

Appendix II: Examples of Flexible Limitations and Exceptions from Existing and Proposed Laws

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FLEXIBLE USE

These clauses bear the most similarity to the Model Flexible Use clause prepared by the Global Expert Network on Flexible Limitations and Exceptions in that they affirmatively

describe factors to be considered in a balancing of the interests to determine whether a particular use should be covered by a limitation and exception to exclusive rights. All of the models quoted below exist in addition to a specific list of limitations exceptions, and are strongly influenced by Anglo-American “fair dealing” or “fair use” clauses.

UNITED STATES

U.S. Copyright Act (1976)

Section 107: Notwithstanding the provisions of sections 106 and 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—

- (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
- (2) the nature of the copyrighted work;
- (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
- (4) 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The fact that a work is unpublished shall not itself bar a finding of fair use if such finding is made upon consideration of all the above factors.

PHILIPPINES

Intellectual Property Code of Philippines (1997)

185.1. The 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. Decompilation, 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. In determining whether the use made of a work in any particular case is fair use, the factors to be considered shall include:

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

185.2. The fact that a work is unpublished shall not by itself bar a finding of fair use if such finding is made upon consideration of all the above factors.

SINGAPORE

Copyright Act Chapter 63 (1987, last amended 2006)

Section 35(1) Subject to this section, a fair dealing with a literary, dramatic, musical or artistic work, or with an adaptation of a literary, dramatic or musical work, for any purpose other than a purpose referred to in section 36 or 37 shall not constitute an infringement of the copyright in the work.
[52/2004]

Section 35(2) For the purposes of this Act, the matters to which regard shall be had, in determining whether a dealing with a literary, dramatic, musical or artistic work or with an adaptation of a literary, dramatic or musical work, being a dealing by way of copying the whole or a part of the work or adaptation, constitutes a fair dealing with the work or adaptation for any purpose other than a purpose referred to in section 36 or 37 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 work or adaptation;
- (c) the amount and substantiality of the part copied taken in relation to the whole work or adaptation;
- (d) the effect of the dealing upon the potential market for, or value of, the work or adaptation; and
- (e) the possibility of obtaining the work or adaptation within a reasonable time at an ordinary commercial price.

Section 36. A fair dealing with a literary, dramatic, musical or artistic work, or with an adaptation of a literary, dramatic or musical work, shall not constitute an infringement of the copyright in the work if it is for the purpose of criticism or review, whether of that work or of another work, and a sufficient acknowledgment of the work is made.

ISRAEL

Copyright Act 2007 - Art. 19

(a) Fair use of a work is permitted for purposes such as: private study, research, criticism, review, journalistic reporting, quotation, or instruction and examination by an educational institution.

(b) In determining whether a use made of a work is fair within the meaning of this section the factors to be considered shall include, inter alia, all of the following:

- (1) The purpose and character of the use;
- (2) The character of the work used;

- (3) The scope of the use, quantitatively and qualitatively, in relation to the work as a whole;
 - (4) The impact of the use on the value of the work and its potential market.
- (c) The Minister may make regulations prescribing conditions under which a use shall be deemed a fair use.

TAIWAN

Copyright Act (2007-07011) – article 65

Fair use of a work shall not constitute infringement on economic rights in the work.

In determining whether the exploitation of a work complies with the provisions of Articles 44 through 63, or other conditions of fair use, all circumstances shall be taken into account, and in particular the following facts shall be noted as the basis for determination:

- (1) The purposes and nature of the exploitation, including whether such exploitation is of a commercial nature or is for nonprofit educational purposes.
- (2) The nature of the work.
- (3) The amount and substantiality of the portion exploited in relation to the work as a whole.
- (4) Effect of the exploitation on the work's current and potential market value.

Where the copyright owner organization and the exploiter organization have formed an agreement on the scope of the fair use of a work, it may be taken as reference in the determination referred to in the preceding paragraph.

In the course of forming an agreement referred to in the preceding paragraph, advice may be sought from the specialized agency in charge of copyright matters.

MALAYSIA

Copyright Act (2012 Amendment, adding the word “including” in 13(2)(a) after “by way of fair dealing” and before “purposes of research,” etc.)

Section 13(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 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 acknowledgement is required in connection with the reporting of news or current events by means of a sound recording, film or broadcast;

REPUBLIC OF KOREA

Copyright Act (2013) - article 35-3

Art.35-3 (Fair Use of Copyrighted Material)

1. Except for situations enumerated in art. 23 to art. 35-2 and in art. 101-3 to 101-5, provided it does not conflict with a normal exploitation of copyrighted work and does not unreasonably prejudice the legitimate interest of the copyright holder, the copyrighted work may be used, among other things, for reporting, criticism, education, and research.

2. In determining whether art. 35-3(1) above applies to a use of copyrighted work, the following factors must be considered.

- The purpose and character of the use, including whether such use is of a commercial nature or is of a nonprofit nature.

- The type or purpose of the copyrighted work.

- The amount and importance of the portion used in relation to the copyrighted work as a whole

- The effect of the use of the copyrighted work upon the current market or the current value of the copyrighted work or on the potential market or the potential value of the copyrighted work.

ENABLING USES OF BERNE 3-STEP TEST

The models below provide catch-all provisions authorizing any use that does not encroach rights holder's interests protected by the Berne Convention's "3-step" test. They differ from the models listed above by virtue of the absence of any statutory language requiring a balance of the author's and user's and other interests. Rather, they define the outer bound of the author's right, declaring in effect that any use beyond that bound is permissible, regardless of its purpose or relation to broader social or economic objectives.

CHINA

Second Draft of the Third Revision of China's Copyright Law (2012)

Article 42: Under the following circumstances, works may be used without the permission of the copyright holder, and without paying remuneration, but the full name of the copyright holder, the name of the work and the source of the work shall be indicated, and it may not infringe other rights enjoyed by the copyright holder according to this Law:

* * *

(13) Other circumstances.

Methods of use of the work referred to in the previous paragraph shall not influence the normal use of the work, and must not unreasonably prejudice the legitimate interest[s] of the copyright owner[s].

WITTEM INTERNATIONAL NETWORK PROJECT ON A EUROPEAN COPYRIGHT CODE (2010)

European Copyright Code, Art 5.5 – Further limitations

Any other use that is comparable to the uses enumerated in art. 5.1 to 5.4(1) is permitted provided that the corresponding requirements of the relevant limitation are met and the use does not conflict

with the normal exploitation of the work and does not unreasonably prejudice the legitimate interests of the author or rightholder, taking account of the legitimate interests of third parties.