

Reformulating Fair Use

- A Comparative Review of Proposed
Amendment of Copyright Law in Taiwan

C. Ouyang

Associate Professor

National Open University, Faculty of Social Sciences

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I. Introduction

1. Copyright Protection:

Legal rights a creator has over his literal and artistic works.

2. Types of Works Protected by Copyright:

“literal and artistic works shall include every production in the literary, scientific and artistic domain, whatever may be the mode or form of its expression”

I. Introduction

2. Works Protected (cont'd)

(Art.2 Berne Convention) , including but not limited to:

--- Writings, Articles, Pamphlets, Poems, Novels, Books, Plays, Maps, Advertisements

--- Lectures, Addresses, Sermons

-- Music, Lyric, Compositions:

--- Paintings, Drawings, Photographs, Films, Choreographics

I. Introduction

--- Sculptures, Architectures, engraving and lithography

--- Computer Program, Database, Technical Drawings

3. Condition for Protection:

Mostly No Registration is required (Burne Convention Art. 5)

I. Introduction

4. Extensive Protection:

Copyright Protection are multi-faceted and cover broadly to acts of re-use or derivative uses of literary and artistic works such as :

“reproduce, adapt, translate, arrangement, edit, publication, public recitation, distribute, public presentation, public performance, public release, etc.”

I. Introduction

5. Doctrine of Fair Use (DFC):

Given the extensive copyright protections granted to a creator, doctrine of fair use is developed as a legal mechanism aimed to Striking a Balance Between Protection of Private Property and Public Interests

6. Issues Arising from Application of DFC:

A concept that can not be fixed with absolute terms.

II. Legal Framework: Copyright Law (1999, amended as of May, 2019)

1. Basic Principle :

No infringement for fair use of copyrighted work.

“Fair use of a work shall not constitute infringement on economic rights in the work.” (Art.65 I)

II. Legal Framework: Copyright Law (1999, amended as of May, 2019)

2. Elements taken into account in determining whether DFC can apply:

“In determining whether the exploitation of a work *complies with the reasonable scope referred to in the provisions of Articles 44 through 63, or other conditions of fair use*, all circumstances shall be taken into account, and in particular the following facts shall be noted as the basis for determination:

II. Legal Framework: Copyright Law (1999, amended as of May, 2019)

- 1. The **purposes and nature of the exploitation**, including whether such exploitation is of a commercial nature or is for nonprofit educational purposes.
- 2. The **nature of the work.**
- 3. **The amount and substantiality** of the portion exploited in relation to the work as a whole.
- 4. **Effect of the exploitation** on the work's current and potential market value. (Art.65 II)

II. Legal Framework: Copyright Law (1999, amended as of May, 2019)

Note: Where the copyright owner organization and the exploiter organization have formed an agreement on the scope of the fair use of a work, it may be taken as reference in the determination referred to in the preceding paragraph. (Art.65 III)

II. Legal Framework: Copyright Law (1999, amended as of May, 2019)

3. Exemplary provisions (Art. 44 -63):

(A) Gov't Agencies:

“*Within a reasonable scope*, central or local government agencies may reproduce the work of another person if it is considered necessary for internal reference for the purpose of legislation or administration; *provided, this shall not apply where such reproduction would prejudice the interests of the economic rights holder due to the type and use of the work and the volume and method of reproduction.* (Art.44)

II. Legal Framework: Copyright Law (1999, amended as of May, 2019)

(B) Personal or Family Uses:

Within a reasonable scope, where for nonprofit use by an individual or a family, a work that has been publicly released may be reproduced by a machine that is either located in a library or is not provided for public use. (Art.51)

II. Legal Framework: Copyright Law (1998, Amended as of 2019)

4. DFU and Educations:

(A) Art. 46: Needs for Teaching

“*Within a reasonable scope*, and *where necessary for the purpose of teaching in schools*, all levels of legally established schools and their teachers may *reproduce* the works of another person which have already been publicly released. (Art.46 I)

The proviso of Article 44 shall apply mutatis mutandis to the circumstances set forth in the preceding paragraph. (Art.46 II)”

II. Legal Framework: Copyright Law (1998, Amended as of 2019)

(B) Art. 47: Preparing Pedagogical Materials

(i) “Within a reasonable scope, and for the purpose of preparing pedagogical texts for which review and approval by an education administrative agency is required by act or regulation, or where an education administrative agency prepares pedagogical texts itself, the works of another person that have been publicly released may be reproduced, adapted, or compiled.” (Art.47 I)

II. Legal Framework: Copyright Law (1998, Amended as of 2019)

(ii) “*Within a reasonable scope* and *for the purpose of meeting educational needs*, all levels of legally established schools and educational institutions may *publicly broadcast* the works of another person that have been publicly released.” (Art.47 III)

Note: Compensations are required for above reuses of works under Art.47

II. Legal Framework: Copyright Law (1998, Amended as of 2019)

5. Issues and Concerns:

(A) Limited Coverage:

(i) Art. 46: focusing on acts of reproduction and in class teaching

(ii) Art. 47: focusing on textbooks reviewed and approved by education administrative agencies

(B) Case by Case Eligibility: DFC will be determined on a case by case basis in reference of the elements mentioned in Art.

III. Proposed Amendment (2021)

1. **Broaden Coverage** (Draft Art. 46, Art.47) :
Protection available to other acts or means of using a published work.

(A) In addition to “Reproduction”, copyright protection is extended to acts of “adaption”, “distribution”, “public performance”, “public presentation”, “re-public communicate”

III. Proposed Amendment (2021)

(B) Further, coverage is extended to acts of “public broadcast”, “public transmission”, “re-public communication” of works that have been publicly released, *provided that* reasonable measures have been taken to prevent unauthorized reception by those who are not registered students. (**Draft Art.46 II**)

III. Proposed Amendment (2021)

2. Protection Expressly Extended to Distant Education (Draft Art.46-1 added)

(A) Protection available to schools & other education institutions, as well as their teachers;

(B) In class teaching, on site live teaching, recorded teaching and other forms of distant(internet) education could be covered and protected:

-- “public broadcast”, “public transmission” and “re-public communication” are covered within and to the extent necessary for teaching. (Draft Art.46-1 I)

III. Proposed Amendment (2021)

(C) No Protection for profit making uses
Draft Art.46-1

(D) Appropriate compensations are
required **Draft Art.46-1 II**

III. Proposed Amendment (2021)

3. Implications:

(A) **Reference** to other legislations: US, Japan, Korea, etc

(B) **Easier** to assert Copyright Law Protection for OER creating and development.

(C) **Reverse** of Burden of Proof

(D) **Shifts** of Controversies:

(i) Purposes of Uses

(ii) Appropriate Compensations

IV. Conclusions

1. Merits of Draft Amendment.

(A) Reducing Complexities in Applying DFU;

(B) Creating a legal regime more favorable to promote OER development;

2. Issues To Tackled: a comparative approach

Possible Solutions: Common Data Pools Contributed by Authors and Shared by the Public

Thank You

Fr Your
Participation
Your

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