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**Digital Technology, Copyright and Education
the Malaysian Perspective**

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Abstract: Internet has radically altered the traditional form of classroom instruction and is particularly vibrant for educational and distance learning programmes. One of the concerns that confront the educational institution is the accumulation of reading materials for classroom education. Most of these materials exist in the form of copyright works and hence the ensuing problem is the application of copyright law to distance learning. This paper would analyse recent changes to the copyright law in Malaysia to see whether it enhances the role of information technology in education and educational activities in Malaysia.

Keywords: Digital technology, copyright law in Malaysia, educational use, exemptions of copyright, fair dealing.

1. Introduction

Internet has radically altered the traditional form of classroom instruction and is particularly vibrant for educational and distance learning programmes. In many parts of the world, including Malaysia, digital technology proves to be a more convenient technology, well suited to the needs of educational spectrum as it can reach far wider audiences than the existing mode of instruction. More fundamentally, the interactive nature of the Internet as a medium of communication simulates a classroom atmosphere of face-to-face teaching. Nevertheless, as we are moving into the new millennium, and as we are leap-frogging to the information age, new questions arise as to how best utilise the countless advantages the Internet has brought forth to mankind in order to foster learning and education.

Virtual education is a new phenomenon in Malaysia. Despite its infancy, it has attracted many educational institutions to embark into virtual programmes. Some of them like UNITAR is already offering full degrees to students through virtual classrooms while others are in the midst of formulating new courses. At the primary school level, several smart schools (schools that integrate the latest technology and pedagogical method of teaching to stimulate young minds) have been established in Malaysia,. Needless to say, digital media has promised exciting prospects for the future of distance learning and education as a whole in Malaysia.

One of the concerns that confront the educational institutions is the accumulation of reading materials for classroom education. Most of these materials exist in the form of copyright works and

hence the ensuing problem is the application of copyright law to distance learning. This paper analyses recent changes to the copyright law in Malaysia to see whether it enhances the role of information technology in education and educational activities in Malaysia.

2. The discourse on the copyright and the Internet

The expansion of copyright into the digital network has activated debates on the proper policy on information and knowledge based products in the new media. Of most controversial is the view that copyright is dead on the Net[1]. The ease of which works can be replicated and distributed to others in the Net means, so they argue, that copyright is entirely unenforceable in the Net. The fear that the Internet would drastically change the scheme of things in the Internet leads the copyright owner to claim for greater rights. Indeed, the forceful lobbying of the copyright owner manifests itself in the conclusion of the WIPO Copyright Treaty (1996). Various amendments on national laws were triggered due to the conclusion of the Treaty. The Malaysian Copyright Amendment Act (1997) was also passed as a result of the WCT.

Well known copyright scholars, are, on the other hand, skeptical about the necessity of broadening rights for digital work. Professor Litman, forcefully argues that the given rationale which underpins the expansion is misplaced and if accepted might stultify the dissemination of ideas and works of expression. The narrow interpretation of reproduction proposed by the copyright owners would lead to a result that users could not even read and access an electronic work, without paying a fee to the copyright owner. This form of 'exclusive right to read' drastically differentiates a digital work with that a print work in a way that the reproduction right extends not only to replication but to consumption[2]<http://www.msen.com/litman/read.htm>. The linchpin of dissatisfaction revolves around the proposition that RAM copying infringes the reproduction right. However temporary and evanescent, RAM copying is, as it is a copy created accidentally by the computer every-time a work is translated into a human readable form, some decision in the US has viewed this as a form of reproduction[3].

The development of technological measures and the prohibition of encryption further strengthen the power of the copyright owner in controlling and monitoring the use and subsequent downstream use of their digital works. The inclusion of the proscription against anti-encryption measures in the WIPO Copyright Treaty marks the supremacy of the copyright owner's interest in the copyright world. It is no wonder that many commentators have argued persuasively against the tying of anti hacking measures with copyright policy[4].

Contractual scheme has often been used by copyright owners to remedy the perceived inadequacy of copyright means of protection. The shrinkwrap and the click on 'licences' operate to ensure the most optimum control by the copyright owner. These contractual rules subject the user to accede to the usage restrictions before being granted access to the work. In many ways, contractual licences may be used to further restrict fair use of work. Due to the manipulative nature of the contractual agreements, many commentators felt that certain rules in copyright should not be and are not capable of being varied by contract[5].

The end result is that access to ideas is contingent on copyright holders' marketing plans who, in turn, may threaten to limit the supply of competing works expressing or debunking those ideas.[6]

Between these two extremes of thought lies the third. This group proposes for the reification of the public interest by fine tuning copyright rights, limits and exceptions in a manner that effectively preserves the existing copyright balance. The idea is that the present public interest embodied in copyright must apply with equal force in digital works. Sir Anthony Mason describes the process of elevation of public interest in two ways:

First, where the scope or breadth of the interests of authors and owners of copyright, including the

concept of copyright, are in question, we should be astute to ensure that, in arriving at a balance, the public interest is not subordinated. Secondly, there is a strong argument for saying that the primacy of the public interest exceptions to owners' right should not be reduced or put at risk in the absence of a cogent case to the contrary.^[7]

3. Copyright law and digital technology in Malaysia - the new landscape

With the setting up of the Multimedia Super Corridor, changes have been made to the Copyright law to accommodate online and digital works. As a testimony to the Malaysian government's conscious effort to leap frog the country into the information age, most of the proposals forwarded by the WIPO Copyright Treaty 1996 was incorporated into the local copyright law, even before the Treaty was ratified by the country. The message is obvious, we must have a legal climate that is supportive of the Internet advancement if we desire to capture the full potential of it.

The objective of the Amendment is clearly espoused in the explanatory statement:

"Technological development, especially technology, has challenged traditional concepts of copyright protection. The proposed establishment of the Multimedia Super Corridor (MSC) will generate both challenges and opportunities for Malaysia. The success of the MSC will, to a certain extent, be determined by the contents that move through it. These include educational works, entertainment products and information that are protected under the copyright law. For the MSC to realize its full potential, it is essential that adequate legal protection be made available to these works. The Act is proposed to be amended towards this end, taking into account recent international developments in respect of certain copyright works".

Among the changes introduced by the 1997 Amendments are:

a) The introduction of 'communication right'.

It is felt that the present bundle of rights given to copyright owners is outmoded with the advent of networking. In particular, the term reproduction connotes some form of material transfer, a notion which is alien in the cyberspace. Due to this, although the act of transmission involves some form of reproduction, and hence caught under the Copyright Act, it is felt that the transmission itself must be proscribed under the law. This necessitates the introduction of the 'communication to the public' right.

This new broadly based, technology neutral right replaces and extends the existing technology-specific transmission-type rights; that is, the wireless broadcast right and the limited cable diffusion right. The new right will apply to works made available on the Internet and other online services, as well as works transmitted or broadcast to the public. It has broad application, applying to works, sound recording, cinematograph films and broadcasts.

The term 'communication to the public' is defined as 'the transmission of a work through a wire or wireless means to the public, including the making available of a work in such a way that members to the public may access the work from a place and at a time individually chosen by them'.

The term 'public' is not defined here. Presumably, the jurisprudence underlying the term 'performing to the public', the circumstances of performing and the nature of audience are among the factors which defines the contours of the term 'public' here. In Australia, the High Court of Australia in *Telstra v APRA*^[8] adopted a broader concept of 'public' and it is irrelevant where the

communication occurs as there can be a communication to individual members of the public in a private or domestic setting. The Court held that callers on hold constitute the copyright owner's public because others are prepared to pay the cost of them hearing the music[9].

This right covers both non-interactive and interactive transmission of works. The emphasis on the 'making available to the public' ensures that this right captures a situation where several unrelated persons (members of the public) may have individual access, from different places and at different times, to a work which is on a publicly accessible sites. The analogy is like posting to a public notice board. The fact whether anyone has actually retrieved the work from the notice board does not matter.

From its language, arguably, the communication right would cover these activities:

- ii) the manifestation of any form of display of the digitized form, including screen display, and
- ii) the transmission of work or the dispatch of materials along the information superhighway[10].

b) The clarification of the term 'fixation'

'fixation' means 'the embodiment of sounds, images or both, *or the representation* thereof in a material form sufficiently permanent or stable to permit to be perceived, reproduced or otherwise communicated during a period of more than transitory duration'.

The clarification of the term 'fixation' is to resolve any problems arising due to the intemporal and impermanency nature of electronic signals. In most probability, the amendment takes into account the current legal development which views RAM copying as an infringing conduct[11]. It is interesting to note that legal circles are beginning to accept that some temporary reproductions may not be as threatening to the copyright interests as they earlier anticipated[12].

c) The codification of the 'idea and expression dichotomy'.

S 2A Copyright protection shall not extend to any idea, procedure, method of operation or mathematical concept as such".

The inclusion of this provision is quite surprising. Absent of any express codification in the statute, the distinction between idea and expression is well-founded in case law. In

Goodyear Tire & Rubber Co & Anor v Silverstone Tire & Rubber Co Sdn Bhd[13], Abdul Malek J of the High Court of Kuala Lumpur reiterates the well established principle that Copyright law is not concerned with the reproduction of ideas, but with the reproduction of the form in which ideas are expressed. If the intention is to reinforce the distinction in the digital environment, it does not help much. It has often been pointed out that networking further blurs the distinction between protectable elements known as expression and non-protectable realm of ideas[14].

d) the introduction of prohibition of anti encryption devices

s 36(3) and (4) which provides:

(3) Copyright is infringed by any person who circumvents or causes any other person to circumvent any effective technological measures that are used by authors in connection with the exercise of their rights under this Act and that restrict acts, in respect of their works, which are not authorized by the authors concerned or permitted by law.

(4) Copyright is infringed by any person who knowingly performs any of the following acts

knowing or having reasonable grounds to know that it will induce, enable, facilitate or conceal an infringement of any right under this Act:

- (a) the removal or alteration of any electronic rights management information without authority;
- (b) the distribution, importation for distribution or communication to the public, without authority, of works or copies of works knowing that electronic rights management information has been removed or altered without authority.

Employing technical devices to override encryption is punishable to a fine exceeding RM250,00 or to imprisonment for a term not exceeding three years or to both and for any subsequent offence, to a fine not exceeding RM500,000 or to imprisonment for a term not exceeding five years or to both.

The inclusion of prohibition on anti-encryption measures have also been described as a further intrusion into the user's activity and erosion of the larger public interest in accessing information[15]. In particular, the prohibition can also constrain activities which would otherwise be considered as fair.[16] Due to this, the US Digital Millennium Copyright Act carves out three specific technology-related exceptions to the ban on circumvention; i.e. encryption research[17], reverse engineering[18] and computer security testing[19]. The circumvention ban also does not apply to a non-profit library, archive, or educational institution. Despite such exceptions, the library quarters feel that the provision is burdensome to librarian as it requires additional effort by the librarian to identify and exempt specific categories of users on the finding of need[20].

4. Distance learning and the implications of copyright law

The USA[21] and Australia[22] have undertaken a specific study on examining the impact of copyright policy on the development of distance learning. As the findings and the recommendations contained in the two reports are relevant to my paper, I have made comprehensive reference to them.

Educational institutions are confronted with two main problems:

- a) the use of portions of the copyright works in educational multimedia projects created by educators or students as part of the systematic learning activity at non-profit educational institutions.
- b) The performance and display of copyrighted works in distance learning classes of nonprofit educational institutions.

Bearing in mind the way educational institutions are conducting their distance learning programmes via the new communication network, there are various ways which copyright can be implicated:

- i) communication via a computer network ; whenever a work is transmitted to others, RAM copies are made.
- ii) scanning of materials into digital format to be uploaded into the university's server,
- iii) student's temporary or permanent copies by caching, downloading or printing out material after receipt
- iv) distribution of copies to the public.

Invariably, the educational institution would create course materials for the students' consumption. The source of the material would be either from the existing printed works, audio visual works or works which are already available on the Internet. Use of portions infringes:

- i) reproduction right
- ii) new definition of material form includes digital format - whether visible or not
- iii) performance and display - would be against (b) and (aa) - communication to the public.

If portions of the work come from materials posted in the website without restriction, presumably, an issue of implied licence may arise here.

It should be stressed here that the new communication to the public right is so wide that it constrains the activities of the educational institution. The new right would arguably include asynchronous delivery over computer networks as it is made clear that members of the public may access the work from a place and at a time individually chosen by them.

5. Current Exemptions under the Copyright Act 1987.

Unlike the US legislation that contains an open-ended fair use scheme, Malaysia has opted for a closed set of specific exceptions, which is similar to the approach to other common law countries. Under the Copyright Act 1987, several specific exclusions can be found. The general fair dealing section can be found in subsection (a)(2) of section 13. Other types of exclusions to excuse other forms of educational use are also in existence. Below is a list of the exceptions:

5.1 *fair dealing for the specified purpose.*

s 13(2)(a) provides:

the doing of any of the acts referred to in subsection (1) by way of fair dealing for purposes of *non profit research, private study, criticism, review* or the *reporting of current events*, subject to the condition that if such use is public, it is accompanied by an acknowledgement of the title of the work and its authorship, except where the work is in connection with the doing of any of such acts for the purposes of non-profit research, private study and the reporting of current events by means of a sound recording, film or broadcast.

The Act does not specify any factors to be considered in determining whether a dealing is a fair dealing: the factors are therefore left to the common law. Indeed, in defining the contours of fair dealing, the guidelines given by Lord Denning MR in *Hubbard v Vosper* will be relevant.

It is impossible to define what is a fair dealing. It must be a question of degree. You must first consider the number and extent of quotations and extracts. Next you must consider the proportions ... Other considerations may come to mind also. But, after all is said and done, it must be a matter of impression.

The exception for private study is similar to those in the UK and Canada and unlike Australia which provide users greater rights to copy. Unfortunately, at present, this provision has not been tested in the Malaysian courts. It will be instructive then to see how this provision has been interpreted in other common law jurisdictions:

To be a fair dealing, the act must take place within the approved purposes. As Mr. Justice Ungood Thomas observed in *Nora Beloff v Pressdram Limited and Another*^[23]:

"It is fair dealing directed to and consequently limited to and to be judged in relation to the approved purposes. It is dealing which is fair for the approved purposes and not dealing which might be fair for some other purpose or fair in general.

In order to come within the "private study" exception, the dealing (usually copying) must be undertaken by the student himself: *University of London Press, Ltd v University Tutorial Press, Ltd* [24] and *Silitoe & Others v McGraw-Hill Book Company (U.K) Ltd*[25]. Meanwhile the Federal Court of Australia has defined 'research' according to its ordinary dictionary meaning. Using the Macquire dictionary, the Court defined 'research' as being:

diligent and systematic enquiry or investigation into a subject in order to discover facts or principles: research in nuclear physics[26].

The narrow interpretation of the term 'private study' means that the exception is not applicable to others who facilitate students with study materials. In Australia, it has been considered whether an amendment to the Act should be made to permit dealings on behalf of others, including libraries and archives[27]. Similarly in the UK, one person can copy on behalf of another under certain conditions.[28] In New Zealand, in the case of *Longman Group Ltd v Carrington Technical Institute Board of Governors & Anor*, it was held that reproduction of works by a person on behalf of another would be precluded in the language of the exception for educational use.

The fair use doctrine in the US is open-ended and is not confined to a specified range of purposes. The relevant section is section 107 of the US Act which provides as follows:

Notwithstanding the provisions of sections 106 and 106A, the fair use of a copyright work including such use by reproduction in copies or phonorecords or by any other means specified by that section, 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 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.

On a comparative analysis, it would seem that the fair dealing provision in Malaysia is the narrowest of all lot. Not only the construction of 'private research' is so strict in that it does not give allowance of others who facilitate educational use, but also the purposes in which one can argue to be fair dealing are also restricted. Moreover, it also seemed that this exception does not apply to the use of a film, sound recording, broadcasts or cable program[29]. The corresponding Australian provision is wider as it also provides for 'audio-visual works'.

5.2 Other privileges enjoyed by the educational institution.

a) the inclusion of a work in a broadcast for illustration for teaching purposes. S.13(2)(f) provides:

the inclusion of a work in a broadcast, performance, showing or playing to the public, collection of literary or musical works, sound recording or film, if such inclusion is made for teaching purposes and is compatible with fair practice:

Provided that mention is made of the source and of the name of the author which appears on the work used.

This provision allows:

- * the inclusion of a work in a broadcast of the collection of literary or musical works, sound recordings or film,

- * the inclusion of collection of literary or musical works, sound recordings or film in the performance, showing or playing to the public

It is a limited right, limited by four factors:

- * inclusion is made for teaching purpose,

- * compatible with fair practice,

- * mention is made of the source,

- * acknowledgement is made as to the author of the work.

In Australia, there was a consensus among the interested parties that the licence to copy broadcasts should be extended to include narrowcasting, cable and satellite delivery of programs, and material contained in foreign broadcasts received in Australia.

b) the setting of exam questions - any use of a work with the exception of reprographic use of musical work. S 13 (ff) expressly states:

any use of a work for the purpose of an examination by way of setting the questions to the candidates or answering the questions:

Provided that a reprographic copy of a musical work shall not be made for use by an examination candidate in performing the work;

c) Recording made by educational institution of broadcast. S 13(g) provides:

the recording made in schools, universities or educational institutions of a work included in a broadcast intended for such schools, universities or educational institutions;

d) S.9(4) express exemption on reprography - if such reproduction is compatible with fair dealing, in particular for private study.

Reproduction of the typographical arrangement of a published edition for the purposes of research, private study, criticism, review or the reporting of current events does not infringe the copyright subsisting by virtue of this section if such reproduction is compatible with fair dealing.

Again, the reproduction must not be for the purpose of garnering commercial profit. In *Newspaper Licensing Agency Limited v Marks & Spencer Plc*^[30] Mr. Justice Lightman opined although the newspaper cuttings by the defendant are generally only small parts of the newspapers as a whole, the defendant's conduct does not constitute "fair dealing". There is a wholesale copying of material which goes far beyond what is necessary to report current events to M&S personnel.

Looking at all the above exceptions on educational use, it is apparent that the provisions are couched

in a way that they are mostly technology specific. E.g while an educational institution is allowed to

(i) record a broadcast for educational use,

(i) showing or playing a work to the public collection of literary or musical works, sound recording or film, and

(ii) inclusion for illustration for teaching purposes

but it does not enjoy the right for:

* a synchronous delivery over computer network,

* Not the creation of course modules - the analogy with the copying of newspaper articles for internal company's distribution. *Newspaper Licensing Agency Ltd v Marks & Spencer Plc Times*,^[31] and

* Not downloading of materials from the Internet

The conclusion that one can derive from the above analysis is that one is simply punished for using the new technology to access information. Ironically, this is the problem that one encounters in discussing the use of electronic materials, which is in actual fact the result of transferring a paper-based vocabulary to an electronic situation.

5.3 Library exceptions

Any use by public library which comports to public interest and fair practice is allowed under the Act. S.13(i) provides:

any use made of a work by or under the direction or control of the Government, by the National Archives or any State Archives, by the National Library, or any State library, or by such public libraries and educational, scientific or professional institutions as the Minister may by order prescribe, where such use is in the public interest and is compatible with fair practice and the provisions of any regulations, and -

(i) no profit is derived therefrom; and

(ii) no admission fee is charged for the performance, showing or playing, if any, to the public of the work thus used

e) S.9(5) permits the reproduction of the typographical arrangement by national library if it is in the public interest and compatible to fair dealing.

The Government, the National Archives, or any State Archives, the National Library, or any State library, or any public libraries and educational, scientific or professional institutions as the Minister may by order prescribe, may reproduce the typographical arrangement of a published edition without infringing the copyright subsisting by virtue of this section if such reproduction is in the public interest and is compatible with fair dealing and the provisions of any regulations.

The library exception is the broadest among the other in respect of the construction of the language. Despite that the language is fraught with many difficulties, for example, would it extend to the communication to the public right. If it is as broad as it professes to be, why should a separate exception is carved out for reprographic use as is made clear in section 9(5). Another issue arises from the fact that the exception is only applicable to 'work'. Would this by implication means that the

other subject matters of copyright would not be applicable? Clearly, with the advancement of technological means of expression, this provision would have to be re-studied and revisited to ensure that the primary objective behind its promulgation can be achieved.

5.4 *Other miscellaneous exceptions*

i) The making of quotation from a published work is allowed as long as compatible with fair practice. Section 13(m) reads:

The making of quotations from a published work if they are 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:

Provided that mention is made of the source and of the name of the author which appears on the work thus used

ii) Reproduction of articles published in the newspapers. Section 13(2)(n) provides:

The reproduction by the press, the broadcasting or the showing to the public of articles published in newspapers or periodicals on current topics, if such reproduction, broadcasting or showing has not been expressly reserved:

Provided that the source is clearly indicated.

These two exceptions, although may be entirely acceptable in the print environment, may pose difficulties, so they argue, in the network environment. Interesting enough, Malaysia is not ready for a comprehensive statutory licensing regime on all copyright subject matters. Currently, no licensing scheme exists to regulate the photocopying of copyright material from newspapers, what more for digital copying.

6. The expansion of fair dealing and permitted use in the digital world.

The policy embodied in all national copyright legislation and international treatise is that concepts of 'fair dealing' and 'fair use' must continually be addressed and sustained. Article 13 of the TRIPS Agreement defines the scope of permissible exceptions to the exclusive rights of authors at the international level. Article 13 of the Agreement provides as follows:

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.

WIPO International Bureau commented on the above provision in this manner:

None of the limitations and exceptions permitted by the Berne Convention should, if correctly applied, conflict with the normal exploitation of the work and not of them should, if correctly applied, prejudice unreasonably the legitimate interests of the right holder.

The limitations posed by the TRIPS Agreement also found acceptance in the WIPO Copyright Treaty (1996) (WCT). Article 10(1) of the WCT provides,

(1) Contracting Parties may, in their legislation, provide for 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.

As made clear by the explanatory statement, 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 exceptions and limitations that are appropriate in the digital network environment.

The benchmark of both the TRIPS Agreement and the WCT is the Berne Convention. The relevant article for exclusion of copyright is Article 9(2) of the Berne Convention which provides:

It shall be a matter for the 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 a work and does not unreasonably prejudice the legitimate interests of the author.

The Berne Convention underlined the 3 steps test which is later taken as the blueprint of the exceptions of the WCT. Regardless of the type of exception, the following factors must be complied with;

(i) reproduction is only allowed in certain circumstances

(ii) the exceptions and limitations are permitted only where they 'do not conflict with the normal exploitation of a work'

(iii) the exceptions and limitations to the reproduction right should 'not unreasonably prejudice the legitimate interests of the author.'[\[32\]](#)

From the above exposition of the various exceptions in the Malaysian Copyright Law, a number of observations can be drawn:

* the concept of fair dealing too restrictive - only covers private and individual use of copyright for learning and education,

* other exemptions are uncertain in its application to the digital environment,

* other exemptions are outmoded and do not extend to the full range of activities involved in digital distance education,

* there exists no satisfactory licensing scheme, and hence no satisfactory alternative is available for the users[\[33\]](#).

Clearly, there is a need to optimize the quality and availability of forms of long distance education that takes full advantage of today's technological capabilities. Expansion of the exceptions to cover digital works provides the expression of A 9(2) of the Berne Convention. Below are some of the suggestions on how to achieve this:

(a) with regards to the provision on fair dealing, there is a need to expand the coverage of rights to the extent technologically necessary. This would require the expansion of the type of subject matter allowed to be used to other types of work besides 'work'.

(b) To allow others who facilitate students with providing course materials such as librarian, lecturers and educational institution to do the copying on behalf of the students. To ensure that unnecessary downstream use of the works outside the context of educational use do not occur, certain stringent requirements can be imposed e.g. it is only applicable to those involved in an educational institution.

(c) to expand "showing or playing to the public" exception to cover transmission of online material or transmission by digital means.

(d) to expand the exception for use of work for educational purposes to not only those used for illustration, but also for materials directly related and of assistance to the teaching.

(e) illustration purposes possibly means that student can choose to view a work asynchronously at a time suitable for them. Use of works for illustration purposes must mean that the use is not dependent on physical classroom.

(f) permitting transmission to be made to students officially enrolled in the course, regardless of their physical location. Limitations can be imposed e.g.:

- * schools will take effort to control downstream uses
- * must not reach to the extent of substituting the original work e.g. scanned material - must not be the whole book.
- * should cover only the performance of reasonable and limited portions of work.
- * must be the subject of study in the course rather than mere entertainment for students or unrelated background or transitional material.
- * Therefore would serve to limit the impact on primary or secondary markets.

The most important factor for the finding of the competitive effects of the use is whether it would vie with the primary market? Indeed, the simple fact that a use is limited for internal use would militate against any negative impact on the primary market of the work. Some limitations can be imposed on the use to ensure that there is no 'spill over effect' for example, the use must be within controlled environment. The institution can also be required to strictly observe of copyright law and take measures to guarantee that no further downstream use of materials occurs.

Such scheme would fit well with the well established jurisprudence that whenever a gain is made for use, fair dealing will never strike.[34] One must be mindful of the observation of Lord Denning in *Hubbard v Vosper*[35]:

"It is not fair dealing for a rival in the trade to take copyright material and use it for his own benefit". [36]

It is trite that the economic implications of a fair use with respect to the value of the work are relevant. However, there has recently been significant disagreement about the correct manner in which to interpret the clause, particularly in relation to the licensing, or potential licensing, of copying by collecting societies. On one hand, there is a view that if there is a ready market or means to pay for use, then fair use privileges would not operate. This view was highly criticised by some commentators as being circular in that it bars reliance on fair dealing once it can be proven that the copyright owner is deprived of a fee.[37]

(e) Allow the downloading and retention of materials by students. Arguably, the practice is analogous to time shifting exemption and so long as the materials are meant for private consumption, it should be allowed.

(f) expand the categories of works covered e.g. educational videos

An exception already exists for literary, musical works, sound recordings, film and broadcast for

illustration purposes. It would serve the interest of the educational institution if this exception is stretched to cover audio-visual works which are crucial in the creation of multimedia works for educational use.

(g) Allow the educational institution a right to upload works onto a server. In the US, it has been recommended that a new ephemeral recording exemption be created[38]. This is to allow an educator to upload a copyright work onto a server, to be subsequently transmitted to students enrolled in her course. Some limitations can be imposed on educational institutions exercising rights under this exemption such as

* that no copy be retained and used solely by the entity that made it,

* and no further copies be reproduced from it,

* remain in the server in a form accessible to students only for the duration of the course.

The possibility of building electronic archives may create a feeling of uneasiness to the copyright owners. They may feel concerned that such electronic archives would jeopardise their market in databases of information product[39]. They may believe that in a digital environment students could utilise this exception to access, copy and transmit significant portions of their works without fear of infringement, possibly causing irreparable damage to their market. However, the overall balance between public interest in access to expression of ideas would tip in favour of the exception.

(h) The need to clarify the library exception to cover any possible electronic use of a work in order to permit effective research and gathering and organising information.

One of the major service that a library does is lending materials to others. Undoubtedly, in a print environment, a library is free to lend out hard copies of materials to their patrons. The Australian Copyright Reform Law Committee has considered the expansion of the privilege to the making available of digital copies as well. The Committee recommends that libraries and archives be able to make royalty-free digital copies (including electronic transmission of a copy stored in digital form and the loan of a digital copy of a work on a carrier such as floppy disk) for the purpose of providing copies to users and other libraries and archives[40]. The Committee notes that the libraries should, at the request of users, be able to make and supply a digital copy of a work on the same terms as they can now make a hard copy. The Committee reiterates that the effect of its recommendation is not to permit systematic digitisation of a library's or archive's collection. This permission operates only if the authorised officer is, after reasonable investigation, satisfied that a copy (not being a second-hand copy) of the work cannot be obtained within a reasonable time at an ordinary commercial price. The majority of the Committee is also of the view that the supply of digital copies of copyright material by email should be treated as analogous to a library supplying copies of the same material in print form by mail or by fax[41]. However, this does not mean that a library or archives would be permitted to make the digital copy available to the public by placing it on a publicly accessible database maintained by the library or archives.

The library exception plays a crucial role in distance education where students are spread out geographically. The need to attend to remote students and users interests is among the important determinant of a successful distance learning program. Current services like interlibrary loan should be made electronically available to them. In this instance, libraries should be allowed to make electronic copies of a work to facilitate students learning.

Preservation of materials in a library collection is crucial in ensuring the availability of works to users. In an analogous manner, the making of a back up copy for software in case the original renders unusable or spoilt has been tolerated and accepted. By the same token, the preservation of works in electronic works should also be permitted. The broad language of provision (i) seemingly

would allow such interpretation to prevail in Malaysia. Since this section is broadly drafted to permit 'any use', it would seem that there is no need to refer specifically to digital copying. The only problem to such a wide construction is the fact that the use is allowed on 'works' and hence would have difficulty to be applied to other subject matter of copyright such as broadcast, audio visual and multimedia.

In Australia, it is recommended that a form of royalty-free copying is permitted whenever the work is in manuscript form or is an original artistic work, or if the work has been damaged or has deteriorated or if it has been lost or stolen[42]. The Committee is of the view that in some instances, copying should be permitted to preserve a sound recording, cinematograph film or any audiovisual item against damage, loss or destruction.

(i) these exceptions must not be overridden by new technological measures to control and monitor use of work.

New technology is being developed to monitor and licence the individual uses of copyright material. Copyright owners view this development as an indication that fair dealing is not necessary for the digital environment[43]. If this assertion is accepted, the idea that royalty free copying are available for purposes that are socially desirable is dead in the cyberworld. It is not difficult to conceive why the Copyright Law Committee Review of Australia rejected such idea. The Committee considers that a fundamental component of maximising the public interest is allowing the free flow of knowledge, ideas and information. On this basis, the Committee rejects the copyright owners submission for a scheme of remuneration to replace the free use of copyright material under the fair dealing provisions. The majority of the Committee does not agree that such schemes should be expanded so as to substitute for fair dealing.

(i) There is a need for special exclusion for external students. Precedent can be sought from the Australian law. S 10(1A) of the Australia Act states:

A fair dealing with a literary work (other than lecture notes) does not constitute an infringement of the copyright in the work if it is for the purpose of, or associated with, an approved course of study or research by an enrolled external student of an educational institution.

(j) The current licence to produce and publish translation is only available for print works but not electronic works

s 31 licence to produce and publish translation

(1) Any person may apply to the Tribunal for a licence to produce and publish in the national language a translation of a literary work written in any other language.

An increasing concern of the developing countries is that the privileges that they have bargained hard and won in the Berne era would be forgone in the digital era. Different countries have different national education policy and the fact that works are available in electronic format must not automatically be made them unavailable to be rendered accessible to others with different language needs.

7. Conclusion

Popular discourse on the viability of copyright in the Internet can be divided into two major streams of thought, that of the proponent and the opponent of the copyright expansion[44]. The former stresses on the need to provide certainty to the copyright owners who feel threaten with the copying ability of the new technology. The latter however, emphasized on the need to maintain an environment in which protection will not stifle dissemination of ideas and works of expression. The

copyright stakeholders view the aversion to expansion of their interest as amenable to amplifying the assertion of user's rights[45]. Interesting enough, both camps would sought assistance from the very philosophy of the copyright protection.

In this paper, exceptions and limitations have been enumerated in order to guarantee a fair balance of rights and interests. Those limitations concern the interest of the public to make informal use of information and cultural goods. My recommendation in the expansion of the existing exceptions represents only a minimalist approach. In Australia, the Copyright Reform Law Committee, after assessing the various positions in the UK, US, Canada, New Zealand and a few other countries, proposed for the expansion of fair dealing to an open-ended model that specifically refers to, but is not limited to, the current exclusive set of purposes and the general application of the 'fairness' factors to all fair dealings. The crucial objective is to strike 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[46].

Brudenall suggested a few alternatives to fair dealing in the digital environment. He conceived of a situation where copying can be allowed solely from within libraries. Individual could warrant on screen before downloading works for browsing or copying that they wish to view the work for their research and study, or any other existing category of fair dealing, and will not re-transmit the work. The other option is to generate revenue from advertising, rather than charging fees per access of each item of copyright material.[47]

It is interesting to note that the European Directive on the Harmonisation of Certain Aspects of Copyright and Related Rights in the Information Society has taken a hard-line approach in evolving exceptions to cater for public needs, particularly with reference to the communication to the public right[48]. Such a restrictive viewpoint is difficult to digest bearing in mind that everybody would benefit from the preservation of 'fair dealing'. We must not be oblivion to the fact that any attempt to replace the existing exceptions with a general scheme of remuneration is not only cumbersome, burdensome but also imposes both financial and administrative hardship to educational institutions. The reification of 'fair dealing' in the digital network, just like in analogue world, is essential to ensure free flow of information. In no way would these deprive the copyright owners from continuing to reap benefits from the investment that they have made in the creation of these works.

References

Barlow J (1994), *Selling Wine Without Bottles: The Economy of Mind on the Global Net*.
http://www.eff.org/pub/Intellectual_property/idea_economy.article.

Brudenall, 'The Future of Fair Dealing in Australian Copyright Law', (1997) *JILT* 1997(1), also available at http://elj.warwick.ac.uk/jilt/copyright/97_1brud/.

Cohen J.E, 'WIPO Copyright Treaty Implementation in the United States: Will Fair Use Survive', (1999) *EIPR* 21(5), 236-247.

Copyright Law Reform Committee, "Simplification of the Copyright Act 1968" Part I, Exceptions to the Exclusive Rights of Copyright Owners, (1988), Commonwealth of Australia, available at <<http://www.law.gov.au/clrc>>.

Cornish, G.P, 'Libraries and the Harmonisation of Copyright', (1998) *EIPR* 20(7), 241-243.

Council Directive on the Harmonisation of Certain Aspects of Copyright and Related Rights in the Information Society 21.05.1999, COM (1999) 250 final.

Dusollier S, 'Electrifying the Fence: The Legal Protection of Technological Measures For

Protecting Copyright', *EIPR* 1999, 21(6), 285-297.

Fraser S, 'The Copyright Battle: Emerging International Rules and Roadblocks on the Global Information Infrastructure', (1997) 15 *J. Marshall J. Computer & Info.L.* 759.

Ginsburg J, 'Authors and Users in Copyright' (1997) 45 *J. Copyright Soc'y U.S.A.* 1.

Hawkins C, 'Technological Measures: Saviour or Saboteur of the Public Domain', (1998) Vol. 9 No. 1, p. 45.

Heidi T, 'The Berne Three-Step Test and the Proposed Copyright Directive', *EIPR* 1999, 21(3), 105-109.

Hoeren T, 'Electronic Archives and the Press : Copyright Problems of Mass Media in the Digital Age', (1998) *EIPR*, 20(7), 256-266.

Ida Madieha Azmi, 'Electronic Works and Copyright: The Demise of Public Interest', [1998] 1 *MLJ* ci -cxxx.

Lewinsky S.V, 'A Successful Step Towards Copyright and Related Rights in the Information Age : The New E.C. Proposal for a Harmonisation Directive', (1998) *EIPR*, 20(4), 135-139.

Litman J, 'The Herbert Tenzer Memorial Conference: Copyright in the Twenty-First Century, The Role of the Copyright Office, the Exclusive Right to Read', (1994) 13 *Cardozo Arts & Ent.L.J.*29, also available at <http://www.msen.com/~litman/read.htm>.

Litman J, 'Revising Copyright Law for the Information Age', (1996) 75 *Or.L.Rev.*19 and Stephen Fraser, 'The Copyright Battle: Emerging International Rules and Roadblocks on the Global Information Infrastructure', (1997)15 *JMARJCIL* 759.

Litman J, 'Reforming Information Law in Copyright's Image', available at <http://www.msen.com/~litman/dayton.htm>.

Loundy D.J, 'Revising The Copyright Law for Electronic Publishing', (1995) 14 *JMARJCIL* 1.

Loundy, 'Revising the Copyright Law for Electronic Publishing', (1995) 14 *J. Marshall J. Computer & Info. L.*

Mason, Sir A, 'Public-interest objectives and the law of Copyright', (1998) *Journal of Law and Information Science* Vol 9 No.1, p.12.

Reilly D, 'The National Information Infrastructure and Copyright: Intersections and Tensions'.

Rothnie W.A, 'Idea and Expression in A Digital World', (1998) *Journal of Law and Information Science*, Vol. 9 No.1, p. 77.

Samuelson P, 'Intellectual Property and the Digital Economy: Why the Anti Circumvention Regulations Need to be Revised', (1999) 14 *Berkeley Tech. L.J.* 519.

US Copyright Office, May (1999), *Report on Copyright and Digital Distance Education*.

Vinje, 'Copyright Imperilled', (1999) *EIPR* 192-207.

Weatherall K., 'An End to Private Communications in Copyright? The Expansion of Rights to Communicate to the Public, Part I & II', [1999] *EIPR* 342 & [1999] *EIPR* 398.

[1] Barlow J (1994), *Selling Wine Without Bottles: The Economy of Mind on the Global Net*. <http://www.eff.org/pub/Intellectual_property/idea_economy.article>.

[2] Litman J, 'The Herbet Tenzer Memorial Conference: Copyright in the Twenty-First Century, The Role of the Copyright Office, the Exclusive Right to Read', (1994) 13 *Cardozo Arts & Ent.L.J.*29, also available at [[. See also Litman J, 'Revising Copyright Law for the Information Age', \(1996\) 75 \] *Or.L.Rev.*19 and Stephen Fraser, 'The Copyright Battle: Emerging International Rules and Roadblocks on the Global Information Infrastructure', \(1997\)15 *JMARJCIL* 759.](#)

[3] David J. Loundy, 'Revising The Copyright Law for Electronic Publishing', (1995) 14 *JMARJCIL* 1.

[4] Samuelson P, 'Intellectual Property and the Digital Economy: Why the Anti Circumvention Regulations Need to be Revised', (1999) 14 *Berkeley Tech. L.J.* 519 and Hawkins C, 'Technological Measures: Saviour or Saboteur of the Public Domain', (1998) Vol. 9 No. 1, p. 45.

[5] See Cohen J.E, 'WIPO Copyright Treaty Implementation in the United States: Will Fair Use Survive', (1999) *EIPR* 21(5), 236-247; and Reilly D, 'The National Information Infrastructure and Copyright: Intersections and Tensions'.

[6] Litman J, *Reforming Information Law in Copyright's Image*, available at <<http://www.msen.com/~litman/dayton.htm>>.

[7] Sir Anthony Mason, 'Public-interest objectives and the law of Copyright', (1998) *Journal of Law and Information Science* Vol 9 No.1, p.12.

[8] (1997) 146 ALR 649.

[9] See Weatherall K., 'An End to Private Communications in Copyright? The Expansion of Rights to Communicate to the Public, Part I & II', [1999] *EIPR* 342 & [1999] *EIPR* 398.

[10] See my earlier work, 'Electronic Works and Copyright: The Demise of Public Interest', [1998] 1 *MLJ* ci -cxx.

[11] See e.g. *MAI v Peak*, 991 F.2d 511 (9th Cir.1993), *Advanced Computer Services v MAI Systems Corp*, 845 F. Supp 356 (ED va 1994) and *Triad Systems Corp v Southeastern Express Co*, 1994 US Dist LEXIS 5390 (ND Cal 1994), aff'd 64 F 3d 1330 (9th Cir 1995). Commentators argue that as the RAM copying are normally diminished once the computer is turned off means that it is unstable enough to be considered as 'copies'. See the excellent analysis of Loundy, 'Revising the Copyright Law for Electronic Publishing', (1995) 14 *J. Marshall J. Computer & Info. L.*

[12] See the *Council Directive on the Harmonisation of Certain Aspects of Copyright and Related Rights in the Information Society*. See also the analysis by Lewinsky S.V, 'A Successful Step Towards Copyright and Related Rights in the Information Age : The New E.C. Proposal for a Harmonisation Directive', (1998) *EIPR*, 20(4), 135-139. According to Article 5(1) of the Proposal, Member States would have to except certain temporary reproductions under a number of specified conditions. Only such acts of temporary reproduction which are integral to a technological process are covered by the exception, if they are made for the sole purpose of enabling a use--such as an on-line transmission or a reproduction--of a work or other subject matter. In addition, such reproduction

must not have any separate economic significance. See also s 202(b) of the US Digital Millennium Copyright Act.

[13] [1994] 1 MLJ 348.

[14] See Rothnie W.A, 'Idea and Expression in A Digital World', (1998) *Journal of Law and Information Science*, Vol. 9 No.1, p. 77.

[15] See Vinje, 'Copyright Imperilled', (1999) *EIPR* 192-207.

[16] See Cornish, G.P, 'Libraries and the Harmonisation of Copyright', (1998) *EIPR* 20(7), 241-243. See also Dusollier S, 'Electrifying the Fence: The Legal Protection of Technological Measures For Protecting Copyright', *EIPR* 1999, 21(6), 285-297. The latter views the protection of technical measures controlling access to works might lead to grant a new right to copyright holders, i.e. the right to control access to works. She suggested that the proper venue for protection of technological measures should be found elsewhere than in IPR legislation.

[17] 1201(a)(g)(2).

[18] 1201(f)(1).

[19] 1201(j).

[20] 1201(d) (1). See Cohen, 'WIPO Copyright Treaty Implementation in the United States : Will Fair Use Survive', (1999) *EIPR* 21(5), 236-247.

[21] See US Copyright Office, May (1999), *Report on Copyright and Digital Distance Education*.

[22] See Copyright Law Reform Committee, "Simplification of the Copyright Act 1968" Part I, Exceptions to the Exclusive Rights of Copyright Owners, (1988), Commonwealth of Australia, available at <<http://www.law.gov.au/clrc>>.

[23] [1973] F.S.R 33.

[24] [1916] 2 Ch. 601.

[25] [1983] F.S.R. 545. See also the Singapore case *Creative Technology Ltd v Aztech Systems Pte Ltd* [1997] F.S.R. 491; 1996 WL 1093711 (CA (Sing)).

[26] *De Garis v Neville Jeffress Pidler Pty Ltd* [1920] AIPC 90-768.

[27] CLRC's Report, p. 76.

[28] S 29(3) of the UK Act states that copying by a person other than a researcher or student is not fair dealing if:

* In the case of a librarian, he or she exceeds the copying limitations that apply to librarians (as set out in ss.38, 39 and 40 of the UK Act).

* In any other case, the person doing the copying knows or has reason to believe that such copying will result in copies of substantially the same material being provided to more than one person at substantially the same time for substantially the same purpose.

[29] On a comparative basis, the UK provision contains an explicit exclusion of photographs. Thus, the use of photographic works cannot be considered as a fair dealing unless it is part of and incorporated into a work for review or criticism. See the distinction between s 30(1) and s 30(2) of the 1988 Act as expounded Mr. Justice Lightman in *Banier v News Group Newspaper Limited*, [1997] FSR 812.

[30] , [1999] W1477537 (Ch D), [1999] E.C.C.E.U. 425, [1999] E.M.L.R. See also the commentary by Benjamin J., Copyright- Fair Dealing with Copying Newspaper Articles for Internal Company Distribution, (1999) EIPR 21(4), n65-67.

[31] January 26, 1999 (Ch.d).

[32] see further Heide T, 'the Berne Three-Step Test and the Proposed Copyright Directive', *EIPR* (1999), 21(30), 105-109.

[33] Section 27B and 27G shall apply to-

(a) licensing schemes operated by licensing bodies in relation to the copyright in literary or musical works, so far as they relate to licences for-

- (i) reproducing the work;
- (ii) performing, showing or playing the work in public;
- (iii) broadcasting or communicating the work by cable; or
- (iv) distributing the work to the public; and

(b) licensing schemes operated by licensing bodies in relation to the copyright in any other works, so far as they relate to licences for-

- (i) making copies of the work;
- (ii) performing, showing or playing the work in public;
- (iii) broadcasting or communicating the work by cable; or
- (iv) causing the work to be publicly performed, shown or played,

and in those sections, "licensing scheme" means a licensing scheme of any of those descriptions.

[34] Case law : *Pro Sieben Media AG v Carlton UK Television Ltd* [1998] WL 1044079 (CA) E.M.L.R. 109 (1999) 22(3) I.P.D 22,029 (1999) 143 S.J.L.B. 37, [1999] 1 W.L.R. 605, [1999] I.T.C.L.R. 332, [1999] 96(5) L.S.G.35. The Court of Appeal, a panel of three judges, in reversing the decision of Hugh Laddie J, held that the degree to which the use of a protected work competed with the exploitation of copyright by the copyright owner was a very important consideration in relation to the issue of fair dealing. The extent of use was also relevant to the defence of fair dealing, but its relevance depended upon the particular circumstances.

[35] [1972] 2 Q.B.D. 84 at 93).

[36] See also *De Gariss v Neville Jefres Pidler Pty Ltd* (1990) 18 IPR 292 at 302 (Fed C of A), where 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'.

[37] See *American Geophysical Union v Texaco*, United States Court of Appeals, Further Amended July 17, 1995 and *Princeton Univ. Press v Michigan Document Service, Inc.* ("Michigan Documents Services") 1996 WL 54741, *11 6th Cir. 1996:Electronic citation:1996 FED App.0046P (6th Cir).

[38] See p. 160 of the US Copyright Office Report.

[39] Hoeren T, 'Electronic Archives and the Press : Copyright Problems of Mass Media in the Digital Age', (1998) *EIPR*, 20(7), 256-266.

[40] The CLRC's Report, p. 127.

[41] Ibid.

[42] See the CLRC's Report p.112.

[43] See Cohen, 'WIPO Copyright Treaty Implementation In the United States: Will Fair Use Survive', *EIPR* 1999, 21(5), 236-247. She vigorously maintained that the law should not allow copyright owners to opt out of the copyright framework of limited entitlements and into more robust entitlements of their own design. See also Heidi, 'The Berne Three-Step Test and the Proposed Copyright Directive', *EIPR* 1999, 21(3), 105-109.

[44] Fraser S, 'The Copyright Battle: Emerging International Rules and Roadblocks on the Global Information Infrastructure', (1997) 15 *J. Marshall J. Computer & Info.L.* 759.

[45] See Ginsburg J, 'Authors and Users in Copyright' (1997) 45 *J. Copyright Soc'y U.S.A.* 1.

[46] CLRC's Report, p. 51-54.

[47] Brudenall, 'The Future of Fair Dealing in Australian Copyright Law', (1997) *JILT* 1997(1), also available at <http://elj.warwick.ac.uk/jilt/copyright/97_1brud/>.

[48] See the draft proposal and the amended proposal for a European Parliament and Council Directive on the Harmonisation of Certain Aspects of Copyright and Related Rights in the Information society, Brussels, 21.05.1999, COM (1999) 250 final.