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# Rights Limitation in Digital Age

Reform of Fair Use in Copyright Law

*Translated by* Shibao Wang · An Zhang ·  
Hao Wang · Jie Wang



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# Preface

From the perspective of the world civilization history, changes in social relations along with the significant development of technology are usually manifested by legal system reforms. The scientific and technological revolutions are the important driving force for the emergence and development of the modern intellectual property system, which is a system of rules gradually formed with the development of modern industry and market economy. Moreover, in modern societies, technology development determines the rise and fall of industries and the changes in market practice. Inevitably, this will in turn exert great influence on the intellectual property system. Such influence is mutual, meaning that the new technology not only presents new problems and challenges to the existing intellectual property system but also provides novel ways to solve the problems and respond to the challenges. The interaction between the technological development and that of the intellectual property system is a long-term, cyclical process; legislators must consider, under a new technological circumstance, how to protect the interests of creators and other rights holders, promote the dissemination of works and information, and popularize knowledge, thereby improving the well-being of the society as a whole.

The system of limitation on copyright is a system that balances and mediates the interests of the creators and the public. In the Internet era where the application of digital technology is ubiquitous, new types of information technology are emerging, enabling people to overcome the traditional time and space constraints on obtaining information and thus disequilibrating the interests between rights holders and users in the traditional copyright system. The system of limitation on copyright mainly includes two types, namely *fair use* and *statutory license*, wherein the fair use system is the start point for reviewing the limitation system. The development and application of digital technology have brought about a new state of imbalance between the fair use of copyright and the right abuse of rights holders. The boundaries of fair use have been affected in some industries, and the interests of many rights holders are therefore seriously affected. In addition, new forms of works produced by integrating the new technology may, due to the dominant strength of the rights holders, discourage the public from being creative. At this point, more attention should be paid to the statutory license system as the endpoint for studying the system of limitation on copyright,

and the balance of interests between the rights holders and the public should be readjusted accordingly.

The fair use system is not a statutory right of the user, but the statutory obligation of the rights holder. It is a necessary constraint on the scope to which the copyright owner can exercise his or her rights. The essence is that, within the scope of the rights of the owner, the copyright law grants an exemption for the specific acts that are recognized by the law and that are insufficient to cause any substantial injury to the copyright owners. In other words, the law does not consider such acts infringement. As be spoken in practice, this system is an institutional paradigm that guarantees the individual rights and makes the rights in harmony with the public interests; it not only effectively protects the copyright owners from infringement on their proper and substantive rights but also facilitates and promotes the public's proper and limited use and dissemination of literary, artistic, and scientific works.

In civil law jurisdictions, a system of limitation on rights mostly bases the copyright law on specific exceptions<sup>1</sup>; while the common law jurisdictions have developed and established a system of limitation on copyright, similar to that of the civil law countries, by case law based on the doctrine of fair use (such as "fair use" in the USA and "fair dealing" in the UK). The fair use system is, originally created by judges' judgments, an important means to protect against infringement of copyright. It is also one of the most important statutory restrictions on the excessive control of rights by rights holders. Therefore, the doctrine of fair use plays a positive role in free dissemination of works and the protection against the negative effects of excessive implementation of monopoly by copyright owners.<sup>2</sup>

Fair use owns a key role for maximizing the utilization of works from the perspective of limiting the interests of copyright owners. For a long time, as a part of the controversial system, some believe that the main roles of fair use can be reflected in the following aspects: first, from the economic perspective, the legislative cause of fair use is largely understood as a way to fix market failures<sup>3</sup>; second, it is conducive to promoting social values such as justice and democracy<sup>4</sup>; third, the

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<sup>1</sup> For instance, Section 6 of the German Act on Copyright and Related Rights contains the "limitations on copyright," which specifies in an enumerative manner the limitations on and exceptions to copyright with regard to fair use and statutory license. This law also defines the user's obligations in different situations. The Italian copyright law lists the specific use behaviors in its "exceptions and limitations" and specifies the circumstances in which the rights holders' right to remuneration should be guaranteed in different activities. During the recent years, the Japanese copyright law has undergone many revisions and also paid attention to the continuous improvement of the limitation on the copyright system and has continuously added new right limitations to the regulations.

<sup>2</sup> Bunker M. D. *Eroding Fair Use: The 'Transformative' Use Doctrine After Campbell* [J]. *Communication Law and Policy*, 2002, 7 (1).

<sup>3</sup> Gordon W. J. *Fair Use as Market Failure: A Structural and Economic Analysis of the Betamax Case and its Predecessors* [J]. *Colum. L. Rev.*, 1982, 82 (1600); Xiong Qi. *On the Applicable Scope for the Fair Use System of Copyright* [J]. *Science Technology and Law*, 2006 (2).

<sup>4</sup> Netanel N. W. *Copyright and a Democratic Civil Society* [J]. *Yale L. J.* 1996, 106 (283); Fisher W. W. *Reconstructing the Fair Use Doctrine* [J]. *Harv. L. Rev.* 1988, 101 (1659). Quoted from a quotation, Bunker M. D. *Eroding Fair Use: The "Transformative" Use Doctrine After Campbell* [J]. *Communication Law and Policy*, 2002, 7 (1).

conflicts between monopoly rights and freedom of speech can be balanced<sup>5</sup>; and fourth, it can provide people with practical ways for intellectual creations on the basis of their predecessors.<sup>6</sup>

For safeguarding the rights of the owners, when new technologies gradually eliminate market failures, the scope of fair use will inevitably narrow. Otherwise, it will cause losses to the rights holders. On the contrary, if theoretically fair use is considered to protect freedom of speech, the impact of new technologies on the scope of fair use will significantly be reduced; the scope could be expanded by limiting the copyright under the new technical conditions. The limitation on the scope of fair use application depends on the theoretical values of the legislators. The examination of the theoretical values comes from the consideration on the performance of the system. An important factor in judging the performance of the system is whether the ultimate outcome of legal practice is beneficial to the growth of social wealth that is not only reflected by the changes in the balance of economic interests, but the aspects of politics, culture, and life as well.

As the copyright system has always been subject to the technologies for creation and communication, the widely applied digital technology has a profound impact on all kinds of intellectual property including copyright to make the intellectual property system adjust or restructure. The flow of knowledge discussed in the modern society no longer focuses on communication or dissemination by means of roads, trade, and trade fairs. The copyright law has experienced three major leaps from printing technology, broadcasting, and television technology, to digital technology. History has proven that the reform and development of copyright law and the expansion and changes in copyright rights are all driven by economics and the investors' pursuit of economic interests in copyright-related industries. When new technologies reduce transaction costs and create new financial incentives, rights holders will mostly tend to expand their rights to a border scope to cover the newly created interests, such as the rights of performer, record producer, and broadcasting organization, and the rights for information dissemination via the Internet. Correspondingly, the traditional profit-making approach may gradually disappear due to the technological changes (e.g., e-book shave gradually replaced some of the printed books in the market). In the course of the above-mentioned systematic changes, any growth or decline in copyright will affect the copyright system to different degrees, among which, the most influential one is fair use.

The circulation of works is the way to realize the benefit of copyright but may be hindered by the high cost of licensing, which is referred to as a mode of "prisoner's dilemma"; it seems that the best way to solve the problem is fair use, but the development of new technology has greatly reduced the licensing cost, for example, the utilization statistics of works can be performed easily on a digital platform. In

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<sup>5</sup> For instance, the conflicts between the US copyright law and freedom of speech emphasized in the First Amendment. Quoted from Lohmann F. V. "Fair use as innovation policy" [J]. *Berkeley Technology Law Journal*, 2008.

<sup>6</sup> Leval P. N. *Toward a Fair Use Standard* [J]. *Harv. L. Rev.*, 1990, 103: 1105, 1109–1110. Quoted from Lohmann F. V. *Fair use as innovation policy* [J]. *Berkeley Technology Law Journal*, 2008.

the chain of interest, the copyright system centers on “author-communicator-user.” The communicator has an increasingly prominent status and is in charge of the interests as a dominant role, especially in the Internet environment where the ability of network service providers is totally different from traditional publishers in nature and roles. Realizing and distributing benefits has become increasingly conspicuous. The traditional publisher plays a crucial role in selecting authors, publicizing works and the like to gain income. However, the network provider can not only replace the role of the traditional publisher but also provide the author and the user with a more free communication platform and allow the author and the user to have more freedom in transaction. Moreover, network provider can create an unprecedented market environment for the formation of the supply-demand chain for works and determine the value of the works. This in turn helps to bring new opportunities and challenges to the intellectual property trading market. However, this has also caused confusion that whether the fair use system still exists in a “fair and legal” way in the new market environment. In the past, the transaction cost method mainly analyzed the balance of interests between the rights holders and the users, which is a binary structure in economic analysis. Nowadays, the communicators in the circulation chain of works own growing interests and roles. Therefore, the analysis and judgment of the role of the communicator should be added into the study of fair use. In particular, the nature of private copying and the potential conflicts brought by it should be concerned under digital technology.

This book emphatically discusses the challenges of the change in the dissemination way of works brought by digital technology to the system of fair use of copyright and analyzes the so-called fairness by the study of theories on the system of fair use of copyright in previous discussions. It is mainly about the necessity of demonstrating “system changes will be brought about by technological changes” from the perspective of economics, i.e., the problem of modification faced by the system of fair use of copyright.

The system of fair use is an outcome under certain technical and economic conditions and should also be appropriately adjusted or restructured as the conditions change. When determining the relevant copyright system on the premise of the legitimacy of the copyright system and that the law should realize sufficient and effective protection of the copyright, we will find that, in the era of digital technology, users can use others’ works without paying the price and without restrictions in the name of fair use, and the interests of the rights holders are hollowed out under the umbrella of fair use, in accordance with the principles established by the system of fair use of copyright under the traditional technical conditions. The protection on the interests of the rights holders by laws and even the copyright system itself perform practically no function. Therefore, although it is still too early to talk about whether the system of fair use should be eliminated, the system of fair use must be adjusted significantly in response to changes in order to maintain the survival of the copyright system.

In addition to analyzing the reconfigurations of fair use from the perspective of economics, this book will make an in-depth research on the interactions between legal systems and culture. In the post-industrial era, the cultural form has undergone



tremendous changes. The development of modern culture characterized by commodification and mediation has largely affected the changes of the legal system. As part of the intellectual property system, the copyright system itself is concerned with a cultural right, which affects people's contact with knowledge and acts on human innovation. The harshness or easing of the system of fair use may have different effects on the direction of cultural development and the innovative manner of people.

This author believes that under the existing copyright system, first of all, it is necessary to stipulate the application of fair use with more stringent standards; secondly, in order to protect the public's interest in the acquisition of knowledge resources, it may be considered to effectively protect the interests of rights holders by expanding the scope of statutory licenses, to reduce the costs of statutory licenses appropriately as a balance and to collectively classify a part of the private copying problems as the copyright limitation category with the statutory licenses; thirdly, it may regulate licensable content for fair use in order to meet the public interest to the public law field; and finally, the fair use may be defined as "innovative capital" existing in the "investment" that encourages innovation, which provides a new perspective for the survival of fair use.

The system of limitation on copyright is a product from an industrialized social environment dominated by early traditional manufacturing. With the development of technology and the transformation of production methods, the relative lag of the system will inevitably become an obstacle to the realization of copyright benefits, and the system is more and more powerless for the moral rights or economic rights in the implementation of the rights. It is a topic worthy of continuous discussion that how the copyright system will reflect the value of its existence in the digital age. How to encourage innovation and achieve balanced distribution of interests in the new system environment is a problem that must be solved by the copyright system.

Law is like the nerve of society. The development of every stage of human society systematically affects the law and adjusts the social relations in revolution by laws. In the post-industrial era, the impact of technology on the economy and the law is more systematic, larger, and even leads to the emergence of a globally unified system. This feature is particularly prominent in the intellectual property legal system. Therefore, the development and reform of the basic system in intellectual property law has transcended the individuality of different countries and regions and has become a common problem facing the world.

As we all know, intellectual property, as a new property form that comes with industrial civilization, is similar to traditional property rights yet has essential differences. The continuous advancement and change of knowledge and technology have profoundly affected our research and mastery on it. Digital technology is a qualitative change and leaps in the progress of human technology. It can be sure that it has profoundly changed our way of life, production methods, behaviors, ways of thinking, and ways of existence, and changed the concepts including traditional time and space, value, and property. We have a reason to believe that it has not yet shown a really significant impact on the social economy, the law, and life. As far as the copyright system is concerned, with the development of copyright content, the system of fair use of copyright must also be adjusted in time and adjusted accordingly. In the

process of establishment, operation, and continuous adjustment of the system, fair use is an enduring topic that cannot be put on hold due to unstable boundary. Practice has taught us that the maturity of research on the system of fair use is always relative. Today, the rapid development and wide application of digital technology has broken the structure of the traditional copyright system and poses a very big challenge to this system. It is time for us to put efforts and make a respond.

Since the establishment of the Chinese Copyright Law in 1990, due to the limitations of the legislative system and mechanism, the work of amending the law has lagged behind. In more than 20 years, there were only two amendments to the law in 2001 and 2010, respectively. The activities of amendments to the law cannot keep up with the economic and social development and cannot be compared with developed countries and regions, especially Japan. This is not only a relatively lagging performance of the law but also a reflection of China's backwardness in technological development and economy as a developing country. The essence of legislation and judicature is an important part of social and economic activities. The lag of legislation and the backwardness of the judicial level will affect, hinder, or even constrain economic development and social progress. Whether the intellectual property system is advanced is related to a plurality of fields such as economy, science and technology, and politics of a country. On the occasion of the third revision of this copyright law, by analyzing the impact of digital technology on the production, distribution, circulation, and consumption of knowledge in modern society, this book seeks to further explore the nature and function of fair use, relocate the fair use system, and propose a better plan for the design of China's system of limitation on copyright while readjusting the copyright system.

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# Introduction

Since the turn of the millennium, digital technology has been widely applied to every aspect of people's lives. The development of technology is gradually changing trading methods and lifestyles and is impacting and bringing challenges to the traditional intellectual property system. The intellectual property system, as a legal system that encourages innovation and protects inventions and creations, has also undergone many changes with the evolution and application of technologies. Compared with patents and trademarks, copyright has been changing dramatically on aspects such as the form of works, way of protection, term of protection, and scope and extent of protection. Meanwhile, works, the object protected by the copyright law, also need to be discussed in the digital technology environment, from the creation of works to their use, and from obtaining works to their dissemination. With technical support, the dissemination of works, an embodiment of knowledge, is much easier than ever before. Moreover, the author's control over works also goes from strong to weak, then back to strong again. How to balance the protection of interests of the author and the public is the key to system adjustment and also a core issue of the copyright limitation system.

The system of limitations on copyright initially focused on study of the fair use system. This was followed by discussion on statutory licenses. The final goal is to set up the structure for the system of limitations on copyright. At present, there are abundant theoretical researches and practical experiences at home and abroad concerning the fair use system of copyright. Under the digital technology, fair use has a great impact on rights holders and related industries. The widespread use of digital technology had profound impact on the copyright system and especially had brought about great challenges to the fair use system. This has drawn extensive attention and become an important issue for lawmakers, judges, and researchers. Literatures of current researches mainly cover the following topics: first, theoretical analysis on the fair use nature of copyright; second, rules for the application of the fair use doctrine, with researches on the application of the fair use doctrine in the USA and cases involving this doctrine, and on the evolution of the fair use system and the drafting of law in countries with written copyright laws; third, the status of fair use in the Internet environment; and fourth, composition of the system of limitation on copyright.

Existing research data provides a broad perspective for understanding the experiences and differences in the fair use system of copyright at home and abroad, and the discussion of related topics is an important basis for further researches. However, the main shortcoming of existing research is that they are not systematic. In view of the above, the main research topics of this book are as follows. First, the consensus on the value of the fair use system: this is the premise of understanding the value and legitimacy of the system and is the basis for systematic discussion and research. Second, fair use offers coordination and interaction with the property rights in the copyright system to balance the interests between rights holders and users.

Traditionally, it is considered that reasonable limitations on the copyright are the same as the exclusion of copyright, and fair use itself can also stimulate innovation, which makes it necessary to systematically study the copyright system. Third, and the primary focus of this book is, in the digital technology environment, how can we set reasonable limitations on copyright in order to protect the interests of the rights holders and at the same time ensure the freedom of “use” by the public in this new media age, and how to eventually balance interests of all parties.

Domestic and foreign rights holders have implemented new business models to adapt to the new digital technology environment. These business models have made it challenging to maintain the fair use system. This book compares different legislative models, draws on the management and operation experience of other countries, and summarizes theoretical deficiencies and practical dilemmas of the current system of China. Suggestions on improvement are provided, with an aim to shed some light on solving both historical and current problems, and on the design the future look of the system of copyright limitation in China.

This book mainly consists of the following three parts.

The first part introduces the theoretical basis of the fair use system. The nature and legitimacy of the system are analyzed from the theoretical perspective. Existing literature has done in-depth analysis on this issue from different levels. This book intends to analyze the logical starting points of various viewpoints and conclusions, distinguish the theories in different fields, and analyze the legal relationship in the fair use system based on an analysis of the legal relationship in the copyright system.

The second part analyzes the status and role of the fair use system in the copyright system in different periods by exploring the evolution of the fair use system in several countries. The study on the fair use system should be based on the practices in China. However, foreign experience, systems, and theories may also be used as reference. This book introduces copyright-related legislations in the USA, Britain, Canada, Germany, Japan, and other countries, and the amendments made by these countries to adapt to technological changes. Using the experience of many countries as a basis, the history, current situation, and future of the fair use system are analyzed. Further, the legal relationship of fair use in the copyright system is systematically analyzed. By such analysis, we study the subtle changes of the status of fair use caused by the change in the rights and obligations relations due to technological revolution in the copyright system, whether under a traditional institutional framework, or in digital technology environment, and seek to find a reasonable position for the fair use system under the new communication technology.

The third part involves reflection on and reconstruction of the fair use system in China. For the institutional research, we should be able to adapt to changes, introduce new ideas, and analyze and find the theory to solve the problems faced by fair use in technological reforms from the perspective of economics and public interest. In studying the issue of statutory license, we discuss the copyright collective management system and the role that the system should play and the corresponding design that should be made in the legislation.

## Research Methodologies

First, empirical analysis. This book is a research on system rather than a theoretical research. Therefore, the study should be based on institutional norms and practical operational problems and try to find deviations from the original intentions and institutional dilemmas, so as to carry out targeted research. Therefore, as writing this book, I collected the material on practical cases, especially cases from USA and UK, and analyzed the rules for the application of the fair use doctrine with some US and UK cases.

Second, analysis of law and economic. This method is commonly used for providing efficiency analysis in institutional analysis and is convinced in efficiency and rationality. The economic analysis method in transaction cost theory has been the most widely accepted theory that can make a reasonable way out for fair use behavior. When fair use occurs, in the context of the traditional modes of communication, market failures caused by excessively high transaction cost may prevent the rights holders from obtaining profits or cause the users to abandon their use due to excessively high licensing costs. In the new technology environment, however, technological advancement can solve the problem of excessively high transaction costs. Further, the application of digital technology can facilitate rights holder's authorization and the user's payment of consideration. The reduction in transaction costs maybe a fatal blow to the existence of the fair use system. Therefore, the method of economic analysis will reposition the fair use system in the copyright system.

Third, comparative analysis. Comparative analysis is an important method of self-cognition. Only after various comparisons, can we fully understand the progress and deficiencies we have. Chinese copyright system is borrowed from abroad. The fair use system is a system with great controversy, with the regulations of different countries vastly different. In China's copyright system, the composition of the limitation system on copyright had been improved. By comparative analysis, we can better define the deficiencies in law. For this purpose, the comparative analysis method will be more targeted and credible, and conclusions from such analysis will be more convincing. Of course, with regard to the comparative analysis method, we should be cautious in sample selection. We need to evaluate whether to select all samples or to extract some samples, and to select samples on criteria. The samples used in this book are the systems of UK, USA, Germany, France, and Italy. On the base of differences in

the definition of works, it is more representative to analyze the systems in different regions with the same legal origin.

## Structure and Content

The Preface mainly covers basic issues such as research basis, background, content, research methodologies, and innovation points.

Chapter 1 discusses the theoretical basis of the limitations on copyright.

In introducing the overall framework of the fair use system, this chapter discusses the nature and legitimacy of fair use, and focuses on the relationship between fair use, a doctrine in the copyright law, and copyright and other rights.

Several theories on the nature of fair use are introduced, including the theories of rights limitation, justifiable cause, user rights, and legal interest that is not yet right. The ideas of these theories are reviewed. The legitimacy of the fair use system is discussed from the perspectives of the philosophy of intellectual property law, economics, constitutional law, and sociology. As copyright is a property right, and the existence of the fair use system is supported by the transaction cost theory, this chapter focuses on the impact of the economic analysis method on the fair use system and the changes brought about by new technologies. From the perspective of sociology, this chapter further discusses the characteristics of cultural modernization and its relationship and interaction with the legal system.

Chapter 2 discusses the institutional context of the fair use system and analyzes the application of fair use through a comparison of laws in different countries. The first part of this chapter introduces the legislation and judicial practice of the fair use system in case law countries that adopt “essentialism” as the core and analyzes the establishment for the fair use doctrine, with a focus on US cases. The second part introduces the legislation of the countries and regions in the continental law system. The third part introduces the fair use system based on the three-step test in international treaties. The fourth part introduces the legislation in China on the basis of two fair use cases.

Chapter 3 begins with an analysis of the legal relationship of the copyright system and further analyzes the subject of rights, object of rights, and the legal relationship between the subject and object in the fair use system.

Chapter 4 attempts to classify the limitations on copyright in the digital technology environment. First, the definition and types of private copying are introduced. Second, the status and role of the copying for innovation in the fair use system are analyzed. In addition, the status of different forms of works in the fair use system is discussed.

Chapter 5 discusses the reconstruction of the copyright limitation system. Legislations in other countries reflect the particularity of the digital technology environment. Reframing the rights limitation system is further provided in this chapter. First, this chapter demonstrates why digital technology has begun to shake the foundation of the fair use system. In view that the legitimacy of the system proved by the transaction