

CONCEPT PAPER ON THE AWARENESS OF 'FAIR DEALING' AMONG LEARNERS OF SUNWAY COLLEGE JOHOR BAHRU

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ABSTRACT

The Copyright Law was enacted to encourage continuous creative work among academicians. In this age of technology, the knowledge and awareness of Copyright Law and its defence of fair dealing is becoming increasingly significant in protecting the academicians' work. The aim of this concept paper is to understand the principle of Copyright Law and fair dealing in literary work. Furthermore, knowledge and awareness of Copyright Law and fair dealing among the learners will be studied. The study will be carried out with the learners of Sunway College Johor Bahru. The study will utilise a quantitative method to analyse the learners' understanding of the knowledge and awareness of Copyright Law and fair dealing. The study is important to show the level of awareness portrayed among learners of Sunway College Johor Bahru.

Keywords: *Intellectual Property Rights, Copyright Law, Fair Dealing, Literary Work*

INTRODUCTION

The Copyright Law was introduced as early as the 17th century in the United Kingdom in the form of a statute called the Statute of Anne 1710. This initial law was established to protect the author or creator of an original piece of work (Rose 1993). In the United States of America, the first Copyright Law was enacted through the Copyright Act 1790. The base of the law was from Statute of Anne (Yu 2007). The Berne Convention was established in 1886 to protect the rights of authors in their literary and artistic works (Ricketson & Ginsburg 2006). The translation of the Malacca Digest, the Maritime Rules of Malacca and the Digest of Kedah Laws indicate that the Copyright Law would have existed as early as 1902 in Malaysia (Khaw 2008). Today, Malaysia is governed by the Copyright Act 1987. In 1990, Malaysia acceded to the Berne Convention for the protection of literary and artistic work (Ricketson & Ginsburg 2006) and further amended the law in 1997 (Anderson 1997). Upon agreement with Trade-Related Aspects of Intellectual Property Rights 1994, the law was further enacted in the year 2000. The law was amended again in 2002 and 2003 (Khaw 2008).

The Copyright Law in Malaysia protects academicians' literary work (Lam Soon (M) Bhd v Forward Supreme Sdn Bhd & Ors 2001). Literary work comprises the preparation of lectures, manuscripts, essays, articles and examination papers in accordance with S3 of Copyright Act 1987. However, the rapid expansion in technology has encouraged easy access in obtaining, copying and pasting data. This custom has also encumbered educators from creating literary work (Lathrop & Foss 2000).

Literary works will be protected by the Copyright Law as long as the work is original according to S7(2) of the Copyright Act 1987. In the case of *Hyperion Records Ltd v Sawkins* (2005), the word 'original work' was further elucidated as a genuine work which is the source and creation of the author. S7(2) of the Copyright Act 1987 further provides that the work must be written down, recorded or reduced to a material form. The work may not be in a visible form: it can also be on tape, stored in the memory of a computer or CD-ROM (*Roland Corp & Anor v Lorenzo & Sons Pty Ltd* 1991). In the case of *John Kenneth Carpenter v Naim Land Sdn. Bhd* (2013), the High Court Judge of Sabah and Sarawak in Kuching, dismissed the former's copyright petition for the procedure manual that he did for the latter in the course of his employment. The learned judge said that the manual was a mere improvement and not an original work.

S13(1) Copyright Act 1987 states it becomes an infringement of the law when there is an activity of sale, reproduction of the work, communication of work in the public, distribution, commercial rental of the copies or copying work from articles or journals without the permission of the author. The work will become an infringement when the author mindlessly copies another's original work (*ZYX Music GmbH v King & ors* 1995). As in the case of *Kohwai & Young Publication (M) Sdn Bhd v Lembaga Pengelda Dewan Bahasa dan Pustaka* (2013) the Court held that the 3 artistic drawings of a snake, turtle and lion in the latter's Pendidikan Islam Year 1 publication was a copyright infringement. The latter did not ask for permission before copying the pictures in their publication.

As an academician, continuous learning is encouraged by referring to other learned educators' research. The defiance of the act will occur at this moment. The underlying principle behind the copyright law is to encourage continuous development in the field of arts and science for the benefit of the public (Bowyer 1996) and secondly, to ensure a fair yield for the creators of literary works (*Sayre v Moore* 1785). Thus, a defence of fair dealing is judicially encouraged to promote incessant creativity of work from the learned educators to the public.

Anyone doing any act by way of fair dealing for the purpose of non-profit research, private study, criticism, review or reporting current events will not breach the Copyright Law, S13(2)(a) Copyright Act 1987. Copyright law and fair dealing is at an infant stage in Malaysia (Munir 1997). The law does not define fair dealing, but Blanchard J referred it to as 'reasonable use' in *Television New Zealand Ltd v Newsmonitor Services Ltd* (1993). However, it is left to the judiciary precedents of the Commonwealth countries to guide the definition of fair dealing (*Fraser – Woodward Ltd v British Broadcasting Corp* 2005).

In the United States of America, Section 107 of the United States Copyright Act 1976 provides four factors to be considered when determining fair dealing. The four factors are i) purpose and character ii) nature of the copy right work iii) amount utilised and iv) value of the copyright work. Firstly, the judiciary will consider the objective and the purpose of the prescribed work. The work should not be for profit or commercial use. Secondly, the intention and motives of the work will be considered (*Hyde Park Residence Ltd v Yelland & Ors* 2000). Thirdly, the quantity of the work exploited in relation to the original work will be analysed (*Independent Television Publication Ltd v Time Out Ltd & Elliot* 1984). Fourthly, the effect of the abuse or commercial value of the copyright will be deliberated (*Fraser-Woodward Ltd v British Broadcasting Corp* 2005). The fifth rule states that the defence is not available even though it is an industry practice or custom to reproduce copyright work (*Banier v News Group Newspaper Ltd* 1997). Finally, both published and unpublished work has the defence of fair dealing (*Beloff v Pressdram Ltd & Anor* 1973).

The defence of fair dealing can be utilised for private study. Private study defined in Longman Group Ltd v Carrington Technical Institute Board of Governess (1991) is a study embarked by the person claiming the study. The case further illustrated that when a teacher prepares materials that have been copied, to be utilised by the students, it will not amount to a private study. A research undertaken by the person with non-commercial reason is construed as ‘non-profit’ research (Creative Technology Ltd v Aztech Systems Pte Ltd 1997). The person claiming the defence should not earn profit from the research.

Criticism, review or reporting of current events is not given a statutory meaning. Thus, in the light of Sillitoe & ors v McGraw-Hill Book Co UK (1983), any assessment or estimate of the qualities of a work is referred to as ‘criticism’. ‘Review’ is referred to as a work of appreciation or criticism of the copyright work (De Garis & Anor v Neville Jeffress Pidler Pty Ltd 1990). In the case of Ashdown v Telegraph Group Ltd (2002) the Court held that merely publishing parts of a confidential meeting is not regarded as criticism or review. Any current events regardless of its importance or its interest to the public are regarded as ‘Reporting of current events’. After the death of the Duchess of Windsor, her letter to her husband prior to her death is considered history and not current events (Associated Newspapers Group Plc v News Group Newspapers Ltd & Ors 1986). However, Section 6(3) of the Copyright Act 1956 of UK does not define historical interest as reporting current of events.

The copyright law and fair dealing was established to protect the work of authors and to promote art and science for the advantage of the public (Sony Corp of America v Universal City Studios 1984). However the growing concern of infringement is significantly arising. The lack of awareness and knowledge of the Copyright law and fair dealing is escalating among the learners of Sunway College Johor Bahru (here after known as SYCJB). This paper aims to consider the awareness and knowledge of the Copyright Law and the use of fair dealing as a defence among the learners in SYCJB.

OBJECTIVES

The study has established the following areas:

- i) the analysis of the knowledge of Copyright Law among the learners in SYCJB
- ii) the analysis of the awareness of Copyright Law among the learners in SYCJB
- iii) the analysis of the knowledge of fair dealing among the learners in SYCJB
- iv) the analysis of the awareness of fair dealing among the learners in SYCJB

The study concentrates on two areas: i) the knowledge and awareness of the Copyright Law and ii) the knowledge and awareness of fair dealing. Knowledge is the understanding of a concept that is acquired by the learner (Palmer & Neal 1994). The ultimate force that stimulates the knowledge will be awareness (Madsen 1996). The aim of this study is to understand the function and purpose of the Copyright Law and fair dealing in literary work while evaluating the learners’ knowledge and awareness of the Copyright Law and fair dealing matters in academia. This study will demonstrate comprehension of the Copyright Law and fair dealing.

SIGNIFICANCE OF THE STUDY

One of the factors that influence investment decisions in a country is Intellectual Property (IP) (Davis & Withers 2006). A robust IP protection will enhance a country's investment by 86% to 100% (WIPO 2007). Technologies have made it simple for our learners to cut, copy, paste and exploit the work of others without the permission of the owner (Negroponte 1995). The usage of technology ubiquitously have further complicated the learners in making an ethical decision (Ribble & Bailey 2005). Thus, knowledge and awareness of Copyright Law is becoming increasingly significant to avoid infringement. The learned judge in the case of *Cardtoons L.C. v. Major League Baseball Players Association* (1998) stated that learners have complexity in understanding the copyright law and the usage of fair dealing. Most of the incidents written below show the lack of knowledge and awareness of the law and its defence.

Authors are paid a fixed cost for their work and variable cost to make copies of the work. Publishers usually rely on the sale of the copies to recoup the fixed price (Landes & Posner 2003). It is an astonishment to learn that US firms estimated a loss of \$23.7 billion during the year of 2009 in IP infringement to China. They experienced the highest loss-to-sale ratio of 6.4% on copyright infringement that year (United States International Trade Commission 2011). In Malaysia, the Ministry of Domestic Trade, Cooperative and Consumerism (MDTCC) have raided and confiscated photocopy machines and hundreds of infringing copies of books from shops around Kuala Lumpur, Perak and Selangor. The shop owners' failure to understand the repercussion of the law has caused them to infringe the law (Chang 2010).

Lord Denning in the case of *Hubbard v Vosper* (1972) held that when the defendant invokes fair dealing, the learned judges have to consider the facts and degree of all the circumstances of the particular case. Unfortunately, till today fair dealing is not given a definition by the learned court of law (*Television New Zealand Ltd v Newsmonitor Services Ltd* 1993). However, the court has been given guidelines that can be binding on the public as a rule of law (*Princeton Univ. Press v. Mich. Document Servs. Inc* 1996). The Human Rights Act 1998 has provided that the Courts are required to be flexible and considerate. The decisions made must be in the eyes of public interest (*Ashdown v Telegraph Group Ltd* 2002). This has further opened the floodgate of confusion among learners on the infringement.

In the case of *University of London Press Ltd v University Tutorial Press Ltd* (1916) exam papers were written by the examiners appointed by the former and were published by University Tutorial Press Ltd. The publishers argued that the examination papers would be used for the private study of the learners. However, the Court held that the publishers could not invoke the defence of fair dealing. In the case of *Williams & Wilkins.co v United States* (1973), 200,000 copies of a ten-page long article of a medical and scientific journal belonging to Williams & Wilkins Company were distributed free of charge by the library. The defence of fair dealing was invoked in this case. The Court illustrated that the defence was invoked to protect the library. The learned judge went on to say that library is a public non-profit government agency that allows photocopies to be made. A photocopy shop copied the publisher's book without obtaining the permission of the publisher. The copied books were sold to the students, (*Books v. Kinko's Graphics Corp* 1991). The shop claimed the defence of fair dealing and the courts ruled in favour of the publisher. The court elaborated that the copying will reduce the sale of the books, (Kaplin & Lee 1997) and awarded \$510,000 in statutory damages as well as legal fees. Recently in the case of *The Authors Guild Inc v Google Inc* (2013), Google provided a full text of books in the public domain and summary of the books that are still under the copyright protection for users of Google Books. The Court held that Google had infringed the Copyright Law as they do not have the right to scan text books that are copyright protected even though it was for public use. Thus, Google agreed to pay \$125 million, out of which \$45 million was to pay the authors of the books that had been scanned without permission. The inconsistency of the judgement brings dilemma in the usage of fair dealing.

The Supreme Court in *Campbell v Acuff-Rose Music* (1994) explained that commercial parody can be utilized as fair use. Thus the song “Oh, Pretty Women” was utilized as the baseline script writing for the famous Richard Gere’s movie “Pretty Women”. Parody is an imitative work created to mock or comment the original work of the author (Hutcheon 1985). However, the rule was different in the case of *Dr. Seuss Enterprises v Penquin Books* (1997), where the latter published a book on the double murder trial of OJ Simpson titled ‘Cat NOT in the Hat’. Dr Seuss sued the latter for copyright infringement for depicting the title ‘The Cat in the Hat’. The court granted the injunction on the basis that it was an infringement of the copyright law. The inconsistency in the rule of fair use brings criticism to the law as stated by the learned judge in *Suntrust v. Houghton Mifflin Co.* (2001).

The study made by Ogunrombi and Bello (1999) in Nigeria showed that only 5 % of learners in Nigeria’s higher education institution can afford to purchase textbooks that are needed for their learning and research. The study pointed out that 70% of the learners photocopy the learning materials. The high cost of text books, inavailability of materials and devaluation of the Nigerian currency have lured the learners to infringe the Copyright law. Previous studies have shown that the learners’ perception is crucial to reduce the infringement of copyright law and fair dealing (Scott 2001). The greater freedom of information via the internet could be misinterpreted by the learners as a validation of information at their door step (Lessig 2004). The learners are not aware of the percentage of materials that can be used in the public domain as private study or private research. The copyright violation and misunderstanding of fair dealing could produce copyright infringement among the learners (Marshall 2005).

In 2005 the University of Minnesota made a study of their graduate students who utilized the ‘Fair Use Analysis (FUA) Tool’. It is a tool developed by the University to produce a better understanding of the law and its defence. The University launched a Copyright Information & Education Web that included the FUA tool. The tool is a device that analyses the work of the students through the four-factor analysis. The first factor is the frequently asked questions on Copyright law. The second factor is a pop-up window that further explains the use of fair dealing in the learners’ work. The third factor is simple questions on the concept of the law and fair dealing that are placed on the computer. The learners have to answer the questions which are weighted using the five-point Likert scale. In the final factor the questions are calculated and a summary report will indicate the overall use of fair dealing in the learners’ work which will be returned to the learners. Despite all the trouble, the finding showed that the tool actually affected the graduates’ understanding of the law and its defence. The tool further confused the graduates in the usage of Copyright law and fair dealing (Greenhow 2008).

The rationale above has shown the importance of the knowledge and awareness of the Copyright law and fair dealing among the learners of SYCJB. It has also given a wider view of the repercussions of infringing the law.

RESEARCH METHODOLOGY

The purpose of this research is to analyse the knowledge and awareness of Copyright Law and fair dealing among the learners of SYCJB. In order to provide a reliable set of data for analysis, the study will utilize a quantitative method. This survey design is selected to collect the data points required for this study. This method allows for standardization of information presented with consistency in the language. This method has reduced biasness that may occur while data gathering. This survey design is an advantage for obtaining data from a small sample (Leedy & Ormrod 2001). The survey questionnaires will be employed to analyse knowledge and awareness of Copyright Law and fair dealing among the learners of SYCJB. The questions emphasised the learners’ understanding of the knowledge and awareness of Copyright Law and the use of fair dealing as a defence.

Research Design

The study intends to illustrate knowledge and awareness of Copyright Law and fair dealing among the learners of SYCJB. Thus, 16 specific research questions were derived from the literature to be utilised as the survey questions.

Table 1: Questions on the awareness of Copyright Law

I understand the Copyright Law.
I copy words from other sources without an acknowledgement.
I resubmit my friend's assignment as my own.
I use a quote without putting the reference.

Table 1 indicates the first of the four questions asked, on the knowledge of Copyright Law among the learners in SYCJB.

Table 2: Questions on the knowledge of Copyright Law

I will illegally download songs from the Internet.
Do you think downloading media without the owner's permission and not paying for it should be considered a punishable offense?
I copy, paste and utilize any images or notes on the Internet.
The author will lose income from the infringement of the Copyright Law.

Table 2 indicates the second of the four questions asked, on the awareness of Copyright Law among the learners in SYCJB.

Table 3: Questions on the awareness of fair dealing

I understand that fair dealing is an exception to the Copyright Law.
I know that private study is an exception to Copyright Law.
I can criticize and review the work of others.
Reporting of current events will be protected by the Copyright Law.

Table 3 indicates the third of the four questions asked, on the knowledge of fair dealing among the learners in SYCJB.

Table 4: Questions on the knowledge of fair dealing

I use photocopied materials to do my assignment.
I can make photocopies of books to sell to my friends.
I can copy articles for my own research.
I can utilize photocopied articles to do a research that will be paid for by a company.

Table 4 indicates the final of the four questions asked, on the awareness of fair dealing among the learners in SYCJB.

The questionnaire will also include basic demographic information to analyze the student’s education background, age and gender and their co-relationship with the knowledge and awareness of Copyright Law and fair dealing. The questions will be rated on a 5-point Likert-type scale. This type of rating scale is more useful when behaviour needs to be evaluated (Leedy and Ormrod 2001).

Sampling

The learners of SYCJB will be taken as the target population of the study. The total population of SYCJB from five different programs is about 1500 students. The study will employ 100 students as the sample for this study.

Table 5: A brief summary of respondents from different programs who will participate in this study

Categories	Number of Participants
1. Diploma in Business Administration	20
2. Diploma in Information Technology	24
3. Diploma in Hospitality Management	10
4. Certified Accounting Technicians	34
5. GCE A-Levels	12

The study will utilise stratified random sampling (Polit & Beck 2004). The researcher will group the population according to the courses and then randomly select the respondents. The names will be randomly selected using every fifth person from the class attendance list. The sample size does not require a specific number of participants to analyse descriptive statistic like the mean, mode and frequency (StatSoft Inc 2004). However the study will include 100 randomly selected participants for the study. Random selection from the alphabetically listed attendance sheets will strengthen the study.

Data Collection

The questionnaire will be hand delivered to the learners and collected upon completion. This method brings better results and is suitable for a small number of sampling (Dillman 1978). To ensure confidentiality each survey will be numerically coded beginning with 001 and ending at 100.

Once the survey is concluded, each category of the data will be analysed. To compare and analyse the common categories, the data will be gathered by grouping them together. Finally the entire data set will be reviewed and compared. The survey will assist the researchers to analyse the students' knowledge and awareness of Copyright Law and their use of the defence of fair dealing.

CONCLUSION

The objective of this study is to examine the level of knowledge and awareness of Copyright Law and fair dealing among the learners of SYCJB. The researchers have identified the broad understanding of the Copyright Law and fair dealing in this study. The confusion in the understanding of the Copyright Law and the use of the defence of fair dealing has caused the infringement of the law. Thus, this study will further clarify the analytical use of this research; it will motivate the attempt to include the knowledge and awareness of Copyright Law among the learners of SYCJB.

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