

Examining 'fair use' of photocopies

A widespread misunderstanding exists regarding the protection of copyrighted work, even among legal practitioners. Questions as to the extent of protection, what comprises an infringing act, and scope of "fair use" do not have definitive answers. This article will only examine fair use in respect to the reproduction of copyrighted work under the Thai Copyright Act 1994 through a precedent case.

Photocopying centres are a common sight in Bangkok, especially near university and school campuses. Many often speculate as to whether or not these shops are infringing copyright. Admittedly, given the scarcity of some textbooks or the funds to buy them, photocopying shops are responding to a demand by students. However, this runs counter to the motivation of authors to publish their works and contribute knowledge to society because of diminished economic incentives.

Section 32 of the Copyright Act provides that "any act in relation to works having copyright protection under this Act will not be regarded as an infringement of copyright, provided that such an act neither conflicts with the normal exploitation of the work nor unreasonably prejudices the lawful rights of the owner."

Acts that do not constitute copyright infringement are specified under the section, including "research or study of the work when not for profit". Based on this exemption, is photocopying of published works for students regarded

as copyright infringement?

From the law quoted above, for photocopiers to qualify for the "research and study" exemption, they must prove that they are not interfering with the exploitation of the work or creating a major disadvantage to the copyright owner. As "normal exploitation" by publishers is obviously to sell books, the fair use principle should not apply in some cases. The relevant precedent judgment of the Supreme Court in Case No. 1732/2543 is cited below.

In this case, the plaintiff was an international publisher, while the defendant was a Thai individual who ran a copying business near a university. The defendant was sued for making photocopies of the plaintiff's entire textbook. The defendant claimed his act was in accordance with a student's order and was for the purpose of research and study and thus exempt under the Act.

Earlier, the Central Intellectual Property and International Trade Court had found the defendant guilty of infringing the plaintiff's copyright and ordered a fine of 100,000 baht. Both the plaintiff and the defendant appealed to the Supreme Court.

However, the Supreme Court held that the defendant could not claim that he had copied the textbook pursuant to a student's orders because he could not prove this fact. As such, he could not cite the exception under Section 32(1) in his favour, which gives rise to the question: If he had been able to prove that the copies were made at the request

of students, would his action fall under the exception?

Although the law provides this exception, it must conform with Section 32 in that it must not conflict with the "normal exploitation of the right holder" nor unreasonably prejudice "the lawful rights of the owner". Because the court did not establish clear criteria for specific acts exempted or the extent to which they may be, future disputes will likely be considered on a case-by-case basis.

The extent of the action may be a key factor. For example, if photocopying is carried out according to a student's order and involves only a small portion of the book, then it is likely to be considered fair use for the purpose of study even though the copy centre turned a profit.

However, photocopying a big part of a published work that is also available in the marketplace should be considered in conflict with normal exploitation, because when a photocopy takes the place of the original work. An infringement of the holder's copyright is clearly established here.

To sum up, the concept of fair use under the Copyright Act gives the public access to copyrighted works. However, it must be interpreted narrowly so it doesn't hurt the copyright holder to ensure that creativity is protected.

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