

## 9 COPYRIGHT INFRINGEMENT AND EDUCATIONAL EXCEPTIONS IN THAILAND: WHAT SHOULD BE THE SOLUTION TO THE PROBLEM OF COPYRIGHT INFRINGEMENT IN THE THAI EDUCATION SECTOR?

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### ABSTRACT

Copyright infringement in Thailand is closely related to inappropriate and vague exceptions for educational purposes provided for in the Thai Copyright Act (CA) 1994, which makes the law ineffective and fails to adequately protect copyright owners' exclusive rights. This paper recommends that the following steps be taken to address these issues: firstly, the educational exception provisions in the Thai CA 1994 should be amended to be more restrictive and limited; and secondly, the establishment of a Copyright Collecting Society (CCS) and licensing scheme system in the Thai education sector should be completed together with the introduction of a regulation and a governmental body to prevent the CCS from abusing its powers in an anti-competitive way. Several lessons drawn from the Thai experience will be outlined as they may be useful for policymakers and researchers in other countries.

**Keywords:** *copyright, educational exceptions, copyright infringement, copyright collecting society, Thailand*

### I. THE ROLE OF COPYRIGHT EXCEPTIONS AND THE PUBLIC INTEREST

Although copyright law grants exclusive rights for copyright owners, it also provides exceptions to exclusive rights allowing users to access and use copyright works in certain circumstances. In this regard, Walker identifies the role of copyright exceptions in balancing private and public interests as a means to promote innovative societies.<sup>1</sup> He observes that the primary justification for granting limited property rights in the form of copyright is that such privilege will benefit society as a whole by promoting innovation and creation.<sup>2</sup> The copyright system, at both international and domestic levels, has therefore sought to strike a balance between maintaining the incentive for creativity by protecting the economic interest of copyright owners and protecting public interest with regard to access to materials and information.<sup>3</sup> In this respect, such exceptions to the exclusive rights play an important role in protecting public interest by allowing the public to access or use copyright works in certain circumstances without paying remuneration fees or infringing the exclusive rights of the

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<sup>1</sup> S Walker, 'The TRIPS Agreement, Sustainable Development and the Public Interest', *The International Union for Conservation of Nature (IUCN) Environmental Policy and Law*, Paper No. 41, 2001, <http://data.iucn.org/dbtw-wpd/edocs/EPLP-041.pdf> pp. 9 to 10.

<sup>2</sup> *ibid.*

<sup>3</sup> *ibid.*

owners.<sup>4</sup> Without the copyright exceptions, it would be inconvenient for users to obtain copyright materials as they would be required to request permission and pay for using materials in every case, whether the extent of use is considered to be small or large. In this context, the copyright exceptions help the public to eliminate transaction costs, such as licensing fees or remuneration fees, since when the purpose of such uses falls within the scope of the exceptions, the reproductions can be done without the payment of royalty fees. Thus, the notion of balancing the interests cannot operate in practice without the use of copyright exceptions as a tool for safeguarding public interests.

This notion has long been recognized at both international and domestic levels. Most international copyright treaties contain provisions which aim at balancing these interests, for instance Article 9(1) and (2) of the Berne Convention. Article 9(1) strengthens the exclusive right of authors by providing that authors of literary and artistic works shall have the exclusive right of authorizing the reproduction of these works in any manner, while Article 9(2) protects the public interest by allowing countries to create the exceptions to the reproduction right in their domestic law. It is believed that a common concern over the public interest in the widest dissemination of information served as the rationale behind the exceptions contained in Article 9, such exceptions having been formulated with the aim of maintaining this balance between private interest and public interest.<sup>5</sup>

Nevertheless, it is important to note that, although Article 9(2) of the Berne Convention allows countries to create the exceptions in their domestic law as a tool to maintain this balance, it also contains the 'three-step test' which provides the conditions to be met for copyright exceptions under national copyright laws and imposes constraints on the provision of these exceptions.<sup>6</sup> In this vein, Article 9(2) requires that the exceptions to the right of reproduction in the countries of the Union must: (1) be limited to certain special cases; (2) not conflict with a normal exploitation of the work; and (3) not unreasonably prejudice the legitimate interests of the author.<sup>7</sup> National legislators must ensure that the exceptions under national copyright laws comply with this test.

If the national legislators fail to ensure compliance with the test, then such an exception may be subject to a challenge from other countries in a WTO dispute settlement proceeding. This was the case in WTO Panel decision WT/DS106, where an Irish collecting society filed an objection to the European Commission directed against the exceptions in Section 110(5) of the US Copyright Act.<sup>8</sup> After commencing a comprehensive investigation of the legal situation in the United States, the Commission filed WTO dispute settlement proceedings against the United States for breach of the Berne Convention and the TRIPS Agreement on behalf of their Member States. The Commission contended that two exceptions under Section 110(5) of the US Copyright Act, which permit the playing of radio and television music in public places without

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<sup>4</sup> R Okediji, 'Towards an International Fair Use standards', 39 *Columbia Journal of Transnational Law* 75, 2000, page 84.

<sup>5</sup> *ibid.*

<sup>6</sup> M Senftleben, *Copyright, Limitations and the The Three-step Test: An Analysis of the Three-Step Test in International and EC Copyright Law* (Kluwer Law International Netherlands, 2004) page 82.

<sup>7</sup> Article 9(2) of the Berne Convention.

<sup>8</sup> WTO Panel Decision No. WT/DS160 (2000); see also WTO Panel, 'The Report of the Panel on United States - Section 110(5) of the US Copyright Act', WT/DS160/R (15 June 2000) - Part I and Part II, accessible at: [http://www.wto.org/english/tratop\\_e/dispu\\_e/distab\\_e.htm](http://www.wto.org/english/tratop_e/dispu_e/distab_e.htm) or [http://www.wto.org/english/tratop\\_e/dispu\\_e/cases\\_e/ds160\\_e.htm](http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds160_e.htm)

the payment of a royalty fee under certain conditions, were inconsistent with US obligations under the Berne Convention and TRIPS. In the WTO dispute settlement proceedings, the Panel examined whether the ‘home-style’ exception in subparagraph (a) and the ‘business’ exception in subparagraph (b) of Section 110(5) of the US Copyright Act satisfied the three-step test.<sup>9</sup> It found that the ‘home-style’ exception met the requirements of the test, but the ‘business’ exception, which allows the amplification of music broadcasts without an authorization and a payment of a royalty fee by food service and drinking establishments and by retail establishments, did not. Therefore, the Panel recommended that the United States bring its law into conformity with the three-step test.

The three-step test and the WTO Panel decision are relevant to Thai copyright law because the second and third criteria of the test were incorporated into Section 32(1) of the Thai CA 1994 as preconditions for specific exceptions and the exceptions in the list of permitted acts. Furthermore, the WTO Panel decision contains an interpretation of the three-step test, which is viewed by many countries as a guideline on how to apply the test; therefore, if the exceptions under the Thai CA 1994 fail to comply with the test, then they may be subject to a challenge from other countries in the WTO dispute settlement proceeding, as in the WTO Panel decision WT/DS106.

The objective of maintaining the balance between these groups of interest in Article 9 of the Berne Convention and the three-step test was later incorporated in Article 9(1) of the TRIPS Agreement, which requires its Members to comply with Articles 1 through 21 of the Berne Convention (1971). In other words, the notion in Article 9 of the Berne Convention has been incorporated into the TRIPS Agreement by reference and as a result WTO Members must also comply with Article 9 of the Berne Convention. This notion was also embodied in Article 13 of TRIPS which reiterates the wording of Article 9(2) of the Berne Convention. It permits WTO Members to create exceptions to the exclusive rights provided under TRIPS but is also subject to the three-step test in Article 13.<sup>10</sup> In addition, the WTO Secretariat has stated that the TRIPS Agreement aims to strike an appropriate balance by recognizing in Article 7 thereof that the protection of intellectual property rights should contribute to the promotion of technological innovation, the transfer and dissemination of technology, to the mutual advantage of users and producers of technological knowledge and in a manner conducive to social and economic welfare and to a balance of rights and obligations.<sup>11</sup> It emphasizes that finding a balance in the protection of copyright between the short-term interests in maximizing access and the long-term interests in promoting creativity and innovation is the goal of the TRIPS Agreement.<sup>12</sup>

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<sup>9</sup> *ibid.*

<sup>10</sup> Article 13 of the TRIPS Agreement stipulates: ‘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’.

<sup>11</sup> World Trade Organization (WTO), ‘Pharmaceutical Patents and the TRIPS Agreement’, (2006), accessible at: [http://www.wto.org/english/tratop\\_e/trips\\_e/pharma\\_ato186\\_e.htm](http://www.wto.org/english/tratop_e/trips_e/pharma_ato186_e.htm); see also World Health Organization (WHO), ‘TRIPS Agreement and Pharmaceuticals: Report of an ASEAN Workshop on the TRIPS Agreement and its Impact on Pharmaceuticals’, (2000), accessible at: <http://apps.who.int/medicinedocs/pdf/h1459e/h1459e.pdf>, page 27.

<sup>12</sup> *ibid.*

Similarly, the objective in Article 9 of the Berne Convention and the three-step test were incorporated into the WIPO Copyright Treaty (WCT) by reference. Pursuant to Article 1 of the WCT, the contracting parties shall comply with Articles 1 to 21 of the Berne Convention. Like the TRIPS Agreement, the WCT not only requires its contracting parties to comply with Article 9 of the Berne Convention by reference, but also reiterates the words of Article 9(2) in its Article 10, so that contracting parties may provide for national exceptions to the rights granted to authors of the works under the WCT, but that such exceptions shall nevertheless be subject to the control of the three-step test embodied in Article 10.<sup>13</sup> Moreover, the preamble to the WCT clarifies that the contracting parties shall recognize: ‘The need to maintain a balance between the rights of authors and the larger public interest, particularly education, research and access to information, as reflected in the Berne Convention’.<sup>14</sup>

Most international copyright treaties allow their contracting countries to have different copyright exceptions in their national copyright laws in order to maintain their own unique equilibrium. The problem is that this balance of protecting the economic interest of copyright owners in order to encourage incentives for creativity and serving public interest in the dissemination of knowledge through the copyright exceptions cannot be easily achieved.<sup>15</sup> This is because the point of the balance can be different in each country, depending on a state's underlying philosophy and objectives for copyright protection.<sup>16</sup> Guibault explains that the copyright exceptions should reflect the need of society to use a work, balanced against the protection on the economic interest of copyright owners. However, this weighing process usually leads to different results in each country, since the potential conflict between the interests of copyright owners and the public interest can take place at different levels and grounds in each country.<sup>17</sup> This difference stems from the legislator's assessment of the importance of a particular exception for society in relation to the need to provide for the payment of an equitable remuneration to the copyright owners in order to maintain incentives for creativity.<sup>18</sup> The outcome of this evaluation will most often determine the form of the exception.

Nevertheless, many scholars believe that copyright exceptions should be based on a public policy objective and the needs of the public. For example, Reinbothe suggests that the exceptions should be based on a public policy objective such as public education, public security, etc.<sup>19</sup> Ricketson emphasizes that it is necessary to have a public policy basis to

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<sup>13</sup> Article 10 of the WIPO Copyright Treaty stipulates: ‘Contracting Parties may, in their national legislation, provide for limitations of or 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’.

<sup>14</sup> The preamble to the WIPO Copyright Treaty.

<sup>15</sup> M Senftleben, *Copyright, Limitations and the Three-Step Test: An Analysis of the Three-Step Test in International and EC Copyright Law* (Kluwer Law International Netherlands 2004) page 145.

<sup>16</sup> R Okediji, ‘Towards an International Fair Use Standard’ 39 *Columbia Journal of Transnational Law* 75, (2000), page 79.

<sup>17</sup> L Guibault, *Copyright Limitations and Contracts: An Analysis of the Contractual Overridability of Limitations on Copyright* (Kluwer Law International London February 2002), page 27.

<sup>18</sup> *ibid.*

<sup>19</sup> J Reinbothe, *The WIPO Treaties 1996 - The WIPO Copyright Treaty and the WIPO Performances and Phonograms Treaty – Commentary and Legal Analysis* (Butterworths, London, 2002), page 124.

consider an exception a special case.<sup>20</sup> Likewise, Senftleben states that exceptions should be based on a specific policy objective such as public education.<sup>21</sup> Burrell and Coleman give an example of the need for the public to have the exception for educational institutions and libraries. They justify this reasoning on the basis that libraries have an essential role in the dissemination and preservation of knowledge and culture for the public, while educational institutions have an important role in providing the public with opportunities for learning and developing their knowledge actively.<sup>22</sup>

In summary, it can thus be assumed that the copyright exceptions are designed either to resolve a potential conflict of interests between copyright owners and users from within the copyright system or to implement a particular aspect of public policy.<sup>23</sup> It therefore follows that the decision to set limits to the exclusive right of copyright owners through the exceptions must be based on clear policy reasons or the needs of the public, such as promoting education and the dissemination of knowledge and information among members of society at large.<sup>24</sup>

Similarly, in its report on ‘Proposed Changes to Copyright Exceptions’, the UK Intellectual Property Office (UKIPO) observed that in determining the appropriate balance between exclusive rights and exceptions, it is a basic principle of copyright policy that the result should be in the public interest.<sup>25</sup> In determining what constitutes the public interest, the government must consider a number of policy goals, including educational, economic, social and legal objectives in correspondence with the incentives for creativity and the economic interest for copyright owners.<sup>26</sup> These are important factors because the economic rationale for copyright protection is to generate a sufficient level of creative works and the provision of exclusive rights for copyright owners is necessary in order to incentivize the production or investment in creative works valuable to society.<sup>27</sup> Without appropriate protection for copyright owners, competitors would be able to offer the same goods at a lower price since the initial cost of creation would not be incurred, which in turn would discourage investment in creative activity.<sup>28</sup> Since the protection of the exclusive rights can potentially impose undue costs on the

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<sup>20</sup> S Ricketson, *The Berne Convention for the Protection of Literary and Artistic Works* (Kluwer, London 1987), page 482.

<sup>21</sup> M Senftleben, *Copyright, Limitations and the Three Step Test: An Analysis of the Three-Step Test in International and EC Copyright Law* (Kluwer Law International Netherlands 2004), page 145.

<sup>22</sup> R Burrell, and A Coleman, *Copyright Exceptions: The Digital Impact*, (Cambridge University Press London 2005) pp. 137 to 139.

<sup>23</sup> L Guibault, *Copyright Limitations and Contracts: An Analysis of the Contractual Overridability of Limitations on Copyright*, (1<sup>st</sup> edn, Kluwer Law International London, February 2002.), page 27.

<sup>24</sup> *ibid.*, page 73; see also M Senftleben, *Copyright, Limitations and the Three-Step Test: An Analysis of The Three-step Test in International and EC Copyright Law* (Kluwer Law International Netherlands 2004) pp. 139, 152 and 267.

<sup>25</sup> UK Intellectual Property Office (UKIPO), ‘Taking Forward the Gowers Review of Intellectual Property: Proposed Changes to Copyright Exceptions’ (2007), accessible at: <http://www.ipo.gov.uk/consult-copyrightexceptions.pdf>. See also UK Intellectual Property Office (UKIPO), ‘Taking forward the Gowers Review of Intellectual Property: Second Stage Consultation on Copyright Exceptions’ (2009), accessible at <http://www.ipo.gov.uk/consult-gowers2.pdf>

<sup>26</sup> *ibid.*

<sup>27</sup> *ibid.*

<sup>28</sup> *ibid.*

public or users, the exceptions in copyright law exist in order to safeguard public interests by preventing such undue costs on the users.<sup>29</sup> This means that the copyright exception must effectively safeguard the public interest while ensuring a socially desirable level of creative output.

The above reasons demonstrate the equal importance of maintaining incentives for creativity by protecting the economic interests of copyright owners and protecting other social values or policy goals, including education. The proposed changes or law reforms recommended in this paper will therefore be based on the idea that the economic interests of copyright owners must be protected effectively, in order to maintain the necessary incentives for creativity and, at the same time, the public interest in education. Currently, neither can be achieved under the Thai CA 1994, because the educational exceptions and the approach of the Thai Court do not seem to provide appropriate protection for the economic interests of copyright owners, and as a result cannot ensure a socially desirable level of creative output in Thailand. This is due to legislation that allows the reproduction of entire textbooks and multiple reproductions by students under the exceptions, regardless of whether or not such textbooks can be obtained in the market place. In addition, the scope of the exceptions under the Thai CA 1994 is unclear, so that the copyright law cannot effectively protect the economic interests of copyright owners in the Thai education sector. (The details about the problems of copyright exceptions in Thailand will be discussed in the next section). If this continues, the effectiveness of the Thai copyright law will be reduced. In order to maintain a socially desirable level of creative output and increase the effectiveness of the Thai copyright law, this paper sets out as a policy objective the improvement of the copyright exceptions under the Thai CA 1994, in order to ensure that copyright owners can obtain an effective economic return from their investment. Once the economic interests of copyright owners are secured under the copyright law, this will encourage greater creativity and innovation in the Thai education sector, which will ultimately benefit the educational market and the public.

## **II. THE NATURE OF THE PROBLEMS**

Copyright exceptions are one of the problematic areas in the Thai CA 1994 as many provisions are unclear, making it difficult to protect copyright works in the Thai education sector. If copyrighted works and educational materials are to be made readily available in the mass education market, there is a need to ensure that the copyright owners can obtain an economic return on their investment. Thus, it is important to ensure that the scope of infringement and copyright exceptions are clear and certain in order to facilitate the enforcement of copyright law. Presently, the exceptions of the Thai CA 1994 are still far from achieving this goal.

The current copyright law and its exceptions cannot effectively protect the exclusive rights and economic interests of copyright owners because of three factors: (1) the obscurity and ambiguity of the educational exceptions under the Thai CA 1994; (2) the current approach of the Thai Court to the exceptions has weakened the copyright protection regime in the education sector; and (3) the absence of a Copyright Collecting Society (CCS) in the education sector makes it more difficult for users to obtain a licence for the use of copyrighted works. These three factors not only make copyright protection and its exceptions ineffective in safeguarding the economic interests of copyright owners, but also undermine the goal of copyright law, which is to encourage greater creativity.

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<sup>29</sup> *ibid.*

Concerning the first factor, one of the key issues arises from the two conditions set out in Section 32(1) – the mainspring of the whole body of exceptions under the Thai CA 1994, which states that an act against a copyrighted work of the copyright owner should not be regarded as an infringement of copyright if two conditions are met. The first condition is that the action or reproduction must not conflict with a normal exploitation of the copyrighted work by the copyright owner; and the second condition is that the action or reproduction must not unreasonably prejudice the legitimate right of the copyright owner. These two conditions are most important because all educational exceptions in the list of permitted acts in Section 32(2) (such as the exceptions for research and study in paragraph 2(1); for teaching in paragraph 2(6); for educational institutions in paragraph 2(7); and for use in examinations in paragraph 2(8); as well as the specific exception for use as reference in Section 33 and for library use in Section 34) require that the two conditions be satisfied together with other additional conditions, in order to be exempted from copyright infringement under the umbrella of these sections.

For instance, Section 32(2) stipulates: ‘subject to paragraph one, any act against the copyright work in paragraph one is not deemed an infringement of copyright; provided that the act is one of the following: (1) research or study of the work which is not for profit ...’.<sup>30</sup> The wording ‘subject to paragraph one’ requires that the two preconditions in paragraph 1 are to be satisfied together with the additional condition that such uses must be for the purpose of research or study which is not for profit in order to be exempted. It also applies to the rest of the educational exceptions contained in the list of permitted acts under Section 32(2). Similarly, most specific exceptions in the CA 1994 require the two conditions in Section 32(1) to be satisfied, together with other additional conditions in order for the acts to be exempted under these specific exceptions. For instance, Section 34 provides that ‘a reproduction of a copyright work by a librarian ... is not deemed an infringement of copyright; provided that the purpose of such reproduction is not for profit and Section 32(1) is complied with ...’.<sup>31</sup> In addition, comparable language can be found in the exception to copyright infringement for use as reference articulated in Section 33 as well. Therefore, if the two conditions of Section 32(1) are unclear, this will normally affect the operation of the specific exceptions which rely on them.

Before 1999, there had been a debate on the issue of whether Section 32(1) should be regarded as a mere preamble or as enforceable preconditions. This issue was resolved by several decisions of the Supreme Court and the IP Court, which held that the two conditions were indeed enforceable preconditions. It is also important to mention the following IP Court Decisions No. 784/2542<sup>32</sup> and No. 785/2542<sup>33</sup>, where the Court outlined several issues in relation to the two conditions contained in Section 32(1). In Decision No. 784/2542, three American publishers, McGraw-Hill, Prentice-Hall and International Thomson Publishing, were joint plaintiffs with the public prosecutor. The plaintiffs claimed that the defendant, who ran a shop offering a photocopy service, infringed their copyrights on the textbooks and requested a heavy penalty to be imposed on him for copyright infringement. The defendant admitted unauthorized reproduction, but relied on the exception for research and study in

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<sup>30</sup> Section 32(2) of the Thai CA 1994.

<sup>31</sup> Section 34 of the Thai CA 1994.

<sup>32</sup> The IP&IT Court Decision No. 784/2542 (1999) (the parties appealed to the Supreme Court and the decision was overturned by the Supreme Court in the Supreme Court Decision No. 5843/2543).

<sup>33</sup> The IP&IT Court Decision No. 785/2542 (1999) (the parties appealed to the Supreme Court and the decision was affirmed by the Supreme Court in the Supreme Court Decision No. 1772/2543).

Section 32(2)(1) as an agent of the students who were using the materials purely for private research and study without making profit from them.

The Court held that in order to benefit from the exception for research and study, the defendant must prove several conditions. First, the act must not conflict with the normal exploitation of the work; second, it must not unreasonably prejudice the legitimate right of the copyright owners in an excessive manner; third, his act must be for the purpose of carrying out research or study of the work; and finally, it must not be for the purpose of profit-seeking. In other words, the IP Court confirmed that the two conditions of Section 32(1) are not a mere preamble but enforceable preconditions.

The Court indicated that, in order to determine whether the reproduction of a copyrighted work conflicts with the normal exploitation thereof and is unreasonably prejudicial to the legitimate right of the copyright owner, it is necessary to consider the circumstances on a case-by-case basis, involving an examination of the factors of quality and quantity. In determining the issue of whether the quantity of duplication is a reasonable amount, the Court acknowledged the difficulty in interpreting the two conditions. The exception allows for the reproduction of copyright works for research or study which is not for profit, provided that the two conditions are satisfied; but it does not set a clear limitation as to the amount of reproduction, nor does it prohibit multiple reproductions of copyrighted materials.

Pursuant to this provision, students are allowed to photocopy or reproduce the whole or part of copyrighted materials for the purposes of research and study which is not for profit, as long as such reproduction does not conflict with a normal exploitation of the copyright work and is not unreasonably prejudicial to the legitimate right of the copyright owner. The difficulty lies in determining the permitted amount of reproduction. Similarly, the exception concerning teaching and educational institutions does not have a clear limitation as to the quantity allowed to be reproduced and does not prohibit multiple reproductions of copyrighted materials. No judicial decision exists by the Thai Court on this matter. The Court implied that there is an issue relating to the duplicate quantity in Thailand due to the difficulty in determining the justifiable quantity of reproduction under the exception for research and study. In practice, the interpretation of these phrases seems to be difficult for both users and the Thai court to determine on a case-by-case basis. With such an unclear provision, it is extremely hard for users or even government officers to know how much of a copyrighted work can be legally reproduced for research and study.

Although these decisions acknowledged the challenges of interpreting the two conditions, they did not clarify their meaning or consider whether they could be applied as a general exception, such as the US fair use exception – for this reason it is unusual for a defendant to rely purely on the two conditions. With such doubts, most defendants would normally prefer to rely on the exceptions in the list of permitted acts in Section 32(2) or specific exceptions in Sections 33 to 43, which require such use to comply with the two conditions together with other additional conditions. Currently, there is no judicial decision where the court has opined on this issue. This ambiguity and the imprecise scope of the exceptions make it more difficult to enforce the copyright law and protect copyright works in the Thai education sector, especially where copyrighted materials are made available on the mass education market. Furthermore, users thus rely on this ambiguity and the imprecise scope of the exceptions and assume that they can reproduce the entire books or materials under the exceptions. This leads to an increased number of copyright infringements in the Thai education sector. As a result, the



economic interests of copyright owners cannot be secured and the goal of the copyright law, which is to encourage greater creativity in Thai society, cannot be achieved. Thus, these unclear exceptions need to be clarified to ensure that the scope of copyright exceptions and infringement is clear and certain, in order for copyright owners to receive an economic return on their investment.

This rationale seems to be consistent with the recommendation of the International Intellectual Property Alliance (IIPA), which states that the ambiguous educational exceptions in Section 32 of the Thai CA 1994 are the chief problem hindering the enforcement of copyright protection in Thailand.<sup>34</sup> The report observes that the educational exceptions in Section 32 of the Thai CA 1994 are poorly drafted and contain gaps which can be interpreted to allow the photocopying of entire textbooks or substantial portions freely.<sup>35</sup> They thus lack a clear limitation as to the amount of reproduction or clear prohibition of multiple reproductions and fail to specify that photocopy shops making photocopies of published materials for students can be held liable for copyright infringement.<sup>36</sup> Hence, it requested that this loophole be closed.<sup>37</sup>

The second factor which makes it more problematic to safeguard the economic interests of copyright owners was created by the IP Court in Decision No. 784/2542. In this vein the Thai Court has never made clear whether multiple reproductions of copyrighted materials are lawful, pursuant to the educational exceptions. It creates two problematic approaches that weaken copyright protection in the Thai education sector. The Court's first approach allows the reproduction of entire textbooks under the exceptions for research and study, when the numbers of the textbooks in the library were not available to match the numbers and the needs of students or the price of books was unreasonably expensive. In its report, the IIPA states that Section 32 of the Thai CA 1994 creates an unclear and overly broad exception, which has been broadly interpreted by the Thai courts to allow unauthorized photocopying of entire textbooks or

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<sup>34</sup> International Intellectual Property Alliance (IIPA), 'International Intellectual Property Alliance 2009 Special 301 Report on Copyright Protection and Enforcement in Thailand', 2009, accessible at: <http://www.iipa.com/rbc/2009/2009SPEC301THAILAND.pdf>

<sup>35</sup> International Intellectual Property Alliance (IIPA), 'International Intellectual Property Alliance 2007 Special 301 Report on Copyright Protection and Enforcement in Thailand', 2007, accessible at <http://www.iipa.com/rbc/2007/2007SPEC301THAILAND.pdf>; see also International Intellectual Property Alliance (IIPA), 'International Intellectual Property Alliance 2006 Special 301 Report on Copyright Protection and Enforcement in Thailand', 2006, accessible at: <http://www.iipa.com/rbc/2006/2006SPEC301THAILAND.pdf>

<sup>36</sup> International Intellectual Property Alliance (IIPA), 'Notice of Intent to Testify at a Public Hearing Concerning the Proposed United States -Thailand Free Trade Agreement', 2004, accessible at: [http://www.iipa.com/pdf/2004\\_Mar\\_19\\_THAILANDFTA\\_TPSC\\_testimony-rev.pdf](http://www.iipa.com/pdf/2004_Mar_19_THAILANDFTA_TPSC_testimony-rev.pdf)

<sup>37</sup> International Intellectual Property Alliance (IIPA), 'International Intellectual Property Alliance 2004 Special 301 Report on Copyright Protection and Enforcement in Thailand', 2004, accessible at: <http://www.iipa.com/rbc/2004/2004SPEC301THAILAND.pdf>; see also International Intellectual Property Alliance (IIPA), 'International Intellectual Property Alliance 2005 Special 301 Report on Copyright Protection and Enforcement in Thailand', 2005, accessible at: <http://www.iipa.com/rbc/2005/2005SPEC301THAILAND.pdf>

substantial portions of published materials, as long as the copy is made for educational purposes.<sup>38</sup>

The second problematic approach taken by the Court has been in interpreting the term ‘not for profit’ as indicating that such reproduction by the photocopy shops will not be considered as profit from infringing copyright works of others, if it is undertaken under order forms or employment contracts between the student and photocopy shops. In Decision No. 784/2542, the photocopy shops that were copying entire textbooks for the students were successful in arguing that they could not be held liable for copyright infringement, because they were not engaged in illegal copying, but rather simply providing a photocopy service for students. This decision illustrates that if the photocopy shop was acting on behalf of the students or by order of the student, then the exceptions to copyright infringement provided for students can also be extended to the photocopy shop as well. Nevertheless, it must be demonstrated that such action was done by the orders of the students or on behalf of the student. If the photocopy shop can prove that there is an order from the students, then the profit granted from photocopying the work will not be considered as profit from infringing another’s copyright but will be the profits in exchange for the use of human labour instead.

These two approaches adopted by the Thai Court severely impair the economic interests of copyright owners. The first approach allows students to reproduce entire textbooks freely under the exceptions, since most universities in Thailand normally do not have enough textbooks to match the number of their students. The second approach allows photocopy shops to avoid copyright infringement by relying on a ‘made to order’ basis through the order form. In this respect, photocopy shops attempt to use the IP Court's approach to their benefit by requesting all students and their customers who want to photocopy the books to fill in the order forms or the employment contracts provided by the photocopy shops. As a result, they can use these order forms as evidence to prove that the work is being reproduced by order of the students or on behalf of the student, so that the profit granted from photocopying the work will not be considered as profit from infringing copyright but as profits in exchange for the use of human labour instead. This means that entire textbooks can be reproduced or multiple reproductions can be made under the exceptions, as long as the defendant has receipts showing that copies were made by order of the students. If such an approach to the exception continues, it will hinder publishers’ efforts to protect their copyrights and increase the level of copyright infringement in the Thai education sector.<sup>39</sup> In order to ensure that the economic interests of copyright owners are secured and that a sufficient level of incentives for creativity in the Thai education sector can be maintained properly, the approach of the Thai court must be clarified and changes must be made to the educational exceptions.

The third factor contributing to the difficulties in protecting the economic interests of copyright owners is the absence of a Copyright Collecting Society (CCS) in the Thai education

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<sup>38</sup> International Intellectual Property Alliance (IIPA), ‘International Intellectual Property Alliance 2005 Special 301 Report on Copyright Protection and Enforcement in Thailand’, 2005, accessible at <http://www.iipa.com/rbc/2005/2005SPEC301THAILAND.pdf>

<sup>39</sup> International Intellectual Property Alliance (IIPA), ‘International Intellectual Property Alliance 2008 Special 301 Report on Copyright Protection and Enforcement in Thailand’, 2008, accessible at: <http://www.iipa.com/rbc/2008/2008SPEC301THAILANDREV.pdf>

sector. The IP Court in Decision No. 784/2542<sup>40</sup> outlined this problem and suggested the establishment of a CCS as follows:

‘... it does not appear that the printing house who is the copyright owner in this case has appointed a representative for granting of permission to use right in Thailand. If students, teachers or photocopy shops which are representatives of such persons in Thailand must request permission from the copyright owner for a justified duplication, it does not appear how such persons or organizations must proceed.’<sup>41</sup>

Similarly, the IP Court in Decision No. 785/2542<sup>42</sup> acknowledged this absence holding that, although the plaintiff had requested the court to impose severe penalties (imprisonment and heavy fine) on the defendant by claiming that the defendant’s act adversely affected the economy and international trade relations, it would not impose these penalties for the following reason:

‘... the publisher who is the copyright owner in this case has never appointed a representative for the purpose of licensing persons in Thailand to utilize the copyright work. If students, teachers or photocopy shops who are representatives of those persons in Thailand want to apply for a licence from the copyright owner so that they can make copies of the work legally, such persons or organization would not know how to apply for such licence.’<sup>43</sup>

The Court was of the view that the injured party should take partial responsibility for the copyright infringement in this case. The Court suggested that the users (defendant) and the publishers (the injured party) should set up ‘a Royal Collecting Organization for various kinds of literary work which are used in teaching and studying’.<sup>44</sup>

These two cases clearly illustrate the problem caused by the absence of a CCS to collect royalty fees for the reproduction of copyrighted works in the Thai education sector. Without the CCS in the Thai education sector, the damage to the economic interest of copyright owners seems to be more severe. As it is difficult for the users to obtain permission from the copyright owner, they may have no choice but to reproduce the copyright materials without prior permission from the copyright owner. It is also undeniable that the increased numbers of copyright infringements in the Thai education sector result from the difficulty in obtaining permission, and the lack of a CCS and licensing scheme system. The introduction of such a system into the Thai education sector is necessary in order to solve this problem.

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<sup>40</sup> The IP&IT Court Decision No. 784/2542 (1999).

<sup>41</sup> *ibid.*

<sup>42</sup> The IP&IT Court Decision No. 785/2542 (1999).

<sup>43</sup> The IP&IT Court Decision No. 785/2542 (1999).

<sup>44</sup> *ibid.*

### III. WHAT SHOULD BE THE SOLUTION TO THE PROBLEMS IN THE THAI EDUCATION SECTOR?

Currently, the educational exceptions and the approach of the Thai Court fail to provide adequate protection for the economic interests of copyright owners and ensure a socially desirable level of creative output in Thailand. As outlined above, this is due to the provisions allowing reproduction of entire textbooks and multiple reproductions by the students, regardless of whether such textbooks are obtainable in the marketplace. Furthermore, the scope of the exceptions under the Thai CA 1994 is unclear, and therefore the copyright law cannot effectively protect the economic interests of copyright owners in the Thai education sector. If this approach continues to be adopted, it will reduce the effectiveness of the Thai copyright law. In order to ensure that the economic interest of copyright owners and the incentive for creativity will be effectively protected under the Thai CA 1994, the following changes and reforms must be carried out.

#### A. THE REMOVAL OF THE TWO CONDITIONS IN SECTION 32(1)

The author recommends that the two conditions in Section 32(1) should not be applied alone as general exceptions even in limited circumstances, but should be removed from the Thai CA 1994 altogether. This position is based on four arguments. Firstly, although the language of Section 32(1) (which is the primary source of interpretation) provides clear conditions to be satisfied and clear results from satisfying those conditions, the legislators of the Thai CA 1994 had no intention to allow the two conditions of Section 32(1) to apply as a general exception.<sup>45</sup> Further, the context of the exceptions in the list of permitted acts in Section 32(2) and the specific exceptions in Sections 33, 34, 35, 36 and 43, considered as a whole, support this argument because these exceptions have incorporated the two conditions in Section 32(1) as preconditions that need to be satisfied, together with other additional conditions in order to be exempted from copyright infringement.

Secondly, since the two conditions in Section 32(1) are the same as the second and third conditions of the three-step test in Article 13 of the TRIPS Agreement and Article 9(2) of the Berne Convention, the recognition of Section 32(1) as a general exception seems to be inconsistent with the object of the three-step test. This is because the main objective of the three-step test is to impose constraints on the exceptions to exclusive rights in national copyright laws, but it is not in itself a copyright exception. Thus, the recognition of the two conditions as a general exception under the Thai CA 1994 is seemingly contrary to the objective of the three-step test.

Thirdly, the recognition of Section 32(1) as a general exception would lead to additional problems when the Thai courts attempt to interpret the two conditions, given that they are the same as the three-step test in the Berne Convention and the TRIPS Agreement, hence an interpretation already exists by the relevant international body, the WTO Panel. If the Thai court were to interpret these two conditions contrary to the findings of the WTO Panel, such decisions would be subject to challenge from other countries. Even if the Thai court attempted to interpret these conditions consistent with the findings of the WTO Panel, the problem of the clarity and the uncertainty of the provision still remain, because the WTO Panel interpreted the three-step test broadly, so there remain doubts about the meaning of the test.

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<sup>45</sup> D Subhapholsiri, *Copyright Law: the Copyright Act B.E. 2537 (1994)*, (3<sup>rd</sup> edn, Nititham Publishing House, Bangkok Thailand 2001) page 234.

Finally, the recognition of Section 32(1) as a general exception even in limited circumstances for the purpose of filling gaps in the copyright exceptions is in breach of the Berne requirement of ‘certain special cases’, which is intended to make the exceptions under national copyright law more explicit and certain by confining them. The recognition of Section 32(1) as a general exception, even in a limited sense, for the purpose of filling the gap where the specific exceptions cannot cover the issues is still problematic when it comes to predicting when the exception will apply since the Thai CA 1994 has many gaps and unclear provisions. If the two conditions are permitted to be applied as general exceptions, such as the US fair use approach, it would only cause additional problems and make the copyright exception even more uncertain.

By removing the two conditions from the copyright exceptions, in relation to the scope of the educational exceptions under the Thai CA 1994, the Court would then be able to determine the question of whether the use is fair in accordance with the conditions in the exceptions in the list of permitted acts in Section 32(2) of the Thai CA 1994 and the specific exceptions in Sections 33 to 35, without the need to rely on the two conditions in Section 32(1). At the same time, these exceptions would satisfy the requirement of ‘certain special cases’ in the three-step test, since the educational exceptions would only apply if the work is used for one of the approved purposes specified in the exception in the list of permitted acts or specific exceptions. This means that any other types of use, which do not explicitly come under the protection of these provisions, will not be exempted pursuant to these provisions, regardless of how ‘fair’ they are. Since the uncertainty of the exceptions as a whole stems from the two conditions, their removal from the educational exceptions will automatically eliminate the problems of ambiguity, including the issue of whether the two conditions in Section 32(1) can be applied as a general exception.

#### B. THE INSERTION OF A CLEAR LIMITATION

The author suggests that the removal of the two conditions must be undertaken in conjunction with the insertion of a clear limitation as to the amount of reproduction. In addition, a clear prohibition on multiple reproductions and the reproduction of entire textbooks must be inserted into the educational exceptions in the list of permitted acts in Section 32(2) and the exception for the reproduction by libraries in Section 34 of the Thai CA 1994. A study of UK copyright law provides an example of how to set such a limitation. For example, the UK Copyright Design and Patents Act 1988 (henceforth CDPA 1988) allows an individual to photocopy an excerpt from a book of not more than one chapter or 5 per cent without infringing copyright.<sup>46</sup> Also, it clearly indicates that an individual making a copy for himself, or others who may make a copy for him, is subject to certain requirements that such person making the copy must not know or have reason to believe that copies of the same material may be provided to more than one person at the same time for the same purpose.<sup>47</sup> These requirements are quite effective because they can prevent users from making multiple reproductions of copyright

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<sup>46</sup> UK Intellectual Property Office (UKIPO), ‘Gowers Review of Intellectual Property’, 2006, accessible at: [http://www.hm-treasury.gov.uk/media/6/E/pbr06\\_gowers\\_report\\_755.pdf](http://www.hm-treasury.gov.uk/media/6/E/pbr06_gowers_report_755.pdf) or [http://www.hm-treasury.gov.uk/gowers\\_review\\_index.htm](http://www.hm-treasury.gov.uk/gowers_review_index.htm)

<sup>47</sup> UK Intellectual Property Office (IPO), ‘Taking Forward the Gowers Review of Intellectual Property: Purposed Changes to Copyright Exceptions’, 2007, accessible at: <http://www.ipso.gov.uk/consult-copyrightexceptions.pdf>

materials and in most circumstances, users will only be able to make a single copy for their own research or study.

Importantly, the UK approach in the *Sillitoe*<sup>48</sup> and the *University of London Press* cases<sup>49</sup> specifies that the fair dealing exception for private study will only cover the private study of a person dealing with the copyright works for his own personal purpose and does not extend to the third parties who produce copyright materials for the public for the purpose of others' private study or for sale to students.<sup>50</sup> This approach can be adapted to solve the issue with respect to the photocopy shops in Thailand. This issue can be resolved if the Thai Government follows the UK approach by limiting the capability of third parties or photocopy shops to make multiple reproductions or copy entire textbooks for sale to the students, and by inserting a clear limitation as to the amount of reproduction, and a clear prohibition on multiple reproductions, into the educational exceptions.

### C. THE ESTABLISHMENT OF A COPYRIGHT COLLECTING SOCIETY

It is further proposed that the establishment of a Copyright Collecting Society (CCS) in the Thai education sector is necessary for ensuring that copyright owners will receive a better economic return from their investment through an effective system of royalty collection. This should be undertaken, while at the same time making it more convenient for the users to obtain licences for the use of educational materials, and thus reduce the number of copyright infringements which occur as a result of the difficulties in obtaining these licences. Such an establishment must be carried out alongside the introduction of the appropriate legal controls to protect the users from any abuse of power by the CCS. The Thai IP Courts, in many decisions on copyright exceptions, have recognized that the establishment of a CCS and its licensing scheme systems in the Thai education sector is necessary. Importantly, they have followed the UK and US approaches by holding that the educational exceptions should not apply where there is a licensing scheme provided by the CCS in place for users. This means that the use of educational materials will be governed by the copyright exceptions and the licensing scheme provided by the CCS. This idea is inspired by the practice in the UK education sector, where the use of educational material is governed by the fair dealing exceptions and the blanket licensing scheme from the CCS.<sup>51</sup>

Nevertheless, the establishment of the CCS in the Thai education sector without any legal control may result in additional problems, since the CCS could potentially abuse its power in an anti-competitive way, as well as setting unfair royalty rates for the users. For this reason, it is necessary to have a dedicated governmental body and regulations to control the operation of the CCS in the Thai education sector. In addition, in order to allow the CCS to function effectively, its establishment must be undertaken hand in hand with the improvement of the educational exceptions to support the operation of the CCS. These educational exceptions must function as an instrument to encourage the copyright owner to participate in the prospective CCS and its licensing scheme system, similar to the United Kingdom. For example, the exception for reprographic copying by educational establishments in Section 36 of the UK

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<sup>48</sup> *Sillitoe and Others v. McGraw-Hill Book Company (U.K.) Ltd.* [1983] FSR 545.

<sup>49</sup> *University of London Press v. University Tutorial Press* [1916] 2 Ch. 601.

<sup>50</sup> H MacQueen et al, *Contemporary Intellectual Property: Law and Policy*, (Oxford University Press 2008) page 137.

<sup>51</sup> U Suthersanen, 'Copyright and Educational Policies: a Stakeholder Analysis', 2003, 23 *Oxford Journal of Legal Studies* 585, page 592.

CDPA 1988 clearly stipulates that the exception will not apply if licences are available and the person making the copies knew or should have been aware of that fact.<sup>52</sup> Similarly, the exception for recording by educational establishments in Section 35 also indicates that if there is a certificated licensing scheme, the exception will not apply and the educational establishment has to obtain such licences.<sup>53</sup> These exceptions are consistent with the approach of the UK Copyright Tribunal in the *Universities UK* case<sup>54</sup>, which stated that the exceptions for educational establishments will not apply if a licensing scheme is available. Without the appropriate copyright exceptions, the CCS and its licensing scheme systems cannot function effectively. Thus the educational exceptions in the Thai CA 1994 need to be developed in order to support the operation of the prospective CCS in the Thai education sector.

#### IV. LESSONS FOR POLICYMAKERS AND RESEARCHERS IN OTHER COUNTRIES

There are several lessons resulting from this study which could benefit or contribute to the development of copyright protection in other countries as well as copyright law in general. Most importantly, it must be borne in mind that a legislative change to copyright law alone may not be enough to solve the problem or improve the effectiveness of a copyright protection regime in one country. The Government may need to employ more than legislative change in order to solve such a problem, for instance, the establishment of a CCS.

Secondly, the uncertainty and ambiguity relating to what copyright law allows under the exception is likely to damage the economic interests of copyright owners and hinder incentives for creativity in society. It also makes the copyright protection regime ineffective as infringers and users might rely on such uncertain and imprecise provisions to reproduce copyright works but escape any copyright infringement liability.

Thirdly, inserting the conditions of the three-step test into the national copyright legislation, as a means to comply with Article 9 of the Berne Convention and Article 13 of the TRIPS Agreement and then regarding them as copyright exceptions in their own right, is not the best mode of implementation. In this instance, the Thai legislators clearly chose a convenient way to ensure that the CA 1994 fully complied with the obligation under the TRIPS Agreement by simply inserting the second and third conditions of the three-step test into the Act and then regarding them as preconditions to all copyright exceptions. This leads to additional problems since the meaning of the two conditions is unclear, thus affecting the operation of other exceptions in the Act, which normally require the two preconditions to be satisfied together without other additional conditions.

Besides, regarding the conditions of the three-step test as a copyright exception is clearly inconsistent with the objective of the test which is to impose constraints on the exceptions to exclusive rights in national copyright laws rather than acting as copyright exceptions themselves. This makes it more difficult for the national courts to interpret the two conditions, because the criteria of the three-step test in the Berne Convention and the TRIPS Agreement have been interpreted by the relevant international bodies, such as the WTO Panel.

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<sup>52</sup> Section 36(3) of the CDPA 1988.

<sup>53</sup> Section 35(2) of the CDPA 1988.

<sup>54</sup> *The Universities U.K. v. Copyright Licensing Agency Ltd* [2002] RPC 639, paragraph 34.

Thus if the national court diverged from the WTO panel in the interpretation of the two conditions, the country might face a challenge from other Members of the WTO, as occurred in WTO Panel Decision No. WT/DS160/R with the United States. Therefore, the insertion of the conditions of the three-step test into the educational exceptions is not the best way or a good example of implementation of Article 13 of the TRIPS Agreement for other countries.

The fourth lesson to be learnt from Thailand is that when the court does not play its role in clarifying the law and ensuring that the exceptions in the national copyright law comply with the three-step test, then it may become necessary for the government to consider making legislative changes in order to ensure that the economic interests of copyright owners and the incentive for creativity under the copyright protection regime are protected. In Thailand, it is clear that the court is not only silent on the issues relating to multiple reproductions and the reproduction of entire books, but it goes further to create two problematic approaches which weaken copyright protection in the Thai education sector and are clearly inconsistent with the three-step test.

Policymakers in other countries can also learn from Thailand's lack of prohibition on multiple reproductions and clear limitation as to the permissible amount of reproduction, which may result in the court creating some unique approaches inconsistent with the three-step test, in order to allow photocopy shops and users to reproduce copyright materials under the exceptions, regardless of whether such reproduction impairs the economic interest of copyright owners. This view is supported by several IIPA reports on copyright protection in Thailand, which illustrate that the increased quantity of copyright infringement in the Thai education sector results from the lack of a clear prohibition on the reproduction of entire textbooks and multiple reproductions.<sup>55</sup>

In addition, the study relating to the CCS in Thailand provides a useful lesson for global copyright protection that the lack of a CCS makes it more difficult to protect the economic interests of copyright owners, because without the CCS it is very difficult and inconvenient for users to apply for licences. As a result, users have no choice but to reproduce copyright materials without prior permission from the copyright owner, which in turn can result in enhanced copyright infringement.

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<sup>55</sup> See the International Intellectual Property Alliance (IIPA) special 301 reports on copyright protection and enforcement in Thailand for the years 2005, 2006, 2007, 2008 and 2009.



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