

ANALYZING FAIR USE: AN EXCEPTION FOR COPYRIGHT INFRINGEMENT UNDER COPYRIGHT LAW IN MYANMAR

Hsu Kay Thi Zaw¹

Abstract

Copyright law is an intricate area of law which regulates intangible property rights in literary and artistic creations. This intricacy only becomes more apparent when the rights of the public to enjoy freedom of expression and free access collides with the claims of copyright ownership. A copyright holder generally has the authority to prevent others from making reproductions, selling or distributing, performing in public, or broadcasting their copyrighted work. But such right is limited to control the monopoly of the copyright holders on the reproductions of their works. Fair use is the mechanism that has been developed to limit the rights of the copyright holders. In cases where the advantages of public use surpass the private benefits of the copyright holder, fair use allows the public to use copyrighted works without the authorization of the right holder. This paper uses the qualitative approach to understand fair use doctrine and its role in balancing the authors' rights and the public interest within the context of Copyright Law, 2019. It re-examines two historical copyright infringement cases through the fair use perspective to evaluate how similar disputes might be assessed under the current legal framework. The analysis reveals that the Copyright Law, 2019 allows fair uses of the copyrighted materials for personal, educational, informational and archival purposes while safeguarding the interests of the authors and copyright holders. Nevertheless, despite the provisions asserting compliance with fair use, the law needs a clear definition of fair use and the extent to which such use is permissible across various contexts. By integrating international standards such as the four-factor test and the three-step test, the current copyright framework can be strengthened and enhanced the co-existence of author protection and public access.

Keywords: Copyright, Copyright Infringement, Fair use

Methodology

This paper used the qualitative research approach to understand fair use doctrine and its role in balancing the authors' rights and the public interest. It uses both primary and secondary sources including legislation, books, academic papers and journals. Firstly, a literature review is conducted to trace the development of the copyright regime, thereby illuminating the nature of copyright protection and infringement. This paper then focuses on the fair use provisions incorporated under the Copyright Law of 2019 and examines two historical copyright infringement cases and reinterprets them through the fair use perspective under the Copyright Law 2019, to assess how the current legal framework balances protection and public access. Finally, the paper discusses potential enhancements to the fair use provisions to promote public access and mitigate the monopolistic tendencies of copyright holders.

Introduction

The copyright framework requires a careful balance between two conflicting goals. On the one hand, there is a strong principle that promotes the widest possible dissemination of knowledge, emphasizing the importance of making information freely available to the public. Copyright gives an intellectual work some attributes of private property, allowing the creator to control how the work is used and to make money from it if others are willing to pay for its use.

¹ Department of Law, University of Mandalay

On the other hand, copyright law imposes restrictions that can limit access to creative and intellectual works, which can hinder this principle. These restrictions can prevent other creators from utilizing existing works, thereby stifling innovation and competition. This tension illustrates the complex nature of copyright law, as it seeks to protect the rights of creators while also considering the public's need for access to knowledge and fostering a competitive economic environment.²

Development of Copyright Law

The beginnings of copyright are intrinsically linked to the advancement of printing technology, which facilitated the rapid and cost-effective reproduction of books.³ The increase in literacy rates generated significant demand for printed works, thereby highlighting the necessity of safeguarding authors and publishers against unauthorized reproductions. This context ultimately led to the establishment of the first copyright laws.⁴ The Statute of Anne, passed by the British Parliament in 1710, marked the first copyright law in the world. It stipulated that after a specified period, the exclusive rights held by the Stationers' Company to produce and distribute copies of literary works would revert to the authors. These authors were then entitled to transfer their rights to other publishers. While failure to register a book precluded the possibility of seeking damages from infringers, it did not nullify the copyright itself.⁵ The Statute was instrumental in fostering competition within the publishing industry by limiting monopolistic practices and acknowledging the author's right to authorize copying.⁶

Following this landmark legislation, the principles of copyright began to spread to other nations. It is widely accepted that copyright is territorial, and to protect works outside their country of origin, it is essential for bilateral agreements to be established with other nations. In the 1900s, such agreements emerged among European countries, though they lacked consistency and comprehensiveness. This gap led to the creation of the first international agreement for author protection, the Berne Convention for the Protection of Literary and Artistic Works, which was adopted on September 9, 1886, in Berne, Switzerland. Member countries formed the Berne Union to ensure that authors' rights were recognized and protected across all participating countries. The administration of the Berne Convention is overseen by the World Intellectual Property Organization (WIPO).⁷ Since its inception in 1886, the Convention has undergone multiple revisions, including updates in Paris, Berlin, and Stockholm throughout the 20th century.⁸

The Berne Convention addresses the protection of literary and artistic works and the rights of their authors, enabling creators to regulate the use of their works, determine the terms of such use, and identify the parties who are permitted to exploit their creations. It encompasses a range of provisions that stipulate the minimum level of protection required, along with specific provisions designed for developing countries that wish to utilize them. Under the Berne

² Leon E. Seltzer, (1977) *Exemptions and Fair Use in Copyright*, 1st ed., 3, United States: Harvard University Press.

³ Orit Fischman Afori, (2012) "The Evolution of Copyright Law and Inductive Speculations as to Its Future" *Journal of Intellectual Property Law*, vol. 19(2), 233.

⁴ International Bureau of WIPO, (2002) "International Protection of Copyright and Related Rights" WIPO, 2.

⁵ The Statute of Anne 1710.

⁶ International Bureau of WIPO, (2002) "International Protection of Copyright and Related Rights" WIPO, 2.

⁷ Ibid.

⁸ WIPO, (2013) *Summaries of Conventions, Treaties and Agreements Administered by WIPO*, 39.

Convention, copyright protection is granted automatically, without the need for formal registration.⁹

Regarding the duration of protection, the general principle is that it extends until the end of the 50th year following the author's death. In the case of anonymous or pseudonymous works, the protection term lasts for 50 years after the work is lawfully made available to the public, unless the pseudonym clearly indicates the author's identity or the author reveals their identity during that time, in which case the general rule applies. For audiovisual works, the minimum protection term is 50 years from the public release of the work or, in the absence of such a release, from its creation. For applied art and photographic works, the minimum protection period is 25 years from the date of creation.¹⁰

In Myanmar, the first Copyright law was enacted in 1914, based on the British Copyright Act 1911. Despite the existence of this law, there were no registration procedures in place, and it did not recognize copyrights obtained in other countries. On 24 May 2019, the Pyidaungsu Hluttaw enacted the Copyright Law (Law No. 15/2019), introducing a new framework for copyright protection. A significant aspect of the Copyright Law which came into force on November 30 2023, is its extension of protection to foreign copyright works. This marks a departure from the previous stance, which only granted protection to creative works published in Myanmar or created by its citizens. Works that are first published in Myanmar; or if it was published in another country, also published in Myanmar within 30 days from the first foreign publication, will be granted with copyright protection, irrespective of the nationality or habitual residence of the author.¹¹

Copyright Protection

Copyright pertains to the protection of literary and artistic creations, including books, music, paintings, sculptures, films, and technology-based works such as computer programs and electronic databases. "Literary and artistic works" encompasses all original works of authorship, regardless of their literary or artistic value. While the ideas expressed do not need to be original, the form of expression must be an original creation by the author. The Berne Convention addresses that protection must cover "every production in the literary, scientific, and artistic domain, regardless of the mode or form of expression."¹² Copyright encompasses two primary categories of rights: economic rights and moral rights. Economic rights enable right holders to receive financial benefits from the use of their works by others. Moral rights empower authors and creators to take actions that preserve their personal connection to their work. While the author or creator typically holds the economic rights, these rights may also be transferred to one or more copyright holders.¹³ Subject to certain allowed reservations, limitations or exceptions, the following are among the rights that must be recognized as exclusive rights of authorization:

- the right to translate,
- the right to make adaptations and arrangements of the work,
- the right to perform in public dramatic, dramatico-musical and musical works,

⁹ WIPO, "Berne Convention for the Protection of Literary and Artistic Works", <https://www.wipo.int/treaties/en/ip/berne>.

¹⁰ *Berne Convention for the Protection of Literary and Artistic Works* 1886 art 7.

¹¹ The Copyright Law 2019 s 12.

¹² *Berne Convention for the Protection of Literary and Artistic Works* 1886 art 2(1).

¹³ WIPO, (2016) *Understanding Copyright and Related Rights*, 9.

- the right to recite literary works in public,
- the right to communicate to the public,
- the performance of such works,
- the right to broadcast,
- the right to make reproductions in any manner or form,
- the right to use the work as a basis for an audiovisual work, and the right to reproduce, distribute, perform in public or communicate to the public that audiovisual work.¹⁴

The Berne Convention recognizes the moral rights of the authors, which include the right to claim authorship of a work and the right to prevent any mutilation, deformation, or other modifications that could harm the author's honor or reputation. Additionally, the Convention stipulates certain limitations and exceptions to economic rights, allowing for instances in which protected works may be utilized without the copyright owner's authorization and without compensation. These exceptions are often termed "fair uses" of copyrighted materials.¹⁵

The Copyright Law 2019 also provides exclusive economic rights and moral rights of the author or owner of copyright. Under Section 18, the author or owner of copyright shall have the exclusive economic rights to carry out or to authorize any other person to carry out the following:

- (a) reproduction;
- (b) translation, adaptation, arrangement or other alteration or modification;
- (c) distribution of the origin or a copy of the work to the public through sale or other transfer of ownership;
- (d) rental of the original or a copy of computer programme, an audiovisual work, a cinematographic work, a literary or artistic work embodied in a phonogram, a database or a musical work in the form of notation to the public;
- (e) public performance;
- (f) broadcasting;
- (g) communication to the public by any other means;
- (h) collection of literary or artistic works of his creation.¹⁶

The law allows the author or owner of copyright may transfer the economic rights to any person in accordance with the provisions contained in Chapter XIII of this Law. According to Section 20, the author, even where he is no longer the owner of the rights under section 18 regarding the literary or artistic work, shall have the following exclusive moral rights:

- (a) right to claim authorship and to have his name indicated as the author on the copies of any public use of his literary or artistic work;
- (b) right to use a pseudonym if it was originally described on copies of a literary or artistic work lawfully made available to the public;

¹⁴ WIPO, (2013) *Summaries of Conventions, Treaties and Agreements Administered by WIPO*, 39.

¹⁵ Ibid 40.

¹⁶ The Copyright Law 2019 s 18.

- (c) right to object to any distortion, mutilation or other modification of, or other derogatory action in relation to his literary or artistic work which would be prejudicial to his honor or reputation.¹⁷

If the author is already dead, his inheritor according to the testament or law or a person or legal entity which has been transferred under the law before the death of the author has right to exercise any of exclusive moral rights. However, the author may waive the exercise of their moral rights for specific uses provided that such waiver is made in a signed, written agreement.

Copyright Infringement

Copyright infringement, commonly referred to as piracy, is the act of doing or causing another person to perform any of the restricted or prohibited activities relating a copyrighted work without the owner's license or permission or with a valid justification. It is the violation of copyright and the unauthorized use of an author's work.¹⁸ The actions that the copyright owner can use exclusive control over in relation to his work include copying, distributing copies to the general public, performing, exhibiting, or performing the work in public, and broadcasting the work. This implies that the owner has the authority to prevent other people from engaging in such behavior, either by filing a claim for infringement against any unauthorized performance of those activities, or issuing a license to a third party to do those actions.¹⁹

These restricted actions include any adaptation of the work which is protected as an original copyright work. The restricted activities will only constitute principal infringement if they are performed in regard to the entire or a major portion of the protected work, although they will be prosecuted whether committed directly or indirectly.²⁰ Secondary infringement occurs when people deal in infringing copies. The secondary infringer is one stage away from the act of illegal reproduction or performance. To conduct an act of secondary infringement, an act of primary infringement must first have occurred.

The remedies available to a copyright owner and to an exclusive licensee for copyright infringement are to bring a civil action for damages or an injunction, and delivery up or destruction of the copies, disclosure of the names of suppliers and sometimes customers, legal costs and interest and/or to prompt a criminal prosecution either privately or by the enforcement authorities for one or more of the criminal offences.²¹

Section 82 of the Copyright Law 2019 provides the copyright infringement which includes;

- (a) for commercial purpose, without the consent of the right holder;
 - (i) direct or indirect reproduction or communication to the public or distribution to the public, of the work protected by copyright or objects protected by related rights;
 - (ii) possessing or dealing pirated copyright or related rights goods;
 - (iii) importing pirated copyright or related rights goods into Myanmar;
 - (iv) acting in a way prohibited under sections 43 and 44.

¹⁷ The Copyright Law 2019 s 20.

¹⁸ Adetutu Deborah Aina-Pelemo & Glorious Oleoghene Akpojar, (2024) "Understanding Copyright and Fair Use in the Academic World" *University of Benin Journal of Business Law*, vol. 5(1), 158.

¹⁹ Tina Hart & Linda Fazzani, (1997) *Intellectual Property Law*, 1st ed., Macmillan Education, 143.

²⁰ Ibid.

²¹ Tina Hart & Linda Fazzani, (1997) *Intellectual Property Law*, 1st ed., Macmillan Education, 150.

- (b) possessing any materials or implements which has been used predominantly to produce copyright or related rights infringing goods.²²

Copyright infringement occurs when anyone, other than the copyright owner or someone authorized by him, does an act e.g., reproduction, translation, adaption, public performance, that is the exclusive right of the owner. The plaintiff must show that he owns the copyright, and:

- (a) that the defendant did an act prejudice to the exclusive right to which belongs to the copyright owner, in relation to the work or a “substantial part” of it; and
- (b) that the defendant did not have the plaintiff’s express or implied authority to do the act.

Once the plaintiff proves these elements, he has *prima facie* proved infringement. To avoid liability, the defendant must provide a valid defence: e.g., “fair dealing” in the U.K. and the Commonwealth, “fair use” in the United States, or some other specific exception.²³

Doctrine of Fair Use

For nearly three hundred years, since shortly after the birth of copyright in England in 1710, courts have recognized that, in certain circumstances, giving authors absolute control over all copying from their works would tend in some circumstances to limit, rather than expand, public knowledge. Courts thus developed the common law doctrine, eventually named fair use, which permits unauthorized copying in some circumstances, so as to further “copyright’s very purpose, to promote the Progress of Science and useful Arts”. The definition of fair use refers explicitly to the rational use system of copyright in the United States, which is extended and developed from the basis of the British fair dealing.²⁴

Fair use or doctrine of fair use is one of the exceptions to copyright infringement which allows an individual to use a copyrighted work without requesting permission from the owner or copyright holder. Fair use connotes that a person can utilize another person’s work without authorization and that utilization is considered legal. It allows an individual to engage in activities like research, educational and academic purposes, criticism, news reporting, news review, and public and private study without the fear of infringing on another’s copyright.²⁵

Fair use is one of the fundamental concepts of copyright laws which opines that it is a right of the public to have a free use of portions of a copyrighted material under specified circumstances.²⁶ The aim is to strike a harmonious balance between the rights of copyright owners and societal needs. This ensures that copyright doesn’t hinder innovation, scholarly inquiry, or the broad dissemination of knowledge.²⁷ This doctrine is marked by its flexibility and is applied on a case-by-case basis, taking into account the distinct characteristics of each situation.

²² The Copyright Law 2019 s 82.

²³ David Vaver, (2002) *Principles of Copyright: Cases and Materials*, WIPO, 128.

²⁴ Authors Guild vs. Google, Inc., (2015) 804 F 3d 202 (2nd Cir) 13.

²⁵ Adetutu Deborah Aina-Peleemo & Glorious Oleoghene Akpojaro, (2024) “Understanding Copyright and Fair Use in the Academic World” *University of Benin Journal of Business Law*, vol. 5(1), 160.

²⁶ Ratan Singh Solanki, (2019) “Web-based Learning: How fair is Fair use?” *International Journal of Innovative Technology and Exploring Engineering*, vol. 8(10), 1485, 1486.

²⁷ Shuguang Zhang, (2024) “Comparing Fair Dealing with Fair Use: Why Fair Dealing Can Better Balance Copyright Interests?” *Advances in Economics Management and Political Sciences*, vol. 75(1) 248, 249.

The fair use doctrine is a central part of modern copyright law and the academics, critics, journalists, teachers, film makers, fan-fiction writers, and technology companies all rely on the fair use doctrine for a certain amount of freedom in dealing with other people's copyrights. This doctrine recognizes that very few works are created without some recognizable borrowing from earlier works. Fair use allows copyrighted material to be used without permission; in so doing, it sets limits on the expansive rights of copyright owners to control the reproduction and performance of their works. As part of copyright law's overall balance between authorial incentives and public freedom, the fair use doctrine "permits and requires courts to avoid rigid application of the copyright statute, when it would restrain the very creativity that law is designed to foster."²⁸

The fair use defense is a legal principle initially recognized as a doctrine before being formally enacted and codified in Legislation.²⁹ In the U.S. Copyright Act 1976, Congress codified its understanding of the fair use doctrine in a fact-seeking four-factor test. The test is a balancing test, with each of the factors weighed together to determine whether an unauthorized appropriation of a copyrighted work is an infringement of the copyright owner's rights, or a use permitted by law.³⁰ Section 107 provides that the fair use of a copyrighted work...for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright. In determining whether the use made of a work in any particular case is a fair use, the factors to be considered shall include:

- (1) the purpose and character of the use, including whether such use is of a commercial nature or is for non-profit educational purposes;
- (2) the nature of the copyrighted work;
- (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
- (4) the effect of the use upon the potential market for or value of the copyrighted work.

The fact that a work is unpublished shall not itself bar a finding of fair use if such finding is made upon consideration of all the above factors.³¹

Courts typically focus most of their analysis on the first, fourth, and third factors, respectively. The first of the four fair use factors, "the purpose and character of the use," seems to be the most influential, as it assesses how compelling an unauthorized use may be. It raises questions such as whether the use of the work is transformative in a way that advances the goals of copyright law, whether the sole purpose for the use is commercial exploitation without a public benefit, and whether the use of the work serves non-profit educational purposes.³² The U.S. Supreme Court held that parody can be fair use, even if it's commercial, because it adds new expression and meaning (transformative use).³³ Transformative use is a sort of value-added

²⁸ Matthew Sag, (2011), "The Prehistory of Fair Use" *Brooklyn Law Review*, vol. 76(4) 1, 1.

²⁹ Pierre N. Leval, (1990) "Towards a Fair Use Standard" *Harvard Law Review*, vol. 103(5), 1105-1136.

³⁰ Trevor G. Reed, (2019) "Fair Use as Cultural Appropriation" *California Law Review*, vol. 109, 1373, 1403.

³¹ The U.S. Copyright Act 1976 s 107.

³² Matthew D. Bunker, (2019), "Decoding Academic Fair Use: Transformative Use and the Fair Use Doctrine in Scholarship" *Journal of Copyright in Education and Librarianship*, vol. 3(1) 1, 2.

³³ *Campell vs. Acuff-Rose Music, Inc.* (1994).

borrowing that emphasizes adding new meaning or message to the borrowed work or, in some cases, the use of the work in a different functional context.³⁴

The third factor, “the amount and substantiality of the portion used without permission in relation to the copyrighted work as a whole,” may also play a significant role, particularly when the copied proportion of the work seems excessive in comparison to any publicly beneficial use being claimed, or when the unauthorized use captures the “heart” of the original work.³⁵ The fourth factor, “the effect of the use upon the potential market or value of the copyrighted work,” is also highly influential. It addresses the potential changes in economic value an unauthorized use would impose on the current copyright owner and whether the use will preempt future authorized uses of the work, and compares these to the public benefits of the use of the work.³⁶

In the case of *Harper & Row Publishers, Inc. vs. Nation Enterprises* (1985), former President Gerald Ford sold plaintiff Harper & Row Publishers, Inc. the right to publish his memoirs. Time magazine paid Harper & Row for the exclusive right to serialize excerpts of the unpublished memoirs. Before Time began serializing, the defendant Nation Enterprises obtained an unauthorized copy of the unpublished memoirs and published an article, which constituted verbatim quotes taken from the manuscript. The Court held that although the excerpts constituted a quantitatively insubstantial portion of the memoirs, they represented “the heart of the book” and were qualitatively substantial in view of their expressive value and their key role in the infringing work. Consequently, noting that the effect of the use upon the potential market for the copyrighted work was the single most important element of fair use, the Court found that the defendant’s use directly competed for a share of the market and presented clear-cut evidence of actual damage.³⁷

In *Authors Guild v. Google, Inc.* (2015), Google collaborated with several major research libraries to digitize their collections for the Google Books project. Plaintiffs, the Authors Guild and individual copyright owners, complained that Google scanned more than twenty-million books without permission or payment of license fees. Google made the digital copies available to its library partners. It also maintained copies on Google servers and on backup tapes, created an electronic index, and displayed “snippets” of text in search engine results. Plaintiffs alleged that Google infringed by using copyrighted books without permission. The Court held that Google’s digitization and subsequent use of the copyrighted works was fair use, concluding that Google’s use was transformative.³⁸

The Berne Convention for the Protection of Literary and Artistic Works (Berne Convention) also explicitly stipulates the copyright limitations and exceptions. Under Article 10,

(1) It shall be permissible to make quotations from a work which has already been lawfully made available to the public, provided that their making is compatible with fair practice, and their extent does not exceed that justified by the purpose, including quotations from newspaper articles and periodicals in the form of press summaries.

³⁴ Matthew D. Bunker, (2019), “Decoding Academic Fair Use: Transformative Use and the Fair Use Doctrine in Scholarship” *Journal of Copyright in Education and Librarianship*, vol. 3(1) 1, 2.

³⁵ Trevor G. Reed, (2019) “Fair Use as Cultural Appropriation” *California Law Review*, vol. 109, 1373, 1403.

³⁶ *Ibid.*

³⁷ *Harper & Row Publishers, Inc. vs. Nation Enterprises* (1985).

³⁸ *Authors Guild vs. Google, Inc.*, (2015) 804 F 3d 202 (2nd Cir).

(2) It shall be a matter for legislation in the countries of the Union, and for special agreements existing or to be concluded between them, to permit the utilization, to the extent justified by the purpose, of literary or artistic works by way of illustration in publications, broadcasts or sound or visual recordings for teaching, provided such utilization is compatible with fair practice.”

Article 2bis. (2) provides that: “It shall also be a matter for legislation in the countries of the Union to determine the conditions under which lectures, addresses and other works of the same nature which are delivered in public may be reproduced by the press, broadcast, communicated to the public by wire and made the subject of public communication as envisaged in Article 11 (1) of this Convention, when such use is justified by the informatory purpose.”

As a general provision for exceptions, Article 9(2) recites: “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.” These general provisions contain three conditions which are jointly known as the ‘three-step test’. As the name suggests, the test consists of three cumulative steps or requirements. Limitations or exceptions to exclusive rights must be confined to:

- (a) certain special cases
- (b) that do not conflict with a normal exploitation of the work and
- (c) that do not unreasonably prejudice the legitimate interests of the author.³⁹

The three-step test has become the international standard for assessing the permissibility of copyright exceptions generally. In 1994, the three-step test was incorporated into the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) under Article 13 of TRIPS Agreement also provides for limitations on and exceptions to copyrights which provides that “Members shall confine limitations or 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 right holder.” The three-step test resembles the U.S. fair use provision in both form and function and it utilizes abstractly worded criteria for assessing the acceptability of certain types of uses of protected works.⁴⁰

Fair Use under Copyright Law 2019

The Copyright Law 2019 also includes several significant changes, one of which permits the reproduction of copyrighted works under specific conditions without the approval of the rights holder under Chapter XII. These statutory “fair use” defences include reporting current events; reproduction of literary and artistic works by libraries for non-commercial purposes such as study, teaching or private research; and the reproduction of the copy of a computer program as a back-up for personal use. According to Section 24, a person may make reproduction of a part of the published literary or artistic work for his personal use without authorization of the right holder and such production shall comply with fair use, shall not conflict with a normal

³⁹ Daniel J. Gervais (2015) *International Intellectual Property*, Edward Elgar Publishing Limited, 167.

⁴⁰ Pamela Samuelson & Kathryn Hashimoto, (2018) “Is the U.S. Fair Use Doctrine Compatible with Berne and TRIPS Obligations?”, *Universalism or Pluralism in International Copyright Law*, 8.

exploitation of the work or shall not unreasonably prejudice the legitimate interests of any right holder.⁴¹

Under Section 25, notwithstanding the provisions of subsection (a) of section 18, the following temporary reproduction of a literary or artistic work shall be permitted:

- (a) reproduction in the process of a digital transmission of the work or in an act of making a digitally stored work perceptible;
- (b) reproduction made by a person entitled to make that reproduction of the work under subsection (a).

Reproduction in the form of quotation is permitted under Section 26.

- (a) Notwithstanding the provisions of subsection (a) of section 18, the reproduction, in the form of quotation, of a part of a published work which has already been lawfully made available to the public shall be permitted without authorization of the right holder.
- (b) The reproduction under subsection (a) shall comply with fair practice and shall not exceed the extent justified by its purpose.
- (c) The quotation shall be accompanied by an indication of source and the name of the author, if his name appears in the work from which the quotation is taken.⁴²

According to Section 27, the following reproductions shall be permitted without authorization of the right holder. Provided that such reproduction shall comply with fair practice and does not exceed the extent justified by its purpose. The name of the author and the sources of reproduced literary or artistic work shall be indicated as far as practicable on all such copies:

- (a) reproduction of a part of a published work or a part of an article included in newspapers, magazines or journals for teaching purposes;
- (b) incorporating the copies made under subsection (a) into printed and electronic course packs to be used in the course of instruction by the educational institutions;
- (c) incorporating portions of works in printed or electronic form in assignments and portfolios, theses and dissertations for personal use and for library deposit by the persons receiving those instructions.⁴³

Moreover, any library or archive whose activities do not serve direct or indirect commercial gain may, without the authorization of the right holder, make a single copy of the work by the reproduction. This allows reproduction of a part or extract of the published article or other literary or artistic work on the request of a natural person and reproduction in order to preserve or replace a copy which has been lost, destroyed or rendered unusable to rent in the permanent collection of another similar library or archive.

Copies can be made for the purpose of duplication, preservation and libraries may supply each other, whether by post, fax or secure electronic transmission, with a copy of a work existing in their collections. But it is important that electronic files shall be deleted immediately after

⁴¹ The Copyright Law 2019 s 24.

⁴² The Copyright Law 2019 s 26.

⁴³ The Copyright Law 2019 s 27.

printing a paper copy from an electronic copy of a work. A paper copy may be supplied by the receiving library to a user of such library. This reproduction and supply process shall be non-recurring. A library or archive may, for the purpose of teaching or research, translate literary or artistic works lawfully acquired or accessed when those works are not available in a language required by such library or archive's users. A natural person or an organization may translate literary or artistic works from or into minority languages provided that such translation is non-commercial and for public information purposes.⁴⁴

Moreover, the law allows for the reproduction made for the purpose of reporting current events, broadcasting or communication to the public of current political, economic or religious articles included in a published newspaper without authorization of the right holder, subject to the obligation to indicate the source and the name of the author if his name appears on it.⁴⁵ The computer programmes may also be reproduced in a single copy or the adaption of the copy by the lawful owner of that copy shall be permitted without authorization of the right holder if the reproduction or the adaption is for personal use and for archival purposes.⁴⁶ Furthermore, the importation of a copy of a literary or artistic work by a natural person for non-commercial purposes shall be permitted without the authorization of the right holder.⁴⁷

Despite the existence of copyright law, there have been relatively few cases prosecuted solely under the previous copyright act. The analysis of the two case studies, *Maung Nyi Pu vs. East End Films* (1939) and *U Hla Win and two others vs. Daw Kyi Kyi @ Daw Yin Wai Lwin* (1999), reveals that both cases primarily involved direct copyright infringement under the Copyright Act of 1911. Although these cases were decided before the introduction of the Copyright Law 2019, analyzing them through the lens of the fair use doctrine helps illustrate how similar cases might be interpreted under the current legal framework. Such analysis is essential to illustrate the practical implications of introducing fair use into Myanmar's copyright regime.

The very first reported case is *Maung Nyi Pu vs. East End Films*, 1939.⁴⁸ The plaintiff, U Nyi Pu, who is the sole proprietor of a film-producing business called the "A1 Film Company" brought a suit against the "East End Films" for the violation of the copyright of A1 Film Company by using a photograph of Ma Than Tin in an advertisement or announcement of the forthcoming productions of the defendants in the *Burmese Cinema Journal*. The plaintiffs claimed that the reproduction of the photograph of Ma Than Tin was the infringement of the plaintiffs' copyright and also claimed an injunction against the defendants and Rs.100 by way of nominal damages. The court decided that there was an authorization by the defendant in the infringement of plaintiff's copyright and allowed the relief claimed by the plaintiff as to the infringement.

In this case, the defendants used a photograph owned by the plaintiff's film company for advertising purposes without authorization. When analyzed using the fair use factors, the purpose and character of the use were commercial rather than educational or transformative, which would weigh heavily against fair use. Although only one photograph was used, it represented the central promotional image of the plaintiff's work and therefore captured the "heart" of the original

⁴⁴ The Copyright Law 2019 s 28.

⁴⁵ The Copyright Law 2019 s 29.

⁴⁶ The Copyright Law 2019 s 30.

⁴⁷ The Copyright Law 2019 s 31.

⁴⁸ *Maung Nyi Pu vs. East End Films*, (1939) AIR (Rangoon) 266.

material. The commercial nature of the use and the potential harm to the plaintiff's economic interest in promoting his productions would likely prevent this case from qualifying as fair use under Section 24 of the 2019 Law, which requires that reproduction shall not conflict with normal exploitation of the work or unreasonably prejudice the legitimate interests of the right holder. The second reported case is the case of *U Hla Win and two others vs. Daw Kyi Kyi @ Daw Yin Wai Lwin*, 1999,⁴⁹ where Daw Kyi Kyi sued the producers of Phowa Video Production for the modification and reproduction as a video of the book written by her called "Hmine Wae Chit Tae Khet Thissa". Daw Kyi Kyi has written the book "Hmine Wae Chit Tae Khet Thissa" which is published in 1981 and from that time she had the copyright to the book according to Section 1(1) of the Copyright Act 1911.⁵⁰ Then she sold the manuscript to Daw Khin Than for video production with Myanmar Kyat 1,000. Daw Khin Than later sold the manuscript to Phowa Video Production and Phowa Video Production produced the video across the country under a slightly changed name of "Hmine Wae Chit Thaw Khet Thissa" but it did not get permission from Daw Kyi Kyi, the copyright owner. Therefore, the court decided that the owner and producers of Phowa Video Production has infringed the copyright of the author by making modifications to the work of the author including the contents and title of the manuscript, reproducing as a video, and broadcasting it nationwide. It also decided to compensate Myanmar Kyats 50,000 to the author.

Similarly, in this case, the defendants modified and reproduced the plaintiff's literary work as a video production without permission. Although the adaptation might appear transformative, the alteration primarily served a commercial purpose and did not introduce new meaning, commentary, or expression that would benefit the public. Under the fair use analysis, the purpose and character of the use were commercial, the amount and substantiality of the copied portion encompassed the essence of the original work, and the effect on the market was significant since the video adaptation competed directly with the author's original book. Therefore, this case would also fail to qualify as fair use under the Copyright Law 2019.

Discussion

It can be seen that while fair use operates as a legal safeguard to promote education, research, and access to information, its boundaries are defined by the balance between public benefit and private rights. The Copyright Law 2019, particularly in Sections 24, 26, and 27, embodies this balance by permitting reproduction for personal, educational, and informational purposes, provided that such acts comply with fair use and do not conflict with normal exploitation of the work. However, these provisions refer to the concept but do not specify the factors for determining when a particular use is fair.

To achieve greater consistency and predictability, it is essential for Myanmar's copyright framework to include a clearer definition of fair use and practical guidelines that illustrate permissible uses. Drawing on international standards, such as the U.S. four-factor test and the Berne Convention's three-step test, could provide useful guidance for future judicial reasoning. It should explicitly define that uses for education, research, criticism and reporting and transformative purposes are presumptively fair, while commercial uses are not, unless they add substantial new value. The fair use analysis in Myanmar should consider both quantitative and

⁴⁹ *U Hla Win and two others vs. Daw Kyi Kyi @ Daw Yin Wai Lwin*, (1999) MLR 208.

⁵⁰ The Copyright Act 1911 s 1(1).

qualitative aspects of copying. Even where the proportion copied is minimal, if the material constitutes the core or commercially valuable part of the work, the use should not qualify as fair. Furthermore, the law or guidelines could specify that if the unauthorized use substitutes for or competes directly with the original, it is not fair. However, if it serves a new purpose without harming the market, it may qualify as fair use. Therefore, developing interpretive guidance or judicial precedents will be crucial to ensure consistent and equitable application of the fair use doctrine under the Copyright Law, 2019.

When compared with international jurisprudence, the outcomes of Myanmar's historical copyright cases reflect a stricter interpretation of infringement, with limited flexibility for transformative or socially beneficial uses. For instance, in *Harper & Row* case, the Court held that even a small excerpt from President Gerald Ford's unpublished memoir constituted infringement because it captured the "heart" of the work, thereby undermining its market value. Conversely, in *Authors Guild* case, the Court recognized Google's large-scale digitization of books as fair use, emphasizing the transformative purpose of creating a searchable database that benefited the public without substituting for the originals. These contrasting outcomes illustrate how U.S. courts apply a flexible, purpose-based analysis under the four-factor test. In Myanmar, however, the absence of judicial precedents on fair use and the need to develop statutory definitions in the Copyright Law 2019 could lead to rigid interpretations that prioritize protection over transformation. Therefore, developing judicial precedents or guidelines aligned with international standards would not only ensure that the fair use doctrine evolves but also balance the rights of authors with the broader social function of copyright.

Conclusion

Fair use is considered as a fundamental concept of copyright law which asserts that the public is entitled to access and use limited portions of copyrighted materials under certain defined circumstances provided that such usage is deemed proportionate to its purpose. As a legal defence to copyright infringement, fair use permits a limited degree of borrowing from copyrighted materials even in the absence of consent or payment to the copyright holder. However, the Copyright Law, 2019 does not contain separate provisions on fair use but the limitations and exceptions provisions under Chapter XII provide different circumstances in which a part of the copyrighted works is allowed to use without authorization from the copyright holder. Fair use under Myanmar's Copyright Law 2019 remains conceptually evolving and largely untested in judicial practice. This paper views that depending on the nature of the intended use, the allowable scope of fair use may vary significantly. The purpose behind the use of the copyrighted work plays a critical role in determining the extent to which fair use can be applied. Therefore, the law needs to develop clear definitions and guidelines based on the four-factor test of the US Copyright Act and the three-step test under the Berne Convention and TRIPS Agreement. Clearer judicial interpretation will not only enhance predictability but also strengthen the balance between protecting authors' rights and ensuring public access to knowledge.

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