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## DIGITAL COPYRIGHT

By Jaime N. Soriano

### Introduction

Internet technology made it possible to distribute, disseminate, share or exchange, or capture various information and data among all the computers interconnected in cyberspace in digital or electronic format. The technology is a huge success that it has also conquered the usual print and broadcast media within its domain.

Digital information may be in the form of text, graphics, sounds, video, pictures, databases, or computer programs. This information can be easily uploaded to, downloaded, transmitted, copied or used electronically from, the Internet. With the convenience and accessibility of data in the network, people tend to assume that they within the public domain and completely ignoring the legal reality that those digital materials are also within the ambit of copyright protection.

Copyright is very much a part of the Internet. Works posted in cyberspace are considered published and therefore qualify for copyright protection.

The Intellectual Property Code of the Philippines defines ‘communication to the public’<sup>1</sup> and ‘published works’<sup>2</sup> as making the work available to the public “by wires or wireless means”. This definition provides the legal recognition and basis of Internet copyright in this jurisdiction.

### The Essence of Copyright

Copyright should literally mean the right to copy. But in legal parlance, the application of the right is applied conversely by giving authors, artists and

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<sup>1</sup> Section 171.3, RA No. 8293, as amended.

<sup>2</sup> Section 171.7, *ibid.*

others the right to exclude others from using their works. Essentially, copyright is the legal right of the author to his intellectual creation or work.

Under Philippine law and following the governing principles of the 1886 Berne Convention, copyright attaches to a work from the moment of its creation by the author without need of further registration.

Obviously, the protection being served by copyright is two-fold: the protection of the author's general right how his work is used, and the protection of his economic rights for creating a valuable work.

It is axiomatic that for the author to enjoy copyright protection for his work, he must satisfy three (3) requirements:

*Originality.* Simply stated this means that the author did not copy the work from someone else's work. While originality is the essence of copyright, it does not require that the work is novel, unlike patents.

*Creativity.* An author can still claim copyright for a work as long as he created it himself, even after people already created a similar work before him. Even if only a part of the work is original, the work could still satisfy the requirement of originality because what is required of the work to enjoy protection is only a minimum amount of creativity.

Hence, while reproduction in context is obviously a mere copy and should not enjoy copyright protection, if something is contributed to the final product and the variations between the original and the copy is more than trivial, the requirements of originality and creativity are deemed satisfied.

*Fixation.* Under this requirement, it is necessary that the original work is fixed as a tangible medium of expression. In short, the copyrighted work must have presence that is cognizable by the human senses. A work like a story, a picture, a sound, or a video is as much protected on a disk or in cyberspace (written in HTML<sup>3</sup> for instance) in a similar fashion as when it is captured in paper, tape, on stage or similar medium of expression.

There is no iota of doubt that these essential elements of what constitute copyright exist in cyberspace works and creation.

### **Exclusive Rights**

Copyright carries with it the following exclusive rights:

*The Right to Privacy of Work.* This simply means that the author or creator has the right to exclude all others or the public from reproducing the work in the

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<sup>3</sup> "HyperText Markup Language", a markup language for the creation of web pages

form of a copy. Copyright connotes the right to exclude, or not to publish, the work. Websites that restrict access to information of works published in the Internet come within the purview of this right.

*The Right of Distribution.* This pertains to the right of the author to distribute copies to the public by sale or other modes of transferring ownership or by rental or lease. This is also known as 'economic rights'.

"First sale" doctrine assures the author or creator of the work that until he parts with the ownership of his creation, his privacy rights remain. It is only after the first sale that the new owner can treat the work also as his own.

Copyright however is not a license to sell or distribute, for example, libelous email or on-line messages. Works and creation that invade the privacy rights of others or violate obscenity laws may not be published just because they happen to be covered by copyright.

The uploading of works or making them available on line in cyberspace constitutes publication. But it does not diminish or necessarily result in the waiver of the author's economic rights over the work.

*The Right to Create Adaptation.* A work may be derived from an original work through translation, interpretation, arrangement, dramatizations, fictionalization, films, recordings, abridgment, condensations or any other form in which a work may be recast, transform or adapted. Subsequent works, independently created although appearing to be similar to earlier works, do not necessarily constitute infringement.

The cut, paste, copy and save-as function of the Internet makes it convenient for users to adapt the work of others as his own without realizing that it could result in copyright violations.

*The Right to Performance and Public Display.* This pertains to the right to perform a protected work in public such as stage play, dramatization, and public performances. The multimedia capabilities of the Internet facilitate the expression of this right.

### **Idea versus Expression**

Copyright covers only the specific form or the particular manner in which ideas or information have been manifested, or the so-called "form of material expression". It is not designed or intended to cover the actual idea, concepts, facts, styles, or techniques embodied in or represented by the copyright work.

Other intellectual property laws, like trademarks and patents, may be the basis though for legal restrictions on certain reproduction or use where copyright may not be available.

In copyright, what is subject of the protection is the manner of expression, and not the idea itself.

The Philippine Intellectual Property Code is clear on this matter when it provides that “no protection shall extend, under this law, to any idea, procedure, system method or operation, concept, principle, discovery or mere data as such, even if they are expressed, explained, illustrated or embodied in a work; news of the day and other miscellaneous facts having the character of mere items of press information; or any official text of a legislative, administrative or legal nature, as well as any official translation thereof.”<sup>4</sup>

### **Works in the Public Domain**

There are certain works that does not enjoy copyright protection, in full or in part, because these works are deemed to be a part of public domain. These works especially when published in the Internet are free for everyone to use.

A work will be part of the public domain if (a) the copyright protection expired, (b) or the copyright is lost or never acquired, (c) the work was published before there was a copyright law, (d) or the author dedicated the work to public domain, i.e. Creative Commons, Copyleft, or the GNU Public License (also known as ‘GPL’) (e) the work is not entitled to copyright protection, i.e. government work, laws, judicial decisions.

All official Philippine texts of a “legislative, administrative, or judicial nature” or any official translation of those kinds of texts may not be copyrighted and are in the public domain.<sup>5</sup> Aside from government documents, no work of the Philippine government, as well as the works of government-owned and/or controlled corporations, can be copyrighted (images, documents, and the like). However, prior approval is needed if a government work will be used for making a profit<sup>6</sup>.

### **Types of Protected Work**

The Intellectual Property Code of the Philippines governs the following copyrighted works:

1. **“Original Work”** consists of original intellectual creations in the literary and artistic domain protected from the moment, and by the sole fact, of their

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<sup>4</sup> Sec. 175, RA No. 8293, as amended.

<sup>5</sup> Ibid

<sup>6</sup> Sec. 176.1, ibid.

creation irrespective of the mode and manner of expression. In particular, it includes the following: (a) books, periodicals, newspapers, pamphlets, letters, articles and other writings; (b) lectures, sermons, addresses or dissertations prepared for oral delivery, whether or not reduced in writing or other material form; (c) dramatic or dramatico-musical compositions, choreographic works or entertainment in dumb shows; (d) musical compositions with or without words; (e) drawing, painting, architecture and other works of arts including models or designs for work of art; (f) original ornamental designs or models for articles of manufacture and other works of applied art; (g) illustrations, maps, plans, sketches, charts and three-dimensional works relative to geography, topography, architecture or science; (h) drawings of a scientific or technical character; (i) photographic works; (j) audiovisual and cinematographic works; (k) pictorial illustrations and advertisements; (l) computer programs; and (m) other literary, scholarly, scientific and artistic works.<sup>7</sup>

2. "**Collective Work**" means a work such as a periodical issue, anthology or encyclopedia, in which the work in its entirety in unmodified form, along with a number of other contributions, constituting separate and independent works in themselves, are assembled into a collective whole, or a work that has been created by two (2) or more natural persons at the initiative and under the direction of another with the understanding that it will be disclosed by the latter under his own name and that contributing natural persons will not be identified<sup>8</sup>.

3. "**Derivative Work**" means a work based upon the work or upon the work and other pre-existing works, such as dramatizations, translations, adaptations, abridgments, arrangements, and other alterations of literary or artistic works including 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.<sup>9</sup> These works shall be protected as a new work provided that they do not affect the force of any subsisting copyright upon the original works employed or be construed to imply any right to such use of the original work, or to secure or extend the copyright in such original works.<sup>10</sup>

Obviously, the Internet is a haven for all of these types of work or intellectual property creation. But in the process many disregard the fact that the derivative work is part of the exclusive rights given to the author or creator of the original work under his right to create adaptation.

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<sup>7</sup> Sec. 172.1 and 172.2, RA No. 8293

<sup>8</sup> Sec. 171.2, *ibid.*

<sup>9</sup> Sec. 173.1, *ibid.*

<sup>10</sup> Sec. 173.2., *ibid.* (also Article 10, TRIPS)

## Copyright Limitations

*The Doctrine of Fair Use:* This is one of the most important limits to copyright. It permits some use of others' works even without approval. While the words "fair" or "reasonable" use cannot be precisely defined, there are a few benchmarks.

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 to be the reproduction of the code and translation of the forms of the computer program to achieve the interoperability 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.

The fact that a work is unpublished shall not by itself bar a finding of fair use if such finding is made upon consideration of all the above factors.<sup>11</sup>

Usage intended to advance public interests such as criticism, education or scholarship is generally favored especially if only a little of another's work is copied. Uses however that generate income or interfere with a copyright owner's income are not. Fairness also means crediting original artists or authors.

The use of another's work for commercial purposes or for profit is disfavored but not entirely forbidden. Hence, while magazines and newspapers are operated for profit, they are not automatically precluded from adopting the doctrine of fair use.

The principles behind fair use are equally applicable in the super information highway as a limitation to digital copyright.

*Moral Rights:* Independent of any economic right, the author of a work has the right to require that the authorship of the works be attributed to him, in particular, the right that his name, as far as practicable be indicated in a prominent way on the copies, and in connection with the public use of his

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<sup>11</sup> Section 185.1 and 185.2, *ibid.*

work; to make any alteration of his work prior to, or to withhold it from, publication; to object to any distortion, mutilation or other modification of, or other derogatory action in relation to, his work which would prejudice his honor or reputation; and, to restrain the use of his name with respect to any work not of his own creation, or in a distorted version of his work.<sup>12</sup>

The author however may waive these rights in writing, electronically<sup>13</sup> or otherwise, but such waiver shall be ineffective where its effect is to permit another to use the name of the author with respect to a work he did not create or to use the name of the author, the title of his work, or his reputation with respect to any version or adaptation of his work which, because of the alterations therein, would substantially tend to injure the literary or artistic reputation of another author.<sup>14</sup>

Insofar as performers, as regards his live aural performances or performances fixed in a sound recordings, he shall have the right to claim to be identified as the performer of his performances independently of his economic rights.<sup>15</sup>

The exclusive rights of performers and producers shall not apply when the work is (1) used by a natural person exclusively for his own personal purposes, or (2) used as short excerpts for reporting current events, or (3) used solely for the purpose of teaching or scientific research, or (4) under conditions of 'fair use' as defined herein.<sup>16</sup>

When an author contributes to a collective work, his right to have his contribution attributed to him is deemed waived unless he expressly reserves it.<sup>17</sup>

Moral rights were first recognized in France and Germany before they were introduced in the Berne Convention. But not all countries recognize moral rights as part of their copyright laws. Notable among them is the United States.

Hence, the application of the doctrine of moral rights in the web may vary from country to country and from jurisdiction to jurisdiction.

### **Points of Copyright Attachment under Philippine Laws**

Copyright protection afforded by Philippine law shall apply to:<sup>18</sup>

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<sup>12</sup>Sec. 193, *ibid.*

<sup>13</sup>The Philippine E-Commerce Act of 2000 gives electronic documents/contracts the functional equivalent of a paper document.

<sup>14</sup>Sec. 195, R. A. 8293

<sup>15</sup> Sec. 204.1, *ibid.*

<sup>16</sup>Sec. 212, *ibid.*

<sup>17</sup>Sec. 196, *ibid.*

<sup>18</sup>Secs 221 to 224, *ibid.*

1. Works of authors who are Filipino citizens or have their habitual residence in the Philippines.
2. Audio-visual works the producer of which has his headquarters or habitual residence in the Philippines.
3. Works first published in the Philippines
4. Works first published in another country but also published in the Philippines within thirty days, irrespective of the nationality or residence of the authors.
5. Works that are to be protected by virtue of any international convention or other international agreement to which the Philippines is a party.
6. With respect to performers, the protection shall apply to (a) performers who are nationals of the Philippines; (b) the performance should have taken place in the Philippines, in case of non-Filipino citizens; or incorporated in sound recordings or carried by broadcast where a copyright is attached.
7. In sound recordings, the protection applies where the producer is a Filipino citizen or the sound recording is first published in the Philippines.
8. In broadcast, the protection shall apply to broadcasts of broadcasting organization the headquarters of which are situated in the Philippines or for broadcasts transmitted from transmitters situated in the Philippines.

These rules may be applied in works found in the Internet particularly if there is an issue as to the application of the Philippine Intellectual Property Code.

### **Duration of Copyright Protection**

Original, derivative and posthumous works: lifetime of the author and for fifty (50) years after his death.<sup>19</sup>

Works of joint authorship: during the life of the last surviving author and for fifty (50) years after his death.<sup>20</sup>

Anonymous or pseudonymous works: for fifty (50) years from the date on which the work was first lawfully published unless before the expiration of this period, the identity of the author is revealed, the term as above stated (for original, derivative and joint authorship work as the case maybe) shall apply. If the work is not published, the fifty (50) years is counted from the making of the work.<sup>21</sup>

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<sup>19</sup> Sec. 213.1, *ibid*

<sup>20</sup> Sec. 213.2, *ibid*.

<sup>21</sup> Sec. 213.3, *ibid*.

Works of applied art<sup>22</sup>: twenty-five (25) years from the date of making of the art.<sup>23</sup>

Photographic works: fifty (50) years from publication of the work and, if unpublished, fifty (50) years from the making.<sup>24</sup>

Audio-visual works including those produced by process analogous to photography or any process for making audio-visual recordings: fifty (50) years from date of publication and, if unpublished, from the date of making.<sup>25</sup>

Calculation of term for the above: the term of protection subsequent to the death of the author provided shall run from the date of his death or of publication, but such terms shall always be deemed to begin on the first day of January of the year following the event which gave rise to them.<sup>26</sup>

For the rights granted to performers and producers of sound recordings: (a) For performances not incorporated in recordings, fifty (50) years from the end of the year in which the performance took place; and (b) For sound or image and sound recordings and for performances incorporated therein, fifty (50) years from the end of the year in which the recording took place.<sup>27</sup>

For broadcasts: twenty (20) years from the date the broadcast took place. The extended term shall be applied only to old works with subsisting protection under the prior law.<sup>28</sup>

In determining whether or not a work in cyberspace with a point of attachment to Philippine laws falls outside copyright protection, and therefore already part of the public domain, a consideration of the foregoing period is imperative.

### **Copyright Myths**

Many Internet users have the general tendency to assume certain beliefs that are in a real sense a myth insofar as digital copyright is concerned. Among these erroneous perceptions are:

1. If the work does not have copyright notice, it is not copyrighted.<sup>29</sup>

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<sup>22</sup> Sec. 171.10, *ibid.* (an artistic creation with utilitarian functions or incorporated in a useful article, whether made by hand or produced on an industrial scale)

<sup>23</sup> Sec. 213.4, *ibid.*

<sup>24</sup> Sec. 213.5, *ibid.*

<sup>25</sup> Sec. 213.6, *ibid.*

<sup>26</sup> Sec. 214, *ibid.*

<sup>27</sup> Sec. 215.1, *ibid.*

<sup>28</sup> Sec. 215.2, *ibid.*

2. If the user of the work does not charge for distributing, copying or selling the work, or if there is no harm to the author, there is no infringement.<sup>30</sup>
3. Any amount of copying for news, scholarship, education or commentary for as long as there is attribution falls within the fair use doctrine.
4. Trademark is the synonymous with copyright.
5. A work of fan fiction, or writing a story using settings or characters from another's work, is derivative work that is beyond the ambit of copyright protection of the original author or creator.<sup>31</sup>
6. To have a copy of the work does not necessarily mean that you have the copyright, especially if there is no commercial value.
7. Internet service providers are liable for copyright infringements.

### **Due Diligence in Internet Copyright**

The fact that a work was posted in the Internet and is free for anyone to download a copy does not make the work automatically as part of the public domain.

In the usual case, there is a need to ask permission from the site owner to publish any materials, including photographs, music, and artwork from the site. Infringement of digital copyright may occur when information is used and distributed without permission.

Pirating software, downloading music, including an image or graphic in a document or presentation, or forwarding private electronic mails, are common copyright violations unless they fall within the purview of fair use. Unauthorized use of these files might result to prosecution and other legal obligations including civil penalties, damages and indemnification.

Users surfing for some materials from a website that he would like to use should search for information about permissions to use, downloading, redistribution or reproduction.

Many Internet sites have a page devoted to "terms of use" or a "privacy policy" that explain how the user can handle the materials obtained from the site. It is best to use the materials in accordance with the policies posted in the

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<sup>29</sup> As published in the homepage of Brad Templeton, Chairman of the Electronic Frontier Foundation, founder of Clarinet and one of the early luminaries of the Usenet, at <http://www.templetons.com/brad/copymyths.html> [accessed: 31 January 2007]

<sup>30</sup> Ibid.

<sup>31</sup> Ibid.

website. In certain cases, particularly when in doubt, it may be best to contact the individual or organization that holds the copyright and obtain permission, electronically or otherwise.

If the user is invoking the doctrine of “fair use” in using the copyrighted materials from the Internet, it is always a sound policy to make an attribution or acknowledgement of the source and owner of the information in the users own work.

The user must have a keen sense to distinguish between what is part of the public domain and which is not. It should be remembered that even in cyberspace, what is the subject of copyright is the expression of idea and not the idea itself. And it is always prudent to check whether works of art, literature, books, films, videos, or photographs culled from the Internet are already part of the public domain with the lapse of their copyright protection. Many times however this task is tedious and getting permission is still the easier route, something that can also be obtained on-line and in real-time.

### **Noted Legal Controversies in e-Copyright**

At present, there are no major law suits involving infringement of Internet copyright in the Philippines. But like most of the other countries, the world is keenly watching the development of legal controversies involving digital copyright especially in the United States.

Of late, the legal issue of copyright infringement was put into the limelight with the development of a file sharing technology called ‘peer-to-peer’ or P2P. Using P2P as connecting nodes, people in the Internet network can easily pass or share in real time content files, especially audio, video or data, for as long as they are in electronic format.

The technology also allows multimedia streaming of video and audio. Thus, network sharing of music and movies, particularly in MP3 and DivX formats, has now become commonplace.

Long before the Internet became a popular media, the US Supreme Court in the leading 1984 case of Sony Corporation of America vs. Universal City Studios Inc.<sup>32</sup>, more popularly known as the Betamax case, held that making individual copies of television shows for purposes of time-shifting is fair use and does not constitute copyright infringement.

The Betamax decision effectively provided a general test for determining whether a device with copying or recording capabilities ran afoul of copyright law. This test has created some interpretative challenges to courts in applying

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<sup>32</sup> 464 U.S. 417 (1984)

the case to more recent file sharing technologies available for use on home computers and over the Internet.<sup>33</sup>

Napster, a company founded by an 18 year old computer science student, provided a platform for users to upload and download music files in compressed digital format. Major recording companies led by A & M Records, Inc. were threatened and immediately sued Napster for contributory and vicarious copyright infringement. Napster argued on the principles of fair use. In 2001, the US Court of Appeals (9<sup>th</sup> Circuit), in the first major case to address the application of copyright in P2P file sharing, ruled<sup>34</sup> that Napster could be liable for contributory infringement

In another legal challenge, dubbed as the most important intellectual property case in decades, lodged by a consortium of twenty-eight movie studios and record labels, the US Supreme Court held in the case of MGM Studios, Inc. v. Grokster, Ltd.<sup>35</sup> that in the process of marketing file sharing software, the file swapping of P2P companies induces copyright infringement and may constitute piracy of intellectual property rights.

The ponente in the Grokster case, Associate Justice David Hackett Souter of the US Supreme Court, said:

"We hold that one who distributes a device with the object of promoting its use to infringe copyright, as shown by clear expression or other affirmative steps taken to foster infringement, is liable for the resulting acts of infringement by third parties."

Legal controversies involving digital copyright are far from over especially with the way the Internet becoming a way of life for most people. In fact, the legal battle has just began.

<sup>33</sup>[http://en.wikipedia.org/wiki/Sony\\_Corp.\\_of\\_America\\_v.\\_Universal\\_City\\_Studios%2C\\_Inc.](http://en.wikipedia.org/wiki/Sony_Corp._of_America_v._Universal_City_Studios%2C_Inc.)  
[accessed: 31 January 2007]

<sup>34</sup> A & M Records, Inc. v. Napster, Inc., 239 F.3d 1004 (9th Cir. 2001)

<sup>35</sup> 545 U.S. 913 (2005)