

Doctrine in vietnam in comparison with us law law international essay

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Part A: Copyright Fair use Doctrine in Vietnam in comparison with US Law.

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Part A: Copyright Fair use Doctrine in Vietnam in comparison with US. Law.

Introduction.

Since the first day in Singapore, I found it difficult to buy or have a copied (scanned version) book, it is far different from my country. In Vietnam, everyone can purchase a copied book from any stationery shop nearby universities at very low price and quickly. If the shop does not have the book you need, you can loan the book from library and leave it to the shop assistants. They never refuse scanning the full book and you can come back later to collect the copied one. Despite the effort of Vietnamese government,

copyright regulations seem to be ignored, the violation still remains complex and serious. The misunderstanding of Fair use Doctrine in Vietnam may be blamed for this situation. Consequently, in the first part of this paper, I will focus on the regulations about Fair use Doctrine in Vietnam and its contrast to US law.

The Fair use Doctrine concept.

The concept of Fair use has been a new convention in many common law jurisdictions (also known as Fair dealing in Canada, UK and other Commonwealth countries; and as Fair practice in EU). It is a doctrine of limitation and exception to the exclusive right granted by copyright law to the author of a creative work[1]. In US copyright law, fair use doctrine permits copying of copyright materials for limited and specific purposes which include commentary, search engines, criticism, news reporting, research, teaching, library archiving and scholarship without acquiring permissions from the right holders. The civil law jurisdictions also have other equal doctrine. In respect of free use for reproduction, the Berne Convention contains a general rule, rather than an explicit limitation. Article 9 states that:(2) 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. Member States may provide for free reproduction in special cases where the acts do not conflict with normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the author[2]. In

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Vietnam, the fair use doctrine is known as "Cases of use of published works where permission and payment of royalties and/or remunerations are not required" stated in Article 25 of Law on IP (Law no: 50/QH/2005/QH11)[3].

The Fair use Doctrine in US Law.

The definition of fair use doctrine is not a very new convention in US law, it has roots from British common law and was first discussed by Justice Joseph Story[4]. The legal concept of "test copyright" was first ratified by the United Kingdom of Great Britain's "Statute of Anne" of 1709. As room was not made for the authorized reproduction of copyrighted content within this newly formulated statutory right, the courts created a doctrine of "Fairness Abridgement" in "Gyles v Wilcox", which eventually evolved into the modern concept of "fair use"[5]. In *Folsom v. Marsh* (9 F. Cas. 342, No. 4, 901 (C. C. D. Mass. 1841)), the defendant had copied 353 pages from the plaintiff's 12-volume biography of George Washington in order to produce a separate two-volume work of his own. Justice Joseph Story was remembered for rejecting the defendant's fair use defense, and his opinion is the foundation of analysis for the Fair use. The Fair use doctrine existed in US common law then was formally adopted and codified by the U. S. legislature in the Copyright Act of 1976, 17 U. S. C. Almost since the beginning of copyright law itself, courts have been sympathetic to these otherwise infringing uses of copyrighted works, finding them fair and reasonable, and therefore exempt from punishment under the law[6]. 17 U. S. C. § 107 Notwithstanding the provisions of sections 17 U. S. C. § 106 and 17 U. S. C. § 106A, the fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified by that section, for purposes

such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright. In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include: the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes; the nature of the copyrighted work; the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and the effect of the use upon the potential market for or value of the copyrighted work. The fact that a work is unpublished shall not itself bar a finding of fair use if such finding is made upon consideration of all the above factors. Section 107 of the 1976 Act states exceptions to copyright infringement for "fair use". These uses include reproduction of a work for the purpose of "criticism, comment, news reporting, teaching..., scholarship, or research". For example, quoting short passages in a review or scholarly work for the purposes of illustration or comment would generally constitute a fair use, as would using some of the content of an original work in a parody derived from it. However, as the courts and Congress have repeatedly emphasised, there is no definitive list of which types of works are and are not covered by fair use. Instead, each case must be determined on its own merits[7]. Over time, the courts recognised certain factors derived from Justice Story's opinion were useful in determining whether fair use existed in any particular case. Consequently, each case is required to take a four-factor balancing test. The fundamental principle, that fair use consists of a balancing of economic interests, is expressed by the court more precisely. Case law has developed and defined the four factors which determine

whether a use is fair as follows[8]: Purpose and character of use. The courts are most likely to find fair use where the use is for non-commercial purposes, such as a book review. Nature of the copyrighted work. The courts are most likely to find fair use where the copied work is a factual work rather than a creative one. Amount and substantiality of the portion used. The courts are most likely to find fair use where what is used is a tiny amount of the protected work. If what is used is small in amount but substantial in terms of importance - the heart of the copied work - a finding of fair use is unlikely. Effect on the potential market for or value of the protected work. The courts are most likely to find fair use where the new work is not a substitute for the copyrighted work. The U. S. fair use approach is flexible. This flexibility, while it permits the court to decide cases on their individual merits, can also be criticised as capricious, unprincipled, and prone to abuse - a critique which can be levelled at balancing tests generally

The Fair use Doctrine in Vietnam Law

Vietnam ended more than three decades of conflict in 1975. In the first 10 years after war, Vietnam has a socialism central- planned economy. In fact, Vietnam was openly opposed to the concept of copyright. The government asserted that copyright protection was contrary to the socialist ideology. Cultural, artistic, and scientific works were property of the people of the Socialist Republic of Vietnam. The very first of IP law legislation plan of Vietnam came to a dead-end in early 1980s. Since the " Doi moi" renovation launched in 1986, along with economic reform, the Vietnam government has strived to renovate and improve its economy by facilitating foreign investment and trade in the domestic market. Vietnam has pushed through a

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great deal of investment-related legislation while slowly renovating its legal framework. The Penal Code of 1985 was the first Code adopted by the authorities. It was followed ten years later by the 1995 Civil Code, including one chapter for IP regulations. The U. S. lifted their embargo in February 1994, and since then, the two states started to negotiate several bilateral agreements, including a Copyright Relations Agreement[9], which was signed in 1997. It is the reason why many Vietnam IP articles were principally based on US Law. In Civil Code 1995[10], the legislators tried to build the factors to analysis the fair use but oriented by the socialist ideology. The following three requirements must be met in Article 760 of the Civil Code in order for the fair use doctrine to apply: The user must provide the name of the original author and citation on the work. The use cannot have or exploit the author's interest in the copyrighted work. The work must be used within the fair use definition provided by Article 760. Contrary to Section 107 of the U. S. Copyright Act, the Code does not provide any element on how to interpret these requirements. The doctrine of fair use allows courts to avoid rigid application of copyright laws when such application would be unfair or would suppress creativity and the dissemination of useful works to the public - the very activity copyright laws are meant to foster; however, this case by case analysis may be troublesome in a society where the legal system is being renovated and jurists are untrained in copyright matters. By that time, Vietnam decided to access to Berne convention, the law-makers build another article in complete accordance with the Berne Convention and the U. S. Copyright Act. Article 761 expressly approves a certain number of fair uses, not limited to critique,

comment, news reporting, and education. After several years, because of the weakness of law implementation, Vietnam law-makers continued to introduce some ambitious legislation plans. In 2005, one year after the Berne Convention came effective in Vietnam, the Parliament passed a new Civil Code in June then the Law on IP 2005^[11] in December. The IP Law of 2005 removed all of the provisions related to Intellectual Property that were by then incorporated in the Civil Code. After that, Vietnam's laws in relation to IP law have been developed over the last decade and are reasonably robust. In just five years, twelve decrees and five circulars related to IP regulations were released, the IP Law 2005 was amended once in 2009. The fair use doctrine, which is stated in Article 25 of the IP Law, changed the most. First, in the new law, the legislators combined article 760 of requirements for fair use to article 761 and added more details and cases of use of published works where permission and payment of royalties and/or remunerations are not required. 1. Cases of use of published works where permission or payment of royalties and/or remunerations is not required include: a/ Duplication of works by authors for scientific research or teaching purpose; b/ Reasonable recitation of works without misrepresenting the authors' views for commentary or illustrative purpose; c/ Recitation of works without misrepresenting the authors' views in articles published in newspapers or periodicals, in radio or television broadcasts, or documentaries; d/ Recitation of works in schools for lecturing purpose without misrepresenting the authors' views and not for commercial purpose; e/ Reprographic reproduction of works by libraries for archival and research purpose; f/ Performance of dramatic works or other performing-art works in mass

cultural, communication or mobilization activities without collecting any charges in any form; g/ Audiovisual recording of performances for purpose of reporting current events or for teaching purpose; h/ Photographing or televising of plastic art, architectural, photographic, applied-art works displayed at public places for purpose of presenting images of such works; i/ Transcription of works into Braille or characters of other languages for the blind; j/ Importation of copies of others' works for personal use. 2.

Organizations and individuals that use works defined in Clause 1 of this Article must neither affect the normal utilization of such works nor cause prejudice to rights of the authors and/or copyright holders; and must indicate the authors' names, and sources and origins of the works. 3. The use of works in the cases specified in Clause 1 of this Article shall not apply to architectural works, plastic works and computer programs. Thus, Fair use doctrine in Vietnam also relies on Decree N° 100/2006/ND-CP of 21st September 2006, Detailing and Guiding the Implementation of a Number of Articles in the Civil Code and the Intellectual Property Law Regarding Copyright and Related Rights[12]. Article 24(1) states: 1. Reasonable recitation of a work by a person without misrepresenting the author's views for commentary or illustrative purpose in his/her work as provided for at Point b, Clause 1, Article 25 of the Intellectual Property Law must satisfy the following conditions: a/ The recited parts aim merely to introduce, comment or clarify matters touched upon in his/her work; b/ The number and essence of parts recited from the work used for recitation are not prejudicial to the copyright to such work and suitable to the nature and characteristics of the type of work used for recitation. This article is the nearest effort of Vietnam

government to limit the arbitrary quote in critique, comment, news reporting, and education, which was caused by article 761 in the past. However, even Vietnam's laws in relation to IP law have been developed over the last decade and reasonably robust, no cases of fair use infringement that been before the courts. Thus interpretations of Vietnam fair use provisions are yet to be tested. Having robust laws is meaningless without enforcement and Vietnam falls behind in this area. Whether its derives from the traditional notion of IP protection being contrary to the socialist ideology as discussed above or common practice, fair use on the street has a whole different meaning to the law.

Enforcement in Vietnam

As mentioned above, copyright protection has been viewed for decades as contrary to the socialist ideal in Vietnam. In an economy where the buying power of the average Vietnamese is estimated at about two hundred dollars per year, pirated goods offer a cheap alternative to the flourishing domestic market for foreign goods. Whilst the legal framework and IP legislation has developed over the past decade, piracy remained an open and often blatant commercial act in Vietnam, providing high profitability and little risk to pirates. Piracy levels in Vietnam remain among the highest in the world and losses continued to mount to the industries. Piracy in the retail markets is unchecked and the Internet in Vietnam remains replete with online piracy. In terms of enforcement, there were few positive developments . In last 5 years, there are two decrees on Sanctioning Administrative Violations of Copyright and Related Rights[13]being implemented. But the enforcement seems to be to weak. No criminal case has ever been brought in Vietnam for

copyright infringement. The Copyright Office of Vietnam (COV) has admitted that they are unable to handle the piracy problem. The COV indicated that in 2008, the Ministry of Culture, Sports and Tourism (MOCST) "examined and settled" 20 cases involving copyright piracy, meting out administrative fines of a total of VND 225 million (US\$12, 050), by no means a deterrent.

Vietnam also maintains some of the most restrictive market access barriers in the world, keeping legitimate products and services out of the market, while creating a fertile ground for piracy. The Germany-based Transparency International and the Center for Community Support Development Studies, under the Vietnam Union of Science and Technology Associations, revealed in a recent study of the integrity among Vietnamese youth that: "...honesty usually results in disadvantage and that an honest person is often seen as an idiot." (VietNamNet, 2011).[14] In fact, there is lack of proper control by civil society and ordinary people in Vietnam. The Law has an article specifying involvement by civil society groups and ordinary people in rooting out corruption, but in reality this is complex and does not work properly. A number of corruption cases relating to management officials, even when publicized, have not been resolved. According to Government Decree No. 47, whistleblowers must give their name and address, detail the corrupt practice and submit documentation to support it. Cultural factors, as well as insufficient legal protection for whistleblowers could be preventing many citizens and public officials from reporting on corruption. Moreover, a number of corruption cases relating to management officials, even when publicized, have not been resolved.

Summary Discussion of Vietnam Law versus U. S. Law .

Vietnam Law which is primarily based on the U. S. approach to fair use perspective on intellectual property is utilitarian and economic. Copyright is granted because it encourages authors and inventors by rewarding them for their acts of creation. According to this justification, copyright serves, and should serve, to maximise social wealth. The differences between economic foundations of U. S. and Vietnam copyright law explain why the protection of authors in the U. S is more flexible than in Vietnam. The U. S. has a dualist system in which U. S. Judges must interpret U. S. law and international law to be consistent with each other. However, where there are inconsistencies, the U. S. law shall control within the U. S. unless the international law is considered self-executing, i. e. containing a provision for the immediate application of the law upon its adoption. Though the U. S. is a signatory to the Berne convention (1 March 1989), Berne has been declared both by Congress and judges not to be a self-executing treaty. This means that absent enabling national legislation, any conflict between the international and domestic law will be resolved according to the U. S. domestic law[15]. Although there is some commonality between Vietnam statutes (no criminal case has ever been brought in Vietnam for copyright infringement) or U. S. common law, there are also a number of striking differences. Differences occur not only at the level of positive law (object of protection) but also in theory. However, these theoretical differences are not irreconcilable. On the other hand, there are also many common points between the two systems. These common points form the basis of integration of the global intellectual property regime.