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FAIR USE: A NARROW EXCEPTION TO COPYRIGHT INFRINGEMENT IN THAILAND

The original concept of copyright law is to protect the author from the unauthorized exploitation of his or her original work. To this end, the public at large may not be able to have access to or exploit useful information protected by copyright. To strike a compromise between the rights of the author and the needs of the public, the doctrine of fair use has been gradually developed. This article discusses the fair use doctrine and its application in Thailand.

An Overview of the Fair Use Doctrine

The doctrine of fair use is widely accepted in the domestic copyright laws of many countries. At the international level, it was first introduced in the Berne Convention for the Protection of Literary and Artistic Works (Berne Convention) and subsequently accepted by the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement). Generally, the Berne Convention and the TRIPS Agreement provide that members shall confine limitations or exceptions to exclusive rights to (1) certain special cases which (2) do not conflict with a normal exploitation of the work and (3) do not unreasonably prejudice the legitimate interests of the right holder. This concept is commonly known as “the three-step test.”

Thailand’s copyright regime acknowledges certain exceptions to copyright infringement, including the fair use exception. As a signatory to the Berne Convention and TRIPS Agreement, Thailand has incorporated the fair use exception into Thailand’s Copyright Act B.E. 2537 (1994) (Copyright Act). The first paragraph of Section 32 of the Copyright Act provides the following general exception to copyright infringement:

An act against a copyright work by virtue of this Act of another person which [1] **does not conflict with a normal exploitation of the copyright work** by the owner of copyright and [2] **does not unreasonably prejudice the legitimate right of the owner of copyright** shall not be deemed an infringement of copyright.
 (emphasis added)

However, the second paragraph of Section 32 further refers to certain acts that can be exempted from copyright infringement, including exceptions such as “research or study of the work which is not for profit.” Since this provision is unclear, the fair use exception has been a debated subject among academics as to whether the general exception in the first paragraph can be used alone to evaluate if an act could qualify as an exemption from copyright infringement.

The Copy Shop Case

Thailand’s carve-out for acceptable uses of a copyrighted work was put to the test in a criminal copyright case

brought by the public prosecutor and Prentice Hall Inc. (plaintiffs) against a photocopy shop (defendant) located near a famous private university in Bangkok.

In the lawsuit, originally brought in the Intellectual Property and International Trade Court (IP&IT Court), the plaintiffs alleged that the defendant committed copyright infringement when the defendant photocopied books and several compilations of excerpts without permission. The defendant argued that the documents were used for educational purposes and that the reproductions were made at the request of students who had themselves brought the original books to the defendant.

The contested question of fact was whether the defendant’s actions constituted an acceptable use of the copyright by virtue of Section 32, which protects acts that:

1. do not conflict with the normal exploitation of the copyright work and
2. do not unreasonably prejudice the legitimate interests of the rights holder;
3. subject to items (1) and (2) above, are deemed to be certain protected actions (including “research or study of the work which is not for profit”).

The IP&IT Court dismissed the case, reasoning that the defendant’s acts did not conflict with the normal exploitation of the work by the copyright owner and did not unreasonably prejudice the legitimate right of the copyright owner. Thus, the defendant’s acts qualified as being exempt from the infringement of copyright under Section 32.

On appeal, the Supreme Court of Thailand reversed the judgment of the IP&IT Court and issued Supreme Court Decision No. 5843/2543(2000). The Supreme Court held that the defendant reproduced many packs of the copyrighted works and stored them in his shop, located near the university. The defendant had ample opportunity to sell the copied documents to students. Such an act was not a transaction requested by students who needed the copies for research or study of the work. The defendant had infringed upon the copyright for commercial purposes, i.e. personal profit derived from selling the copies. Thus, the Supreme Court held that the defendant’s act did not qualify as being exempt from the infringement of copyright under Section 32.

Lessons Learned from the Copy Shop Case

Without well-developed and sufficient precedent on Section 32, we can learn some lessons from the above case. Note that the IP&IT Court dismissed the case, and its reason was merely based on the general exception in the first paragraph of Section 32. On the other hand, the Supreme Court focused on the enumerated acts in the second paragraph of Section 32, namely the research and study exception. Since the Supreme Court required evidence to prove that the alleged act was done for the purpose of research or study, it may be argued that the court narrowly interpreted the concept of fair use to preclude the possibility that the first paragraph of Section 32 alone could be used as an excuse to copyright infringement. To this extent, any act that does not fall under the second paragraph of Section 32 cannot enjoy an exception from copyright infringement. However, it remains unclear how the court would evaluate whether such an act does or does not conflict with the normal exploitation of the copyright work and to what extent it will unreasonably prejudice the legitimate interests of the rights holder. 🏠