

# ***EDUCATIONAL FAIR USE & DIGITAL LEARNING: COMPARATIVE STUDY BETWEEN INDONESIA & MYANMAR***

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## **Abstract**

*The utilization of copyrighted works for educational purposes under the doctrine of fair use is globally accepted, however, the limit and the implementation measures are not clearly defined. In the age of digital learning where the creation, utilization, and dissemination of information in general and copyrighted works, in particular, have become borderless, it's critical to analyze the proper implementation of educational fair use. Using juridical normative approach combined with analytical study and comparative study between Indonesia and Myanmar Copyright Law, this research found that both Indonesia and Myanmar Copyright Law provide important exceptions that are specifically aimed at non-commercial educational purposes and public library archival context, however, the implementing regulations of the educational fair use still non-existence. To optimally and effectively implement the doctrine of fair use for educational purposes in the digital age it's important to adopt globally accepted official guidelines to determine educational fair use more comprehensively followed by synergy, partnership, and collaboration between government, academics, and libraries in formulating both legal and digital infrastructures to guarantee that the implementation of educational fair use in digital age learning complies with national legislation and compliance with international copyright regulations.*

**Keywords:** *Copyright Law, Digital Learning, Educational Fair Use.*



## I. INTRODUCTION

The concept of fair dealing or fair use as the permit to use the copyrighted materials for educational and research purposes has been acknowledged as an important matter since the early development of the copyright act and is incorporated in copyright laws around the world. There are some examples of activities that the court considered fair use: citing a review, excerpts for the explanation, comment or critique, citing short texts of scientific or technical work for lecturing or explanation, a parody version of works and summary/resume of articles in the form of short citations, the use of works in learning activities also the reproduction of the legislative report or litigation. The fair use principle also permits the use and reproduction of copyrighted works by public libraries, non – commercial education and archival institution.

The Conference on Fair Use (CONFU) in the late 1990s was an attempt to develop fair use guidelines that copyright owners and educators could agree on, but the results were far from comprehensive. Prior research from Davis prevails that after the CONFU, the educational activities and purposes that protected under fair use still mainly rely on common practices and court decisions (Davis, 1998). Our previous research reveals the importance of drawing a limit that materials used in class only to serve the needs of specified educational programs and only those portions of the work relevant to the learning objectives allowed to be used in the classroom in a non- commercial conduct. Further, its also important to apply the law of fair use proportionally concerning the nature of the copyrighted works where the term and conditions apply more narrowly to highly creative works that are not particularly created for the purpose of education. (Mayana et al., 2022).

As a globally accepted principle, several international regulations acknowledged the principle of fair use. Berne Convention as the earliest and most widely accepted international convention on Copyright (WIPO, 1886) regulates the exception of exclusive copyright in Article 9 verse (2) that describes the

category of permissive uncompensated use of copyrighted materials as a matter for regulation in the nations of the Union to permit the utilization of copyrighted works according to 3 (three) conditions : use for certain specific cases (non-commercial) that does not conflict with the fair exploitation of the work and do not prejudice the legitimate interest of the creator and / or copyright holder. This measures also adopted by *Agreement on Trade Related Aspect of Intellectual Property Rights (TRIPs Agreement)* and *The World Intellectual Property Organization (WIPO) Copyright Treaty*. The three aforementioned agreements provide flexible space for signatories and member states to formulate their national laws and regulations while referring to these agreements as minimum standards. (Nurmaya et al., 2020)

The development of distance learning and online teaching opens endless possibilities for educational material exchanges and the need for an informed approach to the application of fair use of digital works becomes increasingly critical as the use of such works in educational platforms increases. In the age of distance learning and massive online teaching activities, the creation, utilization, and dissemination of information in general and copyrighted works, in particular, have become borderless. Distance learning has become an essential part of the educational system in many countries. To meet the needs of the changing world, it's important to ensure the availability, accessibility, and affordability of education materials. The international regulations and conventions provide general rules known as the rule of thumbs of fair use that are widely accepted and adopted by the national laws and regulations.

However, despite the global acceptance of fair and free use of copyrighted materials for educational purposes, the limit of such use and the implementation measures is not clearly defined. The right of fair use which is protected by national and international agreements enables academics and scholars to use the information and copyrighted materials within the dynamic nature of the education process in the digital age learning is commonly known and accepted as a concept. Thus, it's important to provide clear requirements and compliances for fair use of

copyrighted works to ensure the balance of public education purpose and the protection of both moral and economic rights of the author and /or copyright holder by setting the codes of conducts as the guidelines on how the scholars allowed to access the copyrighted works within the legally determined reasonable limits. (Alakurt, 2015)

This research particularly aims to analyze the regulations concerning the Copyright regulations, policies, and strategies in implementing educational fair use in Indonesia and Myanmar and further provides some suggestions concerning the formulation of implementing regulation and specific guidelines as code of conducts in implementing fair use of copyrighted materials for educational purposes in the age of digital learning.

## II. RESEARCH METHODOLOGY

The study conducted with a juridical normative approach focused on analyzing the comparison of educational fair use between Indonesia and Myanmar Copyright laws through the examination of legislation and literature such as books, articles, journals, and data cases. The research mainly uses an analytical study completed with the comparative study to highlight the link between legal commonalities and differences in practice concerning the implementation of educational fair use in Indonesia and Myanmar in digital age learning.

## III. RESULT AND ANALYSIS

### A. Doctrine of Fair Use in International Agreements

Statute of Anne introduced the basis for Copyright protection in 1709, and in relatively short times the court found that certain cases of **unauthorized** copies were protected by copyright materials that, at that time described as "*fair abridgment*" (Leval, 1990), This is considered as the legal acknowledgment of fair use that soon widely recognized and later known as

*“doctrine of fair use”* that limits the scope of the private copyright exclusivity concerning public needs.

Berne Convention as the earliest and most widely accepted international convention on copyright (WIPO, 1886) regulates the exception of exclusive copyright in Article 9 verse (2) that describes the category of permissive uncompensated use of copyrighted materials as a matter for regulation in the nations of the Union to allow the use of copyrighted works according to 3 (three) conditions: use for certain specific cases (non-commercial), such use does not conflict with fair exploitation of the work and do not prejudice the legitimate interest of the creator and/or copyright holder. These measurement known as *the “three-step test”* (Okediji, 2006). Article 10 *Berne Convention* regulates *Certain Free Uses of Works* compatible with fair practice, this provision allows the use of any literary and artistic work as an illustration for teaching. (Billah & Albarashdi, 2018)

The Berne Convention became the reference to succeeding regulations like the Agreement on Trade-Related Aspect of Intellectual Property Rights (TRIPs Agreement) and the World Intellectual Property Organization Copyright Treaty 1996 (WIPO Copyright Treaty). These regulations including *the “three-step test”* have been modified and transplanted into national copyright regulations, based on the provision in Article 13 TRIPs Agreement and Article 10 WIPO Copyright Treaty that regulates contracting parties / member-states may provide limitations and exceptions to exclusive rights for certain special cases which do not conflict with a normal exploitation of the work and do not prejudice the legitimate interests of the rights holder. The signatories of the Berne Convention and WIPO also member states of TRIPs – WTO agree to standardize exceptions to exclusive rights under national copyright laws based on fair use.

The Berne Convention, TRIPs Agreement and WIPO Copyright Treaty provide flexible rooms for signatories and member states to formulate their laws and regulations while still referring to these agreements (Nurmaya et al., 2020), further, these agreements are used as the general rule that guides national

legislators with respect to the right of reproduction to formulate the exceptions to the reproductions rights in certain special cases that do not conflict with the normal commercial exploitation of the work and do not unreasonably prejudice the legitimate interest of the author (Edwald, 2016). In practice, to determine whether a certain use is qualified as fair use, four factors need to be examined: **Purposes, Nature, Amount / Quantity, and effect**. These factors are general and apply to any types of fair use whether for educational or other purposes; the factors are non –exhaustive and several Copyright laws do not regulate the list of factors to determine the limit for permissible use of copyrighted works and courts may consider some additional factors to decide a case. (Bartow, 1998)

**Purposes**, fair use usually refers to non-commercial use of copyrighted works that align with social and educational matters like teaching, research, non-profit private study purposes, public information, and public education. The fair use principle also provides a permit for the use and reproduction of copyrighted works by public libraries, non-commercial education, and archival institution to facilitate private study and research. The measurement to determine a non-commercial purpose is that there must not be any direct or indirect monetary gain or compensation of such use. Non – Commercial purposes in the educational use of copyrighted works can be ensured by drawing a limit that materials used in class only to serve the needs of specified educational programs and only those portions of the work relevant to the educational objectives allowed to be used in the classroom.

**Nature**, the idea, and the nature of copyrighted work, whether the works are of a commercial nature or are for non-profit educational purposes. Although there are countless works in the form of literary and/or artistic works used in teaching and learning activities, it doesn't mean that they are freely utilized without considering the legitimate interest and economic rights of the creator and copyright holder. If the nature of the copyrighted works were creative rather than factual then the utilization without the authorization of the author/copyright holder is more likely classified as infringement (Rife, 2008). Concerning the

nature of the Copyrighted work, its important to apply the law of fair use proportionally concerning the nature of the copyrighted works where the term and conditions apply more narrowly to highly creative works that are not particularly created for the purpose of education, for example, its important to avoid substantial excerpts from novels, short stories, poetry, modern arts, images and other commercial materials that meant to be used and repurchased.

**Amount:** The amount and substantially or considerably of the portion utilized in relation to the protected work as an entire, the quantity and value of the utilized materials, whether its substantial part or not. Limitation of the amount of the work that is allowed to use in a fair use framework is also important to ensure as the benchmark of the proportion for the utilization of copyrighted works to be qualified as is not in conflict with a normal and fair exploitation of the work. The materials used in the classroom shall generally be limited to a brief and non-substantial amount of the entire work. Fair use should not harm both moral and economic rights of the Author and Copyright Holder, therefore before using any copyrighted materials for educational purposes, it's important to consider whether the replicating creates harms for the market or offer of the protected materials. The use also ought to incorporate an appropriate reference to the first cause of distribution and a type of copyright notice.

**Effect:** The impact of the utilization upon the likely market for or worth value of the protected work in the term of the degree to which the use and utilization of the copyrighted works may prejudice the sale, decrease or diminish the potential profits of the original works. The implementation of educational fair use shall not be a threat to the creation and dissemination of future educational works regarding the reduction of profitability of the publication and reduction of monetary incentives (Bartow, 1998). In case the copyrighted materials are easily accessible, reasonably available, and affordable for students to purchase, then copying shall not be an option because copying substitutes the need to purchase the books or other materials.

## B. Educational Fair Use in Indonesia Copyright Law

Indonesia is facing a national new trend of hybrid or blended learning up to e-learning following the massive spread of novel coronavirus. The pandemic brought forward many digital learning innovations and investments in education technology, but it also widened the inequity and equality in access to education (UNICEF, 2020). E-learning is the cognitive learning process where the social interaction in which learning materials, sounds, images, videos, and any texts are digitally constructed or presented through the digital platform. (Jonathans & Metboki, 2022).

The massive development and utilization of digital learning need to be supported by digital ethics in the utilization of learning materials from literary works, videos, talks, and other forms of material that are subject to copyright protection. The educators and scholars need to have an adequate understanding of copyright protection and a deep understanding of the fair use principle and its implementation for educational purposes as the rules against plagiarism because the academics and scholars have become important actors in determining how copyright regarding educational purposes operates. (James & Rife, 2005)

Article 1 point 1 of Law number 28 / 2014 on Copyright (Indonesia Copyright Law) defines Copyright as:

*“An exclusive right of the creator granted automatically based on declaratory principle after the Works are manifested in a tangible form without reducing the restrictions and limitations in accordance with the provisions of laws and regulations.”*

The protection of creativity through copyright law is an ultimate necessity as the acknowledgment and protection of the creators over their creations, to protect manifestation of ideas and creations of the minds. Adequate protection is expected to generate creativity, economic growth, and contribution to society. (Ramli et al., 2020).



Indonesia Copyright Law protects copyright and related rights / neighbouring rights. Related rights include the economic rights of performers, producers of the phonogram, and broadcasting organizations, and both of the works and related works are subject to legal protection and subject to fair use. According to Indonesia Copyright law, several things are regulated as not violating copyright or known as fair use. Indonesia regulates fair use as the copyright limitation in article 43 to Article 51 Indonesia Copyright Law. Regarding educational purposes, Article 44 verse (1) point a and point c regulates:

*"Use, retrieval, reproduction, and/or change of Works and/or Related Rights products in whole or substantial part are not regarded as a Copyright infringement if the source is mentioned or cited in full for education, research, scientific writing, report writing, writing of critique or review of a problem without prejudicing the reasonable interests of the Author or the Copyright Holder and for the talks that are only intended for the purpose of education and science"*

For public educational purposes, Article 47 Indonesia Copyright Law allows the reproduction of 1 (one) duplicate of the Works or part of the Works without authorization from the Creator or the Copyright Holder that may be utilized for educational, instructive, or research purposes or for the safeguarding, substitution of copy if the copy is lost, harmed or annihilated from the permanent collection. The reproduction for the exchange of communication or information purposes interlibrary, inter-archival institution and between the library and archival institutions are also categorized as fair use.

Indonesia Copyright Law has provided important exceptions that are specifically aimed at non-commercial educational, scientific purposes and public library archival context, research, and development activities, provided that they do not harm the reasonable interests of the creator in enjoying economic benefits of the creations (Nugroho & Utama, 2020), however, it is of particular importance to formulate special provisions and implementing regulations to

ensure the effectiveness of fair use implementation in teaching, research and other educational purposes.

Indonesia Copyright Law also regulates the compulsory license for educational purposes in article 84 and article 85 as a permit to do translation, interpretation, and/or proliferation of logical and abstract Works which are conceded under the decision of a Minister upon demand from each individual for the reasons for teaching, education, science and/or science just as development activities.

Indonesia copyright law broadly puts the moral right of the creator as the limitation of fair use by other parties. Article 5 verse (1) point e addresses the rights of the author to defend their rights in the event of distortion of works, mutilation of works, modification of works, or other acts which will be prejudicial to their honor or reputation. Indonesia Copyright law provides the rights for the author to decide, whether the certain use and acts towards their works are ethical and do not violate their moral rights in the aspect of the personality that embodied in their works or those use and act cause a defiant, harm or even degrading effects for their works, and concerning this, the user of copyrighted works must pay attention to the reasonable and legitimate interest of the author and copyright holders.

Nevertheless, Indonesia's Copyright Law remains lack of strict and comprehensive regulations concerning educational fair use. The interest of education as one of the exceptions to copyright does not explain the definitions, criteria, and qualitative limitations allowed using copyrighted works for educational interests. The absence of quantitative limitation and the number of copyrighted works allowed to be reproduced also creates confusion. The occurrence of the vacuum of law concerning the implementation of the principle of fair use especially related to the utilization and dissemination of copyrighted works as teaching materials through digital platforms became the normative obstacles in the effort of fostering effective digital learning platforms that provide availability, accessibility, and

affordability of learning materials and at the same time provide proper protection for moral and economic rights of the creator/copyright holder. The establishment of related organizations or agencies responsible to thrive and encourage the promotion, access, and utilization of copyrighted works for educational purposes in digital platforms supported by reliable technological infrastructure is also utterly important in supporting the effective implementation of educational fair use in digital age learning.

### C. Educational Fair Use in Myanmar

The first Copyright law in Myanmar was enacted in 1914 based on the 1911 British Copyright Act, this law gave a decent beginning stage to the "*fair dealing / fair use*" with any work for private review, research, analysis, survey, or paper rundown was allowed. Replicating was allowing for certain educational and/or instructive purposes, for models used in schools, and making duplicates of short sections from distributed scholarly works for use in assortments.

Along with massive transformation and a major change in the country, there has been rapid growth in the telecommunication infrastructure following the adoption of a new telecommunication law in 2013 that latter support the reform process of education to new models of education design and delivery guided by the National Education Strategic Plan 2016 - 2021 (Gregson, 2019). The Transformation by Innovation Distance Education (TIDE) project as one of the programs under strategic Partnerships for Higher Education and Reform, funded by UK AID commenced in February until the end of September 2021. In recent years, through the work of the Electronic Information for Libraries (EIFL) Network, online journal provision has been made available at a growing number of Universities to promote greater knowledge sharing between academics nationally and internationally also accessible for Distance Learning Students.

The case is evidence of how the changes of policy level followed by collaboration and partnerships enable the massive transformation in digital education. The availability of online journal provisions in large amounts as learning and research resource shall be supported by the proper legislation in the term of utilization by academics and scholars also the protection for copyrighted works. As the legislative approach. On 24 May 2019, the Union Parliament of Myanmar passed the Copyright Law (Law No. 15/2019) as the new copyright regulation framework with a few significant standards including the multiplication of a copyrighted work without the approval of the holder of the rights under certain conditions, for example, propagation for teaching or individual use is permitted given that it doesn't affect the rights of the copyright holder. The new copyright law also gives the essential lawful framework expected to help libraries, training, and examination.

General rules concerning fair use in Myanmar regulates in Section 31 of Myanmar Copyright Law No. 15 / 2019 where the importation of a copy of a literary and artistic work by a natural person shall be permitted without the authorization of the rights owner if it is not for commercial gain. Chapter 12 section 24 of Myanmar Copyright Law No. 15 / 2019 regulates that a person may reproduce a published work without the authorization of the rights owner exclusively for his purposes. However, such reproduction shall not be such that it would constitute a misuse of the Literary and Artistic Work or impact the legal rights of any Rights Owner.

Section 26 Myanmar Copyright Law No. 15/2019 regulates a proliferation as a citation of a short piece of a distributed work will be allowed without the approval of the copyrights owner viable with fair practice and not in conflict with the legitimate interest of the author/copyright holder. The citation shall include the source and the name of the author. Concerning the educational purposes, Section 27 Myanmar Copyright Law No. 15 / 2019 regulates the reproductions without the authorization of the Rights Owner that

compatible with fair practices are allowed for the reproduction of a short part of published works, a compilation of copies of work reproduced in electronic and published curriculums to be used as teaching materials that placed in a secure network and only accessible for the authorized participants and the incorporation of parts of the Literary and Artistic Work in electronic or published form, either for personal use or to be placed in a library into a thesis or research paper.

Section 27 Myanmar Copyright Law No. 15 / 2019 regulates the implementation of fair use in educational purposes by non – commercial library by making a single copy/reproduction of a Literary and Artistic Work for a distributed article, other sort work or short concentrate of work and the propagation is done due to a demand by an individual given that the library or archival institution is fulfilled that the duplicate will be utilized exclusively for the reasons for study, teaching or private utilization.

A literary and artistic work may be copied following the intention of reproduction and preservation, for example, a library or archive may obtain a copy or reproduction from another library or archive if its collection of literary and artistic work is not complete and the literary and artistic work is neither available on the market nor from its publisher. Furthermore, the library or archive may borrow a copy from a user for studying on the premises or for private use.

Libraries may communicate and supply items to each other, however, if a copy of a Literary and Artistic is transferred in an electronic file, the file shall be deleted once printed out and such reproduction and provision shall not be repeated. A library or archive may translate, for research or education purposes, a literary and artistic copyrighted work. A person or organization may translate, for the information of the public or persons speaking a minority language, a literary and artistic work from the minority language to the majority language or vice versa if this is not done in order to pursue commercial gain.

Myanmar Copyright Law No. 15 / 2019 largely put the support for modern libraries, education, training, research, and the examination completed with new exemptions for private review, citation, internet

instructing, course-packs, and use in virtual learning conditions, additionally record conveyance administrations, computerized conservation by libraries and archival institution and the creation of format copies for people with print incapacities is allowed. This was followed by the formation of the "eLibrary Myanmar Project" which enhance academic organizations with admittance to a broad scope of excellent global journals, data sets, and e-books to foster libraries to appropriately support students, scientists, and researchers in Myanmar through fair use that balance with copyright protection.

The Myanmar Copyright provides great support for relevant activities like digital-based learning and digital safeguarding by libraries and archives. Notification No. 18/2020 of March 6, 2020, initiated the formation of the Central Committee for Intellectual Property Rights (CCIPR), later changed by Notification No. 21/2020 of March 18<sup>th</sup>, 2020. The CCIPR has 30 members including the Ministry of Business, and delegates from ministries, for example, the Ministry of Information, Ministry of Education, and Ministry of Industry and IP experts.

The tasks and obligations of The CCIPR consist of creating public IP regulations and procedures, formulating IP preparation, and supporting applications from organizations, like universities and libraries to be classified as authorized and approved entities. The establishment of *the Myanmar Academic Library Consortium (MALC)* heralds a new era of collaboration among academic libraries in Myanmar. MALC expand the accessibility to electronic academic resources with low to free of charge through-composed licensing of e-resources and collaboration. Member will be able to share data, information, technology, human resources, and collaboration to guarantee the supportability of admittance to e-resources, and to putting current IT-based library administrations and services for academic and research in Myanmar.

#### IV. CONCLUSION

Both Indonesia and Myanmar Copyright Law adopted the "three-step test" on Article 9 (2) Berne Convention as a general clause on the implementation of fair use and determine that using copyrighted work for educational purposes has been declared as fair use, however, it's still necessary to evaluate and examine in the balance the nature of the work, the substance of the parts used, and the economic and market effect on the economic value of the work. Both Indonesia and Myanmar Copyright Law provides important exceptions that are specifically aimed at non-commercial educational purposes and public library archival context; however, it is of particular importance to formulate special provisions and implement regulations as well as comprehensive codes of conduct to ensure the effectiveness of fair use implementation in teaching, research, and other educational purposes in the digital age learning.

To optimally and effectively implement the doctrine of fair use for educational purposes in the digital age its important to adopt globally accepted official guidelines for determining educational fair use that offers rules of thumb and other important tools to guide and assist faculty, staff, and students in determining whether the certain model of utilization qualified as fair use in a variety of educational contexts, including distance learning followed by synergy, partnership and collaboration approach between government, academic, and libraries so that educational fair use shall be practiced in accordance with national legislation and compliance with international copyright regulations.

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