At present, intellectual property is more significant because it may be sold, transferred, or disposed, this means the intellectual property can bring the benefits to the owner as same as other properties in accordance with the property law. Therefore, for the scope of fairness between owner and user intellectual property, the rights and duties of intellectual property are provided and protected by law.

The copyrighted work which is one of intellectual properties. It is important to develop the knowledge of people in the country. Thus, the protection of the copyright owner should not be disregarded because it shall support the work creativity. It could be seen that the copyright law grants a long period of time for copyright protection. By this, the copyrighted work shall be protected until it becomes public domain that can be obtained freely by the public. Therefore, it is important to support the public to acquire the copyrighted work lawfully in order to prevent the copyright infringement.

Copyright law grants the exclusive right for copyright owner; however, it is not possible to allow the copyright owner to enjoy such exclusive right in all situations. To balance the public interest, most common law countries including U.S. have developed the fair use principle, allowing user to make reasonable use of copyright work without permission. U.S. has developed fair use principle to balance the interest between the copyright owner and public through the four factors under Article 107 of the 1967 Copyright Act. Fair Use which become one of the most important defenses of

* An Independent Study of Master of Law (Business Law), Graduate School, Assumption University, 2008.
copyright infringement. At the same time, most civil law countries including Thailand have developed the fair use principle as well. In Thailand, the fair use doctrine is called the exception of copyright infringement. This principle is provided in section 32 of the Copyright Act B.E. 2537 (A.D.1994).

From studying the exception of copyright infringement, the factors of the exception of copyright infringement is provided in section 32 paragraph 1 of the Copyright Act B.E. 2537 (A.D.1994). The factors of the exception of copyright infringement can be divided into 2 categories as follows:

(1) An act does not conflict with a normal exploitation of the copyright work by the owner of copyright and;

(2) An act does not unreasonably prejudice the legitimate right of the owner of copyright.

Two factors according to section 32 paragraph 1 of the Copyright Act B.E. 2537 (A.D.1994) as mentioned above are in conform with the “Berne Convention” and “TRIPs.” Thailand adopted this principle under “Berne Convention” and “TRIPs” to be its domestic law which is called the Copyright Act B.E. 2537 (A.D.1994). Since the principle of fair use is enacted broadly in the Copyright Act B.E. 2537 (A.D.1994), it causes the problem in interpretation. It does not have the standard to measure what is an act that does not conflict with a normal exploitation of the copyright work by the copyright owner and what is the standard to measure what is an act that unreasonably prejudice the legitimate right of the copyright owner.

Therefore, if we interpreted that section 32 paragraph 1 of the Copyright Act B.E. 2537 (A.D.1994) which is provided ambiguously, it will cause the problem on the various interpretation.

Nevertheless, the interpretation has to consider the fact in each case because the fact in each case is varied from each other.

Moreover, the second factor under section 32 paragraph 1 of the Copyright Act B.E. 2537 (A.D.1994) stated that “an act does not unreasonably prejudice the legitimate right of the owner of copyright.” This factor is enacted ambiguously as well.
It can be concluded that the general principle of fair use doctrine according to section 32 paragraph 1 of the Copyright Act B.E. 2537 (A.D.1994) is enacted ambiguously which causes the problem as follow:

1. The problem from the unclear term used in this section for adjudicating a fair use defense.
2. The problem on the various interpretation.

From studying U.S. copyright law, the fair use doctrine of U.S. is provided in section 107 of the 1967 Copyright Act. The factors of fair use doctrine are provided clearly in section 107 of the 1967 Copyright Act. It defined four factors for adjudicating a fair use defense as follow:

Under the Act, four factors need to be considered in order to determine whether or not a specific action is considered as "fair use." These factors are as follows;

1. the purpose and character of the use, including whether such use is of commercial nature or is for nonprofit 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.

Comparing with fair use doctrine under section 107 of the 1967 Copyright Act, the factors of the copyright infringement exceptions under section 32 paragraph 1 of the Copyright Act B.E. 2537 (A.D.1994) is enacted ambiguously which is different from the general principle of fair use doctrine under section 107 of the 1967 Copyright Act.

Therefore, the author would like to present the doctrine of fair use in Thailand and U.S. and also compare the term used in their existing provisions. A comparative analysis is useful to examine the advantages and disadvantages of the fair use doctrine in each country. Additionally, the research explores if advantageous application in one country can help solve the problems found in the other countries.
At present, Thailand still has the problem on the various interpretation of fair use doctrine under Thai Copyright Act. Specially, the problem are the various interpretation of the terms used. Therefore, in this article, the author would like to analyze the various interpretation of the fair use doctrine under Thai Copyright Act as follows;

The problem on the various interpretation concerning fair use doctrine under section 32 paragraph 1 of the Copyright Act B.E. 2537 (A.D.1994)

There are three main points to be considered concerning the problem on the various interpretation of the fair use doctrine under section 32 paragraph 1 of the Copyright Act B.E. 2537 (A.D.1994) as follows;

1. The various interpretation of the terms used

   The factors which are the principle for adjudicating fair use defense under Thai law is provided in section 32 paragraph 1 of the Copyright Act B.E. 2537 (A.D.1994) as follows;

   (1) An act does not conflict with a normal exploitation of the copyright work by the owner of copyright and;

   (2) An act does not unreasonably prejudice the legitimate right of the owner of copyright.

   Both factors under section 32 paragraph 1 of the Copyright Act B.E. 2537 (A.D.1994) are in conform with “Article 9 (2) of Berne Convention” and “Article 13 of TRIPs.”

   Therefore, it can be said that the principle under “Berne Convention” and “TRIPs” become Thai domestic law which is called the Copyright Act B.E. 2537 (A.D.1994). The principle of fair use in Thailand is legislated and demonstrated in section 32 of the Copyright Act B.E. 2537 (A.D.1994).

   The section 32 paragraph 1 of the Copyright Act B.E. 2537 (A.D.1994) are difficult to understand for the general person who does not have much knowledge about copyright law because the terms used of this
section is provided ambiguously. This makes the proof in court become more difficult when the copyright user is accused of copyright infringement and leads to the problem on the various interpretation concerning fair use doctrine under section 32 paragraph 1 of the Copyright Act B.E. 2537 (A.D.1994).

The author would like to consider the terms used of fair use doctrine under section 32 paragraph 1 of the Copyright Act B.E. 2537 (A.D.1994) by dividing into 2 topics as follows:

The first condition “an act does not conflict with a normal exploitation of the copyright work by the owner of copyright”

“Conflict” means struggle or fight, “exploitation” of the copyrighted work means the activity by which the right holder employs the exclusive rights to extract economic value from their rights and the word “normal” as constituting or conforming to a type or standard; regular, usual, typical, ordinary.

Therefore, The author can conclude that “normal exploitation” means “something less than full use of an exclusive right”.

From consideration of the term used in the first condition, the author can conclude that the term used in the first factor of fair use doctrine under section 32 paragraph 1 of the Copyright Act B.E. 2537 (A.D.1994) which relates to an act does not conflict with a normal exploitation of the copyright work by the owner of copyright, as there is no clear definition covering how much is considered to be a “conflict with a normal exploitation of the copyright work by the owner of copyright”.

From the first condition which is an act that does not conflict with a normal exploitation of the copyright work by the owner of copyright. This term used of the first condition is provided broadly because the law intends to apply this condition as the general provision for an act which shall be deemed the exception of copyright infringement beyond other acts which are provided in the specific sections. However, an act which shall not be deemed an infringement of copyright has to be an act with good faith.
The conflict of the copyright user is any act does not affect with the right holder’s exclusive right. Meanwhile, the copyright user can acquire fully knowledge from copyrighted work.

The normal exploitation is any copyrighted work which is created by the copyright holder, and the copyright holder allows the copyright user to use his work. However, the copyright user has to use the copyrighted work in the scope of fair use.

Nevertheless, the excepting provision under section 32 paragraph 1 of the Copyright Act B.E. 2537 (A.D.1994) is unclear, it causes the problem on the various interpretation. In other words, the law does not provide the minimum standard for using the copyright work without copyright owner’s permission. Therefore, it does not have the standard to measure what is an act that does not conflict with a normal exploitation of the copyright work by the owner of copyright. It does not set any standard or the person who make decision on this issue because the fact in each problem is varied from case by case. Some cases have to interpret broadly for the interest of public. In the other hand, some cases have to interpret narrowly by setting more conditions for copyright infringement exception in order to protect the copyright owner. For example, the creator produce the computer program which is one of the copyright work with level of expert system and specific functionals by using higher technology than other copyright works. Therefore, if allowing the public to use copyright work without copyright owner’s permission by interpreting broadly, it shall cause the problem to defense that this act is the exception of copyright infringement. It leads to the problem of applying copyright infringement exception broadly without limitation, it makes the creator lost motivation to create the creative work.

The second condition “An act does not unreasonably prejudice the legitimate right of the owner of copyright shall not be deemed an infringement of copyright.”

The word “prejudice” means damage, harm or injury. The expression “not unreasonable” connotes “a slightly stricter threshold than
"reasonable". The latter term means "proportionate", "within the limits of reason, not greatly less or more than might be thought likely or appropriate", or "of a fair, average or considerable amount or size".

The term "legitimate" means "conformable to, sanctioned or authorized by, law or principle; lawful; justifiable; proper" and of "normal, regular, conformable to a recognized standard type", that is, it "relates to lawfulness from a legal positivist perspective."

From consideration of the term used in the second condition, the author can conclude that the term used in the second factor of fair use doctrine under section 32 paragraph 1 of the Copyright Act B.E. 2537 (A.D.1994) which relates to an act does not unreasonably prejudice the legitimate right of the owner of copyright, as there is no clear definition covering how much is considered to be a "unreasonably prejudice the legitimate right of the owner of copyright." This means "unreasonably prejudice" is any act that affect the right and the interest of the copyright holder. Therefore, Copyright Act should specifies clearly the scope of the unreasonably prejudice.

However, there is an ambiguity of the term used in the second condition, specially, the term "unreasonably prejudice" that should be clarified in order to have the same understanding among copyright holder, copyright user and lawmaker. Like the term used in the first condition, the term "unreasonably prejudice" is provided ambiguously. This means the copyright user can not unreasonably prejudice the legitimate right of the copyright owner which individual understand that the act is done reasonably. The problem is that there is no a specific indication of the term "unreasonable act". There is no clear definition covering how much is considered to be "unreasonable act." Therefore, it is difficult to estimate how much can be held to be a "reasonable" portion that is appropriate. In other words, it does not have the standard to measure and decide whether the act does not unreasonably prejudice the legitimate right of the copyright owner or not. Since the various and different of copyrighted work which can not adopt the
same standard of reasonable proportion of fair practice in each type of copyrighted material differs from type to type. Consequently, the determination of such practice must rely on the fact of each case.

As analyzed above, the author can conclude that the general principle of fair use doctrine under Thai law according to section 32 paragraph 1 of The Copyright Act B.E. 2537 (A.D.1994) is enacted ambiguously. Therefore, it can lead to the differences in interpretations. This is because it is unclear to determine the precise scope and extent of the exception. In this section, there is no clear definition of what exactly is implied as “fair use” because its term is not clear to adjudicate the exception of copyright infringement defense. Therefore, the court must exercise its discretion from the fact and particulars of the case. As a result, there are various interpretations.

Due to the ambiguity of section 32 of Copyright Act B.E. 2537 (A.D.1994) which can be interpreted differently, many users have complained that they do not know exactly what is allowed or not allowed under this Act.

However, at present, to respond to the problem on the various interpretation that frequently occurs, the government has established a committee comprising officers and members from the Department of Intellectual Property, the Publishers and Booksellers Association of Thailand, university professors, and writers. The Commitee’s aim is to study and formulate guidelines on the scope and applicability of the section 32 exceptions. This supplementary document is called “User Guide for Fair Practice.” Despite the attempt to help solve the ambiguity, the document just provides some guidelines that are rarely used since they are not indicated in the enacted Act and they are considered only by academic.1

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2. Analysis of Thai court’s judicial decision concerning the various interpretation of the application of fair use doctrine under section 32 paragraph 1 of The Copyright Act B.E. 2537 (A.D.1994)

From the principle of fair use doctrine which is the exception of copyright infringement, the main principle of fair use doctrine is to allow the copyright user to have a chance to use copyright work without copyright owner’s permission.

The important objective of fair use doctrine is to balance the copyright owner’s interest and public interest.

However, the fair use doctrine of Thailand which is provided in section 32 paragraph 1 of The Copyright Act B.E. 2537 (A.D.1994) still has the problem on the various interpretation because the term used of this section is no clear. Thus, the court must exercise its discretion from the fact and particulars of the case.

In Thailand, since establishing the Intellectual Property and International Trade Court (IP & IT Court), there were only two fair use doctrine application cases which are brought to the court and are mentioned so much in the public because these two cases were in charge of committing the copyright infringement; however, they were determined in different ground according to their matter of fact. Intellectual Property and International Trade Court (IP & IT Court) case no.784/2542, so called “Ganokchai case” and Intellectual Property and International Trade Court (IP & IT Court) case no.785/2542, so called “Somsak case.”

To illustrate the ambiguous term used in section 32 paragraph 1 of The Copyright Act B.E. 2537 (A.D.1994) which results in various interpretation, different judgements on the same two cases by Intellectual Property and International Trade Court (IP & IT Court), and the supreme Court will be used as examples.

The first case is the Intellectual Property and International Trade Court (IP & IT Court) case no.784/2542 between the Public Prosecutor and Ganokchai Petdawong and the second case is the Intellectual Property and
International Trade Court (IP & IT Court) case no.785/2542 between the Public Prosecutor and Somsak Thanasarasenee.

The fact of the Intellectual Property and International Trade Court (IP & IT Court) case no.784/2542

The Public Prosecutor and several foreign publishers jointly took an action against the owner of a photocopy shop, Mr. Ganokchai Petdawong, for infringement of copyright through photocopying. The joint plaintiff claimed the defendant infringed the copyright since he photocopied excerpts extracted from textbooks that the joint plaintiffs hold the copyrights. The defendant claimed that he was hired by the students to photocopy the books and thus the exception of copyright infringement in section 32 also applies to him. The Intellectual Property and International Trade Court (IP & IT Court) found that the defendant had successfully prove his defense by providing evidence that others were indeed placed by the student. The defendant was acquitted.

The fact of the Intellectual Property and International Trade Court (IP & IT Court) case no.785/2542

The fact of this case are similar to the first case above. In other words. In this case, The Public Prosecutor and several foreign publishers jointly took an action against the owner of a photocopy shop, Mr. Somsak Thanasarasenee, for infringement of copyright through photocopying. The joint plaintiff claimed the defendant infringed the copyright since he photocopied excerpts extracted from textbooks that the joint plaintiffs hold the copyrights. The defendant claimed that he was hired by the students to photocopy the books and thus the exception of copyright infringement in section 32 also applies to him. In this case, the defendant failed to prove that he was hired by the students to do the photocopying. Therefore, The Intellectual Property and International Trade Court (IP & IT Court) held the defendant photocopied the copyrighted works with his own initiative, without the order of student (the defendant prepared all photocopied in advance and promptly sold). Thus, the defendant could not claim the fair use defense because the defendant act was not for the purpose of education or research. The act then was the copyright infringement over the literary work for profit seeking purpose. The Supreme Court affirmed.
The analysis of both cases

From the fact of both cases, the issue of both cases are the copyright infringement action and both have similar facts. Nonetheless, in the Intellectual Property and International Trade Court (IP & IT Court) case no.784/2542, there was a major different fact, the defendant did not prepare the photocopy in advance and the amount of seized photocopy was much less that of the Intellectual Property and International Trade Court (IP & IT Court) case no.785/2542. The IP&IT court reasoned on various issues; article 13 of TRIPs and section 32 of the Thai copyright Act. Scope of limitation to educational work, economic profit and social profit, market accessibility. On the issue of quantity, the IP&IT Court hold that the duplicate quantity may be divided into three types in accordance with the effect on the benefit of the copyright owner. Firstly, copying for the purpose of personal research or analysis. In this case, many printing and distribution organizations attempt to fix a limit figure of the duplication; one chapter from a book or not more than 10%. The user have alternative points of view, particularly in developing where price of books are not reasonably relative to population’s income and affect the high-level education of the nation. Secondly, public educational purpose; library or photocopy shops. These may apply for permission from the copyright owner to duplicate part of the work for a non trading entire text or distribution to public without permission. This duplication could not fall within the scope of the exemption to the copyright infringement under section 32 paragraph 2 (1). However, most problems would relate to the overlap of the first two types. In considering whether the quantity of duplication in this case is reasonable and justifiable amount to the joint plaintiff, “research and study” may require substantive use of information in textbooks and articles. Allowing students to duplicate only one article from the entire journal or one chapter from a book will result in a non-understanding of the thoughts or philosophy in the book. Requiring student to buy every book or subscribe every journal without reasonable exemption provided by law will obstruct the progress of education in the society. Moreover, it does not appear in this case the printing
houses or copyright owners have appointed a representative for granting of permission to use their work in Thailand. If one need to request for permission from the copyright owners for justified duplication, it does not appear how such person must proceed. The copyright owner must establish a compiling system and provide convenience to those intending to request for permission. If the copyright owner does not establish such channel and provide convenience, it cannot be deemed that the of copyright in this case, which is for education purposes, is an obstruction of the owner’s seeking of profit, or affects the lawful rights of the copyright owner under section 32 paragraph 1. Acquitted.²

In both cases, IP&IT Court applied the general principle of fair use according to section 32 paragraph 1. However, this provision is enacted ambiguously without any standard for determining the question of to what extent it shall conflict with a normal exploitation of the copyright work by the owner of copyright and to what extent it shall be regarded as an unreasonable prejudice of the copyright owner’s legitimate right. Therefore, it causes the problem on the various interpretation.

The author can conclude that the judgement of each case depend on the fact of this case. We can see that both case have similar fact but the judgement of both cases are different because they have something different in their fact.

Therefore, from both cases, the applicability and the scope of section 32 (1) exception may be summarised as follows;

1. A student who makes a copy of copyright works for education and research purposes shall not be deemed to have infringed copyright as long as it is not done for profit;

2. This exception extends to the owner of a copy-shop provided that the owner can prove that the act of a copy-shop is done on behalf of a student under a hire-for-work contract;

3. The copy-shop is entitled to charge for the work performed under the hire-for-work contract and such charges do not amount to profit;

4. The quantity or amount of work allowed to be photocopied under the “fair use” principle depends on the case at hand and the court should take into account the need for development when considering its acceptability.3

Nevertheless, the first case, Supreme Court reversed the judgment of The IP&IT court.

From the analysis of both judicial decisions, the author can conclude that in the adjudication, the court has to do the following things;

The first thing that the court has to do is that the court has to consider the fact in each case in order to know the matter of fact in each case, then the court has to settle the issues of case.

The second thing, after the court knows the issue of case, the court has to subsequently apply the principle of the law to the fact of the case. This step makes the court realizes if such case is of the ground which must be determined in accordance with the matter of law.

In the conclusion, in the adjudication, the court has to consider both the matter of fact and the matter of law. Besides, in some case, the court has to use his discretion and expert to adjudicate the case in order to balance the interest of copyright owner and the interest of the public.

3 From the Judgement on Public Prosecutor V. Kanokchai Petchdawong (Thai Supreme Court Judgement No 1343 / 2543)
3. Comparative analysis of the factors determined the act done under fair use doctrine

Comparing to the fair use application under U.S. Copyright law which the fair use doctrine of U.S. Copyright law is the popular exception of the copyright infringement and it is the model of fair use doctrine in many countries. Both Thai and U.S. Copyright laws have some similarities of fair use application such as Purpose of fair use doctrine, Principle of fair use doctrine, Limitation of the copyright owner’s exclusive right, Application of fair use doctrine, Enactment of fair use doctrine, Obligations under the international conventions and The supplementary document supported the application of fair use.

Nevertheless, Thailand which is the developing country and U.S. which is developed country have some differences in the economies, capabilities of national development, cultures, societies, especially the differences in legal system in which Thailand is a civil law system country while U.S. is a common law system country. Therefore, the fair use doctrine between two countries are also different from each other such as Term Used and Factors determined.

Moreover, the author would like to analyze the Intellectual Property and International Trade Court (IP & IT Court) case no.784/2542, so called "Ganokchai case" and Intellectual Property and International Trade Court (IP & IT Court) case no.785/2542, so called "Somsak case." In the case if both case is occured in US, US Court can apply Section 107 of 1976 Copyright Act which provides clear factors to consider what is the fair use which are comprised of:

1. The purpose and character of the use, including whether such use is a commerce mature or is for the benefit of a non-profit educational purpose.
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.
These can help apply with the case directly in considering whether it is the fair use or not. Therefore, it can be concluded that the use of copyrighted work is for educational purpose just by applying the four factors aforementioned. Moreover, US also has guideline user which is provided clearly that the user can at lease copy the copyrighted work for 10%.

Thus, if this case is occurred in US, the US court can apply section 107 of the 1976 Copyright Act and the user's guideline effectively and directly.

The result of the analysis is that the factors of the copyright infringement exceptions under the first paragraph of section 32 of the Copyright Act B.E. 2537 (A.D.1994) are so vague for the copyright user in operation and for the court in judging cases. At present, there is no regulation of the duplication for the copyright user. Consequently, they do not know at what proportion and quantity they can copy the copyright works in compliance with the fair use or the exception of the copyright infringement in order to maintain justice for the owners of copyright works. Therefore, it causes the problem on the various interpretation.

Furthermore, the exception of the copyright infringement under Thai Copyright Law is difference from the general principle of fair use doctrine in U.S. because the general principle of fair use doctrine under section 107 of the 1967 Copyright Act is clear and has specific regulation, including the performance for the copyright users, as the guidance for than to use the mentioned copyrighted works. Therefore, the author would like to give recommendation as follows;

a. Amendment to section 32 paragraph 1 of the Copyright Act B.E. 2537 (A.D.1994).

The factors under section 32 paragraph 1 of the Copyright Act B.E. 2537 (A.D.1994) should be amended to be clearer and more specific by additionally prescribing regulation and condition of the use of the copyright work according to the exception of copyright infringement.

The terms used in the section 32 paragraph 1 of the Copyright Act B.E. 2537 (A.D.1994) such as “conflict with a normal exploitation of the
copyright work by the owner of copyright,” and “unreasonably prejudice the legitimate right of the owner of copyright” should be clearly defined so that users will not interpret the term used variously.

b. To support the draft of the Copyright Amendment Act B.E. ....

At present, the Thai government decided to draft amendments since A.D. 2006 to the copyright law, the government has established a committee comprising officers and member from the Department of Intellectual Property, the lawmakers, the publishers and boksetters Association of Thailand, university professors and writers to work on the provision of a draft amendment to the Thai Copyright Act B.E. ....

The draft of the Copyright Amendment Act B.E. .... provides a clearer indication of the criteria applied to determine the fair use application. Therefore, this draft should be supported to be in force.

c. To enhance knowledge and comprehension to the copyright user in applying the copyright legislation and the principle of fair use.

According to the problem that most copyright user have less knowledge in applying the copyright legislation and the principle of fair use. Thus, to encourage them by giving knowledge or understanding in applying the copyright legislation and the principle of fair use shall be one of solutions to solve this problem.

d. The Department of Intellectual Property Thailand has the copyright user’s guideline since the year B.E. 2542 (A.D. 1999) which restrict the use of the copyright materials to the extent that it is reasonable and fair; however, it is still not common in nationwide because this copyright user’s guideline do not represent a legal document, nor are they legally binding. Therefore, the copyright user’s guideline should be enacted in the Copyright Act as Appendix or the supplementary document.

The copyright user’s guideline should be created and provided to all kinds of copyrighted works for the interest of copyright user. More importantly, the appropriate proportion and quantity of work used should be clearly indicated so that the copyright owner’s interest would not be unreasonably prejudiced.