

Access to Knowledge: Intellectual Property Right as a Potential Barrier for Society and Public to the Knowledge

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Keywords: Copyright, Knowledge, Journal, Publishers, Public interest

Abstract: With the absence of novel technology and expansion of protection of copyright works, the right holders especially the publishers may create the barrier for society particularly the developing countries to knowledge. This article will identify the existing and current situations of copyright expansion on books for education and journals. The role of publishers in hindering the access to knowledge will be identified. Based on the problems on copyright provided previously, the suggestions by striking a fair balance between copyright and public interest will be provided in order to ensure the interest of the public without prejudice to the interest of right holders.

1. Introduction

The technology of internet and computer give the capacity to the normal citizens to have access to amounts of information and knowledges. In addition, the copyrights law seems to pay more attention to enhance the protection of the works in order to meet the trend of new technology instead of concerning the different kinds of public interests such as the needs of education and access to knowledge. It also causes an unbalance situation between the protection of copyrights and the public interest. Standing at the position of promoting the development of the society and delivering more welfare to more citizens, the balance needs to be stroke with the methods of legislation especially international legislation and cooperation.

2. Contents of Rights to Knowledge and Education.

The rights to educations and knowledge are considered as fundamental human rights by most of the countries of the world. This could be revealed by the international treaties and conventions widely signed by countries. In Universal Declaration of Human Rights, the Article 26 states that:

(1)Everyone has the right to get education which should be compulsory and free at least to the extent of fundamental and elementary stages.

(2)Technical and professional education should be generally available, and everyone should receive higher education on an equal basis according to their talents.

(3)Education shall promote the human personality, facilitate the respect for human rights and fundamental freedoms and enhanced the friendship of all nations, racial or religious groups.

And in International Covenant on Economic, Social and Cultural Rights adopted in 1966, Article 13 rules that (a) Primary education shall be compulsory and available free to all; “(b) Secondary education in its different forms, including technical and vocational secondary education, shall be made generally available and accessible to all by every appropriate means, and in particular by the progressive introduction of free education; (c) Higher education shall be made equally accessible to all, on the basis of capacity, by every appropriate means, and in particular by the progressive introduction of free education; (d) Fundamental education shall be encouraged or intensified as far as possible for those persons who have not received or completed the whole period of their primary education;” In ICESCR, the article has stressed that primary educations should be free and

compulsory while the member states shall make progress to facilitate the free education for secondary education and higher education.

However, on the other hand, there is a forthcoming question which was risen whether the intellectual property rights are subject to the free education?

The answer could be positive. The 1999 General Comment No. 13: the right to education, elements to be taken into account include (i) educational materials;(ii) library facilities; (iii) computer facilities (iv) information technology.

So, in other words, it could be an international goal or objective in education and knowledge terms to facilitate the progress of freeing the fee of educations including the fee of educational materials for instance, books. But on the other hand, it is much more like a declaration to state the opinions of the countries on the issues of educations, but not a obligation to obey. Because of this, in present stage, it would be much more relative for countries especially the developing countries urging for education materials which are copyright protected to lower the price of the copyright protected education materials rather than calling for all educational materials to be free. It could be achieved by various methods such as reduce the cost of transactions and encourage the reproductions within the territory. In order to achieve the aims of reducing cost, it could be necessary for developing countries urging for educational material to introduce exceptions and limitations into their national copyright legislation for licensing, translating into their own language editions or importing.

3. Contents of Rights of Copyrights.

On the other hand, the right of copyrights is another human right recognized by Universal Declaration of Human Rights. In Article 17 it states that: “(1) Everyone has the right to own property alone as well as in association with others. (2) No one shall be arbitrarily deprived of his property.” On this stage, the intellectual property rights as a kind of property rights is deemed to be protected as a human right by Universal Declaration of Human Rights. Frequently, copyright included by the intellectual property rights which protects the creations of works by authors is protected as a human right of property as well.

Berne Convention covers protections over the rights of reproductions, distributions, moral rights, rental or lent, adaptations etc. As the Berne Convention was adopted by the Agreement on Trade-Related Aspects of Intellectual Property Rights and the World Trade Organization, Berne Convention was introduced into national legislation of the member states. Berne convention provides strong protection over the countries of the contracting parties of WTO or WIPO. On the other hand, it could be one of the reasons that the difficulties for developing countries to have access to those educational works exist as the Berne Convention could not concern the reality gap between developed countries and developing countries.

4. Problems for Education

As the technology and internet develop in an incredible level, the technology pushed the intellectual property law and protection to evolve into a way to comply with technology but it also, again overlooks the interests of society and this time is the rights of education. Take the publishers in United Kingdom as an instance, as one of the most powerful publishing countries and the highest level degree of publishing market countries, UK has the relative complete legal system of publishing which could be traced back to 1709. To gain as much as possible benefit in business, the publishers like Pearson would sign a contract with authors to require authors to transfer the whole copyrights to the publishers when it is an educational book. The demand of publishers and authors to facilitate the intellectual property rights protection is increasing and they are also lobbying the government for further protection to enforce their rights. The huge industry of publishing with huge benefits are making the publishers and right holders to pay attention to the business asset of the works instead of the society asset. This trend is the main cause of the high barriers and difficulties for developing countries and educational institutes to develop education with the necessary

educational books, journal and articles. In addition, it is not only the developing countries which try to pricing the journal articles but also the education institutes in established publishing industries countries like UK try to have lower price of those academic works. This conflicts was acknowledged by several international institutes and government departments, as the royal society working group on IP, endorsed by the Council of the Royal society of United Kingdom found in 2003: “advances of technology and commercial forces have led to new IP legislation and case law that unreasonably and unnecessarily restrict freedom to access and to use information. This restriction of the commons in the main IP areas of patents, copyright and database right has changed the balance of rights and hampers scientific endeavor. In the interests of society, the balance must be rectified.” The situation that developing countries are facing the challenges of getting access to knowledge was concerned by UNESCO, which is described as following terms: “the creation and ownership of knowledge products are of increasing importance because of the centrality of information and knowledge to post-industrial economies. Copyright has emerged as one of the most important means of regulating the international flow of ideas and knowledge-based products and will be a central instrument for the knowledge industries of the 21st century. Those who control copyright have a significant advantage in the emerging, knowledge-based global economy. The fact is that copyright ownership is largely in the hands of the major industrialized nations and of the major multimedia corporations, placing low per capita income countries as well as smaller economies at a significant disadvantage.”

Furthermore, in Berne Convention, use of copyright work can be considered as free use for teaching purpose, which is regulated as follow:

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

However, such provision seems have little positive effects on promoting the effective use of educational materials in nations especially developing countries. In addition, some issues could come out as different countries implement different approach in introducing this provision. For instance, such education free use introduced by the United Kingdom on Copyright, Designs and Patents Act 1988 was described as: Illustration for instruction, Anthologies for educational use and etc. It could be fair to say that such approaches with a relative scope of free use may not meet the needs of developing countries such as India which have huge amount of communities which used indigenous and local language.

It could also be arguable such permitting reproduction should be “to the extent justified by the purpose” as various elements would affect the extent such as the amount of reproduction or the nature of the educational establishment. As for the “fair practice”, it could be also ambiguous to implement. As the Berne Convention continued to not give further definition on the phrase “fair practice”, member states could have individual definition on “fair practice”. For instance, the “fair practice” could be assessed in three respects in European Legislation: (1) quantity; (2) nature of the work; (3) the purpose.

On the other hand, such provisions about exceptions could be not able to balance the interests of copyright holders and interests of public who have rights to get education as the copyright holders have gained more protection with the new technology which was adopted by copyright laws. Under digital environment, copyright holders could trace and look on the usage of their works without much efforts, prohibiting unauthorized use, but on the other hand, it also means that the benefits of technology could not fully transport to the public or users. Such exceptions of free use on education on Berne Convention could not give satisfied access for public to protected works and it could not successful gain balanced position with the protection of copyright.

After all, it could reveal that the language in this provision have ambiguousness that it could hardly produce similar criteria in international term to establish a free use on education. The objective of this provision could be simple: permitting free use on education with certain amount and only for purpose of education. However, without further details and definitions on some phrase,

it has little effects on facilitating the education and helping parties or countries to have access to education materials.

5. Issues of Three-Step Test

The three-step test was first introduced by the Berne Convention in Article 9(2) and it was adopted and modified by the TRIPS agreement in Article 13 as follow: “Members shall confine limitations and 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 rights holder.” As the free use failed to benefit the permitted use on education, countries could turn to the Three-step test to make exceptions for education. Unfortunately, as the three-step test was interpreted into various ways for instances WTO gave an interpretation on applying three-step test on the case of United States’ exception on sports broadcasts in restaurants, bars and shops, the three-step test was still unable to give significant supports to the education use on protected works.

Firstly, similar issues arise on three-step test. Even if the permitted use of education fulfill the requirement of special certain case, it could be fair to say that the use under education could not meet the requirement of not affecting normal exploitation of right holders or authors as most countries were working to establish the primary education free for all which required mass reproduction of the works. Furthermore, such mass reproduction without compensations to the right holders could fall on the ground of “unreasonably prejudice the legitimate interests of the rights holder.”

Second, the question of whether permitted use on education should have compensation scheme. As for the similar issue of disabled people having access to literal works, even though the Marrakesh Treaty gave freedom to contracting parties to have compensation scheme, most countries did not have compensation scheme to the right holders without sufficient evidences of damage to the copyright holders. However, as the Marrakesh Treaty concerns the interests of disabled people which could have less economic loss on copyright holders as the amount could be small, the exceptions of education would be countered by copyright holders as the amount of required copies would be huge. On the other hand, if the compensation scheme applied, the influences of the exception of education could be reduced as the compensations would have drawbacks on the parties which have needs for those protected copyright work as the cost of purchasing materials would not decrease in a significant degree.

After all, the similar issues with Berne Convention education free use arise, the flexibility and ambitiousness of the three-step test does not only give developing countries and educational institutes have access to protected works for educational purpose, but also give the opportunities for copyright holders to counter or opposed such exceptions. The conflicts between the copyright holders and educational institutes or developing countries would become wider if the authorities introduced an exception of education with mass reproduction and no-compensation scheme. It would not ease the conflicts between both parties and seems could not significantly solve the problems of access to educational material.

6. How the Large Publishers Use Their Power?

Under Berne Convention and national copyright law, copyright holders have efficient protection on right of reproduction, distribution, communication to the public, rental or lent and adaption. With such exclusive rights, copyright holder could gain economic value of copyright work exploiting the work in various in the market. The copyright holders including the authors, publishers and other right holders could be asked for permitted use in certain ways in this case, for education. Assuming that the right holders were kind enough to facilitate the public education and license the work for free for education purpose, there were still some administrative costs which were deemed to be marginal cost, making the works high-cost for education purpose. However, in fact, such kindly free use of a copyright work could be rare as it would not give obvious benefits to the copyright holders but some minor benefits on themselves. Usually, situations of long period of asking for permitted

use and rejections of permitted use requests happens as the copyright law grants them legal protection on their works. In some cases, publishers seem to have simply ignored permission requests, despite a few reminders. Sometimes, the issues of compensations and remuneration could be a barrier for the request of permitted use as the many of the educational institutes had limited budget particularly parties from developing countries. In addition, it could also be difficult for parties who request to permitted use for a collective work such as poetry and stories as the publishers would insist to need permissions of all authors and it could among to a deterrent for parties seeking for permitted use. At last but not the least, even if the licensing was permitted for the parties, there could be various restrictions for the license for instances, limitations of usage time, limitations of amount of the works and etc. it could produce barriers and hindrances for requesting permitted use and usage of works for education purpose. Because it is a completed contractual behaviour and activity, the exclusive rights granted by copyright law allows copyright holders to have more power in the process of permitted use and could be a barrier for the public to seek permitted use for education purpose.

As for developing countries, problems for accessing to educational material would be more significant. Under international copyright protection system, copyright holders also have exclusive rights on developing countries which are contracting parties of Berne Conventions. It means that import and export of copyright works is restricted by copyright protections. Without considering difficulties discussed above, developing countries would face more difficulties. As many of developing countries are not English-speaking countries, more permissions on translations into local language and rights of adaptations would be needed in seeking permitted use. Furthermore, even though under international copyright protection system based on Berne Convention, an approximate copyright system was set up through the world, but differences still exist, which means developing countries have to go through the difficulties of differences on legislations and contractual terms to gain licenses.

7. Academic Publishing Perspective

Academic publishing as one of the most important respects of education, is a subfield of the publishing with certain forms of editions and peer reviews. As for the convenience and uniformity of an academic subject, most of the academic articles would be published on specific journals for the international academic world to review. On the other hand, it would cause problems for education institutes and readers as certain few academic publishers take in charge almost the work of academic works publishing. According to a study in 2015, medical sciences (NMS) and social sciences and humanities (SSH), Reed-Elsevier, Wiley-Blackwell, Springer, and Taylor & Francis account for more than 50% of articles published in 2013, in the subjects of natural science and social science. Accordingly, since 350 years ago, the academic publishers have facilitated their controls on academic publishing with uniform format and power of printing and distribution. However, this advantages were eased by the digital technology as everyone could publish their works in the internet world with enough audiences and readers. It could be fair to say that academic publishers were using the advantages of the development of technology, reducing the marginal cost to an extremely low level or zero and the reputations of the science community to gain benefits from academic publishing while the academic publishers were stating that they have important role in academic publishing. The concerns of academic publishing have been recognized not only by the academic but also by the authorities such as government. It could be unfair that the researchers in the colleges and university produced certain academic works, hand in to the academic journals for peer reviews basically for free while the publishers are providing those works to the scientific communities which is major in the universities and colleges in a high price.

While the academic trying to boycott the power of academic publishers, by refusing to subscribe certain journals from the top five publishers, the authority found that the fund they invested for facilitating the scientific research and publication was flew to the academic publishers and their shareholders. With the increase of academic journals, the price of publishing soared dramatically. According to a report of Science and Technology Committee on academic publishing, the average

price of an academic journal rose 58% between 1998 and 2003, while there was only a 11% increase in the UK retail price index over the same period. After all, because there was not any direct link between the readers and the publishers, the public libraries such as university libraries with certain budget suffered from the pricing issues of academic journals. In addition, with the significant increase cost on subscribing academic materials, the budget of university libraries and educational institutes does not increase but does decrease. According to the report held by The Chartered Institute of Library and Information Professionals (CILIP), between 1996-1997 and 2000-2001, university libraries in UK had 29% less budget on the information resource, but on the other hand, the average journal price increased by 29%. The percentage of spending on information resource on journal was 52%, increasing from 47%, at the same time the libraries still did not have the capacity to maintain the number of journal subscriptions. Furthermore, the academic publishers are using their advantage on controlling the resources of scholar materials to gain more benefits by some methods which could make the situations of libraries worse. For instance, with the development of digitization, the publishers could enforce their copyrights and overwatch their journals in a more powerful method, discouraging the cancelation of the subscriptions by stop providing access to the works which supposed to be provide as they had been paid in the past. The second method the publishers would take could be bundling journal subscriptions, which required the libraries and institutes to subscribe a bundle of journal in which there could be some journals the libraries could not need but they had to pay for it. This kind of method did not have any benefits for the libraries, but heavier economic burden on the libraries and such kind of method also revealed the negative outcomes of the dominant role of the academic publishers in academic resources.

It also revealed that even though the audiences or the readers such as students and teaching staff did not have direct link to the academic publishers, but the negative effects of the monopoly of the academic publishers could have a ultimate influence on the students and teaching staff of the universities. As the paragraph above discussed, the cost of libraries on academic resources made the libraries struggling. The university libraries have to cancel certain journals which have less priority in their subject in order to maintain the journals which have more priority in their subject, which means the resources provided for that less priority subject would decrease. The support for the subject would decrease and the education quality provided by the university and tutors would be affected by less resources. At the end, student could not receive sufficient knowledges and have issues in their self-development as well as Comprehensive development of the student.

8. Possible Solution

It could be fair to suggest that international cooperation need to be involved into the education issues. The achievement of Marrakesh Treaty could happen again with international cooperation and international negotiation. It could be not enough for developing countries to introduce a wide scope of education exception and the issues of of getting access to educational works should be aware and emphasized by the countries. Perhaps, another “Marrakesh Treaty” which relied on the Three-step test and existing international intellectual property legislation would be needed. With further stipulations and regulations on exceptions, giving more rights to the educational institutes and the public, then a fair balance between right holders and the public would be stroke.

As the academic publishers play the significant role in the pricing issues of academic journals, the powers of academic publishers could need to be reduced with certain methods. As the history of academic publishing made the advantage position of academic publishers, it could be hard to break down present situations. However, government could have certain methods to ease this situation, such as exploring the role of licensing organizations, encouraging the authors to pay the fee of publishing (the government would invest research fund to the authors) and encouraging academic communities to publish their works into the public through for instances networks.

9. Conclusion

Under present copyright legislation, the exceptions and free use on education provided by Berne Convention and TRIPS agreement could not meet the need of having access to educational works which are copyright protected. The copyright law which complies with the development of the technology allows right holders to gain benefits from copyright protections with less concerns to the users and the public. Such unbalance positions cause the difficulties for educational institutes and other parties to negotiate with right holders and also cause the advantage positions of certain publishers especially in academic publishing area. Efforts should be made by international worlds and government should take actions to deal with the issues of access to educational works.

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