfilled.

150 Examples of free use include:
- quoting 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.


152 Statute of Anne, 8 Anne, ch. 19 (1710)

153 Three-Step test is defined in Article 9(2) of the Berne Convention for the Protection of Literary and Artistic Works (Paris Act, 1971) NO 615 (E)

154 Article 9(2) of the Berne Convention for the Protection of Literary and Artistic Works (Paris Act, 1971) NO 615 (E)
Notably, the ease and quality of individual copying made possible by recent technology has led some countries to narrow the scope of such provisions, including through systems which allow certain copying, but incorporate a mechanism for payment to rights owners for the prejudice to their economic interests resulting from the copying. The development and nature of the individual use for exceptions as well as the impact of technological change on their application will be studied in detail in Chapter Two.

In addition to the specific categories of free use set out in national laws, the laws of some countries recognise the concept known as fair use (open end system exception) and fair dealing (closed system exception). This allows use of works without the authorisation of the rights owner, taking into account factors which determine whether the reproduction is done lawfully for non-profit purposes only.

**Fair Use**

Fair use\(^{155}\) is an “open” limitation and exception to copyright and is based on a statement, rather than on an exhaustive list of acts which do not constitute infringements. It involves a general “clause” outlining exceptions to copyright. Although this approach is less precise than an exhaustive list, it has the advantage of flexibility to determine whether or not such act is done in relation to any of the four factors namely, purpose and character of the use, the nature of the copyrighted work, the amount and substantiality of the portion used in comparison to the work as whole, and the effect on the potential marketplace.\(^{156}\)

**Fair Dealing**

Fair dealing\(^{157}\) is a closed system of exceptions to copyright which is based on an exhaustive list of lawful acts. This is the solution adopted by European countries, whether governed by civil law, like France,\(^ {158}\) or common law like England\(^ {159}\) and Australia.\(^ {160}\)

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\(^{155}\) The most significant example of an open system is that of fair use, favoured by the United States (Section 107 of US Copyright Act 1976), India (India Copyright Act, 1957), China (Section 22 of People's Republic of China Copyright Act 1990), Taiwan (Copyright Act of Taiwan), and Sweden (The Swedish Act on Copyright in Literary and Artistic Works).

\(^{156}\) Article 107 of the Copyright Act 1976 of the United States of America

\(^{157}\) The fair dealing doctrine is adopted in many countries such as Australia (Section 42 of the Australian Copyright Act 1968), Canada (Section 29 of the Canada Copyright Act 1985), Hong Kong (Section 38(3) of Hong Kong Ordinance) and European Countries such as section 12 of the Irish Copyright Act 1963, Article 68 of the Italian Copyright Law No. 633 of 22 April 1941, as amended up to 1981, section 42(8) of the Austrian Copyright Act, Netherlands- Article 16 of Dutch copyright law, the New Regulation of Copyright, of 23 September 1912, as amended up to 27 October 1972, etc.

\(^{158}\) Article L122-5 of the Intellectual Property Code (France)
The rights of copyright owners are not entirely unrestricted, but are subject to considerations of what constitutes fair and reasonable use of material for certain worthwhile purposes. Fair dealing exceptions are purpose-specific; and the concept of ‘fairness’ carries with it the notion that the dealing does not conflict either with a normal exploitation of the work or with the legitimate interest of the right owner, determined by reference to the established industries.\(^\text{161}\)

Each exception embodies certain values and reflects certain priorities about the scope of the copyright owner’s rights in relation to the general public interest. Moreover, fair dealing with a literary, musical or artistic work for the purpose of criticism or review or the reporting of current events is conditional upon sufficient acknowledgment of the identity of the author of the work.\(^\text{162}\)

The Differences of the Nature and Application between Fair Use and Fair Dealing

Unlike the related United States doctrine of fair use, fair dealing cannot apply to any act which does not fall within one of these categories. In practice, common law courts might rule that actions with a commercial character, which might be assumed to fall into one of these categories, were in fact infringements of copyright as fair dealing is not as flexible a concept as the concept of fair use.

The main difference between the US doctrine of ‘fair use’ and the Australian doctrine of ‘fair dealing’ is that the US exception is open ended and is not confined to a specified range of purposes. If it were adopted in Australia, a fair use limitation as found under the US Act\(^\text{163}\) could result in a wider range of purposes being regarded by the court as falling within fair dealing. Another important difference is that the fair use exception makes no reference to a general quantitative test similar to that provided for in section 40(5) of the Australian Copyright Act.\(^\text{164}\)

Fair use has been rejected on the ground that a copyright work was copied in its entirety.\(^\text{165}\) But the mere fact that the entire work has been copied is not a bar to the finding of a fair use.\(^\text{166}\) The US courts require consideration of the proportion copied in relation to the whole base on whether

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\(^\text{159}\) Article of the Copyright, Designs and Patent Act of 1988 of the United Kingdom
\(^\text{160}\) Article 40(2) of the Australian Copyright Act 1968 (Cth)
\(^\text{163}\) The US Copyright Act of 1976
\(^\text{164}\) Section 40(5) of the Copyright Act 1968 (Cth)
\(^\text{165}\) Supermarket of Homes Inc v San Fernando Valley Board of Realtors 786 F. 2D 1400 (1986)
\(^\text{166}\) Sony v Universal City Studios 464 U.S. 417 (1984)
the taking was substantial.\textsuperscript{167} On the other hand, in the Australian case of \textit{De Garis} it was held that to copy the whole of a work for reward as part of a commercial news-clipping or media-monitoring service was not, in the circumstances of that case, a `fair dealing'.\textsuperscript{168}

In determining whether marketability has been impaired, US courts have examined whether the unauthorised use supplanted or displaced the market for the copyrighted work.\textsuperscript{169} A presumption of harm to the potential market is created where the defendant copied the copyright material for commercial purposes.\textsuperscript{170} In photocopying cases, the substantial adverse impact on the potential market will in general be evidenced by losses in sales or journal subscriptions.\textsuperscript{171}

Under the Australian fair dealing provisions, assessment of what constitutes a `fair dealing' includes examining the effect of the dealing on the value of the copyright material.\textsuperscript{172} The value of the material might depend on the existence of statutory licences that allow for remunerated use. For example, assessment of what is a fair dealing for research or study under section 40 of the Australian Act must now take into account the existence and effect of the statutory licence for multiple copying by educational institutions.\textsuperscript{173}

Interpretation of the common factors used by the courts in the determination of what is regarded as a `fair use' or `fair dealing' appears to be based on similar principles. The overriding principle - that ultimately the question of fair dealing is `a matter of impression', which is to be determined by the court\textsuperscript{174} - would appear to apply equally to the `fair use' doctrine.

\textbf{Compulsory Licensing Systems}

Such limitations and exceptions permitted by the Berne Convention include the possibility for national legislation to substitute a system of compulsory licences with respect to the right of broadcasting and the right of cable distribution; this applies to both sound and television
\begin{footnotes}
\item[168] \textit{De Garis v Neville Jefress Pidler Pty Ltd} (1990) 18 IPR 292 at 302 (Fed C of A)
\item[170] \textit{Original Appalachian Artworks Inc v Topps Chewing Gum Inc} 642 F.Supp 1031 (1986)
\item[171] \textit{American Geophysical Union v Texaco Inc} (1994) 29 IPR 381 at 402 (US Court of Appeals, 2nd Cir)
\item[172] Section 40(2) of the Copyright Act 1968 (Cth)
\item[173] \textit{Haines v Copyright Agency Ltd} (1982) 42 ALR 549 at 555 (Fed C of A)
\item[174] \textit{Hubbard v Vosper} [1972] 2 QB 84 at 94
\end{footnotes}
broadcasts intended to be received directly by the general public.\textsuperscript{175} Moreover, the Convention provides compulsory licences for the translation and reproduction for developing countries so that these two licences can be invoked with respect to the intellectual and educational development of third world countries.

Under the Berne Convention,\textsuperscript{176} apply for a compulsory licence, the right holder, for example, must negotiate with the user for the duration of his/her use for broadcasting and cable distribution. However, if the duration of this use is not addressed by the parties concerned or they do not agree about that duration, the terms of use must be fixed for them by government authority, taking into consideration that the terms may not prejudice the author’s moral rights, and fair remuneration must be paid to the right holder.\textsuperscript{177}

Compulsory licences or non-voluntary licences allow use of works in certain circumstances without the authorisation of the owner of rights, but require that compensation be paid in respect of the use. Such licences are called non-voluntary because they are allowed in the law, and do not result from the exercise of the exclusive right of the copyright owner to authorise particular acts. This means the right owner loses control of his or her work; he or she cannot prevent its use. Compulsory licences were usually created in circumstances where a new technology for the dissemination of works to the public had emerged, and where the national legislator feared that rights owners would prevent the development of the new technology by refusing to authorise use of works.

In the case of a compulsory licence, the right owner is entitled to negotiate with the user to fix the terms of use, including the amount of equitable remuneration.\textsuperscript{178} If the parties do not agree, the amount of remuneration is fixed by government authority, often a special government-appointed body or tribunal.\textsuperscript{179} Compulsory licensing systems can be stipulated in national legislation whenever this is permitted by the international conventions. Collecting Society\textsuperscript{180} is an organisation established to collect and distribute this remuneration. Collective Management Organizations will be critical intermediaries in this process. Their expertise and

\begin{flushleft}
\textsuperscript{175} Article 11bis of the Berne Convention for the Protection of Literary and Artistic Works (Paris Act, 1971) NO 615 (E)
\textsuperscript{176} The Berne Convention for the Protection of Literary and Artistic Works (Paris Act, 1971) NO 615 (E)
\textsuperscript{179} Ibid.
\textsuperscript{180} Collecting Society is the exercise of copyright and related rights by organisations and societies representing the interests of the owners of such rights. These organizations or societies are usually referred to in national copyright laws as licensing bodies.
\end{flushleft}
knowledge of copyright law and management will be essential to make copyright work in the
digital age. To play that role fully and efficiently, these organisations must acquire the rights
they need to license digital uses of protected material and build information systems to deal
with ever more complex rights management and licensing tasks.

3. The 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 society’s
competing interest in the free flow of information and the dissemination of knowledge, on the
other hand. But the copyright balance has never been under as much strain as it is today. The
customary lines between creators and users of copyrighted material and between private and
public acts of use are gradually fading away.\footnote{Litman J, Digital Copyright: Protecting Intellectual Property on the Internet, Prometheus Books, New York, 2001, p 47.} Moreover, the use of digital technology is indeed
modifying the production, distribution, and consumption patterns of copyright works. The advent
of the photocopy machine began the modern age in copyright, meaning copyright works were
easy and fast to reproduce. In addition, people now have access to a wide range of technology to
do home sound and video recording. Perhaps, the greatest threat of all to copyright, however, is
the computer, the ultimate copying machine.

These developments emphasise the importance of the enforcement of intellectual property
rights in general and of copyright in particular. The new inventions facilitate the copying or
distribution of copyright material as mentioned above call into question the adequacy of the
copyright regime.\footnote{Ellison M, ‘Copyright: From ‘The Da Vinci Code’ to YouTube’ February 2007
<http://www.ag.gov.au/agd/WWW/MinisterRuddockHome.nsf/Page/Speeches_2007_Speeches_16_February_2007_-_Speech_-_Opening_address_at_the_Australian_Centre_for_Intellectual_Property_in_Agriculture&apos> (30 November 2007).} While, copyright owners and distributors might respond defensively,
being unconfident they will lose revenue or have their work unfairly exploited by technology,
copyright users have different expectations. YouTube web site, for example, is enjoyed by
millions of users but is also of concern to copyright owners whose copyright materials are posted
without their permission. Consequently, authors, rights holders and politicians are called upon
to respond to this technological development. On the one hand, legislation must provide
sufficient legal certainty to promote creative activities and investments in this field. On the
other hand, a strengthening of copyright law in the digital context 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 right holder and user by encouraging user access to knowledge. At the same time, however, the law must prevent the wide dissemination of copyrighted materials with sophisticated technology that may violate the rights of the owner. The author views 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.

More importantly, copyright law should not only focus on the interests of creators alone; it must also embrace the interests of all participants, of authors, producers and even of end-users and arrive at a reasonable balance between them. In particular, the information contained in a work is not protected as such, but the configuration in which the information is transported to the user. In this respect as well, copyright law does in fact appear to be the right instrument to provide adequate provisions in the digital environment.

Copyright has evolved to deal with new technologies in the past. Photography, sound recordings, and broadcasting have all posed some challenge for copyright law and theory, for both technological reasons and for reasons having to do with evolving notions about what “authorship” is.\textsuperscript{183} Even though copyright's adaptation to these technologies sometimes required adoption of some “sui generis” (of its own kind) rules, previous new technologies have not threatened the viability of the core concepts of copyright law.\textsuperscript{184} Those who believe that copyright law will evolve without serious difficulty in the new digital environment look to this historical experience as a source of reassurance about copyright's potential to evolve to deal with digital networked environments.

More importantly, 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 contracts and of technology in applying copyright. Most significantly, the exceptions that apply in the analogue environment now apply, where practical, to digital uses.


\textsuperscript{184} Ibid.
Keeping a balance between copyright and access to information is, and will remain, a major challenge to the information society. New technology does not change the importance of that balance, nor is it a reason for winding back the scope of the exception for private use.

The digital environment requires effective approaches to the question what constitutes the public interest objectives of both international and national copyright regimes, particularly the exceptions and limitations to copyright. However, it is not just preserving the existing provisions of limitations and exception that is important, but also devising limitations and exceptions that are consistent with greater expectations of access and diffusion given new technological developments. Whereas copyright has traditionally been concerned to control copying of protected works, the focus in respect of material distributed electronically has shifted to controlling access. This shift specifically focuses on copying to access which is an inappropriate response to the changed information paradigm, and the very different supply models which digital technology has given rise to. Consequently, striking an appropriate balance between the right holders and users in the digital age must be considered than in the age of analogue as so much information and media can be translated into an electronic format that can be distributed cheaply over the Internet which can supposedly undercuts the profits the right holders can make from their labour.

Policymakers must, therefore, determine how to balance the interests associated with the new ways to protect creative expression such as amending copyright regimes, and providing the Technological Protect Measures, and contracts, and new ways users are able to access and use creative works. Countries should also have adequate legal protection and effective legal remedies against the circumvention of technological measures used by copyright owners to protect their works from infringing uses. Additionally, the purpose of effective implementation in the global context is a pivotal issue in current debates over the integrity and efficacy of the international copyright system to promote general welfare in developing countries, and as a general matter for creators and users worldwide.

4. Conclusion

The historical and nature of copyright law can be traced back to the development of the printing press. As a legal concept, its origins in Britain were from a reaction to printers' monopolies at the beginning of the eighteenth century. The Statute of Anne was the first real
copyright act passed into force in order to give the author rights for a fixed period, after which the copyright expired. Copyright has grown from a legal concept regulating copying rights in the publishing of books to one with a significant effect on nearly every modern industry, covering such items as sound recordings, films, photographs, software, and architectural works.

Copyright is not a tangible thing. It is made up of a bundle of exclusive economic rights to do certain acts with an original work or other copyright subject-matter. Importantly, the copyright law allow a user to limited copying or distribution of published works without the author's permission in some cases for the non-commercial or individual uses. In the digital age, reproduction of copyright works can be made so cheaply which can supposedly undercut the market value of the right holder. The copyright regime must be amended and developed to effectively keep up with the technological changes so that the copyright works can be thoroughly protected from the copyright infringement.

In essence, it is not necessary to develop a completely new model in order to categorise the products in a digital context. Copyright law will remain an essential instrument of cultural and economic control in the digital world. However, to ensure cooperation among nations, authors and users should preserve the nature and objective of copyright law by balancing their benefits fairly. In addition, legal uncertainties, and any inappropriate implications of the Copyright Act should also be considered as they are currently applied in a digital context. Also, it is essential to develop and put forward responses which meet the needs of both developed and developing countries. According to the statement of Minter Ellison in the Opening address at the Australian Centre for Intellectual Property in Agriculture’s 12th Annual Copyright Conference, “...One principle that guided us is a kind of social contract point of view: the concept that strong copyright protection not only protects the creator of the work, but benefits society as a whole. This is because copyright creates incentives to create new works. …”

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In the next chapter, the development and nature of the exceptions for individual use in copyright conventions will be analysed to provide insights into the exceptions. In addition, the interpretation and role of the three-step test, an exception for private use, in international copyright treaties will be discussed. The chapter will also consider the impact of technological change on the nature and scope of the three-step test. Finally, the chapter ends by considering whether the scope of the three-step test can accommodate the needs of the new environment.
CHAPTER TWO

AN ANALYSIS OF THE EXCEPTIONS FOR INDIVIDUAL USE IN COPYRIGHT CONVENTIONS

1. Introduction

This chapter describes the development of the exceptions for individual use which derive from the Berne Convention, the oldest and most significant international copyright convention. Then, the chapter examines the roles and interpretations of the three-step test in the Berne Convention, in Article 13 of the TRIPS Agreement, Article 10 of the WIPO Copyright Treaty (WCT) Treaties, and Article 16 of the WIPO Performances and Phonograms Treaty (WPPT). Also, special treatment for developing countries is considered. Furthermore, in this Chapter, the impact of the digital environment on the nature of the exceptions for individual use at an international level is discussed and solutions suggested based on the literature and on the current research. Finally, the chapter ends by investigating whether rethinking of the three-step test is essential to accommodate the digital environment.

2. International Copyright Protection Framework

There is no such thing as one international copyright system. Rather, there is an international system that sets norms for protection to be implemented in national law. Several international treaties link together the major trading nations which establish under their own laws not only the minimum standards for protecting each others’ copyright works but also the basis upon which protection is to be extended.

International copyright protection has always balanced the ownership interests of creators and rights holders with the public interest, which is served by ready access to copyright works for various purposes such as private study, education, teaching and research. Thus, international

188 The Berne Convention for the Protection of Literary and Artistic Works (Paris Act, 1971) NO 615 (E)
189 Article 13 of the Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS), Annex 1C, 1994
190 Article 10 of the WIPO Copyright Treaty (WCT), December 20 1996 No 33
191 Article 16 of the WIPO Performances and Phonograms Treaty (WPPT), December 20, 1996, No 34
Part 1: Chapter 2

copyright treaties are the foundation of the various transactions between creators and investors. Treaties are therefore the legal mechanism which ensures that the value of creative effort or investment is not undermined, nor devalued by others exploiting that effort or investment.\(^{193}\)

Most countries in the world are a party to one or more of the international copyright treaties, namely the Berne Convention,\(^{194}\) the TRIPS Agreement,\(^{195}\) the WIPO Copyright Treaty.\(^{196}\) The copyright international treaties require their signatories to recognise the copyright of works of authors from other signatory countries in the same way it recognises the copyright of its own nationals. These treaties set out minimum levels of copyright. Under the treaties, exceptions to copyright owners’ exclusive rights are permitted. Each exception embodies certain values and reflects certain priorities about the scope of the copyright owner’s rights in relation to the general public interest. The treaties allow member countries to sue for infringement if the reproduction of copyright works is not done with fairness. They also provide for seizure of infringing copies. This encourages the signatory members to carefully create their own copyright legislation to meet the purpose of the international conventions and treaties. As a result, the national copyright legislation can be an essential tool to balance the interest of the right holder and the user.

The most useful reference for determining the appropriate “balance” between the rights of owners and users is the three-step test\(^{198}\) in the international treaties namely the Berne Convention to which Australia and Thailand are parties. The three-step test envisages that exceptions and limitations will change over time; the “balance” intended by a legislature at one point in time may not be appropriate later as markets and types of use evolve. For this reason, it is necessary to review the application of the three-step test whether it is appropriate to be based on in the digital environment so that exceptions and limitations which apply in an environment of change can be reviewed periodically to check that they still meet the three-step test.


\(^{195}\) The Berne Convention for the Protection of Literary and Artistic Works (Paris Act, 1971) NO 615 (E)

\(^{196}\) The Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS), Annex 1C, 1994

\(^{197}\) The WIPO Copyright Treaty (WCT), December 20 1996 No. 33

\(^{198}\) Article 9(2) of the Berne Convention for the Protection of Literary and Artistic Works (Paris Act, 1971) NO 615 (E)
3. **The Provision of the Exceptions for Individual Use in the Berne Convention**

The need for a uniform regime led to the formulation and adoption on September 9, 1886, of the Berne Convention for the Protection of Literary and Artistic Works (the Berne Convention). The Berne Convention has been revised several times in order to improve the international system of protection which the Convention provides. Additionally, changes have been effected, firstly to cope with the challenges of accelerating the development of technologies in the field of utilisation of authors’ works and secondly to recognise new rights and to allow for appropriate revisions of established ones.

The Berne Convention, like other legal instruments, provides a minimum standard of copyright protection, at the same time, allowing appropriate exceptions to copyright. Countries that adhere to Berne agree to include this minimum standard in their own domestic copyright statutes, and often go beyond the minimum standard. By including this minimum standard, copyright owners are entitled to this protection in all member countries, according to the copyright laws in those countries. This so called international protection is automatic.

Prior to the Stockholm and Paris Acts, the Berne Convention contained no general provision recognising reproduction rights. Despite its importance in term of copyright, the exception for reproduction rights did not appear in the Convention until as late as Stockholm (1967). This right was recognised, in principle, by all member countries. Basically, reproduction rights were universally recognised under national legislation, but the exceptions to these rights varied considerably from country to country.

With the solution to the various interpretations of reproduction rights or free uses, the Berne Convention has the merit of uniformity as a general rule and the advantage of permitting a great deal of flexibility both for variations from country to country and for the future when new technology may pose new problems. Notably, the Convention ensures its member states that this provision does not encroach upon exceptions that were already contained in national legislation while the provision should be wide enough to cover all reasonable exceptions, but

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200 Ibid.
201 The Berne Convention for the Protection of Literary and Artistic Works (Paris Act, 1971) NO 615 (E)
not so wide as to make the right illusory. In fact, the reproduction right is in the scope of Article 9(2) of the Berne Convention. Article 9(2)\textsuperscript{202} describes the so-called Three-step test as a general exception concerning reproduction rights. The three-step test in the Berne Convention is a fundamental yardstick for copyright exceptions worldwide.

Article 9(2) gives to member countries the power to cut down this exclusive right of reproduction and permit works to be reproduced for ‘the user’s personal and private use’. By its very nature, ‘individual use’ would appear to be confined to the making of single copies, and the basis for it, a kind of *de minimis* argument, coupled with an acknowledgement that author’s rights should not be infringed by the purely private purpose.

Article 9(2) of the Berne Convention says that:

> 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 with a normal exploitation of the work and does not unreasonably prejudice the legitimate interests of the author.\textsuperscript{203}

At present, the provision authorises national legislation to permit the reproduction of protected works only (a) ‘in certain special cases’ provided the other two conditions are also fulfilled: (b) the ‘reproduction does not conflict with a normal exploitation of the work’; and (c) such reproduction ‘does not unreasonably prejudice the legitimate interests of the author’.\textsuperscript{204}

It should be noted that the three steps of the test are cumulative, that is, all of them apply jointly to exceptions so that if an exception fails to comply with any one of the steps, it does not satisfy the test. Its design is pyramidal. Any proposal of exceptions to copyright must pass the ‘in certain special cases’ test, after which the ‘does not conflict with a normal exploitation of the work’ test is analysed. The ‘does not unreasonably prejudice the legitimate interests of the author’ test will be the last test before the exception is deemed to comply with

\textsuperscript{202} Other provisions of Berne, such as those found in Article 2, 10, 11 and 13 grant limitations or exceptions without any three-step test.

\textsuperscript{203} Article 9(2) of the Berne Convention for the Protection of Literary and Artistic Works (Paris Act, 1971) NO 615 (E)

\textsuperscript{204} Ibid.
TRIPS.\textsuperscript{205} Thus, the scope of the first step is broader than that of the second step and the scope of the second step is broader than the scope of the last step.\textsuperscript{206}

In addition, the three-step test applies only in respect of a positively established specific right, such as the reproduction or performance right. According to Paul Goldstein gave a strong expression of the nature of the three-step test in “International Copyright: Practice, Law and Practice”,

...it is not a standalone doctrine. It does not apply in any general way that speaks to the overall effectiveness of a copyright’s laws. The test as now found in Article 13 of TRIPS applies the original exception found in Article 9(2) of the Berne Convention to all exclusive rights in literature and artistic works, not only the reproduction right, which was the case in Berne.\textsuperscript{207}

Pointedly, the terms “special”, “normal”, and “unreasonably” are all open to interpretation.\textsuperscript{208} Generally, the definition of the three-step test constitutes one of the major outstanding issues, especially in relation to the new environment, because of the possible ambiguity of the interpretation and the difficulty in determining the same standard of this provision’s meaning. To gain a better understanding about this, reviewing the interpretations of the three-step test together with considering the ideas suggested by the TRIPS Agreement Panel\textsuperscript{209} and by Sam Ricketson,\textsuperscript{210} an Australian Lawyer who is an expert in the copyright area, can be interestingly helpful.

3.1 Step 1: Confinement to Special Cases

‘In certain special cases’ must be interpreted within a narrow scope. The 'first step' is interpreted as requiring a clear-cut definition of the exception, a narrow scope, and an exceptional objective.\textsuperscript{211} The Berne Convention leaves to the national legislation the task of defining these special circumstances and objectives for private purposes of teaching or

\textsuperscript{205} Le N, ‘Rethinking the three-step test’ in IP Theses IP Community NO.8: For Ex-Participant Alumni of the Industrial Property Training Program in Japan, Asia-Pacific Industrial Property Center (APIC) & Japan Institute of Invention and Innovation (JIII), Tokyo, 2005, pp 91-108.
\textsuperscript{206} Ibid.
\textsuperscript{209} A panel appointed under the TRIPS dispute settlement procedures has reached conclusions on a dispute between the European Union (EU) and the United States over an exception to copyright in US law, which the EU has argued to be inconsistent with the TRIPS obligations, including the three-step test in Article 13 of TRIPS.
\textsuperscript{210} Sam Ricketson is an expert in the Copyright Area.
research. This indicates that general exceptions are not allowed. The WTO panel stated that “certain special cases” meant that:

…an exception or limitation in national law must be clearly defined. However, there is no need to identify explicitly each and every possible situation to which the exception could apply, provided that the scope of the exception is known and particularised. This guarantees a sufficient degree of legal certainty.

…an exception or limitation must be limited in its field of application or exceptional in its scope. In other words, an exception or limitation should be narrow in a quantitative as well as in a qualitative sense. …

This does not mean that the exception has to follow a legitimate public policy objective. The test is to determine the character of the use and the portion of such uses. When examining whether the scope of an exception is narrow, both the actual and potential impact has to be taken into account.

Likewise, the TRIPS Panel believes that the first step means that exceptions must be clearly defined, that is, of ‘certain’ scope or meaning, and of narrow scope and reach, that is, exceptional or ‘special’ in quality or degree. Similarly, in essence, Ricketson believes that the first step meant that exceptions should be for a quite specific purpose. In other words, they should only be made in ‘certain’ specific cases, and not in broad cases or in all cases, and that the purpose for which an exception was made must be ‘special’ in the sense of being justified by a clear reason of public policy or other exceptional circumstances. Ricketson cited the needs of education or research as being one example of a public policy reason which might justify exceptions.

In short, the views of the TRIPS Panel and Ricketson on the term “special” are alike, and both conclude that there must be something exceptional or out of ordinary in the purpose for which an exception is made. This implies that the scope should be narrower. Additionally, the TRIPS Panel

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214 Ibid.
215 A panel appointed under the TRIPS dispute settlement procedures has reached conclusions on a dispute between the European Union (EU) and the United States over an exception to copyright in US law, which the EU has argued to be inconsistent with the TRIPS obligations, including the three-step test in Article 13 of TRIPS.
218 Ibid.
declined to comment on whether the public policy reason for which an exception is made has to be ‘legitimate’ in order to be considered ‘special’.\(^{219}\) The Panel felt that ‘special’ does not require passing judgement on the legitimacy of the reason for an exception in the national law, but rather that it is the narrowness of scope implied by the term ‘special’ which is relevant.

### 3.2 Step 2: No Conflict with the Normal Exploitation of the Work

Article 9(2) provides that there be ‘no conflict with the normal exploitation of the work’ which means that the use must not be of considerable or practical importance or compete economically with the author's interests.\(^ {220}\) The word “normal exploitation” limits the use of copyright works properly, and the use must be for non-profit purposes. The second condition covers the unauthorised making of reproductions, in spheres which are usually within the control of the author. The WTO panel stated that:

> We believe that an exception or limitation to an exclusive right in domestic legislation rises to the level of a conflict with a normal exploitation of the work, if uses that in principle are covered by that right but exempted under the exception or limitation, enter into economic competition with the ways that right holders normally extract economic value from that right to the work and thereby deprive them of significant or tangible commercial gains.\(^ {221}\)

However, the word ‘normal exploitation’ gives no guidance as to the kinds of non-economic normative considerations that may be relevant here, and the extent to which they may limit uses that would otherwise be within the scope of exploitation by the copyright owner. Striking this balance is left as a matter for national legislation. In determining what should be indicated as the “normal exploitation” of the work, it is necessary not only to consider the existence of the work but also to consider the potential uses of a work.\(^ {222}\) Additionally, neither existing nor future exceptions will be in conflict with a normal exploitation of a work because they involve uses that would otherwise be of a commercial benefit to the author. The test is determined whether such uses enter into or will enter into economic competition with the author.\(^ {223}\)


\(^{223}\) Ibid.
The overall conclusion of the TRIPS Panel on the second step resembles the statement of the WTO panel. Also, they consider that ‘normal exploitation’ of a work has to be judged for each right granted under copyright individually, rather than in the context of all of the rights conferred by copyright in a work.\(^{224}\) Thus, in the particular case at issue, the Panel does not believe that the fact that authors can obtain income from giving permission for their works to be included in a broadcast justifies or counterbalances the fact that they are deprived of further income by an exception which prevents them from exercising their public performance rights when the same broadcast is caused to be heard in public.\(^{225}\) The TRIPS Panel felt that it is the potential damage caused by an exception which is relevant to decisions regarding conflicts with normal exploitation, rather than the actual damage occurring at a particular time.\(^{226}\)

Regarding this issue, Ricketson feels that common sense dictates that the second step means there should not be conflict between an exception and the ways in which authors might reasonably be expected to exploit their work in the normal course of events.\(^{227}\) He goes on to indicate that the corollary to this is that there are cases where authors would not usually expect to exploit their work (and therefore where exceptions would be permissible), such as, for example, where a work is used for the purpose of judicial proceedings.

### 3.3 Step 3: No Unreasonable Prejudice to the Legitimate Interests of the Copyright Holder

The provision that use should not unreasonably prejudice the legitimate interests of the author focuses on both the moral and economic rights of the author. Relevant factors of high impact on the interests of the right holder include the context in which the content appears; the extent to which it is exposed to piracy threats; and the intensity of its use as a consequence of the exception.\(^{228}\) This condition covers restrictions, which would prevent the author from participating in the economic benefits flowing from the use of the work. This is most clearly set out in the Report of the Stockholm Conference:


\(^{227}\) Ibid.

If it consists of producing a very large number of copies, it may not be permitted, as it conflicts with a normal exploitation of the work. If it implies a rather large number of copies for use in industrial undertakings, it may not conflict with a normal exploitation of the work, but it may not unreasonably prejudice the legitimate interests of the author, providing that, according to national legislation, an equitable remuneration is paid. If a small number of copies is made, photocopying may be permitted without payment, particularly for individual or scientific use.  

Perhaps the most important point to note here is that it is not a question of prejudice to the legitimate interests of the author since all copying is, to some extent, prejudicial to the interests of the copyright owner. Therefore, the question is whether the prejudice is reasonable or unreasonable. The answer to the problem has to be given in two stages. In the first place, it should be considered by the national legislation which formulates the exception permitted by the Convention, and in the second place, by the national courts which interpret that formula in the national law. Only if the national law chose to disregard one or two of the conditions laid down by Article 9(2), would the member country be in breach of the Convention.

Looking lastly at the third step of the test, both Ricketson and the TRIPS Panel consider that this hinges on the term “unreasonable”. The overall conclusion of the TRIPS Panel about the third step of the test is that prejudice to the legitimate interests of right holders reaches an unreasonable level if an exception causes, or has the potential to cause, an unreasonable loss of income to the right holders. Again, this interpretation may not assist us greatly because it itself uses the term “unreasonable” to refer to any use of copyright material which threatens the interest of the right holder. In practical terms, however, what the Panel was driving at is that it is the scale of losses to right owners which is the determining factor in judging whether an exception is unreasonable, and again what they emphasised is potential losses, rather than actual ones, that is, losses which in their view are relevant.

On the subject of the third step, Ricketson also discusses the inclusion of the word “unreasonable” in the test since, in theory at least, any exceptions cause some prejudice to the interests of authors. As a result, unless the term “prejudice” is qualified in some way, it will be

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230 Ibid.
doubtful whether any exceptions at all would be permissible.\textsuperscript{232} The term “Legitimate interests of the author” includes both economic and personal (moral right) interests of the author and successors in title. This involves some consideration of the normative aspects of these claims.\textsuperscript{233} Ricketson noted that “the prejudice to both economic and personal interests by the proposed usage may be substantial or material, but it must not be “unreasonable” in the sense of being disproportionate. This implies that “unreasonable prejudice” may be avoided by the imposition of conditions on the usage, including a requirement to pay remuneration.”

In conclusion, it may be concluded that in cases where there would be serious losses of profit for the copyright owner, the law should provide authors with some compensation. It is, therefore, clear that exceptions under Article 9(2) may take the form of either free uses or compulsory licences, depending essentially on the number or reproductions made. Nonetheless, quantum issues may need to be approached with some care, depending on the kinds of reproductions that are being made, as the number of reproductions taken individually may look quite different when considered cumulatively. While Article 9(2) is far from providing a ‘bright line’ rule that can be readily applied, the individual and cumulative effect of each of the three steps, in particular the third, is to highlight the need for care, moderation, and constraint in constructing any compulsory licensing scheme under national law.\textsuperscript{234}

To summarise, taking advantage of the provision of copyright exceptions allowed under the Berne convention, three-step test, national copyright laws have long permitted wide scale exceptions such as use for private, non-profit, or educational purposes. Despite the exceptions permitted, in fact, there is ambiguity in the terms used in the three-step test. This accordingly brings different interpretations which ultimately result in the problems in applying the provision. Notably, even in the context of the Berne Convention, the language is not entirely clear as to the nature and scope of exceptions allowed. Because of the uncertainty, most countries exempt private copying from the scope of the exclusive right of reproduction, for reasons of impracticality of enforcement as well as for protection of privacy. Some of these countries, however, provide for systems of compensation for right holders through levies on blank audio and audiovisual recording media or even, in some cases, on recording apparatus. Also, many countries even exempt photocopying or reprography and use by public libraries under this provision.

\textsuperscript{234} Ibid.
4. The Interpretation and Role of the Three-Step Test in Other International Copyright Treaties and Agreements

The three-step test\textsuperscript{235} of the Berne Convention is repeated using almost precisely the same terminology in Article 13 of the TRIPS Agreement,\textsuperscript{236} and Article 10 of the WIPO Copyright Treaty (WCT).\textsuperscript{237} The Trade-Related Aspects of Intellectual Property (TRIPS) Agreement and the WCT make it clear that the three-step test shall not only apply to exceptions to the reproduction rights (as is stipulated in the Berne Convention) but shall apply to exceptions and limitations to any of the rights conferred under the said international instruments, including the Berne Convention.

4.1 The Three Step-Test within the Meaning of Article 13 of the Trade Related Aspects of International Property (TRIPS)

The Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) is an international treaty by the World Trade Organization (WTO) which sets down minimum standards for most forms of intellectual property regulation within all member countries of the WTO. Specifically, TRIPS deals with copyright and related rights, such as rights of performers, producers of sound recordings and broadcasting organisation.

The language of the Berne Convention exists in the World Trade Organisation agreement on Trade-Related Aspects of Intellectual Property (TRIPS). Specifically Article 9(2) of Berne is repeated in Article 13 of TRIPS, with minor differences. In the context of copyright, TRIPS does not confine this Berne Exception only to the right of reproduction but extends it to all exclusive rights conferred by copyright.

The TRIPS Agreement is both a concise and efficiently drafted instrument, in that it incorporates a wide number of existing international obligations and treats these as a platform for its own additional requirements.

\textsuperscript{235} Three-Step test is defined in Article 9(2) of the Berne Convention for the Protection of Literary and Artistic Works (Paris Act, 1971) NO 615 (E)

\textsuperscript{236} Article 13 of the Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS), Annex 1C, 1994

\textsuperscript{237} Article 10 of the WIPO Copyright Treaty (WCT), December 20 1996 No. 33
Exceptions and limitations to copyright in Article 13 of the TRIPS Agreement:

Members shall confine limitations and exceptions to exclusive rights to certain special cases which do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the rights holder.\(^{238}\)

As regards related rights, the TRIPS Agreement permits Member States to provide for conditions, limitations, exceptions, and reservations to the extent permitted by the Rome Convention but qualifies this by applying the three-step test of the Berne Convention also to limitations on related rights.\(^{239}\)

However, an interesting difference between the Article 13 of TRIPS and the Article 9(2) of the Berne Convention is the word ‘right holder’ and ‘author’. While the former uses the first word, the latter uses only the second one. In some cases, the ‘author’ and the ‘right holder’ can be the same person but, in many cases, this is not be so. Then, “…this may therefore lead to a significant difference in the application of the third step”.\(^{240}\) This is because the legitimate interests of the ‘author’ in Article 9(2) of the Berne Convention include both non-monetary (moral) interests and monetary interests while those of the ‘right holder’ who is not the ‘author’ in Article 13 of TRIPS include only the monetary interests. In other words, it can be implied that exception which is allowable under Article 13 of the TRIPS can contravene Article 9(2) of the Berne Convention as it may be an unreasonable prejudice to the author’s legitimate interests (moral interests).\(^{241}\)

In the context of Article 13 of the TRIPS Agreement, the WTO Panel took the view that the first condition should be interpreted without reference to the policy underlying it:

In our view, the first condition of Article 13 requires that a limitation or exception in national legislation should be clearly defined and should be narrow in its scope and reach. On the other hand, a limitation or exception may be compatible with the first condition even if it pursues a special purpose whose underlying legitimacy in a normative sense cannot be discerned. The wording of Article 13’s first condition does not imply passing a judgment on the exceptions in dispute. However, public policy exceptions stated by law makers when enacting a limitation or exception

\(^{238}\) Article 13 of the Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS), Annex 1C, 1994
\(^{241}\) Ibid.
Part 1: Chapter 2

may be useful from a factual perspective for making inferences about the scope of a limitation or exception or the clarity of its definition.\(^{242}\)

In respect of the right provided for, the TRIPS Agreement contains further provisions that deal specifically with its relationship to the Berne Convention and these, in turn, modify the application of the “balanced” approach. This means Article 13 does not create new exceptions. Instead, it allows countries to create new compulsory licences to maintain a balance between right holder and user in Member States. The reason is simply to explain that the wording of Article 13 draws heavily from Article 9 (2) of the Berne Convention, which applies only to the right of reproduction, however. This provision has been interpreted as allowing compulsory licensing of the right of reproduction.

Although Article 13 adopts virtually the same language as Article 9(2) of Berne in relation to the three-step test, its opening words are somewhat different. While Article 9(2) says that it is a matter for legislation in Union countries “to permit the reproduction” of works subject to satisfying the three-step test, Article 13 is more directive in tone, saying that members “shall confine limitations or exceptions to exclusive rights” in accordance with the Three-step test.\(^{243}\) Thus, Article 9(2) does not use the words “exceptions” or “limitations”, nor do these terms appear elsewhere in Berne. What meanings, therefore, do these terms bear, as used in Article 13?\(^{244}\) Their ordinary dictionary meanings indicate that they are interchangeable; in other words, an “exception” to a rule is probably no different from a “limitation” on that rule.\(^{245}\) In either instance, the result will be that the rule does not apply to the particular situation or instance. There appears to be no consistency in the way in which these terms are used or interpreted in national laws.\(^{246}\) It is also reasonable to assume that Article 9(2) is concerned with exceptions and

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\(^{244}\) Ricketson S, The Three-Step Test, Deemed Quantities, Libraries and Closed Exceptions, Centre for Copyright Studies, Strawberry Hills, NSW, 2002, p 44.

\(^{245}\) Ibid.

limitations to the reproduction right, although it does not use these terms.\textsuperscript{247} In both instances, therefore, the capacity to make exceptions or limitations is subject to the Three-step test.

\textbf{4.2 Incorporation of the Three-Step Test in the WIPO Copyright Treaties of 1996}

The World Intellectual Property Organisation treaties, finalised in Geneva in December 1996, set the framework for world digital copyright regimes. The WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT), both of which recently came into force following the 30\textsuperscript{th} ratification of each treaty, provide for a Berne-consistent update of the international copyright regime.\textsuperscript{248}

WCT deals with protection for authors of literary and artistic works, such as writings and computer programs; original databases; musical works; audiovisual works; works of fine art and photographs. The purpose of the two treaties is to update and supplement the major existing WIPO treaties on copyright and related rights, primarily in order to respond to developments in technology and in the marketplace.

The WCT specifically provides for member countries to enact exceptions within the confines of the Three-step test. The Three-step test is incorporated into the WCT in two ways: first, indirectly under Article 1(4), and, secondly, explicitly under Article 10. These provisions need to be considered separately.

\textbf{4.2.1 Under Article 1(4)}

This Article applies directly to the reproduction right, as it requires Contracting Parties to comply with Articles 1–21 and the Appendix of the Berne Convention.

Accordingly, if a Contracting Party is not a member of Berne, it will still have to apply the three-step test to the reproduction right by virtue of Article 9(2) of Berne. More problematic, however, is the effect of an “agreed statement” to Article 1(4) of the WCT which was


adopted by the 1996 Diplomatic Conference at the time of adopting the text of the WCT itself.\textsuperscript{249} This provides for a possible extension of the operation of Article 9(1) and (2) through the adoption of the following interpretation:

The reproduction right, as set out in Article 9 of the Berne Convention, and the exceptions permitted thereunder, apply fully in the digital environment, in particular to the use of works in digital form. It is understood that the storage of a protected work in digital form in an electronic medium constitutes a reproduction within the meaning of Article 9 of the Berne Convention.\textsuperscript{250}

On its face, this statement appears to remove any doubts that might otherwise exist as to whether the reproduction right under Article 9(1) of the Berne Convention, and the exceptions permitted under Article 9(2), apply to digital and electronic usages.\textsuperscript{251}

\textbf{4.2.2 Under Article 10}

In the case of Article 10, however, the Three-step test appears directly in the text, and has a much wider potential application than just to the reproduction right. The provision in Article 10 states:

(1) Contracting Parties may, in their national legislation, provide for limitations of or exceptions to the rights granted to authors of literary and artistic works under this Treaty in certain special cases that do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the author.

(2) Contracting Parties shall, when applying the Berne Convention, confine any limitations of or exceptions to rights provided for therein to certain special cases that do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the author.\textsuperscript{252}

Article 10 of the WIPO Copyright Treaty (WCT) determines the limitations and exceptions that are allowed. Paragraph (1) states the types of limitations under the WCT while Paragraph (2) provides criteria for the application of the rights under the Berne Convention.\textsuperscript{253} This leads to a greater field of application of the Three-step-test. While under the Berne


\textsuperscript{252} Ibid.

\textsuperscript{253} Ibid.
Convention, the Three-step-test is only applicable for the right of reproduction, Article 10 of the WCT covers all rights provided by the WCT and the Berne Convention. Compared to the TRIPS Agreement, the provisions of the WCT are similar to those in Article 13 of the TRIPS which applies the same test for all rights provided by TRIPS.\textsuperscript{254}

Considering these two paragraphs carefully, their operation is different. The interpretations of Paragraph (1) can be referred to those developed in relation to Article 9(2) of Berne.\textsuperscript{255} However, the language used in Paragraph (2) can be more problematic, namely, “Contracting Parties shall, when applying the Berne Convention, …”. This may mean that in applying the Berne Convention, the WCT members are required to make any limitations and exceptions subject to the three-step test beyond the conditions permitted in the Berne Convention. This places greater restrictions on the scope of permissible exceptions which can affect, for instance, the indeterminate implied category of ‘minor reservations’.\textsuperscript{256} This is because if under national law, the reservations exceed the limits set by the three-step test, they will not be allowed under Article 10(2) of the WCT. In other words, the Article 10(2) may possibly narrow what was already permitted by some Articles of the Berne Convention.\textsuperscript{257}

Regarding this concern, some Articles of the WCT specifically indicate the Berne Convention as the basis expressively.\textsuperscript{258} Also, an agreed statement was adopted by the 1996 Diplomatic Conference:

It is understood that the provisions of Article 10 permit Contracting Parties to carry forward and appropriately extend into the digital environment limitations and exceptions in their national laws which have been considered acceptable under the Berne Convention. Similarly, these provisions should be understood to permit Contracting Parties to devise new limitations and exceptions that are ‘appropriate in the digital environment’.

It is also understood that Article 10(2) neither reduces nor extends the scope of applicability of the limitations and exceptions permitted by the Berne Convention.

\textsuperscript{256} Ibid, 868.
\textsuperscript{257} Ibid, 869.
\textsuperscript{258} Ibid.
In summary, the WIPO Copyright Treaty, which was intended to be applied in the digital environment, appears to be applicable to all authors’ rights and not merely to the reproduction right in Article 9(2) of the Berne Convention. However, the WCT limitations and exceptions for the digital environment should also rely on the Berne Convention, that is, the Berne Convention still plays a major role in its consideration. Likewise, the WIPO Performances and Phonograms Treaty, which was created to protect the performers and producers of phonograms, also determines the Berne Convention as its core. It provides the limitations and exceptions which can be adopted in the digital environment and which must so far be confined to those also complying with the Berne Convention.

Article 10 of the WIPO Copyright Treaty (WCT) states that the three-step test permitted contracting countries to impose new limitations in respect of digital works which must be ‘appropriate to the new environment.’ However, this cannot be understood as an opportunity to enlarge the scope of the exceptions to make them appropriate for the digital environment.

Interestingly, the WCT used the term ‘the normal’ instead of ‘a normal’. According to the comments of Reinbothe and Von Lewinski, when imposing any copyright exceptions, national law must analyse each right, not the exploitation rights as a whole. When the word ‘a’ is replaced by ‘the’, such a restriction does not apply, and the normal exploitations could be those that in normal circumstances could acquire “considerable economic or practical importance to the right holders.”

Moreover, unlike Article 9(2) of the Berne Convention, Article 13 of the TRIPS Agreement and Article 10 of the WCT will not only prohibit limitations or exceptions prejudicial to the ‘normal exploitation of the work or the ‘legitimate interests of the right holder’ in regard to the reproduction right. These two Articles also protect other rights that might apply in global networks. With this difference, the scope of the three-step test in the TRIPS Agreement and the WCT clearly protect the right holder’s exclusive rights.

259 Le N, ‘Rethinking the three-step test’ in IP Theses IP Community NO.8: For Ex-Participant Alumni of the Industrial Property Training Program in Japan, Asia-Pacific Industrial Property Center (APIC) & Japan Institute of Invention and Innovation (JIII), Tokyo, 2005, pp 91-108.
5. International Copyright Exceptions: Special Treatment for Developing Countries

In theory, international copyright rules should be able to deal with problems of access because they provide room for countries to include exemptions and relaxations of copyright in certain circumstances under their national laws. Nonetheless, a central question remains as to whether the exemptions and limitations within the existing framework of international rules allow developing countries to set the right balance in protecting copyright whilst also addressing their special development needs.

Where a developing country decides to enter international copyright relations it will generally find that a perceptible gap remains between what is needed to satisfy its requirements [for education and transfer of knowledge] and the standard of protection demanded by a multilateral instrument such as the Berne Convention. \(^{260}\)

In other words, it could be said that all of the limitations and exceptions pertain primarily to the use of and access to copyright materials. For developing countries access to legitimate copies is precisely the issue. Most developing countries have the requisite copying technologies to reproduce copyright works and thus supply the local market with cheap copies. There is also another component to the access problem for developing countries and that is the availability of copies in local languages. In regard to this, the Berne Convention grants authors the exclusive right to translate their works, meaning that even if cheap copies were available for purchase locally, access would nevertheless be meaningless unless those copies were translated. In summary, therefore, the reproduction and translation rights operate as barriers to access in developing countries.

These tensions have been present since the inception of the Berne Convention, but have faded in the last forty years or so. \(^{261}\) At the 1967 Stockholm conference of the Berne Convention, developing countries argued for additional flexibilities within international copyright rules because of their needs for mass education. \(^{262}\) The conference produced a Protocol that allowed developing countries to provide a reduced term of protection of 25

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\(^{262}\) Ibid.
years together with compulsory licensing for translations into local languages and, most controversially, for any protected use for educational, scientific or research purposes. However, the Stockholm Protocol was never ratified because of a lack of consensus between developed and developing countries. Eventually, in Paris in 1971, agreement was reached on a watered down set of exemptions for developing countries, essentially allowing limited compulsory licensing of works for translation into local languages and reproduction licences, subject to certain conditions. These are set out in an Appendix to the Convention. Specifically, the purpose of the Appendix was to make copyright works more easily accessible and to facilitate circulation in developing countries. The Appendix established a complex compulsory licensing scheme that limits authors’ control over the reproduction and translation right under restricted circumstances that include: 1) a three year waiting period from the date of first publication of the work before issuing a licence for translation; a five year waiting period for a reproduction licence, but for works of poetry, fiction, music and drama the waiting period is seven years. For scientific works, the waiting period for a reproduction licence is three years; 2) the developing country must have a “competent authority” in place to issue such licences; 3) the translation licence can be granted only for teaching, scholarship and research purposes, and is for use in connection with systematic instructional activities. However, the scope of these terms is not defined by the Appendix.

Although the Appendix was created as a compromise between developed and developing countries, it has been of very little direct benefit to developing countries, as shown by the fact that only a handful of developing countries have ever included the special provisions in their national laws. This is because there are some pitfalls related directly to the complex and burdensome requirements imposed by it. The transaction costs involved in fulfilling these requirements are not insignificant, and the waiting period by itself materially reduces the value of the copyright material to consumers. Further, the limited scope for which a compulsory licence can be used, as well as the different standards applied to the reproduction licences versus the translation licence, together add up to a licensing scheme that creates challenges in economies of scale that deter potential licensees.

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However, despite its widely acknowledged pitfalls as a means to address the bulk access problem, the Appendix is still very important. This is because it is incorporated into the TRIPS Agreement and remains the only bulk access mechanism tool in international copyright law. Also, it is incorporated into the WCT. Moreover, compliance with it is also required as a condition of adherence to the World Trade Organisation (WTO) under the Agreement on Trade-Related Aspects of Intellectual Property Rights 1994 (the TRIPS Agreement) as well as under the WIPO Copyright Treaty (WCT), regardless of whether the country in question is a Berne Member.

More emphatically, especially in the digital environment the enactment of national copyright legislation does not sufficiently encourage the developing countries to fulfil their desire of country development. Recently, many developing countries have developed and reviewed their copyright laws. Nonetheless, librarians and educators have not been included in the legislative process. As a result, the needs of libraries, education, disabled persons have not been addressed in their implemented laws.265

They have also adopted stricter copyright regimes in line with developed countries, yet they are net importers of intellectual property. They have not availed themselves of the flexibilities in international Intellectual Property agreements.

The minimum copyright term in the Berne Convention and TRIPS Agreement is 50 years after the author's death, yet many developing countries have extended their copyright term far beyond these requirements. Although the Appendix is not the best solution for the developing countries, up until now, it has been a good means to help them respond to their information needs via electronic access. It represents an attempt by the international copyright conventions to ensure that developing countries are not prevented from gaining access to materials needed for educational purposes and the process of nation-building.

6. Three-Step Test in the Digital Environment

In the current digital environment, there is a need for the scope of the three-step test, a major provision of individual use many conventions rely on, to be reviewed so that it can still function as a reliable model for national laws and international agreements. Its scope should

265 Arlene Cohen, Updating copyright laws in developing countries, October 2006 <http://lists.spc.int/pipermail/piala_lists.spc.int/2006-October/000044.html> 27 November 2007
be determined by what is appropriate. Even if existing minimum Berne rights, once appropriately consolidated, might respond to the digital environment, existing Berne exceptions and limitations pose special difficulties. For example, the exceptions to the Berne right of reproduction are vague and open-ended,\textsuperscript{266} while the Berne right of public communication by broadcasting or cable transmission may be made subject to variable conditions, including legal licences in appropriate cases.\textsuperscript{267}

Moreover, the interpretation of the three-step test of the Berne Convention\textsuperscript{268} varies in the legislation of different countries. This raises the difficulty of its application, particularly in the digital environment. Thus, it is necessary to override international interests in order to guide the development of limitations and exceptions along convergent paths.

In the past, the main forms of ‘normal exploitation’ of text works have been published in periodicals and in books. The exceptions, which allow fair practice for research or study, and the library exceptions, sanction copying which was presumed not to undermine these ‘normal uses’. In the digital era, the use of the ‘normal exploitation’ of works has changed. Users make use of copyright works regardless of the interest of the right holder. This has put the purpose of the three-step test under strain. The problems for both the users, in terms of individual use, and for right holders, in terms of copyright piracy, have become ever more difficult to deal with. In other words, because of the technological developments, the balance between the users and the right holders cannot be maintained satisfactorily.

In the digital environment, the ‘normal exploitation’ of a work, as protected under Article 9(2) of the Berne Convention\textsuperscript{269} would include each and every act of use to ensure the protected works are referred to ‘exploitation’ by the author, rather than by the third party for whom an exception to liability it sought. Even if such copying is not regarded as ‘exploitation’ for the purposes of Article 9(2) and therefore does not conflict with the second step, it may invoke the third step, thus calling for a compensation scheme.


\textsuperscript{268} The Berne Convention for the Protection of Literary and Artistic Works (Paris Act, 1971) NO 615 (E)

\textsuperscript{269} Article 9(2) of the Berne Convention for the Protection of Literary and Artistic Works (Paris Act, 1971) NO 615 (E)
Part 1: Chapter 2

Essentially, there are two dimensions in considering what the three-step test might imply in the digital environment. The first question is whether any new exceptions or minor changes of the three-step test are needed in this environment. The second question is whether existing provisions of the three-step test from the analogue environment remain appropriate in the digital environment, or need to be restricted in some way in that environment. The factors that might dictate a reduction in the scope of exceptions in the digital context relate mainly to the perfect reproductions that the technology allows, and the ease with which it enables material to be disseminated to large numbers of people, again without any loss of quality. Some of the factors which might mean that new exceptions are desirable have been raised such as the status of electronic copies which simply allow a work to be seen or heard.\(^\text{270}\)

Nonetheless, some countries clearly feel that the kinds of temporary electronic copies which occur, for example, simply to allow material to be viewed on screen, should not be regarded as reproductions at all, since such copies do not represent a real or separate act of exploitation.\(^\text{271}\) Other countries see no basic difficulty with a comprehensive reproduction right extending to copies of this kind, or consider that this already exists by virtue of the wide definition of the reproduction right in the Berne Convention.\(^\text{272}\)

In the other words, there is an understanding that exceptions to the reproduction right permitted under Article 9(2) of Berne Convention\(^\text{273}\) also fully apply in the digital environment. This is reflected in the agreed statement to Article 1(4) of the WCT.\(^\text{274}\) Moreover, the agreed statement to Article 10 of the WCT\(^\text{275}\) on exceptions sets out the understanding that contracting parties to the treaty are permitted “to carry forward and appropriately extend into the digital environment limitations and exceptions in their national laws which have been considered acceptable under the Berne Convention”, that is, not only in the case of the reproduction right but also other rights. Similar understandings apply in the case of the WPPT.\(^\text{276}\)

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\(^\text{271}\) Ibid.


\(^\text{273}\) The Berne Convention for the Protection of Literary and Artistic Works (Paris Act, 1971) NO 615 (E)

\(^\text{274}\) Article 1(4) of the WIPO Copyright Treaty (WCT), December 20 1996 No. 33

\(^\text{275}\) Article 10 of the WIPO Copyright Treaty (WCT), December 20 1996 No. 33

Specifically, what the lawmakers and the member states of the Berne Convention should bring into action is the inclusion of provisions which allow authors of literary and artistic works to have exclusive rights over the availability of electronic forms of their works to the public. Furthermore, it shall also be a matter for legislation in the countries party to the Berne Convention to implement the existing provisions by applying for an exclusive right or exclusive rights of authorisation to be granted under the Berne Convention. However, to be able to offer all these options, certain ‘gaps’ which arises from the broad term used in the Convention need to be eliminated.

Most importantly, this provision plays an important role in developing countries in regard to closing the knowledge gap in these countries and protecting the copyright of their right holders’ intellectual works from being infringed. If this provision is abolished, it is difficult to set the standard of the copyright exceptions in national law and thus the balance of the interest between user and right holder will be adversely affected.

Probably, it would not be appropriate to try to work out new international norms, at least for the time being; however, it should be made certain that Article 9 (2) of the Berne Convention277 is duly interpreted and applied in accordance with the new conditions.

7. Conclusion

The origins of the three-step test, an exception for individual use, were laid down in Article 9(2) of the Berne Convention. The objectives of the three-step test have been applied in the exceptions and limitations of domestic law as well as other international agreements. This includes the provisions of two subsequent international agreements with a potentially wider sphere of application, namely, the TRIPS Agreement (Article 13) and the WCT (Article 10). Also, some or all international copyright protections give prominence to the knowledge gap in developing countries, so the special provisions, emphasising reproduction and translation licensing, are especially provided for them.

This chapter ends with the conclusion that the three-step test should be reconsidered as it is ambiguous in terms of its definition which gives rise to differing interpretations among member

277 Article 9(2) of the Berne Convention for the Protection of Literary and Artistic Works (Paris Act, 1971) NO 615 (E)
states. Also, its scope, particularly the reproduction exception, is vague and open-ended. Consequently, this can be problematic, specifically in the digital environment.

In the next part of the thesis, the exceptions for individual use in developed and developing countries will be analysed. This includes the exceptions for individual use as practised in Australia, as a case representing developed countries and exceptions for individual use as practised in Thailand, as a case representing developing countries. This part of the thesis ends by presenting the researcher’s conclusions and recommendations.
Part Two: Analysis of the Exceptions for Individual Use in Developed and Developing Countries: The Generalisation from the Case Studies of Australia and Thailand

While Part One of this thesis presented the uncertainty of the exceptions for individual use derived from the international copyright conventions, which form the basis of the domestic exceptions in many member countries, both in developed and developing worlds, Part Two of this thesis specifically focuses on the uncertainty of the exceptions for individual use found in two national copyright law systems, one an example of a developed country and the other an example of a developing country. Chapters Three and Four examine the exceptions for individual use in Australia and Thailand respectively in the following aspects:

1) nature of the copyright law;
2) application of the exceptions for individual use;
3) current problems found in the application of the exceptions for individual use; and,
4) proposed solutions to the uncertainty of the application of the exceptions for individual use.

After investigating the issues related to the exceptions for individual use in each country, a comparative analysis is undertaken to examine the advantages and disadvantages of the exceptions for individual use in each country, and to explore if the advantageous application in one country can help solve the problems found in the other countries as presented in Chapter Five.

The most significant reasons to choose Australia and Thailand as examples in this thesis are as follows:

1) different law systems—Australia is a common law system country while Thailand is a civil law system one;
2) both countries are the members of the copyright international conventions;
3) the application of the individual use exceptions and the problems found in these countries can be useful for the understanding of the current conditions, problems found and proposed solutions in the developed and developing countries; and
4) the application of the individual use exception in Australia and Thailand can be helpful for further investigating the exceptions for individual use in other countries as many other countries may share some of their problems.
In other words, it is hoped that the generalisation of the position in developed and developing countries will be tested in an examination of the laws and practice of Australia and Thailand.

The exceptions for individual use are important to both developed and developing countries since they can be applied as a tool to maintain the balance between the right holders and users. In other words, they are based on the ways in which copyright law should react, in order to protect the producers and suppliers of different kinds of works while preserving the interest of the public, particularly in relation to research and education.

Nowadays, particularly in the new global economy, the exception for individual use is increasingly crucial as intellectual property is a major factor used for international trade negotiation. It is a trade topic raised in the World Trade Organization (WTO) and is so important that the WTO finally issued TRIPS Agreement, in 1995, which “…introduced intellectual property rules into the multilateral trading system for the first time.” As copyright is a part of intellectual property right which is important in the global economy, the exceptions for individual use, as a part of copyright, are also important to the world trade.

More importantly, as information is more valuable than other resources in the new global economy, the application of the exceptions for individual use becomes a major key to the growth of the country. This is because access to information becomes costly due to the increasing degree of copyright protection in the global marketplace. New laws, which protect information that previously would have been available for use, may quickly price information and the products developed with that information out of the reach, especially, of the developing world. For example, consider the plight of mainland China, which struggled to enter the Information Age in 2000, its people could ill afford to pay the prices charged by Western corporations for such items as computer software, CDs, and DVDs—prices that

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were fostered by strong intellectual property schemes.\textsuperscript{281} Recently, its vice-minister of the Ministry of Commerce, Yi Xiaozhun, said at a conference that, “…standards and Intellectual Property rights are critical for economies such as China’s that are basing their development on science and technology…”.\textsuperscript{282} As a result, the exceptions for individual use are so crucial that their reduction can have detrimental effect, particularly on developing countries, and can finally widen the gap between developed and developing nations as knowledge generally flows from the developed world to the developing world and fee payment, then, flows from the poor countries or developing world to the rich countries or developed world.\textsuperscript{283}

Apart from realising the significance of the exceptions for individual use, it is clear from the legal literature that both developed and developing countries also confront the same problem, at the national level, about the different interpretations of the exceptions for individual use, which are applied within each country.\textsuperscript{284} In other words, although the exceptions to copyright are an essential part of copyright law, the extent and purpose of exceptions are often misunderstood. On the one hand, some consumers may believe that they can make a copy of an item that they have purchased containing copyright material, provided they do not sell the copy. On the other hand, some copyright notices placed on copyright material may claim that any copying is unlawful. In fact, neither position is consistent with international convention obligations or the domestic laws of convention countries.

In addition, problems related to the exceptions for individual use also result from their differences in the conformity of the application of the exceptions for individual use with the real intent of the three-step test\textsuperscript{285} and in the response to the digital environment. The application of the exceptions for individual use with the real intent is the core purpose of the exceptions indicated in the three-step test (Article 9(2)) of the Berne Convention. First, as mentioned above, although both the developed and developing worlds include these


\textsuperscript{285} Three-Step test is defined in Article 9(2) of the Berne Convention for the Protection of Literary and Artistic Works (Paris Act, 1971) NO 615 (E)
exceptions for individual use in their copyright law systems, practically, what is being done within these two country groups is stated to be quite different. In other words, it has been suggested that the exceptions for individual use applied in the developed countries appear better conformed in practice to the real intent than in the developing countries.  

Specifically in the developing world, the application of the exceptions for individual use has had to confront misguided individuals in society who believe and expound the theory that developing countries should feel free to copy works coming in from other countries, notably the more developed countries. Due to this fact, developed countries are concerned about the application of existing exceptions for individual use in developing countries, which are described as free use provisions. Developing countries often make use of copyright materials, mostly imported from developed countries, without paying attention to the interest of market value of developed countries.

Regarding the literature, there exist two perspectives related to the solution for the problems of different interpretations of the exceptions for individual use, which are applied within each country, as well as of the conformity of the application of the exceptions with the real intent. One is on the right holder’s side, that is, it encourages the statutory licensing to protect the right holders’ interest. The other is on the users’ side, that is, it supports the idea of the exceptions for individual use for the users’ benefits to access the information.

In particular, the first idea backs the concept that the right holders have the rights to obtain compensation. This can be seen through Ricketson’s statement that, “…the exclusive rights granted by copyright, which are becoming “outdated and irrelevant”, could be replaced by

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mere rights to obtain a remuneration .” In addition, trends in international copyright treaties as well as in national legislation also show increasing efforts on the part of developed countries to reduce or exclude the possibility of individual use exemptions. Meanwhile, the second idea defends the concept of users’ free information access, especially in case of developing countries. It stands on the idea that higher copyright protection can cause information to be too costly to developing countries and this can widen the gap between developed and developing countries.

One hypothesis for a solution to the problem which is examined by the author is a hybrid of statutory licensing and free use for individual purposes both for developed and developing countries. Australia and Thailand are chosen as examples. This is because in both countries, an idea of using statutory licensing or fee-based exceptions is accepted while an idea of free-based exceptions is agreed for the purposes of study and research and non-commercially individual purposes. This will be clarified more in Chapters Three and Four.

In the digital world, the application of legal exceptions is much more difficult to manage than in the analogue world. Although both developed and developing countries are concerned about this issue, often they have the different perspectives on the response to the new environment. Developed nations have amended and already enacted new copyright drafts related directly to the exceptions for individual use. The Australian Government, for instance, passed its “Digital Agenda Act” in 2000 and further amendment in its Copyright Amendment Act in 2006. In the US, the “Digital Millennium Copyright Act” (DMCA) was passed in October 1998.

293 The Copyright Amendment (Digital Agenda) Act 2000 No. 119, 2000
294 Copyright Amendment Act 2006 No. 158, 2006
It has been suggested that it is difficult for developing countries to keep pace with the digital environment.\footnote{Steinhardt B, ‘Preserving Fair Use in the Digital Age’ 2000 <http://webworld.unesco.org/infoethics2000/documents/paper_steinhardt.rtf> (5 June 2005).} This is because the affordability of basic technology is an important issue in developing countries. Some social structure in developing countries may be an impediment to the spread of digital learning.\footnote{Rajan S M T, ‘Digital Learning Legal Background Paper: Digital Learning in India-Problems and Prospects’ no date <http://cyber.law.harvard.edu/home/uploads/819/India_Module.doc> (21 April 2007)} Some people believed that the copyright laws in developing countries may currently undergo a process of reform as it may increasingly generate public controversy which causes the difficulties of implementing them.\footnote{Loney M, ‘Government Body Says Developing Countries Need Open Source’, ZDNet UK, 13 September 2002, <http://news.zdnet.co.uk/itmanagement/0,1000000308,2122219,00.htm> (20 April, 2007).} From these reasons, it is generally accepted that developing countries must take time to amend their copyright law in order to effectively adopt in the digital era. Thailand, for example, has been amending a new copyright draft since 2004 but it not has been passed into force yet primarily because of these two reasons: it needs to spell out the parity between the international approach to the use of copyright-protected materials and the requirements of the nation and the parity of the interests between the right owners and the public at large.

However, there are some developing countries such as China which has sought through its new Copyright Act of 2006\footnote{The Copyright Act 2006 (Republic of China, 2006) No. 95} to keep pace with the digital environment where enforcement is not quite successful. It is evidence, for example, piracy is still a major problem in China.\footnote{Cheng J, ‘By the Numbers: Piracy Rate in China Down 10 Percent’ 2007 <http://arstechnica.com/news.ars/post/20070515-by-the-numbers-piracy-rate-in-china-down-10-percent.html> (2 June 2007).}

Regarding the response to the digital environment, the idea to amend and enact new copyright drafts related directly to the exceptions for individual use for the digital environment is possibly appropriate. Moreover, standardised contract and compulsory licensing system at national level and revision of international copyright system at international level should be established.\footnote{Yoo E, ‘How can Fair Use Doctrine Be Applied for the Appropriate Level of Copyright Protection in the Global Market Place?’ 2000 <http://webworld.unesco.org/infoethics2000/documents/paper_yoo.rtf> (20 April 2007).}

In contrast, for some countries particularly in developing countries, the solution may be to strictly apply the current exceptions for individual use to the new environment. As a result, the author will test these ideas with the cases of Australia and Thailand in Chapters Three and Four respectively. Australia will be used as an example of a developed country where the new
amended drafts of copyright legislation and exceptions for individual use are enacted while Thailand will be used as an example of a developing country where the current copyright law and exceptions for individual use are applied as the new draft is not yet in force. The findings gained from the analysis of these examples can provide a better understanding of the ideas to respond to the digital environment.

In addition, in response to the digital era, another issue that is still important and should also be considered is the application of the exceptions for individual use. This is the exceptions for individual use are an essential instrument for people in the developing countries to access information in the developed countries without the right holders’ permission and the compensation provided. Additionally, if the strict copyright enforcement is determined in the developed countries, this could have a major impact on users’ knowledge access, especially throughout the developing countries, which can finally result in damages for developing their human resources and technological capacity, and for poor people.302 Consequently, the author will examine the development of new principles for the individual use exceptions, including possible approaches to deal with the case of developing countries, under special rules.303 In other words, the question will be asked the exceptions for individual use should be still preserved in the digital age.304

CHAPTER THREE

ANALYSIS OF THE APPLICATION OF THE EXCEPTIONS
FOR INDIVIDUAL USE IN AUSTRALIA

1. Introduction

The exceptions for individual use have been an important component of modern national copyright law in developed countries, including Australia. It is appropriate to study the exceptions for individual use in Australia as it is a developed country where there have also been many reviews of the “copyright balance” and accordingly of copyright exceptions. In addition, the exceptions for individual use are a crucial issue, as high levels of intellectual property protection exist. A study of the exceptions for individual use in such a country can be helpful in improving understanding of current application of the exceptions for individual use in a developed country. Such a study can therefore also be useful in considering the application of the exceptions in other countries.

The Copyright Act 1968 is the current copyright legislation in Australia. It provides the exceptions for individual use in sections 40 – 43 and other sections in Part IV (sections 101-112B). In 1998, the Copyright Law Review Committee (CLRC) made a number of recommendations for changes to the exceptions in its report Exceptions to the Exclusive Rights of Copyright Owners. In addition, in 2000, the Australian government passed the Digital Agenda Reform Act which also includes sections related to the exceptions for

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305 The Copyright Act 1968 (Cth)
306 The Copyright Law Review Committee was established in 1983 by the Attorney-General as a specialist advisory body to report to the Government on specific copyright law issues referred to it from time to time. The Committee is assisted by a permanent Secretariat, based within the Copyright Law Branch, Attorney-General's Department, Canberra.
307 "After a brief period under Mr Peter Banki, the Committee was chaired by Professor Dennis Pearce from September 1996 until April 2000. The Committee completed two reports during this period. The first was a report on the simplification of the Copyright Act in two parts. Part 1 related to the Exceptions to the Exclusive Rights of Copyright Owners which was published in September 1998. Meanwhile, Part 2 related to the Categorisation of Subject Matter and Exclusive Rights, and Other Issues which was published in February 1999. “In February 2001, the Committee published a report on the Jurisdiction and Procedures of the Copyright Tribunal. One of these recommendations was the introduction of an “open-ended” fair dealing exception, intended to operate in a similar way to the fair use provision in the US.” Copyright Law Review Committee, ‘Copyright and Contract’, 2004 <http://www.ag.gov.au/agd/www/Cirrhome.nsf/0/66F1AB61D9F770E3CA256C4F000AFC84?OpenDocument> (2 August 2006).
This Chapter briefly explores the nature of the Australian copyright law. It examines the exceptions for individual use applied in Australia including the doctrine of fair dealing. Finally, it analyses the problems found and proposed solutions for the individual use exceptions in Australia, including issues related to the digital environment.

2. The Nature of the Australian Copyright Law

Australia inherited its copyright law, along with much of its other law, from the United Kingdom. Indeed, until the Australian Copyright Act 1968 (Cth)\(^{310}\) entered into force, Australia maintained, for over 50 years, an old copyright statute from the United Kingdom which had been repealed in the latter nation about 12 years earlier.

2.1 The Copyright Owner’s Exclusive Rights

For a work to be protected by copyright law, it must be ‘original.’\(^{311}\) In order for a work to be protectable, it must be fixed in a tangible medium of expression. A work is considered fixed when it is stored on some medium in which it can be perceived, reproduced, or otherwise communicated. As a statutory regime, the Copyright Act 1968 (Cth) applies to an extremely diverse range of subject matter. Owners of copyright have a number of exclusive rights over their copyright materials. The copyright owner’s permission is required if the reproduction of a copyright material is made. The copyright owner’s exclusive rights apply to different types of copyright materials as follows:

1) Literary, dramatic, artistic and musical works
2) Films, sound recordings, broadcasts and published editions

\(^{308}\) The Copyright Amendment Act 2006 No. 158, 2006
\(^{309}\) Schedule 6 of the Copyright Amendment Act 2006 NO. 158, 2006. The Schedule deals with the exceptions to the infringement of copyright.
\(^{310}\) The Australian Copyright Act 1968 (Cth) An Act relating to copyright and the protection of certain performances, and for other purposes
\(^{311}\) Section 32 of the Copyright Act 1968 (Cth)
2.1.1 Literary, Dramatic, Artistic and Musical Works

The Copyright Act 1968 protects computer programs, compilation (such as anthologies, directories, and databases), dramatic works (such as choreography, screenplays, plays, and mime pieces), artistic works, and musical works. Owners of copyright in “works” have the exclusive right to reproduce the work, make the work public for the first time, communicate the work to the public, perform the work in the public, and make an adaptation. 312

2.1.2 Films, Sound Recordings, Broadcasts and Published Editions

Owners of copyright in films, sound recordings, broadcasts and published editions have the exclusive right to copy their material. In addition, there are rights relating to showing films and playing recordings in public, transmitting films and sound recordings to the public using any form of technology (via email, broadcasting, cable or the internet, for example), and rebroadcasting television and sound broadcasts. In regard to published editions, “publishers have copyright in their typographical arrangements, which are separate from the copyright in works reproduced in the edition (such as poems or illustrations or music)”. 313

The copyright notice consists of the symbol ©, followed by the name of the copyright owner and the year of first publication. For sound recordings, the letter “P” (for phonogram) in a circle or in brackets is used instead of the “C” in a circle. 314 The “copyright notice” does not need to be on something to ensure that it is protected by copyright in Australia or in most other countries, but it does remind people that the work may be protected. It also lets people know who is claiming copyright.

2.2 Assigning and Licensing Rights

Copyright owners can “assign” or license their rights. 315 Assignments and licences can apply to all the rights in the material, or to just one or some of the rights. In addition, a copyright owner may restrict an assignment or licence in various ways. A copyright owner may also set certain conditions, such as payment, as part of their agreement to assign or license rights.

312 Section 31 of the Copyright Act 1968 (Cth)
313 Ibid.
315 Section 117 of the Copyright Act 1968 (Cth). See also Sections 47, 70, and 107 of the Copyright Act 1968 (Cth)
While assignments and exclusive licences must be in writing and signed by or on behalf of the copyright owner to be fully effective, it is good business practice to put all agreements relating to copyright into writing.

### 2.3 Duration of Copyright

The period of copyright protection has been extended for most categories of works subject to section 33,\(^{316}\) copyright that subsists in a literary, dramatic, musical or artistic work continues to subsist until the end of 70 years after the end of the calendar year in which the death of an author/creator. The duration of the first publication of a literary, dramatic, musical or artistic work is anonymous or pseudonymous is extended to until the end of the period of 70 years after the end of the calendar year in which the work was first published.\(^{317}\) This was implemented from the start of 2005 and brings Australian law into line with the US. Previously the duration of copyright was generally 50 years after the death of the author. This change is not retrospective. If a work was out of copyright before 1 January 2005 then it will stay out of copyright even though 70 years may not have elapsed since the death of the author.\(^{318}\)

Currently, the range of works protected by the Copyright Act has increased due to technological advances. With response to the technological change, the exceptions for individual use are categorised so that the Act can cover a wide array of information access. Each category of exceptions serves a different need of information access while protecting the copyright holder’s interest as well.

In recent years, a number of policy reviews have led to the government amending the copyright law in its application in the digital environment. Australia enacted the Digital Agenda Reform Act\(^ {319}\) in order to implement the standards developed in the WIPO Copyright Treaty.\(^ {320}\) As such, the Digital Agenda Reform Act\(^ {321}\) reflected the need to protect owners of copyright from unfair and arbitrary interferences with their legal rights.\(^ {322}\) The significance of

\(^{316}\) Section 33 of the Copyright Act 1968 (Cth)
\(^{317}\) Section 34 of the Copyright Act 1968 (Cth)
\(^{319}\) The Copyright Amendment (Digital Agenda) Act 2000 No. 110, 2000
\(^{320}\) The WIPO Copyright Treaty (WCT), 1996
\(^{321}\) The Copyright Amendment (Digital Agenda) Act 2000 No. 110, 2000
the Digital Agenda Reform Act lies in the fact that it was the main response of the Commonwealth Government to the challenges facing Australian copyright law and its exceptions in the digital era. Section 3 of the Digital Agenda Reform Act stated that the objective was to ensure the efficient operation of relevant industries in the online environment. This was to be achieved by promoting the creation of copyright material and the exploitation of new online technologies through financial reward for creators and investors as well as by promoting certainty for industries that are investing in and providing online access to copyright material.

After Australia and the US reached their agreement on free trade, the US Free Trade Agreement Implementation Act 2004 (USFTAI Act) was enacted. It amended the Australian Copyright Act 1968 (Cth). The USFTAI Act inserted new exceptions into the Act 1968. The exceptions, for instance, ensure that certain reproductions and copies made appropriately as part of the normal use of works legitimately produced and acquired will not constitute an infringement of copyright.

The Copyright Amendment Act 2006 was passed by both houses of Parliament on 5 December 2006. The Act received Royal Assent on 11 December 2006. The reforms strengthen owners’ rights and provide more certainty for users in the digital environment. New exceptions allow consumers to enjoy legitimate copyright material in some circumstances without breaching the law; one example is fair dealing for parody and satire. New exceptions allow for the use of copyright material for socially useful purposes, such as use by educational institutions and people with disability. The laws also ensure that copyright owners can better protect their legitimate rights and securely make their material available online in new and different ways, for example through the use of technological protection measures. New enforcement measures, including on-the-spot fines and proceeds of crime remedies, target copyright piracy.

324 Section 3 of the Copyright Amendment (Digital Agenda) Act 2000 No. 119, 2000
325 US Free Trade Agreement Implementation Act 2004, No. 120, 2004 (An Act to implement the Australia-United States Free Trade Agreement, and for other purposes)
326 The Australian Copyright Act 1968 (Cth)
327 US Free Trade Agreement Implementation Act 2004, No. 120, 2004
328 Amendments to the Copyright Act made by the US Free Trade Agreement Implementation Act 2004 (USFTAI Act) and the Copyright Legislation Amendment Act 2004 (CLA Act) extended the duration of copyright works, films and sound recordings from 1 January 2005. The copyright duration is now 20 years longer for works, other than photographs, and for films and sound recordings. The term for photographs has been made the same as that for other artistic works.
329 The Copyright Amendment Act 2006 No. 158, 2006
The important changes introduced in Copyright Amendment Copyright Act 2006\(^{330}\) are contained in the Copyright Act 1968\(^{331}\) as amended on 31 December 2006. Certainly, the Act provides a number of amendments to strengthen the ability of copyright owners’ and courts’ to address copyright infringement. Meanwhile, the Copyright Act 1968 grants users a new ‘flexible dealings exception’ to allow for non-commercial uses. Although, the Copyright Amendment Act 2006 introduces important changes to allow users to extensively access controls, there are some concerns about the important changes. The Technological Protection Measures (TPM)\(^{332}\) provision, for instance, provide with a right holder a wider scope to control access to copyright material than was practicable in the former times. However, there are some concerns about “digital lock-up” as such measures cannot distinguish between illegal access and legal use. Some other concerns will be discussed later in this Chapter.

### 3. The Application of the Exceptions for Individual Use

The application of the exceptions for individual use examined in this thesis covers the exceptions provided in the Copyright Act 1968 as amended to 31 December 2006.

There are a number of defences in the Copyright Act 1968 (Cth) against the monopoly rights given to copyright owners. The exceptions are categorised into four main groups: fair dealing; free use exceptions; statutory licences and limiting the effect of legislative individual use provisions. The principal exceptions, such as those for fair dealing, are fundamental to defining the copyright interest, while others, such as the statutory licences, are not true exceptions to the exclusive rights of copyright owners and might more appropriately be termed limitations.

#### 3.1 Fair Dealing

Before the Copyright Act 1968 was amended to 31 December 2006, the existing fair dealing exceptions applied only where the dealing was done for one of the four specified "permitted purposes" (research or study, criticism or review, news reporting, and giving professional

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\(^{330}\) The Copyright Amendment Act 2006 No. 158, 2006

\(^{331}\) The Copyright Act 1968 (Cth) No. 63 of 1968 as amended. This compilation was prepared on 19 December 005 taking into account amendments up to Act No. 130 of 2005. See Note 1 of the Copyright Act 1968 (Cth).

\(^{332}\) The Technological Protection Measures (TPMs) are contained in sections 47D, 49, 50, 51A, 107, and 109, and Part VB of the Copyright Act 1968 (Cth). TPMs are used to prevent copyright materials from being accessed or copied.
advice) and failed to protect the legitimate interests of ordinary Australian consumers to make minor, non-commercial dealings with legitimately acquired copyright material. The absence of flexibility brought out uncertainty surrounding the existence of a ‘public interest’ exception. By contrast, the Copyright Act 1968 as amended on 31 December 2006 continues to build on existing jurisprudence that has developed around the current fair dealing provisions. It provides a fair balance between the competing interests of copyright owners and users and describes the limits to copyright owners’ rights in a manner that maximises the public interest.

In other words, the exceptions as they existed in the Copyright Act 1968 before the amendment at its inception had insufficient flexibility because the exceptions applied only to specific uses and did not account for new uses which arose as technology developed. In addition, the fair dealing exceptions that were put into the Copyright Act 1968 increased the complexity of the legislation. There was no clear description about how the approach should be applied to enable copyright owners’ rights to be limited “in a manner that maximised the public interest”.

With the amendment, the Copyright Act 1968 maintains certainty for owners and users with respect to the current fair dealing provisions. The fair dealing for research and study provision has been amended to ensure that, as well as copies of ‘not more than a reasonable portion automatically being a fair dealing, there is scope to assess the application of certain factors to determine if copying of a greater amount should be a fair dealing. However, there are some concerns that the definition of the terms in fair dealing sections should be indicated in the Copyright Act 1968 so that the terms will not be variously interpreted. Moreover, the application of the new fair dealing for purpose of parody and satire needs careful consideration as it may prejudice the right holder’s moral right. This point will be discussed in detail below.

With the incorporation of the Copyright Amendment (Digital Agenda) Act 2000, the existing fair dealing exceptions effectively apply to the new communication right, and provide guidance on determining how the exceptions will apply in the digital environment. The central aim of the Copyright Amendment (Digital Agenda) Act 2000 was to ‘ensure that copyright law continues to promote creative endeavour while allowing reasonable access to copyright material on the Internet and through new communications technologies’. The Copyright Amendment (Digital Agenda) Act 2000 applied the "fair dealing" exception to the new right of communication to the public. This new right includes the right to make copyright material available online (such as uploading material onto a server connected to the Internet) or to electronically transmit material.

In relation to the research and study exception, the Digital Agenda Reform Act clarifies what will be a "reasonable portion" of works in electronic form. A user may copy 10 per cent of an electronic text work (a work that does not include sound, pictures or video footage) for the purpose of research or study, without permission. Nonetheless, all relevant factors should be considered in deciding whether a use is a fair dealing, including the portion being copied, the commercial availability of the material and the effect of the use on the copyright owner’s potential market.

Fair dealing in the Copyright Act 1968 as amended to 31 December 2006 authorises users to use copyright protected works for any of the following five purposes. These uses will not constitute an infringement of copyright:

1. Fair dealing for purpose of research or study (sections 40 and 103C);
2. Fair dealing for purpose of criticism or review (sections 41 and 103A);
3. Fair dealing for purpose of parody or satire (sections 41A and 103AA);
4. Fair dealing for purpose of reporting the news (sections 42 and 103B); or
5. Reproduction for purpose of professional advice (sections 43(2)).

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335 On 17 August 2000 the Copyright Amendment (Digital Agenda) Bill 2000 passed the Senate and the House of Representatives. The Digital Agenda Bill received Royal Assent on 4 September 2000, and became the Copyright Amendment (Digital Agenda) Act 2000, Act No. 110 of 2000. The Digital Agenda Act is intended to commence on 4 March 2001.


337 The Copyright Amendment (Digital Agenda) Act 2000, Act No. 110 of 2000


339 The Copyright Act 1968 (Cth)
3.1.1 Research or Study

A fair dealing with a literary, dramatic or musical work (or with an adaptation of such a work), or a fair dealing with an artistic work, is not an infringement of copyright if the fair dealing is for the purpose of research or study. 340

The fair dealing exception which has, arguably, been most narrowly construed is the exception for research or study 341. In Australia, the leading authority on the definition of ‘research’ and ‘study’ is the decision of Beaumont J in *De Garis v Neville Jeffress Pidler* 342 in 1990. That case related to a press clippings business operated by the respondent company.

With regard to the rejection of fair dealing, Beaumont J held that

…the terms ‘research’ and ‘study’ were intended to have their dictionary meanings, such as ‘diligent and systematic enquiry or investigation’ (research), the ‘application of the mind to the acquisition of knowledge’ (study) and ‘a thorough examination and analysis of a particular subject’ (study). Beaumont J considered that the activity in *De Garis* was ‘an activity engaged in by [the respondent] in the ordinary course of trade which, in my view, is in the nature of an information audit and should be distinguished from research activity of the kind contemplated by s 40.’ 343

Prior to the *Copyright Amendment Act 1980* (Cth), the word "study" was qualified by the adjective "private", but "private" was deleted following the recommendations of the Franki Committee. In relation to fair dealing for research and study, the Franki Committee’s 344 recommendations were informed by an underlying policy concern to ensure that the ‘public interest in ensuring a free flow of information in education and research’ was balanced against concerns for the potential economic impact which fair dealing uses may have on the copyright owner: 345

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340 Section 40 (1) of the Copyright Act 1968 (Cth)
341 Section 40 of the Copyright Act 1968 (Cth)
342 *De Garis v Neville Jeffress Pidler* Pty Ltd (De Garis) (1990) 37 FCR 99 at 106
343 In Australia, the leading authority on the definition of 'research' and 'study' is the decision of Beaumont J in *De Garis v Neville Jeffress Pidler* in 1990. See also Intellectual Property Research Institute of Australia (IPRIA) and Centre for Media and Communications Law (CMCL), The University of Melbourne, ‘Response to the Issues Paper: Fair Use and Other Copyright Exceptions in the Digital Age’ 2005 <http://www.crimeprevention.gov.au/ agd/WWW/rwpattach.nsf/VAP/(0C3FC6E500CE9F81CF8AAA22DF670141F)-150+IPRIA+1.doc/$file/150+IPRIA+1.doc> (21 June 2006).
344 Copyright Law Committee on Reprographic Reproduction 1976, - referred to as the Franki Committee.
345 According to the recommendations of the Franki Committee, the addition of section 40(2)(e) in 1980 and its requirement to consider 'the effect of the dealing upon the potential market for or value of the work' ensured that economic reward for copyright owners was maintained. Copyright Law Review Committee, ‘Chapter Three- the Exceptions, no date.
‘Even in cases where copying is carried out in the pursuit of a socially desirable objective, it by no means follows that it should take place to the unreasonable prejudice of the economic or other legitimate interests of the author.’

The fair dealing defence for research or study not only applies for literary, dramatic and musical works, it also applies for an audiovisual item namely a sound recording, a cinematograph film, a sound broadcast or a television broadcast in Part IV. Use of copyright material for the purpose of research or study will not infringe copyright, provided the use is “fair”. Under the fair dealing exception, in section 40, the factors to be considered in determining if a dealing is fair include:

1) the purpose and character of the dealing;
2) the nature of the work or adaptation;
3) the possibility of obtaining the work or adaptation within a reasonable time at an ordinary commercial price;
4) the effect of the dealing upon the potential market for, or value of, the work or adaptation; and
5) the amount and substantiality of the part copied in relation to the whole work or adaptation.

A similar list of factors under section 103C provides guidance in determining a fair dealing of an audio-visual item for the purpose of research and study. The Copyright Act 1968 states a reproduction for the purpose of research or study should be made in a reasonable portion of a work or adaptation and must be fair. However, in fact, this is just a deeming provision which guarantees that fair dealing applies if a person photocopies either not more than one chapter, or less than 10 per cent of a book or journal.
This means a person could make a reproduction more than a reasonable portion indicated in the Copyright Act 1968, as long as he/she can argue that the reproduction is made for the purpose of research or study and is fair. For example, a student can reproduce a number of chapters of an out of print book for reading as a supplementary document in a course. This can be advantageous to the country since it can encourage researchers and students in acquiring knowledge. However, the proving that reproduction is made for the purpose of research or study is also important.

3.1.2 Criticism or Review

Section 41 allows a fair dealing with a work or adaptation for the purpose of criticism or review provided that sufficient acknowledgment of the work is made. This exception also applies to such a dealing with an audio-visual item as well as to the underlying copyright material in the audio-visual item under s. 103A. People can use copyright material for the purpose of criticism or review without infringing copyright, provided they acknowledge the author and title of the work, and provided the dealing is “fair”. The criticism or review may relate to the work being used or to other material.

However, it is much harder to understand, again from a common sense perspective exactly what counts as ‘criticism’ or ‘review’, and whether some particular use falls within the term of criticism or review. The meaning of ‘criticism or review’ has been considered in a number of cases. In Commonwealth of Australia v John Fairfax & Sons Ltd it was held that the work must be used for genuine criticism or review and cannot be published under the pretence of quotation. If the person has other motives, especially if these motives involve using the material to make a profit, or using a competitor’s material to divert customers from the competitor, the fact that they have also engaged in a form of criticism or review is not enough to prevent the use from infringing copyright. Sillitoe v McGraw-Hill Book Co (UK) Ltd held, however, that it is not necessary that criticism or review be the sole purpose of

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350 Section 10 of the Copyright Act 1968 (Cth) Sufficient acknowledgment in relation to a work includes:
‘an acknowledgment identifying the work by its title or other description and, unless the work is anonymous or pseudonymous or the author has previously agreed or directed that an acknowledgment of his or her name is not to be made, also identifying the author.’

351 The Copyright Amendment Act 1986 inserted this provision.

352 Section 41 of the Copyright Act 1968 (Cth)


the dealing, provided there is a substantial measure of criticism or review. In the *De Garis* case Beaumont J held that the *Macquarie Dictionary* definition of the terms applied.

The Federal Court has stated that “criticism and review” involves making a judgment of the material concerned, or of the underlying ideas. Criticism and review may be strongly expressed, and may be expressed humorously, and need not be balanced. The defence that a copyright work has been used for criticism or review can apply where the criticism or review takes place in a commercial context, such as in published books or newspapers or on commercial television.

To achieve the effective standard of the fair dealing defences, it may be necessary to broaden the terms of the existing copyright legislation. The most recent, and arguably most authoritative, treatment of fair dealing was the High Court judgment in *The Panel* case. It involved a television show (*The Panel*) consisting of largely unscripted, humorous discussion of current events and popular culture. As part of the show, panelists would show excerpts from other television programs interspersed with commentary. The makers of the show argued that the uses were fair dealing either for criticism or review or the reporting of news. In the first instance, Conti held that some uses were fair dealing. On appeal, members of the Full Court disagreed with the trial judge, and amongst themselves, as to which uses were fair dealing. The decision is ‘both confused and confusing’ due to a lack of clarity in the law and in what constitutes legitimate criticism. Commentators consider its problems ‘manifold and profound, leaving the law in relation to fair dealing defences in Australia obscure and unsettled.’

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355 *De Garis v Neville Jeffress Pidler Pty Ltd (De Garis) (1990) 37 FCR 99 at 106*
356 The court adopted the *Macquarie Dictionary* definition of "research" and "study": "research" was defined as ‘diligent and systematic inquiry or investigation into a subject in order to discover facts or principles’. ‘study’ included the following: ‘1. application of the mind to the acquisition of knowledge, as by reading, investigation or reflection; 2. the cultivation of a particular branch of learning, science, or art...; 3. a particular course of effort to acquire knowledge...; 5. a thorough examination and analysis of a particular subject...’. Rickets on S, ‘The Three-Step Test, Deemed Quantities, Libraries and Closed Exceptions’ 2002 <http://www.copyright.com.au/reports%20&%20papers/CCS0202 Berne.pdf> (15 April 2005).
358 Section 103(A) of the Copyright Act 1968 (Cth) (Copyright in subject-matter other than works Part IV: Infringement of copyright in subject-matter other than works Division 6)
359 Section 103(B) of the Copyright Act 1968 (Cth) (Copyright in subject-matter other than works Part IV: Infringement of copyright in subject-matter other than works Division 6)
The factors which are relevant in determining the fairness of the dealing include the length of the excerpts which have been appropriated from the work; the relative importance of the excerpts in relation to the critic’s or journalist's own comments, the use made of the work, and the nature of the use, be it criticism, review or summary. While the taking of a substantial part of a work does not automatically exclude the possibility of recourse to the defence of fair dealing, it is a very revealing factor. Since substantiality as to both quantity and quality must be considered, even a very short excerpt may not qualify as a fair dealing if it consists of the "vital" part of the initial work.

### 3.1.3 Parody and Satire

There is a new fair dealing defence for parody and satire contained in sections 41A and 103AA of the Copyright Act 1968. A parody transforms and comments on the copyright material itself, whereas a satire uses copyright material to draw attention to a more general comment on society. The fair dealing for parody and satire apply where a person or organisation can demonstrate that their use of copyright material (both literary, dramatic and musical works, and audio-visual subject matter) is a fair dealing for parody or satire. Pointedly, it appears that the definition of fair dealing for the purpose of parody and satire is not clear. Moreover, according to Skone James’ view on the issue of fair dealing for parody and satire, Fair dealing for criticism and review has very limited application to parody and satire, because of the requirement of sufficient acknowledgement and the possibility of a breach of moral right.

Recently, in Australia, the political cartoonist, Bill Leak’s repeated depictions of the Australian politician Kevin Rudd as comic-book favourite Tintin earned him threats of copyright infringement from Tintin’s copyright owners. The cartoonist has reportedly refused...

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363 Section 10(2) of the Copyright Act 1968 (Cth).
364 Fair dealing for the purpose of parody and satire was introduced in Copyright Amendment Act 2006.
to give undertakings to cease using the character in future cartoons and intends on relying on the fair dealing for the purpose of parody and satire in his defence if action is commenced.  

3.1.4 Reporting the News

Copyright material may be used in reporting news in a newspaper, magazine or similar periodical, or in a film, or by means of a broadcast. The playing of a musical work during news reporting by means of a communication or in a cinematograph film will only constitute a fair dealing if it forms part of the news being reported. The author and title of the work must be acknowledged. However, fair dealing for the purpose of reporting current events does not apply to photograph. This is because to “ensure that the most valuable sources of revenue for certain types of photography is not lost”.

The courts have found that the term ‘news’ is not restricted to current events. It can relate to long-term reviews or commentary. Section 103B applies a corresponding exception to any fair dealing with an audio-visual item or with any other work or audio-visual item included in the material. In the De Garis case, Beaumont J accepted the Macquarie Dictionary definition of ‘news’, finding that ‘news’ included a report of any recent event or situation; the reports of events published in a newspaper or journal, or on radio, television or any other medium; information and events considered suitable for reporting and information not previously known.

In looking at whether a person’s use of copyright material comes within the exception of fair dealing for reporting news, courts are likely to require more than simply a connection with a newsworthy topic. The crucial element in determining whether the exception applies seems to be whether the primary purpose is to report or comment on news. In TCN Channel Nine & Ors v Channel Ten, Conti J observed that it can be difficult to distinguish between news and entertainment, as news may involve entertainment and the use of humour. Although

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370 Section 42(2) of the Copyright Act 1968 (Cth)
372 Commonwealth of Australia v John Fairfax & Sons Ltd (1980) 147 CLR 39 per Mason J.
373 An audio-visual item means a sound recording, a cinematograph film, a sound broadcast or a television broadcast (s. 100A).
courts have held that reporting news may involve the use of humour, it seems that where a court considers the purpose of using the material is primarily to entertain, the presence of newsworthy issues is not sufficient to make the use a fair dealing.

Sections 42 and 103B require sufficient acknowledgment to be made of the literary, dramatic, and musical works or audio-visual items if the reporting occurs via a newspaper, magazine or similar periodical. The requirement to sufficiently acknowledge a work in instances of a fair dealing of an audio-visual item also a work for news reporting or criticism and review is separate to, and does not diminish, the moral rights requiring the attribution of the author of a work when undertaking specific acts in relation to their work.

3.1.5 Reproduction for Purpose of Professional Advice

The Copyright Act 1968 distinguishes between using copyright material for judicial proceedings and the use of copyright material in the course of the giving of professional advice. The fair dealing limitation is only applied under s. 43(2), which provides an exception for a fair dealing with a literary, dramatic, musical or artistic work if it is for the purpose of the giving of professional advice by a legal practitioner, patent attorney or trademarks attorney to assist people to gain a greater awareness of their legal rights and obligations. The use of the material must genuinely be for the purpose of giving such advice, and must be fair. For example, if an item is available for sale, it is unlikely that this provision would allow a person to copy the entire item for the purposes of legal advice.

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378 Sufficient acknowledgment in relation to a work includes:

‘an acknowledgment identifying the work by its title or other description and, unless the work is anonymous or pseudonymous or the author has previously agreed or directed that an acknowledgment of his or her name is not to be made, also identifying the author.’

379 Although under s. 103B a fair dealing can be made with an audio-visual item or with any other work or audio-visual item included in the item, sufficient acknowledgment is only required of the first-mentioned audio-visual item. Sufficient acknowledgment is also a requirement of a fair dealing of a work for the purpose of criticism and review (s. 41).

380 Moral rights are distinct from the exclusive rights of copyright in works and other subject matter in Parts III and IV of the Copyright Act. Unlike copyright, which is an economic right, moral rights are personal rights. The two principal rights forming the basis of moral rights include: the right to be identified as the author of a work (the right of ‘attribution’) and the right of integrity (the right to object to distortion, mutilation or other modification of, or derogatory action in relation to, the work which is prejudicial to the author’s honour or reputation).

381 Section 193 requires that the author be attributed whenever any ‘attributable’ act is performed. Section 194 indicates what are attributable acts in relation to different types of works and cinematograph films which will require an attribution of authorship (such as reproducing, publishing, performing, communicating or adapting a literary, dramatic or musical work). Section 195AC also provides an author with a right to take action against false attribution.

3.2 Free use Exceptions

Apart from the fair dealing sections, Copyright Act 1986\(^{383}\) also provides other free uses which allow a person to use copyright materials without any payment at all to copyright owners. The exceptions may be highly particularised, setting out in exact terms the situations in which they apply. The exceptions do not constitute an infringement of copyright if the acts are done for non-commercial purposes in the following categories:

1) Acts done for purpose of judicial proceedings (sections. 43(1), and 104);
2) Libraries and archives exceptions (sections. 48-53 and 104A-104B, 112AA);
3) Exception for the purpose of education (section. 44);
4) Reproduction for purpose of literary, dramatic, and musical works (sections. 45-47A);
5) Temporary reproductions (sections. 43A and 111A, and 43B and 111B);
6) Reproduction of on approved label for containers for chemical product (sections. 44B and 112B);
7) Reproduction of computer program for normal use or study (sections. 47AB-47H);
8) Reproduction of edition of work (section. 112);
9) Reproduction of audio-visual items (sound recording, cinematograph film, sound broadcast, or television broadcast) for private and domestic use (sections.105-111);
10) Private Copying (Time-Shifting (section. 111) and Format-Shifting (sections. 43C, 43J, 109A, and 110AA));
11) Importation (section. 37); and
12) Exceptions for Artistic Works (sections. 65-68, 70, 72-73).

### 3.2.1 Acts Done for Purpose of Judicial Proceeding

Unlike section 43(2),\(^{384}\) section 43(1) provides a complete exemption from infringement of copyright in a literary, dramatic, musical or artistic work as a result of anything done for the purpose of a judicial proceeding or a report of a judicial proceeding. This is a blanket exception which is not qualified by any requirement of fair dealing.\(^{385}\)

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\(^{383}\) The Copyright Act 1968 (Cth)

\(^{384}\) Section 43(2) of the Copyright Act 1968 (Cth) Section 43(2) states that

2) A fair dealing with a literary, dramatic, musical or artistic work does not constitute an infringement of the copyright in the work if it is for the purpose of the giving of professional advice by:

(a) a legal practitioner; or
(b) a person registered as a patent attorney under the Patents Act 1990; or
(c) a person registered as a trade marks attorney under the Trade Marks Act 1995.

There is a general exemption from infringement of copyright in sound recordings, films, broadcasts and published editions which cover anything done for the purpose of:

- a judicial proceeding or report of a judicial proceeding and
- seeking professional advice from a legal practitioner; patent attorney or trade marks attorney; or for the purpose of, or in the course of the giving of this professional advice.

Thus, section 104(a)-(c) effectively conflate section 43(1) and (2) by removing the fair dealing requirement for the giving of professional advice in relation to audio-visual items. As this section is not a fair dealing exemption, it permits unlimited copying (or any other act within the copyright) for the specific purposes to which it refers.

### 3.2.2 Library and Archive Exceptions

The Copyright Act 1968 provides institution exceptions for certain non-commercial use which allow libraries and educational institutions to reproduce some works as long as the copying conforms to specific purposes. The purposes of the copying include for educational instruction, for libraries and archives, or for assisting a person with a disability. The exceptions for reproduction must comply with Australia’s international treaty obligations, in particular, the so-called three-step test which was originally specified in the Berne Convention and is used in many international documents including the TRIPS agreement. This is because the three-step test provided in the Berne Convention allows users to reproduce copyright materials for certain special cases which do not conflict with the concept of a normal exploitation of the work. In all cases, the reproduction must be made without unreasonably prejudicing the legitimate interests of the right holder. Libraries, archives, and non-profit organisations, therefore are able to allow the users to legally reproduce a reasonable portion of the works only for non-commercial purposes. However, compliance with this international obligation can cause the problem of uncertainty in regard to the Australian exceptions. This is because the new section 200AB attempts “…to

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386 Section 104(a) of the Copyright Act 1968 (Cth)
387 Section 104(b)(c) of the Copyright Act 1968 (Cth)
389 The Copyright Act 1968 (Cth)
390 Three-Step test is defined in Article 9(2) of the Berne Convention for the Protection of Literary and Artistic(Paris Act, 1971) NO 615 (E)
391 The Berne Convention for the Protection of Literary and Artistic(Paris Act, 1971) NO 615 (E)
392 The Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS), Annex 1C, 1994
393 Section 200AB of the Copyright Act 1968 (Cth)
provide an open-ended exception in line with the United States model, and to allow the courts to determine if other uses should be permitted as exceptions to copyright”. As the section 200AB derives from the international convention, in conjunction with the Australian domestic law, this will make Australian law uniformity with the international convention. However, as the section 200AB is adopted without the Australian jurisprudence, it is necessary that the uniformity of the Australian provision to the international convention be carefully clarified. This is because if there is doubt as to whether the domestic law is uniform with the international convention, some uncertainty as to the scope of the new open-ended exceptions will probably occur unless case law is developed. The Australian Government should respond to this issue by monitoring the development of case law with respect to the open-ended exception which also developing clear terminology, scope, and treatment to ensure so that this section can be clearly interpreted by both courts and the public.

In addition, the direct importation of language from TRIPS into section 200AB is controversial. For example, some commentators have questioned how “special case” will be assessed, given that the term as used in TRIPS refers to the exception constituting a special case and not the use. Moreover, it remains to be seen what analytical tools will be relevant in interpreting each test of the three-step test. It is therefore difficult to rely on which sources can be used to interpret by the judiciary and users.

Provisions under Part III Division 5 of the Copyright Act 1968 provide an exception to infringement of copyright for the reproduction of literary, dramatic, musical and artistic works held by libraries and archives. Under Part IV Division 6 of the Copyright Act 1968, there are exemptions for copying a sound recording or cinematograph film for preservation

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395 Section 200AB of the Copyright Act 1968 (Cth)
398 World Trade Organization, United States – Section 110(5) of the US Copyright Act, Report of the Panel, WT/DS160R, 15 June 2000. The Panel held that exceptions must be limited in qualitative and quantitative ways. The term ‘certain’ means that the scope of the exception must be ‘clearly defined’: it need not specify every circumstance in which it arises, ‘provided that the scope of the exception is known and particularised’
399 Part III Division 5 of the Copyright Act 1968 (Cth). Division 5 of Part Three deals with the copying of works in libraries or archives
400 Part IV Division 6 of the Copyright Act 1968 (Cth). Division 6 of Part IV deals with copyright in subject-matter other than work.
purposes,\textsuperscript{401} or for the purpose of research and study or with a view to publication.\textsuperscript{402} Although the Copyright Act 1968\textsuperscript{403} does not contain a definition of the word ‘library’, in applying the statutory exceptions the Act differentiates between different types of libraries. The exceptions for intra-library copying for research or study\textsuperscript{404} and for inter-library copying\textsuperscript{405} are restricted to non-profit libraries. However, copying unpublished copyright material and copying for preservation under sections 51,\textsuperscript{406} 51A,\textsuperscript{407} 110A\textsuperscript{408} and 110B\textsuperscript{409} applies to all libraries and archives. Provisions relating to copying by archives are also limited to those archives and bodies which are not operated for the purposes of deriving a profit.\textsuperscript{410}

In differentiating between non-profit libraries and libraries established or conducted for profit, section 18 states that ‘a library shall not be taken to be established or conducted for profit by reason only that the library is owned by a person carrying on business for profit’.\textsuperscript{411} Thus, it does not follow that a research library owned by a commercial organisation will automatically be excluded from the statutory scheme under sections 49\textsuperscript{412} and 50.\textsuperscript{413} Other factors, such as whether or not the library is conducted as a profit centre within the organisation, must also be considered. Libraries in educational institutions and in government may rely upon the library provisions. However, the purpose for which a copy is made may mean that copying by the library should be done under the educational or government copying provisions.\textsuperscript{414}

Although the fair dealing and library and archives exceptions have a similar policy basis, the latter are far narrower than the former. The current Copyright Act\textsuperscript{415} in Australia limits the proportions of material that can be copied by libraries and the use of these copies. The Copyright Act 1968\textsuperscript{416} also requires declarations to be made to assist in limiting the purposes

\textsuperscript{401} Section 110B of the Copyright Act 1968 (Cth)
\textsuperscript{402} Section 110A of the Copyright Act 1968 (Cth)
\textsuperscript{403} The Copyright Act 1968 (Cth)
\textsuperscript{404} Section 49 of the Copyright Act 1968 (Cth)
\textsuperscript{405} Section 50 of the Copyright Act 1968 (Cth)
\textsuperscript{406} Section 51 of the Copyright Act 1968 (Cth)
\textsuperscript{407} Section 51A of the Copyright Act 1968 (Cth)
\textsuperscript{408} Section 110A of the Copyright Act 1968 (Cth)
\textsuperscript{409} Section 110B of the Copyright Act 1968 (Cth)
\textsuperscript{410} Section 10 (4)(B) of the Copyright Act 1968 (Cth)
\textsuperscript{411} Section 18 of the Copyright Act 1968 (Cth)
\textsuperscript{412} Section 49 of the Copyright Act 1968 (Cth)
\textsuperscript{413} Section 50 of the Copyright Act 1968 (Cth)
\textsuperscript{414} The educational copying provisions are mostly set out in Part VB of the Act; and sections 183 and 183A deal with copying by government ‘for the services of’ government.
\textsuperscript{415} The Copyright Act 1968 (Cth)
\textsuperscript{416} The Copyright Act 1968 (Cth)
for which copies can be made, and the quantity of material that can be copied. Prescribed
documentation and records must also be kept. Nor do the library provisions allow a library to
deal with copyright material on behalf of a client in every way in which clients themselves
amendments,\footnote{Copyright Amendment (Digital Agenda) Act 2000, Act No. 110 of 2000} particularly, restrict the scope of the exceptions as they apply to the digital
environment. A more detailed analysis of the limitations on reproducing and communicating
print-based and digital material is included in the following discussion of each library and
archive provision. These amendments are seen as allowing the use of new technology to
provide the general community with access to copyright material without unreasonably
prejudicing copyright owners.

Section 49 allows a non-profit making library or archives to reproduce and communicate
published works for a client who has requested this for his or her research or study for free
without infringing copyright.\footnote{Sections 49(6) and (7) exempt a library or archive from infringing the copyright in a periodical publication or published
work by supplying a reproduction of the material to an individual, providing the request and declaration provisions under ss. 49(2) and (2C) have been satisfied. A new s. 49(7B) also provides a similar exception to an infringement of copyright in an
article or published work where the material is communicated in electronic format.} The purpose for which a library is able to deal with copyright
material for a client is limited to this one research or study purpose, and does not extend to
other purposes covered by fair dealing.\footnote{The fair dealing provisions (ss. 40-3 and 103A-C) cover dealings with copyright material for the purpose of research or
study; criticism or review; reporting news; and giving professional legal advice (for works only).} The amounts of published literary, dramatic or musical works that can be copied under
section 49 differ according to the type of work copied and whether the material is in hard
copy or electronic form.\footnote{Section 49(5) allows libraries and archives to reproduce the whole or a reasonable portion of a work (other than an article
contained in a periodical publication) in their collection without infringing copyright, provided that the work cannot be
obtained within a reasonable time at an ordinary commercial price.} In relation to periodical publications, the following amount may be copied:

- the whole or part of an article from an issue of a periodical publication;\footnote{Section 49(1)(a) of the Copyright Act 1968 (Cth)} and
- the whole or parts of two or more articles from the same issue of a
periodical publication unless they relate to the same subject matter.\footnote{Section 49(4) of the Copyright Act 1968 (Cth)}
For works other than periodical publications, the amount of allowable copying includes:

- a ‘reasonable portion’ of most types of works;\(^{424}\) and
- the whole or more than a ‘reasonable portion’ of such a work if a copy of the reproduction is not available within a reasonable time at an ordinary commercial price.\(^{425}\)

Copyright Amendment (Digital Agenda) Act 2000\(^{426}\) also extend the operation of the provisions under section 49 to electronic material. Library and archives can now supply electronic reproductions of works or parts of works in response to user requests for the purpose of research or study without infringing copyright, subject to certain conditions.\(^{427}\)

Works can only be supplied to a user on dumb terminals which prevent making further reproductions or communications of the work.

Pointedly, according to Emily Hudson and Andrew T Kenyon’s research,\(^{428}\) they gave their opinions on the libraries and archives exceptions that, “the libraries and archives provisions are generally not applicable for public activities, such as reproducing material for exhibitions, allowing patrons to browse collection items onsite on copy-disabled terminals, or the creation of online databases.” This is because the Copyright Act 1968 contains narrow exceptions allowing published works acquired in electronic form to be made available on electronic copy disabled terminals,\(^{429}\) and preservation copies of unstable artistic works to be made available on entirely copy disabled terminals.\(^{430}\)

### 3.2.3 Exception for the Purpose of Education

The copyright in a published literary, dramatic, musical or artistic work is not infringed by the inclusion of a short extract from the work, or, in the case of a published literary, dramatic or musical work, from an adaptation of the work, in a collection of literary, dramatic, musical or artistic works contained in a book, sound recording or cinematograph film and intended for

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\(^{424}\) This test only applies to a published literary, dramatic, or musical work (other than an article in a periodical publication or a computer program) (s. 49(5)).

\(^{425}\) This test only applies to a published literary, dramatic, or musical work (other than an article in a periodical publication or a computer program) (s. 49(5)).

\(^{426}\) Copyright Amendment (Digital Agenda) Act 2000, Act No. 110 of 2000

\(^{427}\) Sections 49(7)(A) and (7)(B) of the Copyright Act 1968 (Cth)


\(^{429}\) Section 49(5A) of the Copyright Act 1968 (Cth)

\(^{430}\) Section 51A(3A) of the Copyright Act 1968 (Cth)
use by places of education. 431 However, the collection must be described in an appropriate place in the book, on the label of each record embodying the recording or of its container, or in the film, as being intended for use by places of education. 432 Additionally, The copyright in a published literary, dramatic, musical or artistic work is not infringed by the inclusion of a short extract from the work, or, in the case of a published literary, dramatic or musical work use by places of education if the work or adaptation used by place of education was not published for the purpose of being used by places of education. 433 Importantly, a sufficient acknowledgement of the work or adaptation used by places of education must be made. 434

3.2.4 Reproduction of Literary, Dramatic, and Musical Works

Acts not constituting infringements of copyright in literary, dramatic and musical works are provided in sections 45-47A.

Reading or recitation in public or for a broadcast of an extract of reasonable length does not constitute an infringement of the copyright in the work if a sufficient acknowledgement of the work is made. 435 Also, the performance does not constitute an infringement of the copyright in the work if a literary, dramatic or musical work, or an adaptation of such a work, is performed in public, by the operation of reception equipment or by the use of a record, at premises where persons reside or sleep. 436

Recording or filming a work for purpose of broadcasting does not constitute an infringement of the copyright in the work. 437 However, this does not apply in relation to a recording or film where a record embodying the recording or a copy of the film is used for the purpose of the broadcasting of the work or adaptation by a person who is not the maker of the recording or film unless the maker has paid to the owner of the copyright in the work such amount as they agree or, in default of agreement, has given an undertaking in writing to the owner to pay to the owner such amount as is determined by the Copyright Tribunal, on the application of either of them, to be equitable remuneration to the owner for the making of the recording or film. 438

431 Section 44(1) of the Copyright Act 1968 (Cth)
432 Section 44(1)(a) of the Copyright Act 1968 (Cth)
433 Section 44 (b) of the Copyright Act 1968 (Cth)
434 Section 44(2) of the Copyright Act 1968 (Cth)
435 Section 45 of the Copyright Act 1968 (Cth)
436 Section 46 of the Copyright Act 1968 (Cth)
437 Section 47(1) of the Copyright Act 1968 (Cth)
438 Section 47(3) of the Copyright Act 1968 (Cth)
In the case of reproduction for the purpose of simulcasting the work or adaptation in digital form, it does not constitute an infringement of the copyright in the work if the embodying recording or a copy of the film is not used for a purpose other than the simulcasting of the work or adaptation in circumstances that do not constitute an infringement of the copyright in the work.

Moreover, the making of a sound broadcast of, or of an adaptation of, a published literary or dramatic work does not constitute an infringement of copyright in the work if the broadcast is made by a person who is the holder of a print disability radio licence and the broadcast is made under the licence. The owner of the copyright in a literary or dramatic work, or the agent of such an owner, may notify in writing a person who holds or held a print disability radio licence that the owner or agent wishes to inspect all the records of the person made by or on behalf of the person for the purposes of paragraph (1)(b) or such of those records as relate to the works of a specified author.

### 3.2.5 Temporary Reproduction

Many temporary reproductions are made in the course of the technical processes of exercising the new communication right. The Copyright Amendment (Digital Agenda) Act 2000 ("CADA") introduced new exceptions in relation to the exclusive right of reproduction for temporary reproductions made as part of the technical process of making a communication. The exception is intended to include temporary reproductions made in the course of browsing or viewing copyright material on-line, and in certain limited types of caching. The exception is limited to temporary reproductions made in the course of non-infringing communications, and involves reproductions which have little or no independent economic significance. The exceptions for temporary reproduction relate to the exceptions for the reproduction of computer programs for normal use. To make a temporary reproduction of information for the reproduction that occurs incidentally through normal computer usage is allowed if such reproduction is not damage the copyright owner’s interest.

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439 Section 47AA of the Copyright Act 1968 (Cth)
440 Section 47AA(2)(a) of the Copyright Act 1968 (Cth)
441 Section 47A of the Copyright Act 1968 (Cth)
442 Section 47A (1)(b) of the Copyright Act 1968 (Cth)
443 The Copyright Amendment (Digital Agenda) Act 2000, Act No. 110 of 2000
There are four sections dealing with the temporary reproduction contained in the Copyright Act 1968. Sections 43A and 111A are related to the temporary reproductions made in the course of communication, whereas sections 43B and 111B are related to the temporary reproductions of works as part of a technical process of use.

**Temporary Reproductions Made in the Course of Communication**

The copyright in a work, or an adaptation of a work, is not infringed by making a temporary reproduction of the work or adaptation, as part of the technical process of making or receiving a communication. This exception also applies to such a dealing with an audio-visual item as well as to the underlying copyright material in the audio-visual item under s. 111A.

**Temporary Reproductions of Works as Part of a Technical Process of Use**

Temporary reproductions of works as part of a technical process of use are not infringed if the reproduction is incidentally made as a necessary part of a technical process of using a copy of the work. A “technical process” suggests something done by a computer program or a machine without human intervention. Notably, this section does not apply to a copy of the work where the copy is made in another country and would be an infringing copy of the work if the person who made the copy had done so in Australia. Section 111B applies in accordance with section 43B to temporary copy of audio-visual item as part of a technical process of use.

Not all temporary reproduction, however, is automatic and part of a technical process. It is also not clear what uses which sometimes may be commercial uses, may be made of temporary reproduction as technology develops. Consequently, whether reproduction is temporary or

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445 The Copyright Act 1968 (Cth)
446 Section 43A of the Copyright Act 1968 (Cth). The section deals with the temporary reproductions of the work or adaptation as part of the technical process of making or receiving a communication.
447 Section 111A of the Copyright Act 1968 (Cth). The section deals with the temporary reproduction of the work or adaptation as part of the technical process of making or receiving a communication.
448 Section 43B of the Copyright Act 1968 (Cth). The section deals with the temporary reproduction of the work as part of a technical process of use.
449 Section 111B of the Copyright Act 1968 (Cth). The section deals with the temporary reproduction of the subject matter as part of a technical process of use.
450 Section 43A of the Copyright Act 1968 (Cth)
451 Section 111A of the Copyright Act 1968 (Cth)
452 Section 43B of the Copyright Act 1968 (Cth)
453 Section 111B of the Copyright Act 1968 (Cth)
permanent is not necessarily a useful yardstick by which to measure whether infringement has occurred. Rather, it is the purpose of the copying that should be considered.\footnote{International Intellectual Property Alliance, ‘Digital Technology and the Copyright Act 1994’ 2003 <http://www.med.govt.nz/upload/6252/21.pdf> (11 December 2006).}

According to the Internal working paper of Ministry of Economic Development, copyright owners have expressed concerns in relation to the possibility of providing a blanket exception for all temporary reproduction.\footnote{Ministry of Economic Development, ‘Part Three: Reproduction Right’ 2002 <http://www.med.govt.nz/templates/MultipageDocumentPage____927.aspx> (4 June 2006).} It is argued that such an exception may limit their ability to enforce copyright, particularly in relation to "on-line" and software piracy. The copyright owners consider that some allowances should be made for temporary reproduction. This should be in the form of clarifying what types of temporary reproduction should be permitted acts. The definition of a technical process should be reviewed, particularly in regard to whether it should cover automatic copying undertaken by computer systems to improve network efficiencies.

However, users have argued that they should not be held liable for temporary reproduction that is automatically undertaken as part of the technical processes involved in making authorised use of works\footnote{Ministry of Economic Development, ‘Part Three: Reproduction Right’ 2002 <http://www.med.govt.nz/templates/MultipageDocumentPage____927.aspx> (4 June 2006).} such as forward caching (forward caching occurs when a user on the corporate network makes a request for Web content located on an Internet Web server.). An extension of this view is a suggestion that some form of exception or defence be available for "innocent" infringers of copyright. There is some support for this by copyright owners in situations where the infringer does not obtain an "economic benefit" from the infringement.

### 3.2.6 Reproduction of Writing on Approved Label for Containers for Chemical Product

The reproduction on a label on a container for a chemical product of any writing appearing on an approved label is not an infringement of any copyright subsisting under this Part in relation to that writing.\footnote{Section 44B of the Copyright Act 1968 (Cth)} Section 112B\footnote{Section 112B of the Copyright Act 1968 (Cth)} applies a corresponding exception to any reproduction with an audio-visual item.
3.2.7 Reproduction of Computer Programs for Normal Use or Study

Exceptions to exclusive rights are designed to make allowance for the reproduction that occurs incidentally through normal computer usage (such as running software on a hard drive); to allow for legitimate activities (such as error correction and security testing); and to promote the development of new interoperable technology. The making of reproductions (and in certain circumstances adaptations) of computer programs is allowed for the following purposes:

1) normal use or study of the program (section 47B);
2) making a back-up copy (section 47C);
3) making interoperable products (section 47D);
4) error correction in programs (section 47E); and
5) security testing of a program or of a computer system or network of which it forms a part (section 47F).

Section 47B(2)(b)\(^{459}\) allows an express direction or licence to override the exception in section 47B(1)\(^{460}\) which allows the making of an incidental and automatic reproduction of a computer program in the course of running a computer program for the purposes for which the program is designed.

The exception for reverse engineering of computer programs\(^{461}\) was provided to maintain Australia’s international competitiveness.\(^{462}\) The Government acknowledged the competitive nature of the computer industry internationally. Section 47AB\(^{463}\) was inserted into the Copyright Act 1968 and clarified that the definition of computer program in Part III Division 4A of the Act included any literary work that is incorporated in, or associated with, a computer program; and is essential to the effective operation of a function of that computer program. The stated intention of the amendment was to:

\begin{quote}
ensure that, whenever a person is permitted to reproduce a computer program for the purposes of normal use or study, making a back-up copy, making interoperable products, error correction or security testing, that person is also permitted to reproduce any literary work that is incorporated in, or associated
\end{quote}

\(^{459}\) Section 47B(2)(b) of the Copyright 1968 (Cth)

\(^{460}\) Section 47B(1) of the Copyright 1968 (Cth)

\(^{461}\) Section 47(D) of the Copyright Act 1968 (Cth)


\(^{463}\) Section 47B of the Copyright 1968 (Cth)
with a computer program, which is essential to the effective operation of a function of that program.\textsuperscript{464}

Considerations of the public interest in permitting interoperability and promoting the efficient operation of technology also influenced the insertion of section 47AB in the Copyright Act 1968.\textsuperscript{465} In response to the indication of the Copyright Amendment (Digital Agenda) Act 2000\textsuperscript{466} regarding the extension of the exceptions to computer programs to associated literary works, the Copyright Act 1968\textsuperscript{467} provides consistency with the legislative changes to the definition of ‘computer program’ in section 10(1).\textsuperscript{468} The amendment is vital to the effective performance of the functions of that program.

\textbf{3.2.8 Reproduction of Edition of Work}

The copyright in a published edition of a work or works is not infringed by the making of a reproduction of the whole or a part of that edition if that reproduction is made where the edition contains one work only. The edition must be a dealing for individual and non-commercial purposes under sections 40-44. The making of a copy, including a copy for a person with a print disability or a copy for a person with an intellectual disability of the whole or a part of that work in libraries, archives or cultural institutions\textsuperscript{469} is not infringed.

In the case of the edition containing more than one work, a dealing with one of those works or dealings with some or all of those works by virtue of sections 40-44 is not deemed to infringe a copyright in that work.\textsuperscript{470} This also includes the making of a copy for a person with an intellectual disability of the whole or a part of one of those works or the making of copies (including copies for persons with a print disability or copies for persons with an intellectual disability) of the whole or parts of some or all of those works.\textsuperscript{471}

Apart from making copy of such works in libraries, archives or cultural institutions, reproduction also includes a multiple reproduction of works both in printed anthologies\textsuperscript{472} and hardcopy\textsuperscript{473} by education institutions. Additionally, the copying and communicating of
works by institutions in order to assist a person with a print disability\textsuperscript{474} does not constitute an infringement. Moreover, the reproduction of one copy of the whole or of a part of prescribed works (statutory instrument, judgement, etc)\textsuperscript{475} by or on behalf of a person and for a particular purpose is not deemed an infringement.\textsuperscript{476}

3.2.9 Reproduction of Audio-Visual Items for Private, Domestic, Library and Archive Use

The Copyright Act 1968\textsuperscript{477} contains exceptions to the infringement of copyright in subject-matter other than works in Division 6. In this Division, audio-visual item means a sound recording, a cinematograph film, a sound broadcast or a television broadcast.\textsuperscript{478}

The Copyright Act 1968 states that copyright in certain recordings is not infringed by causing recordings to be heard in public or broadcast\textsuperscript{479} and the copyright in the recording is not infringed by the making by a person of a copy of the sound recording in association with other matter, solely for the purpose of the broadcasting of the recording in association with the other matter.\textsuperscript{480} The copyright in a sound recording that has been published is not infringed if the person has paid equitable remuneration to the owner of the copyright in the recording such amount as they agree for the causing of the recording to be heard in public\textsuperscript{481} and the published sound recording is broadcast in certain circumstances.\textsuperscript{482} Section 106(1)(a)\textsuperscript{483} provides a similar exception to section 46 for sound recordings heard in public as part of the amenities provided at premises where persons reside or sleep. A further exception to copyright infringement is provided for a club, society or other organisation which causes the sound recording to be heard in public as part of the activities of, or for the

\textsuperscript{474} Sections 135ZN-135ZT of the Copyright Act 1968 (Cth)
\textsuperscript{475} Section 182A(3) of the Copyright Act (Cth) states that in subsection (1), a prescribed work means:
(a) an Act or State Act, an enactment of the legislature of a Territory or an instrument (including an Ordinance or a rule, regulation or by-law) made under an Act, a State Act or such an enactment;
(b) a judgment, order or award of a Federal court or of a court of a State or Territory;
(c) a judgment, order or award of a Tribunal (not being a court) established by or under an Act or other enactment of the Commonwealth, a State or a Territory;
(d) reasons for a decision of a court referred to in paragraph (b), or of a Tribunal referred to in paragraph (c), given by the court or by the Tribunal; or
(e) reasons given by a Justice, Judge or other member of a court referred to in paragraph (b), or of a member of a Tribunal referred to in paragraph (c), for a decision given by him or her either as the sole member, or as one of the members, of the court or Tribunal.
\textsuperscript{476} Section 182A of the Copyright Act 1968 (Cth)
\textsuperscript{477} The Copyright Act 1968 (Cth)
\textsuperscript{478} Part IV Division 6 of the Copyright Act 1968 (Cth)
\textsuperscript{479} Sections 105 of the Copyright Act 1968 (Cth)
\textsuperscript{480} Sections 107 of the Copyright Act 1968 (Cth)
\textsuperscript{481} Section 108(1) of the Copyright Act 1968 (Cth)
\textsuperscript{482} Section 109 of the Copyright Act 1968 (Cth)
\textsuperscript{483} Section 106(1)(a) of the Copyright Act 1968 (Cth)
benefit of, the organisation.  

However, section 106(1)(b) limits the exception to non-profit organisations whose principal objects are charitable or are concerned with the advancement of religion, education or social welfare. The exception does not apply if these organisations charge admission and the proceeds are applied otherwise than for the principal purposes of the organisation.

Apart from the exceptions for sound recording, the Copyright Act 1968 provides provisions relating to cinematograph films. The copyright in the film is not infringed by causing of the film to be seen or heard, or to be both seen and heard, in public after the expiration of 50 years after the expiration of the calendar year in which the principal events depicted in the film occurred and by embodying in a sound-track associated with the visual images forming part of a cinematograph film. This provision also protects a person who, after that copyright has expired, causes the film to be seen or heard in public does not, by so doing, infringe any copyright subsisting by virtue of Part III in a literary, dramatic, musical or artistic work.

In addition, the Copyright Act 1968 allows a person, or on behalf of the officer in charge of the library or archives, to copy and communicate unpublished sound recordings and cinematograph films in libraries or archives for the purpose of research or study or with a view to publication. Also, a person is allowed to copy and communicate sound recordings and cinematograph films for preservation and other purposes.

However, this reproduction does not apply in relation to a sound recording or a cinematograph film, held in a published form in the collection of a library or archives unless an authorised officer of the library or archives has, after reasonable investigation, made a declaration stating that he or she is satisfied that a copy of the sound recording or cinematograph film, as the case may be, cannot be obtained within a reasonable time at an

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484 Section 106(1)(b) of the Copyright Act 1968 (Cth)
485 Section 106(1)(b) of the Copyright Act 1968 (Cth)
486 Sections 106(2) and (3) of the Copyright Act 1968 (Cth)
487 The Copyright Act 1968 (Cth)
488 Section 110(1) of the Copyright Act 1968 (Cth)
489 Section 110(3) of the Copyright Act 1968 (Cth)
490 Part III of the Copyright Act 1968 (Cth). Part III of the Copyright Act 1968 deals with the copyright in original literary, dramatic, musical, and artistic works.
491 Section 110(2) of the Copyright Act 1968 (Cth)
492 Section 110A of the Copyright Act 1968 (Cth)
493 Section 110B of the Copyright Act 1968 (Cth)
ordinary commercial price. In the case of making preservation copies of significant recordings and films in key cultural institutions' collections, the authorised officer must take into account whether an electronic copy can be obtained within a reasonable time at an ordinary commercial price.

In section 110C the copyright is not infringed by the making of a copy of the recording or film if the recording or film from which the copy is made is in analog form and the copy is made solely for the purpose of simulcasting the recording or film in digital form.

### 3.2.10 Private Copying

The Copyright Amendment Act 2006 introduced two exceptions namely time-shifting and format-shifting to implement the Government's intentions on exceptions for copyright infringement and the Government's response to the Digital Agenda review. Some private use does not damage the copyright owner’s economic incentives. These two exceptions were also introduced for the sake of alignment with international standards as well as the Australia United States Free Trade Agreement (AUSFTA).

These flexible exceptions are fundamentally important to the development of new technologies and new uses of copyright material. In order to rely on the legislature to keep copyright exceptions in pace with new technology, time-shifting and format-shifting are an approach to encourage people to keep pace with the digital environment.

#### Time Shifting

Time-shifting was once unlawful in Australia but now it is contained in the Copyright Act 1968. Since the introduction of the Betamax videocassette recorder in 1975, practically every Australian citizen who has recorded a television broadcast for later viewing has done so unlawfully.

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494 Section 110BA of the Copyright Act 1968 (Cth)
495 Section 110C of the Copyright Act 1968 (Cth)
496 The Copyright Amendment Act 2006 No. 158, 2006
497 The Australia-United States Free Trade Agreement (AUSFTA) is a preferential trade agreement between Australia and the United States of America. AUSFTA came into force on 1 January 2005.
The legality of time-shifting programming in the United States was proven by a landmark court case involving Universal Studios versus Sony Corporation (Sony Corp. of America v. Universal City Studios, Inc.), when Sony argued successfully that the advent of its Betamax video recorder in 1976 did not violate the copyright of the owners of shows which it recorded.

In 1979, Universal sued Sony, claiming its timed recording capability amounted to “copyright infringement”. However, a district court found that noncommercial home use recording was considered fair use and ruled in favour of Sony. On Appeal, the decision was reversed. The Supreme Court of the United States reversed it yet again in 1984, and found in favour of Sony 5-4. The majority decision held that time shifting was a fair use, represented no substantial harm to the copyright holder, and would not contribute to a diminished marketplace for its product.

Section 111 of the Copyright Act 1968 contains the time-shifting provisions, which make it permissible to make a time shift recording of a radio or television program for listening or viewing at a later time.

There are a number of conditions included to protect the right holder as follows:

1) The recording is meant only for temporary use, not to be played over and over.
2) No further copies can be made.
3) The recording is only to be played in domestic premises.
4) The recording may be loaned to a member of the family or household but not more widely.
5) There is a restriction on some dealings including selling, letting for hire, offering for sale or hire or distributing the copy for trade or other purposes.

As soon as a person who has made a copy receives commercial benefit from the recording, copyright is immediately breached.

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499 Section 111 of the Copyright Act 1968 (Cth)
Format Shifting

The Copyright Act 1968 introduces a number of format shifting exceptions which are contained in the following sections:

1) Section 43C: Reproducing works in books, newspapers and periodical publications in a different form for private use;
2) Section 47J: Reproducing photographs in a different format for private use;
3) Section 109A: Copying sound recordings for private and domestic use; and
4) Section 110AA: Reproducing cinematograph film in a different format for private use

For books, newspapers, periodical publications, photograph and sound recordings, only one copy may be made of the original material in each particular format. The original material must not be infringing and must be ‘owned’ by the person making the copy for the format shifting exception to apply; if the original material is borrowed, the copy cannot lawfully be made, nor is it possible to make a copy on the owner's behalf. A ‘main copy’ is the final copy. For example, in order to copy a CD to an MP3 player, the CD must first be copied onto a computer. The computer copy is considered to be a ‘temporary copy’ and the main copy is the one made on the MP3 player. This means a user is not allowed to make the private copy from an illegitimate recording for example, from a burnt CD or from peer to peer files, and upload or distribute music via the Internet. Consumers also lose the benefit of the exception if they give away their original copy. The copyright owner is protected in that individuals must not make multiple copies and only the owner of the original may make a copy.

The Copyright Act 1968 provides that the copy becomes an infringing copy if the original material is disposed of to another person. However, a user is not allowed to acquire the original material, make a copy, and pass ownership to another person who might repeat the process. This provision is designed to prevent serial copying and seeks to protect the copyright owner by allowing only one main copy to be made from each original.

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501 The Copyright Act 1968 (Cth)
502 Section 109A of the Copyright Act 1968 (Cth)
503 The Copyright Act 1968 (Cth)
3.2.11 Importation

The import of overseas works such as a literary, dramatic, musical or artistic work for selling, letting for hire, or by way of trade offering or exposing for sale or hire, distributing, for the purpose of trade, for any other purpose to an extent that will affect prejudicially the owner of the copyright, or by way of trade exhibiting the article in public is an infringement of copyright.\(^{504}\) This means section 37 prohibits a person from importing an oversea works for a commercial purpose.

However, in order to encourage people to access information worldwide, the Copyright Act 1968\(^{505}\) allows a person to import copyright works such as books from overseas for the purpose of individual or non-commercial uses.

3.2.12 Exceptions for Artistic Works

The Copyright Act 1968 authorises a person to make a copy of a painting, draw, engrave, or photograph of the building or model or by the inclusion of the building or model in a cinematograph film or in a television broadcast.\(^{506}\) The copyright is not construed infringement for incidental filming or televising of artistic works\(^{507}\) as well as publishing of artistic works\(^{508}\).

Reproduction for purpose of including a work in a television broadcast where

the inclusion of an artistic work in a television broadcast made by a person would not (whether by reason of an assignment or licence or of the operation of a provision of this Act) constitute an infringement of copyright in the work but the making by the person of a cinematograph film of the work would, apart from this subsection, constitute such an infringement, the copyright in the work is not infringed by the making by the person of such a film solely for the purpose of the inclusion of the work in a television broadcast.\(^{509}\)

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\(^{504}\) Section 37 of the Copyright Act 1968 (Cth)
\(^{505}\) The Copyright Act 1968 (Cth)
\(^{506}\) Section 66 of the Copyright Act 1968 (Cth)
\(^{507}\) Section 67 of the Copyright Act 1968 (Cth)
\(^{508}\) Section 68 of the Copyright Act 1968 (Cth)
\(^{509}\) Section 70 (1) of the Copyright Act 1968 (Cth)
However, the making of further copies of the film for the purpose of the inclusion of the work in such a broadcast is an infringement of copyright. In addition, a copy of the film is used for the purpose of the inclusion of the work in a television broadcast made by a person who is not the maker of the film which is not allowed unless the maker has paid to the owner of the copyright in the work such amount as they agree. In the case that an agreement cannot be reached, the Copyright Tribunal will determine the equitable remuneration to the owner for the making of the film.\textsuperscript{510}

Reproduction of part of a work in a later artistic work by the same author is not an infringement of copyright if in making the later work, the author does not repeat or imitate the main design of the earlier work.\textsuperscript{511} Reconstruction of a building or where a building has been constructed in accordance with architectural drawings or plans in which copyright subsists and has been so constructed by, or with the licence of, the owner of that copyright, that copyright is not an infringement by a later reconstruction of the building by reference to those drawings or plans.\textsuperscript{512}

Some exceptions with respect to artistic works are claimed as two dimensional reproductions of artistic works. Section 65 of the Copyright Act\textsuperscript{513} allows two-dimensional reproductions of public art (sculptures and works of artistic craftsmanship displayed in a public place). A similar provision, section 66\textsuperscript{514} also allows two-dimensional reproductions of buildings and models of buildings. Neither section expressly allows the reproduction of “underlying” works such as design drawings or architectural plans. In contrast, section 73\textsuperscript{515} (which relates to reconstruction of buildings and forms part of the same group of exceptions to infringement) expressly allows the reproduction of architectural drawings or plans as well as of the building itself. The question is whether sections 65\textsuperscript{516} and 66\textsuperscript{517} have limited application in practice, because the reproduction of public art and buildings will often indirectly reproduce underlying works.

\textsuperscript{510} Section 70 of the Copyright Act 1968 (Cth)
\textsuperscript{511} Section 72 of the Copyright Act 1968 (Cth)
\textsuperscript{512} Section 73 of the Copyright Act 1968 (Cth)
\textsuperscript{513} Section 65 of the Copyright Act 1968 (Cth)
\textsuperscript{514} Section 66 of the Copyright Act 1968 (Cth)
\textsuperscript{515} Section 73 of the Copyright Act 1968 (Cth)
\textsuperscript{516} Section 65 of the Copyright Act 1968 (Cth)
\textsuperscript{517} Section 66 of the Copyright Act 1968 (Cth)
The issue arises because individuals can infringe copyright, without direct access to a work, if they have had access to an intermediary object. For example, if there is sufficient objective similarity between a photograph of a sculpture and the design drawings for the sculpture, the photograph may infringe the drawings even though the photographer had no direct access to the drawings.

3.3 Statutory Licences

Apart from the above exceptions for individual use that are categorised as free-based exceptions namely fair dealing and exceptions for free use, the Copyright Act 1968 also provides fee-based exceptions or statutory licensing (remuneration licensing). In Australia, statutory licences allow use by schools, universities, libraries, archives and others on payment of a licence fee set either by agreement or by the copyright tribunal.

The Copyright Act 1968 establishes a number of statutory licences to allow for the use of copyright material without the owner’s permission, provided equitable remuneration is paid. The word ‘equitable’ is intended to mean fair, just and reasonable, and this qualification ensures that copyright owners are fairly remunerated.

The Copyright Tribunal was established under the Copyright Act 1968, and has certain powers relating to royalties and licensing. For instance, the Copyright Tribunal has the power to inquire into the amount of royalty payable in respect of the recording of musical works and fix royalties or equitable remuneration in respect of compulsory licences. The Copyright Tribunal helps maintain the balance of the interest between the right holder and the public at large. It receives support from the Federal Court of Australia.

Many of the particular uses of copyright material now subject to statutory licences developed before the law clearly recognised the right of copyright owners to control them. Guibault also argued that “some statutory licences were created to alleviate the symptoms of market failure

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518 The Copyright Act 1968 (Cth)
519 The copyright tribunal was established under the Copyright Act 1968, and has certain powers relating to royalties and licensing. It receives operational support from the Federal Court of Australia.
520 Section 135ZZ of the Copyright Act 1968 (Cth)
522 The Copyright Tribunal is an independent body established under the Copyright Designs and Patents Act 1988.
523 The main function of the Tribunal is to settle various types of disputes, where the parties cannot agree between themselves, mainly in the field of collective copyright licensing.
raised by constant technological developments, which make effective control of exclusive rights practically impossible." Statutory licences are therefore a practical means of remunerating owners, particularly where it is impossible to monitor usage in situations where technology (such as reprography) has made the reproduction of copyright material easier, cheaper and of better quality.

The circumstances surrounding large scale copying by institutional users contrasts dramatically with the situation involving copying by individual copyright users under fair dealing. Some statutory licence schemes operate where the licensee is an institution (or government body), such as the schemes which apply to the copying and communication of broadcasts, and the reproduction and communication of works, by educational and other institutions. Institutions often possess sufficient power to negotiate with copyright owners, and for this reason the Copyright Act 1968 provides for statutory licensing. In this way, the statutory licence schemes operate as default provisions. The role of statutory licence scheme is to provide for the efficient remuneration of copyright owners for multiple copying rather than the defence of an individual use of copyright material. Hence, statutory licence schemes are not properly regarded as exceptions to the exclusive rights of copyright owners, but rather as exceptions to the right to refuse a licence.

Pointedly, a “certain special purposes” exception in a statutory licence scheme in the Copyright Act 1968 allows libraries and educational institutions to reproduce some works as long as the copying conforms to specific purposes. The purposes of the copying include for educational instruction, for libraries and archives, or for assisting a person with a disability. There is a further condition for this copying. The reproduction must satisfy the so-called the three-step test. The copying must be limited to “certain special cases”, must not conflict with “normal exploitation” of the work, and must not “unreasonably prejudice” the interests of the creator. The educational institution must be able to convince a court that the reproduction of copyright material meets these conditions.

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525 Ibid.
526 Parts VA and VB of the Copyright Act 1968 (Cth)
527 The Copyright Act 1968 (Cth)
528 The statutory licensing schemes under Parts VA and VB of the Act for copying, reproduction and communication by educational institutions or institutions assisting persons with a print disability or an intellectual disability do not preclude voluntary licensing (s. 135Z (Part VA) and s. 135ZZF (Part VB)).
Libraries and Archives

Libraries and Archives are allowed to officially copy materials for the purpose of providing services to their users. They are also allowed to copy material of cultural significance if this material is not commercially available; however this is restricted to reproduction.

If a remuneration notice is given by, or on behalf of, a library or archives, the amount of equitable remuneration payable to the relevant collecting society by the library or archives for electronic reproductions and communications made by it, or on its behalf, under section 49(5AB) while the notice is in force is an amount determined by agreement between the library or archives and the collecting society or, failing such agreement, by the Copyright Tribunal on application made by either of them.

Educational Institutions

The Copyright Act 1968 has been amended to provide that when copyright materials are used for teaching purposes, as long as there is no commercial benefit, copyright infringement will not occur. The statutory licence applicable to educational institutions is currently limited to the copying of broadcast material. With the plentifully increase of access to materials online, it is possible if the statutory licence to use materials will be extended to apply to on-line materials. Non-commercial uses by educational institutions are likely to extend to content currently covered by statutory licences such as film and sound recording content.

Pointedly, according to Laddie’s view on the point of the statutory license under Part VA of the Copyright Act relates to the reproduction of copyright materials for use in educational institutions.

529 Section 200AB of the Copyright Act 1968 (Cth)
530 Section 49(5AB) of the Copyright Act 1968 (Cth)
531 Section 135ZZM of the Copyright Act 1968 (Cth)
532 Part VA of the Copyright Act 1968 (Cth)
…if universities and schools had to negotiate with copyright owners for the right to make copies of material for use in instruction, the costs of such negotiations could be overwhelming and might lead to inefficiently low use of materials in teaching. The license, as Ricketson and Creswell observe, ‘represents an attempt to approximate what would otherwise be freely negotiated by the rights owner … and the user’.

Disability

A person with a disability is allowed to reproduce material in a different format if the person cannot access it in the manner it is presented. It is permissible for a fee to be recovered for the services provided by libraries, educational institutions and those helping the disabled, for example translating books in Braille. However a profit or commercial gain may not be made from these services.

There is a range of statutory licenses, including those for:

1) ‘ephemeral’ reproduction of a literary, dramatic, musical or artistic work or a sound recording for the purposes of broadcasting (section 47, 70, 107);

2) the making of sound broadcasts of literary and dramatic works by holders of a print disability radio licence (section 47A);

3) recording of musical and literary works (Part III Division 6);

4) ‘off air’ copying and communication of broadcasts by educational institutions and institutions assisting people with an intellectual disability (Part VA);

5) reproducing and communicating works and published editions etc. by educational institutions and institutions assisting people with a print or intellectual disability (Part VB);

6) retransmissions of free-to-air broadcasts (Part VC);

7) public performance and broadcast of sound recordings (section 108(1)(a), and section 109(1)); and

8) use of copyright material by the Crown (Part VII Division 2).

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3.4 Limiting the Effect of Legislative Individual Use Provisions

The limiting the effect of legislative individual use provisions is the provisions granted to the right holders to determine a reasonable agreement or condition with the users to access their copyright works. The right holders apply these provisions to protect their rights and ensure authorised uses. There are two major provisions to enable the right holders to prevent the massive illegal dissemination of digital works that takes place off and online everyday: Technological Protection Measures (TPMs), and Contracts.

The provisions of the Technological Protection Measures (TPMs) have then been amended as part of AUSFTA in 2004.537 The provisions related to TPMs schemes are contained in the Copyright Act 1968 to assist copyright owners to protect their works from piracy. Apart for TPMs, the Australian government introduced the contractual agreements in the copyright to create a more secure environment for copyright owners to release their copyright materials. However, although these two protection provisions provide copyright owners’ ability to control every access to a work, there is a counter argument as to whether these measures enable copyright owners to sidestep the application of the individual use provisions which users remain fully free to exercise their traditional fair individual use rights without the authority of the copyright owner.

3.4.1 Technological Protection Measures (TPMs)

In general terms, Technological Protection Measures (TPMs) are software, components and other devices that copyright owners use to protect copyright material from being accessed or copied made. TPMs include encryption software, passwords, and access codes. For example, the manufacturer of an electronic games console may include software in the console that prevents a game purchased in the United States being played on a console bought in Australia. The purpose of this is to enable that the manufacturer to control the sale of games in each region. While copyright owners seek to protect their work from unauthorised access and use by means of TPMs, TPMs can also be disabled or circumvented through a range of means, including the use of computer programs or

devices such as microchips. TPMs are a valid response by copyright owners seeking to protect their intellectual property from infringement.

Prior to the amendments of the Copyright Act 1968 on 31 of December 2006, TPMs was an offence to deal with devices that permitted circumvention of TPMs, although it was not an offence to use a TPM. The amendments will not permit to use a circumvention device to break a TPM. The amendments also change the definition of TPMs to include TPMs which prevent or restrict access to copyright material in some circumstances. Previously, a TPM was only protected by law if it prevented copyright infringement.

The technological protection measure provisions in the Copyright Act 1968 before amended on 31 of December 2006 were the subject of a recent High Court case Stevens v Kabushiki Sony Computer Entertainment, which emphasised the need to link any TPM protected by the Copyright Act to the prevention and inhibition of copyright infringement. This case demonstrates some of the issues which arise from the definition of TPM and the question of the appropriate levels of statutory protection to be afforded to TPMs. Central to the case was the question of what exactly constitutes a TPM under the Copyright Act 1968.

The case reached the High Court on appeal from the full Federal Court; the appeal was allowed in favour of the applicant (Stevens). The facts of the case concerned an alleged infringement of copyright due to the circumvention of an access TPM on Sony PlayStation game consoles. In Stevens, the High Court unanimously overturned the Full Court of the Federal Court of Australia, and restored the judgment of the trial judge, who held that the TPM used in the Sony Playstation was not a ‘technological protection measure’ within the meaning of s 10(1) of the Copyright Act 1968 (Cth). The TPM in question did not prevent the copying of PlayStation games but did prevent the playing of infringing copies of PlayStation games. At the time of the case it was not an infringement of copyright to play an infringing copy of a game (although it was of course a copyright infringement to make an unauthorised copy of a game). The High Court found that the TPM access device used by Sony in the consoles did not actually constitute a TPM within the

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538 The Copyright Act 1968 (Cth)
539 Stevens v Kabushiki Kaisha Sony Computer Entertainment [2005] HCA 58 (Stevens v Sony)
540 The Copyright Act 1968 (Cth)
definition of the Copyright Act 1968, as it did not prevent copyright infringement *per se* but prevented access only after infringement had already occurred.\(^\text{541}\)

In this vein, Professor Fitzgerald argued that copyright law is not appropriate to effectively provide legislative protection for business models and endorse a preference in the marketplace for certain business activities:

> Australian consumers, once they lawfully purchase a copyright item, have the right to use that item subject to controls that limit or prevent copyright infringement. Copyright infringement should be the touchstone of technological protection measures protected under the Copyright Act. If they are to be protected at all for other reasons, we should be looking at them under the other particular heads—whether it is consumer legislation or whether it is content legislation—but not under the Copyright Act.\(^\text{542}\)

Nonetheless, there are other persons expressed strong disagreements with Professor Fitzgerald’s argument. Mr. Maurice Gonsalves from the Interactive Entertainment Association of Australia was of the view that, in the online environment, where a copyright owner is exercising the copyright owner's right of communication to the public:\(^\text{543}\)

> … there is no other way of protecting the copyright work other than using the technological protection measure. So without protection like this, that potential distribution model is eliminated altogether potentially—which is detrimental to consumers because those models will not evolve.

However, the exceptions to circumvention of TPMs contained in the Copyright Act 1968 should be carefully considered as to whether or not the provisions of the Act dealing with TPMs might be used to prevent the interoperability of data or the creation of software programs which can access other people's data.

The AUSFTA required Australia to prohibit the use of devices and services to circumvent TPMs. As a result of the amendments, it is unlawful to use devices which unlock TPMs. Under the Copyright Act 1968,\(^\text{544}\) a TPM is currently defined as being a device or product, or


\(^{544}\) The Copyright Act 1968 (Cth)
a component incorporated into a process, that is designed, in the ordinary course of its operation, to prevent or inhibit the infringement of copyright in a work or other subject-matter by either or both of the following means:

1. by ensuring that access to the work or other subject matter is available solely by use of an access code or process (including decryption, unscrambling or other transformation of the work or other subject-matter) with the authority of the owner or exclusive licensee of the copyright;
2. through copy control mechanisms. Copyright protection measures are designed to control activities such as reproduction of copyright material, for example by limiting the number of copies that a consumer might make of an item.

One of the main differences between the two types of TPM is that an access control TPM will block access generally, while a copyright protection TPM will operate at the point where there is an attempt to carry out an act protected by the copyright, for example make a copy of the material. In its 1999 advisory report on the Copyright Amendment (Digital Agenda) Bill 1999, the then House of Representatives Standing Committee on Legal and Constitutional affairs observed that:

Copy control measures are more closely allied with copyright, and the infringement of copyright, than access control measures. Access control measures seek to prevent all access to copyright material, not only that access which is unlawful.

TPMs must be connected with copyright infringement. The scope of the scheme is limited to preventing circumvention of TPMs which is designed to stop copyright piracy. The scheme will not cover TPMs which are not designed to prevent or inhibit people from infringing copyright. The scheme will not apply to TPMs solely designed for other purposes, such as market segmentation, for example, “region coding or the protection against competition in aftermarket goods such as spare parts, where the TPM does not have a connection with copyright.”

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548 Ibid.
549 Ibid.
The Copyright Act 1968 provides for civil actions by copyright owners and prosecutions for criminal offences where a person makes, sells, imports, markets, distributes or otherwise deals in a circumvention device. However:

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\text{to be liable under a civil action for any of the above, the person must have known, or be reasonably expected to have known, that the device or service in question would be used to circumvent or facilitate the circumvention of the TPM. The requisite level of intent in criminal proceedings is knowledge or recklessness.}
\]

To prevent circumvention of the technological measures, the anti-circumvention provisions are created for copyright owners in order that they can use the provisions to protect their works from infringing uses. Therefore, recently, the way that copyright works are protected can be divided into three levels: copyright regime, Technological Protection Measures, and anti-circumvention provisions. The anti-circumvention provisions represent a most extraordinary extension of the power of copyright owners to control not only reproduction of their works, but also access to those works.

Although anti-circumvention provisions effectively protect the copyright works, they may extremely protect non-infringing uses such as fair dealing and uses in relation to insubstantial parts of a work. Consequently, if a work is protected by a Technological Protection Measure with the anti-circumvention provisions, it is impossible that any users can access even an insubstantial portion of that work, if they do not fall within one of the very few exceptions which will enable them to legitimately obtain a circumvention device.

Kirby J in the Stevens judgment went on to discuss the effect of giving anti-circumvention protection to technologies which control access to copyright material:

550 The Copyright Act 1968 (Cth)
If the definition of TPM were to be read expansively, so as to include devices designed to prevent access to material, with no inherent or necessary link to the prevention or inhibition of infringement of copyright, this would expand the ambit of the definition beyond that naturally indicated by the text of s 10(1) of the Copyright Act. It could interfere with the fair dealing provisions in Div 3 of Pt III of the Copyright Act and thereby alter the balance struck by the law in this country.

[Protecting access controls] would enable rights holders effectively to opt out of the fair dealing scheme of the Act. This would have the potential consequence of restricting access to a broad range of material and of impeding lawful dealings as permitted by Div 3 of Pt III of the Copyright Act. The inevitable result would be the substitution of contractual obligations inter partes for the provisions contained in the Copyright Act — the relevant public law. Potentially, this could have serious consequences for the operation of the fair dealing provisions of that Act.\(^555\)

In fact, access to the public domain works is not obliged by the copyright law and they can receive the benefit by being subjected to TPM. However, practically, the anti-circumvention provisions which are created to provide the copyright owner excessively protect their rights by controlling both the reproduction of the works and access to the works. Therefore, the problem is that it is difficult to the users to access such works for the purpose of research or study and other fair dealing purposes.

In the TPM provisions in relation to the forbiddance on the use of a circumvention device, there is an exception which enables users to circumvent if they have the permission of the copyright owner. This can prevent the copyright owner from the circumvention that arises due to unauthorised use of passwords provided by other users of the material. However, there is no guarantee that users are the only persons who own copyright of the saved document.

Section 116A of the Copyright Act 1968\(^556\) is subject to certain exceptions, including the supply of a circumvention service or device to a person for a permitted purpose. The permitted purposes include:

1) Reproducing computer programs to make interoperable products\(^557\)
2) Reproducing computer programs to correct errors\(^558\)
3) Reproducing computer programs for security testing\(^559\)

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\(^{556}\) Section 116A of the Copyright Act 1968 (Cth)
\(^{557}\) Section 47D of the Copyright Act 1968 (Cth)
\(^{558}\) Section 47E of the Copyright Act 1968 (Cth)
Part 2: Chapter 3

4) Copying by Parliamentary libraries for members of Parliament

5) Reproducing and communicating works by libraries and archives for users

6) Reproducing and communicating works by libraries and archives

7) Reproducing and communicating works for preservation and other purposes

8) Using of copyright material for the services of the Crown and

9) Reproducing and communicating works etc by education and other institutions.

The permitted purpose provisions provide an important means of maintaining the copyright balance in the digital environment. In an effort to balance the need to protect owners against the interests of legitimate users, limitations are placed on the scope of the ‘permitted purpose’ exceptions. However, the provisions of permitted purposes are not effectively applicable. This is because the operation of some provisions can result in a breach of the law. It is impossible to anticipate all situations where such breaches of the law by use of TPMs may occur. Moreover, the permitted purposes provisions under TPMs do not cover all important provisions for the purpose of exercising the right of users. Fair dealing, for example, is not a ‘permitted purpose’. If the university allows its staff or students to legitimately use device order to exercise their fair dealing right, the university may run the risk of being liable under section 116A(1)(b)(iii) for disturbing a circumvention device for a purpose “that will affect prejudicially the owner of copyright”.

As fair dealing is contained in the Copyright Act 1968, fair dealing should be made as a permitted purpose in the legal protections for TPMs when the Act includes the legal protections for TPMs that are required under the WCT. Moreover, apart from providing the educational Part VB licence as a permitted purpose, extending the permitted purpose to cover Part VAA

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559 Section 47F of the Copyright Act 1968 (Cth)
560 Section 48A of the Copyright Act 1968 (Cth)
561 Section 49 of the Copyright Act 1968 (Cth)
562 Section 50 of the Copyright Act 1968 (Cth)
563 Section 51A of the Copyright Act 1968 (Cth)
564 Section 116A(1)(b)(iii) of the Copyright Act 1968 (Cth)
566 The Copyright Act 1968 (Cth)
567 The WIPO Copyright Treaty (WCT), December 20 1996 No. 33
568 Part VB of the Copyright Act 1968 (Cth)
569 Part VAA of the Copyright Act 1968 (Cth)
570 Part VB licence as a permitted purpose, extending the permitted purpose to cover Part VAA.
is necessary. This is because broadcasters internationally tend to put TPMs in their broadcasts to prevent people copying from them. Therefore, if the Part VAA is not a permitted purpose, it may be made useless.\textsuperscript{572}

Although, TPMs have the ability to set licensing terms and the technological capability of controlling both the use of and access to a work well beyond the boundaries of the copyright regime, there are concerns about “digital lockup”, as such measures, by preventing access, cannot distinguish between infringing activities and permitted acts. Access control and copy control TPMs may be difficult to categorise. TPMs very often display both access control and use control characteristics. Where TPMs have both access and copy characteristics, the adoption of a legal exception that only authorises one form will inevitably lead to more confusion than clarity in its practical application.\textsuperscript{573}

The absence of a clear exception for interoperability to permit access to a customer's data would ‘pose a substantial threat to user’s ability to compete in the software market’ and would have ‘a substantive adverse effect on competition and innovation’.\textsuperscript{574} This is because TPMs can be used to lock customers out of their own data or to require customers to be locked into a specific purveyor. Importantly, the limitation of the interoperability exception for only access control TPMs, and not TPMs generally, is problematic for two major reasons:

1. Access control and copy control TPMs may be difficult to categorize. TPMs often display both access control and use control characteristics. Where TPMs have both access and copy characteristics, the adoption of a legal exception that only authorises one form will inevitably lead to more confusion than clarity in its practical application. Concerning the offences created under section 132APA, TPMs often display access and copy functions; they are difficult to categorize. It therefore seems illogical that a person would only commit an offence where an access control TPM has been circumvented.

2. Exceptions may be rendered void by licensing provisions. The current amendments to the Copyright Act pose confusion in the area of fair dealings defences and the exceptions to the circumvention of technological protection measures. It is unclear as to whether licensing


provisions may lawfully prohibit exceptions to the circumvention of TPMs. This type of approach should be strongly avoided. Clarification may be required in the Act on this point. …

Access control is necessary to address large-scale copyright infringement made possible by digital technologies. Additionally, TPMs provide copyright owners with greater scope to control access to materials than was possible in the analogue world, and that access (along with the ability to read, view or listen), compared to use, has not traditionally been an exclusive right of the copyright owner. This can affect the users in regard to the confusion of TPMs’ practical application. In addition, it is difficult to categorise the access control and copy control of copyright work subject to TPMs. More importantly, uncontrolled use of TPMs together with anti-circumvention legislation and contractual practices would allow rights owners to extend their rights far beyond the bounds of the copyright regime, to the detriment of the public interest.

3.4.2 Contractual System

Contractual system is another layer of protection available to copyright holders. Copyright holders are able to set the terms of use through licences. To operate the markets for copyright materials in the most efficient way for the benefit of right holders and users of such copyright materials, the operation will include contractual modification of the relationship between the parties where modification is dictated by the market. The right holders will attempt to ensure that usage is governed by contractual terms in private transactions as well as the rights provided by copyright laws to obtain the benefit of extra protection that contractual rights will bring. The right holders have always negotiated contracts which specify the particular nature of the relationships, in regard to commercial rights such as distribution, reproduction, and translation. Users also accept the need for specific terms to facilitate their use and enjoyment of these works.

Importantly, if copyright law is perceived as inadequate or providing too many exceptions, the right holders may ignore copyright altogether and rely on contractual remedies. Although access to material via contract may provide users with greater certainty as to the scope of

“private uses”, use of contract law together with technological forms of protection, such as through encryption, will weaken current rights to access and re-use ideas. However it should be noted that potential problems may exist under contract and trade practices law when imposing harsh or unreasonable contractual terms in relation to information or copyright material deemed essential to the production of new goods.

Contracts and TPMs can complement each other. The technologies may obviate the need to rely on contract as a means of controlling access to and use of copyright work. For example, a contract which requires a user to destroy a CD after a licence expires may not be necessary if the CD can lock itself up at this point. Nevertheless, technological developments have also provided owners with the means for concluding cost-effective online contracts with end-users of copyright materials.

The extension of electronic and other trade in copyright works and other subject matter is subject to agreements which exclude or modify the copyright exceptions and the nature of any differences between online and offline trade. This is because both owner and user interests variously accepted that electronic trade in copyright material differs from non-electronic trade in that:

1) contracts generally take the form of licences for access to copyright material;
2) copyright material in electronic form is more vulnerable to unauthorised copying;
3) copyright (and other) material can be protected by technological protection measures;
4) mass direct contracting with end-users is possible; and
5) contracts are more likely to be transacted across national borders.

In general, if a contractual provision prohibits an activity allowed by the Copyright Act, that activity will not infringe copyright, but it may breach the contract. The exceptions in the Copyright Act are not excluded or overridden by contract, but an activity allowed under the Copyright Act may breach a contract. It may also breach other areas of law.

Considering public policy reason, exempting any of the exceptions from modification by contract is not appropriate since each exception is shaped by a balance of the particular factors contributing to the public interest in the exception. Each exception has different underlying public policy, for example, the underlying public policy of section 41, fair dealing for the purpose of criticism or review is different from that of section 43, fair dealing for the giving of professional advice. As a result, it is necessary to consider the relationship between contract and copyright and the ability to modify the scope of exceptions by contract so that the copyright balance when each of the exceptions was introduced into the Copyright Act could be achieved. This is evident with reference to modification by contract for certain provisions in the Act at section 47H; and also at section 135ZZF and section 135Z in respect of the statutory licences. The problems posed by the contractual agreement will be discussed in detail later in the section entitled The Problem of Response to the New Environment.

4. Analysis of the Current Problems in the Application of the Exceptions for Individual Use

In the introduction of Part Two, two problems related to the exceptions for individual use in both developed and developing countries were presented. They are different interpretations of the exceptions for individual use, and respond to the new environment. As a result, these two problems will be used as the basis for the analysis of the current problems in the application of fair dealing.

4.1 The Problem of Different Interpretations of the Exceptions for Individual Use

According to the application of the exceptions for individual use described in the last section, the solution Australia takes to deal with this problem is the hybrid of statutory licensing and free use for individual uses. However, although the Copyright Act 1968, as amended on 31 December 2006, could clarify many issues found before the amendment, from the analysis of the researcher, some problems relevant to different interpretations still exist. Mainly, they are the different interpretations of the terms used, and different interpretations of fairness.

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579 Section 47H prohibits the exclusion of those exceptions that allow the reproduction of a program for the purposes of decompilation for studying the program; for making a backup copy; for making interoperable products; for error correction; or for security testing.
580 Section 135ZZF of the Copyright Act 1968 (Cth)
581 Section 135Z of the Copyright Act 1968 (Cth)
583 The Copyright Act 1968 (Cth)
4.1.1 The Different Interpretations of the Terms Used

The problem of different interpretations of the terms used occurs because there is no clear definition indicated in the amended Copyright Act 1968.\textsuperscript{584} Some examples are the terms: research and study, parody and satire, criticism and review, and news reporting. As a result, the definition and scope of the terms protected by the Act as fair dealing can be differently interpreted.

The terms “parody” and “satire”, for instance, are not defined in the Copyright Act 1968 and have not yet been considered by Australian courts. However it is likely under establishment principles of statutory interpretation that a court would look at dictionary definitions of the words to work out what they mean. The courts broadly define parody as using a work to criticise the work itself for example, “a comedy skit using parts of a movie scene to comment on how bad the movie is.”\textsuperscript{585} As for satire, it is defined as using a work to criticise something other than the work as in the case of politicians, celebrities or society itself for example, “a political cartoon which uses comic strip characters to send up politicians.”\textsuperscript{586}

In \textit{Johnstone v. Bernard Jones Publications case}\textsuperscript{587} and \textit{Landbroke (Football) Ltd. v. William Hill (Football) Ltd. Case},\textsuperscript{588} whether a defendant's dealing with a work falls into one of the five aforesaid categories of purposes such as private study, research, criticism, review or newspaper summary, parody and satire, and whether it is "fair", is left to judicial interpretation upon the facts of each case. By taking this approach the legislator has avoided the difficult task of having to arrive at a definition. As a result, the courts are given the freedom to tailor their decisions to the facts which are placed before them without having to work their way around an impractical definition. Although this seems to be a resolution, it can be good evidence showing that the terms used in the Copyright Act 1968\textsuperscript{589} are problematic. This is because the courts cannot use any useful definitions from the Act as their references for the consideration. Instead, they can freely tailor their decisions differently to

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{584} The Copyright Act 1968 (Cth)
\item \textsuperscript{586} Ibid.
\item \textsuperscript{587} \textit{Johnstone v. Bernard Jones Publications}, (1938), [1938] 1 Ch. 599 (Ch. D.)
\item \textsuperscript{588} \textit{Landbroke (Football) Ltd. v. William Hill (Football) Ltd. Case}, (1962), [1980] R.P.C. 539, Denning J. (C.A.). While the taking of a substantial part of a work does not automatically exclude the possibility of recourse to the defense of fair dealing, it is a very revealing factor. Since substantiality as to both quantity and quality must be considered, even a very short excerpt may not qualify as a fair dealing if it consists of the “vital” part of the initial work.
\item \textsuperscript{589} The Copyright Act 1968 (Cth)
\end{itemize}
\end{footnotesize}
the facts placed before them. In addition, the problem of different interpretations of the terms used can also affect general users since unclear definitions will lead to unclear application can make them variously interpret their applications as protected under the fair dealing, while some applications may not be considered under the protection. The result is to simply bar, at the outset, certain socially useful, transformative uses which are quite arguably within the intent of the statutory purposes, without ever getting to the issue of fairness.

4.1.2 The Different Interpretations of Fairness

As far as the problem about the different interpretations of fairness is concerned, in one aspect, ‘fairness’ in the exceptions for individual use can be interpreted differently. This is because the Copyright Act 1968 does not provide users clearly what is exactly implied by “fair dealing”.

The fair dealing purposes set out in the Copyright Act 1968 (Cth)\textsuperscript{590} have been narrowly interpreted by Australian courts.\textsuperscript{591} This is a problem because it makes the law harder for non-experts to understand and apply since they cannot know to which extent the application is considered as fair or unfair. Where all the emphasis is on the exact purpose, people wishing to re-use material cannot rely on their judgment about the broad purpose and their intuition about what is ‘fair’.

Additionally, it is relatively easy to understand, from a common sense perspective, that the appropriateness of a particular use will be judged by whether it is fair, given the nature of the work, the nature of the use, the possibility of obtaining the work commercially within a reasonable time, how much of a work is copied, and whether it interferes with copyright owners’ markets.\textsuperscript{592} In fact, these guidelines can also be ambiguous and finally result in different interpretations in practice. This is because the possibility of obtaining the work commercially within a reasonable time and whether it interferes with copyright owners’ markets can be interpreted differently by each user since these factors can be considered subjectively.

\textsuperscript{590} The Copyright Act 1968 Act (Cth)
\textsuperscript{591} Commonwealth of Australia v John Fairfax & Sons Ltd (1980)32 ALR 485; 55 ALJR 45 at 49 (Mason J)
4.2 The Problem of Response to the New Environment

The law responds to the new environment of digital technology is a problem faced by developed and developing countries. The stand Australia takes is to amend and enact a new copyright law related directly to the exceptions for individual use for the digital environment. Additionally, in the new environment, Australia still maintains the exceptions for individual use both in the form of fee-based (statutory licensing) and free-based (fair dealing and other free use exceptions) exceptions.

In the amended Copyright Act 1968, free use exceptions to copyright are not just ‘defences’, but define the boundaries of the copyright owners’ rights which are limited. Statutory licences tend to be used where an act falls within that set of uses which might be termed ‘normal exploitation’ which copyright owners have a right to control, but the costs of managing and enforcing such rights would be prohibitive. The licence, as Ricketson and Creswell observe, ‘represents an attempt to approximate what would otherwise be freely negotiated by the rights owner and… the user’. If the exception is limited to certain, very specific uses, this would tend to support a free exception. If broader copying rights are proposed, only a statutory licence is a viable option.

Nonetheless, the only point to consider is how to appropriately impose the exceptions so that the copies made under these exceptions are not for resale or distribution. It may be possible under the three-step test for a statutory licence scheme to permit a wider range of private copying than could be allowed under one or more exception that does not compensate the copyright owners.

Although the amendment Australia made to its Copyright Act 1968 could be the solution as the response to the digital environment, the amendment leaves some problems unanswered as follows: the problem in contractual agreement, the problem in fair practice for time shifting and format shifting, and the problem in educational/research segments.
4.2.1 The Problem in Contractual Agreement

In this thesis, five main concerns about the problem in contractual agreement are discussed.

First, since the current Copyright Act 1968 aimed to protect the right holders more strictly in the digital age, it may exceedingly limit the users’ ability to reproduce the copyright materials under the contractual agreement. As Professor Cohen noted, contractual control changes both the amount and nature of access granted to users. Many uses which do not currently require licences, such as fair use or the use of uncopyrightable ideas, may be subject to contract. Further, contractual arrangements exclude the public interest element built into copyright.

Currently, no longer do copyright owners need to rely solely on the Copyright Act to protect their interest, and no longer do they have to accept the balance struck in the Act between their rights and those of users. Copyright owners can strike their own balance. This causes the conflict between the copyright owners and users. If copyright owners are free to use contractual arrangements to restrict use, and are then able to use copyright to prevent any use that is not subject to these restrictions, owners are gaining absolute monopoly over their works. When owners exercise absolute monopoly, users’ choices become very limited. Users must either accept the contractual restrictions or abandon access to the work altogether.

Secondly, the current legislative regime is inadequate in dealing with copyright and Contract Law. The students are allowed to take advantage of the fair dealing exception in section 40 to copy a "reasonable portion" of the book in library for the purposes of their research or study. The students can also copy a reasonable portion of the works without infringing copyright although libraries have purchased such works electronically. However, the students

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597 The Copyright Act 1968 (Cth)
603 Section 40 Of the Copyright Act 1068 (Cth)
may be prevented from taking advantage of the fair dealing rights granted by copyright law on such works if the contract between the libraries and the publishers do not allow this.\textsuperscript{604}

Recently, although most contracts allow the students to copy a reasonable portion of electronic works, the libraries are required to pay a licence fee for the expected or actual uses. This has now included the uses for the purpose of fair dealing which neither infringe copyright nor require any payment for the printed books. This is because some publishers apply the licence fees in such a way to avoid claiming payment for uses that would amount to fair dealings. However, some publishers do not as they contract out of fair dealing.

In the case that lecturers prepare coursepack or book of readings for students, the lecturers are free to copy an article from a periodical, or a reasonable portion of a book by applying the educational statutory licence contained in Part VB of the Copyright Act 1968.\textsuperscript{605} However, the relevant work purchased electronically may cause the right granted by the Part VB licence useless. This is because if the contracts allow the reproduction of the electronic works, the reproduction can be made merely for the inclusion in the coursepack for students. Similar to fair dealing provisions, the Part VB educational statutory licence can be contracted out of.\textsuperscript{606}

In conclusion, both the lecturers who rely on the Part VB statutory licence\textsuperscript{607} and the students who rely on the section 40\textsuperscript{608} of the fair dealing exception may be in breach of copyright if they reproduced an electronic version of such works. In addition, the university may be in breach of its contract with the publisher if it allows the lecturers and students to exercise the rights extended to them by the Copyright Act.\textsuperscript{609} In other words, contract could control the copyright at least in regard to electronic copyright works. It also rewrites the balance that Parliament strikes and it is also protected by the Copyright Act 1968. The publishers, therefore, can determine how much of their works can be copied, for what purposes, and even whether or not their works could be accessed.

\textsuperscript{605} Part VB of the Copyright Act 1968 (Cth)
\textsuperscript{607} Part VB of the Copyright Act 1968 (Cth)
\textsuperscript{608} Section 40 of the Copyright Act 1968 (Cth)
\textsuperscript{609} The Copyright Act 1968 (Cth)
Thirdly, if there is no express prohibition in the Copyright Act on “contract out” then the scope of provisions may be modified by contract. This is because there are no other legal remedies to stop such contract out. The express prohibition in section 47H could be misread to suggest that provisions elsewhere in the Copyright Act could be overridden by contract. Therefore, owners should not be permitted to contract out of the copyright balance. Moreover, it should be an express acknowledgment that none of the exceptions contained in the Copyright Act can be overridden by contract.

The Australian government should put in place comprehensive measures to ensure that parties cannot ‘contract out’ of the exceptions laid down by the Copyright Act 1968. The combination of technological measures and contract must assure copyright owners and users that the balance of interests in the Act is preserved. The current exceptions under the Copyright Act 1968, should not be directly or indirectly, diminished by contract. There is no guarantee that contract can deliver complete protection to copyright owners in a digital world. The doctrine of privity of contract confines its reach, and copyright still has a role to play in protecting works. The rights granted to users by the provisions of the Copyright Act relating to research and study, criticism and review, parody and satire, and news reporting are a vital means of ensuring continued public access to and use of copyright material.

Pointedly, people often use contracts to exclude the operation of fair dealing. Consequently, there is uncertainty concerning the extent to which contracts that purport to exclude or modify exceptions to copyright infringement are legally enforceable as a matter of copyright law. With one exception, the Copyright Act is silent on the ability of private parties to enter agreements that exclude or modify the statutory exceptions to copyright infringement. User argued that contracts which exclude or modify the exceptions can be unfair to individuals in a way that cannot be accommodated by general law or statutory

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610 Section 47H of the Copyright Act 1968 (Cth)
unconscionability. This was largely because of perceived difficulties in negotiating mass-market agreements.\textsuperscript{615}

From the analysis of this thesis, the applications and roles of the licence or contract should not be able to extinguish fair dealing uses or limit the fair dealing exceptions as well as the rights of libraries under the Copyright Act. It is important that the Government ensure that the special provisions for libraries and archives are not undercut by contractual provisions. Similarly, statutory compulsory licences should not be displaced by contractual provisions, which diminish the rights of copyright users. National copyright legislation should render invalid any terms of a licence that restrict or override exceptions or limitations embodied in copyright law. National copyright laws should aim for a balance between the rights of copyright owners to protect their interests through technical means and the rights of users to circumvent such measures for legitimate, non-infringing purposes.

Fourthly, the implied doctrine of good faith is not clearly established within Australian contract law. Therefore there are no clearly defined criteria or requirement to formulate “good faith” in a contractual relationship. Concepts such as cooperation, reasonableness, proper purpose and legitimate interest can at times seem vague; however they are often linked to the implied duty of good faith.\textsuperscript{616}

Lastly, although the use of TPMs can facilitate the automatic ‘negotiation’ of contracts between copyright owners and users, in this environment, the bargaining power between the copyright owners and users may well be unequal.\textsuperscript{617} The combined use of TPMs and

\textsuperscript{615} There are three sufficient notice of and assent to terms particularly relevant to the following new types of mass-market agreement:

- Shrinkwrap agreements, (which commonly accompany software products) in which terms are sealed inside shrinkwrapping and/or appear when software is installed. The terms of these agreements are not accessible until after a product is purchased and opened/installed. The outside of the wrapping may or may not indicate that terms are forthcoming. Where terms are displayed upon installation, the user may also be required to click an "I agree" or similar icon before installation can be completed.
- Clickwrap agreements, in which a party indicates assent to terms of an agreement offered online by clicking on an "I agree" or similar icon.


\textsuperscript{617} ‘Copyright Policy, Affording Legal protection to TPMs’ \textsuperscript{2004} <http://www.pch.gc.ca/progs/ac-ca/progs/pda-cpb/pubs/protectionII/5_c.cfm#notes> (10 May 2007).
contracts in this manner could therefore lead to unconscionable transactions. This point can be supported by the expression of some commentators:

Are we heading for a world in which each and every use of information is dictated by fully automated systems? A world in which every information product carries with itself its own unerasable, non-overridable licensing conditions? A world in which what is allowed and what is not, is no longer decided by the law but by computer code?  

Where technological constraints substitute for legal constraints, control over the design of information rights is shifted into the hands of private parties, who may or may not honor the public policies that animate public access doctrines such as fair use. Rights holders can effectively write their own intellectual property statute in computer code.

In conclusion, copyright law should not give right holders the power to use technological or contractual measures to override the exceptions and limitations to copyright and distort the balance set in international and domestic copyright legislation. Licensing agreements should complement copyright legislation, not replace it. Most copying of material in libraries is for educational, research or private study purposes. It is in the public interest to have access to information in all formats. Importantly, the rights of copyright owners are not entirely unrestricted, but are subject to considerations of what is fair and reasonable use of material for certain worthwhile purposes.

### 4.2.2 The Problem in Fair Practice for Time Shifting and Format Shifting

As time shifting and format shifting were firstly introduced in the Copyright Act 1968 as amended on 31 December 2006, one problem relevant to them that arose is the problem resulting from the uncertainty about the application of time shifting and format shifting.

Specifically, copyright holders are unable to ensure that the recording made by users for time shifting will be deleted after one use. It is possible to use the recording over and over again without paying remuneration to the right holder. In other words, the real practice may contradict the regulations indicated in the Copyright Act 1968 that users may burn a

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620 The Copyright Act 1968 (Cth)
collection (or library) of their favourite programs on DVD or CD but only temporarily until a person watches or listens to it for the first time. This may also include the recording of a program from pay-television without paying the subscription fee to watch the program. A recording is for the personal use of the person who made it. Although users can invite a friend over to watch or listen to their recording, they cannot lend or give it to a friend to take home. Additionally, as the provision is still uncertain in the scope of their application, users may even upload the recording to the Internet to share with others. Time shifting is, therefore, a problem in the Act that should be considered.

According to the Copyright Act 1968, a format-shift copy must be made by the owner of the original copy.\textsuperscript{621} It will not be possible for a business to make copies for a customer. Users may not allow someone to make a copy in a different format for them. In addition, they are not be able to sell, loan or give away any format-shift copy they make in a different format, although a friend can listen to the music with them. Nevertheless, similarly to time shifting, how can copyright holders know whether the users make a ‘back-up’ copy of a CD in case the original is lost or damaged? This kind of copying can infringe the right holders’ interest as a format-shift copy must be in a different audio format to the original as the original may be destroyed or discarded by unauthorised persons. It is very difficult to imagine the government adopting a general free exception that allowed for unlimited shifting from one format to another: copyright owners would be likely to argue, with some justification, that this would significantly interfere with emerging markets for digital works and with price discrimination which is the selling of copies at different prices that allow different kinds of use.\textsuperscript{622}

\textbf{4.2.3 The Problem in the Educational/Research Segments}

The amended Copyright Act 1968 on 31 of December 2006\textsuperscript{623} can cause a problem in the educational/research segments due to the reasonable portion of reproduction right indicated in the current Copyright Act 1968. This is because the portion can sometimes make it difficult for the students/researchers who do not understand that the fair dealing for the purpose of research or study has a deeming provision which does not limit the reproduction as long as the purpose of research or study can be proven. As a result, it is possibly hard for them to exercise their fair

\textsuperscript{621} Section 110B of the Copyright Act 1968 (Cth)
\textsuperscript{623} The Copyright Act 1968 (Cth)
reproduction rights for some copyright materials in order that their copies are still comprehensible but do not exceed the fixed portion. The problem is important because the development and growth of a country is dependent on the education and research within the country.

The Copyright Act 1968 should be stricter in preventing copyright piracy but fairer for consumers using new technologies. However, after examining it, the Act could have some problematic effects on general students/researchers in terms of accessing copyright materials. This is because it removes the flexibility by allowing fairness to be determined by all users, even the ones who are not aware of the deeming provision, after the minimum limit of 10 per cent. Prior to the amendment of the Copyright Act 1968 on 31 December 2006, the act was considered on a case-by-case basis as long as copying was done fairly. Therefore, the current Copyright Act 1968 can strike the needs of students or researchers with the hard 10 percent limit. This means that any reproduction of a printed or electronic literary or dramatic work which exceeds 10 percent or one chapter can be determined as an infringement of copyright, and punishable by damages, fines, or even imprisonment, for any students/researchers who are not familiar with copyright regime.

The Copyright Act 1968 only allows fair dealings for a number of uses, like criticism or review, news reporting, or critically, research or study. Despite the Australian Government’s stated support for researchers and students, the amendments give the opposite results. This is because although the Australian Copyright Act 1968 was partly amended because of the requirement under the Australia-United States Free Trade Agreement to make Australian copyright laws similar to those of the US, Australia does not apply the open-ended exception, used in the US, to the amended Act. More importantly, the Australian Government has decided to limit the concept of fair dealing for research and study. The Government limits the numbers of copyright works to be reproduced in a reasonable portion of such works. However, the Government allows people to reproduce the copyright work more than the number limited in the deeming provision merely in the case if the reproduction is made for the purpose of research or study. While the Government claims that this new change adds certainty for researchers, this kind of certainty, in fact, comes at the expense of the actual ability to research. As a result, it is unacceptable in an information age,

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624 The Copyright Act 1968 (Cth)
where educated workers and researchers are driving the economy, to limit the ability of students and researchers to make fair copies of important copyright material as mentioned above.

In conclusion, despite the attempt to amend the Copyright Act 1968 to respond to the digital environment, the amendment may still allow some new problems in the issue of fair dealing and other exceptions. This is emphasised by Dr. Rimmer’s statement that,

> the reforms have failed in their aims to take full account of new technologies. The legislation is disappointing because the copyright exceptions that are put forward are narrow, unworkable and unyielding … [This is because] the Federal Government were seeking to make political compromises, however that compromise has not necessarily satisfied the various interest groups.\(^{626}\)

### 5. Conclusion

In Australia, four sets of exceptions have been particularly relevant to individual use: fair dealing, free use exceptions, statuary licences, and limiting the effect of the legislative individual use provisions. Like other developed and developing countries, Australia also encounters the problems in the application of the exceptions for individual use despite its amendment of the Copyright Act 1968 on 31 December 2006. The problems are derived mainly from the different interpretations of the exceptions for individual use and from the new environment. As a result, although the current exceptions for individual use could be applied quite effectively, the attempt for the legal protection that could better balance the interests between the right holders and users should be further considered.

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CHAPTER FOUR

ANALYSIS OF THE APPLICATION OF THE EXCEPTIONS FOR INDIVIDUAL USE IN THAILAND

1. Introduction

Chapter Four will examine the application of the exceptions for individual use in Thailand. The reasons for doing this are as follows:

First, Thailand is a developing country which is a member of the World Trade Organization (WTO). Consequently, it has to abide by WTO measures, including intellectual property protection. Thailand has been trying to develop and amend the Copyright Act in order to properly protect foreign works in accordance with Thailand’s bilateral and multi-lateral responsibilities. As copyright is a crucial issue for international trade, Thailand has enacted copyright legislation and amended the latest version as the Copyright Act 1994. However, as the country still faces the significant problem of copyright piracy, it is worth studying the Thai law and exceptions for individual use which need improvement to meet international standards.

Secondly, in consideration of rapid technological change, the Thai government has recently issued a new draft of the Copyright Act 1994 to respond to the new digital environment. The draft attempts to implement important protections needed to provide an adequate legal framework for electronic commerce. In addition, it has made positive changes regarding the effective application of the exceptions for individual use. The government has been taking systematic measures to slow down intellectual property right violation in all means such as producing, distributing, selling, importing and exporting. As a result, this modernisation is of current importance.

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627 World Trade Organization (WTO)
628 The Copyright Act B.E. 2537 (A.D. 1994)
629 Ibid.
Finally, Thailand has a civil law system, unlike Australia which has a common law system. In 1994, in response to technological change, the Copyright Act 1994\textsuperscript{631} was passed. Nonetheless, the scope and application of the exceptions and limitations to copyright are problematic. The Copyright Act 1994 does not determine limitations regarding the amount and proportion of the reproduction rights for the public. It is for this reason that a new draft has been created.\textsuperscript{632} Study of the application and scope of the Thai private use exceptions is important as the Thai exceptions are neither as flexible as American fair use nor as exhaustive as Australian fair dealing.

Accordingly, this chapter explains the exceptions for individual use in the Thai Copyright Act.\textsuperscript{633} The chapter provides an overview of copyright law in Thailand and its application, the application of exceptions to copyright infringement and limitations of exclusive rights in Thailand, the understanding and interpretation of the exceptions for individual use in Thailand in the digital millennium, and the modernisation of the Thai Copyright Law.

2. The Exceptions for Individual Use in the Thai Copyright Act

The Copyright Act, B.E 2537 (A.D.1994) of Thailand provides certain limitations on and exceptions to the copyright protection given to owners. These rights are meant to enhance public access to these copyrighted materials for specific purposes. Among other limitations and exceptions to copyright infringement that can maintain the balance of the interest between the right holder and the user are the private use exceptions in section 32 of the Thai Copyright Act 1994.\textsuperscript{634} Thailand interprets the exceptions for individual use in accordance with the international standards as set out in Article 13 of the TRIPS Agreement,\textsuperscript{635} the Berne three-step test.\textsuperscript{636}

\textsuperscript{631} The Copyright Act B.E. 2537 (A.D. 1994)
\textsuperscript{633} The Copyright Act B.E. 2537 (A.D.1994)
\textsuperscript{634} Section 32 of the Copyright Act B.E. 2537 (A.D.1994)
\textsuperscript{635} Article 13 of the Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS), Annex 1C, 1994
\textsuperscript{636} Article 9(2) of the Berne Convention for the Protection of Literary and Artistic Works (Paris Act, 1971) NO 615 (E)
2.1 Overview of Copyright Law in Thailand

Section 4 of the Copyright Act B.E. 2537 defines the word “copyright” as “the exclusive right to do any act under this Act in relation to the work made by the author.” The works, which are able to be protected under the Copyright Act B.E. 2537, must be creative works, irrespective of the mode or the form in which the work is expressed.

In Thai Copyright legislation, the societal interest in a balanced approach to encouraging initial and subsequent creativity is maintained in a number of ways. Among the rules of the Thai copyright law that facilitate ongoing creativity are: (1) the idea-expression distinction, (2) originality standards for copyright protection, and (3) certain exceptions or limitations to the right of authors such as the right of private use recognised in the Berne Convention for the Protection of Literary and Artistic Works, of which Thailand is a member.

Now the challenge is to apply and refine the copyright law to promote innovation and an optimal degree of economic development. Much attention has been given to consolidate copyright in Thailand. In order to counter the increased piracy in the country and following significant pressure from the United States (Thailand is on the priority watch list for action under Special 301 of the Tariff Act in 2007), the Copyright Act B.E. 2537 was passed in 1994. The new copyright law which came into effect on March 21, 1995, marked a major step for Thailand towards providing adequate and effective protection of copyright. At that time, the Copyright Act was introduced to bring Thailand’s laws in line with TRIPS requirements. In 1996, the WIPO Internet Treaties (WIPO Copyright Treaty (WCT) and WIPO Performances and Phonograms Treaty (WPPT)) came into force. Although, the Copyright Act 1994 contains certain provisions clearly intended to implement the provisions of the WIPO Internet Treaties, like many of its Asian neighbours, Thailand is not yet ready to ratify the WCT or the WPPT. To ensure that Thailand adheres to the international copyright agreements, both the public and the private sectors have been collaborating in the search for a solution to copyright piracy.

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637 Section 4 of the Copyright Act B.E. 2537 (A.D.1994)
638 The Berne Convention for the Protection of Literary and Artistic Works (Paris Act, 1971) NO 615 (E)
2.1.1 Origins of Copyright Law in Thailand

The historical record indicates that the foundation of the copyright law in Thailand is based on the ‘Announcement of the Vajiranana Library (the present National Library)’ made in B.E. 2435 (A.D. 1892) during the reign of King Rama V of the Chakri Dynasty while the official administration in Thailand, or Siam at that time, was as absolute Monarchy.

The Royal Library was established in B.E. 2424 (A.D. 1881) and administered by a Committee appointed by the King under royal patronage. The Library Committee determined that the publication of the Book Vachirayanvises, either in whole or in part, was prohibited since the Committee’s permission was required. King Rama V approved this determination and the above-mentioned Announcement of the Vajiranana Royal Library was proclaimed.

Pursuant to the legal and administrative system when this Announcement was made, the Announcement was considered a law of the land because it represented a royal order, which generally applied to all people. The Announcement was regarded as the first copyright law in Thailand because authority to authorise the reproduction of literary works was vested in the Committee. Its content was therefore consistent with the copyright principle in which the copyright owner of literary and artistic works has exclusive rights to permit the reproduction, adaptation or publication of a work.

As time passed, the Announcement was found to be inadequate to protect books other than the Book Vachirayanvises. In 1901, the necessity to protect the authors of other books brought about the enactment of the “The Ownership of Authors Act B.E. 2444”.

Analysis of the preamble

641 The Vajiranana Library was a library which eventually developed into the National Library of Thailand. The National Library of Thailand was first established by King Chulalongkorn (King Rama V, 1868-1910), in the reign of the Chakri Dynasty, on October 12, 1905 by combining three former libraries namely; Ho Phra Mandira Dharma, Ho Phra Samut Vajiranana and Ho Phra Buddhhasasana Sangaha. It was named Ho Phra Samut Samrap Phra Nakhon, which was changed to the National Library after the revolution in 1932. See also Suwakhon Siriwongworawat, The National Library of Thailand.


644 The Book Vachirayanvises was issued in B.E. 2427 (A.D. 1884). It was a monthly newspaper which had its focus on history, culture and entertainment. The Book Vachirayanvises was administered by the Committee under Royal patronage. (Translated from Thai, Trirat N & Chaiwat T, ‘The Research Report on the Market Framework of and Control over Newspaper in Thailand’ 2004 <http://www.tdri.or.th/reports/unpublished/media/number3.pdf> (3 January 2007).

645 There was an announcement of the Vajiranana Library (now, the National Library) in 1894 prohibiting any person from publishing any part of, or any article published in the Vajirayarnvises Book without the prior permission of “Kammassampathikasapa.” The announcement protected rights in regard to articles published in the Vajirayarnvises Book.


and the provisions of the Act showed that this Act could have been influenced by the Statute of Queen Anne 1709 and the Literary Copyright Act 1842 which were in force in the United Kingdom at the time. It was also claimed in the preamble that Prince Rajburidirekridh, a son of King Rama V, who studied law in Britain introduced this new law to Thailand.

The Ownership of Authors Act had been in force for more than ten years before it was amended in B.E. 2457 (A.D. 1914). The major revision included the modification of the definition of “books” to cover more written work, the registration and notice of copyright, non-copyright works and the burden of proof. However, this Act governed only books. Other types of copyright work were still outside the realm of this legislation.

In the reign of King Prajadhipok (King Rama VII, 1925-1934), the Act for the Protection of Literary and Artistic Works B.E. 2474, which repealed the former two Acts, was promulgated on 16 June 1931. This Act was the first modern copyright law, because it contained the universal principles of copyright law, especially the protection of literary, artistic, scientific and foreign works. In 1931, Thailand acceded to the Berne Convention for the Protection of Literary and Artistic Works 1886, revised in Berlin in 1908 with an Additional Protocol in 1914. Thailand, thus, had to enact a domestic law that complied with the Berne Convention. The legislation, named “the Act for the Protection of Literary and Artistic Works B.E. 2474”, was enacted in 1931, the year in which Thailand officially became a contracting member of the Berne Union. To be compliant with the Berne Convention, the Act adopted the basic principles of the Convention, namely national treatment, minimum rights, and automatic protection, without any formality and also provided other important elements such as a broader definition of what constituted a copyright work, protection of foreign works, and civil and criminal sanctions.

The Act for the Protection of Literary and Artistic Works B.E. 2474 had been in effect for forty-seven years without any amendment until it was repealed and replaced by the Copyright Act B.E. 2521 in 1978. The main reasons for the new law were that the 1931 Act was

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648 Statute of Anne, 8 Anne, ch. 19 (1710)
649 Ibid.
650 Ibid.
652 The Berne Convention for the Protection of Literary and Artistic Works 1886
somewhat out of date, provision for protection was insufficient and the criminal sanctions within the Act could not effectively deter infringements. More importantly, there was no provision of individual use exceptions in the Copyright Act B.E. 2521. The 1978 Act saw four major changes, namely, the expansion of what constituted a copyright work, explicit criminal offences and higher sanctions, an adjusted term of protection, and the fundamental rule for international copyright protection with the authority to issue a Royal Decree specifying the conditions for protection.\footnote{\textsuperscript{654}}

In an adjusted term of protection, the private use exceptions from infringement of copyright were provided, consistent with the three-step test of the Berne Convention\footnote{\textsuperscript{655}} and the TRIPS agreement\footnote{\textsuperscript{656}} Accordingly, the Royal Decree for the Protection of International Copyright B.E. 2526 was proclaimed in 1983 to set the conditions allowed under the Berne Convention and the reservations that Thailand had deposited\footnote{\textsuperscript{657}} This Royal Decree was then abrogated by the subsequent Royal Decree for the Protection of International Copyright B.E. 2536 in 1993 because some conditions were changed to meet contemporary international standards. Although, the private use exceptions were created to allow users to make use of copyright work without the right holder’s permission, some problems occurred in regard to the increasing copyright piracy in Thailand. This is because the private use exception provided in the Copyright Act B.E 2521 defined the scope of the exception broadly, with the result that it could be variously interpreted. Users were therefore able to take advantage of the gap in the provision for their defence. Moreover, the right holders were not satisfied with these exceptions since their copyright materials were not totally protected by the Copyright Act B.E. 2521.

The Copyright Act B.E. 2521 remained in force without any amendment until 1994. In that year, the Copyright Act B.E. 2537\footnote{\textsuperscript{658}} was passed to repeal the former Act and to lay down a new set of provisions, some of which repeat the previous laws, some of which are adjusted and some of which are totally new. The purpose of this enactment was to elevate domestic copyright law to meet acceptable international standards, in order to secure the national

\textsuperscript{654} The Copyright Act B.E. 2521 (A.D. 1978), which became effective on 19 December 1978 provided protection for audio-visual works, sound records and video broadcasting works. See also Hemarajata C, ‘Copyright Law in Thailand’ no date \url{<http://tla.tiac.or.th/ifla/ifla99_21.htm>} (3 January 2007).
\textsuperscript{655} Article 9(2) of the Berne Convention for the Protection of Literary and Artistic Works (Paris Act, 1971) NO 615 (E)
\textsuperscript{656} The Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS), Annex 1C, 1994
\textsuperscript{657} Rattanapichat T, \textit{The Protection of Literary and Artistic Works}, Department of Fine Arts, Bangkok, 1968, p 52. (in Thai)
\textsuperscript{658} The Copyright Act B.E. 2537 (A.D 1994)
interest, particularly in international trade and relations. This objective is elaborated in the principle and rationale of the Act as follows:

The reason to enact this legislation is that whereas the Copyright Act B.E. 2521 has been long in force, the provisions therein are not consistent with the changing internal and external situations particularly the expansion and development of economy and trade as well as the domestic and international industry. It is therefore deemed appropriate to improve the measures for the copyright protection to be more efficient to accommodate the aforesaid changes and to promote the creation of literary, artistic and other related works.  

The drafting of the Copyright Act B.E. 2537 was done while the negotiation of TRIPS was still under way. Since it was the policy of the government to adjust the copyright law to accepted international standards, the drafters closely monitored the possible outcome of the TRIPS negotiations. When the TRIPS negotiation reached the final stage, the drafting committee foresaw a TRIPS conclusion concerning copyright, which would soon bind member countries of the WTO. The Committee adopted a strategy to include the copyright rules proposed by TRIPS in the new Act so that it would be difficult for any trading partner to allege that Thailand lacked an internationally accepted standard for copyright protection. However, to include substance of the copyright protection is basically dependent on the degree of the important of that substance. If the substance relates to the principle which needs to be approved by the Parliament, that substance of protection must be inserted in the Act. On the contrary, if it is involved with the details of protection, it can be inserted in the Regulation. Further, the Copyright Act B.E. 2537 (A.D. 1994) was amended and some sections related to the exceptions from infringement of the copyright were inserted in order to effectively balance the interest between the right holder and the user. The amendment was also made to keep pace with the technological changes. The provision of an exception with respect to computer programs, for instance, was granted in the Copyright Act 1994 in order to encourage users to access information technology as well as to create and develop new computer programs.

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660 The Copyright Act B.E. 2537 (A.D. 1994)
661 The Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS), Annex 1C, 1994
The Copyright Act B.E. 2537 has been in force since 21 March B.E. 2538 or 1995. So far, it has not been amended. The Act already conformed to TRIPS when it was enacted, and there was, therefore, no need to revise it to meet either the criteria or the 1999 deadline set by TRIPS for developing countries.

In conclusion, the Thai copyright system dates back to B.E. 2435 or 1892 with the proclamation of the Announcement of the Royal Library. Even though this initiative was purely domestic, the Announcement is considered a copyright law because its content corresponds with the copyright concept. The next stage sees the introduction of British copyright principles into the Thai legal system in B.E. 2444 or 1901. The subsequent stage is Thailand’s adoption of international copyright rules under the Berne Convention in B.E. 2474 or 1931. Most recently, Thailand accepted the standards set by TRIPS in the Copyright Act of B.E. 2537, which came into force in 1995.

2.1.2 International Protection under Thai Copyright Law

Thailand is committed to the protection of foreign copyright as it has been a member of the Berne Union since its accession to the Berne Convention for the Protection of Literary and Artistic Works in 1931. The most important obligation for Thailand as a member of the Union was to enact copyright law which complied with the Berne Convention as adopted by Thailand.

In response to the international obligation, the Copyright Act B.E. 2537 provides more obvious protection for international copyright than the provisions under the former copyright laws. This is because the conditions relating to the acquisition of copyright of any work created by a foreign author in another country, which used to be stipulated in the said Royal decree, are specifically included in section 8 regarding the acquisition of copyright under Chapter 2 of this Act. At present, therefore, Thailand fully accedes to the Berne Convention, Paris Act 1971 in regard to both the substantive and the administrative clauses. This accession also avails Thailand, as a developing country, of the right to apply Article II

664 The Berne Convention for the Protection of Literary and Artistic Works (Paris Act, 1971) NO 615 (E)
665 The Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS), Annex 1C, 1994
666 Rattanapichat T, The Protection of Literary and Artistic Works, Department of Fine Arts, Bangkok, 1968, p 52. (in Thai)
667 Mongkolnavin U, The Explanation of International Law, Faculty of Law, Chulalongkorn University, Bangkok, 1966, p 182. (in Thai)
(Limitations on the Right of Translation) of the Appendix of the Paris Act 1971. Article II of the Appendix of the Paris Act 1971, which is a provision of special treatment, provides the right of translation for developing countries in order to access imported books. This Article has been discussed in Chapter Two.

2.1.3 Copyright Works in the Copyright Act 1994

Copyright works by virtue of the Copyright Act B.E. 2537 (1994) include works of authorship in literary, dramatic, artistic, musical, audiovisual, cinematographic, sound recording, sound and video broadcasting form, or any other work in the literary, scientific or artistic domain, whatever may be the mode or form of its expression. However, whether a work will be protected by copyright or not is not based only on the type of work. There are other elements to be taken into consideration to determine whether a work is a copyright work or not.

There are four elements of copyrightability that are generally accepted in foreign and domestic copyright laws as follows:
1) Expression of idea;
2) Expressed in a type of work recognised by law;
3) Originality; and
4) Non-illegal work

Expression of Idea

As for the Thai copyright law, the principle that a copyright work must be an expression of an idea and not the idea itself was not written until the enactment of the Copyright Act B.E. 2537. The Act states clearly “Copyright protection shall not extend to any idea or procedure, process or system or method of use or operation or concept, principle, discovery or scientific or mathematical theory.” This provision is influenced by TRIPS. So far, the litigants in infringement cases have not raised this principle. Nevertheless, the issue as to whether the defendant copies the work or just uses the idea in such work is foreseeable in future infringement disputes.

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669 Article II Appendix of the Berne Convention for the Protection of Literary and Artistic Works (Paris Act, 1971) No 615 (E)
670 The Copyright Act B.E. 2537 (A.D. 1994)
671 Section 6 paragraph 1 of the Copyright Act B.E. 2537 (A.D. 1994)
672 Section 6 paragraph 2 of the Copyright Act B.E. 2537 (A.D. 1994)
673 Article 9 paragraph 2 of the Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS), Annex 1C, 1994
Expressed in a Type of Work Recognised by Law

The Copyright Act B.E. 2537 governs a number of copyright works, namely, literary work, dramatic work, artistic work, musical work, audiovisual work, cinematographic work, sound recording, sound and video broadcasting work or any other work in the literary, scientific or artistic domain. The Act provides the definitions of these works. Along with each definition, some explanations or examples will be added in the Act by the lawmakers where necessary.

To make it consistent with TRIPS, the Act protects computer programs as literary works. The long lasting debate as to whether computer programs are protected under the copyright law thus comes to an end. Computer programs are defined by the Copyright Act B.E. 2537 (1994) as “instructions, set of instructions or anything which is used with a computer so as to make the computer work or to generate a result no matter what the computer language is.” By this broad definition, a computer program includes a program written in either source code or object code and in any computer language.

Originality

The principle of originality means that a copyright work must be directly made by the author himself with his own appropriate level of capability or knowledge or judgment in regard to such work. The level of such intellectual property input has to be measured against the output. What counts in the Thai law is that the work originates from the authors and is not copied from another work.

This universal rule finds its place in the Thai copyright law. The former Copyright Act B.E. 2521 (1978) adopts this rule by defining “author” using a term which is understood as “a person who creates a work with his original thinking”. This definition has led to the misunderstanding that the author has to use his own original idea to create a work. The present Copyright Act deals

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674 Section 4 of the Copyright Act B.E. 2537 (A.D. 1994)
675 The Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS), Annex 1C, 1994
676 The Juridical Council, a duty of this government unit is to give opinion as to the interpretation of laws upon request by other government units or state enterprises, had an opinion in 1985 that a computer program, a work in the scientific domain under the Copyright Act B.E. 2521 (A.D. 1978) which has been controversial need not be cited any more since the new copyright law clarifies the problem.
with this defect by redefining “author” as “a person who makes or creates a copyright work” and does not allude to any original thinking, thus avoiding the confusion.

There is a Supreme Court Decision that elaborates the application of this principle of originality in the Thai law.\textsuperscript{678} In a copyright infringement case, the plaintiff filed an action claiming that the defendants copied a highway map allegedly created by the plaintiff. It was found that the plaintiff had received permission to reprint it from the Highway Department, the copyright owner of the map. The Court ruled that the plaintiff was not the copyright owner in the reprinted map because the plaintiff merely made printing improvements without creating any important part of the map.\textsuperscript{679}

**Non-Illegal Work**

A non-illegal work is a copyright work produced by human effort which abides by a law. However, there are no provisions on this issue in any of the Thai Copyright Acts, including the Act for the Protection of Literary and Artistic Works B.E. 2474 (1931),\textsuperscript{680} the Copyright Act B.E. 2521 (1978)\textsuperscript{681} and the Copyright Act B.E. 2537 (1994).\textsuperscript{682} As a result, there is an argument that the author of an illegal work should not be protected by copyright law, as such works do not duly contribute to the society as intended by the objectives of the copyright legislation.

In Thailand, there has been only one case, which deals with this issue. In a case before the Supreme Court, Decision no. 3705/2530, the plaintiff claimed copyright in a videotape, which the defendant allegedly reproduced without the plaintiff’s permission. The Court found that the videotape in dispute was in fact an illegal work according to the Penal Code, which provides that whoever makes or possesses an obscene work is criminally liable. Therefore, the Court ruled that the videotape was not a copyright work by virtue of the Copyright Act B.E. 2521. Consequently, the plaintiff was held not to be the copyright owner and therefore was not entitled to file the complaint.\textsuperscript{683} The ruling, which so far has not been criticised, seems to be generally accepted and helps interpret the copyright law in regard to one of the criteria for protection. There remains,

\textsuperscript{679} Supreme Court Decision No. 4486/2539.
\textsuperscript{680} The Act for the Protection of Literary and Artistic Works B.E. 2474 (A.D. 1931)
\textsuperscript{681} The Copyright Act B.E. 2521 (A.D. 1978)
\textsuperscript{682} The Copyright Act B.E. 2537 (A.D. 1994)
\textsuperscript{683} Supreme Court Decision No. 3705/2530.
however, a debate as to whether a work, which contravenes public order or moral right but may not be illegal, could receive copyright protection or not. The issue argued in the above mentioned Supreme Court Decision does not go that far.

In conclusion, works that qualify for protection under the Thai copyright law are based upon the aforesaid criteria, namely, (1) expression of idea, (2) expression in a type of work recognised by law, (3) originality and (4) non-illegal work. Other elements, by contrast, are not formulated under copyright protection. The copyright law has no requirements about the quality of a work. Instead, it takes into consideration only the originality of a work. Nor does the law have any requirements about the novelty of a work. The author can always enjoy copyright in the work he or she originally creates by himself or herself without copying from other works, even though the work may not be new.

2.1.4 Rights of Copyright Owner

Basically, copyright is a negative right in the sense that copyright owners are entitled to prohibit others from exploiting their work and to claim compensation or other remedies for the violation of their exclusive rights. In practice, the copyright laws usually characterise copyright in a positive way by stating that copyright owners have the exclusive rights to some specific acts regarding their work. The Copyright Act B.E. 2537 (1994), like its forerunner the 1978 Act, takes this positive approach for the sake of easier perception by the public. Copyright, therefore, is defined by the Act as the exclusive right to act according to this Act with respect to a work created by the author.

Another provision subsequently elaborates on the term “exclusive right” in the definition. The Act provides that “Subject to section 9, section 10 and section 14, the owner of copyright has the exclusive rights of:

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686 Section 15 of the Copyright Act B.E. 2537 (A.D. 1994)
(1) reproduction or adaptation;
(2) communication to the public;
(3) letting for hire of the original or copies of a computer program, an audiovisual work, a cinematographic work or a sound recording;
(4) giving benefits accruing from the copyright to other persons;
(5) licensing the rights mentioned in (1), (2) or (3) with or without conditions provided that the said conditions shall not unfairly restrict the competition.687

The phrase “Subject to section 9, section 10 and section 14” indicates that these are the cases where there could be an agreement between relevant parties specifying the scope of the rights of each party, which may be somewhat different from the exclusive rights normally provided by law.

Apart from these particular cases, the copyright owners shall solely enjoy the exclusive rights, which consist of the rights to reproduction, adaptation, communication to the public and letting for hire the original or copies of a computer program, an audiovisual work, a cinematographic work or a sound recording. Normally, the exercise of these exclusive rights by the copyright owner or by another through a licensing scheme brings economic benefit to the copyright owner in the form of royalties. Thus, the exclusive rights in the Thai copyright Act 1994 are sometimes referred to as economic rights, while the authors’ rights which mostly concern the dignity and integrity of the author are by contrast referred to as moral rights.688

The rights of reproduction, adaptation and communication to the public are conventional rights within the concept of copyright. The scope of these rights is elaborated by the definitions in the Act.689 The lease of the original or leasing of copies of the four copyright works, namely, a computer program, an audiovisual work, a cinematographic work or a sound recording, is a new right recently proposed in TRIPS and adopted by the 1994 Act.690

The Copyright Act of B.E. 2537 (1994)691 recognises the author’s moral rights. It grants two types of author’s rights, namely, the right of paternity and the right of integrity. As far as the right of paternity is concerned, the author is entitled to the acknowledgement of his identity.692 Should a licensee or even an assignee of copyright publish the work without

687 Section 15 of the Copyright Act B.E. 2537 (A.D. 1994)
689 Ibid 27.
690 Section 4 of the Copyright Act B.E. 2537 (A.D. 1994)
691 Copyright Act B.E. 2537 (A.D. 1994)
recognising the author, the author can demand appropriate acknowledgement. The right of integrity empowers the author to prevent the assignee of copyright or anyone else from distorting, shortening, adapting or doing anything with the work to the extent that such act would damage the reputation or dignity of the author. Irrespective of these rights, the author and his counterparts may agree otherwise in writing. This flexibility would allow the author to negotiate most of his or her interest.

2.1.5 Acquisition of Copyright

The acquisition of copyright for protection under the Copyright Act B.E. 2537 can be classified into four categories as follows:

1) The author shall be entitled to the copyright in the work he has created under any of the following conditions
   
   • In the case where the work has not been published yet, the author must be a Thai national or must have stayed in the Kingdom, or a national of or resident in a country which is a member of the convention on copyright protection of which Thailand is also a member, throughout the time or most of the time of a work’s creation.
   
   • In the case where the work has been published, the first publication must have been in the Kingdom or in a country which is a member of the convention on copyright protection of which Thailand is also a member, or in the case where the first publication is made outside the Kingdom or in another country which is not a member of the convention on copyright protection of which Thailand is a member, if the work has been published in the Kingdom or in a country which is a member of the convention on copyright protection of which Thailand is also a member, within thirty days as from the date of the first publication, or the author must be qualified according to that prescribed in above paragraph at the time of the first publication.

However, in the case where the author must be a Thai national, if he is a juristic person, such juristic person must be incorporated under the law of Thailand. By virtue of section 4 of the Copyright Act B.E. 2537, the meaning of the publication is a disposition of the duplicated copies of a work, regardless of its form or character, with

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693 Section 18 of the Copyright Act B.E. 2537 (A.D.1994)
694 Ibid.
695 Section 8 of the Copyright Act B.E. 2537 (A.D.1994)
the consent of the author, by making duplicated copies available to a reasonable number of the public, having due regard to the nature of the work. The meaning of publication does not include a performance or display of dramatic, musical or cinematographic works, lecturing or delivering a speech on literary work, sound and video broadcasting about any work, exhibition of artistic work and construction of architectural work.

In the case where the author has created a work in the capacity of an officer or employee, he shall be entitled to the copyright in that work, but his employer is entitled to the right to disseminate that work to the public in accordance with the purpose of the employment, unless it has been agreed otherwise in writing. Additionally, the employer shall be entitled to the copyright in the work the author was specifically commissioned to make, unless the author and the employer have agreed otherwise.

2) In the case of a work being by its nature an adaptation of the work copyrighted under this Act with the consent of the copyright owner, the person making such adaptation shall be entitled to the copyright under this Act, without prejudice to the right of the copyright owner in the work of the original author which was adapted.

3) In the case of a work being by its nature a compilation or composition of the works copyrighted under this Act with the consent of the copyright owner, or being a compilation or composition of data or anything else which can be read or transferred by a machine or other equipment, if the person, who compiles or composes, has done so by selecting or rearranging in its nature which is not an imitation of another person’s work, the person making such compilation and composition shall be entitled to the copyright to such work under this Act, without prejudice to the right of the copyright owner in the work and data or anything else of the original author which was compiled or composed.

4) The Ministries, sub-Ministries, Departments or any other state or local agency shall be entitled to the copyright in the works created under their employment or direction or control, unless it has been agreed otherwise in writing.

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696 Section 9 of the Copyright Act B.E. 2537 (A.D.1994)
697 Section 10 of the Copyright Act B.E. 2537 (A.D.1994)
698 Section 11 of the Copyright Act B.E. 2537 (A.D.1994)
699 Section 12 of the Copyright Act B.E. 2537 (A.D.1994)
700 Section 14 of the Copyright Act B.E. 2537 (A.D.1994)
2.1.6 Term of Copyright

The Copyright Act B.E. 2537 (1994) provides the term of copyright for each type of work in sections 19 to 26. The term of protection is consistent with the Paris Act (1971).\textsuperscript{701} The Act takes the minimum term of protection approach. In general, therefore, protection runs throughout the life of the author and continues fifty years after the author’s death. The Act, in other circumstances, counts the term from the making of the work or the first publication of the work, if any. There is an exception to the fifty-year term in the case of works of applied art as permitted by the Paris Act (1971).\textsuperscript{702} For this type of work, the Act provides twenty-five years from the making of the work or, if there is a publication, twenty-five years from the first publication.\textsuperscript{703}

If the author or every joint author was dead before the publication of the work, the copyright shall subsist for a period of fifty years from the date of its first publication.\textsuperscript{704} In the case of the author being a juristic person,\textsuperscript{705} or using a pseudonymous or anonymous name and being unknown in terms of identity,\textsuperscript{706} “the copyright in such work shall subsist for a period of fifty years from the date of its creation, but if the work is published during the said period, the copyright shall subsist for a period of fifty years from the date of its first publication.”

The copyright in a photographic, audio-visual, cinematographic, sound recording or sound and video broadcasting work,\textsuperscript{707} or the copyright in a work created in accordance with the employment, direction or control of the Ministries, sub-Ministries, Departments or any other state or local agency shall subsist for a period of fifty years from the date of its creation.\textsuperscript{708} However, if the work is published during the said period, the copyright shall subsist for a period of fifty years from the date of its publication.\textsuperscript{709}

\textsuperscript{702} Article 7 (4) of the Berne Convention for the Protection of Literary and Artistic Works (Paris Act, 1971) NO 615 (E)
\textsuperscript{703} Section 22 of the Copyright Act B.E. 2537 (A.D. 1994)
\textsuperscript{704} See Section 19 paragraph 2,3 of the Copyright Act B.E. 2537 (A.D. 1994)
\textsuperscript{705} See Section 19 paragraph 4 of the Copyright Act B.E. 2537 (A.D. 1994)
\textsuperscript{706} See Section 20 of the Copyright Act B.E. 2537 (A.D. 1994)
\textsuperscript{707} See Section 21 of the Copyright Act B.E. 2537 (A.D. 1994)
\textsuperscript{708} See Section 23 of the Copyright Act B.E. 2537 (A.D. 1994)
\textsuperscript{709} Section 21, 23 of the Copyright Act B.E. 2537 (A.D. 1994)
The publication of any copyright work after the termination of the term of copyright protection shall not give rise to the copyright in that work anew. For instance, the publication of a musical work after fifty years from the death of the composer does not give rise anew to the copyright in that work.

2.2 The Application of Exceptions to Copyright Infringement and Limitations of Exclusive Rights in Thailand

As a developing country, it appears that access to educational materials is a major requirement in Thailand in order to encourage knowledge transfer. Thailand mostly imports copyright textbooks from developed countries and then translates into the Thai language. However, there are complaints that the imported textbooks are expensive which means sometimes they are 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. For these reasons, 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’ permissions or the compensation for the reproduction of copyright works.

The establishment of exceptions to copyright in the copyright system as discussed in Chapters One and Two aims to balance the interest of the copyright owner and the interest of the public. In principle, the copyright owner holds 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. It is, nonetheless, also true that the term of protection is remarkably long, with the result that the public hardly benefits from the creation should it have to wait that long. The exceptions to copyright are made to adjust this balance of interest. The regime allows the public to use the work within the scope drawn by the law even during the term of protection. The work, then, will be useful, not only to the copyright owner, but also to the public to some certain extent. The equilibrium of interest, of course, responds to the intent of the copyright system to stimulate the creation of original works for the benefit of society.
2.2.1 Exceptions to Copyright Infringement

This part will examine the exceptions to copyright infringement in the Copyright Act B.E. 2537 (1994). The exceptions are provided to comply with the three-step test of the Berne Convention, Paris Act (1971) and the TRIPS Agreement.

The international rules play a significant role in reshaping the exceptions to copyright infringement in Thailand. There are three major changes from the previous 1978 Act, which provides narrower exceptions than the present law, as follows:

1. The 1994 Act provides a general framework in each category of exceptions in order to consider the exceptions to copyright infringement while the 1978 Act lays down specific exceptions only.
2. The 1994 Act includes a provision with respect to the exceptions of infringement against computer programs while the 1978 Act does not mention computer programs at all.
3. The 1994 Act effectively determines the scope of the exceptions to copyright infringement or, in other words, confers more protection to the copyright owner.

The exceptions of copyright infringement by virtue of the 1994 Act can be itemised as follows:

1) General exceptions;
2) Specific exceptions;
3) Exception with respect to use as reference;
4) Exception with respect to use by librarians;
5) Exception with respect to computer programs;
6) Exception for the purpose of teaching;
7) Exception for the purpose of Library
8) Exception with respect to performance of dramatic or musical works;
9) Exception with respect to artistic works;
10) Exception with respect to architectural works;
11) Exception with respect to copyright works in cinematographic works; and
12) Exception with respect to government use

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710 Article 9(2) of the Berne Convention for the Protection of Literary and Artistic Works in 1967 NO 615 (E)
711 Article 13 of the Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS), Annex 1C, 1994
712 Section 32 paragraph 1 of the Copyright Act B.E. 2537 (A.D. 1994)
713 Section 35 of the Copyright Act B.E. 2537 (A.D. 1994)
General Exceptions

This general exception states that an act against a copyright work of another person, which does not conflict with a normal exploitation of the copyright work of the owner of copyright and does not unreasonably prejudice the legitimate right of the owner of copyright, shall not be deemed an infringement of copyright.\(^{714}\)

This provision requires two conditions to form the general exception. This provision gives rise to a debate\(^{715}\) as to whether it can be used as an exception to infringement independently of other specific exceptions or whether it must be used with another definite case of exception. So far, there has been no precedent case.

Specific Exceptions

The Copyright Act, B.E 2537 (1994)\(^{716}\) of Thailand provides certain limitations and exceptions to the copyright protection given to owners. These rights are meant to enhance public access to these copyrighted materials for specific purposes. The Act provides several specific exceptions to infringement for any copyright work as follows:

Subject to the provision of paragraph 1, any act against the copyright work in paragraph 1 shall not be deemed an infringement of copyright provided that the act is each of the following manners:
(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 acknowledgement 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

\(^{714}\) Section 32 paragraph 1 of the Copyright Act B.E. 2537 (A.D. 1994)
\(^{716}\) The Copyright Act B.E. 2537 (A.D. 1994)
sell to students in a class or in an educational institution provided that the act is not for profit;
(8) use of the work as part of questions and answers in an examination.\textsuperscript{717}

The applicability and concept of “fair use” as stated in section 32 of the Copyright Act, B.E 2537 (1994) has of late come under scrutiny in Thailand. Section 32(1)\textsuperscript{718} exempts the non-profit research or study of copyright work from being deemed as copyright infringement. This exception enables students to use any copyrighted works for their research and studies without having to seek permission from the right-holder. Section 32(6)\textsuperscript{719} allows teachers to reproduce, adapt, exhibit or display copyright work for the benefit of their teaching provided that the act is not for profit.

The use of exceptions in defence of copyright infringement has recently emerged as the users are not well informed as to how to appropriately and legally adopt the exceptions for private and non-commercial purposes. The defence is raised in a criminal copyright action filed in the Central Intellectual Property and International Trade Court by the public prosecutor and several international publishers comprising \textit{Prentice–Hall Inc., McGraw Hill Company Inc. and International Thompson Publishing Inc.}\textsuperscript{720} as co-plaintiffs and an owner of a photocopying shop owner as a defendant. The defendant was accused of committing copyright infringement by reproducing parts of books for students who bring the books to the shop for such a service. The Central Intellectual Property and International Trade Court (IP & IT Court) analysed the facts and suggested several reasons the defendant’s act fell under the scope of an exception to infringement. The case has been sent for appeal to the Supreme Court and the Court has been decided that the defendant was guilty. It is foreseeable that the Court will have to deal with the issue of exceptions of infringement increasingly from now on.\textsuperscript{721}

\textbf{Exception with Respect to Use as Reference}

A reasonable recitation, quotation, copy, emulation or reference in part of and from a copyright work by virtue of this Act with an acknowledgement of the ownership of copyright in such work shall not be deemed an infringement of copyright provided that section 32 paragraph 1 is complied with.\textsuperscript{722}

\textsuperscript{717} Section 32 paragraph 2 of the Copyright Act B.E. 2537 (A.D. 1994)
\textsuperscript{718} Section 32 paragraph 1 of the Copyright Act B.E. 2537 (A.D. 1994)
\textsuperscript{719} Section 32 paragraph 6 of the Copyright Act B.E. 2537 (A.D. 1994)
\textsuperscript{722} Section 33 of the Copyright Act B.E. 2537 (A.D. 1994)
It is not uncommon for teachers of the history of art to quote representative pictures of a particular school of art to, say, illustrate the history of twentieth-century art. It will not be sensible to quote only part of the pictures. However, that is the only way quotations of copyright work can be carried out under the Copyright Act of Thailand.\textsuperscript{723} Section 33 of the law requires any quotation to be “reasonable” and “in part”, although neither the Berne Convention nor the TRIPS Agreement places any limitation on the length or purpose of quotations.\textsuperscript{724}

**Exception with respect to Use by Librarians**

For the purpose of academic dissemination, the Act provides that a reproduction of a copyright work by virtue of this Act by a librarian in the following cases shall not be deemed an infringement of copyright provided that the purpose of such reproduction is not for profit and section 32 paragraph 1 is complied with:

1. reproduction for use in the library or another library;
2. reasonable reproduction in part of a work for another person for the use in research or study.\textsuperscript{725}

**Exception with respect to Computer Programs**

This exception is newly introduced in the 1994 Act to correspond with the protection of a computer program. The scheme is detailed and reads:

An act against a computer program which is a copyright work by virtue of this Act in the following cases shall not be deemed an infringement of copyright provided that the purpose is not for profit and section 32 paragraph 1 is complied with:

1. research or study of the computer program;
2. use for the benefit of the owner of the copy of the computer program;
3. comment, criticism or introduction of the work with an acknowledgement of the ownership of the computer program;
4. reporting of the news through mass media with an acknowledgement of the ownership of copyright in the computer program;

\textsuperscript{723} Section 33 of the Copyright Act, B.E.2537 provides that “[a] reasonable citation, quotation, copy, emulation or reference in part and from a copyright work under this Act with an acknowledgment of the ownership of copyright in such work shall not be deemed an infringement of copyright…”

\textsuperscript{724} Article 10(1) of the Berne Convention for the Protection of Literary and Artistic Works (Paris Act, 1971) NO 615 (E)

\textsuperscript{725} Section 34 of the Copyright Act B.E. 2537 (A.D. 1994)
(5) making copies of a computer program for a reasonable quantity by a person who has legitimately bought or obtained the program from another person so as to keep them for maintenance or prevention or loss;
(6) 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;
(7) use of the computer program as part of questions and answers in an examination;
(8) adapting the computer program as necessary for use;
(9) making copies of the computer program so as to keep them for the reference or research for public interest.\textsuperscript{726}

\section*{Exception for the Purpose of Teaching}

In Thailand, reproduction of the whole of a copyright work, such as a photograph, for distribution to students in a class by a teacher appears to be prohibited by the Copyright Act of Thailand even when it is not for profit.\textsuperscript{727} Such use could have been made possible under the Act. The Berne Convention and the TRIPS Agreement do not prohibit the utilisation of the whole of a copyright work for teaching purposes.\textsuperscript{728}

Further, a teacher in Thailand seems to be prohibited from uploading learning materials onto a website for transmission through the internet. This is because the wording of the teaching exception in the Copyright Act of Thailand does not seem wide enough to cover such a circumstance.\textsuperscript{729} This could also mean that providers of distance education in Thailand may not rely on the teaching exception to make available learning materials to students.

Broadcasting can be an important tool for transmission of knowledge. The Berne Convention gives national lawmakers the freedom to determine the conditions under which the copyright owners may exercise their rights of broadcasting. One way of using this flexibility is to allow free use of copyright work in broadcasts transmitted in school buildings. Nevertheless, the Copyright Act of Thailand does not contain any limitation or exception to the copyright owner’s right of broadcasting.

\textsuperscript{726} Section 35 of the Copyright Act B.E. 2537 (A.D. 1994)
\textsuperscript{727} Section 32(7) of the Copyright Act, B.E.2537 allows “reproduction, adaptation in part of a work or abridgment or making a summary by a teacher or an educational institution so as to distribute or sell to students in a class or in an educational institution provided that the act is not for profit”.
\textsuperscript{728} Article 10(2) of the Berne Convention for the Protection of Literary and Artistic Works (Paris Act, 1971) NO 615 (E)
\textsuperscript{729} Section 32(6) of the Copyright Act, B.E.2537 allows “reproduction, adaptation, exhibition or display by a teacher for the benefit of his teaching provided that the act is not for profit”. Section 32(7) of the Copyright Act, B.E.2537 allows “reproduction, adaptation in part of a work or abridgment or making a summary by a teacher or an educational institution so as to distribute or sell to students in a class or in an educational institution provided that the act is not for profit”.

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**Exception for the Purpose of Library**

In Thailand, the Copyright Act 1994 provides an exception for the libraries to allow the librarians to use their copyright works in a specific manner, subject to certain terms. However, the exception for the libraries’ purpose is subject to two conditions. First, the act must not conflict with the copyright holder’s right and second, it must not unreasonably prejudice the legitimate rights of the owner.\(^{730}\) Under section 34\(^ {731}\) permits a librarian to reproduce a copyright work for use in his or her own library or another library or to reproduce a reasonable reproduction in part of a work for another person for the benefit of research or study.

**Exception with Respect to Performance of Dramatic or Musical Works**

The law also establishes the exception regarding entertainment works, that an appropriate public performance of a dramatic work or a musical work, which is not organised or conducted for seeking profit from such activity and without direct or indirect charge for watching the performance and the performers not receiving remuneration for such performance, shall not be deemed an infringement of copyright, provided that it is conducted by an association, foundation or another organisation which has objectives for public charity, education, religion or social welfare and that section 32 paragraph 1 is complied with.\(^ {732}\)

**Exception with Respect to Artistic Works**

The Act provides three provisions for the exceptions regarding artistic works of different kinds:

1) a drawing, painting, construction, engraving, moulding, carving, lithographing, photographing, cinematographing, video broadcasting, or any similar act of an

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\(^{730}\) Section 32 of the Copyright Act, B.E.2537 (A.D. 1994) provides that: -

“An act against a copyright work under this Act of another person which does not conflict with the normal exploitation of the copyright work by the owner of copyright and does not unreasonably prejudice the legitimate rights of the owner of copyright shall not be deemed an infringement of copyright.

Subject to the provision in the first paragraph, the following acts in relation to a copyright work shall not be deemed an infringement of copyright:

(1) research or study of the work which is not for profit;

(2) reproduction, adaptation, exhibition or display by a teacher for the benefit of his teaching provided that the act is not for profit;

(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 abridgment or making a summary by a teacher or an educational institution so as to distribute or sell to students in a class or in an educational institution provided that the act is not for profit;”

\(^{731}\) Section 34 of the Copyright Act, B.E.2537 (A.D. 1994)

\(^{732}\) Section 36 of the Copyright Act, B.E.2537 (A.D. 1994)
artistic work, except an architectural work, which is openly located in a public
place shall not be deemed an infringement of copyright in the artistic work;\textsuperscript{733}

2) a photographing or cinematographing or video broadcasting of a work of which an
artistic work is a component shall not be deemed an infringement of copyright in
the artistic work;\textsuperscript{734}

3) in the case that another person, besides the author, jointly owns the copyright in
an artistic work, the subsequent creation by the same author of the artistic work in
such a manner that a part of the original artistic work is reproduced or the printing
pattern, sketch, plan, model or data acquired from a study which has been applied
in the creation of the original artistic work is used shall not be deemed an
infringement of copyright in the artistic work, provided that the author does not
reproduce or copy the substantial part of the original artistic work.\textsuperscript{735}

\textbf{Exceptions with Respect to Architectural Works}

Two provisions are relevant. The following acts shall not be deemed an infringement of
copyright in an architectural work:

1) a drawing, painting, engraving, molding, carving, lithographing, photographing,
cinematographing, video broadcasting of an architectural work;

2) a restoration in the same appearance of a building which is a copyright
architectural work.\textsuperscript{736}

\textbf{Exception with Respect to Copyright Works in Cinematographic Works}

This exception clarifies that when the term of protection for a cinematographic work has
come to an end, the communication to the public of the cinematographic work shall not be
deemed an infringement of copyright in the literary work, dramatic work, sound recording or
any work previously used to create such cinematographic work.\textsuperscript{737}

\textsuperscript{733} The Statement of Judge Prinya Deepadung, Research Justice of the Division of IP & IT of the Supreme Court Thailand, on 31 August 2005 in Project On Copyright And Access To Knowledge Country Study-Thailand
\textsuperscript{734} The Statement of Judge Visit Sripibool, Judge of The IP&IT Court, on 29 July 2005 in Project On Copyright And Access To Knowledge Country Study-Thailand
\textsuperscript{736} Section 41 of the Copyright Act B.E. 2537 (A.D. 1994)
\textsuperscript{737} Section 42 of the Copyright Act B.E. 2537 (A.D. 1994)
Exception with Respect to Government Use

A reproduction of a copyright work, which is in the possession of the government by an authorised official or by an order of such official for the benefit of government service, shall not be deemed an infringement of copyright, provided that section 32 paragraph 1 is complied with.\footnote{Section 43 of the Copyright Act B.E. 2537 (A.D. 1994)}

2.2.2 Developing Country’s Limitations to Exclusive Rights

The Berne Convention has an appendix, which expressly gives developing countries the option to exercise two forms of compulsory licensing. The first is a compulsory licensing regime that allows governments to grant a licence to make a translation of printed materials and publish the translation for the purpose of teaching, scholarship or research. The second is compulsory licensing to reproduce and publish printed works for use in connection with systematic instructional activities. A country that intends to avail itself of any of the compulsory licensing options has to make a declaration to that effect. Thailand has only made a declaration in relation to the first option, namely the one on translation.\footnote{Sections 54 and 55 of the Copyright Act, B.E.2537 (A.D. 1994)} Hence, the government can grant compulsory licences to translate and publish textbooks, but it cannot grant compulsory licences to reproduce and publish printed works even for systematic instructional activities including classroom use.

Limitation on the Right to Translation

This limitation is divided into two systems. The first system is compulsory licensing and the second is the so-called ten year regime.

Compulsory Licensing

Article II of the Appendix to the Paris Act 1971\footnote{Article II Appendix of the Berne Convention for the Protection of Literary and Artistic Works (Paris Act, 1971) NO 615 (E)} entitles the developing countries, which declare their acceptance of this system, to translate copyright works in the manner authorised by the Appendix. There are a number of conditions to abide by. The compulsory system is
available only for translation for educational, teaching or research purposes. The work to be translated under this system must have been published for at least three years and not been translated into the languages in general use. The applicant for translation must prove that he/she has made an effort to seek a licence from the copyright owner but has failed to get a voluntary licence or to locate the copyright owner. Besides, there are many other requirements to meet in order to utilise this system.

In Thailand, compulsory licence is not widely applied in Thailand as there is no other provision for compulsory licences indicated in the Copyright Act 1994, with the exception of the compulsory licence of translation which is provided for the purpose of research or study, and teaching. In addition, the public generally lacks awareness of this concept of exceptions to copyright. Members of the public only know how to make use of copyright works for private purposes without the right holder’s permission and the remuneration of royalty. Many are not even aware that such exceptions exist, or are not sure of the exact scope and applicability of the exceptions.\footnote{The statement of Judge Prinya Deepadung, Research Justice of the Division of IP&IT of the Supreme Court Thailand, on 31 August 2005 in ‘Project on Copyright And Access To Knowledge Country Study-Thailand’, no date, <http://www.ciroap.org/a2k/documents/countrireports/thailand-final.pdf>, (14 February 2006)}

\textit{Ten-Year Regime}

Article V of the Appendix to the Paris Act 1971\footnote{Article V Appendix of the Berne Convention for the Protection of Literary and Artistic Works (Paris Act, 1971) NO 615 (E)} offers an alternative possibility for limitation of the right to translate copyright works for developing countries. The limitation of the translation right is that work to be translated must have been published for at least ten years and not been translated into the language used in the country of application. Any developing country, which wants to apply this scheme, must declare its adoption upon ratification or accession to the Berne Convention.\footnote{The Berne Convention for the Protection of Literary and Artistic Works (Paris Act, 1971) NO 615 (E)}

Thailand used to adopt the ten year regime in the Copyright Act B.E. 2521 (1978)\footnote{See the Royal Decree Providing Conditions for the Protection of International Copyright B.E. 2526 (A.D. 1983), Section 5 paragraph 2.} when the country still acceded to the Berlin Act 1908 with a number of reservations dating back to the first accession to the Berne Union in 1931. As a developing country, Thailand reserved the right to translation in accordance with the scheme. The Copyright Act B.E. 2537
(1994), however, ended the use of the system of the ten-year regime and instead accepted the compulsory licensing system. After the 1994 Act was enacted, the government deposited the declaration on May 23, 1995 with the World Intellectual Property Organization extending the effects of its accession to the Paris Act (1971) to Articles 1 to 21 and the Appendix and Article II of the Appendix. The accession officially came into effect on September 2, 1995 and the availability of limitations on the right of translation ceased on October 10, 2004 unless it was withdrawn earlier. Thus, the limitation on the exclusive right to translation currently utilised by Thailand is the compulsory licensing system, in accordance with Article II of the Appendix attached to the Paris Act 1971.

The 1994 Act avails itself of the limitation of the right to translation with the same conditions set forth in the Appendix of the Paris Act 1971. The law authorises the Director General of the Department of Intellectual Property to establish a fair compensation for the translation should the copyright owner and the applicant not reach an agreement. The parties can appeal to the Copyright Board within ninety days after receiving the order. The Board’s decision is final.

**Limitation on the Right to Reproduction**

Apart from Article 9 (2) of the Paris Act 1971, which includes an exception to the exclusive right of reproduction to the effect that the domestic laws of member countries may permit the reproduction in certain special cases provided that it does not conflict with a normal exploitation of the work and does not unreasonably prejudice the legitimate interests of the author. Article III of the Appendix offers a compulsory licensing system for developing countries to enable them to reproduce works subject to the prescribed conditions. Several conditions are similar to Appendix II relating to the compulsory licensing system for translation. The 1994 Act provides exceptions to the right to reproduction but, unlike the compulsory licensing system for translation, does not avail itself of the compulsory licensing system for reproduction.

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745 The Copyright Act B.E. 2537 (A.D. 1994)
746 Section 54 and Section 55 of the Copyright Act B.E. 2537 (A.D. 1994)
747 Appendix II of the Berne Convention for the Protection of Literary and Artistic Works (Paris Act, 1971) NO 615 (E)
749 Article 9(2) of the Berne Convention for the Protection of Literary and Artistic Works (Paris Act, 1971) NO 615 (E)
750 Article III Appendix of the Berne Convention for the Protection of Literary and Artistic Works (Paris Act, 1971) NO 615 (E)
751 Article II Appendix of the Berne Convention for the Protection of Literary and Artistic Works (Paris Act, 1971) NO 615 (E)
2.3 Modernisation of the Thai Copyright Law

The criticism of the existing provisions in the Copyright Act of 1994\textsuperscript{752} reflected the reality that Thailand had decided to put most issues of intellectual property under one roof through the establishment of the Department of Intellectual Property (DIP) of the Ministry of Commerce.\textsuperscript{753} There are some issues of intellectual property, for example, plant variety protection is not under the authority of DIP but it is under the authority of the Department of Agriculture. The importance of copyright to trade and business has been clearly acknowledged through not only the substantive provisions of the law but also the actual administration of the Copyright Act. It has been transferred from the realm of art and education to that of modern business. As far back as August 1993, the Thai government undertook to create a new court,\textsuperscript{754} to which specially trained judges would be assigned, to deal only with violations of international trade rules and handle both civil and criminal intellectual property right cases.

Clear recognition by the Thai government of a comprehensive regulatory regime is needed. The government should implement the compulsory licensing for other acts such as reproduction of works and audio-visual items, and the anti-competitive provision in the copyright law. Moreover, the Thai government should clarify and broaden the limitations and exceptions to copyright law and monitor closely any proposed amendments to the copyright law. Progress toward putting this regime in place has been extremely slow and must be accelerated as a top priority on Thailand’s legislative agenda. The Thai legislative process is normally quite protracted; strong pressures from the responsible departments will be needed if the new legislation is to come into effect quickly enough to be of maximum usefulness against the growing threat of optical media piracy. Prompt enactment and implementation of proper legislation should give enforcement authorities a powerful new tool to wield against the optical media piracy syndicates. Such measures would lessen the attractiveness of Thailand as a site for locating future pirate facilities. However, in reality, there are many external uncontrollable factors that could slow down the process of enacting the new legislation such as a long list of Bills that the Parliament has to consider during the past years.

\textsuperscript{752} The Copyright Act B.E. 2537 (A.D. 1994)
and the workload of the Council of the State who job is to consider the Bill before sending it to the Cabinet and the low priority given to the Bill by the Cabinet.

Section 32 of the current Thai Act 1994755 creates an overly broad exception which has been interpreted by courts as allowing photocopying of entire textbooks and other published materials, as long as the copy is made for “educational purposes.” The applicability of the “private use” provision under section 32 of the Copyright Act of Thailand was discussed recently when two cases (Public Prosecutor v. Kanokchai Petchdawong756 and Public Prosecutor and several foreign publishers jointly v. Somsak Thanasarasenee)757 were brought by the public prosecutor together with a few foreign publishers against commercial photocopy shop owners.758

This section, as interpreted, is inconsistent with Thailand’s international obligations. Fundamentally, to comply with the three-step test of the Berne Convention and the TRIPS Agreement, section 32 must allow the user to make use of copyright material in a special circumstance without conflicting the normal exploitation of copyright work and prejudicing the legitimate interest of the copyright owner. Although, the users apply section 32 where they would like to reproduce entire published works for their private purpose without the right holders’ permission, this reproduction can affect the right holders’ interests in that it is likely to be discrepant to the purpose of the three-step test.

The Royal Thai Government must, therefore, amend the law to ensure that exceptions or limitations in the law are not applied to permit students, teachers, or copyshops (or anyone else acting on their behalf) to make or distribute unauthorised reproductions or unauthorised translations of works, compilations, or substantial portions thereof, in a manner that impinges on the rights accorded to copyright owners under the international law. Since the Thai government decided to draft amendments to the copyright law, Thai officials from a number of agencies have been working with private sector advisors and others to draft comprehensive

755 Section 32 of the Copyright Act B.E. 2537 (A.D. 1994)
756 Public Prosecutor v. Kanokchai Petchdawong [Thai Supreme Court Judgment No 1343 /2543]
757 Public Prosecutor and a several foreign publishers jointly v. Somsak Thanasarasenee [Thai Supreme Court Judgment No 1732/2543]
758 The IP&IT court extended the exception to copyright infringement relied upon by the students in section 32 to the photocopy shops if it is proven that the act of photocopying was done on behalf of the students. It thus stretched the ambit of section 32 to cover not only students, but also commercial photocopying shops. This decision was heavily criticised by the publishing industry for it was said that the extension contravened the accepted principles of “fair use”.

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legislation. Additionally, the Thai government proposes to establish the Collecting Society in order to help maintain the balance of the interests between the right holders and the users by serving as an effective intermediary between the two parties.

2.3.1 Draft of the Copyright Amendment Act B.E. 2537 (A.D. 1994)

A Working Committee on Copyright, comprising officials from the Department of Intellectual Property (DIP) and representatives of copyright owners, has been set up to work on the provisions of a draft amendment to the Thai Copyright Act 1994. The draft of the Copyright Amendment Act 1994 repeals some ambiguous terms such as “reproduction” and “publication” in section 4 and inserts some definitions in some sections such as “distribute”, and “technological measures” in order to balance the interests of the right holders and the public as well as to keep pace with the digital environment. However, it should be further revised to include modern and effective enforcement provisions to eradicate all forms of piracy, particularly in the digital environment. In particular, the draft provisions regarding the prohibition of the circumvention of technological protection measures (TPMs) would have to be further tightened in order to fully implement the crucial requirements of the WIPO treaties.

Recently, the Department of Intellectual Property in Thailand has created a website to receive suggestions and opinion from the public with a view to drafting an amendment to the Copyright Act 1994. However, there is no clear information as to when the amended draft will be in force. This is because the process of enacting the Bills depends on the consideration of many authorities and various external factors as mentioned above. This amendment is being made in response to the need for clear specifications regarding the use of copyright works. Specifically, in regard to the exceptions for individual use, the draft provides a clearer indication of the criteria applied to determine the fair practice of exceptions for individual use. Four criteria are in accordance with US fair use: purpose and character of the use, nature of the copyrighted work, amount and substantiality of the portion used in comparison to the work as whole, and effect on the potential marketplace.

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760 Section 4 of the Copyright Act B.E. 2537 (A.D. 1994)
In addition, the draft of the Copyright Amendment Act 1994\textsuperscript{763} provides limitations on the reproduction of copyright works. This limitation correlates to Australian fair dealing, that is, it indicates the amount to be deemed as fair practice of reproduction. For example, a teacher can make one or more copies of excerpts of works for educational purposes, not for display by the teacher for the benefit of his/her teaching. However, the reproduction is restricted to no more than 10 per cent of the original work and not more than one copy per student. In the Copyright Act 1994,\textsuperscript{764} there is no such clear indication as to the amount of reproduction allowed. Because of the ambiguity of the current Act (1994), amendments are being drafted to fill a gap that has caused prejudice to right holders.

The draft of the Copyright Amendment Act 1994 attempts to implement important protections needed to provide an adequate legal framework to reduce the ambiguity in the scope and application of the private use exceptions in regard to international copyright requirements. The following changes should possibly be proposed to the draft amendments regarding the effective application of the private use provisions:\textsuperscript{765}

- Make it an offence for a photocopy shop to provide infringing copies of works; …
- Establish voluntary collective management of copyright and safeguards against overzealous collection of royalties on behalf of performers (or the unlawful collection on behalf of other copyright owners).

The proposed amendment carefully focuses on the infringing copies made by a photocopy shop as it plays an important role to promote access to educational material for the average Thai people. Legal action has been brought against two commercial photocopy shop owners. They were charged and convicted for infringing copyright through the making of free copies of textbooks. Both of them referred to section 32 in order to avoid the copyright infringement occurred due to the reproduction of copyright material for commercial purposes.

At the same time, there are certain areas which remain ambiguous which the Thai government needs to clarify.\textsuperscript{766}

\textsuperscript{763} The draft amendment of the Copyright Act 1994 was created in 2003 in order to develop many important substantive and enforcement concepts in the Copyright Act 1994. The 2003 draft is now in the process of Royal Decree consideration.

\textsuperscript{764} The Copyright Act B.E. 2537 (A.D.1994)


- The exceptions to temporary copy protection are explicitly subject to the Berne three-step test, but are not made applicable to computer programs. The current exceptions are too narrow to satisfy Thailand’s international obligations. (There are ambiguous exceptions to protection for computer software because of the potentially over broad exceptions to protection generally, particularly in educational contexts);
- The prohibition on importation includes the ability to authorise or prohibit the importation of piratical copies of works as well as copies of works without the authorisation of the right owner; …

2.3.2 Establishment of Collecting Society

In keeping with the technological change, a collecting society is an important organisation serving as an effective link between right owners and users in developing countries, including Thailand. In Thailand, the role of the collecting society has become more pivotal in the light of the increasingly negative impact of piracy on copyright holders like musicians and record companies.

Domestically, there is a serious need for a strong and viable collecting society. However, as stated above, the IP&IT court has held that it is unfair to penalise the photocopy shop owner when the publishers have failed to provide a mechanism for requesting and granting permission to reproduce copyright works. This is because there is no collecting society to be an intermediary organisation able to deal with an agreement between copyright owner and user in Thailand. Thus, even if the shop owner wants to seek permission or pay a royalty, he or she will have no idea how to do so.

Consequently, the special working group on copyright and neighbouring rights has been looking into drafting a sui generis law on the collecting society in which the state regulates the collecting society of copyright works, especially in regard to the right of reproduction. The Department of Intellectual Property (DIP) should set up a collecting society for books in order to collect royalties for photocopying outside the boundaries of fair use. However, when interviewed, many opined that Thai society is not ready for such an idea. This idea is not acceptable to many local authors, and even some publishers. For them, photocopying should not be regulated as this may harm dissemination of knowledge to the public.

Thus, in order to encourage people to access knowledge, the Thai government should raise public awareness of the existence of exceptions to copyright infringement. Moreover, the Thai government needs to implement the compulsory licensing mechanism, clarify and broaden the limitations and exceptions to copyright law and pay particularly attention to any proposed amendments to the copyright law in order to reduce the ambit of the scope of the exceptions in the national legislation.

2.4 Analysis of the Current Problems in the Application of Thai Individual Use Exceptions

In this section, the Thai individual use exceptions will be analysed in order to explore the current problems found in the exceptions. The analysis will be presented on the basis of the problems, related to the exceptions for individual use, found in both developed and developing countries that were presented in the introduction of Part Two. The problems used as the outline for the analysis of the current problems in the application of the Thai individual use exceptions resemble those presented in Chapter Three for the analysis of the current problems in the application of Australian fair dealing. They are different interpretations of the exceptions for individual use, and respond to the digital environment. However, as Thailand is a developing country where the problem of conformity in the application of the exceptions for individual use according to the real purpose of the three-step test exists, this problem is also presented.

2.4.1 The Problem of Different Interpretations of the Exceptions for Individual Use, and the Problem of Conformity in the Application of the Exceptions for Individual Use according to the Real Purpose of the Three-Step Test

In Thailand, the answer chosen to resolve these two problems is a hybrid of compulsory licensing to protect the right holders’ interest and free use for individual uses to support the users’ benefits in accessing the information. However, the compulsory licensing applied in Thailand is only for the case of translation. Despite the use of the hybrid means, at present, Thailand still encounters some problems related to the different interpretations of the exceptions for individual use, which is similar to Australia, and the conformity in the application of the exceptions according to the real purpose of the three-step test. Specifically, these problems are the different interpretations of the terms used, and different interpretations of fairness.
The Different Interpretations of the Terms Used

Notably, the words defined in Thai private use exceptions (sections 32 – 43)\textsuperscript{769} may be interpreted in different ways as they are unclear in their definitions. Private use for the purpose of research or study, for example, is not clearly defined in the Copyright Act 1994 in terms of the extent of the scope of the act for research or study.

There is some concern in the term “a reasonable quotation…in part of...a copyright work” in section 33\textsuperscript{770} which relates to the exception with respect to use as reference, as there is no clear definition covering how much is considered to be a “reasonable quotation”. It is, therefore important to consider case by case by determining the necessity of using the reference, the benefit to the reader and the user, and the copyright creation of the creator regardless of dependence on the quotation. However, practically, it is difficult to estimate how much can be held to be a “reasonable” portion that is appropriate for the purpose of reference or quotation, as the term, a reasonable portion, can be interpreted differently. Hence, the court must exercise its discretion from the fact and particulars of the case.

The term “the purpose is not for profit” in section 35\textsuperscript{771} is another example which demonstrating that the term used can cause different interpretations. This is because it can cover any consequent acts indicated in all subsections under section 35.\textsuperscript{772} As a result, a software company adopting the exception for the purpose of reverse engineering or decompilation in this section in order to create and develop a more useful and advantageous computer program may be interpreted as contravening the provision. This is because a research or study conducted by a software company in order to develop a computer program that is better than those of other companies may be considered as an act for a commercial purpose. As a result, it is questionable if the exception is beneficial in practice as it is impossible to apply the exception for a defence. However, there is no case law which exemplifies this issue.

In addition, the phrase “the purpose is not for profit” in section 35 also brings difficulty to the development of computer programs, especially in the case of a new programmer. This is because to develop a new program, the new programmer may not be able to avoid studying

\textsuperscript{769} Sections 32-35 of the Copyright Act B.E. 2537 (A.D. 1994)
\textsuperscript{770} Sections 33 of the Copyright Act B.E. 2537 (A.D. 1994)
\textsuperscript{771} Sections 35 of the Copyright Act B.E. 2537 (A.D. 1994)
the programs that have already been created even though it can be interpreted that the new
program may eventually result in profit for the new programmer. The term used in the
provision may therefore hinder the development of new computer programs consequently it is
suggested that the provision should be amended by repealing this term. By this amendment,
gaps which allow a user to take advantage of a right holder in any respect will not occur. This
is because the conditions in all subsections and in section 32 paragraph 1 which must be
followed and satisfied are already strict enough.

The Different Interpretations of Fairness

The exceptions to copyright infringement in section 32 were incorporated to allow the use of
copyright works without permission under certain circumstances and for certain purposes.
This is meant to balance the exclusive rights of the right-holders and the rights of the public
to benefit from the works. Thus, copying for the purpose of education and research should
not be deemed an infringement of copyright. However, the language of section 32 in the 1994
Act can cause different interpretations. This is because it is unclear as to the precise scope
and extent of the exceptions. In the Act, there is no clear definition of what exactly is implied
as “fair”. As a result, there are different interpretations.

For example, some maintain that the provisions are not unreasonable since they are
confined to acts that "are not done for the purposes of profit" and which ‘neither
interfere with the copyright owner obtaining benefits (from the copyright work) nor cause
the owner to suffer a greater adverse effect than would be reasonably expected". On the
contrary, Judge Prinya Deepadung, Research Justice of the Division of IP&IT of the
Supreme Court Thailand, criticised the Act as providing far too wide a range of
exceptions on the grounds of alleged private use. His comment may be emphasised as the
opinion of a judge who interprets section 32 liberally. He is of the opinion that so long as
the wrongdoer can prove that the purpose and intention of reproduction is for educational
and research use and not for profit, then section 32 should apply, regardless of whether

773 Section 32 of the Copyright Act B.E. 2537 (A.D. 1994)
775 Ibid.
only part of the book is copied, or the whole of the book is copied or the essential part of the book is copied.\textsuperscript{777}

Due to the ambiguity of the language which can be interpreted differently, many users have complained that they do not know exactly what is allowed or not allowed under the Copyright Act.\textsuperscript{778} Pointedly, the term “in part of a work or abridgement” in section 32(7),\textsuperscript{779} for instance, can be possibly interpreted as if it modifies the word “reproduction”. If so, there may be a problem. This is because if a lecturer, for example, makes a copy of whole article, his/her act cannot be protected under this provision even though sometimes, it is necessary to reproduce the whole article for the article to be comprehensible? In fact, if considering the problem by interpreting the term in section 32(7) as indicated in the Act, the act of the lecturer may be considered as an infringement. However, if the problem is considered and interpreted differently by adopting section 32 paragraph 1,\textsuperscript{780} the act of the lecturer may be defended and deemed as fair. Owing to the problem of different interpretations of fairness, some users tend to be overly cautious and refrain from using any of the exceptions.

Additionally, in essence, there are also some problems that occur in the exceptions for libraries regarding the amount of reproduction in the libraries. This is likely to conclude in two major problems. First, there are many patrons in the libraries, particularly university libraries. Secondly, the prints and multimedia in the libraries must be imported at great expense from overseas and there are not enough such items to serve the libraries’ patrons. As a result, there is a problem as to what amount of the reproduction of copyright materials which are kept in libraries can be considered as fair under the provision. In the case of the amount of the reproduction, it is necessary to consider the compliance with section 32 paragraph 1\textsuperscript{781} whether or not the reproduction must not be conflicted with the normal exploitation of the copyright work as well as unreasonably prejudiced the legitimate right of the copyright owner. However, to consider this, there may be different interpretations.

\textsuperscript{778} The Copyright Act B.E. 2537 (A.D. 1994)
\textsuperscript{779} Section 32 (7) of the Copyright Act B.E. 2537 (A.D. 1994)
\textsuperscript{780} Section 32 (1) of the Copyright Act B.E. 2537 (A.D. 1994)
\textsuperscript{781} Ibid.
To respond to the problem of different interpretations of fairness that frequently occurs, the government has established a committee comprising officers and members from the Department of Intellectual Property, the Publishers and Booksellers Association of Thailand, university professors, and writers. The Committee’s aim is to study and formulate guidelines on the scope and applicability of the section 32 exceptions and the “private use” concept.\(^{782}\) This supplementary document is called *User Guide for Fair Practice*.\(^{783}\) Despite the attempt to help solve the ambiguity, the document just provides some guidelines that are rarely used since they are not indicated in the enacted Act and they are considered only by academics.

In fact, the language of section 32\(^{784}\) in the Act which is passed into force should be clear about what is considered as “fair” by, for instance, including the guidelines indicated in the *User Guide for Fair Practice*, in the Copyright Act 1994.\(^{785}\) More importantly, it is essential to ensure that besides academics and students, the public should also be aware of the exceptions as well as the guidelines, and use them.

Unfortunately, at present, the public generally lacks awareness of this concept of exceptions to copyright.\(^{786}\) Indeed, many people are not even aware that such exceptions exist.\(^{787}\) Sometimes, lecturers, for example, arrange for certain books, which are usually imported textbooks, to be photocopied at the photocopy shop as they claim that this copying is done for educational purposes. Students then individually pick them up and pay for the book at the shop.\(^{788}\)

To illustrate the doubtful language in section 32\(^{789}\) which results in different interpretations of fairness, different judgments on the same two cases by the Central Intellectual Property and International Trade Court (IP&IT Court), and the Supreme Court will be used as examples.

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\(^{784}\) Section 32 of the Copyright Act B.E. 2537 (A.D. 1994)
\(^{788}\) Ibid.
\(^{789}\) Section 32 of the Copyright Act B.E. 2537 (A.D. 1994)
The first case is the case of the *Public Prosecutor v. Kanokchai Petchdawong*.\(^{790}\) In this case, the Public Prosecutor and several foreign publishers jointly took an action against the owner of a photocopy shop, Mr Kanokchai Petchdwong, for infringement of copyright through photocopying. The defendant claimed that he was hired by the students to photocopy the books and thus the exception in section 32 also applies to him. The IP&IT court found that the defendant had successfully proved his defence by providing evidence that orders were indeed placed by the students. The defendant was acquitted.

The second case is the case of the *Public Prosecutor and several foreign publishers jointly v. Somsak Thanasarasnee*.\(^{791}\) The facts of this case are similar to those of the Kanokchai case. The Public Prosecutor took an action against the owner of a photocopy shop, Mr Somsak Thanasarasenee. Here, the defendant failed to prove that he was hired by the students to do the photocopying. In fact, the IP&IT Court found that the defendant had “copied the work at his own initiative without the instruction of the student”. There were 361 completed-copied books. The defendant was found guilty.

The decision of the IP&IT Court on these two cases has drawn criticism from the publishing industry. In the case of Kanokchai, the IP&IT Court extended the exception to copyright infringement relied upon by the students in section 32 to the photocopy shops if it is proven that the act of photocopying was done on behalf of the students. This decision thus stretched the ambit of section 32 to cover not only students, but also commercial photocopying shops. The decision was heavily criticised by the publishing industry for it was said that the extension contravened the accepted principles of “private use”. Here, the question that arose for consideration was: can the private use exception that applies to a person under section 32 paragraph 1\(^{792}\) of the Copyright Act also apply to the photocopy shop, as if that person is making the copy himself or herself? It was a matter of interpretation of section 32\(^{793}\) and the IP&IT Court defined the situation in which it would apply.

\(^{790}\) *Public Prosecutor v. Kanokchai Petchdawong* [Thai Supreme Court Judgment No 1343 /2543]  
\(^{791}\) *Public Prosecutor and a several foreign publishers jointly v. Somsak Thanasarasenee* [Thai Supreme Court Judgment No 1732/2543]  
\(^{792}\) Section 32 (1) of the Copyright Act B.E. 2537 (A.D. 1994)  
\(^{793}\) Section 32 of the Copyright Act B.E. 2537 (A.D. 1994)
Specifically, from the judgement of the *Kanokchai case*, it appears that the IP&IT Court took the view that the photocopy shop owner is an agent for the students and made the copy on behalf of the students. Thus, the exemption from copyright infringement in section 32 (1) relied upon by the students was applied to exempt the photocopy shop owner as well. The act is considered as “fair”. In order to prove the relationship of agency, a hire-for-work contract between the students and the shop owner must exist. The rationale behind this decision is that if a student who photocopies is allowed to raise the “private use” exception, then the person who is contracted by that student to do just that should also be exempted from liability. Otherwise, there would be no photocopy business at all. In addressing the issue of whether the act of the photocopy shop is “for profit”, the IP&IT Court took the view that when the photocopy shop is hired to make a copy, the shop owner may charge for the papers and the use of the machine as remuneration, and this shall not be regarded as profit. According to Copinger and Skone James:

In the case of a photocopier made available by a library or photocopy shop, a finding of authorisation would require very clear evidence that the supplier gave the copier permission to copy the particular work, rather than merely to use the photocopies.

In addition, the IP&IT Court dealt with the principle that the act shall not “conflict with the normal exploitation of the works” and “unreasonably prejudice the legitimate rights of the owner” in a manner that gives great consideration to the need for access to knowledge. The IP&IT Court did not specify the quantity or the amount of works which one can duplicate in order to qualify for “private use”. Instead the Court took into consideration the importance of education for the development of Thailand vis-à-vis the amount of information that one could extract from a book or an article. In the written judgment, the Court stated that to have a rule that limits the quantity of work that can be duplicated would result in “non-understanding of the thoughts or philosophy in the book”. The IP&IT court also considered whether the right owners had facilitated the giving of permission to a person who intended to make the copy. If they fail to facilitate the giving of permission, then the making of a copy of the work does not affect the normal exploitation of the work or unreasonably prejudice the legitimate interest of the owner.

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794 *Public Prosecutor v. Kanokchai Petchdawong* [Thai Supreme Court Judgment No 1343 /2543]
Therefore, from the Kanokchai and Somsak cases, the applicability and the scope of section 32 (1) exception,\textsuperscript{796} insofar as educational materials are concerned, may be summarised as follows:

(i) A student who makes a copy of copyrighted works for education and research purposes shall not be deemed to have infringed copyright as long as it is not done for profit;
(ii) This exception extends to the owner of a photocopy shop provided that the owner can prove that the act of photocopying is done on behalf of a student under a hire-for-work contract;
(iii) The photocopy shop owner is entitled to charge for the work performed under the hire-for-work contract and such charges do not amount to “profit”;
(iv) The quantity or amount of work allowed to be photocopied under the “fair use” principle depends on the case at hand and the court should take into account the need for development when considering its acceptability.\textsuperscript{797}

When both these cases went up to the Supreme Court on appeal, the case of the \textit{Public Prosecutor v. Kanokchai Petchdawong}\textsuperscript{798} highlighted the different interpretations of fairness, This is because in the Supreme Court, Mr Kanokchai was found guilty and was fined. This decision was based largely on evidence presented rather than the substantive law. The Supreme Court found that the defendant had failed to prove that he was hired by the students to make a copy of the textbook. The documentary evidence produced by the defendant was very “suspicious” and there was no mention of the existence of a hire-for-work contract between him and the students. Besides, no witness had come forward to testify that the defendant had merely made copies of the book on the request of the student. The Supreme Court did not address the issue on the applicability and scope of the section 32 exceptions.\textsuperscript{799}

It appears that if the defendant had been successful in proving a hire-for-work contract, the Supreme Court would have acquitted the defendant.

As for the appeal of Mr Somsak,\textsuperscript{800} the Supreme Court confirmed the conviction and the penalty imposed by the IP&IT Court. The Supreme Court found that the defendant was guilty of secondary infringement merely by possessing copies of photocopied textbooks if the

\textsuperscript{796} Section 32 (1) of the Copyright Act B.E. 2537 (A.D. 1994)
\textsuperscript{797} From the Judgement on Public Prosecutor v. Kanokchai Petchdawong [Thai Supreme Court Judgment No 1343 /2543] and Public Prosecutor and a several foreign publishers jointly v. Somsak Thanasarasenee. [Thai Supreme Court Judgment No 1732/2543]
\textsuperscript{798} Public Prosecutor v. Kanokchai Petchdawong [Thai Supreme Court Judgment No 1343 /2543]
\textsuperscript{799} Section 32 of the Copyright Act B.E. 2537 (A.D. 1994)
\textsuperscript{800} Public Prosecutor and several foreign publishers jointly v. Somsak Thanasarasenee. [Thai Supreme Court Judgment No 1732/2543]
intention was to sell the books or offer them for sale. Furthermore, the defendant was aware that what he had done amounted to infringement of copyright.

2.4.2 The Problem of Response to the Digital Environment

To respond to the new environment of digital technology is a problem both developed and developing countries confront. Thailand has been attempting to enact a new copyright draft to the Copyright Act 1994 since 2004 but this has not yet passed into force. As a result, Thailand still applies the Copyright Act 1994 as well as the exceptions for individual use to the new digital era. It still maintains the exceptions for individual use both in the form of fee-based (compulsory licensing) and free-based (private use exceptions) exceptions as indicated in the current Act. With the application of the current exceptions for individual use, some major problems Thailand is currently facing include the following: the problem of applying the individual use exceptions to the new media, and the problem in unauthorised uses of digital copyright materials.

The Problem of Applying the Individual Use Exceptions to the New Media

After considering the Thai Copyright Act 1994, it seems that section 37 which concerns computer programs may be appropriately adopted in the information age. Two specific situations in which copying is permitted are adapting a computer program ‘when it is necessary for use,’ for the benefit of the owner of a computer program, and making copies of a copyrighted work ‘to save it for use as a reference or for research for the benefit of the public’.

However, the current exceptions do not cover all the new media in the digital environment comprehensively, for example, copyright works on the Internet. In other words, the new media can be problematic under the current individual use exceptions. As a result, making the Copyright Act 1994 available onto a web site for transmission through the Internet may be difficult. This is because the wording of the teaching exception, for instance, in the Copyright Act of Thailand does not seem wide enough to cover such a circumstance. This could also

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801 The Copyright Act B.E. 2537 (A.D. 1994)
802 Section 37 of the Copyright Act B.E. 2537 (A.D. 1994)
803 The Copyright Act B.E. 2537 (A.D. 1994)
804 Section 32(6) of Copyright Act, B.E.2537 allows “reproduction, adaptation, exhibition or display by a teacher for the benefit of his teaching provided that the act is not for profit”. Section 32(7) of Copyright Act, B.E.2537 allows
mean that providers of distance education in Thailand may not rely on the teaching exception to make learning materials available to students.

Another point to consider in this issue is that many universities have also embarked on their own digitisation of materials and databases. However, digitisation is restricted to their own publications, theses and journals. Universities have initiated digitisation to make available for download via the internet, all theses written by their students. It does not, however, digitise other materials in the library. Publishers of digital content often impose restrictions in the terms of the licensing agreement. Indeed, they sometimes restrict access to their content at any one point in time to a limited number of users. Licensed access is controlled by password. Publishers will assign one password to each authorised user and those without a password will not be able to access the contents. Publishers are able to detect if a user is an authorised or legitimate user by looking at the IP address of the computer accessing the contents. Moreover, they can also detect any illegal downloading. Usually, the licensing arrangement permits downloading of ten percent of a document’s contents.805

The requirement of a password to access digital information can crucially hinder the transmission of knowledge in developing countries such as Thailand. If the publishers control or totally prevent access to copyright material, members of the public will be unable to effective utilise 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 contract and by technological protection measures. Clarity and certainty in the private use exceptions for research and study therefore essential to support university teaching and research.

Moreover, as there is no provision for Technological Protection Measures (TPMs) indicated in the current Thai Copyright act 1994,806 there will not be any measures to control the right holders’ rights to reasonably prevent and control access to the right holders’ copyright materials. Nor will the permitted purposes be indicated so that the users can know how much of and what kind of works they can use. The provision for technological protection measures

805 "reproduction, adaptation in part of a work or abridgment or making a summary by a teacher or an educational institution so as to distribute or sell to students in a class or in an educational institution provided that the act is not for profit".
806 The Copyright Act B.E. 2537 (A.D. 1994)
will be introduced in the draft of Copyright Amendment Act 1994. As a result, section 15 will be applied to protect the right holders’ exclusive rights while section 32 paragraph 1 will be applied in cases of the access and reproduction of digital information. However, the scope of section 32 paragraph 1 is so broad that it may be inefficient applied in the digital environment. The application of section 32 possibly harms the legitimate interests of the right holders where the users need to adopt it to avoid the risk of infringement.

In contrast, Australia has amended the provisions for technological protection measures and then included them in the Copyright Act 1998 in order to effectively protect copyright works from infringement. However, there are some concerns as to whether the provisions may allow copyright holders to diminish the intent of these exceptions merely by applying some type of TPM to their work. As a practical matter, these exemptions do not apply to works protected by a TPM. This concern is discussed in detail in Chapter Three.

However, Thailand has just enacted the Computer Crime Act B.E. 2550 (A.D. 2007) which covers any acts related to computer programs and technological measures. At present there are a number of offences committed in relation to data and computer systems which cause an impact on the economy, society, and public and government security. Suppression of offences is difficult to achieve and beyond the scope of the law as currently enforced. Accordingly, for the prevention and suppression of such crimes, it is appropriate to provide penalties and measures to enable prevention and suppression to be carried out in an efficient manner. It is therefore necessary to enact the Computer Crime Act B.E. 2550 (A.D. 2007).

Sections 5 and 7 of the Computer Crime Act 2007 prohibit a person from illegal access to a computer program or computer data which is specifically protected by technological measures and it shall be deemed an infringement if a person knows the technological measures of another person’s computer program and then unlawfully discloses them in such a way that the disclosure may cause damage to that person’s interest. Additionally, a person is not allowed to illegally damage, destroy, adapt, adjust, or make an addition even partially to another person’s computer data.

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808 Sections 5 and 7 of the Computer Crime Act B.E. 2550 (A.D. 2007)
809 Section 6 of the Computer Crime Act B.E. 2550 (A.D. 2007)
810 Section 9 of the Computer Crime Act B.E. 2550 (A.D. 2007)
The Problem in Unauthorised Uses of Digital Copyright Materials

Nowadays, agreement on the effectiveness of the application of the private use concept in the information society is required in Thailand. Both public and private sectors in Thailand are trying to find a solution and enact a new draft to enforce the infringement of copyright, much of which occurs through the inappropriate use of the copyright exceptions. While the new amended draft is in process and the present exceptions for individual use are currently applied, the main concern of the Department of Intellectual Property is with the private interests of authors and with improving the protection accorded to them.\(^\text{811}\) However, these concerns are usually of little interest to the users and pirated copyright material shops, which are more concerned with self interest and finding solutions to achieve information access.

Under the application of the current individual use exceptions to the new environment, the unauthorised use of sound recordings, musical compositions, and computer programs also needs constant attention because it remains pervasive in Thailand. In fact, the DIP and relevant authorities have made significant improvement particularly in, establishment of the IP&IT court and strengthening of their enforcement system, over the past few years when compared to five-six year ago. However, Thailand still presents good examples of copyright piracy because of a decline in the effectiveness of Thailand’s enforcement efforts against piracy.\(^\text{812}\) Piracy rates particularly for videos and software — remain unacceptably high. Initially, users made copies of computer software and sound recordings solely for individual entertainment. However, since digital technologies now enable fast reproduction, people have used this advantage to earn considerable amounts of money.\(^\text{813}\) Some scholars argue that the private use concept was again adopted inappropriately as a defence against infringement since the ambit of the exceptions allow people to claim that their act are done for the individual purposes in order to avoid the copyright infringement.\(^\text{814}\) In addition, on top of a climate already rife with commercial photocopying, other forms of book piracy and software piracy, some decisions by the Thai courts seem to endorse the outright copying — even by


commercial enterprises — of complete books or substantial portions thereof under a faulty interpretation of the Thai private use exceptions.\textsuperscript{815}

As far as the rate of unauthorised uses of business software in business settings is concerned, the rate still remains unacceptably high in Thailand, at 77 per cent in 2005. Moreover, revenue losses continue to increase every year.\textsuperscript{816} Thus, while the business software industry has been able to get full cooperation from enforcement authorities in conducting end-user and retail raids (by the first week of October 2005, the police had conducted six end-user raids based on complaints filed by the Business Software Alliance),\textsuperscript{817} these raids do not seem to be having a significant deterrent effect on the overall piracy rate in Thailand. This is because the piracy in Thailand still continuously increases every year as can be seen through the table shown in appendix 6: The Estimated Trade Losses Due to the Copyright Piracy in Thailand, and Appendix 7: Summary of Copyright Piracy Rate in Asia Pacific.

An interesting appeal that should be closely monitored involves a defendant named Yothin Krutpong,\textsuperscript{818} a shop owner who sold pirate optical media products including VCDs, music CDs and other optical media products from his store in Panthip Plaza. In May 1999, the Intellectual Property court imposed on him the toughest sentence ever handed down for copyright piracy in Thailand: twenty-eight months in jail, and fines totalling Baht 840,000 (US$22,400). The sentence has been appealed in the Supreme Court where it is still pending. If the appeal is unsuccessful, the defendant could be the first copyright pirate to be imprisoned in Thailand for copyright infringement.

Thai court decisions on this case in 2000 on substantive copyright law and enforcement issues were rendered, not by the Intellectual Property and International Trade Court, but by the country’s Supreme Court, hearing appeals from a specialised tribunal. The results sent decidedly mixed signals regarding Thailand’s commitment to fulfil its international obligations in the fight against copyright piracy.

\textsuperscript{815} See Prentice Hall Inc. v. Kanokchai Petchdawong, Black Case No. Or. 326/2542, Red Case No. Or. 784/2542 (plaintiff claimed copyright infringement by a copy shop owner who was copying entire textbooks; court indicated strongly that receipts showing copies made on behalf of students would likely entitle defendant to avail himself of fair use defense under Article 32, setting no limit on scope of permissible copying under the Thai interpretation of the Berne three-part test).


\textsuperscript{817} Ibid.

\textsuperscript{818} Yothin Krutpong (Thai Supreme Court Judgement No 3371 /2542)
An even more disturbing Supreme Court decision involved *Atec Computer*\(^{819}\) and its director, who in 1999 had been fined a total of Baht 1,050,000 (US$28,000 at the exchange rates at that time) for loading unauthorised copies of Microsoft business software programs on the hard disks of computers the company was selling. This was a positive change from the light sentences imposed by the IP&IT Court in its earlier software piracy cases. It was welcomed by the public, and sent a strong message that this common form of software piracy is not acceptable in Thailand. Unfortunately, on October 16, 2000, the Supreme Court released a decision overturning the conviction, on the grounds that, because a Microsoft investigator had ordered the computer, Microsoft could not have been the injured party, and indeed had “facilitated” the offence. While this decision casts doubt on the legal validity of “trap purchases,” one of the most commonly employed techniques in investigating all kinds of piracy cases, it also threatens to undermine the ability of the petitioners to conduct an effective fight against piracy.

3. Conclusion

The *Copyright Act, B.E 2537 (1994)* of Thailand provides certain limitations and exceptions to the copyright protection given to owners. These rights are meant to enhance public access to these copyrighted materials for specific purposes. The applicability and concept of “fair use” as stated in section 32 of the *Copyright Act, B.E 2537 (1994)* has of late come under scrutiny in Thailand. However, in regard to section 32 there are complaints that the exact scope and applicability of the section, specifically 32 paragraph 1 exception remains unclear, insofar as educational materials are concerned. The IP&IT Court is of the view that section 32 should be interpreted uniformly in order to make its application more standardised.

Despite the problem resulted from section 32 of the Copyright Act B.E. 2537 (A.D. 1994), the exceptions for individual use are required in Thailand. This is because, as a developing country, Thailand imports copyright materials from developed countries. As a result, if the exceptions for individual use are curtailed Thailand will experience a great impact, so will many developing countries due to the fact that generally, there has been a dire need for information in the developing world, particularly in crucial areas such as education, medicine, law and human rights. In response to Thailand’s need and that of other

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819 *Microsoft v ATEC Computer* (Thai Supreme Court Judgment No 4301/2543)
developing countries to close the knowledge gap in the information society, the application of legal exceptions is considered a possible solution as otherwise; the cost of access can hinder the access to knowledge. It is essential that developing countries have access to important knowledge-based products as they seek to bring education to all, to facilitate research, to improve competitiveness, to protect their cultural expressions, and to reduce poverty.

Therefore, the current Thai Copyright Act should be amended to ensure that the public right of access is not unreasonably impeded by the rights granted to right holders. Meanwhile the right holders’ interests are not prejudiced by the unauthorised uses. In addition, the amended Act must be followed up with vigorous enforcement if Thailand is to continue to make greater progress against copyright piracy.

According to the analysis of this research, some suggestions that could be proposed to the lawmakers and the Thai government include the following:

1) Adopt the compulsory licensing option to reproduce and publish works for classroom use in regard to the translation of works for the benefit of study, teaching or research without a profit-seeking intention and upon satisfying the conditions set out in the Act. This would be a positive contribution in terms of access to knowledge, as students would then not need to purchase textbooks for their study;

2) Define the teaching exception in Thai law such as to allow the use of the whole of a work for distribution to students in a class and the uploading of materials onto a website for teaching use;

3) Encourage the establishment of the collecting Society in order to maintain the balance of interest between right holders and users.

4) Not restrict the quotations exception only to those that are “reasonable” and “in part” so that information access will be encouraged in educational institutions;

5) Explicitly provide the provisions related to TPMs in the Thai copyright legislation so that the right holder can control access and copy of the copyright materials. This is because TPMs will help protect any illegal or unauthorised access, then, the copyright piracy will be in control. However, the provisions of TMPs should not excessively impede the access right of the users.
6) Allow free use of copyright work in educational broadcasts in order to support the knowledge base in educational institutions; and

7) Raise public awareness on issues of copyright and its exceptions, as well as access to knowledge so that the users will be well informed as to how to fairly use and access copyright materials.
CHAPTER FIVE

A COMPARISON OF THE EXCEPTIONS FOR INDIVIDUAL USE
IN AUSTRALIA AND THAILAND

1. Introduction

Australia and Thailand recognise the importance of effective protection of intellectual property as a vital component in fostering invention and technology. Both countries are parties to the World Trade Organization’s Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) and understand the importance of the intellectual property component in exports.

The Thailand-Australia Free Trade Agreement (TAFTA) strengthens both countries’ capacity to protect intellectual property and reaffirms that they will respect the provisions of TRIPS. Under TAFTA, Australia and Thailand will take measures to prevent the export of goods which infringe intellectual property rights, including through the exchange of information through nominated contact points. They have further agreed to cooperate in increasing awareness of intellectual property rights and the commercialisation of intellectual property.

In the previous two chapters, the application of the Australian exceptions for individual use (fair dealing) was presented in Chapter Three as an example of the application of these exceptions in a developed country. In Chapter Four, the application of Thai private use exception is examined as an example of their application of the exceptions for individual use in developing country. As a result, for this chapter, a comparative analysis of these two countries will be made so that the advantages and disadvantages of the exceptions for individual use in each country can be revealed. More importantly, this can finally bring an
Part 2: Chapter 5

exploration if to explore whether the advantageous application in one country can help solve the problems found in other countries. The comparison made in this thesis is divided into two main sections: the nature and application of the exceptions for individual use, and the problems found and proposed solutions.

2. The Nature and Application of the Exceptions for Individual Use

This section presents the comparative analysis of the nature and application of the exceptions for individual use in Australia, a developed country, and in Thailand, a developing country. The comparison can be divided into four categories: fair use exceptions (Australian fair dealing and Thai private use exceptions), free use exceptions, licences (Australian statutory licences and Thai compulsory licence), and limitation of the legislative individual use provisions. Tables which illustrate the comparison of these categories in detail are included as Appendix 2-5 while some highlights for each category are presented below.

2.1 Fair Use Exceptions

The fair dealing and private use exceptions in Australia and Thailand are purpose specific. The terms have been interpreted narrowly by the Courts. Additionally, neither country gives clear definitions of the terms “research or study”, “criticism or review”, or “reporting news” in their current Copyright Acts. This will cause problems for the users and the courts due to the various interpretations of the terms.826 This point have already been discussed in the section entitled The Different Interpretations of the Terms Used (Chapter Three) and the section entitled The Problem of Different Interpretations of the Exceptions for Individual Use, and the Problem of Conformity of the Application of the Exceptions for Individual Use with the Real Purpose of the Three-Step Test (Chapter Four).

Under the terms of the Copyright Act 1968827 and the Copyright Act 1994,828 people are able to make use of copyright work for the purpose of criticism or review, or reporting news without infringing copyright, provided they acknowledge the author and title of the work, and

827 The Copyright Act 1968 (Cth)
828 The Copyright Act B.E. 2537 (A.D. 1994)
provided the use is “fair”. However, neither Australia nor Thailand clearly indicates to what extent a use is deemed as fair. Whether a person’s use of copyright work is fair depends on the circumstances of the case. The court must consider whether such use is fair or not by determining the criterion of a fair minded (genuinely use copyright work for one of the purposes set out in the Copyright Act) and honest person (his/her use of copyright work is fair in that context).  

Regarding the wording “fair” in the Thai context in section 32(2) dealing with the “use for personal benefit or for the benefit of himself and other family members or close relatives”, it does not mean that “use for personal benefit or for the benefit of himself and other family members or close relatives” is fair. This is because although the person making use of the copyright material for this mere fact does not do so for commercial purposes, his/her use can cause some damages to the legitimate interest of the right holder. The lawmakers should consider the wording used in this section as there may be so many people apply this section to avoid their illegal use that it may prejudice the right holders’ market value.

Provisions that both countries provide but which are indicated in different categories, are the exception of reproduction for teaching, and the exception of reproduction by teachers and educational institutions. In Australia, these two provisions are categorised as a free use exception. However, in Thailand, they are categorised as a private use exception (fair use exception).

There is no exception for the purpose of parody or satire in the Thai Copyright Act 1994. If the act is done for this purpose, section 32 paragraph 1 and 32(1) will be applied. In Australia, fair dealing for the purpose of parody or satire is provided for in the Copyright Act 1968. However, there is no clear definition of the terms “parody or satire” indicated in the Act. The Court must consider the terms from the definitions in dictionaries. Pointedly, the use of copyright work for parodic or satiric purpose must be fair. However, it is unclear how courts will assess “fairness” when it comes to this exception. The court must consider how much of the copyright material is used and whether or not the right holder generally licences such uses. Additionally, the court must carefully consider if the genuine purpose of dealing is parody or satire rather than a pretence for some other purpose so that the moral rights of the copyright owners will not be prejudiced.

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830 Section 32 paragraph 1 of the Copyright Act B.E. 2537 (A.D. 1994)
831 Sections 41A and 103AA of the Copyright Act 1968 (Cth)
Regarding parody or satire, from the researcher’s point of view, according to Thai tradition, this exception may not be proposed since in Thailand, the Copyright Act places emphasis on the copyright owners’ moral rights, so does the Australian Copyright Act 1968. In addition, if there is any case relevant to parody or satire, the Court will adopt section 32 paragraph 1 and 32(1) for its consideration.

Australia contributes the deeming provision for a reasonable portion reproduced in the copyright work as well as the factors which determine whether or not the act is done for the purpose of fair dealing. Pointedly, reproducing a copyright work in a deeming provision of reasonable portion can be applied only in a limited way such as where it is for research or study. Meanwhile, there are no indications on these two important issues in the Thai Copyright Act 1994. Thus, many problems occur because the users lack awareness of the extent to which the reproduction should be made and can be considered as fair. To solve the problem, Thailand may, consequently, amend its Copyright Act 1994 by indicating the reasonable portion and the factors which determine the act for the purpose of private use, which appear in the draft of the Copyright Amendment Act 1994 which is not yet passed into force. Even though the reasonable portion may cause some concerns which Australia is now encountering. For example, the researchers or students have limited knowledge about the extent to which the deeming provisions in the Copyright Act 1968 allow them to reproduce copyright materials. Thai users may defend themselves, in the way Australian users do in their defence in the case that their reproduction exceeds the reasonable portion, by arguing that the reproduction is done for the purpose of research or study and is fair. However, the Thai IP Court should have an important role in proving the users’ defences as well. In addition, this should be aware that such an exception is still subject to the general requirements of the three-step test which is of the important yardstick of the exceptions for individual use in both international and national legislation.

The Copyright Act 1994\textsuperscript{833} contributes an exception of the use for the benefit of the individual, other family members, or close relatives in section 32(2).\textsuperscript{834} However, persons are not allowed to adopt this provision if the reproduction is made for profit purposes. Pointedly, the Copyright Act 1994 does not provide users with a clear definition of the terms “personal, other family member, or close relative benefit” nor the factors to be

\textsuperscript{833} The Copyright Act B.E. 2537 (A.D. 1994)
\textsuperscript{834} Section 32(2) of the Copyright Act B.E. 2537 (A.D. 1994)
considered in determining if a use is fair. On the contrary, there is no exception of the use for the benefit of the individual, other family members, or close relatives in the Copyright Act 1968.\(^{835}\) However, the Copyright Act 1968 provides private copying provisions for whose own benefit, or loan to whose family or household in terms of time-shifting and format shifting. The private copying provisions are categorised as free use exceptions. On the other hand, there are no provisions for private copying in the Copyright Act 1994. If a private copying either in the means of time-shifting or format-shifting is made, apart from adopting section 32(2), section 32 paragraph 1\(^{836}\) can also be adopted in order to prove to the court that the private copying is made without prejudicing the legitimate interest of the right holder and conflicting with a normal exploitation of the copyright work of the owner of copyright.

In respect to the exception for using copyright works for questions and answers in an examination, Australia does not specify this exception in the Copyright Act 1968. However, the Act may allow users to use work for questions and answers in an examination if the act is done for the purpose of research or study. By contrast, Thailand distinctly specifies this exception in the Copyright Act 1994 but the use must not be made for profit.

### 2.2 Free Use Exceptions

The Copyright Act 1968\(^{837}\) distinguishes between using copyright material for judicial proceedings\(^{838}\) and using copyright material specifically for the giving of professional advice.\(^{839}\) Any acts done for the purpose of judicial proceedings is categorised as free use, whereas reproduction for the purpose of professional advice is categorised as fair dealing.

Using copyright material for judicial proceedings is a blanket section which is not qualified by any requirement of fair dealing. This is contrary to the exception for judicial proceeding and professional advice in the Thai Copyright Act 1994\(^{840}\) as this exception is specifically categorised as private use (fair use). Thus, any acts that are done for this purpose must be fair.

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\(^{835}\) The Copyright Act 1968 (Cth)
\(^{836}\) Section 32 paragraph 1 of the Copyright Act B.E. 2537 (A.D. 1994)
\(^{837}\) The Copyright Act 1968 (Cth)
\(^{838}\) Sections 43(1) and 104 of the Copyright Act 1968 (Cth)
\(^{839}\) Section 43(2) of the Copyright Act 1968 (Cth)
\(^{840}\) Section 32(5) of the Copyright Act B.E. 2537 (A.D. 1994)
Regarding the libraries’ or archives’ exceptions, both Australia and Thailand fundamentally indicate the similar nature and application of these exceptions. However, there are some significant points distinguishable to these exceptions in both countries. The Copyright Act 1968 provides statutory licences for libraries or archives to officially copy materials for the purpose of providing services to their users. They are also allowed to copy materials of cultural significance if this material is not commercially available; however this is restricted to reproduction, and equitable remuneration must be paid to a collecting society. In contrast, there are no statutory licences for libraries or archives in Thailand. These exceptions are classified as free use provisions in the Copyright Act 1994. Therefore, any acts done in libraries or archives must not be done for profit.

Although, Thailand does not provide statutory licences for libraries or educational institutions, in practice, libraries, especially in higher education, have to subscribe to online databases and e-books, for instance, paying fees to the publishers. More importantly, publishers of digital content often impose restrictions in the licensing agreements for their content. Some restrictions may not be deemed as fair for libraries. Some foreigner publishers, for example, require libraries to subscribe to the same journal both in printed form and electronic form. In addition, the publishers sometimes allow a specified number of users to access their content at the same time. As a result, Thailand should provide statutory licences for libraries and educational institutions in the Copyright Act so that the Act can be the reference that both the libraries and the publishers can use for making a fair and reasonable agreement for both sides.

Australia and Thailand allow a person to reproduce copyright materials for the purpose of literary, dramatic, and musical works. The reproduction must require sufficient acknowledgement of the ownership of the copyright in such work. However, Thailand does not indicate a requirement for sufficient acknowledgement of the right of authorship in the Copyright Act 1994. Unlike the Copyright Act 1968, the Thai Copyright Act does not provide for public performance of literary works, recording or filming a work for broadcasting, or reading or recitation in public or for a broadcast. Additionally, there is no exception for simulcasting the

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841 Sections 48-53 and 104A-104B, 112AA of the Copyright Act 1968 (Cth) and Section 34 of the Copyright Act B.E. 2537 (A.D. 1994)
842 Section 200AB of the Copyright Act 1968 (Cth)
843 Section 34 of the Copyright Act B.E. 2537 (A.D. 1994)
844 Sections 45-47A of the Copyright Act 1968 (Cth), and section 36 of the Copyright Act B.E. 2537 (A.D. 1994)
work or adaptation in the digital form. Another point to consider is that the Copyright Act 1968 states that a person who does not make the recording or filming of a work for broadcasting must pay an owner of such, an amount that they have agreed.\textsuperscript{845} Moreover, the making of a sound broadcast of a published literary or dramatic work by holders of print disability radio licences; the Copyright Act 1968 requires them to make the broadcast under licences.\textsuperscript{846} Consider to these two points, the Copyright Act 1994 does not contribute any licences for reproducing any kind of work under this provision. Thus, the reproduction must only be made not for profit and the performers will not receive remuneration for their performance.

There is no exception for the purpose of temporary reproduction\textsuperscript{847} in the Copyright Act 1994. However, if the temporary reproduction is made for private and non-commercial purposes, a person is able to adopt section 32 paragraph 1\textsuperscript{848} as his/her defence. However, as section 32 paragraph 1 is broad in its scope, the section can be applied where a person need to make a temporary reproduction of copyright works. The section merely places emphasis on allowing the reproduction which must not conflict with a normal exploitation of the copyright work of the owner of copyright and does not unreasonably prejudice the legitimate right of the owner of copyright. As there is no specific provision related to the exceptions for temporary reproduction, it is difficult to the courts to determine the fair amount of the reproduction. In addition, there is no guarantee if the reproduction is made for a temporary use and at a period of time. It will be possibly useful to introduce the exceptions for temporary reproduction in the Thai Copyright Act because these exceptions can be applied rather effectively at the present in Australia. Furthermore, to apply these exceptions effectively in Thailand, a developing country, there should also be the measures to raise the public awareness on the issue of the individual use exceptions as have been realised by the people in developed countries.

Unlike Australia, Thailand has no exceptions for the reproduction of writing labels for chemical product,\textsuperscript{849} edition of the work,\textsuperscript{850} and the exception for importation\textsuperscript{851} in the Copyright Act 1994. Nonetheless, if the reproduction is not done for profit, section 32 paragraph 1\textsuperscript{852} can be applied.

\begin{footnotesize}
\begin{enumerate}
\item \textsuperscript{845} Sections 47 of the Copyright Act 1968 (Cth)
\item \textsuperscript{846} Sections 47A of the Copyright Act 1968 (Cth)
\item \textsuperscript{847} Sections 43A and 111A, and 43B and 111B of the Copyright Act 1968 (Cth)
\item \textsuperscript{848} Section 36 of the Copyright Act B.E. 2537 (A.D. 1994)
\item \textsuperscript{849} Sections 44B and 112B of the Copyright Act 1968 (Cth)
\item \textsuperscript{850} Sections 112 of the Copyright Act 1968 (Cth)
\item \textsuperscript{851} Sections 37 of the Copyright Act 1968 (Cth)
\item \textsuperscript{852} Section 32 paragraph 1 of the Copyright Act B.E. 2537 (A.D.1994)
\end{enumerate}
\end{footnotesize}
Both Australia and Thailand have determined that similar kinds of audio-visual works can be reproduced for private use. However, they are different in the scope and application of the provisions. The Copyright Act 1968 provides a provision for making a copy of the sound recording for the purpose of broadcasting.\footnote{Section 107 of the Copyright Act 1968 (Cth)} In addition, it also allows reproduction by non-profit organisations whose principal objects are charitable or are concerned with advancement of religion, education or social welfare without charges.\footnote{Sections 106(2) and (3) of the Copyright Act 1968 (Cth)} Moreover, it provides a provision for causing a sound recording to be heard in the public for a club, society, or other organizations that is not established or conducted for profit.\footnote{Section 106(1)(b) of the Copyright Act 1968 (Cth)} Nonetheless, in regard to copyright in published recording by public performance, an equitable remuneration must be paid to the right holder.\footnote{Section 108 of the Copyright Act 1968 (Cth)}

On the contrary, Thailand does not specify the exception for reproduction of broadcasting in the Copyright Act 1994. This causes a significant problem in the development of knowledge in the country as broadcasting for education can be an important tool for transmission of knowledge. In order to solve this problem, this provision should be included in the Thai Copyright Act 1994 so that free use of copyright work in broadcast transmitted in school buildings can be allowed. Unlike Australia, the reproduction of audio-visual works for non-profit organisations, whose principal objects are charitable or are concerned with advancement of religion, education or social welfare, without charges in Thailand can be done only for the public performance. This is appropriate in the Thai context since the control of the reproduction of audio-visual works for non-profit organisations in Thailand is insufficiently effective for other purposes or else the reproduction may cause the problem of copyright piracy. Additionally, the Copyright Act 1994 does not provide a provision for causing a sound recording to be heard in the public for a club, society, or other organizations that is not established or conducted for profit, which is included in the Copyright Act 1968. This can cause the ambiguity whether the use falls within the commercial use or the non-commercial use. Therefore, it is proposed that this provision should be considered to be included in the Thai Copyright Act.
Unlike the Copyright 1994, there is no specific exception for reference/quotation\textsuperscript{857} in the Copyright Act 1986. However, the Copyright Act 1968 enables a person to use, quote or extract from literary and dramatic works for the purpose of research or study, criticism or review, and reporting news. More importantly, whether or not a person needs permission to use quotes and extracts will generally depend on whether or not what he/she wants to use is a “substantial part” of the work from which it comes. By contrast, the Copyright Act 1994 does not indicate when or how the permission is needed. The Act only emphasises the reasonable quotation in part of and from a copyright work for considering when it is fair.

Australia and Thailand include exceptions for government use\textsuperscript{858} in their Copyright Act. Notwithstanding, there are some different points. In Australia, the government must pay the relevant collecting society in relation to government copies made in a particular period for the services of a government equitable remuneration worked out for that period using. The method of working out the equitable remuneration payable may provide for different treatment of different kinds or classes of government copies. Conversely, in Thailand, government needs not to pay for any reproductions of the copyright works if such reproductions are made under official provision. Regarding the exception for government use, in Thailand, any act done for government is held to be for the public benefit. The government therefore will not pay for such use. Additionally, as a developing country, Thailand cannot afford many expenses that may occur under licences. Moreover, there is no collecting society established in Thailand to organise a royalty for the use of copyright work.

\section*{2.3 Licences}

As Thailand is a developing country, the Berne Convention\textsuperscript{859} authorises the Thai government to grant and control a compulsory licence for translation in order to encourage Thai people to access information. The translation is limited to the purpose of teaching, research, and study. Unlike Thailand, Australia provides statutory licences for use by schools, libraries, archives, disabled people, and others on payment of a licence fee set either by agreement between the right holder and user or by the Copyright Tribunal. Statutory licences do not merely restrict the translation of

\begin{footnotesize}
\begin{itemize}
\item Section 33 of the Copyright Act B.E. 2537 (A.D.1994)
\item Sections 183A of the Copyright Act 1968 (Cth), and section 43 of the Copyright Act B.E. 2537 (A.D.1994)
\item The Berne Convention for the Protection of Literary and Artistic Works (Paris Act, 1971) NO 615 (E)
\end{itemize}
\end{footnotesize}
works. However, there is a similar point in the licencing system of these two countries namely the licences must not be used for commercial purposes.

To the researcher, apart from the statutory licences for libraries and educational institutions which are mentioned above, it is appropriate that Thailand does not contribute any other kinds of licences since it is a just a developing country where the private use exception can be an important instrument to correct the balance between the protection of the creative and financial contributions of copyright owners, and the rights of users to access information.

In conclusion, it could be said that on the one hand, better and broader protection in Thailand should please those with creative abilities as well as those investing in creating and distributing their creations. On the other hand, such protection should not make easy, inexpensive access to these works become too difficult or expensive. Once again, therefore, the Thai lawmakers have to manage and balance these conflicting interests appropriately.

2.4 Limitation of Legislative Individual Use Provisions

The Copyright Act 1968\textsuperscript{860} contains provisions related to the Technological Protection Measures (TPMs) which help balance the interest between the right holder and the user as well as help combat copyright piracy in the digital environment. Moreover, in order to respond the rapid and continuing growth of electronic commerce, the Australian government facilitates the use of Contractual agreement (contract) in copyright to set terms and conditions on access to and use of copyright material. Although these two limitations of legislative individual provisions are advantageous in providing the right holder with a greater scope to control access to copyright materials than was plausible in the analogue world, there are some impacts particularly for the users in cases of being prevented access copyright works. This is because TPM cannot distinguish between legal and illegal uses as well as TPM can be used to protect works in public domain. The current amendments relevant to the provisions of TMPs to the Copyright Act 1968 pose confusion in the area of fair dealing defences and the exceptions to the circumvention of TPMs. It is unclear as to whether licensing provisions may lawfully prohibit exceptions to the

\textsuperscript{860} The Copyright Act 1968 (Cth)
circumvention of TPMs. It is necessary to avoid this type of approach in the current circumstances. This point has been discussed in detail in Chapter Three.

In contrast, the current Copyright Act 1994 does not protect the technological measures and Contractual System. However, the Department of Intellectual property has been proceeding on drafting the Copyright Amendment Act 1994 following FTA and DMCA. It is now under consideration of the committee by the Office of the Council of State. According to the draft of the Copyright Amendment Act 1994, section 3 inserts a definition as provided in section 4 of the Copyright Act 1994. The term “technological protection measures” means any technology, device, or component that, in the normal course of its operation, controls or prevents access to a protected work, performance, phonogram, or other subject matter, or protects any copyright or any rights related to copyright.

According to the provisions related to the technological protection measures in the draft of the Copyright Amendment Act B.E. 2537 (A.D. 1994), there is no effectiveness criterion mentioned in the draft. As a result, the provisions of TPM in the Thai context are possibly unable to provide adequate legal protection against the circumvention of effective technological measures.

Considering the definition “technology” as provided in the draft of the Copyright Amendment Act 1994, it seems that the definition is interpreted from the Free Trade Agreement (US and Singapore) in every respect. It, however, uses the term “…in the normal course of its operation, control or prevent access…” in the draft, though, FTA provides the term “that…control access”. As a result, the definition indicated in the draft will not only make the ineffective technological measure protected, but a technological measure which is unable to sharply control access. However, it has been created to prevent or control access to a protected work, performance, phonogram, or other subject matter. Any copyright or any rights related to copyright will also be protected. Thus, the condition of the protection of technological measures.

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862 The Copyright Act B.E. 2537 (A.D.1994)
863 The Digital Millennium Copyright Act (DMCA) is a United States copyright law which implements two 1996 WIPO treaties.
864 Article 16.4.7 (b) of the US-Singapore Free Trade Agreement states that “…effective technological measure means any technology, device, or component that, in the normal course of its operation, controls access to a protected work, performance, phonogram, or other subject matter, or protects any copyright or any rights related to copyright.”
Part 2: Chapter 5

measure in Thailand cannot meet an international standard nor can it keep pace with the digital environment. This will cause many disadvantages for Thai people because all technological measures will be protected even utterly ineffective technological measures.

For this reason, it is necessary for the Committee of the Office of the Council of State to amend some definitions so that the provision for technological measures can be effectively applied and protect the copyright materials from infringement. Meanwhile, the provision will not pose a substantial threat to the user’s ability to legally access or copy such materials. Particularly, there is a concern about the unclear notification of the limitations and exceptions permitting a person to circumvent TPMs for the educational purposes. Section 53 (3) is directly relevant to exception to TPM provisions under the draft of the Copyright Act 1994. Section 53(3) states that:

A person is not allowed to circumvent the technological protection measures for copyright work or performer’s right. The circumvention of technological protection measures to copyright work…it is does not conflict with a normal exploitation of the work and does not unreasonably prejudice the legitimate interest of owner of copyright, such circumvention shall not be deemed an infringement of the copyright. Subject to the provision of paragraph one, any act is done for circumventing the technological protection measures shall not be deemed an infringement of copyright provided that the act is each of the followings:

1. facilitating circumvention of the technological protection measures for personal benefit or for the benefit of himself and other family member or close relatives; …
2. any act done for circumventing the technological protection as indicated in the Royal Decree. (in Thai)

However, the exception under this section results in some questions. Which acts should be deemed an infringement of copyright if facilitating circumvention of the technological protection measure for personal benefit or for the benefit of himself and other family member or close relatives shall not be deemed an infringement of copyright? This question is being discussed amongst Thai lawmakers.

866 Section 53(3) of the draft of the Copyright Act B.E. 2537 (A.D. 1994)
Regarding the contractual agreement provided in copyright, Thailand has not yet initiated this as it can affect access and use of information. This is because the contractual agreement between the right holder and user may hinder the application of private use exceptions as well as limit the public rights to effectively access and use copyright materials. Moreover, if the right holder imposes unreasonable contractual terms, the user may not abide by the agreement. This can impact on a person who would like to use the copyright material for the purpose of research or study.

Notably, users in developing countries like Thailand should have the exceptions for individual use on available information, including creating and distributing printed electronic copies in reasonable numbers for educational and research purposes. If suppliers of digital information or software attempt to restrict fair use rights, either through contract provisions or by technological methods of protection, the contract provisions may be treated as void.

3. The Problems Found and Proposed Solutions

The introduction of Part Two presents the problems related to the exceptions for individual use which are found in both developed and developing countries as well as the proposed solutions to these problems from the literature. In Chapters Three and Four, these problems and solutions are also used respectively as the frame for the analysis of the current problems in Australian application of fair dealing, as an application of the exceptions for individual use in a developed country, and Thai private use exceptions, as an application of the exceptions for individual use in a developing country. As a result, the comparative analysis of the exceptions for individual use between these two countries on the problems found and proposed solutions taken will use this same structure. The comparison can be divided into two topics: the problems found, and the proposed solutions taken.

3.1 The Problems Found

According to the problems related to the exceptions for individual use which can be found in both developed and developing countries, the problems which can be found both in Australia, as a developed country, and Thailand, as a developing country are the problem of different interpretations of the exceptions for individual use, and the problem of response to the digital environment.

Apart from the similar problems both countries confronted, another problem that can be deemed as their difference is the problem of conformity in the application of the exceptions for individual use according to the real purpose of the three-step test. In the introduction of Part Two, it is mentioned that the exceptions for individual use applied in the developed countries appear to conform better in practice to the real purpose of the three-step test than in the developing countries. Considering the cases of Thailand and Australia, the problem more obviously exists in Thailand. In fact, this problem may be present in Australia but there is no evidence from the literature if compared to Thailand. As a result, the problem of conformity in the application of the exceptions for individual use according to the real purpose of the three-step test is a problem found in Thailand. It can result in copyright piracy in the country.

For example, in Thailand, it is difficult to limit the reproduction of copyright work for the private use of “personal benefit or the benefit of himself/herself and other family members or close relatives” since there is no clear definition of the terms used in this phrase of the provision. As a result, the right owners can argue if they cannot ensure that their works will not be reproduced, sold, lent or distributed to other persons for commercial uses without their consent instead of use for personal and family benefit. Indeed, users may unintentionally apply the private use exceptions for the commercial purposes as the right owners claim but they do not know whether their uses can unreasonably prejudice the right holders’ legitimate interest. Such uses can contravene the real purpose indicated in the three-step test when allowing the users to cut down the right holders’ exclusive rights but the reproduction of copyright work must not be made unreasonably prejudice the right holders’ interest. The reason for the problem is probably due to the users’ lack of understanding of the application of the exceptions for individual use. This may be proved by the fact that in Thailand, most accused persons alleged to have infringed copyright (in respect of books and not optical discs) rarely raise the defence of “fair use” or other exceptions. In the case of optical discs, the reason for the problem may be due to the users’ disregard for the real purpose of the exceptions for individual use. As a result, in 2005, the Thai legislators enacted the Act for the control of CD/optical disc production in order to prevent copyright infringement for this

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869 Article 9(2) of the Berne Convention for the Protection of Literary and Artistic Works (Paris Act, 1971) NO 615 (E)
871 The Act for the Control of CD/Optical Disc B.E. 2548 (A.D. 2005)
kind of media. However, the Act has not been effectively applied yet as copyright infringement in the form of MP3 on optical discs is still serious in Thailand.\footnote{872}{Disaster of Thai Songs on “Faithfulness” and “Consciousness”, \textit{Manager Online}, 22 February 2007, \texttt{<http://202.57.155.216/Daily/ViewNews.aspx?NewsID=9500000021447>} (22 February 2007). (in Thai)}

3.2 The Proposed Solutions Taken

On the issue of proposed solutions taken, they will be presented in accordance with the problems found. They are the problem of different interpretations of the exceptions for individual use, and the problem of response to the digital environment. However, as the proposed solution from the literature to the problem of conformity in the application of the exceptions for individual use according to the real purpose of the three-step test, which exists in Thailand, is the same as the one proposed for the problem of different interpretations of the exceptions for individual use, they will be explained together.

3.2.1 The Proposed Solution for the Problem of Different Interpretations of the Exceptions for Individual Use, and the Problem of Conformity in the Application of the Exceptions for Individual Use according to the Real Purpose of the Three-Step Test

In Australia, the response to the problem of different interpretations of the exceptions for individual use is the hybrid of statutory licensing and free use for individual uses. However, it is still complaint with the international agreement because there is a question how “special case” will be assessed whether the use falls within the term “special case” indicated in TRIPS. Similarly, in Thailand, the hybrid of compulsory licensing and free use for individual uses is used as the key to handle both the problem of different interpretations of the exceptions for individual use and the problem of conformity in the application of the exceptions for individual use according to the real purpose of the three-step test.

However, the licensing systems that Australia and Thailand apply are different. This is because the statutory licensing in Australia is imposed in the domestic law. Additionally, Australia has established a collecting society, which is an organisation responsible for collecting the royalties of the copyright works. In contrast, the compulsory licensing Thailand makes use of results from the international agreement that developing countries must declare their acceptance of compulsory licence in Article 2 of the appendix, entitled in the Berne
Convention,\textsuperscript{873} to translate the copyright works. The royalties for the translation of the copyright works are in the authority of the Thai Government. There is no specific organisation established to be responsible as is the case in Australia.

Moreover, the coverage of statutory licensing in Australia is broader while the compulsory licensing in Thailand is limited. It applies merely to translation. Even then, the control of compulsory licensing for translation in Thailand is not adequately effective as illegal translation remains a concern, particularly for novels and comics originally in the Japanese or Korean language. Most translations of these books are not licensed.\textsuperscript{874}

Looking through the above comparison, it is likely that the Australian hybrid of statutory licensing and free use of individual uses is a good solution. Although Thailand is a developing country and it is unlikely to adopt completely the same method as Australia exercises, some useful aspects should be reviewed and applied to the capability of a developing country, namely, on an economic, cultural, and social basis. For example, Thailand should establish an organisation that functions in the same way as the Australian collecting society. Fortunately, this idea is formulated in the new amending draft of the Thai Copyright Act 1994 pending enactment. This organisation should effectively administer the licensing systems in Thailand, primarily the compulsory licensing for translation. In addition, Thailand may apply the statutory licensing to other kinds of copyright materials in order to prevent copyright piracy and maintain the balance of the right holders’ and users’ interest.

Apart from taking the hybrid means as the solution to the problem of different interpretations of the exceptions for individual use, another similarity between Australia and Thailand are the problems they still face in the area of different interpretations. These problems are the problem of different interpretations of the terms used, and the problem of different interpretations of fairness. Regarding the different interpretations of the terms used, they are caused by the fact that in Australian and Thai exceptions for individual use, some terms are not clear enough and some even have no definitions. In the case of different interpretations of fairness, mainly, the problems found in both countries concern the precise extent to which fairness can be determined.

\textsuperscript{873} Appendix II of The Berne Convention for the Protection of Literary and Artistic Works (Paris Act, 1971) NO 615 (E)
However, under the same problem found in different interpretations of fairness, there are differences in their background. Specifically, Australia and Thailand face this same problem although the Australian Copyright Act indicates the reasonable portion for fair dealing. On the contrary, there is no indication as to what constitutes a reasonable portion/quantity for private use exceptions in the Thai Copyright Act since such an indication is specified in another supplementary document which is rarely used. In other words, it may be assumed that in these two countries, the problem of different interpretations of fairness remains no matter whether the reasonable portion is indicated in the Copyright Act or not.

In the Australian context, the problem of different interpretations of fairness can stem from different interpretations of the factors used to determine what is fair as described in Chapter Three. In terms of a reasonable portion indicated in the Australian Copyright Act 1968, a reasonable portion also causes the problem in educational/research segments as explained in Chapter Three. The Thai problem of different interpretations of fairness, it may derive from the fact that the language used is ambiguous. Partly, may be because the clearer guidelines are indicated in another supplementary document, instead of the Copyright Act 1994. As a result, they are not widely used or known.

From the comparison of these two countries on the problems of the different interpretations they still encounter, both the problem of different interpretations of the terms used and the problem of different interpretations of fairness, some suggestions, both for developed and developing countries, may be summarised as follows:

1) all terms used in the exceptions for individual use should be clearly defined in the Copyright Act;
2) the terms and language used in the exceptions for individual use should not be ambiguous;
3) the reasonable portion/quantity for the individual use exceptions should be indicated in the Copyright Act so that it is widely applied and known; and
4) the indication for reasonable portion/quantity should be definite with the consideration for the purpose of research or study to be used practically for all users.

875 The Copyright Act B.E. 2537 (A.D. 1994)
3.2.2 The Proposed Solution for the Problem of Response to the Digital Environment

In Australia, the proposed solution that is chosen to respond to the digital environment is to amend and enact a new copyright legislation related directly to the exceptions for individual use for the digital environment. Apart from the reason of responding to the digital environment, the new amended Copyright Act 1968876 as well as the exceptions for individual use result largely from the Free Trade Agreement Australia made with the US. Although Thailand has realised the challenge of the new environment and has been amending a new copyright draft and the exceptions for individual use since 2004, the current Copyright Act 1994877 is still in use. In other words, in Thailand, the current exceptions for individual use are still applied to the digital environment since the process of the new amended draft of the Copyright Act in a developing country can take some time. This is because the new Act has to balance the interests between the right holders and users by considering both the international conventions and the need to develop the country.

However, similarly, in both countries, the exceptions for individual use are maintained in the digital age, both the fee-based (statutory licensing in Australia and compulsory licensing in Thailand) and free-based (fair dealing in Australia and private use exceptions in Thailand) exceptions. This suggests that even in the new environment, both developed and developing countries still realise the importance of the individual use exceptions and preserve them for the development of their countries.

In addition, although Australia and Thailand have their different ways to respond to the digital environment, another similarity between them is the fact that both still have their problems to cope with in the digital age as presented in Chapters Three and Four. In other words, from the examples of these two countries, it may be assumed that no matter which alternative is taken to respond to the digital environment, either amending and enacting new copyright drafts related directly to the exceptions for individual use for the digital environment like Australia, or applying the current exceptions for individual use to the new environment like Thailand, problems cannot be avoided. This may imply that in the digital environment, the problems that have occurred are still new and may be complicated in many facets. As a result, amending and enacting the appropriate

876 The Copyright Act 1968 (Cth)
877 The Copyright Act B.E. 2537 (A.D. 1994)
legislation and exceptions for individual use to ensure that the balance of the copyright holders’ and users’ interests can be maintained appropriately can take time, especially in the case of developing countries. This is because in the developing countries, many users lack an adequate understanding of the exceptions for individual use while accessing the knowledge of other countries is required for the development of the countries.

4. Conclusion

The comparison of the exceptions for individual use in Australia and Thailand concludes Part Two of the thesis. The comparison of the exceptions for individual use in this chapter contributes to the understanding of the exceptions for individual use in Australia, a developed country, and Thailand, a developing country. The findings can contribute to the knowledge and awareness surrounding the issue of copyright, and, in particular to the resolution of the problems found in respect to the exceptions for individual use in both countries. More importantly, the findings found from these two countries can be of value in the generalisation to other developed and developing countries so that the uncertainty in the exceptions for individual use in copyright law can be internationally understood and improved.
CONCLUSIONS AND RECOMMENDATIONS

The thesis has highlighted a fundamental problem posed by changing technology, particularly digital technology, for the concept of individual use of copyright materials, that is, the problem of regulating the boundaries of individual copying of copyright materials. The contentious issues raised by this phenomenon include legal, commercial, cultural, and economic questions regarding the fairness and appropriateness of the existing limitations and exceptions for the right holders of copyright.

1. Conclusions Responding to the Research Questions

The thesis has explored four research questions and its findings in relation to them are as follows:

1.1 Question 1: Do the Exceptions for Individual Use Still Maintain the Balance of the Interests between Right Holders and Users in the Digital Environment?

Chapters Two, Three, Four, and Five contribute to the answer to this research question. From the analysis of these four chapters in the thesis, the exceptions for individual use can still maintain the balance of the interests between right holders and users in the digital environment provided some amendments are made to keep pace with the new environment.

According to Chapter Two which examined the scope of the existing provisions of the three-step test in the Berne Convention, particularly in regard to the effectiveness of the provisions in the digital environment, many lawmakers and others interested in the issue of copyright were of the opinion that the application of the three-step test was not workable in the digital environment, due to its limited scope. Technological development has posed new challenges in relation to the enforcement of rights since the Internet has increased the ease with which intellectual property rights in digital works can be infringed. The authors and right holders are not able to control or protect their works because of excessive reproduction for personal or research purposes. This development has created new pressure to review the

878 Three-Step test is defined in Article 9(2) of the Berne Convention for the Protection of Literary and Artistic Works (Paris Act, 1971) NO 615 (E)
availability and scope of the exceptions for individual use and to internationalise the copyright system.

Even if the existing minimum Berne rights, once appropriately consolidated, might respond to the digital environment, the existing Berne exceptions and limitations pose special difficulties. The exceptions to the Berne right of reproduction are vague and open-ended, while the Berne right of public communication by broadcasting or cable transmission may be made subject to variable conditions, including legal licences in appropriate cases. In other words, it would be too facile to recommend a mere restatement of existing limitations and exceptions. The rationale of many existing limitations may not justify simply converting them to the digital environment.

In conclusion, if the digital use right came into effect, there would be convincing arguments for extending the scope of existing exemptions in order to regain the necessary balance. Rights and exemptions are somehow intertwined; if the scope of rights increased, it might be necessary to broaden the exemptions accordingly. Hence, some authors and industry groups have argued that the exceptions for individual use require minor changes to reflect the new technological environment, particularly, with respect to the scope of exploitation rights and the extent of the exceptions for individual use. Then, the exceptions for individual use can still maintain the balance of the interests between right holders and users in the digital environment as presented in Chapter Two.

Apart from Chapter Two, Chapters Three, Four, and Five also provide the answers to this research question in relation to an example representing developed countries, Australia, and an example representing developing countries, Thailand. According to Chapter Three, Australia has responded to the new environment of digital technology by amending its Copyright Act 1968. In other words, Australia has amended and enacted new copyright regimes related directly to the exceptions for individual use for the digital environment. In the new environment, Australia still maintains the exceptions for individual use both in the form of fee-based (statutory licensing) and free-based (fair dealing and other free use exceptions) exceptions. As a result, because of the amendments Australia made, Australian exceptions for individual use still maintain the balance of the interests between

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879 Article 9(2) of the Berne Convention for the Protection of Literary and Artistic Works (Paris Act, 1971) NO 615 (E)
880 The Copyright Act 1968 (Cth)
right holders and users in the digital environment. However, although the amendments Australia made to its Copyright Act 1968\textsuperscript{881} could be the solution for the digital environment, the amended Act may still result in some problems which are the problem in contractual agreement, the problem in fair practice for time shifting and format shifting, and the problem in educational/research segments. These problems are described in detail in Chapter Three.

According to Chapter Four, Thailand has been attempting to enact a new copyright draft to the Copyright Act 1994 since 2004 but it has not yet passed into force. As a result, Thailand still applies the Copyright Act 1994\textsuperscript{882} as well as exceptions for individual use for the new digital era. It still maintains the exceptions for individual use both in the form of fee-based (compulsory licensing) and free-based (private use exceptions) exceptions as indicated in the current Act. In fact, the current exceptions for individual use applied in Thailand can still maintain the balance of the interests between right holders and users in the digital environment at some level, but insufficiently. This is because there are some major problems Thailand is currently facing, the problem in applying the individual use exceptions to the new media, and the problem in unauthorised uses of digital copyright materials, as discussed in Chapter Four. However, if the draft of the Copyright Amendment Act 1994\textsuperscript{883} is enacted, the Thai Government and lawmakers assume that the exceptions for individual use will possibly better maintain the balance of the interests between right holders and users in the digital environment.

Finally, from the comparison between the exceptions for individual use in Australia and Thailand in Chapter Five, the exceptions for individual use in Australia, which were amended and enacted, can maintain the balance of the interests between right holders and users in the digital environment better than the current Thai Copyright Act and exceptions for individual use. Consequently, some suggestions in regard to the amendment of the exceptions for individual use in Thailand, arising from the comparison with Australian exceptions for individual use, are provided in Chapter Five.

\textsuperscript{881} The Copyright Act 1968 (Cth)
\textsuperscript{882} The Copyright Act B.E. 2537 (A.D. 1994)
\textsuperscript{883} The 2004 Draft of Copyright Act B.E. 2537 (A.D. 1994)
1.2 Question 2: How Can International Copyright Agreements and National Copyright Legislation Find a Solution to the Conflict of Interests between Right Holder Countries and User Countries in Applying the Exceptions for Individual Use?

Chapters Two, Three, Four, and Five respond to this research question. From the analysis of these four chapters in the thesis, both the international copyright agreements and national copyright legislation can assist in solving the conflict of interests between right holder countries and user countries in applying the exceptions for individual use, by adopting measures as described below.

According to Chapter Two, international copyright agreements can provide a solution to the conflict of interests between right holder countries and user countries by having some minor changes, mainly, in the three-step test of the Berne Convention. In addition, the way they currently provide special treatments for developing countries to set the right balance in protecting copyright, while also encouraging them to access information, is also another measure which can contribute to the solution to the conflict.

Specifically, the language in the three-step test of the Berne Convention\(^{884}\) should be amended, as presented in Chapter Two, so that there is neither ambiguity nor different interpretations among member countries. In addition, this amendment can also be useful to the legislation of signatory countries which is based on it. Regarding the special treatments provided for developing countries, international copyright agreements, particularly the Berne Convention, grant developing countries compulsory licences for translation and reproduction rights. These licences can help the right holder countries to protect their copyright while also helping the user countries to access the information necessary to the development of their countries.

According to Chapter Three, Australia is used as an example of the developed countries which are usually the right holders. Its amended national copyright legislation can contribute to a solution to the conflict of interests between right holder countries and user countries in applying the exceptions for individual use by thoroughly protecting the right holders but still allowing the exceptions for individual use for the users. For example, Australia introduced the provisions of the Technological Protection Measures (TPMs) which can protect the interests of the right holders and provide the individual access to the users.

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884 Article 9(2) of the Berne Convention for the Protection of Literary and Artistic Works (Paris Act, 1971) NO 615 (E)
Moreover, national legislation in Australia has alleviated the conflict between the right holders and the users related to information access by establishing a collecting society, so the interests of the copyright holders can be protected and compensation provided. Meanwhile, the users can access the copyright materials without infringement and prejudice of the right holders’ interests. With the measures Australia has taken, stronger protection for the right holders can exist and the gap between right holder countries and user countries should not be excessively affected.

According to Chapter Four, Thailand is used as an example representing developing countries who are usually the users. Its national copyright legislation can contribute to a solution to the conflict of interests between right holder countries and user countries in applying the exceptions for individual use. However, to better contribute to a solution to the conflict, Thailand has enacted new Acts relevant to the Copyright Act 1994, namely, the Optical Disc Production Act B.E. 2548 (A.D. 2005)\textsuperscript{885} and the Computer Crime Act B.E. 2550 (A.D. 2007)\textsuperscript{886} which provide the penalty to the act of hacking, sending virus and other illegal uses. In addition, Thailand has realised the challenge of the new environment and has been amending a new copyright draft and exceptions for individual use, known as the draft of the Copyright Amendment Act 1994. This draft includes the provision of the establishment of the collecting society in Thailand. This is intended to be a mechanism to control copyright infringement and to systemise the individual use exceptions.

Finally, Chapter Five provides the comparison made between the exceptions for individual use in Australia and Thailand. The comparison can illustrate the many national attempts both countries have been making in the attempt to find a viable solution to the conflict of interests between right holder countries and user countries in applying the exceptions for individual use. Chapter Five also shows the advantages and disadvantages of the measures used in each country as well as suggestions in regard to the application of the advantageous measures of one country to the other.

\textsuperscript{885} The Optical Disc Production Act B.E. 2548 (A.D. 2005)
\textsuperscript{886} The Computer Crime Act B.E. 2550 (A.D. 2007)
Conclusions

1.3 Question 3: What Are the Differences between Developed and Developing Countries in the Application of the Exceptions for Individual Use as well as the Problems Found and Solutions Proposed?

In order to answer this research question, Chapter Five provides the key. Specifically, the study makes a comparison between the application of the exceptions for individual use as well as the problems found and the proposed solutions in Australia, a developed country, and Thailand, a developing country. The comparison reveals both similarities and differences. The comparison reveals differences that can be divided into four categories: fair use exceptions (Australian fair dealing and Thai private use exceptions), free use exceptions, licences (Australian statutory licences and the Thai compulsory licence), and limitation of legislative individual use provisions. This may be due to the differences in culture, society, legal system, technology, and the economy. As a result, the exceptions for individual use in Australia, a developed country, could not completely be applied in their entirety in Thailand, a developing country. However, in some aspects the application of the individual use exceptions in Australia can also be useful in regard to the application of the individual use exceptions in Thailand.

In regard to the problems found and the solutions proposed in both a developed and developing country, from this study, the major problems they confronted are quite similar: the problem of different interpretations of the exceptions for individual use, and the problem of the response to the digital environment. However, the solutions likely to be proposed in both developed and developing countries may be both similar and different, in some respects, as represented by Australia, an example of a developed country, and Thailand, an example of a developing country as discussed in Chapter Five.

2. Recommendations Regarding Individual Use Exceptions

After having investigated a wide array of literature, in order to maintain the balance of the interests between the copyright holders and users, the recommendations in regard to the exceptions for individual use can be presented as follows:

1) Amendment of the wording in the three-step test of the Berne Convention;
2) Amendment of domestic copyright law and its exceptions for individual use;
3) Encouragement of the role of Collective Management Organisations; and
4) Raising public awareness on the issue of copyright and its exceptions for individual use.

2.1 Amendment of the Wording of the Three-step test of the Berne Convention

The wording of the three-step test of the Berne Convention should be amended for all of the three steps which are:

1) Step 1: For special cases only;
2) Step 2: Should not conflict with a normal exploitation of the work;
3) Step 3: Does not unreasonably prejudice the legitimate interests of the author.\textsuperscript{887}

The first step is interpreted as requiring a clear-cut definition of the exception, a narrow scope, and an exceptional objective.\textsuperscript{888} The Berne Convention leaves to the national legislation the task of defining these special circumstances and objectives for private purposes of teaching or research. This will cause a different interpretation of the term “for special cases” amongst the member countries. The term “for special cases” should be clearly defined whether the reproduction of copyright works is made in certain special case or not. Additionally, the term should be narrow in its scope so that the users will be unable to inappropriately reproduce such work for commercial purposes.

The second step covers the unauthorised making of a reproduction, in spheres which are usually within the control of the author. Article 9(2)\textsuperscript{889} provides that there be ‘no conflict with the normal exploitation of the work. This means that the use must not be of considerable or practical importance or compete economically with the author's interests.\textsuperscript{890} The term “normal exploitation” limits the use of copyright works properly, and the use must be for non-profit purposes. However, the term ‘normal exploitation’ gives no guidance as to the kinds of non-economic normative considerations that may be relevant here. Nor does the term indicate the extent to which they uses may be limited that would otherwise be within the scope of exploitation by the copyright owner. Striking this balance is left as a matter for national legislation.

\textsuperscript{887} Article 9(2) of the Berne Convention for the Protection of Literary and Artistic Works (Paris Act, 1971) NO 615 (E)
\textsuperscript{889} Article 9(2) of the Berne Convention for the Protection of Literary and Artistic Works (Paris Act, 1971) NO 615 (E)
From the analysis, if ‘not conflict with normal exploitation’ means *de minimis* reproduction, such an interpretation is difficult to apply to the digital environment.\(^\text{891}\) This can be understood to mean that the normal exploitation relates rather to the economic benefits of the right holder than the behaviour of the user of such copy. Thanks to the sophistication of the technology, a single unauthorised copy could multiply instantly to a large number of copies. There is no *de minimis* reproduction in the digital environment, and the user cannot guarantee it.

In view of the ambiguity referred to above, to be able to control antitrust measures, as the TRIPS\(^{892}\) drafters intended, the condition ‘not conflict with a normal exploitation…’ in the three-step test needs to be amended. An amendment could be helpful as it could become a standard applicable to the Berne member countries without any misinterpretations. The amendment may be made by narrowing or, at least, clearly defining the term “normal exploitation” of the work as this term is a dynamic concept, and it is possible that an exception may come into conflict with a normal exploitation as technology and circumstance of use change.

As the terms “for special cases” and “normal exploitation” are ambiguous as there are no clear definitions and criteria. At the international level, there should be the clear definition defined in the international treaties particularly in the Berne Convention which is the major copyright convention. The definition should also be agreed and similarly understood by the member states. In regard to the national level, lawmakers in the national legislation should determine the criteria indicating when the terms “for special cases” and “normal exploitation” should be applied. The criteria in each member state may vary from one state to another state due to each country’s legal system, economy, culture, and society. However, the criteria indicated in all member states should be based on the same definitions of these two terms defined in the international treaties especially in the Berne Convention.

In this research, the researcher proposes A term “for special cases”, which is called “certain special purposes with fairness”. Two criteria are established for this new term: purpose and character of use, and quantity and quality.


\(^{892}\) The Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS), Annex 1C, 1994
Conclusions

Purpose and Character of Use

“Purpose and character of use” should be taken into account when “for special cases” is considered because fairness is raised as the important issue when this term is applied. However, fairness should not only be the issue to consider. As Ricketson states:

…it can be argued a use will never be “fair” in isolation: its fairness will only be established if it is tied to some identified purpose … The more general and less defined the purpose, the less likely is it to be a fair one.\textsuperscript{893}

Regarding “character of use”, it is related to “purpose”. As a result, “purpose and character of use” should be taken into account as in as Australian fair dealing doctrine\textsuperscript{894} and US fair use doctrine,\textsuperscript{895} for instance.

Quantity and Quality

“Quantity and quality” should be another criterion that could determine the term “for special cases” since “…an exception should be narrow in quantitative as well as in a qualitative sense”\textsuperscript{896} so that it could be deemed as exceptional in its scope. This is because in regard to quantity, it is necessary that the proportion of the use of copyright materials be reasonable. In regard to quality, the substantial part of the copyright works should be determined. Specifically, in the application of “for special cases”, the part of copyright works that is used should not be a substantial part of such works. However, if it is so, it is necessary to consider the quantity of the use of the copyright works. “Proportion and substance copied” in section 107 of US Copyright Act 1976\textsuperscript{897} is an example of the application of this criterion.

In regard to the term “normal exploitation”, the researcher proposes “reasonably normal exploitation” in this research. To determine the term “normal exploitation” as the second condition of the three-step test, two aspects are important for the criteria: economic aspect


\textsuperscript{894} Section 40 of the Copyright Act 1968 (Cth). Among the criteria used to determine the fairness of a use is the purpose and character of the dealing.

\textsuperscript{895} Section 107 of Title 17 of United States of American Copyright Act of 1976.


\textsuperscript{897} The four factors to determine whether the reproduction of copyright material is done for the purpose of fair use or not are in Section 107 of Title 17 of United States of American Copyright Act of 1976.
and non-economic aspect. Specifically, “normal exploitation” could be considered in an economic aspect since it refers to “…the activity by which right owners use their exclusive rights for their economic benefit”. This is on the basis that it is important to postulate that the owner has the capacity to exercise his rights in full, without being inhibited one way or another by the presence of an exemption, and ask simply whether the particular usage is something that the copyright owner would ordinarily or, perhaps, reasonably seek to exploit.

Economic aspect is applied as a criterion when “normal exploitation” is considered, for instance, in section 107 of US Copyright Act 1976. The effect on the potential market is one of the factors to determine whether the use is fair or not. France is another country that adopts economic criteria as the basis to decide if there is a conflict with a normal exploitation of the work.

However, another issue is raised when the term “normal exploitation” is considered. The issue is the “non-economic aspect” or “normative issues”, which can differ from country to country, dependent on each country’s legal system, society, economy and culture. This is supported by Ricketson’s statement:

…it must be determined whether the use in question is one that the copyright owner should control, or whether there is some other countervailing interest that would justify this not being so. In light of the other exceptions allowed under the Convention, such an interest would need to be one of some wider public importance, rather than one pertaining to private interests.

Therefore, in determining the term “normal exploitation”, in the researcher’s viewpoint, the economic aspect should be considered along with the non-economic aspect. This is because the economic aspect for the normal exploitation of the right holders is important as an incentive to create a copyright work. However, to benefit the public at large to make use of

900 Section 107 of Title 17 of United States of American Copyright Act of 1976.
Conclusions

copyright materials for non-commercial purposes, the non-economic aspect should not be ignored when the term “normal exploitation” is regarded.

The third step provides that the use should not unreasonably prejudice the legitimate interests of the author and focuses on both the moral and economic rights of the author. Relevant factors of high impact on the interests of the right holder include the context in which the content appears; the extent to which it is exposed to piracy threats; and the intensity of its use as a consequence of the exception. This condition covers restrictions, which would prevent the author from participating in the economic benefits flowing from the use of the work. Regarding the term “unreasonably prejudice” the legitimate interests of the author, the users will not exactly know of when and how their reproduction will unreasonably prejudice the legitimate interests of the author.

While Article 9(2) of the Berne Convention says that it is a matter for legislation in Union countries “to permit the reproduction” of works subject to satisfying the three-step test, Article 13 of the TRIPS Agreement is more directive in tone, stipulating that members “shall confine limitations or exceptions to exclusive rights” in accordance with the three-step test. Thus, Article 9(2) does not use the words “exceptions” or “limitations”, nor do these terms appear elsewhere in Berne. In the context of the Berne Convention, this language was not entirely clear as to the nature and scope of exceptions allowed. Most countries exempt individual copying from the scope of the exclusive rights of reproduction, first because of the impracticality of enforcement, and secondly for protection of privacy. The result is that the rule does not apply to a particular situation or instance. There appears to be no consistency in the way in which these terms are used in national laws, and it seems reasonable to regard both as interchangeable. As international conventions, the terms used in both the Berne Convention and the TRIPS Agreement should be the same so that the language can be clearly interpreted without any problems when the tree-step test of the Conventions are referred to the member countries.

904 Article 9(2) of the Berne Convention for the Protection of Literary and Artistic Works (Paris Act, 1971) NO 615 (E)
905 Article 13 of the Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS), Annex 1C, 1994
In addition, to avoid discrepancies in the way that the three-step test is understood, which can cause disadvantages to some countries, the scope and definition of the exception for individual use, that is the limitation on reproduction, in the three-step test,\textsuperscript{907} should be clarified. This would not only result in the corresponding application of the three-step test by member countries but also in the prevention of conflict between member states on the adoption of the three-step test for the individual use exceptions of their national laws. Consequently, it would be in accordance with the real purpose of the three-step test.

Even though recommendations will be made in regard to minor changes to the three-step test in order to keep pace with the digital environment, it is important also to consider the needs of developing countries. Information and knowledge transfer from developed countries should still be affordable to them. The three-step test is therefore still an essential instrument to reduce the knowledge gap between developed countries and developing countries. This way developing countries can reduce their own knowledge gap while at the same time contributing to a reduction in copyright piracy.

\subsection*{2.2 Amendment of Domestic Copyright Law and Its Exceptions for Individual Use}

According to the analysis of the thesis, the problem of different interpretations of the exceptions for individual use is a problem encountered by both developed and developing countries. The examples of both Australia, a developed country, and Thailand, a developing country, confirm this. It is therefore recommended that a way out of the problem is to amend domestic copyright law and its exceptions for individual use. This may finally make domestic copyright law and its individual use exceptions more effective in balancing the interests between copyright holders and users in each country.

The terms used in the wording of the exceptions for individual use, as used, for example, in the domestic copyright law of both Australia and Thailand, terms such as “study or research”, and “criticism or review” in the Copyright Act 1968,\textsuperscript{908} and the Copyright Act B.E. 2537 (A.D. 1994)\textsuperscript{909} should be clearly defined so that users will not interpret the term used differently. This can cause a significant problem even if the use of copyright works is done

\begin{itemize}
\item \textsuperscript{907} Three-Step test is defined in Article 9(2) of the Berne Convention for the Protection of Literary and Artistic Works (Paris Act, 1971) NO 615 (E)
\item \textsuperscript{908} The Copyright Act 1968 (Cth)
\item \textsuperscript{909} The Copyright Act B.E. 2537 (A.D. 1994)
\end{itemize}
Conclusions

for the purpose of research or study and can be protected under the exceptions for individual use. Importantly, without terms such as these being explicitly defined in the relevant Act, the courts must rely on definitions in a variety of dictionaries as their references for the consideration. The result is that they can freely tailor their decisions differently according to the facts placed before them. For these reasons, it is necessary to incorporate the definition of significant terms in the national Copyright Acts in order to eliminate, or at least, mitigate the inappropriate interpretation as well as misuse of the courts and users. However, in fact, it is quite normal and it is the intention of the lawmakers to allow some flexibility for the court to apply the law to case before him but it is greatly appropriate to determine the scope of the term used in order to prevent the different interpretation.

In addition, given the speed of technological change, the complexity and ineffectiveness that currently surrounds the copyright law and its exceptions for individual use, particularly in relation to the new media that the changing technology has made and continues to make possible, could be avoided by amending the Copyright Act, particularly the provisions for individual use exceptions. Effective amendment of the exceptions for individual use has the potential to accommodate the challenges posed by technological development and strengthen the policy of providing certainty for both copyright owners and users as to permitted acts.

2.3 Encouragement of the Role of Collective Management Organisations

Collective Management Organisations are usually referred to in national copyright laws as licensing bodies. They are related to individual use in the sense that they help maintain the balance of the interests between the right holders and the users. By serving as effective links between right owners and users, Collective Management Organisations ensure that right owners receive payment for the use of their works. At the same time, users can still access the copyright materials without permission from the right holders. However, the number of copyright materials under the protection of the Collective Management Organisations should be limited. They should be those copyright materials which are often infringed for commercial purposes, for example, music and dramatic works. In addition, the royalty to the copyright owners should not be too expensive so that users will not try to avoid paying for the royalty. It should also be affordable for educational and other non-commercial purposes. Concerning artistic and literary works which are generally used for educational and non-
Conclusions

commercial purposes, fair practice under the exceptions for individual use should be applied, rather than management by a collecting society. This is because the exceptions for individual use can provide the free use of the copyright materials with good faith. Thus, the exception for individual use is still essential for developing countries, as copyright users, to reduce the knowledge gap and accelerate the development of their countries.

The Collective Management Organisation can exercise their power to protect their repertoire of copyright materials for their members as the so-called the world repertoire. Pointedly, the Collective Management Organisation is not only a royalty processing centre but also has a statutory duty to foster and protect creators. Users as collectors of those works can easily access the Collective Management Organisations as a one-stop-shop, and be able to clear all the rights in different kinds of works, simultaneously.\footnote{Gervais D J, ‘Advisory Committee on Management of Copyright and Related Rights in Global Information Networks’, 1998 <http://www.wipo.int/edocs/mdocs/enforcement/en/acme_1/acmc_1_1-main1.doc> (23 February 2005).}

In developing countries with large markets for the products of their copyright-based industries, both domestically and abroad, establishing these institutions can be seen as incurring a large cost. Nevertheless, it is worthwhile. These agencies can play an important role in protecting the copyright holders who are the direct beneficiaries.

In summary, as seen from the responsibility of the Collective Management Organisations and their potential advantage, both developed and developing countries should be encouraged to establish and use the services of the Collective Management Organisations. This is because the Collective Management Organisations can facilitate legal imports and exports of intellectual works worldwide. Simultaneously, this can be of value to the right holders by protecting their interest in the market value of the copyright work. In addition, the Collective Management Organisations reinforce the information access of developing countries’ people.

2.4 Raising Public Awareness on the Issue of Copyright and Its Exceptions for Individual Use

Generally, public awareness on copyright issues is inadequate in developing countries. Most people are unaware of the existence of the exceptions to copyright infringement and of how to apply the exceptions for individual use in accordance with the main purpose of the provisions. In
addition, both local non-government organisations and civil society groups are generally unfamiliar with the issues of copyright and access to knowledge.

Although governments in developing countries have proposed amendments to the copyright law and its exceptions for individual use in order to strike a balance between the interests of the right holders and the users, the amendments cannot be applied effectively if people lack understanding of the nature, application, and purpose of the exceptions for individual use. As a result, information about the exceptions for individual use should be promoted to the public through various media, for example, publications, radio and television broadcasting, and websites. Additionally, in schools, and educational institutions, seminars and group discussions should be organised so that awareness of the importance of the exceptions for individual use is raised starting at the school level.

In conclusion, this thesis has examined both the international agreements and national legislative provisions for the individual use in copyright law to ascertain: (a) whether the existing exceptions are effective in balancing the interests of the right holders and the users in the digital environment, (b) whether the same interpretations of the exceptions should be applied worldwide, (c) what needs to be done to solve the conflicts between right holders and users and between developed countries and developing countries, and (d) how the conflict in regard to the exceptions for individual use in the international level should be resolved in order to be referred to in domestic copyright laws.

The thesis has demonstrated the developing countries would be greatly affected if the exceptions for individual use were curtailed; subject to some minor changes, the existing exceptions can effectively maintain the balance of interest between the right holders and the public at large; the same interpretations of the exceptions should be adopted universally; and the conflict can be solved nationally by using statutory licensing, for example, collective management organisations founded in each country, especially, in the developing world. As far as the international level is concerned the conflict can be resolved by providing broad exemptions as mentioned in Chapters Four and Five, for the purpose of research or study, and non-commercial uses to developing countries, and by amending the three-step test of the Berne Convention by some minor changes to the wording.  

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911 Three-Step test is defined in Article 9(2) of the Berne Convention for the Protection of Literary and Artistic Works (Paris Act, 1971) NO 615 (E)
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# Appendix 1: The Comparison of the Nature and Application of the Exceptions for Individual Use between Australia and Thailand

<table>
<thead>
<tr>
<th>FAIR USE</th>
<th>THAILAND (Private Use)</th>
<th>AUSTRALIA</th>
<th>FREE USE</th>
<th>THAILAND</th>
</tr>
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<tbody>
<tr>
<td>Australia (Fair Dealing)</td>
<td>research or study (40, 103C)</td>
<td>research or study (32(1))</td>
<td>reproduction of literary/dramatic/musical works (45-47(A))</td>
<td>exception for performance of dramatic/musical work (36)</td>
</tr>
<tr>
<td>• criticism or review (41, 103A)</td>
<td>• comment, criticism or introduction of the work (32(3))</td>
<td>• reproduction for normal use or study of computer program (47AB-47H)</td>
<td>• exception for computer program (35)</td>
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</tr>
<tr>
<td>• reporting or news (42, 103B)</td>
<td>• reporting news (32(4))</td>
<td>• exceptions for libraries/archives (48-53, 104,112)</td>
<td>• exception for libraries (34)</td>
<td></td>
</tr>
<tr>
<td>• judicial proceedings (43(2))</td>
<td>• judicial proceedings (32(5))</td>
<td>• reproduction of audio visual items (105-111)</td>
<td>• exception for cinematographic works (42)</td>
<td></td>
</tr>
<tr>
<td>• parody or satire (41A, 103AA)</td>
<td>• use for personal benefit or for the benefit of himself and other family members or close relatives (32(2))</td>
<td>• exception for artistic work(65-73)</td>
<td>• exceptions for architectural works (38, 41)</td>
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<td></td>
<td>• reproduction, adaptation, exhibition or display by a teacher (32(6))</td>
<td>• acts done for purpose of judicial proceedings (43(1), 104)</td>
<td>• exceptions for artistic works (37, 39, 40)</td>
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<td></td>
<td>• reproduction, adaptation in part of a work or abridgement or making a summary by a teacher or an educational institution (32(7))</td>
<td>• exception for the purpose of education (44)</td>
<td>• exception for reference (33)</td>
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<td></td>
<td>• use of the work as part of questions and answers in an examination (32(8))</td>
<td>• private copying (111, 43, 109, 110)</td>
<td>• exception for governmental use (43)</td>
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<td>• importation (37)</td>
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<td>• reproduction of chemical product (44B, 112B)</td>
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<td>Australia (Statutory Licences)</td>
<td>Thailand (Compulsory Licences)</td>
<td>Australia</td>
<td>Thailand</td>
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<tr>
<td>• educational institutions</td>
<td>• translation</td>
<td>• Technological Protection Measures (TPMs)</td>
<td>No provisions</td>
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<td>• contractual system (47H)</td>
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<td>• disabled people</td>
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**Meaning**

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<tr>
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<th>italic fonts</th>
<th>bold fonts</th>
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</thead>
<tbody>
<tr>
<td>= Similar provisions</td>
<td>= Similar provisions but different categories</td>
<td>= Differences</td>
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### Appendix 2: The Comparison of Fair Use Exceptions between Australia and Thailand

<table>
<thead>
<tr>
<th><strong>Australia (Fair Dealing)</strong></th>
<th><strong>Thailand (Private Use)</strong></th>
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<td><strong>Research or Study</strong></td>
<td><strong>Research or Study</strong></td>
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<td><em>Similarities</em></td>
<td><em>Similarities</em></td>
</tr>
<tr>
<td>- Literary, dramatic, musical, audio-visual works</td>
<td>- Any copyright works</td>
</tr>
<tr>
<td>- No definition of the term “research or study”</td>
<td>- No definition of the term “research or study”</td>
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<td><strong>Differences</strong></td>
<td><strong>Differences</strong></td>
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<td>- Reasonable portion applied</td>
<td>- No reasonable quantity indicated in the Act</td>
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<tr>
<td>- Factors to determine “fair dealing” are applied</td>
<td>- No factors to determine “private use” indicated in the Act</td>
</tr>
<tr>
<td><strong>Criticism or Review</strong></td>
<td><strong>Comment, Criticism, or Introduction of Work</strong></td>
</tr>
<tr>
<td><em>Similarities</em></td>
<td><em>Similarities</em></td>
</tr>
<tr>
<td>- Works and audio-visual items</td>
<td>- Any copyright works</td>
</tr>
<tr>
<td>- Sufficient acknowledgement is required</td>
<td>- Sufficient acknowledge is required</td>
</tr>
<tr>
<td>- No definition of the term “criticism or review”</td>
<td>- No definition of the term “criticism or review”</td>
</tr>
<tr>
<td><strong>Differences</strong></td>
<td><strong>Differences</strong></td>
</tr>
<tr>
<td>- Factor to determine “fair dealing” are applied</td>
<td>- No factors to determine “private use” indicated in the Act</td>
</tr>
<tr>
<td><strong>Parody or Satire</strong></td>
<td><strong>Parody and Satire</strong></td>
</tr>
<tr>
<td><strong>Differences</strong></td>
<td><strong>Differences</strong></td>
</tr>
<tr>
<td>- Works and audio-visual items</td>
<td>- No provision</td>
</tr>
<tr>
<td>- Factors to determine “fair dealing” are applied</td>
<td>- Section 32(1) is applied for the purpose of parody and satire</td>
</tr>
<tr>
<td>- No definition of the term “criticism or review”</td>
<td></td>
</tr>
<tr>
<td>Australia (Fair Dealing)</td>
<td>Thailand (Private Use)</td>
</tr>
<tr>
<td>-------------------------</td>
<td>-----------------------</td>
</tr>
<tr>
<td><strong>Reporting News</strong></td>
<td></td>
</tr>
<tr>
<td><strong>Similarities</strong></td>
<td></td>
</tr>
<tr>
<td>• Works and audio-visual items</td>
<td>Mass media</td>
</tr>
<tr>
<td>• Sufficient acknowledgement is required</td>
<td>Sufficient acknowledgement is required</td>
</tr>
<tr>
<td>• No definition of the term “reporting news”</td>
<td>No definition of the term “reporting news”</td>
</tr>
<tr>
<td><strong>Differences</strong></td>
<td></td>
</tr>
<tr>
<td>• Factors to determine “fair dealing” are applied</td>
<td>No factors to determine “fair dealing” are applied</td>
</tr>
<tr>
<td><strong>Judicial Proceeding and Professional Advice</strong></td>
<td></td>
</tr>
<tr>
<td><strong>Similarities</strong></td>
<td></td>
</tr>
<tr>
<td>• Literary, dramatic, musical or artistic works</td>
<td>Copyright works</td>
</tr>
<tr>
<td>• Must be fair</td>
<td>No profit</td>
</tr>
<tr>
<td><strong>Differences</strong></td>
<td></td>
</tr>
<tr>
<td>• Factors to determine “fair dealing” are applied</td>
<td>No factors to determine “fair dealing” are applied</td>
</tr>
<tr>
<td><strong>Use for Personal, Other Family Members, or Close Relatives Benefit</strong></td>
<td></td>
</tr>
<tr>
<td><strong>Differences</strong></td>
<td></td>
</tr>
<tr>
<td>• Australia does not provide this provision in the exception for fair dealing but the Copyright Act 1968 provides a private copying for benefit a person or his/her family in terms of time-shifting and format-shifting.</td>
<td>Reproduction, adaptation, publication of literary, dramatic, musical, audio-visual works for personal or family benefit</td>
</tr>
<tr>
<td><strong>Reproduction for Teaching</strong></td>
<td></td>
</tr>
<tr>
<td><strong>Similarity but Different Categories</strong></td>
<td></td>
</tr>
<tr>
<td>• Australia determines the exceptions for the purpose of education as free use (s. 44) and statutory licences (ss. 135ZGA-135ZM, 200, 200AAA, and 200AB.</td>
<td>Reproducing, adapting, exhibiting, displaying by teacher for teaching</td>
</tr>
<tr>
<td>• Not for profit</td>
<td>Not for profit</td>
</tr>
<tr>
<td><strong>Australia (Fair Dealing)</strong></td>
<td><strong>Thailand (Private Use)</strong></td>
</tr>
<tr>
<td>-----------------------------</td>
<td>---------------------------</td>
</tr>
<tr>
<td><strong>Reproduction by Teacher and Educational Institution</strong></td>
<td><strong>Reproduction by Teacher and Educational Institution</strong></td>
</tr>
<tr>
<td><strong>Similarity but Different Categories</strong></td>
<td><strong>Similarity but Different Categories</strong></td>
</tr>
<tr>
<td>• Australia determines the exceptions for the purpose of education as free use (s. 44) and statutory licences (ss. 135ZGA-135ZM, 200, 200AAA, and 200AB.</td>
<td>• Reproducing and adapting in part of work or abridgement or making summary to distribute and sell to student in class and in educational institution.</td>
</tr>
<tr>
<td></td>
<td>• Not for profit</td>
</tr>
<tr>
<td></td>
<td>• This provision is categorized as private use.</td>
</tr>
<tr>
<td><strong>Use for Question and Answers in Examination</strong></td>
<td><strong>Use for Question and Answers in Examination</strong></td>
</tr>
<tr>
<td><strong>Differences</strong></td>
<td><strong>Differences</strong></td>
</tr>
<tr>
<td>• No exception for the use of the work as part of questions and answers in an examination in the Copyright Act 1968. However, the Act allows users to use the work for questions and answers in an examination as the act is done for the purpose of research or study.</td>
<td>• Use of the work as part of questions and answers in an examination.</td>
</tr>
<tr>
<td></td>
<td>• Not for profit</td>
</tr>
</tbody>
</table>
### Appendix 3: The Comparison of Free Use between Australia and Thailand

<table>
<thead>
<tr>
<th>Australia</th>
<th>Thailand</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Judicial Proceedings or Professional Advice</strong></td>
<td><strong>Judicial Proceedings or Professional Advice</strong></td>
</tr>
<tr>
<td><strong>Differences</strong></td>
<td><strong>Differences</strong></td>
</tr>
<tr>
<td>• Literary, dramatic, musical, artistic, and audio-visual works</td>
<td>• Thai copyright Act provides the exception for judicial proceeding or professional advice as a private use except s. 35(6) which is deemed as free use.</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th><strong>Libraries and Archives Exceptions</strong></th>
<th><strong>Libraries Exceptions</strong></th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Similarities</strong></td>
<td><strong>Similarities</strong></td>
</tr>
<tr>
<td>• Literary, dramatic, musical, artistic, and audio-visual works</td>
<td>• Copyright Works</td>
</tr>
<tr>
<td>• Preservation, research or study, view to publication</td>
<td>• Reproduction for use in library or another library</td>
</tr>
<tr>
<td>• Not for profit</td>
<td>• Not for profit</td>
</tr>
<tr>
<td>• Reasonable portion of most types of works</td>
<td>• Reasonable portion for another person for research or study</td>
</tr>
<tr>
<td>• Reproduce and communicate published works for a client for research or study for free</td>
<td><strong>Differences</strong></td>
</tr>
<tr>
<td><strong>Differences</strong></td>
<td>• The Copyright Act does not define the term “library” whether it includes archive or not. However, in practice, this provision can be applied to both library and archive.</td>
</tr>
<tr>
<td>• Declarations to be made to assist the purposes for which copies can be made, and the quantity of material that can be copied.</td>
<td><strong>Differences</strong></td>
</tr>
<tr>
<td>• Australia also provides statutory licences for library or archive to officially copy materials for the purpose of providing services to their users (s200AB). They are also allowed to copy material of cultural significance if this material is not commercially available; however this is restricted to reproduction. Equitable remuneration must be paid to a collecting society.</td>
<td>• The Copyright Act does not define the term “library” whether it includes archive or not. However, in practice, this provision can be applied to both library and archive.</td>
</tr>
</tbody>
</table>
### Appendix 3

<table>
<thead>
<tr>
<th><strong>Australia</strong></th>
<th><strong>Thailand</strong></th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Similarities</strong>&lt;br&gt;• Performance of dramatic, and musical work in public or at premises&lt;br&gt;• Not for commercial purpose&lt;br&gt;<strong>Differences</strong>&lt;br&gt;• Sufficient acknowledgement is required&lt;br&gt;• Performance of Literary in public&lt;br&gt;• Reproduction for the purpose of simulcasting the work or adaptation in digital form,&lt;br&gt;• Recording or filming a work for broadcasting and reading or recitation in public and for a broadcast&lt;br&gt;• Person who does not make the recording or filming a work for broadcasting must pay an owner of such amount as they agree.&lt;br&gt;• Making sound broadcast, adaptation, and published works by disability can be done under licence.</td>
<td><strong>Similarities</strong>&lt;br&gt;• Public performance of dramatic or musical work&lt;br&gt;• Not for profit&lt;br&gt;<strong>Differences</strong>&lt;br&gt;• The Act does not specify a sufficient acknowledgement of the ownership of copyright in such work&lt;br&gt;• Thai Copyright Act does not provide public performance of literary, recording or filming a work for broadcasting, and reading or recitation in public and for a broadcast. Also, There is no provision for simulcasting the work or adaptation in digital form,&lt;br&gt;• Performers not receiving remuneration for the public performance&lt;br&gt;• Public performance must be only conducted by an association, or foundation for public charity, or education.&lt;br&gt;• No licences granted for disable persons</td>
</tr>
<tr>
<td><strong>Temporary Reproduction</strong>&lt;br&gt;<strong>Differences</strong>&lt;br&gt;• Temporary reproductions made in the course of communication: works and audio-visual items&lt;br&gt;• Temporary reproductions of works as part of a technical process of use: works and audio-visual items</td>
<td><strong>Temporary Reproduction</strong>&lt;br&gt;<strong>Differences</strong>&lt;br&gt;• No exceptions for the purpose of temporary reproduction in Thai Copyright Act 1994. However, users can apply s. 32(1) to avoid copyright infringement if temporary reproduction is made.</td>
</tr>
</tbody>
</table>

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247
<table>
<thead>
<tr>
<th>Reproduction Computer Program</th>
<th>Reproduction of Computer Program</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Similarities</strong></td>
<td><strong>Similarities</strong></td>
</tr>
<tr>
<td>• Normal use or study of the program</td>
<td>• Not for profit</td>
</tr>
<tr>
<td>• Making a back-up copy</td>
<td>• Use for research or study, and for benefit of the owner</td>
</tr>
<tr>
<td>• Making interoperable products</td>
<td>• Making copies of a computer program for maintenance or prevention of loss</td>
</tr>
<tr>
<td>• Error correction program</td>
<td>• Adapting as necessary for use</td>
</tr>
<tr>
<td>• Security testing of a program</td>
<td>• Reference or research for public interest</td>
</tr>
<tr>
<td><strong>Differences</strong></td>
<td><strong>Differences</strong></td>
</tr>
<tr>
<td>• The Copyright Act 1968 does not specify the exceptions for comment, criticism, reporting news, questions or answers in an examination, and benefit of judicial proceedings.</td>
<td>• Comment, criticism, or introduction of the work with acknowledgement of the owner</td>
</tr>
<tr>
<td></td>
<td>• Reporting news with acknowledgement of the owner</td>
</tr>
<tr>
<td></td>
<td>• Use for questions or answers in an examination</td>
</tr>
<tr>
<td></td>
<td>• Use for benefit of judicial proceedings</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Reproduction of Writing on Approved Label for Container for Chemical product</th>
<th>Reproduction of Writing on Approved Label for Container for Chemical product</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Differences</strong></td>
<td><strong>Differences</strong></td>
</tr>
<tr>
<td>• Not for profit</td>
<td>• No exception for reproduction of writing label for chemical product in the Copyright Act 1994. However, if the reproduction is not done for commercial purpose which unreasonably prejudices the legitimate interest of the right holder, s. 32(1) can be applied.</td>
</tr>
<tr>
<td>• Label on a container including any reproduction with audio-visual items</td>
<td></td>
</tr>
<tr>
<td>Australia</td>
<td>Thailand</td>
</tr>
<tr>
<td>-----------</td>
<td>----------</td>
</tr>
<tr>
<td><em>Differences</em></td>
<td><em>Differences</em></td>
</tr>
<tr>
<td>- Published edition of a work</td>
<td>- No exception for the reproduction of edition of work in the Copyright Act 1994. However, a person can apply s. 32 where the reproduction is made.</td>
</tr>
<tr>
<td>- Making of a reproduction of the whole or a part of that edition</td>
<td></td>
</tr>
<tr>
<td>- Reproduction of edition of work for print disability in libraries, archives, and cultural institutions</td>
<td></td>
</tr>
<tr>
<td>- Multiple reproduction of work both in printed anthologies and hard copy by educational institutions</td>
<td></td>
</tr>
<tr>
<td>- Reproduction of one copy of prescribed works for a particular purpose</td>
<td></td>
</tr>
<tr>
<td><strong>Reproduction Audiovisual Items for Private Use</strong></td>
<td><strong>Reproduction Audiovisual Items for Private Use</strong></td>
</tr>
<tr>
<td><em>Similarities</em></td>
<td><em>Similarities</em></td>
</tr>
<tr>
<td>- Copying and communicating sound recording, cinematograph film for preservation, simulcasting, and other purposes</td>
<td>- Reproduction of literary, dramatic, artistic, musical, audiovisual and sound recording works to create cinematographic work</td>
</tr>
<tr>
<td>- Preservation copies of significant recordings, films in cultural institutions’ collections</td>
<td></td>
</tr>
<tr>
<td><em>Differences</em></td>
<td><em>Differences</em></td>
</tr>
<tr>
<td>- Certain recording in public or broadcast</td>
<td>- Thai Copyright Act 1994 does not contribute the exception for reproduction of literary, dramatic, artistic, musical, audiovisual and sound recording works to other kinds of work except to create cinematographic work.</td>
</tr>
<tr>
<td>- Making of copy of the sound recording for broadcasting</td>
<td>- No exception for the reproduction of broadcasting in the Copyright Act 1994.</td>
</tr>
<tr>
<td>- Copyright in published recording by public performance with equitable remuneration paid</td>
<td>- The reproduction of audiovisual items for non-profit organizations whose principal objects are charitable or are concerned with advancement religion, education or social welfare without charges can be done only for the reproduction of public performance.</td>
</tr>
<tr>
<td>- Copyright in published sound recording by broadcast in certain circumstances</td>
<td></td>
</tr>
<tr>
<td>- Sound recording to be heard in public for a club, society or other organization</td>
<td></td>
</tr>
<tr>
<td>- Non-profit organizations whose principal objects are charitable or are concerned with advancement religion, education or social welfare without charges.</td>
<td></td>
</tr>
<tr>
<td>- Copying sound recording and cinematograph films in libraries or archives</td>
<td></td>
</tr>
<tr>
<td><strong>Australia</strong></td>
<td><strong>Thailand</strong></td>
</tr>
<tr>
<td>----------------</td>
<td>--------------</td>
</tr>
<tr>
<td><strong>Private Copying</strong></td>
<td><strong>Private Copying</strong></td>
</tr>
<tr>
<td><strong>Differences</strong></td>
<td><strong>Differences</strong></td>
</tr>
<tr>
<td>• Time-shifting: recording broadcasts for replaying at more convenient time</td>
<td>• No provisions of private copying in the Thai Copyright Act 1994.</td>
</tr>
<tr>
<td>1. temporary use</td>
<td>• If private copying is made, s. 32(1) and (2) can be applied for a defenses. However, a person who makes a private copying must prove that his/her work is done for the purpose of individual and commercial use.</td>
</tr>
<tr>
<td>2. no further copy</td>
<td></td>
</tr>
<tr>
<td>3. for domestic premises</td>
<td></td>
</tr>
<tr>
<td>4. not for general loan</td>
<td></td>
</tr>
<tr>
<td>5. not for selling, letting for hire, and distributing for trade</td>
<td></td>
</tr>
<tr>
<td>• Format-shifting: reproduction works in different format</td>
<td></td>
</tr>
<tr>
<td>1. reproduction works in books, newspapers, and periodical publications</td>
<td></td>
</tr>
<tr>
<td>2. reproducing photocopy in different format for private use</td>
<td></td>
</tr>
<tr>
<td>3. copying sound recording</td>
<td></td>
</tr>
<tr>
<td>4. reproducing cinematograph film</td>
<td></td>
</tr>
<tr>
<td>5. only one copy can be made of the original material in each particular format</td>
<td></td>
</tr>
<tr>
<td><strong>Importation</strong></td>
<td><strong>Importation</strong></td>
</tr>
<tr>
<td><strong>Differences</strong></td>
<td><strong>Differences</strong></td>
</tr>
<tr>
<td>• Prohibition for commercial purpose</td>
<td>• No exception of importation provided in Thailand.</td>
</tr>
<tr>
<td>• Allowing for individual use (research or study)</td>
<td>• If the act complies with s. 32(1), importation of legal works and audio-visual items is not infringed.</td>
</tr>
<tr>
<td>• Not allowing for importing illegal works and audio-visual items</td>
<td></td>
</tr>
</tbody>
</table>
### Appendix 3

<table>
<thead>
<tr>
<th>Australia</th>
<th>Thailand</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Exceptions for Artistic Works</strong></td>
<td><strong>Exceptions for Artistic Works</strong></td>
</tr>
<tr>
<td><strong>Similarities</strong></td>
<td><strong>Similarities</strong></td>
</tr>
<tr>
<td>• Incidental filming, televising, or publishing of the artistic works</td>
<td>• Use for drawing, painting, constructing, engraving, sculpting, carving, lithographing, photographing, filming, video broadcasting to any work displayed in a public place.</td>
</tr>
<tr>
<td>• Reproduction for purpose of including work in television broadcast where the inclusion of an artistic work in a television broadcast. Not allow for a person who is not the maker of the film unless the maker has paid to the owner of the copyright in the work such amount as they agree.</td>
<td>• Photographing, cinematographing, video broadcasting of work of which an artistic work is component.</td>
</tr>
<tr>
<td>• Not allow for making of further copies of the film for the purpose of the inclusion of the work in such a broadcast.</td>
<td>• Reproducing, printing pattern, sketching, planning, modeling, data acquiring from a study of an original artistic work are done by another person.</td>
</tr>
<tr>
<td>• Reproduction of part of work in a later artistic work by the same author.</td>
<td>• Not allow for reproducing, or copying the substantial part of an original artistic work.</td>
</tr>
<tr>
<td><strong>Exception for Reference/Quotation</strong></td>
<td><strong>Exception for Reference/Quotation</strong></td>
</tr>
<tr>
<td><strong>Differences</strong></td>
<td><strong>Differences</strong></td>
</tr>
<tr>
<td>• No provision of exception for reference indicated in the Copyright Act 1968. However, the Act allows a person to use quote or extract in literary and dramatic works for the purpose of research or study, criticism or review, and reporting news.</td>
<td>• Reasonable recitation, quotation, copy, emulation, or reference in part of and from a copyright work.</td>
</tr>
<tr>
<td>• Whether or not a person needs permission to use quotes and extracts will generally depend on whether or not what he/she wants to use is a “substantial part” of the work from which it comes.</td>
<td>• Sufficient acknowledgement is required.</td>
</tr>
<tr>
<td>• Users are likely to need permission to reproduce a quote if: 1. the quotation is a “work” for the purposes of copyright; 2. the quotation is an important part of a “work”; 3. the copyright has not expired; and 4. no special exception applies.</td>
<td>• Reasonable copying for library, research or study, non-profit purposes.</td>
</tr>
<tr>
<td><strong>Australia</strong></td>
<td><strong>Thailand</strong></td>
</tr>
<tr>
<td>---</td>
<td>---</td>
</tr>
<tr>
<td><strong>Exception for Architectural works</strong></td>
<td><strong>Exception for Architectural works</strong></td>
</tr>
<tr>
<td><strong>Similarities</strong></td>
<td><strong>Similarities</strong></td>
</tr>
</tbody>
</table>
| • Reconstruction of building in accordance with architectural drawings or plans in which copyright subsists and has been so constructed by, or with the licence of, the owner of that copyright. | • Drawing, painting, construction, engraving, moulding, carving, lithographing, photographing, cinematographing, video broadcasting of an architectural work.  
• Reconstruction of a building which is a copyright architectural work to its previous form. |
| **Exception for Government Use** | **Exception for Government Use** |
| **Similarities** | **Similarities** |
| • The copyright in a literary, dramatic, musical or artistic work or a published edition of such a work, or in a sound recording, cinematograph film, television broadcast or sound broadcast, is not infringed by the Commonwealth or a State, or by a person authorized in writing by the Commonwealth or a State, doing any acts comprised in the copyright if the acts are done for the services of the Commonwealth or State. | • Copying a copyright work in conducting government affairs by government official with authority under the law or as directed by government officials. |
| **Differences** | **Differences** |
| • The government must pay the relevant collecting society in relation to government copies made in a particular period for the services of a government (other than excluded copies) equitable remuneration worked out for that period using.  
• The method of working out the equitable remuneration payable may provide for different treatment of different kinds or classes of government copies. | • Government need not to pay for the reproduction if such work is made under official provision. |
## Appendix 4: The Comparison of Licences between Australia and Thailand

<table>
<thead>
<tr>
<th>Differences</th>
<th>Australia (Statutory Licences)</th>
<th>Thailand (Compulsory Licences)</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td><strong>Differences</strong></td>
<td></td>
</tr>
<tr>
<td></td>
<td>• Allowing for using by schools, libraries, archives, and others on payment of a licences fees set either by agreement or by the Copyright Tribunal</td>
<td></td>
</tr>
<tr>
<td></td>
<td>• Remunerating for multiple copying</td>
<td></td>
</tr>
<tr>
<td></td>
<td>• Licences for Libraries or Archives</td>
<td></td>
</tr>
<tr>
<td></td>
<td>1. remuneration notice for equitable remuneration</td>
<td></td>
</tr>
<tr>
<td></td>
<td>2. not for commercial purpose</td>
<td></td>
</tr>
<tr>
<td></td>
<td>3. restricted to the reproduction</td>
<td></td>
</tr>
<tr>
<td></td>
<td>4. remuneration agrees between libraries or archives and the collecting society</td>
<td></td>
</tr>
<tr>
<td></td>
<td>• Educational institutions</td>
<td></td>
</tr>
<tr>
<td></td>
<td>1. for teaching purpose</td>
<td></td>
</tr>
<tr>
<td></td>
<td>2. no commercial benefit</td>
<td></td>
</tr>
<tr>
<td></td>
<td>3. limited to copy of broadcast material</td>
<td></td>
</tr>
<tr>
<td></td>
<td>4. extend to apply to on-line materials</td>
<td></td>
</tr>
<tr>
<td></td>
<td>• Disability</td>
<td></td>
</tr>
<tr>
<td></td>
<td>1. allow to reproduce material in different format</td>
<td></td>
</tr>
<tr>
<td></td>
<td>2. fees must be recovered for the services provides by libraries, or educational institution</td>
<td></td>
</tr>
<tr>
<td></td>
<td>3. not for profit</td>
<td></td>
</tr>
</tbody>
</table>
## Appendix 5: The Comparison of Limitation of Legislative Individual Use Provisions between Australia and Thailand

<table>
<thead>
<tr>
<th>Differences</th>
<th>Thailand</th>
</tr>
</thead>
<tbody>
<tr>
<td>Balance interest between owner and user in digital age</td>
<td></td>
</tr>
<tr>
<td>Against copyright piracy</td>
<td></td>
</tr>
<tr>
<td>Meet international obligation and free trade agreement</td>
<td></td>
</tr>
<tr>
<td>Two types of limitation of legislative individual use provisions:</td>
<td></td>
</tr>
<tr>
<td>Technological Protection Measures (TPMs) and Contractual System</td>
<td></td>
</tr>
<tr>
<td>• TPMs</td>
<td></td>
</tr>
<tr>
<td>1. valid response to protect works from infringement</td>
<td></td>
</tr>
<tr>
<td>2. provide owner a greater scope to control access to materials than was possible in the analogue world</td>
<td></td>
</tr>
<tr>
<td>3. criminal offences where a person makes, sells, imports, markets, distributes, or otherwise deals in a circumstance device</td>
<td></td>
</tr>
<tr>
<td>4. exceptions to liability for both civil actions and criminal proceedings are available if the circumvention device is to be used for a permitted purpose.</td>
<td></td>
</tr>
<tr>
<td>• Contracts</td>
<td></td>
</tr>
<tr>
<td>1. providing incentives for creative persons to express themselves, and the interest of the public to have access to these creative expressions by contractual terms in private transaction.</td>
<td></td>
</tr>
<tr>
<td>2. contracts generally take the form of licences to access to copyright material</td>
<td></td>
</tr>
<tr>
<td>3. prohibit activities that may contravene the three-step test</td>
<td></td>
</tr>
<tr>
<td>4. contracts and TPMs can complement each other</td>
<td></td>
</tr>
<tr>
<td>5. exceptions in the Copyright Act 1968 are not excluded or overridden by contracts.</td>
<td></td>
</tr>
</tbody>
</table>

• There are no provisions for the limitation of legislative individual use provisions in Thailand.
Appendix 6: The Estimated Trade Losses Due to the Copyright Piracy in Thailand

<table>
<thead>
<tr>
<th></th>
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</thead>
<tbody>
<tr>
<td><strong>Loss</strong></td>
<td>20.7</td>
<td>21.9</td>
<td>24.9</td>
<td>26.8</td>
<td>30.0</td>
<td>NA</td>
</tr>
<tr>
<td><strong>Level</strong></td>
<td>50%</td>
<td>45%</td>
<td>45%</td>
<td>41%</td>
<td>42%</td>
<td>NA</td>
</tr>
<tr>
<td><strong>Records &amp; Music</strong></td>
<td></td>
<td></td>
<td></td>
<td></td>
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<td></td>
</tr>
<tr>
<td><strong>Loss</strong></td>
<td>164.0</td>
<td>155.0</td>
<td>100.0</td>
<td>84.0</td>
<td>57.3</td>
<td>NA</td>
</tr>
<tr>
<td><strong>Level</strong></td>
<td>80%</td>
<td>80%</td>
<td>78%</td>
<td>80%</td>
<td>77%</td>
<td>NA</td>
</tr>
<tr>
<td><strong>Business Software</strong></td>
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<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td><strong>Loss</strong></td>
<td>35.0</td>
<td>30.0</td>
<td>30.0</td>
<td>28.0</td>
<td>28.0</td>
<td>NA</td>
</tr>
<tr>
<td><strong>Level</strong></td>
<td>NA</td>
<td>NA</td>
<td>NA</td>
<td>NA</td>
<td>NA</td>
<td>NA</td>
</tr>
<tr>
<td><strong>Books</strong></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td><strong>Loss</strong></td>
<td>NA</td>
<td>NA</td>
<td>149.0</td>
<td>30.0</td>
<td>28.0</td>
<td>26.0</td>
</tr>
<tr>
<td><strong>Level</strong></td>
<td>NA</td>
<td>NA</td>
<td>62%</td>
<td>60%</td>
<td>60%</td>
<td>70%</td>
</tr>
<tr>
<td><strong>Motion Pictures</strong></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td><strong>Loss</strong></td>
<td>219.7</td>
<td>355.9</td>
<td>184.9</td>
<td>166.8</td>
<td>166.8</td>
<td>NA</td>
</tr>
<tr>
<td><strong>TOTALS</strong></td>
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</tr>
</tbody>
</table>

## Appendix 7: Summary of Copyright Piracy Rate in Asia Pacific

<table>
<thead>
<tr>
<th></th>
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</thead>
<tbody>
<tr>
<td>Japan</td>
<td>103,401</td>
<td>13.0%</td>
<td>19.7%</td>
<td>28%</td>
</tr>
<tr>
<td>China</td>
<td>27,520</td>
<td>85.3%</td>
<td>209.1%</td>
<td>86%</td>
</tr>
<tr>
<td>Australia</td>
<td>19,053</td>
<td>30.0%</td>
<td>38.8%</td>
<td>31%</td>
</tr>
<tr>
<td>Korea</td>
<td>12,529</td>
<td>40.4%</td>
<td>47.8%</td>
<td>46%</td>
</tr>
<tr>
<td>India</td>
<td>7,377</td>
<td>136.6%</td>
<td>164.50</td>
<td>72%</td>
</tr>
<tr>
<td>Taiwan</td>
<td>6,175</td>
<td>13.4%</td>
<td>17.8%</td>
<td>43%</td>
</tr>
<tr>
<td>Singapore</td>
<td>3,713</td>
<td>18.5%</td>
<td>24.5%</td>
<td>40%</td>
</tr>
<tr>
<td>Hong Kong</td>
<td>3,284</td>
<td>20.8%</td>
<td>27.0%</td>
<td>54%</td>
</tr>
<tr>
<td>New Zealand</td>
<td>2,959</td>
<td>29.0%</td>
<td>35.6%</td>
<td>23%</td>
</tr>
<tr>
<td>Malaysia</td>
<td>2,902</td>
<td>77.1%</td>
<td>91.2%</td>
<td>60%</td>
</tr>
<tr>
<td>Thailand</td>
<td>2,348</td>
<td>64.3%</td>
<td>90.5%</td>
<td>80%</td>
</tr>
<tr>
<td>Indonesia</td>
<td>1,673</td>
<td>79.3%</td>
<td>152.3%</td>
<td>87%</td>
</tr>
<tr>
<td>Philippines</td>
<td>1,070</td>
<td>80.6%</td>
<td>94.9%</td>
<td>71%</td>
</tr>
<tr>
<td>Vietnam</td>
<td>509</td>
<td>107.8%</td>
<td>169.3%</td>
<td>90%</td>
</tr>
<tr>
<td>Total</td>
<td>194,529</td>
<td>33.9%</td>
<td>59.1%</td>
<td>54%</td>
</tr>
</tbody>
</table>