

Copyright Protection for Philippine Publications

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Introduction

Archivists and librarians bear enormous responsibilities in providing access to materials under copyright without documented permission in that they share with their patrons any liability for copyright violation. They are uncomfortably placed on the line between the right of the intellectual property-holder to the fruit of his/her labor, on the one hand, and the right of the public to know, on the other. Donors of library and archival materials expect to be protected from injury to whatever rights they retain in the materials deposited or donated. At the same time, archivists and librarians must serve the demands of research and scholarship. An added complication is the ease with which present-day technology enables users of information to duplicate or replicate copyrighted material (whether textual, audiovisual, or electronic). Thus, copyright laws have become harder to enforce and interpret. The line should be drawn by the law, but in many cases, judgment calls are made, and the judgment often is made wittingly or unwittingly by the archivist or librarian. When the right to know comes into conflict with the right of the author or creator to the fruit of labor, the archivist or librarian is bound to rely on the law.

To anticipate and avert whatever legal problems may arise, and to provide a clear understanding of what may and may not be done with copyrighted (and even uncopyrighted)

materials, this paper discusses issues and concerns of Filipino librarians and archivists with the new Philippine Copyright Law, and seeks to answer the following questions:

- What copyright problems are encountered in Philippine libraries/archives?
- What is protected by the Philippine Copyright Law?
- What reproduction rights do Philippine libraries/archives have under the law?
- How can these libraries/archives avoid copyright liability?
- What can Filipino librarians do to help in the enforcement of the law?

An overview of copyright problems in the Philippines

The Philippine Constitution recognizes that an effective intellectual and industrial property system is vital to the development of creative activity. To this end, it enjoins the State to protect and secure the exclusive rights of scientists, inventors, artists, and other gifted citizens to their intellectual property and creation. To fulfill this mandate, the Philippine Congress passed the Intellectual Property Code, Republic Act 8293, which took effect in 1998. The country also acceded to the Berne Convention, which protects the property rights of artists and writers, and as a member of the World Trade Organization, accepted its mandate to protect intellectual protection expressed and distributed in the various modes and channels invented by man.

Unfortunately, with the awesome advances in information and communication technologies, these intellectual creations are now being exploited by a new breed of pirates who utilize the same new technology to steal the rights of creators. Intellectual piracy has become a lucrative industry in the country today because it offers a less hostile environment to software piracy, as compared to the growing vigilance of our Asian neighbors.

Pirated software in the form of CDs, DVDs, and similar optic products are openly sold at ridiculously low prices in the streets. Based on the 2000 figures, our software industry had lost about US\$ 27.1 million or about Php1.4 billion in revenues as a result of 51% piracy rate. Our

sound recording industry suffered from a piracy rate of 33% , based on the same figures, which lost an estimated US\$ 1.3 million or Php 65 million. Our entertainment software industry reported a staggering 98% piracy rate for the same year, losing about US\$ 41 million or about Php 2 billion. There are no accurate estimates as to the amount of losses incurred by the commission of intellectual piracy over the cyberspace.

Copyright problems encountered in libraries/archives

In developing countries such as the Philippines, where the high cost of books and serial publications precipitates an endless struggle (to buy or to photocopy), photocopying multiple copies, particularly of textbooks and reference materials, has been a preferred acquisition mode to meet user demands and at the same time avoid purchase. Often, librarians request their fellow librarians in other libraries or information centers to photocopy materials not found in their collection but frequently consulted by their patrons. This practice became prevalent particularly during the Martial Law period when Presidential Decree No. 49 issued by then President Ferdinand Marcos was in force, which allowed libraries to have at least two reproduced copies of any published work for research purposes, and to photocopy any unpublished work for preservation. Requesting through interlibrary loan a photocopy of an entire book to accommodate user request was another prevalent practice then.

Photocopying an entire thesis without the author's permission is another concern of college and university libraries with theses holdings. Theses, although widely regarded as unpublished materials, are generally integrated with the book collection. They are cataloged like books, and accessible in open shelves to library users. Some libraries even allow them to be circulated for home use. This practice encourages unsupervised copying. Many circulation

books, likewise, end up in photocopying shops, not only for the convenience of library users, but also for reason of economy.

Another major concern of many academic libraries involves arrangement with faculty in the practice of multiple copying of instruction materials for class use. Some libraries even supply photocopied chapters from books, or articles from periodicals and professional or academic journals, to be used as required readings, upon the request of their faculty.

Making extra copies of films and videos, not to mention buying pirated editions in print or non-print format, are often resorted to by many libraries in order to economize. Another common concern is the practice of supplying excerpts or chapters from books, and articles from journal publications for document delivery. These materials are faxed to library patrons upon request for a reasonable fee to cover the photocopying cost .

Some of these current library practices are regarded as infringements of our copyright law. To fully appreciate these concerns, let us proceed to a layman's discussion of the pertinent provisions of the law.

What is protected by Law?

Copyright laws exist to protect the intellectual standing and economic livelihood of creators and publishers of all literary, dramatic, artistic, musical, electronic and audio-visual works. The Intellectual Property Code (Republic Act No. 8293) , which took effect on January 1, 1998, prescribes the law on intellectual property rights in the Philippines, namely :¹

Copyright and Related rights
Trademarks and Service Marks
Geographic Indications
Industrial Designs

¹ *Intellectual Property Code of the Philippines* (Republic Act No. 8293). (Makati City: Dept. of Trade and Industry, 1998), unpagged.

Patents
 Layout Designs of Integrated Circuits
 Protection of Undisclosed Information

The law also establishes the Property Intellectual Office, providing for its powers and functions, such as:

- Examine applications for grant of letters patent for inventions and register utility models and industrial designs
- Examine applications for the registration of marks, geographic indication, integrated circuits
- Register technology transfer arrangements and settle disputes involving technology transfer payments and develop/implement strategies to promote and facilitate technology transfer
- Promote the use of patent information as a tool for technology development
- Publish regularly in its own publication the patents, marks, utility models and industrial designs, issued and approved, and the technology transfer arrangements registered
- Adjudicate contested proceedings affecting intellectual property rights, and
- Coordinate with other government agencies and the private sector efforts to formulate and implement plans and policies to strengthen the protection of intellectual property rights in the country

The *Law on Copyright*, as provided in the Intellectual Property Code, protects original works from the moment of creation, retaining the same provision in the Presidential Decree No. 49. It does not protect ideas, procedure, system, method of operation, discovery, concept or mere data. There is no copyright for government works (although prior approval from the government agency concerned is required for the exploitation of such work for profit). In particular, our Copyright Law protects creators of:

- Literary works, such as books, pamphlets, articles and other writings; periodicals and newspapers; lectures, sermons, addresses, dissertations prepared for oral delivery, whether or not reduced in writing or other material form; and letters
- Dramatic, or dramatico-musical compositions, choreographic works or entertainment in dumb shows
- Musical compositions, with or without words
- Artistic works, such as drawings, painting, architecture, sculpture, engraving, lithography; models or designs for works of art; works of applied art; photographic works; 3-dimensional works
- other forms of expressions, such as
 - sound recordings and other audiovisual works*
 - cinematographic works*
 - sound and television broadcasts*

pictorial illustrations and advertisements

Other literary, scholarly, scientific and artistic works not included above are also covered, irrespective of their mode of expression, as well as their content, quality and purpose.

Derivative works shall be considered as **new works**. These include :

- Dramatizations, translations, adaptations, abridgments, arrangement, and other alterations of literary or artistic works
- Collections of literary, scholarly or artistic works, and compilations of data and other materials which are original by reason of the selection or coordination or arrangement of their contents

It is interesting to note that the 1997 Copyright Law carries the same protection provided in PD 49 for computer programs, to cover such works as multi-media (e.g. cd-roms), databases, and software.²

The exclusive economic rights of creators include the right to :

- reproduce
- publish if unpublished
- perform in public
- display in public
- broadcast
- include in cable program
- make an adaptation/ dramatization/translation
- first sale

For the first time, the right to rental of the original or copy of an audiovisual or cinematographic work, or sound recording, computer program, including the *right to make commercial rental arrangements* is provided under the law.³

And for the first time, under the *E-Commerce Act*, piracy or the unauthorized copying, reproduction, dissemination, distribution, importation, use, removal, alteration, substitution, modification, storage, uploading, downloading, communicating, making available to the public, or

² Decree on the Protection of Intellectual Property (Presidential Decree No. 49), Chapter 1, Section 2 (N).

³ Intellectual Property Code of the Philippines, p. 53.

broadcasting of legally protected sound through the use of telecommunication networks, such as, but not limited to, the Internet, infringes intellectual property rights.

Who are the rights-holders?

Generally, the owner of copyright is the author/creator, except for employee works (such as the works of a journalist since the work is part of his regular duties), in which case, the owner of the copyright is the employer. For commissioned photos, engravings, drawings, paintings, and other works, the one who commissioned the work shall own the work, but the copyright shall remain with the author/creator, unless there is a written agreement to the contrary. For joint authorship, the co-authors shall be co-owners, unless the work consists of parts, and the authors of each part can be identified.

For audiovisual work, the copyright shall belong to the producer, the author of the scenario, the composer of the music, the film director, and the author of the work so adapted, unless there is an agreement among the creators to the contrary. In the case of letters, the writer owns copyright to his letters. This means the person who receives the letter does not own the copyright to that letter. For anonymous or pseudonymous works, the publishers of these works shall own the copyright as they represent these authors, unless the contrary appears, or unless the author's identity is well known, or the author discloses his identity.

The term of protection for copyrighted works varies. The rights of authors of literary works, generally, are protected during their lifetime and fifty (50) years after death. For joint authors, the protection lasts during their lifetimes and fifty (50) years after the death of the last surviving author. For anonymous/pseudonymous works, the protection lasts fifty (50) years from the date when the work was first lawfully published. For applied art, it is twenty-five (25) years

from the date of making. For photographic and audiovisual works, it is fifty (50) years from publication, and if unpublished, fifty (50) years from the making. Performers are protected fifty (50) years from the end of the year when the performance took place. Recording companies are granted protection for fifty (50) years from the end of the year when the recording took place. Broadcasts are protected twenty (20) years from the date the broadcast took place.⁴ Because works are automatically protected from the moment of creation, the protection applied for published works (which is the life-plus-fifty-years rule) now also apply for unpublished works. The old concept of perpetual protection for unpublished material is gone.⁵

What are the penalties for rights-violators?

The Copyright Law applies stiffer penalties for violation, when compared with the old provisions of PD 49. The penalty for first offenders is imprisonment of 1 to 3 years and a fine of P 50,000 to P 150,000. Compare this with P 200 to 2,000 or one year under the old law. For second offense, the penalty is imprisonment of 3 to 6 years and a fine of P 150,000 to P 300,000. The third offense is imprisonment of 6 to 9 years and a fine of P 500,000 to P 1.5 M.

Notwithstanding the strictness of the new provisions, the Copyright Law allows the following:

- recitation or performance of a work, after it has been made accessible to the public, provided it is done privately and free of charge, or if made strictly for a charitable or religious institution or society;
- quoting from a published work in accordance with **fair use**, provided that the source and the name of the author is cited;
- reproducing and communicating to the public of literary, scientific or artistic works as part of reports of current events by means of photography, cinematography, or broadcasting;
- inclusion of a work in a publication, broadcast or other communication to the public provided such inclusion is for teaching purpose, and is compatible with fair use, and that the work is cited;

⁴ Ibid., p. 65.

⁵ Robert Cogswell, *Copyright Law for Unpublished Manuscripts and Archival Collections* (Texas: Glanville Publishers, 1992), p. 20.

- recording made in educational institutions of a work included in a broadcast for the use of such institution, under certain conditions;
- use of a work under the direction or control of the Government, or by The National Library, or by educational, scientific, or professional institutions where such use is in the public interest and is compatible with fair use;
- public performance or communication to the public of a work in a place where no admission fee is charged
- public display of the original or a copy of the work, provided either it has been published, or sold, given away, or transferred to another person by the author or his assigns; and,
- any use of the work for the purpose of judicial proceedings or for professional legal advice.

Let us now dwell on these limitations to the Copyright Law and what reproduction rights are still enjoyed by archives and libraries.

Library's right to reproduce

Reprography is an important service provided by archives and libraries to their patrons. To protect their interests, these institutions fought to retain their reproduction rights. They must, however, meet certain conditions in order to continue enjoying exemptions to the law. First, libraries and archives must not produce copies for direct or indirect commercial advantage. Second, the purpose for reproduction is strictly for research or study.

Considering the provisions of the Copyright Law for protected works and the above limitations on copyright, what reproduction rights do libraries/ archives have under the law?

As in PD 49, the new copyright law allows reproduction of published works by a natural person for the exclusive purpose of research and private study without need for authorization or permission of the copyright owner, provided it is not for an entire book, or a substantial part of it, and in general, for any work where reproduction would unreasonably conflict with a normal exploitation of the work or would be prejudicial to the interests of the author.

At the same time, the law allows libraries and archives whose activities are not for profit to reproduce, without obtaining permission from the author or copyright owner, any of the following:

- works that are rare or too fragile to be lent out in its original form
- articles or chapters in composite works for purposes of research or study, and for reason of expediency (instead of lending the volumes or booklets which contain them)
- works required for preservation or security, or to replace lost, destroyed or unusable copy in the library's permanent collection, or in another library/archives collection
- out-of-stock, out-of-print works
- computer program to provide a back-up copy or to replace a lawfully obtained copy

For preservation or replacement of lost, stolen, destroyed, unusable copy in the library's collection, this reproduction right is limited to only one single copy. (In PD 49, this right is limited to two copies).⁶ However, this right extends to photos, movies, and sound recordings under the new provision.

The Concept of Fair Use

The history of "fair use" extends far back before PD 49 and the 1997 Copyright Law. US and Philippine courts, in the past, allowed certain, limited uses of copyrighted material without permission from the copyright owner. Consequently in the process, these courts, by precedent, firmed up the practice of fair use privilege. The doctrine provides freedom to make copies and publish quotations beyond the special privileges granted to libraries and archives. In time, "fair use" became a convenient excuse for copying, and served as a defense against copyright infringement, when invoked. The doctrine also permits libraries to supply multiple copies of materials for classroom teaching, for purposes of scholarship, research and private study, criticism and review, news reporting, and similar purposes. There are several factors in determining what constitutes "fair use," as enumerated in the 1997 Copyright Law:

- the purpose and character of the use, including whether such use is of commercial nature, or for non-profit educational purposes
- the nature of the copyrighted work
- the amount and substantiality of the portion used in relation to the work as a whole, and

⁶ *Decree on the Protection of Intellectual Property (Presidential Decree No. 49)*, Chapter 2, Section 13.

- the effect of the use upon the potential market for or value of the work

Although the law does not distinguish between published and unpublished material in judging fair use, the right of fair use to archival materials is much more limiting, particularly for unpublished manuscripts and other resources. One reason might be because their fair use has not been and may never be firmly defined. Legal precedents continue to discourage the use of the “fair use” doctrine in unpublished documents. This is the reason why archives caution their patrons in writing that they bear copyright liabilities if permission to copy or quote is not obtained from the copyright owner. As a general rule, unpublished works may not be quoted legally as easily as published works. And in particular, unpublished letters usually enjoy insulation from fair use copying.⁷

For classroom copying, the following guidelines are suggested in the exercise of this privilege.⁸

- Faculty may make a single copy for purposes of scholarly research, classroom teaching, or preparation for teaching (but not for an entire book, data compilation, etc)
- Faculty may request libraries (or the archives) serving them to supply multiple copies for classroom use, provided the copy is brief, and the cost of negotiating permission to do so would be prohibitive and unreasonable, and provided further that the copying is only for one course
- Faculty may not substitute copying for the purchase of anthologies, compilations, or collective works
- Such copying may not be repeated by the same faculty for the same material from term to term
- Such copying may not be directed from a higher authority, but only at the instance of the individual faculty
- The cost of the copy may not be charged to the student beyond its actual cost
- Videocassette recording of broadcast programs is now considered fair use, as long as the ultimate intent is to erase the recording after viewing

⁷ Cogswell, pp. 41-3

⁸ Ibid., pp. 38-40.

How can Libraries/Archives avoid copyright liability?

Librarians and archivists provide unsupervised photocopying service under the assumption that their patrons are aware of this provision. They believe that their institutions do not share any liability for copyright infringement if the copying done by their patrons exceeds fair use provisions. To my mind, library infringement of copyright may be avoided simply by a thorough review of library policies, particularly those affecting photocopying services, document delivery, interlibrary loans, and the implementation of projects involving reproduction .

At the outset, libraries and archives should post a warning sign or notice on every location of unsupervised copying machines concerning copyright restrictions. The posted notice or sign must be displayed prominently, clearly visible, legible, and comprehensible to a casual observer. In circulating materials for home use, users must be reminded that copying the books lent out may exceed fair use privileges in violation of copyright, in the absence of such signs and written notices.

It may be necessary to include in published library guides, flyers or brochures, such a policy statement that the library reserves the right to refuse to accept a copying request for the reason that such a request may violate Copyright Law.

Many libraries and archives provide document delivery service for requested materials, usually limited to a few pages from book chapters or journal articles. The extent of photocopying done for such delivery service should be limited to what is allowed by “fair use” and relevant or appropriate interlibrary loan practices. Interlibrary loans may be made as long as the copier has no intention to supply such aggregate quantities as to substitute for a subscription to or purchase of the work.

There should be clear-cut policies on the reproduction of preservation copies. Generally, Philippine publications are subject to a lot of duplication, because they easily run out of print, and heavy usage necessitates the need for an additional security copy to ensure the preservation of the original copies. Academic libraries and archives have a commitment to preserving our cultural records, especially our Filipiniana collections, which go easily out of stock and out of print. Librarians measure the remaining life of these materials in decades, not centuries, unlike their counterpart special collections in major repositories abroad. It is a matter of great priority, therefore, for these materials to be saved. As a means of storage and access to recorded information, digital technology offers exciting possibilities and practical advantages as well. For materials stored digitally, users operate on exact images of original works stored in their local computers. Separating usage from the original in this way, this technology can provide multiple, simultaneous uses from a single original, thereby rendering the original free from misuse, abuse in handling, and potential loss and destruction. The technology also provides effective and efficient means of access. In full text documents, a library patron can retrieve needed information by simply searching for keywords, and they can easily manipulate the display of digital information by choosing whether to view them on-screen, store them on diskette, or have a print-out copy.

Digital conversion projects, however, require certain guidelines to avoid copyright infringement. Materials to be digitized should cover works that are rare or too fragile to be lent out in its original form, and generally, works required for preservation or security.

Promoting Copyright Law enforcement...

How may archives and libraries help in the implementation of the Copyright Law? There are many ways to promote awareness and enforce compliance with our new Copyright Law. One

is to include policy statements or guidelines on fair use for copyrighted materials and on the use of films and videos in library publications or informational materials, in addition to instructional guidelines on library photocopying services..

The library orientation program provides an excellent opportunity for the librarian or archivist to mention relevant copyright rules that students and faculty are expected to comply with. By discussing copyright policies, issues and concerns during Student/Faculty Orientation, potential cases of violations or infringements are prevented.

Another is to avoid library arrangement, whenever possible, for the systematic reproduction of multiple copies for students. The Faculty should be reminded that textbook copying requires the written permission of the textbook author or publisher. In general, the library should make a clear policy prohibiting copying of copyrighted materials not allowed by fair use, license agreement, or permission of the copyright owner.

Another welcome promotion of the Copyright Law is for libraries to recommend the inclusion in student and faculty handbooks such rules that place liability for willful infringement on student or faculty violators. This kind of awareness is necessary and complementary to the efforts of librarians and archivists in the strict implementation of the Copyright Law. In the University of Manchester, regulations on the protection of intellectual property rights, and guidelines on the use of computing facilities within the University, have been issued to enjoin faculty, staff and students to comply with the provisions of the British Copyright Law. The guidelines were issued by the Registrar as early as in December 1989 in the form of a memorandum to all heads of departments and notices for general display around the University. These are regularly updated whenever necessary by similar circulations.⁹

⁹ The John Rylands University Library of Manchester, *Reader Guide GS.11*, September 1994.

Keeping records regarding requests for permissions, responses to requests, and license agreements is one good advise that cannot be ignored. Copyright violators are often traced through these records, and these may serve as evidence in cases of willful (or otherwise) violation.

Staff awareness of the present Copyright Law is a must. By discussing copyright problems encountered in the workplace during meetings with staff and by encouraging librarians and staff to attend seminars on Copyright Law, many of the thorny issues are addressed and common solutions are worked out. Strict implementation of library policies related to copyright protection and immediate reporting of violations to the proper authorities within the school or academic institution should send the right signals to library patrons.

Summary and Conclusion

Clearly, libraries and archives play an important role in the protection of intellectual creations. Encouraging open forums and open discussions on copyright protection and its implications on the right to access will help towards a better understanding of the multifaceted issues and concerns of their patrons or users. One cannot ignore the value of educating the academic public, in light of the fact that the primary mission of archives and libraries is to promote service, research and scholarship.

The END

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