Reformulating Fair Use: Copyright Protection Facilitating OER
- A Comparative Review of Latest Proposed Copyright Law Amendment in Taiwan

The doctrine of Fair Use has been developed in many jurisdictions as one of the key copyright concept. By providing a safe harbor, the doctrine aims to identify an array of activities utilizing a published work of another person without copyright infringement. Without doubts, the doctrine, once appropriately interpreted and applied, would certainly help promote the environment with a regulatory regime in which open education resources ("OER") will be created, developed and utilized more widely. However, as the notion of fair use is somehow abstract and conceptual, sometimes it may not be easy to draw a crystal clear line between what acts are legally permissible and what are aberrant and prone to infringe the rights and interests of other persons. For the stakeholders of OER community, in particular those engaging producing and developing teaching materials, this doctrine is indeed instrumental in providing a helpful guidance on avoiding certain apparent risks of copyright infringements but in reality circumstances, on a number of occasions, would arise in where no clear cut answer are readily available.

In the Recommendations on Open Educational Resources adopted on November 21, 2019, actions are called to further build up capacity of stakeholders to create, re-use, adapt and redistribute OER, and authorities are urged to develop supportive policy as well as sustainability models for OER. To move towards those directions efficiently and effectively, it is essential to take concrete actions to promote and maintain a well defined and effective regulatory regime, upon which all OER stakeholders participated in legitimate creation, development, distribution, and other utilization of teaching and other education resources can rely to expel and avoid risks or concerns of random or inadvertent copyright infringements. A delicate balance between private property rights and the interests of the general public, in particular OER stakeholders, needs to be carefully evaluated and introduced into the regulatory regime by the relevant authorities in a more definite and unambiguous manner. In this regard, further review and exploiting the fair use doctrine should provide helpful insights.

It is interesting to see that the latest copyright law amendment bill formally adopted in Taiwan earlier this year, an attempt has been made with the aims to reduce complexities and difficulties associated with judicial application of the fair use doctrine. For example, under current copyright law in Taiwan, in order to as a validly assert fair use as a defense against copyright infringement, the author, i.e. the alleged copyright infringer, must prove and establish that the allegedly wrongful acts, i.e. his or her reproducing, adapting or other using the published work of the plaintiff, are
within the reasonable extent. Needless to say, the process of bringing in evidence to show the extent of reasonableness may sometime be difficult and time consuming. Further, given that copyright disputes and infringement cases may arise within a wide spectrum of backgrounds and circumstances and involve identification of numerous factual and other factors, it is challenging for the court to formulate a coherent framework of judicial decisions, under which the doctrine of fair use can be addressed and explained in a more succinct and straightforward manner.

In order to wipe out uncertainties and complexities that administrative authorities and the court may encounter for application of doctrine of fair use, the draft amendment apparently takes a different approach. It specifically makes a general shield available to formal education institutions (i.e. schools, colleges, universities established and registered pursuant to relevant laws and regulations) providing distant learning by loosening the statutory requirement of reasonable use while the doctrine of fair use is at issue. As a result, all of the existing provisions dealing with fair use are tailored to make fair use a more accessible defense against claims of copyright infringement. For example, in one of the proposed amendment, it is expressly provided that any of those formal education institutions and their members charged with the duties of teaching would be, to the extent necessary for achieving the purpose of teaching or education, permitted to avail themselves of the doctrine of fair use for reproducing, adapting, distributing, publicly performing, presenting or re-communicating of a work that has been published by others. Therefore, if any OER community stakeholder is a member associated with those institutions, it is legally more viable to make a valid defense against infringement claims for materials he has created, edited, developed and utilized for teaching purposes. However, this does not mean the fair use doctrine can be asserted with no limitation. A careful reading of the proposed amendment provisions suggests that the fair use defense would be rejected if it is established that the alleged act is not in line with a reasonable use of a published work and unreasonably causes injuries to the property rights of its author. It looks like that by shifting the burden of proof the proposed amendment is anticipated to make the legal environment more responsive and accessible to the OER community, in which the doctrine of fair use doctrine is able to function as a more useful legal instrument. More detailed review and analysis of the proposed amendment on fair use doctrine and other relevant issues will be further addressed in the presentation.

In summary, this presentation is prepared with the aim of exploring possible alternatives dealing with the fair use doctrine with a focus on the latest copyright law amendment provisions in Taiwan. The presentation comprises four parts. First, the presentation will generally describe and discuss the existing regulatory regime
governing the doctrine of fair uses and the implications for OER content creation and development. Secondly, the presentation will focus on discussion of the background of the amendment bill and the goals it tends to achieve. Thirdly, the presentation will re-examine and analyze key contents of the proposed amendment provisions, with its focus on the provisions specifically dealing with the doctrine and OER, as well as some key issues that remain unclear in the draft amendment. In the final part, the presentation will make a comparative observation by looking into how similar issues are addressed and handled in other jurisdictions and would suggest further buildup of a multi-jurisdiction platform through which communications and coordination can be effectively made to promote application of the fair use doctrine as an effective means of facilitating OER.
The doctrine of fair Use has been developed in many jurisdictions as one of the key copyright concept. However, as the notion of fair use itself is abstract and conceptual, sometimes it may not be easy to draw a crystal clear line between what acts are legally permissible and what are aberrant and prone to infringe the rights and interests of other persons.

In summary, this presentation is prepared with the aim of exploring possible alternatives in dealing with the fair use doctrine by looking into the latest copyright law amendment provisions proposed in Taiwan. In addition to introducing and analyzing the proposed amendment bill, the presentation will also assess the potential impacts the amendment may have on OER community for availing itself of a more effective legal tool against copyright infringement claims. Further, the presentation will make a comparative observation by looking into how similar issues are addressed and handled in other jurisdictions and would suggest building up a multi-jurisdiction platform through which communications and coordination can be effectively made to promote application of the fair use doctrine as an effective means of facilitating OER.