COPYRIGHT EXCEPTIONS FOR THE DIGITAL AGE: A COMPARATIVE STUDY IN MALAYSIA AND THE PHILIPPINES

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I. INTRODUCTION

Copyright is a major form of intellectual property rights. It is one of the seven recognized forms of intellectual property rights under the World Trade Organization's Agreement on Trade-Related Aspects of Intellectual Property Rights ("TRIPS"). Much of copyright law today is harmonized internationally through the Berne Convention on the Protection of Literary and Artistic Works, 1886, and its subsequent revisions.

Copyright exceptions, or sometimes also known as copyright limitations, are situations where a person technically infringes a copyright owner's rights, but is otherwise excused by the law. The legal basis for copyright exceptions is said to be grounded on Article 9(2) of the Berne Convention: "It shall be a matter for legislation in the countries of the Union to permit the reproduction of such works in certain special cases, provided that such reproduction does not conflict with a normal exploitation of the work and does not unreasonably prejudice the legitimate interests of the author." The conditions laid down in Article 9(2) is known as the Three-Step Test.

Copyright exceptions are important parts of copyright law. They provide a balance between the rights of a copyright owner and the users' rights to legitimately enjoy a work. With the rise of digitization, copyright exceptions take on an ever significant role. In the digital world, everything is a copy, and is potentially subject to the control of copyright owners. Therefore, it is for copyright exceptions to restore the balance in favor of users in this digital age.

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ACKNOWLEDGEMENT: Research for this paper is made possible through financial support by the University of the Philippines, Asian Comparative Law Project. Special thanks to Professor J.J. Disini of the University of the Philippines, College of Law, for his kind comments on an early draft and input on the Philippines' legal position. All errors are my own.

The United Kingdom's government commissioned a review on intellectual property in 2010. The report, chaired by Professor Ian Hargreaves, provided an overview of where copyright exceptions have to be reformed to cater to the users' practices and expectations in the digital age.[1] In the Report, several areas and cases have been highlighted which needed reform in order to enable greater use of copyright works: text and data mining; search-engine indexing; digital archival and digitization of text; educational use (e.g. YouTube videos in classrooms and reuse of copyrighted material in students' assignments and presentations); video parodies and mash-ups; digitization of orphan works; format-shifting; non-commercial uses in research; and limited private copying. These identified situations can be used to assess whether Malaysian and Philippine copyright laws are forward-looking enough in addressing these issues.

II. COPYRIGHT LAW IN MALAYSIA

Copyright law in Malaysia is governed by the Copyright Act of 1987 (Act 332). As a former British colony and a common law country, Malaysia's copyright law is highly influenced by English case law and statutory interpretations. In fact, the first copyright statute in force in pre-independence Malayan territories was the English Imperial Copyright Act of 1911, which was applicable to the Straits Settlements of Malacca, Penang, and Singapore.[2] Even after the UK joined the European Union (EU), and the EU started to impose its continental civilian influence on English copyright law, Malaysian courts' deference to English jurisprudence remains unwavering.

Malaysia is a party to several international treaties governing copyright and intellectual property rights. The country acceded to the Berne Convention on the Protection of Literary and Artistic Works on 1 January 1990 and the World Intellectual Property Organization (WIPO) Copyright Treaty on 27 September 2012. Malaysia is also a member state of the World Trade Organization (WTO) from 1 January 1995, and is thus party to the TRIPS as part of the WTO Agreement. Membership in all these international treaties means that Malaysian copyright law is largely, if not wholly, in compliance with international copyright norms and obligations.

The Malaysian Copyright Act of 1987 was enacted to replace the Copyright Act of 1969, which was the first copyright legislation applicable throughout the country. One of the main objectives of the 1987 Act was to bring Malaysian copyright law in line with the provisions of the Berne Convention in anticipation of the country's joining the Convention. Several amendments to the Copyright Act of 1987 in subsequent years

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[1] IAN HARGREAVES, DIGITAL OPPORTUNITY: A REVIEW OF INTELLECTUAL PROPERTY AND GROWTH (2011).

[2] LAKE TEE KHAW, COPYRIGHT LAW IN MALAYSIA 4 (3d ed., LexisNexis 2008).

have added corrections to some legislative shortcomings[3] as well as provided additional protection, especially those related to technological advances.[4]

Although the Copyright Act of 1987 technically governs copyright law in Malaysia, and Section 6 declares that "[s]ubject to this Act, no copyright shall subsist otherwise than by virtue of this Act," English copyright principles remain influential in interpreting and applying the provisions of the Copyright Act. For example, subsection 7(2A) incorporating Paragraph 9.2 of the TRIPS Agreement states that "[c]opyright protection shall not extend to any idea, procedure, method of operation or mathematical concept as such." However, the distinction between what is an unprotected idea and what is a protected expression is not as developed in English copyright law as in the United States. As Lord Hailsham noted in the House of Lords' opinion in *LB (Plastics) Ltd. v. Swish Products Ltd.*, "[i]t all depends on what you mean by 'ideas'."[5] More importantly, unprotected ideas only mean "commonplace, unoriginal, or consist of general ideas,"[6] whereas detailed "ideas" are still being protected, such as the content of a literary work, from being translated into another language.

III. COPYRIGHT EXCEPTIONS IN MALAYSIA

Copyright exceptions in Malaysian copyright law are in the form of fair dealings and permitted acts. For literary, musical or artistic works, films, sound recordings, or derivative works, 21 separate paragraphs provide for different copyright exceptions. Most of these exceptions were written in an era where usage of computers was not ubiquitous. However, since they are largely technologically agnostic, the exceptions could well be applied to a digital platform.

Of the 21 paragraphs, only two paragraphs have direct relevance to the digital sphere. Paragraph (p) of subsection 13(2) concerns an exemption from "the commercial rental of computer programs, where the program is not the essential object of the rental." This is to exclude control by the copyright owner over rental of electronic equipment which include embedded computer programs. For example, modern automobiles use digital technology to control various aspects of the

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[3] Lake Tee Khaw, *Recent Amendments to Malaysian Copyright Law*, 19 EUROPEAN INTELLECTUAL PROPERTY REVIEW 81–90 (1997).

[4] Lake Tee Khaw, *Of Encryption and Devices: The Anti Circumvention Provision of the Malaysian Copyright Act 1987*, 27 EUROPEAN INTELLECTUAL PROPERTY REVIEW 53–64 (2005).

[5] [1979] R.P.C. 551, at 629.

[6] Designers Guild Ltd. v. Russell Williams (Textiles) Ltd., [2000] 1 W.L.R. 2416, at 2425; Elias Idris v. Mohd Syamsul Md Yusof & Ors.

functioning of vehicles and will have computer programs operating as part of the control system.

Paragraph (q) concerns "transient and incidental electronic copy of a work made available on a network if the making of such copy is required for the viewing, listening or utilization of the said work." The phrase "required for the viewing, listening or utilization of the said work" suggests that this exception was written with Internet browsing in mind. For example, when a page is viewed on a web browser, the digital information will have to pass through numerous network devices, where each will make a temporary copy for relaying down the next node. When the information arrives at a user's computer, a temporary copy will be stored in the browser program's cache. This piece of digital information is then processed, and the information which was appropriately formatted is presented on the user's screen which, in the eyes of copyright law, is also a copy. Although the Act is silent as to the maximum duration allowed within the meaning of "transient", it is reasonable to assume that it does not amount to permanent storage, although temporary caching by a browser program is to be expected as the norm.

It is to be noted that the exception in Paragraph (q) is only applicable to "a work made available on a network." The corresponding exception in the EU Information Society Directive covers two distinct scenarios: "Temporary acts of reproduction referred to in Article 2, which are transient or incidental [and] an integral and essential part of a technological process and whose sole purpose is to enable: (a) a transmission in a network between third parties by an intermediary, or (b) a lawful use [...] of a work or other subject-matter to be made, and which have no independent economic significance, shall be exempted from the reproduction right provided for in Article 2."[7] Paragraph 13(2)(q) roughly falls within the ambit of scenario (b).

Scenario (b) of an exception for "lawful use" covers a wider range of situations than temporary copy for network transmission purposes. It may cover temporary copies, such as those which reside on a user computer's random access memory (RAM). Regrettably, the "lawful use" exception does not cover a copy of a properly licensed computer program installed on a user's hard drive. Most likely, the legislature assumes that such a right to install a copy on a user's hard drive for "lawful use" of the program is already covered by an explicit license agreement or some form of implied license.[8]

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[7] Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the Harmonisation of Certain Aspects of Copyright and Related Rights in the Information Society, O.J. (L 167) 10, article 5(1).

[8] *See* Robin Ray v. Classic FM Plc [1998] F.S.R. 622 (HC).

In addition to the above, Part VIB of the Malaysian Copyright Act further provides for limitation of liabilities of service provides. These limitations were enacted to bring into force the WIPO Copyright Treaty of 1996. Section 43D provides for a service provider who caches a copy of a copyrighted work on a network "in order to facilitate efficient access to the work by a user[.]" This is an exemption from liability under certain conditions. This section supersedes a similar exception introduced under the Copyright (Amendment) Act of 1997. Section 43D falls within scenario (a) of Article 2 of the EU Information Society Directive.

Section 43E covers exemptions, under certain conditions, of a service provider from liability for (a) providing an online storage facility, and (b) linking to an infringing copy of a work. It is conceivable that exemption (a) applies to cloud storage providers, hosting providers, and content management providers which allow members of the public to post or upload content to their systems. Exemption (b) explicitly exempts search engines and web pages possessing links to content which could potentially be considered as infringing another's copyright. In both circumstances above, a mechanism is provided to allow a copyright owner to notify a service provider of the infringement in order for the latter to remove access to the infringing copies.[9] Exemption (b), however, does not go so far as to sanction a search engine provider for storing a snapshot of a website in order to build an index for its search engine.

Section 36A recognizes technological protection measures, and Section 37 makes it an infringement and Section 41 an offence, for a person to circumvent or distribute a device to evade technological protection measures. Six exceptions are available to this section on technological protection measures: (a) to achieve inter-operability of a computer program, (b) vulnerability testing, (c) security testing, (d) to disable undisclosed capability collecting personal data, (e) law enforcement purposes, and (f) for making an acquisition decision by a library, archive or educational institution.

IV. TECHNOLOGICALLY NEUTRAL EXCEPTIONS

Of the 21 paragraphs of exceptions provided under subsection 13(2), majority of the exceptions are technologically neutral and their applications are not necessarily

[9] Surprisingly, a copy of the notice by a copyright owner is not needed to be furnished to the content owner before or after removal or disablement of any content. On the other hand, section 43I provides that anyone who suffers a loss or damages as a result of a false notice may claim compensation from the issuer of such false notice.

confined to the digital environment. Nevertheless, a few exceptions have significant implications to practices in the digital world.

Paragraph (e) covers "the incidental inclusion of a work in an artistic work, sound recording, film or broadcast," of which, "artistic work" would most likely be a photograph. Therefore, the incidental inclusion of a work in a photograph, sound recording, film or broadcast is not an infringement. This is particularly pertinent to digital photography, sound recording, and video recording of public events by the public. The operative word here is "incidental", which has been discussed in an English case. In *IPC Magazines Ltd. v. MGN Ltd.*,[10] Mr. Richard McCombe QC, sitting as deputy judge of the High Court, interpreted the word "incidental" to mean "casual, inessential, subordinate or merely background."

Paragraph (f) covers "the inclusion of a work in a broadcast, performance, showing, or playing to the public, collection of literary or musical works, sound recording or film, if such inclusion is made by way of illustration for teaching purposes and is compatible with fair practice[.]" The exception is applicable to the educational practices of playing online videos in classrooms, or linking to videos and textual content in a virtual learning environment (VLE) for an online learning setting. What amounts to "fair practice" is not defined, and so far, there has been no judicial determination on what is and is not fair practice in the context of Paragraph (f).

Paragraphs (gg) and (ggg) cover sound and video recording for "private and domestic use." The paragraphs give an exemption for "the making of a sound recording [or film] of a broadcast, or a literary, dramatic or musical work, sound recording or a film included in the broadcast insofar as it consists of sounds [or visual images] if such sound recording [or a film] of a broadcast is for the private and domestic use of the person by whom the sound recording [or film] is made." One application of paragraphs (gg) and (ggg) is for home taping of television programs.[11] The word "broadcast" is defined as "the transmitting, by wire or wireless means, of visual images, sounds or other information which—(a) is capable of being lawfully received by members of the public; or (b) is transmitted for presentation to members of the public[.]" Although this definition of "broadcast" appears to be fairly wide and may potentially include video-on-demand services through fibre optic cables or the Internet, a further reading of the phrase "broadcasting service" shows that it is confined to "any service of radio or television broadcast, operated under the general direction and control of or under licence by the Government, in any part of Malaysia." Thus, it would appear that the word "broadcast" has to be given a restrictive meaning

[10] [1998] FSR 431 (ChD).

[11] *See* Sony Corp. of America v. Universal City Studios, Inc., 464 U.S. 417 (1984).

limited to radio and television broadcasts, which excludes video-on-demand and streaming services through the Internet.

Paragraph (gggg) is an accessibility exception: "[T]he making and issuing of copies of any work into a format to cater for the special needs of people who are visually or hearing impaired and the issuing of such copies to the public by non-profit making bodies or institutions and on such terms as the Minister may determine." It is not clear whether the 3 parts of the exception are to be read conjunctively or disjunctively. If the case is the former, then to evoke this exception, there must be "such terms as the Minister may determine." On the other hand, since the word "may" is used in relation to the terms, this exception can be read to mean that even if the relevant Minister does not make any terms, the exception can be used. This exception is best read in relation to print or physical media. "Making and issuing of copies" of the Braille version of a literary work would fit into this exception. Likewise, "making and issuing of copies" of an audiobook version of a literary work would also satisfy this exception.

With the advent of text-to-speech technology and digital Braille display, the need for pre-recorded audiobooks and Braille text is substantially diminished. The Marrakesh Treaty to Facilitate Access to Published Works for Persons who are Blind, Visually Impaired, or Otherwise Print Disabled (2017), for which Malaysia is yet to be a signatory member, provides for a list of exceptions to cater to visually impaired persons' access to published works. Arguably, Paragraph (ggg) can also substantially satisfy the requirements and ideals of the Marrakesh Treaty. It could also potentially sidestep the legality issue of enabling a text-to-speech feature for e-books, such as the one found in Amazon's Kindle e-book readers.[12]

V. FAIR USE IN MALAYSIA

Traditionally, copyright exceptions in Malaysian copyright law follow the English approach of situationally-specific fair dealings. An amendment introduced in 2012 added a new subsection to Section 13, which can potentially be read as introducing the American fair use doctrine into Malaysian copyright law.[13] Prior to the amendment, Paragraph (2)(a) reads:

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[12] *See* Jeremy B. Francis, *The Kindle Controversy: An Economic Analysis of How the Amazon Kindle's Text-to-speech Feature Violates Copyright Law,* 13 VANDERBILT JOURNAL OF ENTERTAINMENT & TECHNOLOGY LAW 407–440 (2011).

[13] Copyright Act of 2012, § 9.

(2) Notwithstanding subsection (1), the right of control under that subsection does not include the right to control—

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

After the amendment in 2012, Paragraph (2)(a) now reads:

[T]he doing of any of the acts referred to in subsection (1) by way of fair dealing including for purposes of research, private study, criticism, review or the reporting of news or current events:

Provided that it is accompanied by an acknowledgement of the title of the work and its authorship, except that no acknowledgment is required in connection with the reporting of news or current events by means of a sound recording, film or broadcast[.]

Furthermore, a new subsection (2A) is provided:

For the purposes of paragraph (2)(a), in determining whether a dealing constitutes a fair dealing, the factors to be considered shall include—

(a) the purpose and character of the dealing, including whether such dealing is of a commercial nature or is for non-profit educational purposes;
(b) the nature of the copyright work;
(c) the amount and substantiality of the portion used in relation to the copyright work as a whole; and
(d) the effect of the dealing upon the potential market for or value of the copyright work.

It is argued that the amendment to Paragraph (2)(a) and the inclusion of subsection (2A) have the effect of changing the meaning of "fair dealing" in the Copyright Act. Prior to 2012, fair dealing under Paragraph (2)(a) is restricted to the purposes of "non-profit research, private study, criticism, review or the reporting of current events" which, according to the English principle of fair dealing, has a narrower application than the American fair use doctrine.

Nallini Pathmanathan J, in *MediaCorp News Pte Ltd. v. MediaBanc (Johor Bharu) Sdn Bhd,* held, in relation to the old Paragraph (2)(a):

> The section is drafted so as to specify with particularity the only circumstances or occasions of use which would qualify for exemption, namely non-profit research, private study, criticism, review or the reporting of current events. The section does not provide for a broad and unspecified category of acts of 'fair dealing' or use, of which the circumstances of non-profit research, private study, criticism, review or the reporting of current events provide some specific examples. This is evident from the fact that the words 'fair dealing' are immediately qualified by the words 'for the purposes of' and followed by the specific events or circumstances in which copyright control is precluded.
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> Unlike the situation in the United States of America, the Act does not allow for 'fair dealing' to be assessed by considering a broad category of circumstances and ascertaining whether those circumstances conform to a set of statutory guidelines. On the contrary, fair dealing under the Act is confined to 'fair dealing' for the prescribed purposes set out in that section and no more. The aforesaid case therefore has to be read in the context of application of the statutory test provided in that jurisdiction.[14]

The addition of the word "including" in the amended Paragraph (2)(a) of Section 13 is of utmost importance. In *Ng Beng Kok v. PP,* Zabariah Mohd Yusof JCA held:

> By introducing the word 'including' immediately after the words '[...] circumstances', the Legislature has expanded the meaning of the expressions "circumstances" for the purposes of the Act. The word 'include/including' is generally used to enlarge the meaning of the words or phrases occurring in the body of statute. When it is so used, those words or phrases must be construed as comprehending not only such things, such as they signify according to their natural impart, but also those things which the interpretation clause declares that they shall include. In other words, when the words 'include/including' is used in the definition or section, the Legislature does not intend to restrict the definition; it makes the definition enumerative but not exhaustive.[15]

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[14] [2010] 6 M.L.J. 657 (HC).

[15] [2017] 7 C.L.J. 175, at ¶ 35.

Applying the same principle to Paragraph (2)(a), the acceptable purposes of "fair dealing" in the amendment paragraph would go beyond the traditional "research, private study, criticism, review or the reporting of news or current events." With the amendment, this list of purposes are merely illustrative and not exhaustive.[16]

The addition of subsection (2A) is also important. If read literally, it sets the four factors that have to be considered when applying the extended scope of fair dealing. However, the fact that they are an almost verbatim copy of the four factors for fair use in Section 107 of the US Copyright Act gives it an additional meaning. In fact, the enactment of subsection (2A) looked as if the legislature took an inspiration from Nallini Pathmanathan J in *MediaCorp News Pte Ltd v. MediaBanc (Johor Bharu) Sdn Bhd:*

> [T]he position in the United States is somewhat different. In that jurisdiction four factors are statutorily provided, the application of which will enable a determination of whether a use is fair. These four factors are the purpose and character of the use, including whether the use is of a commercial nature or is for non-profit educational purposes, the nature of the copyrighted work, the amount and substantiality of the portion used and the effect of the use upon the potential market for or value of the copyrighted work. The various purposes set out there, namely criticism, comment, news reporting, teaching scholarship or research are referred to as examples of fair use but do not serve to provide the defining limits for 'fair dealing', unlike the position under the Act in Malaysia. To that extent the definition of 'fair dealing' in that jurisdiction is considerably wider than in Malaysia under the Act.[17]

It is trite law and timeless practice in Malaysian statutory interpretation that where a local statutory provision is in *pari materia* to an English common law statute, the court is bound by the interpretation given by the English courts;[18] or if such cases fall outside the prescribed common law transplant date in the Civil Law Act of 1956, they are still regarded as of highly persuasive value.[19] In the event that the transplanted law originates from a jurisdiction outside the English common law world, it is possible that Malaysian courts may still refer to those court decisions interpreting the original statutory provisions. An example of such an arrangement can

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[16] Another subtle change in Paragraph (2)(a) is the omission of the phrase "non-profit" for research purposes. Influence for this removal is most likely to have stemmed from the Singaporean case of *Creative Technology Ltd. v. Aztech Systems Ptd. Ltd.* [1997] 1 S.L.R. 621 (CA).

[17] [2010] 6 M.L.J. 657 (HC), at ¶ 211.

[18] Khalid Panjang & Ors v. Public Prosecutor (No. 2) [1964] 1 M.L.J. 108 (FC).

[19] Abdul Malek bin Hassan v. Mohammad Hihwan bin Mastuki [1987] 1 M.L.J. 489 (SC).

be found in the Malaysian Competition Act of 2010, which is largely derived from European competition law principles. Consequently, the Malaysian Competition Commission and the Malaysian Competition Appeal Tribunal routinely cite European competition decisions as authorities.

Although the US is considered as a jurisdiction with a common law system, decisions therefrom are less commonly cited in Malaysian courts, principally because Malaysian common law relies on the common law as practiced in England, and lesser elsewhere. The few American copyright cases that have been cited in Malaysian court reports are *Computer Associates International Inc. v. Altai,*[20] *Kelly v. Arriba Soft Corp.*,[21] and *Davidson & Associates Inc. v. Internet Gateway*.[22] It is argued that with the inclusion of subsection (2A), it has essentially set in motion a process of transplanting the US' fair use jurisprudence. "Fair dealing" in Malaysia is no longer the fair dealing of the yore. In fact, it is, like wolf in sheep's clothing—nothing but a disguise for the American fair use doctrine. Thus, it is hoped that similar to competition law cases from Europe, important fair use decisions from the US would be recognized and adopted in Malaysian copyright cases.

Perhaps one difference between Paragraph (2)(a) and Section 107 of the US Copyright Act is that the former requires acknowledgement of the title of the original work and its authorship, whereas such a requirement is not stated in the US law. It is not clear whether this is the intention of the drafter or just a drafting oversight. Whereas the original purposes of "research, private study, criticism, review or the reporting of news or current events" were primarily literary in nature, and thus would not be impossible to state the title of the original work and its authorship, there might be circumstances where giving such acknowledgement might not be practical. Also, fair use in the American context is used as an ex post facto defense; or, the situation concerned might not even have anything to do with copying.

In *Sony Corporation of America v. Universal City Studios, Inc.*, the US Supreme Court allowed the fair use exception for the use of video-cassette recorders for time-shifting of television programs.[23] However, an on-going dispute between Oracle America, Inc. and Google is still pending determination by the US Supreme Court on whether the fair use exception is applicable to the Java programming language's application program interface (API).[24] In both cases, no acknowledgement

[20] 982 F.2d 693 (2d Cir. 1992).

[21] 336 F.3d 811 (9th Cir. 2002).

[22] 334 F.Supp 2d 1164 (E.D. Mo. 2004).

[23] 464 U.S. 417 (1984).

[24] Google LLC v. Oracle America, Inc., available at https://www.supremecourt.gov/search.aspx?filename=/docket/docketfiles/html/public/18-956.html.

was found in the infringing subject matter, although it is arguable that a recorded television programme would retain its title and credit screen indicating authorship.

Even if Malaysian courts do not proactively develop new exceptions under its recently acquired "fair dealing" doctrine, transplanting the American fair use doctrine would mean that whatever copyright exceptions have been allowed under the fair use doctrine in the US should be similarly acknowledged as allowable in Malaysia. After all, what is good for the goose is good for the gander.

Singapore likewise amended their Copyright Act of 1987 in 2004, as part of a US-Singapore Free Trade Agreement, to create a "fair dealing" exception which contains the 4 conditions in Section 107 of the US Copyright Act. According to a Singaporean copyright scholar, this has the effect of introducing the American fair use doctrine into Singaporean copyright law.[25]

VI. COPYRIGHT EXCEPTIONS IN THE PHILIPPINES

Copyright law in the Philippines is governed by Part IV of the Intellectual Property Code (Republic Act No. 8293).[26] Chapter VIII of Part IV provides for copyright limitations. Section 184 lists eleven paragraphs of situational exceptions to copyright protection. Apart from Section 184, Sections 185 to 190 also provide various types of exceptions and limitations based on very specific conditions.

On the other hand, Section 185 provides for a fair use exception. The 4 factors found in Section 107 of the US Copyright Act are adopted verbatim. However, the way Section 185 is written does not suggest that this fair use exception is as broad as in other jurisdictions, because it states that "[t]he fair use of a copyrighted work for criticism, comment, news reporting, teaching including multiple copies for classroom use, scholarship, research and similar purposes is not an infringement of copyright." It appears that the fair use exception provided in the Intellectual Property Code is a limited one because its application is confined to the list of purposes, i.e. criticism, comment, news reporting, etc.

An amendment by Republic Act No. 10372 of 2012 to the Intellectual Property Code further added an additional category of fair use in Section 185: "Decompilation,

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[25] Wee Loon Ng-Loy, *The Imperial Copyright Act 1911 in Singapore: Copyright Creatures Great and Small, This Act it Made Them All*, in A SHIFTING EMPIRE: 100 YEARS OF THE COPYRIGHT ACT 1911, 141–167 (Uma Suthersanen & Ysolde Gendreau eds., 2013).

[26] For a historical background, *see* Ferdinand M. Negre & Jonathan Q. Perez, *The Philippines*, in INTELLECTUAL PROPERTY IN ASIA: LAW, ECONOMICS, HISTORY AND POLITICS 199–231 (Paul Goldstein & Joseph Straus eds., 2009).

which is understood here to be the reproduction of the code and translation of the forms of the computer program to achieve the inter-operability of an independently created computer program with other programs may also constitute fair use." Interestingly, this addition does not say that decompilation of a computer program for the purpose of inter-operatability *is* fair use, but *may only constitute* fair use.

In *ABS-CBN Corporation v. Gozon*,[27] the Philippines Supreme Court had the occasion to examine Section 185. It found that to evoke Section 185, it is necessary that the purpose must be within the list enumerated in subsection 185.1. It also suggested that the fair use must be "transformative" in nature, i.e., by adding a "new expression, meaning or message." Secondly, fair use favors factual work more than creative work. Thirdly, the amount taken must be "fair" and not excessive. Finally, the use must not "have a negative impact on the copyrighted work's market." In the context of a news broadcast, of which the present case was concerned with, it was stated by the Supreme Court that "the primary reason for copyrighting newscasts by broadcasters would seem to be to prevent competing stations from rebroadcasting current news from the station with the best coverage of a particular news item, thus misappropriating a portion of the market share." Therefore, in that case, the Supreme Court rejected the fair use argument raised by the respondent as it reproduced approximately 5 seconds of news reporting from the appellant.

The 2012 amendment also incorporated protection for rights management information[28] and technological measures[29] into the Intellectual Property Code. Circumventing effective technological measures and removing or altering electronic rights management information are both a copyright infringement[30] and a crime.[31] The Intellectual Property Code provides no specific exemption to the protection of rights management information and technological measures. Likewise, the Intellectual Property Code is silent on the limitation of liability for Internet service providers.

Apart from the decompilation under the fair use exception discussed above, Section 189 provides for a back-up copy or adaptation of a computer program. In addition, several generic limitations to copyright protection are available in the Intellectual Property Code.

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[27] G. R. No. 195956, Mar. 11, 2015.

[28] Intellectual Property Code (Philippines), subsection 171.13.

[29] Intellectual Property Code (Philippines), subsection 171.12.

[30] Intellectual Property Code (Philippines), subsection 216.1.

[31] Intellectual Property Code (Philippines), subsection 217.2.

VII. COMPARATIVE ANALYSIS

There are similarities between the Malaysian and Philippine approaches to copyright exceptions. Both employ a list of exceptions based on specific situations. In addition, a fair use exception is available. The same 4 factors in Section 107 of the US Copyright Act have also been adopted by both the Malaysian and Philippine laws on fair use.

In the case of Malaysia, there is no limit as to the situations that the "fair dealing" exception can be applied to. However, as a legacy of its previous form, Paragraph 13(2)(a) requires acknowledgement of authorship. On the other hand, the Philippines' fair use exception is confined to "criticism, comment, news reporting, teaching including multiple copies for classroom use, scholarship, research, and similar purposes" and "decompilation" of a computer program. No acknowledgement of authorship is required. Due to this, its application may not be as wide as in the American context, such as for the purpose of time shifting in the *Sony* case.

The Malaysian "fair dealing" exception does not explicitly provide for decompilation, although the expansive language of that paragraph does not preclude it from being considered under the "fair dealing" exception. As of the time of writing, a determination from US Supreme Court is still pending in the case of *Google LLC v. Oracle America, Inc.* on whether the use of the Java programming language API can be exempted under the fair use doctrine. Many software industry players have expressed serious concerns that there would be negative repercussions to the industry if the use of API for inter-operability purposes is not exempted under the fair use doctrine.[32]

With regard to technological measures, the Malaysian Act provides for 6 specific situational exceptions which include the inter-operability exception, and vulnerability and security testings. No equivalent exception is found in the Philippine Intellectual Property Code.

Both Malaysia and the Philippines have a provision to allow for a back-up of computer programs. These provisions are the legacy of yester-years, where computer programs were sold on easily damaged floppy disks. Nowadays, installation files are downloadable for free from websites, or more commonly nowadays, using an app store platform. Restriction of access of the installed programs is done by way of a validated unique product key.

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[32] Pamela Samuelson, *API Copyrights Revisited,* Communications of the ACM, July 2019, at 20–22.

VIII. CONCLUSION

The march of technology is never-ending. Likewise, copyright law will have to constantly keep up with changes in the technological environment, just as the birth and existence of copyright law is intertwined with the emergence of copying technology, starting first with the printing presses and later digital technology.

Between Malaysia and the Philippines, the former appears to have taken into account more copyright exceptions which are relevant to the digital age. The fair use exceptions in Malaysia are also wider and not confined to any specific purposes.

Notwithstanding thus, both jurisdictions still have some fair amount of work to do on the copyright exceptions front if the issues and uses raised by the UK's Hargreaves Report are to be used as a benchmark. User digitization and format-shifting rights are important to preserve knowledge and cultural artifacts for future generations. Archiving, data mining, and storage rights need to be addressed to develop technologically advanced tools based on machine learning and deep learning. Video parody and mash-up rights by users are a modern form of digital expression. Educational practices are increasingly relied on and material on the Internet is being used and re-used, and as such, copyright law should accommodate and proffer a liberal attitude towards these practices.

The task of crafting copyright exceptions is not over and should never be. So long as copyright law exists, users' rights as defended by copyright exceptions are a necessity. This delicate balance is to be shouldered by copyright exceptions.