

# PHILIPPINE COPYRIGHT LAW

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## I. DESCRIPTIVE MODEL

For brevity, the paper will examine Philippine copyright law only along several dimensions—what Professor Lawrence Lessig describes as the scope, reach, and term of copyright.<sup>1</sup> First, the scope refers to the types of works protected. Second, the reach of copyright takes into consideration the rights provided to persons—the modalities of use and exclusion that the law enables. Third, and finally, the term of protection refers to the length of time the work is subject to protection.<sup>2</sup>

The paper will not only describe the current substance of the law but provide an account of its historical development. What is hoped to be advanced is the assertion that Philippine copyright law is largely a product of the transplantation of US law, with succeeding modifications adopted to reflect not only the development of new media and new technologies, but also the country’s status as a net importer of intellectual goods. This historical view provides not only an explanatory model for the current features of Philippine copyright law, but also provides a vantage point from which to predict future developments of the law.

### A. Constitutional Basis

Both the US and Philippine copyright law can be traced to constitutional texts. The US constitution provides that: “The Congress shall have Power [...] To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.”<sup>3</sup> The grant of exclusive rights was derived from the Statute of Anne. At the same time, the term limitations can be attributed to the English tradition of distrust against monopolies.<sup>4</sup>

The Philippine Constitution also has a provision mandating copyright legislation. Under the 1987 Constitution, the State “shall protect and secure the

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<sup>1</sup> Lessig, L., *Does Copyright Have Limits: Eldred v. Ashcroft and Its Aftermath*, QUEENSLAND UNIVERSITY LAW AND TECHNOLOGY JOURNAL, 5, 219–230, at 222.

<sup>2</sup> *Id.*

<sup>3</sup> U.S. CONST. art. I, § 8.

<sup>4</sup> *Supra* note 1.

exclusive rights of scientists, inventors, artists, and other gifted citizens to their intellectual property and creations, particularly when beneficial to the people, for such period as may be provided by law.”<sup>5</sup> A similar provision in the 1973 Constitution states that “[t]he exclusive right to inventions, writings and artistic creations shall be secured to inventors authors, and artists for a limited period.”<sup>6</sup>

## II. SUBJECT MATTER OF COPYRIGHT

### A. Works Protected

Scope refers to the set of works that are subject to copyright protection. The subject matter protected by Philippine copyright has developed along the same path as the US model—defined by gradual expansion to protect more works as media and technology evolved. The first intellectual property law to be enacted, in what was then a territory of the US, was Act No. 3134 or the Copyright Law of the Philippine Islands. The law extended protection to the following works:

#### SECTION 2.

Copyright may be secured by any citizen of the Philippine Islands or of the United States for any work falling within the following classes of work:

- (a) Books, including composite and cyclopedic works, manuscripts, directories, gazetteers, and other compilations;
- (b) Periodicals, including pamphlets;
- (c) Lectures, sermons, addresses, dissertations prepared for oral delivery;
- (d) Dramatic or dramatico-musical compositions;
- (e) Musical compositions with or without words;
- (f) Maps, plans, sketches, charts, drawings, designs;
- (g) Works of art; models or designs for works of art;
- (h) Reproductions of a work of art;
- (i) Drawings or plastic works of a scientific or technical character;
- (j) Photographs, engravings, lithographs, lantern slides, cinematographic pictures;
- (k) Prints and pictorial illustrations;
- (l) Dramatizations, translations, adaptations, collections, compilations, abridgements, arrangements, commentaries, critical studies, abstracts, versifications; and

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<sup>5</sup> PHIL. CONST. art. XIV, § 13.

<sup>6</sup> PHIL. CONST. (1973), art. XV, § 9(3).

(m) Other articles and writings[.]<sup>7</sup>

This is identical to the scope of the US Copyright Act of 1909, differing only with the addition of dramatizations and “other articles and writings” in the enumeration of materials under the scope of protection of Act No. 3134.<sup>8</sup>

The country’s accession to the Berne Convention of 1948 in 1951 meant an expansion of the scope of protection in order to meet the international baseline. Works such as cinematographic works, as well as collections of literary or artistic works (by reason of selection and arrangement) were also under the scope of Philippine copyright.<sup>9</sup>

The next revision of the scope of protection was made through Presidential Decree No. 49 (“P.D. No. 49”) enacted by President Marcos in his exercise of legislative powers, after placing the Philippines under martial law. The law extended the scope of protection to works which has since been covered by amendments to the US Copyright Act, such as motion pictures.<sup>10</sup>

P.D. No. 49 provided new exclusive rights to performers and producers of sound recordings, as well as broadcasting organizations, making the Philippines substantially compliant with the Rome Convention of 1961, even prior to its formal accession in 1984. The law also extended protection to the following new categories:

- (O) Prints, pictorial, illustration, advertising copies, labels, tags, and box wraps; and
- (P) Dramatization, translations, adaptations, abridgements, arrangements and other alterations of literary, musical or artistic works or of works of the Philippine Government as herein defined, which shall be protected as provided in Section 8 of this Decree.<sup>11</sup>

Under Section 8 of the law, protection was contingent on the “the consent of the creator or proprietor of the original works on which they are based.” Furthermore, the protection extended to these works will be independent from the original works.<sup>12</sup>

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<sup>7</sup> Rep. Act No. 3134 (1924), § 2.

<sup>8</sup> § 2.

<sup>9</sup> The Berne Convention for the Protection of Literary and Artistic Works (1948), art. 2.

<sup>10</sup> Pres. Dec. No. 49 (1972), § 2(m).

<sup>11</sup> § 8.

<sup>12</sup> § 8.

Presidential Decree No. 285 (amended by P.D. No. 400 and P.D. No. 1203), also enacted by President Marcos, effected a partial withdrawal of the protective scope of copyright, at least insofar as textbooks are concerned. Under the said law, “educational, scientific, or cultural book[s], pamphlet[s], and other materials” could be subjected to a compulsory license upon a finding that its price “has become so exorbitant as to be detrimental to the national interest.”<sup>13</sup>

Finally, the latest iteration of Philippine copyright law came from Intellectual Property Code of 1998 (“IP Code”). In addition to those protected under previous copyright laws, the scope was extended to the following works:

- (a) Books, pamphlets, articles and other writings;
- (b) Periodicals and newspapers;
- (c) Lectures, sermons, addresses, dissertations prepared for oral delivery, whether or not reduced in writing or other material form;
- (d) Letters;
- (e) Dramatic or dramatico-musical compositions; choreographic works or entertainment in dumb shows;
- (f) Musical compositions, with or without words;
- (g) Works of drawing, painting, architecture, sculpture, engraving, lithography or other works of art; models or designs for works of art;
- (h) Original ornamental designs or models for articles of manufacture, whether or not registrable as an industrial design, and other works of applied art;
- (i) Illustrations, maps, plans, sketches, charts and three-dimensional works relative to geography, topography, architecture or science;
- (j) Drawings or plastic works of a scientific or technical character;
- (k) Photographic works including works produced by a process analogous to photography; lantern slides;
- (l) Audiovisual works and cinematographic works and works produced by a process analogous to cinematography or any process for making audio-visual recordings;
- (m) Pictorial illustrations and advertisements;
- (n) Computer programs; and
- (o) Other literary, scholarly, scientific, and artistic works.<sup>14</sup>

At the same time, it closely tracked the categorization and wording of the 1976 Copyright Act from the US,<sup>15</sup> extending protection to architectural designs. Section 175 of the IP Code also provides that no protection shall be extended to “any idea,

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<sup>13</sup> Pres. Dec. No. 285 (1973), § 1.

<sup>14</sup> Rep. Act No. 8293 (1997), § 172.1.

<sup>15</sup> Pub.L. 94–553.

procedure, [or] system.”<sup>16</sup> This language is identical to Section 102(b) of the 1976 Copyright Act, which in turn codifies the US Supreme Court’s ruling in *Baker v. Selden*.<sup>17</sup>

## **B. Registration Requirement**

The applicability of copyright protection used to be contingent on registration of the work. Following the Philippines’ accession to the Berne Convention, such formality is no longer required. Under Sec. 172.1 of the Philippines’ IP Code, copyright inheres in the work from the moment of creation.

In both early versions of the Philippine law as well as the US law, registration of the work was required for copyright to apply. Under both the 1790 and the 1831 copyright laws of the United States, protection was contingent on notice of copyright and deposit of the work prior to its publication with the district court.<sup>18</sup> The 1909 amendments to US copyright centralized the depositary function to a national copyright office under the Library of Congress.<sup>19</sup> Act No. 3134 adopted a similar system, requiring registration and deposit of the work with the Philippine Library and Museum, along with publication of the copyright claim.<sup>20</sup> P.D. No. 49 likewise formalized the country’s obligations under the Berne Convention to ensure that the protection of works and the enjoyment of rights are no longer contingent on a formality. This was maintained in the latest copyright provisions of the IP Code.

## **III. THE REACH OF COPYRIGHT**

### **A. Modalities Available to Rightsholders**

The Statute of Anne,<sup>21</sup> the world’s first copyright law, was concerned only with the right of publishers to reprint books.<sup>22</sup> Given the state of technology and the market at the time that it was enacted, the law was simply concerned with the printing, reprinting, publication of books, as well as exposing these for sale.<sup>23</sup> It did not cover any modalities of use, such as translations, adaptations, or other modes of distribution. The US copyright laws of 1790 and 1831 covered the same ground,

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<sup>16</sup> § 175.

<sup>17</sup> 101 U.S. 99 (1879).

<sup>18</sup> U.S. Copyright Act of 1790, § 3; U.S. Copyright Act of 1831 (1831), § 4.

<sup>19</sup> U.S. Copyright Law of 1909, § 54.

<sup>20</sup> Rep. Act No. 3134 (1924), § 11.

<sup>21</sup> 8 Ann. c. 19

<sup>22</sup> *Supra* note 1.

<sup>23</sup> The Statute of Anne, *available at* [http://avalon.law.yale.edu/18th\\_century/anne\\_1710.asp](http://avalon.law.yale.edu/18th_century/anne_1710.asp).

protecting the rights to “printing, reprinting, publishing and vending.”<sup>24</sup> The 1909 US copyright law added to this the right to make translations and dramatizations, public delivery (in the case of a speech or a sermon), as well as performances (for dramas and musical compositions).<sup>25</sup>

These formed the basis of the grant of rights in the Philippines’ Act No. 3134, the Philippines’ first copyright law after it gained independence, which gave creators the following exclusive rights:

- (a) To print, reprint, publish, copy, distribute, multiply, sell, and make photographs, photo-engravings, and pictorial illustrations of the copyrighted work;
- (b) To make any translation or other version or extracts or arrangements or adaptations thereof; to dramatize it if it be a non-dramatic work; to convert it into a non-dramatic work if it be a drama; to complete or execute it if it be a model or design;
- (c) To exhibit, perform, represent, produce, or reproduce the copyrighted work in any manner or by any method whatever for profit or otherwise; if not reproduced in copies for sale, to sell any manuscripts or any record whatsoever thereof; and
- (d) To make any other use or disposition of the copyrighted work consistent with the laws of the land.<sup>26</sup>

This reflects the innovation of the US Copyright Act of 1909, which protects performance rights and derivative works in US copyright law for the first time.<sup>27</sup>

The same set of rights was re-enacted in P.D. No 49, which reproduced the above provision in its entirety.<sup>28</sup>

The 1976 Copyright Act of the US featured a broader grant of rights, integrating new modalities of use and distribution made possible by new forms of media:

- (1) to reproduce the copyrighted work in copies or phonorecords;
- (2) to prepare derivative works based upon the copyrighted work;
- (3) to distribute copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending;

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<sup>24</sup> U.S. Copyright Act of 1790, § 1; U.S. Copyright Act of 1831.

<sup>25</sup> U.S. Copyright Law of 1909, § 1.

<sup>26</sup> Rep. Act No. 3134 (1924), § 3.

<sup>27</sup> *Supra* note 25.

<sup>28</sup> Pres. Decree No. 49 (1972), § 5.

- (4) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and motion pictures and other audiovisual works, to perform the copyrighted work publicly; and
- (5) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and pictorial, graphic, or sculptural works, including the individual images of a motion picture or other audiovisual work, to display the copyrighted work publicly.<sup>29</sup>

In a bilateral treaty it entered into with the US through an exchange of notes in April 6, 1993, the Philippines committed to enacting legislation that will bring the scope and reach of Philippine copyright law at parity with the US—providing new exclusive rights to the producers of sound recordings and computer programs—both growing sources of revenue for US companies at that time.<sup>30</sup> As a result of this commitment, the Philippines passed the IP Code.<sup>31</sup> Chapter V, covering copyright, added new exclusive economic rights that prohibited the rental of the copyrighted works to the public and gave exclusive rights to the producers of sound recordings and authors of computer programs:

- 177.1. Reproduction of the work or substantial portion of the work;
- 177.2. Dramatization, translation, adaptation, abridgment, arrangement or other transformation of the work;
- 177.3. The first public distribution of the original and each copy of the work by sale or other forms of transfer of ownership;
- 177.4. Rental of the original or a copy of an audiovisual or cinematographic work, a work embodied in a sound recording, a computer program, a compilation of data and other materials or a musical work in graphic form, irrespective of the ownership of the original or the copy which is the subject of the rental; (n)
- 177.5. Public display of the original or a copy of the work;
- 177.6. Public performance of the work; and
- 177.7. Other communication to the public of the work.

The US also insisted on better enforcement mechanisms in the Philippines' IP law.<sup>32</sup> In response to the bilateral treaty's requirements, the IP Code allows for infringement claims to be pursued through administrative action (instead of judicial

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<sup>29</sup> 17 U.S.C. 106.

<sup>30</sup> See, generally, Wrase, A.M., *US Bilateral Agreements and the Protection of Intellectual Property Rights: Effective for U.S. Intellectual Property Interests or a Way Out of the Issue?* DICKINSON JOURNAL OF INTERNATIONAL LAW 19, 245–267.

<sup>31</sup> Rep. Act No. 8293 (1998).

<sup>32</sup> Wrase, *supra* note 30.

remedies, such as a criminal action for copyright infringement).<sup>33</sup> The IP Code also provides for border enforcement (through customs authorities) of intellectual property rights.<sup>34</sup>

## **B. Anti-circumvention of Technological Measures**

The last round of major amendments to the Philippine Copyright law was carried out through Republic Act No. 10372. The amendment had the effect of expanding the reach of copyright by changing what it meant for a work to be communicated to the public to include rebroadcasting or retransmission by cable or satellite:

171.3. ‘Communication to the public’ or ‘communicate to the public’ means any communication to the public, including broadcasting, rebroadcasting, retransmitting by cable, broadcasting and retransmitting by satellite, and includes the making of a work available to the public by wire or wireless means in such a way that members of the public may access these works from a place and time individually chosen by them[.]<sup>35</sup>

Furthermore, the law gave additional teeth to rights enforcement by penalizing not only the copying of the work, but also the circumvention of technological measures and rights management mechanisms designed to protect the work from unauthorized copying:

216.1. Remedies for Infringement.—Any person infringing a right protected under this law shall be liable:

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(b) To pay to the copyright proprietor or his assigns or heirs such actual damages, including legal costs and other expenses, as he may have incurred due to the infringement as well as the profits the infringer may have made due to such infringement, and in proving profits the plaintiff shall be required to prove sales only and the defendant shall be required to prove every element of cost which he claims, or, in lieu of actual damages and profits, such damages which to the court shall appear to be just and shall not be regarded as penalty: Provided, That

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<sup>33</sup> Under Philippine law, a criminal action can have a “civil aspect” which relates to the private harm resulting in damages.

<sup>34</sup> *Id.*

<sup>35</sup> Rep. Act No. 10372 (2013), § 4.

the amount of damages to be awarded shall be doubled against any person who:

- (i) Circumvents effective technological measures; or
- (ii) Having reasonable grounds to know that it will induce, enable, facilitate or conceal the infringement, remove or alter any electronic rights management information from a copy of a work, sound recording, or fixation of a performance, or distribute, import for distribution, broadcast, or communicate to the public works or copies of works without authority, knowing that electronic rights management information has been removed or altered without authority.<sup>36</sup>

The new law defines technological measures and rights management information as such:

- 171.12. ‘Technological measure’ means any technology, device or component that, in the normal course of its operation, restricts acts in respect of a work, performance or sound recording, which are not authorized by the authors, performers or producers of sound recordings concerned or permitted by law; and
- 171.13. ‘Rights management information’ means information which identifies the work, sound recording or performance; the author of the work, producer of the sound recording or performer of the performance; the owner of any right in the work, sound recording or performance; or information about the terms and conditions of the use of the work, sound recording or performance; and any number or code that represent such information, when any of these items is attached to a copy of the work, sound recording or fixation of performance or appears in conjunction with the communication to the public of a work, sound recording or performance.<sup>37</sup>

In both intent and text, the amendment mirrors the US Digital Millennium Copyright Act,<sup>38</sup> which provides that “[n]o person shall circumvent a technological measure that effectively controls access to a work protected under this title.”<sup>39</sup>

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<sup>36</sup> § 22.

<sup>37</sup> § 6.

<sup>38</sup> DMCA, Pub. L. No. 105-304, 112 Stat. 2860.

<sup>39</sup> 17 U.S.C. 1201.

### C. Fair Use

Related to the economic rights extended to creators (or their assignees) is the affordances provided by fair use, which allows use of the works without giving rise to infringement of copyright. Under US copyright law, “fair use” was a common law doctrine before it was codified into the Copyright Act of 1976.

To a certain extent, P.D. No. 49 codified the general contours of common law fair use by excluding some excerpts as well as matters of public interest from the scope of copyright protection:

Section 11. To an extent compatible with fair practice and justified by the scientific, critical, informatory or educational purpose, it shall be permissible to make quotations or excerpts from a work already lawfully made accessible to the public. Such quotations may be utilized in their original form or in translation.

News items, editorials, and articles on current political, social, economic, scientific or religious topic may be reproduced by the press or broadcast, unless they contain or are accompanied by a notice that their reproduction or publication is reserved. In case of musical works, parts of little extent may also be reproduced.

Quotations and excerpts as well as reproductions shall always be accompanied by an acknowledgment of the source and name of the author, if his name appears thereon.

The IP Code replaced this with a more general four-factor test, lifted directly from Section 107 of the 1976 Copyright Act:

Sec. 185. Fair Use of a Copyrighted Work.—185.1. The fair use of a copyrighted work for criticism, comment, news reporting, teaching including multiple copies for classroom use, scholarship, research, and similar purposes is not an infringement of copyright. Decompilation, which is understood here to be the reproduction of the code and translation of the forms of the computer program to achieve the inter-operability of an independently created computer program with other programs may also constitute fair use. In determining whether the use made of a work in any particular case is fair use, the factors to be considered shall include:

- (a) The purpose and character of the use, including whether such use is of a commercial nature or is for non-profit education purposes;
- (b) The nature of the copyrighted work;

- (c) The amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
- (d) The effect of the use upon the potential market for or value of the copyrighted work.

#### **IV. THE TERM OF COPYRIGHT**

The evolution of the US copyright law is marked by the growth in the length of term for protection. As discussed above, copyright law emerged as a compromise between the need to incentivize the creation of cultural works on one hand, and the need to suppress monopolies on the other. Limited terms represent the fulcrum of that balance. Longer terms provided by each new re-enactment of the copyright law indicate that the balance may have shifted in favor of rights holders (many of which are not necessarily individual creators but their assignees—large multinational corporations).

The first US Copyright law in 1790 provided for a 14-year term, which can be renewed once at the end of the first term.<sup>40</sup> Under the 1909 act, the first term was 28 years from the date the copyright was secured, extensible once to another term at the end of the 28th year—a maximum of 56 years.<sup>41</sup> Both required registration for the works to receive copyright protection. Under the 1976 Copyright Act, the term was the life of the author plus 50 years after the author’s death, in compliance with the Berne Convention standard.<sup>42</sup> Under the Copyright Term Extension Act of 1998, this was extended to 70 years after the author’s death.<sup>43</sup>

The Philippine Copyright Law has followed the general direction of this trend. Act No. 3135, passed in 1924, did not deviate far from the 1909 US law, with an initial term of 30 years, renewable once for a similar length of time.<sup>44</sup> Presidential Decree No. 49 was ahead in complying with Berne standards, providing for a term that lasted for the life of the author plus 50 years.<sup>45</sup> This term was preserved in the 1998 IP Code.<sup>46</sup>

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<sup>40</sup> U.S. Copyright Act of 1790, § 1.

<sup>41</sup> U.S. Copyright Law of 1909, § 23.

<sup>42</sup> Copyright Act of 1976, § 302(a).

<sup>43</sup> 112 Stat. 2827, § 102.

<sup>44</sup> Rep. Act No. 3134 (1924), § 18.

<sup>45</sup> Pres. Dec. No. 49 (1972), § 21.

<sup>46</sup> Rep. Act No. 8293 (1997), § 213.1.

## V. CONCLUSION

This short survey of the legislative histories of both the Philippine and US Copyright laws shows a correlation of text, concepts, and policy direction.

In both streams of legislation, we see a movement towards the expansion of the entitlements of rights holders. This can be seen in the number and types of works protected. The trend can also be seen in the growing extent of the rights that may be exercised over the protected works. Finally, successive amendments of each country's copyright laws have seen the repeated extension of the term of protection.

Although the correlation is apparent, the causal mechanisms are far less obvious. The internationalization of intellectual property may account for developments, such as the removal of formalities as well as the establishment of a common baseline of rights. However, the expansion of the works covered, and the term of protection have marked US copyright legislation even before its accession to the Berne Convention. Records of the US Congress as well as scholarship on the matter reflect that this expansion can be attributed to aggressive lobbying from rightsholders, who often had direct participation in drafting the language of subsequent amendments to the US copyright laws.<sup>47</sup>

On the other hand, the record is incomplete when it comes to Philippine copyright law. No records are available locally concerning any legislative debates that led to Act No. 3134. P.D. No. 49, on the other hand, was enacted based on authoritarian fiat instead of legislative debate. There are no records of the policy justifications behind its provisions. The IP Code was largely brought about by the country's commitments to the US and with the WIPO. Representatives of key US-based IP producers, such as Microsoft, were very active at the committee level hearings. The same justifications—treaty compliance and keeping up with international standards—were deployed for the passage of R.A. No. 10372.<sup>48</sup>

Each strata in the evolution of copyright law in both countries indicate a greater concentration of power for rightsholders, with minimal elaboration in the legislation for the other aspect of the limited monopoly—reasonable affordances for the spread of information and culture.

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<sup>47</sup> See, generally, Goldman, A. A. *The History of U.S.A. Copyright Law Revision from 1901 to 1954*, The House Report 1 on the Copyright Act of 1909 (1909). See also Litman, J. D., *Copyright Compromise and Legislative History*, CORNELL LAW REVIEW, 72, 857–904 (1987).

<sup>48</sup> Villar: *Protect Filipino artists, amend IP law*, PHILIPPINE SENATE WEBSITE, available at [http://www.senate.gov.ph/press\\_release/2011/1207\\_villar3.asp](http://www.senate.gov.ph/press_release/2011/1207_villar3.asp).