

FACILITATING ACCESS TO KNOWLEDGE FOR EDUCATION IN VIETNAM THROUGH RE- CONSTRUCTING APPROPRIATE LIMITATIONS AND EXCEPTIONS TO COPYRIGHT

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ABSTRACT

This Article provides detailed recommendations of restructuring copyright limitations and exceptions in Vietnamese copyright law so that it can support for education by ensuring the public can access to knowledge. Although Vietnam has recently made significant achievements in increasing living standards and reducing poverty, educational development in this country Vietnam is typically slow and outdated. This country has a large amount of unskilled people that have been exploited by other countries for cheap labor. While Vietnam has had economic growth in the short term, this is not truly development in the long term and will not last. Many reasons contribute to this problem, but the most important reason is the shortage of advanced knowledge in textbooks and other educational materials. Access to cultural works for education is significantly restricted because of copyright protections. This Article argues that copyright limitations and exceptions can provide the possibility of accessing and using copyright works for educational purpose with free of charge or reasonable compensation to the copyright owner. In doing this enhance access to knowledge for learning in this country.

This Article examines knowledge access demand for education in Vietnam. Currently, Vietnam is confronting the shortage of knowledge access for education, especially higher education. This shortcoming partly stems from strict copyright protection so that educational sector cannot afford to access on

fresh knowledge expressed in copyright works. Reconstructing limitations and exceptions to copyright toward enlarging their scope are a good solution to resolve access issue in Vietnam. This Article provides main suggestions: (1) adopting fair use; (2) introducing licensing schemes for educational institutions; (3) broadening the rights for libraries in serving customers for educational purpose; and (4) raising its voice in copyright international arguments for supporting education in developing countries

Keywords: Vietnam copyright limitations and exceptions, copyright and education, three-step test, fair dealing, fair use, limitations and exceptions for libraries.

知識接觸與越南教育－以著作權的限制與例外之法制重構為中心

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摘 要

本文討論越南著作權法對教育上接觸知識的限制，並提出相關的改革建議。

關鍵字：合理使用，越南，著作權法，教學

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I. Introduction

Education, in every sense, is one of the important elements for development. It is recognized as the key to achieving many development goals. It empowers people to develop personal skills and behaviors, as well as a sense of dignity.¹ It enriches people's knowledge and understanding of the world. It improves the quality of their lives and benefits every individual and the society.² Moreover, it is a human right, as well as an indispensable means to realize other human rights, according to the United Nations.³ Thus, education plays a crucial role in promoting people's creativity and social progress.

Education plays a central role in Vietnam culture and society. It is considered as the avenue of advancement and families routinely sacrifice much to ensure their offspring get the required education. The government of Vietnam has constantly set education as a top priority in the country's development both in strategy papers and its budget allocation.⁴ The great efforts have brought significant achievements in education with increased enrolment and improved teaching and learning condition.⁵ However, Vietnam's education, especially

¹ Committee on International Covenant of Economic, Social and Cultural Rights, Dec. 16, 1966, 993 U.N.T.S No. 03.

² İlhan Öztürk, *The Role of Education in Economic Development: A Theoretical Perspective*, 23 (1) J. RURAL DEV. & ADMIN. 39, 39 (2001).

³ General Comments No. 13, The Right to Education (Article 13 of the Covenant), at 112-127 UN Doc. E/2000/22, Report of the Committee, Social and Cultural Rights, 21st sess., 1999.

⁴ Vietnamese government has increased the expenditure for education from 13% to approximately 20% of its State Budget. Vietnam has fallen into one of the top countries spending for education. H. Hanh, *Vietnam Is in the Top Group Spending For Education*, TINMOI NEWSPAPER, (Apr. 20, 2010, 03:43), <http://www.tinmoi.vn/Viet-Nam-thuoc-nhom-nuoc-co-ty-le-chi-cho-giao-duc-cao-nhat-the-gioi-01154100.html>; In 2015, Vietnam maintains 20% of State Budget spending for education. *Vietnam Maintains 20% of State Budget Spending for Education in 2015*, VUFO-NGO RESOURCE CENTRE, <http://www.ngocentre.org.vn/news/vietnam-maintains-20-state-budget-spending-education-2015> (last visited July 17, 2016).

⁵ *Vietnam Development Report 2014 - Skilling up Vietnam: Preparing the Workforce for a Modern Market Economy*, WORLD BANK (Nov. 2013), www-wds.worldbank.org/external/

higher education, is still facing mismatches in meeting the needs for industrialization, modernization and international economic integration. This shortcoming mainly stems from out of date teaching and learning methods, limited resourced for education and in efficient resources. It thus requires further strengthening of education system by improving capability of knowledge access in educational institutions including obtaining access to textbooks, journal articles, educational computer programs and other educational materials.

Increasing access to textbooks and other educational materials requires educational institutions to obtain permission and pay royalties as compensation to the copyright owner under protections of copyright, thus educational institutions with modest financial budget cannot afford. Fortunately, it is possible for educational institution to take advantages of limitations and exceptions to copyright in order to get access and utilize copyright works without permission of copyright owners and free of charge or at a reasonable price. Copyright limitations and exceptions encourage learning and diffusion of knowledge with educational sector by providing privileges in favor of educational institutions and their students accessing copyright works.

However, current Vietnamese copyright law is not really supportive for educational access when its copyright limitations and exceptions are quite restrictive. Although, international and regional agreements that Vietnam has been signed, particularly Berne Convention, TRIPS Agreement contains flexibilities for the country to draft limitations and exceptions to copyright for educational purposes, Vietnam fails in implementing into its domestic law provisions of copyright limitations and exceptions when it provides inflexible and limited scope provision of copyright limitations and exceptions. Therefore,

this Article would like to introduce new version of copyright limitations and exceptions in Vietnamese copyright law so that it can support for education effectively.

This Article proceeds as follows. Part I provides the scene of Vietnam and identifies its special access need on educational materials. Part II sets forth the theoretical role of copyright limitations and exceptions in supporting education. Part III examines copyright limitations and exceptions in Vietnam. The Part reveals that Vietnamese copyright law implements international conventions very quickly, but it only considers increasing rights of copyright owners, not equally pay attention to the interest of the public through limitations and exceptions to copyright. This has led to impede knowledge flow within the society in general and hinder teachers and students to access to educational works in particular. Part IV then focus on how copyright limitations and exceptions should be re-constructed to support for education. Part V concludes findings of the study and some further research is recommended

II. Some Important Concepts

A. The “Limitations and Exceptions to Copyright”

This phrase has various meanings. It could be broadly applied to all limitations and exceptions existing in copyright law, but could be restricted only within the meaning of limitations and exceptions to exclusive rights of the copyright owner. Hence, this section aims to make it clear that this term is used in this article in the restricted meaning: limitations and exceptions that restrict the exclusive rights of the copyright owner. The term encompasses instances where a work may be used without permission and payment of remuneration – so-called “uncompensated limitations and exceptions” – as well as the case of so-called “statutory/compulsory licences”, where the use of the work does not

require the author's permission but a reasonable payment needs to be made.

By 1994, the term “copyright limitations and exceptions” had not appeared in any jurisdiction, even in IP international treaties. By that time, it had been occasionally stated by IP scholars. This term was formally tracked by the establishment of the TRIPS Agreement, and then repeated in WIPO Treaties, including the WIPO Performances and Phonograms Treaty 1996 (WPPT), WIPO Copyright Treaty 1996 (WCT) and the Beijing Treaty. However, no definition of this term has been found. Additionally, ‘there is no definition in the international and regional instruments of the difference between a “limitation” and an “exception”’.⁶

In this article, the terms “limitation” and “exception” embody different, but related, meanings. According to the Oxford English Dictionary, “limitation” refers to “a limiting rule or circumstance; a restriction”;⁷ whereas “exception” means “a person or thing that is excluded from a general statement or does not follow a rule”.⁸ There is a notable difference between a limitation and an exception: one is a restriction of a rule and the other is an exemption from a rule. Importantly, Lucie Guibault argued that “limitations” and “exceptions” are not to be taken as equivalents. The expression “limitations”, which includes “exemptions” and “exceptions”, refers to the restrictions imposed on the exercise of copyright owners’ rights. Specifically, the term “exception” is used in some circumstances that do not follow the rule or are excluded from the application of the law.⁹ Put differently, limitations to copyright draws a line that restrict

⁶ ADRIAN STERLING, *WORLD COPYRIGHT LAW* 434 (2003).

⁷ *Limitation*, ONLINE OXFORD ENGLISH DICTIONARY, <http://oxforddictionaries.com/definition/english/limitation> (last visited July 17, 2016).

⁸ *Exception*, ONLINE OXFORD ENGLISH DICTIONARY, <http://oxforddictionaries.com/definition/english/exception?q=exception> (last visited July 17, 2016).

⁹ Lucie Guibault, *Discussion Paper on the Question of Exceptions to and Limitations on Copyright and Neighbour Rights in the Digital Era*, at 7, INSTITUUT VOOR INFORMATIERECHT (1998), <http://www.ivir.nl/publications/guibault/final-report.pdf>.

exclusive rights of the copyright owner, while exceptions to copyright emphasizes exempted circumstances that exclude the user from infringement of copyright. Ficsor stated that

In accordance with the ordinary meaning of the words, an “exception” means that the given acts are exempted from the application of the right concerned, while a “limitation” means that, although the right is applicable, it is limited in a certain way.¹⁰

Ficsor refers to compulsory licenses as “limitations” and to the use without authorization and payment of remuneration as “exceptions”;¹¹ that is to say, a “copyright exception” means that the given acts are exempted from the application of the right concerned. There is no authorization needed and there is no obligation to pay remuneration. Whereas, a “copyright limitation” means that, although the right is applicable, it is limited in a certain way. For example, an exclusive right is limited to a mere right to remuneration or to a compulsory license.

Although copyright limitations differ from copyright exceptions, they are both important for users to access copyright works. There is a body of cases where the user is not liable for doing what would otherwise be an exclusive right of the copyright owner. Starting from Article 13 of the TRIPS Agreement and then Article 10 of WCT, limitations and exceptions have been bundled together. WIPO states that copyright limitations and exceptions are “cases in which protected works may be used without the authorization of the right hold-

¹⁰ Mihaly J. Ficsor, *Short Paper on the Three-Step Test for the Application of Exceptions and Limitations in the Field of Copyright*, 2 (Working Paper for the Central and Eastern European Copyright Alliance (CEECA) in the 25th session of the WIPO Standing Committee on Copyright and Related Rights (SCCR), Geneva, Nov. 19-23, 2012).

¹¹ *Id.* MIHALY J. FICSOR, *THE LAW OF COPYRIGHT AND THE INTERNET – THE 1996 WIPO TREATIES, THEIR INTERPRETATION AND IMPLEMENTATION* 257 (2002).

er and with or without payment of compensation.” They encompass a substantial use of copyright work but are exempted by special purposes, such as fair use or fair dealing and compulsory licenses. The combination of limitations and exceptions constitutes the bundle of users’ rights to strike the balance with the exclusive rights of copyright owners.¹² The concepts are treated together in this article .

B. Fair Use

Fair use is one approach used in drafting copyright limitations and exceptions in national laws. The fair use doctrine was first codified in the Copyright Act of 1976 (USA), section 107. Under this provision, the use of a copyright work for criticism, comment, news reporting, teaching, scholarship or research was not an infringement of copyright if it satisfies the assessment of ‘fairness’ of the use based on a balancing of four factors:

(1) The purpose and character of the use, including whether such use is of a commercial nature or is for non-profit educational purposes. The preamble of section 107 offers various purposes favored by fair use, namely criticism, comment, news reporting, teaching, scholarship and research. However, the list in section 107 is not exhaustive, and other non-enumerated purposes will be examined.

(2) The nature of the copyright work. According to the Supreme Court, the major distinction in valuating this factor is whether the work is factual or fictional. For example, “informative works, such as new reports, that readily lend themselves to productive use by others, are less protected than creative works of entertainment.”¹³ Another consideration is whether the work is available to the public. Courts are less likely to find fair in the copying of an unpub-

¹² STEPHEN M. STEWART, INTERNATIONAL COPYRIGHT AND NEIGHBOURING RIGHTS 79 (1989).

¹³ Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417, 496-97 (1984).

lished work. However, the fact that “a work is unpublished shall not itself bar a finding of fair use if such finding is made upon consideration of factors.”¹⁴

(3) The amount and substantiality of the portion used in relation to the copyrighted work as a whole. This third factor requires the courts to consider whether the amount of use is reasonable in both qualitative and quantitative terms.¹⁵ Whether the amount used is reasonable must be determined in light of the size of both the copyrighted work and the work in which it is used, and the economic effect of the portion taken to both works.¹⁶ For example, the amount used will be favored by fair use if it is a small quantity and likewise if the portion used is not central or significant to the entire work. In contrast, it will be rejected as a fair use if the portion used is central or the heart of the original work.¹⁷

(4) The effect of the use upon the potential market for or value of the copyrighted work. This factor requires the courts to consider not only the extent of harm caused by the use, but also “whether unrestricted and widespread conduct of the sort engaged in by the defendant...would result in a substantially adverse impact on the potential market for the original.”¹⁸

It is worth noting that the assessment of the four factors in determining fair use is not exhaustive, but the courts are required to consider the factors together.¹⁹ Should one factor fail to satisfy the fair work doctrine, then one must look to the other factors.²⁰ Indeed, the endless variety of situations and com-

¹⁴ 17 U.S.C. §107 (2013).

¹⁵ 17 U.S.C. §107(3) (2013). *See also* L.RAY PATTERSON & STANLEY W. LINDBERG, *THE NATURE OF COPYRIGHT: A LAW OF USERS' RIGHTS* 202 (1991).

¹⁶ *Id.* at 203.

¹⁷ *Bill Graham Archives, LLC v. Dorling Kindersley Ltd.*, 448 F.3d 605 (2d Cir. 2006).

¹⁸ *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 590 (1994).

¹⁹ It was noted in H.R. Rep. No.94-1476, at 65 (1976). It was also emphasized in *Sony Co. v. Universal City Studios*, 464 U.S. ¶ 79 (1984).

²⁰ PATTERSON & LINDBERG, *supra* note 15, at 202.

binations of circumstances that can arise in any particular case preclude the formulation of an exact rule.²¹ This means that whether a particular use is a fair use is, to a large extent, a matter of judgment.

C. Fair Dealing

Fair dealing is the other approach used in drafting copyright limitations and exceptions in national laws. The fair dealing defense was first developed by section 2(1)(i) of the Copyright Act 1911 (UK), which provided that “any fair dealing with any work for the purposes of private study, research, criticism, review or newspaper summary”²² would not constitute a copyright infringement. Under fair dealing, what constitutes fairness is determined by permitted purposes. Fair dealing, therefore, is recognized by its closed-ended mechanism. National legislations that employ the fair dealing approach provide a closed list of limitations and exceptions to copyright. Fair dealing privileges for the specific purposes of criticism or review, research and study, parody or satire, and reporting news are recognized in many countries.²³

There are some positive aspects of fair dealing: they are explicit and predictable. In determining whether a use comes within the bounds of a fair dealing defense, the courts apply a two-step process.²⁴ First, the use must be for one of the specific purposes provided for in the national copyright act (or a closed-list copyright limitations and exceptions’ provision). For example, a closed list of copyright limitations and exceptions in Vietnamese copyright law is regulated in Article 25-26 of the Law on IP 2005 (revised in 2009). In order to con-

²¹ *Id.* at 66.

²² Section 2(1)(i) of the *Copyright Act 1911* (UK), an Act to Amend and Consolidate the law Relating to Copyright.

²³ Australia, for example, inserted new provisions permitting fair dealings with copyright materials for purposes of parody or satire in the *Copyright Amendment Act 2006 (Cth)*, section 41A.

²⁴ ALRC, *Copyright and the Digital Economy*, Discussion Paper No.79, at 133 (2013).

clude a use as fair dealing, the Vietnamese courts must consider whether the use is for one of the purposes such as research or teaching, criticism or review, and so on. If the use falls into a purpose provided by the Law on IP 2005 (revised in 2009), it might be a legitimate if it satisfies the second process: the use must be fair. The question whether a particular use is fair will depend on the circumstances of the case, subject to guidance as to fairness stipulated by legislators. For example, in the fair dealing exception for the purpose of research or teaching in Vietnamese law, matters to be considered are that only one copy allowed is allowed and that copy must not be for a commercial purpose. Fair dealing for the purpose of criticism or commentary must be the quotation of ‘reasonable portion without misrepresenting authors’ views.²⁵

However, the fair dealing defense has been criticized as restrictive as it is unable to be developed by the courts. The use of the work for any other purpose is never considered, even though it may be fair. Moreover, the fair dealing approach is not sufficiently broad to provide an effective balance between owners and users in the digital environment. It is not flexible enough to respond to changing circumstances caused by new technologies and uses. This issue will be discussed further below.

III. Special Access Needs of Vietnam to Copyright Works For Education

With a population of approximately ninety million people, ranked the eight-most populous Asian country, Vietnam has achieved fabulous economic growth performance in two recent decades: more than 7% on average in

²⁵ Article 25(1)(b) of the *Law on IP 2005* (amended in 2009).

2000s,²⁶ GNI per capita reached over \$1,000 in 2010,²⁷ and became a lower middle-income country in 2011.²⁸ The Vietnamese government has consistently given high priority to education. As a result, Vietnam has had remarkable progress in improving access to education with over 90% of the working-age population is literate.²⁹

Despite the substantial progresses, Vietnam urgently requires access to advanced textbooks and educational materials for education in order to resolve the shortage of skilled labor in this country that threat to spread poverty both in urban and rural areas. Currently, the percentage of unskilled laborers has been significantly increased. This figure of 66% of the total workforce in 2006 was grown up to over 70% in 2009.³⁰ According to World Bank, Vietnam ranks on the bottom half of the rankings about ASEAN labor force development.³¹ This is rooted from the wave of rapid shift of employment out of low productivity agriculture into higher productivity industrial fields in recent years. The rapid economic growth of Vietnam in the last ten years has been driven predominantly by the huge size of its workforce with youth population, as a large number of unskilled workers have been exploited by other countries for cheap labor.

²⁶ GDP growth averaged around 9% per year from 1993 to 1997, 6.8% per year from 1998 to 2004, 8% in 2005 and 7.8% in 2006.. This economy was evaluated 10 times in late-1980s to 2006, at \$61 billion, making Vietnam the 58th largest economy in the world in this year, up from 76th in 1986. Growth remained strong even in the face of the late-2000 global recession, holding at 6.8% in 2010 and 5.8% in 2011. *2011 Social-Economic Statistical Data*, GENERAL STATISTIC OFFICE OF VIETNAM, <http://www.gso.gov.vn/default.aspx?tabid=622&idmid=&ItemID=12133> (last visited July 17, 2016); *The World Factbook: Vietnam*, Centre Intelligent Agency, <https://www.cia.gov/library/publications/the-world-factbook/geos/vm.html> (last visited July 17, 2016).

²⁷ *GNI per capita, Atlas Method (Current US\$)*, WORLD BANK, <http://data.worldbank.org/indicator/NY.GNP.PCAP.CD> (last visited Sept. 3, 2015).

²⁸ *Overview of Vietnam*, WORLD BANK, <http://www.worldbank.org/en/country/vietnam/overview> (last visited July 17, 2016).

²⁹ See *supra* note 5.

³⁰ *Growing Pool of Unskilled Labour Left behind in Vietnam*, THE ROCKEFELLER FOUNDATION, <http://www.searchlightcatalysts.org/node/310> (last visited July 17, 2016).

³¹ For example, unskilled workers are counted for 41.4% in Hanoi, 54.5% in Ho Chi Minh city, 62.9% in Vung Tau, and 64% in Haiphong. See *supra* note 5.

For long term development, Vietnam has been experiencing an unsustainable economic development,³² because it cannot continue to rely on the size of its workforce for continued success when “golden population” becomes fade. Vietnam needs to focus on equipping its workforce with more skill-intensive non-manual jobs in the coming decades. Future growth is highly dependent on a high quality workforce who is better skilled and trained in modern education and with better quality language skills. According to Vietnam Works, a biggest Vietnam-based recruiting company, the number of skilled jobs posting in Vietnam increased by 23% in the first half of 2014 in compared to the same period last year, jobs mainly in IT, software and marketing. Unfortunately, many companies have not found it easy to recruit staffs due to low supply of necessary skills such as language, cognitive, behavioral and technical skills.³³ Local employees are not up to date with the latest information and technology as well as lack important knowledge in law and finance. To deal with the skilled worker shortage, many companies in Vietnam have spent a huge amount of money annually on retraining their employees.³⁴ This solution is not long-term effective. It must be done by renovating higher education in Vietnam, because a key reason for the lack of skilled workers in Vietnam is outdated education system. Although budget allocation has reserved high priority to education,³⁵ spending

³² Vietnam is in the period of “golden population structure” where fore every two people or more working, there is only one dependent person. *Population and Development*, UNFPA VIETNAM, <http://vietnam.unfpa.org/public/lang/en/pid/5571>(last visited July 17, 2016); *Golden Population Begins to fade*, VIENAM NEWS, (May 28, 2014), <http://vietnam-news.vn/opinion/255446/%E2%80%98golden-population-begins-to-fade.html>.

³³ According to recent World Bank Report, less than 15% of the labour force is competent to English and computing skills in Hanoi. See *supra* note5.

³⁴ According to Nicola Connolly, Vice Chair of the European Chamber of Commerce, foreign companies in Vietnam are forced to spend money for retraining 40-50% of their Vietnamese employees. See *Foreign Companies Report Labor and Skills Shortage in Vietnam*, VIETNAM BRIEFING (July 30, 2014), <http://www.vietnam-briefing.com/news/foreign-companies-report-labor-skills-shortage-vietnam.html/>.

³⁵ Vietnam has been fallen into top countries spending governmental budget for education in the world. Within 12 years (from 1998 to 2010), the country invested the total budget

money for knowledge access such as buying textbooks and other educational materials is not really noticeable by the Vietnamese government. The state budget has been mainly spent on improving school's infrastructure, school attendance rate, and expansion in the number of universities and colleges rather than focusing on the quality of education.³⁶ As a result, the quality of education is yet to meet the demand and development of the country. It was reported by VTC News that majority of textbooks used by Vietnamese universities are imported and translated from Russia, China and East-Europe since 60s- 70s of the last century.³⁷ Urgently, Vietnam needs to cut off out of date curriculum content and improving teaching and learning methods by accessing latest textbooks and other educational materials in order to help Vietnamese student to become more effective problem-solvers, critical thinkers, better communicators, and updated fresh knowledge learners.

Furthermore, accessing to copyright works for education is highly required due to the demand of acquiring knowledge for everyday self-education of Vietnamese people. Deep influence of Confucianism values and ideals imported from China,³⁸ Vietnamese people have a great love of learning. They

for education from 13% to 20%. The state budget for education has been down to 10% from 2013, but investment for education is still a top priority in Vietnam for the purposes of poverty reduction and industrialisation. See *supra* note 5.

³⁶ *High Quality Education for All Should Be Vietnam's Priority*, WORLD BANK (Apr. 25, 2012), <http://www.worldbank.org/en/news/feature/2012/04/25/high-quality-education-for-all-should-be-vietnams-priority>.

³⁷ Binh Na, *Textbooks Invested Millions VND Are Still Outdated*, VTC NEWS (Jan. 3, 2009), <http://vtc.vn/dau-tu-tien-ti-giao-trinh-van-lac-hau.2.203143.htm> (translated from Vietnamese language).

³⁸ The Vietnamese people became independent from China in 938 AD and extended geographically into Southeast Asia, throughout the Indochina Peninsula. *Brief History of Vietnam*, VIET VENTURES, www.vietventures.com/Vietnam/history_vietnam.asp (last visited July 17, 2016); Gowming Donget al., *Knowledge-Sharing Intention in Vietnamese Organisations*, 40 *VINE* 262, 270 (2010); Que Thi Nguyet Nguyen et al., *The Inter-Relationships between Entrepreneurial Culture, Knowledge Management and Competitive Advantage in a Transitional Economy*, <http://artsonline.monash.edu.au/mai/files/2012/07/qtnghuyetnguyen.pdf> (2008).

believe that “the only way for the superior man to civilize the people and establish good customs is through education.”³⁹ For the love of learning, people desire to obtain knowledge. As a result, the country presents a high demand for gaining access to knowledge. It was reported by Cimigo that Vietnam has experienced rapid growth of internet penetration over the last few years, similar to China, the Philippines, and Thailand. The most important activity of the population on the internet is information and knowledge gathering.⁴⁰ However, the population of Vietnam is struggling with collecting fresh knowledge and information due to barriers of languages as well as copyright protection.

IV. Copyright Limitations and Exceptions Can Support Access to Copyright Works for Education in Vietnam

Educational activities have a strong connection to copyright. Indeed, to catch the student’s attention and to improve their learning skills, educators rely heavily on contemporary books, newspapers, magazines, photographs, video, slides, sound recordings, broadcasting programs, and other media.⁴¹ In practice, schools make millions of photocopies of copyright material in Vietnam every year. Moreover, the performance of works, the diffusion of radio or television broadcasts, and the communication of video or sound recordings are particularly suitable for teaching in a classroom environment.

Copyright limitations and exceptions support education by allowing stu-

³⁹ LIN YUTANG, *THE WISDOM OF CONFUCIUS* 200 (Michael Joseph ed., 1958). This idea is very important to support flexible and broad limitations and exceptions to copyright for education, because this country considers education the priority. Its opinion is heavily influenced by Confucius.

⁴⁰ *2011 Vietnam NetCitizens Report: Internet Usage and Development in Vietnam*, CIMIGO (2011), <http://www.cimigo.com/en/research-report/vietnam-netcitizens-report-2011-english>.

⁴¹ Educational Multimedia Fair Use Guidelines Development Committee, *Fair Use Guidelines for Educational Multimedia*, July 17, 1996, §12.

dents, as well as educational institutions, to obtain knowledge without prior permission from copyright owners. From the Statute of Anne 1709, the encouragement of learning and dissemination of knowledge as a means to enhance the general welfare have been the chief goals behind the granting of exclusive rights to authors.⁴² To implement this goal, a number of limitations and exceptions are established to carry out the government's information policy of dissemination of knowledge and information among the members of society.⁴³ First of all, there are limitations and exceptions for anybody to quote excerpts of cultural expression for the purpose of learning or criticism. This helps learners to achieve knowledge and improve their skills, which are essential for their lives. Moreover, privileges in favor of schools, universities, other educational institutions, public libraries, archives, and handicapped persons are those limitations and exceptions encouraging the spread of knowledge and information within the educational sector. Sustained access to educational knowledge is critical to long term improvements in productivity, preventive health care, the empowerment of women, the reduction of backwardness, and reductions in inequality.⁴⁴ More importantly, information society information is currently converted into the raw material of economic activity in order to create wealth. There is no doubt that access to a broad and diverse supply of information is extremely important for the citizens of society.⁴⁵ Dissemination, therefore, is a public good.⁴⁶ It is beneficial for both individuals and social growth. It enables

⁴² Preamble of the *Statute of Anne 1709*.

⁴³ Within the international framework, *Article 10(2) of the Berne Convention* for the Protection of Literary and Artistic Works provides a provision called the "illustration for teaching". This provision opens potential policy space for signatory nations to mandate access to educational materials for development needs.

⁴⁴ *Why Access to Education Is Important*, CONSORTIUM FOR RESEARCH ON EDUCATIONAL ACCESS, TRANSITIONS AND EQUITY, <http://www.create-rpc.org/about/why/> (last visited July 17, 2016).

⁴⁵ Peter Lyman, *The Article 2B Debate and the Sociology of the Information Age*, 13 BERKELEY TECH. L.J.1064, 1069 (1998).

⁴⁶ Benedict Atkinson & Brian Fitzgerald, *Copyright as an Instrument of Information Flow*

individuals in society to understand, learn, and express.

Additionally, copyright limitations and exceptions, to some extent, are expected to be free in reproducing works for education, which is compatible with Vietnamese culture. As a matter of culture, Vietnamese people are in favor of free reproduction of expression for education. Confucius stressed repetition or memorization as the important methods of acquiring knowledge. Hence, in Confucian-based societies such as Vietnam, “the development of the ability to use imitation and repetition as an aid to learning is encouraged.”⁴⁷ People are encouraged to learn and reproduce other expressions accurately. For example, at school, education is based on examination and memorisation, students are expected to have great knowledge rather than critical thinking. As a result, in terms of education, there is no shame if someone incorporates or uses someone else’s work into their own works without permission. Moreover, the authors whose works are reproduced in classes without permission are generally more proud than hurt. It is also necessary to say that promotion of learning and respect of teachers are one of the traditional values of the Vietnamese people.⁴⁸ Furthermore, education has been prioritised in Vietnam for a thousand years, and teachers are highly respected as “father” or “the engineers of the human soul” or “being a teacher for one day, being the father for life.”⁴⁹ In govern-

and Dissemination: The Case of ICE TV Pty Ltd v. Nine Network Australia Pty Ltd (2008), QUEENSLAND UNIVERSITY OF TECHNOLOGY, <http://eprints.qut.edu.au/15208/1/152078.pdf>.

⁴⁷ Purdie Nola, *Education Statistics–News Sheet*, 4(6) DATA MANAGEMENT UNIT, MINISTRY OF EDUCATION 3 (1995).

⁴⁸ *Education in Vietnam: Development History, Challenges and Solutions*, WORLD BANK (2005) http://siteresources.worldbank.org/EDUCATION/Resources/278200-1121703274255/1439264-1153425508901/Education_Vietnam_Development.pdf.

⁴⁹ The father of Confucianism, Confucius (551-479 BC), was a Chinese philosopher. It is worth noting that Vietnam, throughout history, has been heavily influenced by Chinese culture, particularly in the education sector. In the past, China was the cradle of Eastern Philosophy, especially Confucianism, which was created in China. Vietnam was heavily influenced by this school of thought. Confucianism was used as the main contents of education through Feudal Vietnam until 1945. Despite occupation by the French from

ment policy, education has been esteemed as the prime priority of Vietnam and it is a foundation to promote the culture and economic development of the country.⁵⁰ In short, both the public and the State recognise that education has important social benefits and the relevant uses of copyrighted works should be exempted from the usual legal obligations. In the other words, the use of copyrighted works should be treated to be free for education. Provisions of copyright limitations and exceptions for education provide educational institutions with the right to access copyright work “without the consent from, and without the payment of remuneration to, the copyright owner.”⁵¹ For instance, copyright limitations and exceptions in many cases provide rooms for students reproducing cultural works during studying and examination. Also, for the purpose of education, teachers are allowed to freely reproduce works in classrooms in the course of teaching.

V. Copyright Limitations and Exceptions in Vietnamese Copyright Law

Due to high demand of knowledge access for education, there is an expectation that Vietnamese copyright law should be introduced in a way that facilitates the knowledge demand for education. Unfortunately, copyright law in Vietnam is currently extremely restrictive, skewed towards knowledge privatisation, and pays little attention to access for education.

In the effort of joining the WTO and implementing its law in accordance

1889, two education systems existed in parallel in Vietnam, one taught Confucianism and the other was taught by the French. To date, Confucian educational philosophy has strongly influenced the educational policies of Vietnam. James A. Crites, *Confucianism and Its Spread to Vietnam*, ANGELFIRE COMMUNICATIONS, <http://www.angelfire.com/ca/beekeeper/cf.html> (last visited July 17, 2016); *Confucianism*, WIKIPEDIA, <http://en.wikipedia.org/wiki/Confucianism>, (last visited July 17, 2016).

⁵⁰ *The Education Law 2005* (amended 2010) art. 9.

⁵¹ Article 25(1) (d), (g) and 32 (1) (b) of *the Law on Intellectual Property 2005*.

with the Bilateral Trade Agreement (BTA) VN-US, a separate IP law called the Law on IP 2005 was introduced, which is stricter than ever before.⁵² It introduced the broad bundle of exclusive rights for copyright owners, both economic rights (the right of making a derivative work, right of reproduction, right of distribution, right of communication to public, right of rental, and right of exhibition) and moral rights (right to title the work, right to attachment, right to publication, and right of integrity). All exclusive rights of the copyright holder extended by TRIPS are included in Vietnamese copyright law. The term of protection is 50 years, plus the lifetime of the author; or 75 years from the date of first publication for cinematographic works, photographic works and works of applied art, and anonymous works. In accordance with international convention, works of foreign authors are protected the same way as domestic authors if the authors are citizens of countries that have agreements with Vietnam or are member of the same conventions that Vietnam is a party to. Additionally, infringement of copyright in Vietnam is able to be concluded either through civil⁵³ or criminal liability.⁵⁴ International copyright obligations set out by Berne, Rome, TRIPS, WCT and WPPT are overprotective.⁵⁵ They believe

⁵² *Overview of Copyright in 2008*, Copyright Office of Vietnam, http://www.cov.gov.vn/cbqen/index.php?option=com_content&view=article&id=769&catid=49&Itemid=96 (last visited July 17, 2016).

⁵³ Decree 131/2013/ND-CP on Administrative Penalties for Copyright and Related Rights Infringement, *come into force* Dec. 15, 2013, *available at* <http://www.cov.gov.vn/cbq/attachments/article/1337/ND131.pdf>.

⁵⁴ *The Criminal Code 2009* art. 170(1).

⁵⁵ Ruth L. Okediji, *The International Copyright System: Limitations, Exceptions and Public Interest Considerations for Developing Countries*², http://unctad.org/en/docs/iteipc200610_en.pdf (ICTSD Issue Paper No. 15, 2006); Lauren Loew, *Creative Industries in Developing Countries and Intellectual Property Protection*, 9(1) *VANDERBILT J. ENT. & TECH. L.* 171, 177 (2006); Michael J Finger, *Introduction and Overview*, in *POOR PEOPLE'S KNOWLEDGE: PROMOTING INTELLECTUAL PROPERTY IN DEVELOPING COUNTRIES* 1, 1 (2004); Marci A Hamilton, *The TRIPS Agreement: Imperialistic, Outdated, and Overprotective*, 29 *VAND. J. TRANSNAT'L L.* 613, 615 (1996); Andreean Leger, *The Roles of IPRs for Innovation: A Review of the Empirical Evidence and Implications for Developing Countries* (GERMAN INSTITUTE FOR ECON. RES. DISCUSSION PAPER No. 707, 2007); Carsten Fink & Carlos A Primo Braga, *How Stronger Protection of IPRs Affects International*

that overprotective international copyright is actually generated by developed countries and then forced onto the developing world, which differs significantly from the developed world in levels of development, politics, and culture.⁵⁶ Academics therefore object the view of “one size’s Western-style IPRs fit for all”.⁵⁷

Despite overly strong protection, piracy and Intellectual Property Rights (IPR) infringements are still widespread in Vietnam. The piracy rates in the software industry and music industry were recorded at 84% and 90% respectively. Book and journal publishers also suffer from uncontrolled piracy, in the form of illegal reprints, translations, and photocopies. Approximately 90% of the English language teaching works have been disseminated without authorization.⁵⁸ In terms of enforcement, despite making a lot of effort, there has been little positive recent development. The Copyright Office of Vietnam in its 2008 reports admitted that “the Inspectorate of the Ministry of Culture, Sports & Tourism (MOCST) has made every effort, but is unable to meet the requirement to establish order in the field of copyright and strictly handle the organizations and individuals who violate copyright and related rights”.⁵⁹ Such issues remain of concern to the United States, leading the Office of the US Trade Representative to place Vietnam on its Special 301 Report “Watch List”

Trade Flows 19-22 (WORLD BANK POL’Y RES. WORKING PAPER, 2005); Rami Olwan, *Intellectual Property and Development: Theory and Practice* 16 (May 2011) (PhD Thesis, Queensland University of Technology).

⁵⁶ *Id.*

⁵⁷ Loew, *supra* note 33, at 185; Madhavi Sunder, *IP3*, 59(2) *STAN. L. REV.* 257, 260 (2006); Keith E. Maskus, *Intellectual Property Rights and Economic Development*, 32 *CASE WESTERN J. INT’L L.* 471, 473 (2000).

⁵⁸ *International Intellectual Property Alliance, Special 301 Report on Copyright Protection and Enforcement 2010*, OFFICE OF THE UNITED STATES TRADE REPRESENTATIVES (2010), <http://www.ustr.gov/about-US/press-office/reports-and-publications/2010/2010-special-301-report>.

⁵⁹ *See supra* note 52.

of Nations whose IPR practices remain inadequate.⁶⁰ As a result, Dr. Vu Manh Chu, General Director of the Copyright Office of Vietnam, said that the violations have negative effects on creative activities, the investment environment, social and cultural development, and the nation's integration into the world economy.⁶¹

In seeking an answer for the rampant copyright infringement in Vietnam, some blame ineffective enforcement.⁶² However, the most important reason is that the Vietnamese copyright system is tremendously imbalanced. Too much protection is provided for the copyright owner, while there are few workable limitations and exceptions to copyright. Consequently, ordinary people have had their rights to access taken away by the shortage of important limitations and exceptions, in addition to the impractical and small scope of existing limitations and exceptions, which forces them to seek an alternative, illegal method. Vietnamese legislators have not paid attention to drafting a proper set of copyright limitations and exceptions that provide true rights for users to legitimately access cultural expressions.

Currently, copyright limitations and exceptions in the Law on IP 2005 are double the provisions given previously. They are applied by new regimes of either uncompensated or compensated schemes. Unfortunately, the educational limitations and exceptions do not reflect what Vietnamese people expect, as

⁶⁰ *International Intellectual Property Alliance, Special 301 Report on Copyright Protection and Enforcement 2011*, OFFICE OF THE UNITED STATES TRADE REPRESENTATIVES (2011), <http://www.ustr.gov/about-USE/press-office/reports-and-publications/2011/2011-special-301-report>.

⁶¹ *Vietnam to Clamp Down on Copyright Infringement*, VIETNAMNEWS.BIZ (Jan. 09, 2009), http://www.vietnamnews.biz/Vietnam-to-clamp-down-on-copyright-infringement_51.html.

⁶² IIPA, for example, it has been concluded in their reports every year that the reason for piracy in Vietnam has weak enforcement of copyright law. See more at IIPA Reports from 2001-2014 at www.iipa.com.

they are rather unclear, narrow in scope, and lack important provisions.

A. The Failure of Implementing the Three-Step Test

In implementing international obligations, Vietnam makes its copyright limitations and exceptions more restrictive. As an international obligation, drafting copyright limitations and exceptions Vietnam is bound by the three-step test under Berne Convention and TRIPS Agreement.⁶³ Vietnamese legislators attempted to adopt international standards into its domestic law, but the adoption is imperfect. It repeats the three-step test verbatim in the law. The simplicity of the limitations and exceptions' provisions not only limits the number of applicable limitations and exceptions, but also restricts the scope of each of the limitations and exceptions. The three-step test of Berne creates an additional condition that specific limitations and exceptions must satisfy, as it is inserted at the end of its closed list of limitations and exceptions.⁶⁴ Vietnam limitations and exceptions are subject to double tests: one test is set up under each particular limitations and exceptions and then has to comply with the second test: the three-step test. In Geiger, Gervais, and Senftleben's words, the three-step test "serves as a further restriction imposed on national limitations and exceptions".⁶⁵ The Vietnamese situation is similar to the Chilean IP

⁶³ The three-step test was first set out in the *Berne Convention* 1971 and then adopted in the TRIPS Agreement and other copyright agreements. Article 9(2) of Berne (approved by the Paris Act 1971) introduced setting out the general rule, with three requirements that must be satisfied for an exception or limitation of the reproduction to fall within the range of circumstances envisaged by the rule. Today this rule is known as the three-step test: It shall be a matter for legislation in the countries of the Union to permit the reproduction of such works in certain special cases, provided that such reproduction does not conflict with a normal exploitation of the work and does not unreasonably prejudice the legitimate interests of the author.

The three conditions set forth in the test are: (1) certain special cases, (2) no conflict with a normal exploitation, and (3) no unreasonable prejudice to the legitimate interests of the author/right holders.

⁶⁴ Art. 25 (2) and 26 (2) of the *Law on IP 2005*.

⁶⁵ Christophe Geiger et al., *The Three-Step Test Revisited: How to Use The Test's Flexibil-*

Law in 2003. The attention of implementing the three-step test was traced in the amendment of Chilean IP Law 1970 in 2003 that brought the legislation signed by Chile into accordance with the Agreements of the WTO,⁶⁶ including the TRIPS Agreements. Chilean lawmakers added a new Article 45bis that reproduced the treaties' language.⁶⁷ Article 45bis was criticized as "an extremely unfair test against the very few exceptions authorised by the law."⁶⁸ It requires the courts to exercise double tests for applying any exception, which is too strict and restricts the scope of limitations and exceptions to copyright.⁶⁹ The restriction of the application of limitations and exceptions raised by introducing the three-step test into its legislation was illustrated by the case of *Dao Thai Ton v. Nguyen Quang Tuan*.⁷⁰ In this case, the plaintiff, Nguyen Quang Tuan, claimed the defendant, Dao Thai Ton, had copied the full text of four articles of the plaintiff into the defendant's book "The Tale of Kieu – Research and Discussion". The plaintiff argued that the defendant illegally reproduces his works without his permission. However, the defendant believed that the use of Nguyen Quang Tuan's articles did not infringe copyright because it fell into the scope of limitations and exceptions to copyright in terms of quotation

ity in National Copyright Law, 29(3) AM. U. INT'L L. REV. 581, 583, 617-618(2014).

⁶⁶ *Law No. 19.912 Bringing the Legislation Signed by Chile, in Accordance With The Agreements Of The World Trade Organization (WTO)*, WIPO, <http://www.wipo.int/wipolex/en/details.jsp?id=5321>(last visited July 16, 2016).

⁶⁷ Article 45bis added by the *Law No. 19.912*:

The exceptions established in this paragraph and in the following paragraph are limited to cases that do not conflict with normal exploitation of the work and do not cause unjustifiable damage to the legitimate interests of the copyright holder.

⁶⁸ Daniel Alvarez Valenzuela, *The Quest for a Normative Balance: The Recent Reforms to Chile's Copyright Law*, ICTSD (Dec. 12, 2011), <http://web.uchile.cl/archivos/derecho/CEDI/Art%EDculos/the-quest-for-a-normative-balance-the-recent-reforms-to-chil-ee28099s-copyright-law.pdf>.

⁶⁹ *Id.*

⁷⁰ This case was initially held by the Hanoi People's Court, following this it was appealed and overruled by the Court of Appeal of the Supreme People's Court. See more at Judgment No. 127/2007/DSPT (June 14, 2007), http://www.ecap-project.org/sites/default/files/ip_case_law/VN_1-2-2007.pdf.

for the purpose of criticism. When this case brought to the courts, the courts had to follow to steps: (1) whether the use of the works fell into the closed list provided under Article 21 (1) of the Law on IP 2005. If the first step was satisfied, then the court needed to examine the three-step test added at Article 25 (2) Whether the right to quote/cite of the defendant has violated the three-step test or not. This means that limitations and exceptions for quotation have to pass two layers of restriction: one from the provision for quotation itself, and one from the three-step test. In this case, the courts had to pay attention to not only find out how much citation of the work is “reasonable”,⁷¹ but also to interpret three-step test. That is to say, adding the three-step test into legislation is wrong as it makes copyright limitations and exceptions more restrictive.

B. The Lack of Exception for Self-Study

The law does not cover limitations and exceptions for self-study circumstances, which impedes students gaining lawful access to cultural expression.⁷² The laws only give users the right to make one copy for their own research and teaching without commercial purposes.⁷³ “Study”⁷⁴ is not included in the

⁷¹ Article 25 (1) (b).

⁷² Scholars in Vietnam concluded that the Law on Intellectual Property does not allow students to reproduce the copyrighted work for self-study purpose. See Ngoc Lam Nguyen et al., *Regarding the Reproduction Right in Education Environment*, 2 VIETNAMESE LEGAL J. 39 (2007).

⁷³ Article 25(1) (a) of the Law on IP 2005. The word “research” is defined as “scientific research is the activity of discovering and inquiring into phenomena, things and laws of the nature, society and thought, and creating solutions for practical application. Scientific research includes basic research and applied research.” The Law on Science and Technology 2000art. 2(4), available at http://www.wipo.int/clea/docs_new/pdf/en/vn/vn049en.pdf. “Teaching” is defined as “the imparting of instruction or knowledge; the occupation or function of a teacher.” *Teaching*, OXFORD ENGLISH DICTIONARY ONLINE, <http://www.oed.com/view/Entry/198356?rskey=gjKT4p&result=1&isAdvanced=false#eid> (last visited July 17, 2016).

⁷⁴ The word “study” is defined as “the application of mind to the acquisition of learning; mental labour, reading and reflection directed to learning, literary composition, invention, or the like.” *Study*, OXFORD ENGLISH DICTIONARY ONLINE, <http://www.oed.com/view/Entry/192083?rskey=RjTTg5&result=1&isAdvanced=false#eid> (last visited July 17,

meaning of “research” or “teaching”. In the information age, students have a high demand for retrieving information and knowledge for study or greater production. However, they cannot afford to buy copyright works due to their modest budgets. Indeed, the majority of students in Vietnam are photocopying textbooks, articles, and lectures for their study. This has created an industry – the photocopying industry – that produces copies of works to fulfil students’ needs.⁷⁵ Such acts are obviously prohibited by the law. Therefore, many schools and universities of Vietnam have chosen to rent out places within their campus for the development of photocopying business, rather than provide photocopying services for students, in order to avoid copyright infringement issues. Moreover, some big state university libraries, such as the Vietnam University of Commerce and Hanoi Law University, do not allow students to take educational materials to their premises for the purpose of photocopying, even small parts. The unauthorized reproduction by a student of a reasonable part of a work to illustrate a lesson is accepted in almost all countries in the world.⁷⁶ Thus, without the advantage of limitations and exceptions for personal study, students in Vietnam are struggling to gain access to their educational materials lawfully. This is to say, Vietnam should introduce an exception for self-study. If Vietnam adopts fair use, this use should be included as fair use.

C. The Absence of Rules on Compulsory Licenses

In the absence of proper remuneration schemes for educational use, it is hard for students and teachers to gain bulk access to educational materials.

2016).

⁷⁵ It has been reported by IIPA from 2001 up to now, that Vietnam has suffered from overwhelming piracy, in the form of illegal reprints and photocopies. See *2001-2014 Special 301 Report – Vietnam*, IIPA, <http://www.iipa.com/rbc/2008/2008SPEC301VIETNAM.pdf>.

⁷⁶ This issue is stipulated in §107 of the US as fair use and appears in Article 22(1) of the *Chinese Copyright Act*. Similarly, Section 40 of the *Australian Copyright Act 1968* considers study as fair dealing.

Like other developing countries, it is a necessity for Vietnam to have access to educational materials at affordable prices. For the purpose of educating skilled people, Vietnam needs to be able to access a complete book or an article to deliver to learners in the course of teaching. In order to do that teachers or educational institutions must seek permission from copyright owners, because none of the limitations and exceptions of Vietnam allow them to utilize entire works for teaching.⁷⁷ Teachers are allowed to make a single copy, while students are not permitted to reproduce works. The administration costs plus royalties for obtaining permission are extremely high, whereas schools and universities in Vietnam have limited financial resources and weak bargaining power to negotiate with commercial publishers. Therefore, most schools and universities have operated in an isolated world with a modest number of textbooks and little access to scientific journals, especially international journals.⁷⁸ Students and teachers opt to pay for illegal copies made by photocopying businesses. The photocopying business makes a huge profit from their sale, while publishers and copyright owners suffer from the practice of illegally photocopied works. This leads to two bad outcomes: users in the educational sector incur the risk of being sued at any time by copyright owners, and it erodes the incentive of creativities. This became true in the case of First New Co. v. Australia International English School & Vietnam Australian English Association on February 2012.⁷⁹ The defendants were sued for infringement, as they deliber-

⁷⁷ Article 25 (1) (b), (d) and (g) of the Law on IP 2005 permit to use part work only.

⁷⁸ Stephen W. Director et al., *Observes to Tertiary Education in Information Technology, Electronics-Digital and Telecommunication Fields in Some Universities of Vietnam*, THE NATIONAL ACADEMIES (2006).

⁷⁹ Cong Quang, *The First Litigation Related to Books' Copyright*, DANTRI ONLINE NEWSPAPER (Feb. 28, 2012), <http://dantri.com.vn/c20/s202-569841/hoi-chuong-thuc-tinh-viec-ton-trong-ban-quyen.htm> (in Vietnamese language); HoaBinh, *Australia International English School and Vietnam Australian English Association Were Sued*, BAOMOI (Feb. 22, 2012), <http://www.baomoi.com/Anh-ngu-Uc-Chau-va-Anh-van-Viet-Uc-bi-kien/107/7924917.epi> (in Vietnamese language).

ately reproduced some parts of copyrighted books for their own collections to use in lectures or as study materials in their classrooms. The First New Company required compensation of 380 million VND (approximately 18,000 US dollars).⁸⁰ Ultimately, the case was settled by negotiation between parties: the defendant had to compensate the huge amount of money for their infringement acts, plus give a public apology.⁸¹ The practice of illegally photocopying works in the educational sector has been not tolerated by copyright owners, because it negatively affects the normal exploitations of the work, the second step of the three-step test. This is witnessed by the reaction of the Vietnam Reproduction Rights Organization (VIETRRO) in relation to making copies of artistic works by students and teachers.⁸² VIETRRO made a claim to the Ministry of Education and Training (MOET) to ask for compensation (10,000 VND per year per student, or 500VND and a little bit more per teacher for whatever they copied, or asked a photocopying business to pay some levies) for photocopying made by students and teachers.⁸³ MOET has remained silent on this issue. There is a fear that VIETRRO will bring the case to the court for copyright infringement in the educational sector.

D. The Out of Date of the One Copy Rule

The one copy reproduction rule for reproduction of educational materi-

⁸⁰ *Id.*

⁸¹ *Id.*

⁸² VIETRRO was established on Mar. 29, 2010 by the Vietnam Writer Association and approved by the Ministry of Culture, Sport and Tourism of Vietnam (MOCST) and the Ministry of Home Affairs of Vietnam (MOHA). This organisation is working as a collective management organisation that represents copyright owners to license reproduction rights. Currently, VIETRRO has represented more than 10,000 copyright owners. See more at VIETRRO, <http://www.viettro.org.vn/> (last visited July 17, 2016).

⁸³ *VIETRRO Will Collect 1 Million US Dollars in 5 Years*, BAOMOI (Dec. 21, 2011), <http://www.baomoi.com/Hiep-hoi-Quyen-sao-chep-VN-5-nam-thu-phi-sao-chep-1-trieu-usd/59/4307513.epi>.

als for teaching is an obstacle to the educational sector.⁸⁴ It challenges teachers in the course of distributing the work to students. How can she/he do this with only one copy in her/his hand? She can perhaps pass it to the students and the students can enjoy the copyrighted work for a very short period and return it to the teacher. Even this can be seen as a copyright infringement, as Vietnamese limitations and exceptions do not mention that teachers are entitled to distribute the work to a class. In reality, teachers often make multiple copies of essential materials and distribute them to their students. More professionally and conveniently, educational institutions combine necessary materials together and make copies to deliver to their students so that they can be used in classrooms. Such acts by teachers or educational institutions are absolutely liable for copyright infringement. It is evident by the litigation between *Fist New Co. v. Australia International English School & Vietnam Australian English Association* on February 2012.⁸⁵ The defendants paid a huge amount of compensation for the use of the compilations that contained some parts of the plaintiff's books in their classrooms, because they infringed copyright by making more than one copy of some excerpts of copyrighted works and distributing them in their classrooms. This discourages schools from endeavoring to make study material resources; and thus, impedes the overhaul of education in the country.

E. Limitations and Exceptions to Copyright Do Not Extend to Distance Learning

Current limitations and exceptions for education do not extend to distance learning, which constrains the development of this educational model. Recently, distance learning has played an important role, due to the massive

⁸⁴ *The Law on IP 2005 (revised 2009)* art. 25(1)(a). This provision was interpreted by the Decree 100/2006/ND-CP that no more than one copy of a work is allowable.

⁸⁵ *See supra* note 79.

demand from not only remote areas,⁸⁶ but also big cities such as Hanoi and Ho Chi Minh. The emergence of information technology, especially the internet, has made distance education flourish and become a great monetary potential for educational institutions and enterprises.^{87, 88} At the same time, distance learning brings equality for people in education, regardless of their locations and conditions,⁸⁹ which is good for human development. Therefore, it needs to be facilitated in Vietnam. Unfortunately, this educational model is impeded by inappropriate limitations and exceptions because Vietnamese limitations and exceptions treat distance learning the same as face-to-face learning. Today's

⁸⁶ Distance learning is defined as “a form of education in which students are separated from their instructors by time and/or space” *See Report on Copyright and Digital Distance Education ii*, US COPYRIGHT OFFICE (May 1999), http://www.copyright.gov/reports/de_rprt.pdf.

⁸⁷ It was recorded in 1998-1999 that approximately 800,000 learners participated in courses of distance education. *A Country Report on Open and Distance Learning in Vietnam*, GLOBAL DISTANCE LEARNING NETWORK (2001), http://gdenet.idln.or.id/country/ar_vietnam/CRVietnam.htm; Doung et al., *Distance Education Policy and Public Awareness in Cambodia, Laos and Vietnam*, DISTANCE EDUCATION 28, 163-177 (2d ed. 2007), <http://search.proquest.com/docview/217779057?accountid=13380>.

⁸⁸ Distance learning has been undertaken in Vietnam since 1993, when the government created two Open Universities to help the development of distance education in Hanoi and Ho Chi Minh cities. Distance learning is reaching wider audiences, covering all segments of the population. The college audience is increasing rapidly due to responsiveness to the needs of an older, non-traditional student population. Students also include professionals engaging in professional development or training, and retirees. To date, 17 universities have provided distance learning programmes and covered 63 cities and provinces in Vietnam. Approximately 160 thousand students have graduated and around 233 thousand students are studying such programmes. Distance education in Vietnam is the most utilised form of higher education. Before the spread of the internet, distance learning was conducted via audio or visual audio broadcasts, tapes, CDs, VCDs. Thanks to the development of the internet, educational materials are now digitalised and transmitted to learners via the internet. *See Vi Thuy, Develop Distance Learning – an Indispensable Trend*, EDUCATION AND EPOCH ONLINE NEWSPAPER (Nov. 2, 2009), <http://www.gtd.vn/channel/2741/200911/Phat-trien-giao-duc-tu-xa-Xu-the-tat-yeu-cua-thoi-dai-1913519/>.

⁸⁹ Distance education helps students overcome such barriers as full-time work commitments, geographic inaccessibility, and the difficulty of obtaining child or elder care, and physical disabilities. It can also provide the advantage of convenience and flexibility. With digital technologies enabling courses to reach and appeal to wider audiences, including rural, busy, impaired, and retired people.

distance education courses use digital technologies such as email, shared applications, streaming video/audio, video/audio file sharing, links, interactive CD-ROMs and DVD-ROMs⁹⁰ for various purposes and in numerous ways. These uses during the conduct of distance education make it different from face-to-face instruction. In virtual life, a teacher using a work to teach her class will invariably exercise one or more of the copyright owner's exclusive rights. She reproduces it and displays it to her limited students. In this situation, the one-copy reproduction rule can be workable. Unlike face-to face teaching,⁹¹ if a teacher wants to display a copyrighted work to students she/he must transmit it over a digital network. The transmission over a digital network will generally constitute an exercise of the reproduction right and possibly the distribution right.⁹² The digital transmission involves the automatic creation of copies during the transmission process. Particularly, when material is transmitted to a distant location over a computer network, temporary RAM copies are made in the computers through which it passes, by virtue of the technological process of transmission. In the other words, RAM copies implicate the copyright owner's reproduction right.⁹³ The copy of the work that arrives on the recipient's computer is the ultimate copy in this process. This means that it is possible to create numerous copies of the work using digital transmission. This kind of digital transmission constitutes the communication right to the public via a computer network. Therefore, it does not enable educators to digitize and transmit copyright materials to remote students, as this process definitely creates multiple copies instead of one copy.

⁹⁰ Formore detail about these technologies, see *supra* note 86.

⁹¹ This is the rule established in Article 25(1)(a) and 32 (1)(b) of the *Law on Intellectual Property* 2005 that allows users to reproduce only one copy of a work for teaching purposes.

⁹² See *supra* note 86.

⁹³ *MAI Sys.Corp. v. Peak Computer, Inc.*, 991 F. 2d 511 (9th Cir. 1993); *Stenograph L.L.C. v. Bossard Assocs.*, 144 F. 3d 96, 101-102 (D.C. Cir. 1998).

F. The Ignorance of Rules for Access to Educational Materials for Ethnic Groups

Access to educational materials of minority ethnic groups is extremely restricted because the copyright law removed the limitations and exceptions for translation of works from Vietnamese language to minority languages. Vietnam is a culturally diverse country, with 54 different ethnic groups and 90 different languages. Although King people (or Viets) account for approximately 86% of Vietnam's total population,⁹⁴ the Vietnamese Constitution explicitly declares that "every nationality group lives equally, co-operates, and helps each other. Each ethnic group has the right to preserve and use their own language."⁹⁵ Currently, many ethnic groups, such as Tay, Thai, Muong, H'Mong, Dao, and Khmer, use their own languages in conjunction with the national Vietnamese language. It is worth noting that members of 53 ethnic minority groups in Vietnam occupy up to 14% of the country's population, but they account for more than half of the country's poor people. The Vietnamese government has attributed a lot of effort to exercising favourable policies to such groups. One such effort is to provide education and give them opportunities to absorb cultural and artistic activities from outside their communities.⁹⁶ Unfortunately, the privilege of translation and distribution of works from Vietnamese languages to minority ethnic languages that used to exist under Article 761(f) of the Civil Code 1995, was removed by the Law on IP 2005. Therefore, these translations and distributions infringe copyright, if they are done without authorisation and

⁹⁴ Cu Hoa Van, *The Nationality Issue and the Implementation of Nationality Policy in Vietnam: Facts and Solutions*, NATIONAL ASSEMBLY OF VIETNAM (2009), http://www.na.gov.vn/sach_qh/chinhsachpl/phan4/p4_iv_6.html; *Vietnam Demographic 2012*, INDEXMUNDI, http://www.indexmundi.com/vietnam/demographics_profile.html (last visited July 16, 2016).

⁹⁵ Article 34 of *Constitution 1992 of Vietnam*.

⁹⁶ Bert Maetern, *Challenges of Poverty's Reduction in Vietnam*, OXFAM IN VIETNAM (Mar. 05, 2012), <http://oxfaminvietnam.wordpress.com/2012/03/05/the-challenges-of-poverty-reduction-in-vietnam/>.

payment of royalties. This results in a shortage of textbooks, newspapers, and books translated from the national Vietnamese language into ethnic languages.⁹⁷ It explains why numerous people of minority ethnic groups are living in poverty and are uneducated. Therefore, it is worthwhile that Vietnam adds limitations and exceptions for translation and distribution of works to minority ethnic languages for educational purposes.

G. The Lack of Important Access Rights for Libraries

Inappropriate copyright limitations and exceptions for libraries have blocked the knowledge flow within the society, thus it hinders the capability of learning of Vietnamese citizens. Libraries play an important role in society. They contribute greatly to promoting learning, and spreading and sharing knowledge among members of society, in furtherance of a common good.⁹⁸ They are the public's access points to knowledge for the public to accomplish research, teaching and learning. More importantly, these access points are free of charge;⁹⁹ thereby, they have immense value for the people who lack resources elsewhere, like many in Vietnam. In exercising their function, libraries become deeply involved in access to cultural works when they make reproductions of the works for purposes of preservation, distribute works for research, private study, and teaching, and send or receive works under the name of interlibrary loans. Vietnam copyright law provides privileges for libraries to ac-

⁹⁷ Thong Ta Van, *Preservation Languages of Minority Ethnic Group in Vietnam*, THE PEOPLE (July 12 2014), <http://www.nhandan.com.vn/khoahoc/khoa-hoc/item/23754202-baoton-ngon-ngu-cac-dan-toc-thieu-so-o-viet-nam.html>.

⁹⁸ GUAN H TANG, COPYRIGHT AND THE PUBLIC INTEREST IN CHINA 167 (2011); Juan Carlos Fernández-Molina & José Augusto Chaves Guimarães, *Library Exceptions in the Copyright Laws of Ibero-American Countries*, 26(3) INFO. DEVELOPMENT 214, 215(2010); Shalini R Urs, *Copyright, Academic Research and Libraries: Balancing the Rights of Stakeholders in the Digital Age*, 38(3) PROGRAM: ELECTRONIC LIBRARY & INFO. SYSTEM 201, 201 (2004).

⁹⁹ See *Ordinance of Libraries 2001 of Vietnam*, article 6(2).

cess cultural expression; however, this privilege is extremely limited, therefore libraries are struggling to provide adequate resources, to create friendly, accessible environments, as well as extending their service to different groups of the community. Firstly, there is the fact that collections of Vietnamese libraries are modest and insufficient to meet the demands of the public. Many reasons have been determined, such as the lack of funding to import collections from overseas, the development of collections mainly depending on donations, the limited number of works published in Vietnamese, or untrained libraries in archiving works.¹⁰⁰ The restricted scope of limitations and exceptions for libraries partly contributes to this issue. Libraries are permitted to reproduce cultural works for preservation under Article 25(1)(đ) of the Law on IP 2005.¹⁰¹ However, only one copy can be made.¹⁰² This rule challenges librarians, because original works, especially printed works, have been damaged, lost, or stolen. If this happens, and there is only one copy left, this will also be at risk of being damaged, lost or stolen. However, librarians are not allowed to make multiple copies or digitalise them for safe preservation. Therefore, they are suffering the loss of cultural works from libraries' collections. This negatively impacts on human development, as it shrinks the range of cultural works that human beings can learn from. Moreover, libraries are confronting difficulties in exercising their function of dissemination of knowledge to the public as "libraries are not allowed to reproduce and disseminate copies of works to the public, even digital copies."¹⁰³ Article 25(1)(đ) of the Law on IP 2005 refers to the right of libraries to reproduce one copy for research. In connection to the provision

¹⁰⁰ See generally Barbro Thomas, *Development of Public Library Performance in Laos and Vietnam* 13, (NATIONAL LIBRARY OF SWEDEN FINAL REPORT, 2009), http://www.kb.se/Dokument/Bibliotek/utredn_rapporter/2009/Laos_Vietnam_Final_Report_2009-04-07.pdf.

¹⁰¹ Article 25(1)(đ) of the *Law on IP 2005*.

¹⁰² Article 25(2) of the *Decree 100/2006/ND-CP (Sept. 21, 2006) Detailing and Guiding the Implementation of A Number of Articles of the Civil Code and the Intellectual Property Regarding the Copyright and Related Right*.

¹⁰³ *Id.*

that prohibits libraries from reproducing and disseminating copies of works to the public, it is likely that the libraries are only entitled to copy one copy for themselves to serve their own research, not for research purpose of the public. This means that libraries are not allowed to reproduce and supply copies of articles or books to their patrons, which is the public, as well as to other libraries through inter-library systems. Prohibiting the supply of copies of works to patrons definitely creates obstacles to the dissemination of knowledge in public, as libraries can only provide materials to enjoy on their premises, without allowing any copying of materials. Currently, if the patrons want to make a copy for their legitimate purposes of research or teaching, they must borrow copyrighted works and take them somewhere else to reproduce them, rather than order libraries' officers to do so. This not only creates huge profits for the photocopying industry, but also makes libraries less helpful and discourages patrons from retrieving resources from libraries. This explains why Vietnam's citizens have a longstanding passion for reading,¹⁰⁴ public libraries are widespread throughout the country,¹⁰⁵ but only a very small portion of the population take advantages of public libraries.¹⁰⁶ Furthermore, the development of interlibrary lending in Vietnam is impeded because copyright law does not allow libraries to reproduce works to the public. Within academic libraries, interlibrary loans have been seen as the effective way of supplementing the limited resources currently available. This becomes more important in Vietnam, as

¹⁰⁴ Over 90 percent of the Vietnamese population are literate. Every corner of streets or parks shows people reading books, newspapers, or magazines. In addition, over 25 million people access websites via internet daily for the love of reading. See DinhKieuNhung, *Unlocking the Potential of Vietnam's Libraries*, THE ASIA FOUNDATION (Sept. 7, 2011), <http://asiafoundation.org/in-asia/2011/09/07/unlocking-the-potential-of-vietnams-libraries/>.

¹⁰⁵ *Id.* There are nearly 2,000 commune-level libraries, 613 district libraries, 63 provincial libraries and a national library..

¹⁰⁶ Recent surveys indicated that only 2 or 3 percent of the population have used a libraries' services. This figure is around 60 percent of the population in the world. Barbro Thomas, *supra* note 100, at 17.

most libraries do not have sufficient resources to meet their own needs. Additionally, Vietnamese limitations and exceptions exclude libraries from the right of dissemination of copies of works in digital forms; it concedes the dead of distance/digital libraries. Thanks to digital technologies, people can digitalize copyrighted works into digital forms so that they can be enjoyed online and transmitted through the internet. This has resulted in the dramatic growth of distance/digital libraries around the world in the past two decades.¹⁰⁷ Libraries nowadays can serve patrons both from inside their premises and from a distance by sending digital copies to patrons. Unfortunately, library staffs are confronted with the challenge of addressing copyright issues related to distributing work in digital forms; due to Vietnamese copyright law treating this act as copyright infringement. Therefore, libraries' distance services via digital forms have been far reached to special target groups that suffer disadvantages of locations or abilities. In short, libraries in Vietnam "are unattractive and under-resourced to meet the tremendous demand for study and research."¹⁰⁸ People in remote areas are not able to reach fresh knowledge.¹⁰⁹ Those shortcomings stem from the lack of proper privileges for libraries. In her article, Thu Hang complained that "libraries open every day just doing a simple things, lending books from limited resources."¹¹⁰ This is true, because librarians are not allowed to provide various services for the public. For example, interlibrary transfer is impossible, so if a library patron cannot find a book in a library, he/

¹⁰⁷ Oded Nov & Chen Ye, *Users' Personality and Perceived Ease of use of Digital Libraries: The Case for Resistance to Change*, 59(5) J. AM. SOCIETY FOR INFO. SCIENCE & TECH. 845 (2008).

¹⁰⁸ Thu Hang, *Outdated Libraries Put Damper on Learning*, VIETNAMNEWS (July 27, 2010), <http://vietnamnews.vn/in-bai/201919/outdated-libraries-put-damper-on-learning-.html>.

¹⁰⁹ Anh Tuyet, *Improving the Spread of Scientific and Technology Knowledge for People in Remote Areas*, HANOIMOI NEWSPAPER (May 29, 2015), <http://hanoimoi.com.vn/Tin-tuc/Khoa-hoc/757788/nang-cao-vai-tro-pho-bien-kien-thuc-khoa-hoc-cong-nghe> (translated from Vietnamese languages).

¹¹⁰ Thu Hang, *supra* note 108.

she must go to another library.¹¹¹ This discourages the public from going to libraries. Moreover, the lack of educational material encoded for people with disabilities has become common in Vietnam,¹¹² as copyright protection pushes the price up, while limitations and exceptions to copyright are limited.

VI. Recommendations of Reconstructing Copyright Limitations and Exceptions to Facilitate Access to Knowledge For Education

A. Remove the Three-Step Test from Legislation

As a requirement of international law, a country needs to unpack the three-step test to form its own limitations and exceptions. The three-step test draws a baseline for nations to introduce their own limitations and exception, so it should be regarded as a guiding principle to dictate that member nations write their legislation, rather than used as a strict rule.¹¹³ This means the test needs to be examined by lawmakers before introducing certain limitations and exceptions, not users, copyright holders, or courts. As a general principle or packed guide, the three-step test must be unpacked by domestic legislation. In implementing the test, each country has its own method. The three-step test is impliedly addressed in the §107 of the US Copyright Act of fair use with four factors: (1) the purpose and character of the use, including whether such use is

¹¹¹ Thu Hang, *supra* note 108. In this article, the author said she often has to run between libraries to find a book she needs.

¹¹² *The Shortage of Books for Visually Impaired People*, HANOI DISABLE ASSOCIATION, http://dphanoi.org.vn/index.php?option=com_content&task=view&id=2718&Itemid=808 (last visited July 17, 2016) (translated from Vietnamese language). The article stated that books for visually impaired people only satisfied 60% of the demand. Sexual educational and entertainment books for such people are extremely rare.

¹¹³ Okediji, *supra* note 55, at 32; *Declaration on a Balanced Interpretation of the Three-Step Test in Copyright Law*, MAX PLANCK INSTITUTE FOR INTELLECTUAL PROPERTY, COMPETITION AND TAX LAW, http://www.ip.mpg.de/shared/data/pdf/declaration_three_step_pdf.

of a commercial nature or is for non-profit 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. Other specific limitations and exceptions of the US have been introduced consistent with the three-step test, although their laws do not mention the test at all. Similarly, Chi¹¹⁴ and Brazil¹¹⁵ created their own exhaustive lists of limitations and exceptions without referring to the three-step test, as the test was carefully examined by lawmakers before introducing such limitations and exceptions.

The three-step test has not been properly unpacked in Vietnam. Vietnam simply reproduces the treaties' language into its domestic law¹¹⁶ as below:

Article 25 (2): Organizations and individuals that use works defined in Clause 1 of this Article may neither affect the normal utilization of these works nor prejudice the rights of the authors or copyright holders; and shall indicate the authors' names, and sources and origins of these works.

Article 26 (2): Organizations and individuals that use works under Clause 1 of this Article must neither affect the normal utilization of these

¹¹⁴ The 2010 IP Law of Chile under Article 71 Q introduced the fair dealing provision that implemented the three step test as below:

The incidental and exceptional use of a protected work is hereby deemed lawful, for purposes of criticism, commentary, caricature, teaching, scholarship, or research, provided that said use does not constitute a covert exploitation of the protected work. The exception established by this article is not application to audiovisual works of a documentary nature.

¹¹⁵ Pedro Nicoletti Mizukami *et al.*, said that the three-step test "was not itself turned into law in Brazil". Brazilian copyright law has no provision directly referring to the three-step test. See Pedro Nicoletti Mizukami *et al.*, *Exception and Limitations to Copyright in Brazil: A Call for Reform*, in ACCESS TO KNOWLEDGE IN BRAZIL: NEW RESEARCH ON IP, INNOVATION AND DEVELOPMENT 50 n.10, (Lea Shaver ed., 2010).

¹¹⁶ See Article 25, 26 of the *Law on IP 2005*.

works nor prejudice the rights of the authors or copyright holders: and shall indicate the authors' names, and sources and origins of the works.

The way to implement the three-step test makes the law unworkable, because its meaning is too general. Take the case of Section 200AB of the Australian Copyright Act 1968 as an example. The Copyright Amendment Act 2006 of Australia was intended to create a flexible exception toward open-ended fair use to enable copyright material to be used for certain socially useful purposes. Section 200AB allows libraries, archives, galleries, and museums to use copyright materials, provided they are compliant with the three-step test.¹¹⁷ In practice, this section has not really worked, as it creates confusion and uncertainty,¹¹⁸ and thus, is not reliable.¹¹⁹ The use of the treaties' language undermines the objectives of Section 200AB in creating flexible dealing exceptions.¹²⁰

That is to say, the three-step test works as a legislative guidance in drafting limitations and exceptions, not as a restriction to be directly adopted in legislation. Therefore, it restricts the application of limitations and exceptions if lawmakers introduce it directly into their legislation. It becomes a burden for both users and courts in exercising limitations and exceptions in practice. Thus, it should be removed from legislation.

¹¹⁷ *The Australian Copyright Act 1968 (Cth.)*, Section 200AB(1)

¹¹⁸ See Nicolas Suzoret *et al.*, *Digital Copyright and Disability Discrimination: From Braille Books to Bookshare*, 13 MEDIA & ARTS L. REV. 1, 8, 13 (2008). It was argued that there is no guidance about what is likely to constitute a "special case", which makes the law uncertain; See also Anne Fitzgerald & Kylie Pappalardo, *Copyright Law and IP' Report on the Government 2.0 Taskforce: Project 4*, 50 (2009), <http://eprints.qut.edu.au/29416/1/29416.pdf>. It is argued that Section 200AB provides insufficient certainty about the meaning of "special case".

¹¹⁹ Fitzgerald & Pappalardo, *supra* note 119. They argued that it is unreliable and this stems from the uncertainty inherited from Berne.

¹²⁰ *Id.*; Suzor *et al.*, *supra* note 118.

B. Adopting US Fair Use Approach Instead of Fair Dealing

In drafting limitations and exceptions to copyright, Vietnam follows fair dealing approach by providing closed-list of copyright limitations and exceptions under Articles 25(1) and 26(1) of the Law on IP 2005(amended in 2009):

Article 25. Cases of use of published works in which permission and payment of royalties or remunerations are not required

1. Cases of use of published works in which permission or payment of royalties or remunerations is not required include:

a/ Duplication of works for personal 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:

c/ 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 the 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 the purpose of presenting images of these 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.

3. The provisions of Points a and e. Clause 1 of this Article are not applicable to architectural works, plastic works and computer programs.

Article 26. Cases of use of published works in which permission is not required but the payment of royalties or remunerations is required

1. Broadcasting organizations that use published works in making their broadcasts, which are sponsored, advertised or charged in whatever form, are not required to obtain permission but have to pay royalties or remunerations to copyright holders from the date of use. Levels of royalties, remunerations or other material benefits and modes of payment shall be agreed upon by involved parties. If no agreement is reached, involved parties shall comply with regulations of the Government or institute lawsuits at court under law.

Broadcasting organizations that use published works in making their broadcasts, which are not sponsored, advertised or charged in whatever form, are not required to obtain permission but have to pay royalties or remunerations to copyright holders from the date of use under regulations of the Government.

3. *The use of works in the cases specified in Clause 1 of this Article does not apply to cinematographic works.*

It can be seen from the aforementioned legal provisions, Vietnam provides closed lists of copyright limitations and exceptions which refers to fair dealing approach. This approach is a fix set of limitations and exceptions, so it does not allow courts to enlarge the scope of limitations and exceptions if necessary. Therefore, it is too restrictive, rigid, and unadaptable in the digital economy. Therefore, it is not suitable for Vietnam, a knowledge seeker, to improve education. Fair dealing is recognized by the closed-ended mechanism, which is inflexible and restrictive, because it provides courts with less flexibility in dealing with new circumstances.¹²¹ Under fair dealing, what constitutes fairness is determined by permitted purposes. The use for any other purpose is never considered, even though it may be fair. Australia's fair dealing, for example, requires that the dealing must be carried out for one of five specific purposes.¹²² Similarly, Vietnam¹²³ provides fair dealing privileges for specific purposes of criticism, commentary, caricature, teaching, scholarship, or research. The specificity of the fair dealing provisions hinders the courts when dealing with new circumstances that have emerged in the digital economy. Specific circumstances identified by the list leave no room for the court to consider the development of copyright law, especially regarding digital technologies and

¹²¹ Paula Baron, *The Moebius Strip: Private Right and Public Use in Copyright Law*, 70 ALBANY L.REV. 1227, 1232 (2007); Fred Von Lohmann, *Fair Use and Digital Right Management: Preliminary Thoughts on the (Irreconcilable?) Tension Between Them*, ELECTRONIC FRONTIER FOUNDATION1, 5-6 (2002), https://www.eff.org/files/cfp_fair_use_and_drm_0.pdf.

¹²² Research or study, criticism or review, reporting news, professional advice given by a legal practitioner or attorney, and parody or satire. Section 40-42, 103A-103C of the *Copyright Act (Cth) 1968*.

¹²³ Article 25 (1) of the *Law on IP 2005*.

the internet. The scope of Vietnamese copyright limitations and exceptions has remained unchanged since enacted in 2005, while cultural, social, and technological changes happen constantly. As a result, the limited fair dealing approach is too scant to embrace the new circumstances that have occurred due to recent technological and social changes. For example, while it is popular that teachers send over lectures and other educational materials via internet for students in distance learning, and that everyone is making a copy of works for self-study, the closed-list of copyright limitations and exceptions in Vietnam does not account to those circumstances, therefore if any case is brought to the Vietnamese court relating to the use of educational materials for distance learning, or self-study, the court would have to conclude that such uses constitute copyright infringement. No way for the courts to judge such uses lawfully, as such uses were outside of the permitted purposes' categories clarified by the Law on IP 2005.

Moreover, closed-list limitations and exceptions cannot create a way for users to legally access computer software source codes for study purposes (reverse engineering), which has occurred in recent years, this might therefore impede innovation in this field. Vietnam's software development industry has been booming in the last five years. Companies like Intel, Samsung, and LG have invested billions in the country's electronics manufacturing industry.¹²⁴ The information technology sector was expected to contribute 8-10 percent of GDP by 2020.¹²⁵ This plan will become true if 250,000 information technology workers study cutting-edge technologies.¹²⁶ In the computer software industries, workers need to absorb ideas created around the world and then develop them into new software. Moreover, computer software products quickly be-

¹²⁴ Hawkins Pham, *Computer Science in Vietnam: Counting Down to The Hour of Cod*, FORBES (Dec. 18, 2014), <http://www.forbes.com/sites/techonomy/2014/12/18/4560/>.

¹²⁵ *Id.*

¹²⁶ *Id.*

come obsolete; thus, competitive preference is only achieved by someone who quickly develops them. Time delays occur if developers are prohibited from learning about existing software. This restrains the development of follow-up innovation or inter-operating applications through reverse engineering. Therefore, if Vietnam's limitations and exceptions extend to the making of a reproduction of a computer program for the purpose of studying the ideas behind the program, and the way in which it functions, it will help to educate thousands IT workers and thus facilitate competition and growth in the computer software industry. Unfortunately, the restricted fair dealing approach will not allow for these limitations and exceptions unless a change is made to the legislation.¹²⁷

Unlike strict fair dealing, which is confined to prescribed purposes or types of use, fair use is flexible because it provides general fairness factors to determine which use is fair. These factors include the purpose and character of the use and any harm that might be done to a rights holder's interests by the use.¹²⁸ It is broadly applicable to all kinds and uses of copyrighted work, regardless of any specific purposes, as long as such uses satisfy four general factors. The list of the specific examples of fair use, such as criticism, comment, news reporting, teaching, scholarship, or research, is non-exclusive. The list has been broadened over time by the courts. Take the case of reverse engineering of computer programs as an example. Reverse engineering al-

¹²⁷ It is different from the fair use approach of the US reverse engineering was allowable on the grounds of fair use from 1992 by judgements of the court in the case *Atari Games Corp. v. Nintendo of America, Inc.*, 975 F.2d 832 (Fed. Cir. 1992) the court held that "reverse engineering object codes to discern the unprotectable ideas in a computer program is a fair use." In the *Sega Enterprises Ltd. V. Accolade, Inc.* 977 F. 2d 1510 (9th Cir. 1992) the court reached a similar conclusion that making intermediate copies of software's code to study and understand the code was fair use'. See Robert H. Lande & Sturgis M. Sobin, *Reverse Engineering of Computer Software and the US Antitrust Law*, 9(2) HARV. J.L. & TECH. 237, 245 (1996).

¹²⁸ Section 107 of the US *Copyright Act*.

ways requires deconstructing the original program's literal code. In doing so, it can create compatible and interoperable programs that may contain code from the original program. Therefore, to some extent it may constitute copyright infringement. However, thanks to the flexible and broad meaning of fair use, reverse engineering had been defended.¹²⁹ Moreover, fair use is only limited to those uses that the court has previously affirmed and new uses cannot evolve.¹³⁰ Hence, under the general and flexible terms of fair use, a creator may dare to make some use of another's work that he/she believes to be fair. If the copyright owner agrees, the use continues, otherwise she/he can call on the courts to intervene and rule on the case.¹³¹ Additionally, flexible fair use leaves the courts' ultimate discretion in application by imposing only four general factors, which makes the law easily adaptable to new circumstances without legislation. Fair use was a judicial doctrine codified by the Congress merely "to restate the present judicial doctrine of fair use, not to change, narrow, or enlarge it in anyway".¹³² This means that by the time of its codification, Congress intended to leave it to the courts' discretion to decide fair use based on facts of each case. Each case raising the question of fair use has to be decided based on its own facts. Fair use doctrine, thus, is regarded as an embodiment of "law

¹²⁹ Currently, the reverse engineering exception is covered by s. 1201(f) of the US Copyright Act, introduced by the Digital Millennium Copyright Act 1998. However, before codifying this provision, the US courts had held it as a finding of fair use. For example, the cases of *Sega Enterprises Ltd v. Accolade, Inc.*, 977 F2d 1510 (9th Cir. 1992); *Atari Games Corp v. Nintendo of America, Inc.*, 975 F2d 832 (Fed.Cir. 1992); *Suny Handa, Reverse Engineering Computer Programs under Canadian Copyright Law*, 40 MCGILL L.J. 621, 684 (1995).

¹³⁰ Von Lohmann, *supra* note 121.

¹³¹ In US, it can be illustrated by *Sony Corp. of America v. Universal City Studios, Inc.*, 464 U.S. 417 (1984) case. In the belief of fair use, in 1975 Sony produced and released a recording tool called the Betamax VCR for home taping of television programs for later viewing (time-shifting). In 1976, some copyright owners, such as Universal City Studios and the Walt Disney Company, sued Sony for providing a tool of piracy. The Supreme Court ruled in 1984 that time-shifting constituted fair use. That is to say, flexible fair use operates as a 'safety valve' mediation between copyright and new technologies.

¹³² H.R.Rep. No.94-1476, 94th Cong., 2d Sess.86, 66 (1976).

and fact”.¹³³ It enables the courts to apply an endless variety of cases and can be adapted to new situations through case by case development.

Fair use is a great provision in the rapid technological changes, as it offers a flexible standard for courts to actively adapt the copyright law to major changes in technology.¹³⁴ As new technologies develop, courts generally have the first opportunity to apply copyright law to them, with Congress lagging behind. With its discretion, the court is able to interpret fairness factors based on their own facts. It has been witnessed by the US practice that the court enables, among other things, the use of thumbnail images in internet search results,¹³⁵ caching of web pages by a search engine, a digital plagiarism detection service, and time-shifting of over the air-broadcasting programming by the privilege of the fair use defence in the US.¹³⁶ By doing this, a legislative solution of Congress for new technologies is only the final word after the court ruling.

Vietnam has been confronted with a shortage of knowledge for education, so Vietnam requires broad and inexpensive knowledge access. However, overly strong copyright protection in Vietnam is creating obstacles for innovation and development. It creates a copyright imbalance, increases the price of access and takes away the capability of the public to access cultural knowledge for education. Current Vietnamese limitations and exceptions are critically strict; therefore, the country needs to extend their scope to rebalance the copyright system and cope with the rapid change in digital technologies and social needs. To achieve this, fair use seems to be the best option for Vietnam

¹³³ Harper and Row Publishers, Inc. v. Nation Enterprises, 471 U.S. 539, 560 (1985).

¹³⁴ *Fair Use and Other Copyright Exceptions: An Examination of Fair Use, Fair Dealing and Other Exceptions in the Digital Age*, THE DEPARTMENT OF THE ATTORNEY GENERAL (2005), http://www.copyright.org.au/admin/cms-acc1/_images/144741021851b6a62aab6b2.pdf.

¹³⁵ Kelly v. Arriba Soft Corp., 336 F.3d 811, 815-16 (9th Cir. 2003); Perfect 10, Inc. v. Amazon.com, Inc., 508 F.3d 1146, 1163-68 (9th Cir. 2007).

¹³⁶ A.V. v. Iparadigms, LLC, 562 F.3d 630, 637-45 (4th Cir. 2009).

in extending the scope of limitations and exceptions, as it more flexible, adaptable, and adequately predictable than fair dealing. The above arguments have led to the conclusion that the fair dealing approach is too rigid and restrictive; hence, it will never be comprehensive in its coverage and may therefore prevent digital technology improvement and the dynamism of the information society in Vietnam. Innovation and development in Vietnam may be restrained if the laws remain frozen and outdated, and allow copyright holders to block important new technologies.¹³⁷ Moreover, fair dealing is expected to provide certainty; however, what it has presented in practice shows that fair dealing has not been more certain than fair use. In contrast, fair use is fairly flexible and easily adaptable in the new circumstances that constantly occur in the daily life of the digital economy. It ensures its law avoids instant revisions of inserting new limitations and exceptions into its legislation in order to keep pace with rapid technological changes of the digital age. In terms of certainty or predictability, recent empirical studies have concluded that fair use was actually not incoherent, uncertain, or unpredictable as had been assumed.¹³⁸ Statistics from case law showed that fair use outcomes were certain and predictable. In addition, by using the fair use clause, the transaction cost for use of a work may be considerably decreased, as if it is a permitted use under the fair use defence it will gain free access without permission.¹³⁹ Moreover, when the statutory law leaves much to be desired,¹⁴⁰ fair use can offer a flexible standard to the courts

¹³⁷ Matthew Sag, *Predicting Fair Use*, 73 (1) OHIO STATE L.J.47, 50 (2012).

¹³⁸ Barton Beebe, *An Empirical Study of US Copyright Fair Use Opinions, 1978-2005*, 156 (3) U. PA. L. REV. 549 (2008); Pamela Samuelson, *Unbundling Fair Use*, 77 FORDHAM L. REV. 2537, 2547 (2009); Matthew Sag, *The Pre-History of Fair Use*, 76 BROOK. L. REV.1371 (2011).

¹³⁹ Glynn S. Lunney, Jr., *Fair Use and Market Failure: Sony Revisited*, 82B.U. L. REV.975(2002); Wendy Gordon, *Excuse and Justification in the Law of Fair Use: Commodification and Market Perspectives*, in THE COMMODIFICATION OF INFORMATION (Elkin-Koren & Netanel eds., 2002).

¹⁴⁰ The Vietnamese legal system has maintained various defects. Its law still contains numerous loopholes that contradict each other. See Dang The Duc, *Overhaul of Intellectual*

to fill the gap. At present, by adopting the fair use defence, the use of computer software for reverse engineering, the use of work for self-study, and the use of work in term of distance learning will be included into the fair use doctrine. Moreover, life is made up of multiple facets; hence, the law should be flexible to be applicable into many circumstances. No law can be written in a way that embraces and covers all circumstances of reality and society at all times. The legal system is often out of date with real life, because the moment the law is enacted or amended, life goes on and naturally continues to incorporate new facets and aspects. However, if a law is drafted based on a general principle, it can have a wide reach. Modern law is characterised by its generality rather than having a number of factual circumstances as its subject matter. This generality and flexibility allows the law to respond and adapt to new circumstances through its interpretation without requiring legislative interference. The law still remains as written, although its meaning can be adapted to changes of social life and the evolution of society. It contains the capacity to adapt and enhance the law without changing the way it was written. Furthermore, general limitations and exceptions should be described using fair use in order to make them easy to understand. In addition, it is important to note that there are indications that Vietnam tried to shift to fair use in the Civil Code 1995 by introducing fair use like provisions in Article 760.¹⁴¹ This reflects that Vietnamese copyright law paid attention to fair use and it might be considered as a founda-

Property System in Vietnam, INTELLECTUAL PROPERTY MAGAZINE (2000), <http://www.intellectualpropertymagazine.com/ipwo/doc/view.htm?id=49&searchCode=P&channelID=c> copyright; Pham & Associates, *Vietnam Moves to Fill IP System Gaps*, MODAQ (July 12, 2000), <http://www.mondaq.com/article.asp?articleid=8872>; Abbott Philip *et al.*, *Trade and Development: Lessons from Vietnam's Past Trade Agreement*, 37(2) WORLD DEVELOPMENT 342, 346 (2009); GLOBAL INVESTMENT AND BUSINESS CENTRE USA, VIETNAM BUSINESS LAW HANDBOOK 24 (2007).

¹⁴¹ It said above that the *Civil Code* 1995 Art. 760 introduced a general provision for limitations and exceptions to copyright and Art. 761 were examples of limitations and exceptions.

tion for the establishment of fair use in this country.¹⁴²

C. Introducing Statutory Licensing Schemes for Educational Purpose

To deal with the issue of illegally bulk copy of copyright works, Vietnamese copyright law should introduce compulsory licensing schemes for such uses. This scheme has been in force in many countries such as Australia, US, UK, Thailand and Malaysia. In Australia, for example, apart from free use exceptions for educational use under the fair dealing doctrine for research or study, and Section 200AB,^{143, 144} educational sectors are able to rely on compulsory licensing schemes to obtain access to entire educational materials subject to reasonable payment to copyright owners via the collecting society under Part VA & VB of the Copyright Act 1968. In the Vietnam situation, compulsory license should be a good choice for the use of entire works for education, because it can ensure the interest of the copyright owner and facilitate legitimate uses of copyright works in educational sectors at the same time. Some people can argue that it is not necessary to introduce compulsory licence scheme in Vietnam when educational institutions can go to publishers to negotiate voluntarily. Currently, it is difficult for authors/publishers and educational sector to reach an agreement in using educational materials, especially in books and text books imported from overseas. Authors are expecting a high rate of royalties while educational sector wishes for free access to educational materials. For example, in case of school text books, VIETTRO on Sept. 24, 2014 submitted a claim to the Copyright Office of Vietnam to require a the amount of 23.7 billion Vietnamdong royalties, approximately 1

¹⁴² There might be some worries about the adoption of fair use into Vietnamese copyright law. As the limit scope of this article, this topic cannot be solved, it will be resolved by another article of the author.

¹⁴³ Section 40-42 and 103A-C, *The Copyright Act (Cth)* 1968.

¹⁴⁴ *The Copyright Act (Cth)* 1968.

million USD, for the use of copyright works in school textbooks (from grade 1 to 12) in 2014.¹⁴⁵ This is disproportionately high in compare to the selling price of school textbooks. In development policy, Vietnam put the first priority on education, so the government has tried to ensure that every student going to school can afford to buy school textbooks. Hence, school textbook are sold under manufactured price and the government has to cover publishers' losses.¹⁴⁶ Moreover, as Vietnamese culture, free reproduction of works for education is favored off, so educational institutions are often not willing to pay royalties for the use of copyright works. Publishers of school textbooks have not paid royalties for the authors of the works for many years. Up to now, licensing fee for using copyright works in school textbooks has not been finalized yet. While waiting for final agreement, copyright owners are losing their licensing fee. That is to say, voluntary licensing scheme is economically inefficient in Vietnam. It is better this country sets out compulsory licensing scheme, in which the government will set out a reasonable fixed royalty for the use of the work for education. In doing so, users including teachers, students, and educational institutions are happy to pay a small amount of royalties to the copyright owners or a collecting society such as VIETTRO while the copyright owners are also happy because their interests are protected. This scheme will bring down licensing price. At the same time, it forces educational institutions to pay remuneration when using copyright works immediately.

¹⁴⁵ Anh Khoa, *Shock with the Number of 1 million USD if Paid for Textbook Copyright Royalties*, DANTRI NEWSPAPER (Sept. 26, 2014), <http://dantri.com.vn/giao-duc-khuyen-hoc/choang-voi-con-so-1-trieu-usd-neu-tra-tien-ban-quyen-sach-giao-khoa-1412248941.htm> (translated from Vietnamese language).

¹⁴⁶ In Vietnam, publishing school textbooks is not for commercial purpose because publishers suffer loss of income from publishing them. Vietnamese government has to cover publishers' losses. See Nguyen Minh Thuyet, *The Public Will Suffer Losses Because School Textbooks' Price Is Increased by Copyright Royalties*, DANTRI NEWSPAPER (Oct. 4, 2014), <http://dantri.com.vn/giao-duc-khuyen-hoc/cong-chung-se-thiet-neu-sach-giao-khoa-bi-doi-gia-vi-tac-quyen-1412965281.htm> (translated from Vietnamese language).

It is worthy noted that when teachers or educational institutions use entire works they have to pay an equitable remuneration by a set royalty under compulsory license. It is deemed to not unreasonably prejudice the interests of copyright owner, because a requirement to pay remuneration under compulsory license can recover the losses of the copyright owner by the interpretation of Main Committee I quoted below:¹⁴⁷

A rather large number of copies for use in industrial undertakings...may not unreasonably prejudice the legitimate interests of the author, provided that, according to national legislation, an equitable remuneration is paid. If a small number of copies are made, photocopying maybe permitted without payment, particularly for individual or scientific use.¹⁴⁸

As such, if educational institutions transmit a small amount of the work under fair dealing provisions, such use is fair and cause small harm to the copyright owners. If they transmit whole works under licensing schemes, they have to pay royalties to copyright owners. Moreover, suggestion of introducing compulsory licensing for education is not only to provide the opportunity for students/teachers to legally obtain bulk access to copyright works, but also create more money for the copyright owner by collecting royalties via collecting societies. That is to say, providing more access for education can help Vietnamese people improve their working skills, knowledge and enjoyment but do not harm to the interest of the copyright owner. New reform still keeps balance between interests of copyright owners and users.

D. Providing More Privileges for Libraries

Copyright exceptions for libraries and archives should be updated to

¹⁴⁷ *Id.*

¹⁴⁸ *Records* 1967, Vol. II, at 1145-1146. Professor Ulmer's comments appear at 883.

better enable preservation and other legitimate use in accordance with rapid technological change. Copyright law should: (1) remove the one copy rule for preservation or replacement and enable to some extent reproduction of copies of copyright materials for preservation and security (2) allow libraries to reproduce and disseminate single copies of small portions of all types of works, regardless of format, for legitimate purposes such as scholarship, research, study, or upon the request of users or other libraries, and digitalize works and communicate with users and other libraries in digital forms (3) extend these privileges to other public archiving organizations, such as museums and public galleries; (4) search and preserve collections of publicly available online content based on the needs and interests of local communities and make them available to users; (5) convert the format of works when the equipment for perceiving the work is obsolete and the copyright owner has not distributed the work in the newer format.

Next, Vietnamese copyright law should extend the compulsory licensing scheme to libraries so that libraries are more active in serving the public and the rights of copyright owners are guaranteed by compulsory royalties under this scheme. The free reproduction and communication of the works for users can be justified where libraries or archives are doing at reasonable portion of copyright works subject to the requests of individual students or researchers under the use for research or study. In this case, libraries or archives are doing on the behalf of users for research or study, and such uses are deemed to be fair or not unreasonable prejudice the interests of the copyright owners.¹⁴⁹ However, the reproduction and communication of the whole or more than reasonable portions of works for users possibly harm for the copyright owner, because users would otherwise be possible to seek a license from the copyright owner

¹⁴⁹ I justified this argument in section III.G.

to make the reproduction.¹⁵⁰ Sam Ricketson thus asserted that a free use of the making of reproductions of the whole or more than a reasonable portion of copyright works for the purposes of individual users in the requesting library may be well be a disproportionate prejudice in the absence of a requirement to pay remuneration.¹⁵¹ Similarly, in term of interlibrary lending, the making of the reproduction of work to supply to other libraries or archives is unreasonable prejudice to the economic interest of authors, in the sense of being disproportionate (as required by the third-step of the Berne Convention to assess the balance between copyright owners and users).¹⁵² Even in the case of reproduction and communication of works for preservation, it is possible that the copyright owners still suffers from losses, on the basis that they could authorise libraries or archives to do. Therefore, to balance interests of both sides, it is suggested that a requirement to pay remuneration may be help to void the disproportionate.¹⁵³ It means that libraries must pay remuneration to the copyright owners either by voluntary licensing or compulsory licensing schemes. Voluntary licences for libraries are possible but not greatly appreciated because it might be difficult for libraries to negotiate with copyright owners to obtain licences. In many cases, according to Jane Ginsburg, transaction costs may be subdued by voluntary collective licensing.¹⁵⁴ Libraries in Vietnam are today in poor conditions and tight budgets allocated from government cannot afford voluntary licensing fees which are “very often higher than the royalties reasonably payable in respect of the reproduction of the work.”¹⁵⁵ It is a good idea to

¹⁵⁰ Sam Ricketson, *WIPO Study on Limitations and Exceptions of Copyright and Related Rights in the Digital Environment* (WORLD INTELLECTUAL PROPERTY ORGANIZATION No. SCCR/9/7, 2003).

¹⁵¹ *Id.* at 120-21.

¹⁵² *Id.* at 120.

¹⁵³ *Id.* at 40, Reports 1967 the discussion of Main Committee I.

¹⁵⁴ Jane Ginsburg, *Creation and Commercial Value: Copyright Protection of Works for Information*, 90 COLUM. L. REV. 1865, 1926 (1990).

¹⁵⁵ *Report on Reprographic Reproduction*, AUSTRALIAN COPYRIGHT LAW COMMITTEE (1976)

apply the compulsory licensing scheme for libraries, so that they are able to access copyright works without permission but reasonable payment must be made. It is necessary to repeat the words of Jan Ginsburg that “the real purpose of a compulsory license is to reduce the extent to which copyright ownership of the work conveys monopoly power, so that the copyright owner must make the work available to all who wish to access and exploit it”.¹⁵⁶

E. Actively Raising Its Voice in International Arguments to Ask More Support for Education in Developing Countries

In order to get practical privileges for developing countries to improve education, it needs to collaborate with other developing countries such as Brazil or Chile to put pressure on the international community. Brazil is leading a movement within WIPO to take into account constructing limitations and exceptions to copyright for innovation and development by asking WIPO for new agreements for the benefit of developing world. This nation has, along with other countries in the group of “Friends of Development”¹⁵⁷ submitted a Proposal for a Development Agenda in 2004. The Development Agenda was then adopted by the General Assembly of WIPO in September 2007, including 45 recommendations towards development-oriented approaches to IP that would allow equal access to copyright works.¹⁵⁸ In 2005, Brazil made a proposal calling for a general public interest clause, broad copyright limitations and exceptions, and a minimum list of exceptions to be present in a future treaty.¹⁵⁹ Chile,

(Franki Committee Report).

¹⁵⁶ Ginsburg, *supra* note 155, at 1926.

¹⁵⁷ The “Friends of Development” group includes Brazil, Argentina, Bolivia, Cuba, the Dominican Republic, Ecuador, Egypt, Iran, Kenya, Peru, Sierra Leone, South Africa, Tanzania, and Venezuela.

¹⁵⁸ WIPO Gen. Assemb. Report, Doc. No. WO/GA/32/13 (Nov.12, 2015).

¹⁵⁹ *Proposal by Brazil on the Protection of Broadcasting Organization – Corrigendum*, WIPO Doc. No.SCCR/13/3(Nov.21, 2005), http://www.wipo.int/meetings/en/doc_details.jsp?doc_id=53241.

in November 2004, for instance, asked WIPO to include limitations and exceptions to copyright for the purposes of education, libraries and archives, and disabled persons on the WIPO's Standing Committee on Copyright and Related Rights in order "to strengthen international understanding of the need to have adequate limitations, learn from existing models, and move towards agreement on exceptions and limitations for public interest purposes, which, like minimum standards, were to be envisaged in all legislation for the benefit of the international community".¹⁶⁰ Following this, in 2005 Chile composed another Proposal concerning the protection of broadcasting organisations that recommended some exceptions to copyright in the case of broadcast.^{161, 162} A few days later, Chile submitted another Proposal on the Analysis of Exceptions and Limitations that requires the recognition of minimum limitations and exceptions at the international level.¹⁶³ Next, Chile, along with Brazil and others, proposed a Proposal to Standing Committee on Copyright and Limited Rights for Limitations and Exceptions in 2008.¹⁶⁴ Currently, Chile, along with Vietnam and other developing countries, is negotiating with developed countries including Australia and the US on the Agreement of Trans Pacific Partnership (TPP). This Agreement contains provisions of copyright limitations and exceptions. Chile is actively protesting provisions that create more restrictive limitations and exceptions. Vietnam should join the active developing countries'

¹⁶⁰ *Proposal by Chile on the subject Exceptions and Limitations to Copyright and Related Rights (Chile's 2005 submission)*, WIPO Doc. No. SCCR/12/3 (Nov. 17-19, 2004), http://www.wipo.int/edocs/mdocs/copyright/en/sccr_12/sccr_12_3.pdf.

¹⁶¹ *Proposal by Chile Concerning the Treaty for the Protection of Broadcasting Organisation*, WIPO Doc. No. SCCR/13/4 (Nov. 21-23, 2005), http://www.wipo.int/edocs/mdocs/copyright/en/sccr_13/sccr_13_4.pdf.

¹⁶² *Id.* at section III.

¹⁶³ *Proposal by Chile on the Analysis of Exceptions and Limitations*, WIPO Doc. No. SCCR 13/5 (Nov. 22, 2005), http://www.wipo.int/edocs/mdocs/copyright/en/sccr_13/sccr_13_5.pdf.

¹⁶⁴ *Proposal by Brazil, Chile, Nicaragua and Uruguay for Work Related Limitations and Exceptions*, WIPO Doc. No. SCCR/16 (July 17, 2008), http://www.wipo.int/meetings/en/doc_details.jsp?doc_id=10771.

group of Chile, Malaysia, Brunei, and other developing countries to raise its voice in international discussions in order to obtain practical limitations and exceptions for the interest of developing countries.

VII. Conclusion

It is undeniable that Vietnam is today confronting to the shortage of knowledge access for education, especially higher education. This shortcoming partly stems from strict copyright protection so that educational sector cannot afford to access on fresh knowledge expressed in copyright works. Reconstructing limitations and exceptions to copyright toward enlarging their scope are a good solution to resolve access issue in Vietnam. It is high time for Vietnam to: (1) remove the three-step test from legislation; (2) adopt fair use; (3) introduce licensing schemes for educational institutions; (3) broaden the rights for libraries in serving customers for educational purpose; and (4) raise its voice in copyright international arguments for supporting education in developing countries. In doing so makes more access to copyright works for educational purpose, thus, it can not only resolve the shortage of skilled labour in this country that threat to spread poverty both in urban and rural areas, but also satisfy knowledge demand of Vietnamese citizens for self-education and the love of learning.

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