THIS year marks the 20th anniversary of Singapore's copyright statute - the Copyright Act of 1987. In the last 20 years, this piece of legislation has been amended many times, ranging from minor clarifications to major face-lifts, often in response to various international obligations undertaken by Singapore through multilateral and bilateral agreements.

Burton Ong, For The Straits Times

Mon, Aug 27, 2007
The Straits Times

The most recent substantive changes to the copyright framework took place a couple of years back after the conclusion of the United States-Singapore Free Trade Agreement, under which copyright owners were guaranteed a significantly expanded suite of legal rights.

In the past few years, a lot of media attention focused on the rigorous enforcement of these rights against copyright infringers, particularly in cases where copyright owners invoked those statutory provisions which criminalise certain forms of infringing behaviour.

A lot less attention was given to changes made to the Copyright Act to counter-balance the expanding arsenal of rights that copyright owners have lobbied for and received.

One provision, which was most recently amended in 2004, stands out in particular. This is Section 35 of the Act ('Fair dealing in relation to works') which declares that a 'fair dealing' with a copyright-protected work 'shall not constitute an infringement of the copyright in the work'.

Whether or not a particular situation involves 'fair dealing' depends on the particular facts in each case. Section 35(2) sets out a non-exhaustive list of five considerations which a court is expected to take into account when making this determination. These factors include 'the purpose and character of the dealing', 'the nature of the work', 'the amount and substantiality of the part copied', 'the effect...upon the potential market for, or value of, the work' and 'the possibility of obtaining the work or adaptation within a reasonable time at an ordinary commercial price'.

Prior to 2004, the application of this 'fair dealing' provision was restricted by the need to show that the copied work was used for specific purposes, including 'research and study', 'criticism or review' and 'reporting current events'.

While these purposes may still be relied upon today to justify the unauthorised reproduction of a work, the key difference in the amended Section 35 is that it is now an open-ended defence which is available as long as the 'fairness' of the dealing is established - without having to fit the purpose of the reproduction within one of these specific pigeon-holes.

This deliberate expansion of the 'fair dealing' provision in the Copyright Act very clearly demonstrates an important function of the copyright law regime that is frequently overlooked.

Copyright law is not just about protecting the interests of copyright owners. It is equally concerned about
establishing a fair equilibrium between those interests and the interests of the public - the users of copyright-protected works - by demarcating a 'safety zone' within which the members of the public may make use of copyrighted works without infringing upon exclusive rights of their respective copyright owners.

In some jurisdictions with very similar copyright regimes, the 'fair dealing' provision is seen as not just an exception to the copyright owner’s legal monopoly, but rather an expression of the users’ rights to make use of the copyright-protected work in limited circumstances.

Given the current brouhaha surrounding the local crackdown on anime fans who have downloaded unauthorised copies of anime programmes from the Internet, and with the possibility that one of these cases may proceed to trial, there may be a golden opportunity for judicial clarification on the scope of the Section 35 'fair dealing' provision.

Each downloader’s case is potentially unique and will affect his or her ability to plead 'fair dealing'. How many copies of each copyright-protected anime programme were made? Was the copied programme viewed privately and deleted, or was it burned onto a DVD and resold? Were legitimately licensed copies of the copied programme available on the market at the time it was copied or at any time thereafter?

A myriad of factors influence the culpability of the copyright user’s conduct and, by extension, his ability to establish that he has engaged in 'fair dealing'.

One interesting aspect that has emerged from news reports and letters to the press from anime fans is the argument that the unauthorised downloading of these anime programmes is an aspect of anime fans' sub-culture which actually supports the anime industry rather than undermines its commercial viability.

Proponents of this argument highlight the role which these downloaded copies have in increasing the popularity of these anime programmes and how the anime fan, who starts out watching a few episodes of an anime programme off the Internet, is likely to purchase licensed high-quality DVDs and box sets when they are released down the road.

The unauthorised downloading is motivated by the fact that licensed copies are not available in the local market, or that they are of poor visual quality or that they do not contain English subtitling.

The increased exposure of this segment of the public to these anime programmes via the Internet also creates a fan base from which a market for spin-off products (i.e. toys, games, accessories, apparel) arises, a market that the copyright owner is able to exploit by licensing the right to reproduce images of his copyright-protected characters.

If the real-life experiences of a genuine anime fan (with his cabinet full of licensed DVDs and paraphernalia) support these arguments, then he may well have a strong case in characterising his conduct as a 'fair dealing'.

This is because, applying the fourth factor in Section 35(2) of the Copyright Act, ‘the effect (of making and viewing the unauthorised copies of the anime programme) ... upon the potential market for, or value of, the work’ is likely to benefit the copyright owner on the whole.

The point is: Not all anime programme downloaders are equally at risk of being found liable for copyright infringement. Some of them will be in a stronger position than others to invoke the 'fair dealing' provisions of the Copyright Act. The challenge for the copyright owner is to separate the bona fide fans from the bogus freeloaders.

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