DIGITAL THIEVERY: HOW PHILIPPINE LEGISLATION ADDRESSES THE PROBLEM OF PIRACY IN CYBERSPACE

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For publishers who still see a threat in the photocopier,
the Internet looks like the end of the world.

-Christopher Anderson[1]

I. INTRODUCTION

A. The Information Revolution

Information technology has gone through a dizzying transformation. From wall carvings, ink and parchment, to the printing press, information technology has now transcended the physical sphere and is now conquering the dimension known as cyberspace, where anything and everything is possible.

The information revolution brought about by the Internet has caused a giant ripple into the otherwise placid waters of intellectual property protection. The ever-increasing traffic of intellectual creations in the Internet and consequently, the enormous legal implications it brought about has necessitated a review of our copyright law. With the awareness of the manifest deficiencies in the law, it has become imperative to adopt new legislation sufficient to catch up with the relentless movement of copyrighted works in the Internet.

B. Scope of the Study

This paper seeks to elucidate on various copyright issues, which have sprung in relation to the expansive growth of the Internet, and on how these issues

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[1] *A Survey of the Internet: The Accidental Superhighway*, THE ECONOMIST, July 1, 1995, http://www.temple.edu/lawschool/dpost/accidentalsuperhighway.htm (last visited Sept. 27, 2002).

are addressed by current legislation, in particular, the anti-piracy provision found in the E-Commerce Act of 2000.

II. THE INTELLECTUAL PROPERTY CODE: REPUBLIC ACT 8293[2]

A. What is Copyright?

Copyright is a bundle of rights, which seeks to safeguard the rights of the authors over their works. It consists of rights aimed at preventing others from copying these creations without the consent of the authors. Our present copyright law provides that "original intellectual creations in the literary and artistic domain [are] protected from the moment of their creation."[3] Prior registration, which was a requisite under the old law, is no longer necessary for these original creations to enjoy copyright protection.

While copyright assures the authors of their rights over their creations, it does not reserve unto them absolute monopoly over their works. Apart from rewarding the labors of authors, copyright has for its objective the "promotion of progress and scientific art". This, copyright achieves by granting to the authors the right to their original expression, while encouraging others to build freely upon the ideas and information conveyed by a work.[4] Copyright does not place an exclusive emphasis on protection of original works lest promotion of innovation and cultural as well as educational enrichment be undermined. The right of the people to access materials, whether with copyrighted contents or none, is still recognized and given importance under existing copyright laws.

B. Subject Matter of Copyright Protection

Copyright protection extends to all kinds of creation in the literary, artistic, and even scientific domain, whatever the mode or form of expression is. The only requirement is that the creation is original. The ideas in the work need not be new, but the form in which the idea is expressed must be an original creation of the author. Protection is independent of the quality or the value attaching to the work.

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[2] Hereinafter, the IP Code.

[3] INTELLECTUAL PROP. CODE, sec. 172.

[4] American Association of Law Libraries, American Library Association, Association of Academic Health Sciences Library Directors, Association of Research Libraries, Medical Library Association Special Libraries Association, *Fair Use in the Electronic Age: Serving the Public Interest* (Jan. 1, 1995), *at* http://arl.cni.org/scomm/copyright/uses.html (last visited Sept. 27, 2002).

Copyright is not dependent on the purpose for which the work is intended either.[5] Copyrightable works include the following original creations:[6]

i. Books, pamphlets, articles and other writings;
ii. Periodicals and newspapers;
iii. Lectures, sermons, addresses, dissertations prepared for oral delivery, whether or not reduced in writing or other material form;
iv. Letters;
v. Dramatic or dramatico-musical compositions; choreographic works or entertainment in dumb shows;
vi. Musical compositions, with or without words;
vii. Works of drawing, painting, architecture, sculpture, engraving, lithography or other works of art; models or designs for works of art;
viii. Original ornamental designs or models for articles of manufacture, whether or not registrable as an industrial design, and other works of applied art;
ix. Illustrations, maps, plans, sketches, charts and three-dimensional works relative to geography, topography, architecture or science;
x. Drawings or plastic works of a scientific or technical character;
xi. Photographic works including works produced by a process analogous to photography; lantern slides;
xii. Audiovisual works and cinematographic works and works produced by a process analogous to cinematography or any process for making audio-visual recordings;
xiii. Pictorial illustrations and advertisements;
xiv. Computer programs; and
xv. Other literary, scholarly, scientific and artistic works.

This enumeration should be viewed broadly. The embodiment of an idea in a work is not circumscribed in any of the manner of expression mentioned above. Copyright law has always been susceptible to the emergence of new and innovative ways of edifying ideas. A painting on a woman's body may very well enjoy copyright, though the medium or the manner by which it is presented is not among those mentioned in the law.

Copyright law also protects derivative works. Dramatizations, translations, adaptations, abridgments, arrangements, and other alterations of literary or artistic works as well as 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[7] are among the derivative works protected by copyright. They enjoy copyright independent of that existing in the

[5] INTELLECTUAL PROP. CODE, sec. 172.2.
[6] INTELLECTUAL PROP. CODE, sec. 172.1.
[7] INTELLECTUAL PROP. CODE, sec. 173.2.

work from which they are culled, provided that the derivative work is, in itself original such that it contains a substantial amount of new material. Thus, a movie adaptation of a novel enjoys copyright in all its components, distinct and separate from the copyright owned by the author of the novel with respect thereto. An anthologist who selects 15 stories that, to her judgment, are the best works of an author enjoy copyright over the anthology without affecting the copyright, which exists in each and every story. The same holds true for a compilation of data or other materials.

It must be stressed that it is the form of expression that is protected. Ideas, concepts, principles, systems, methods or operations do not fall within the ambit of protection extended by the law. Copyright protects original works of authorship that are fixed in tangible form of expression such that they can be perceived, communicated, or reproduced either directly or with the aid of a machine or device.[8] Neither does protection cover discovery or mere data as such, even if they are expressed, explained, 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, including official translation thereof.[9] Nor does copyright exist in any work of the government.[10]

C. RIGHTS AFFORDED BY COPYRIGHT

To reiterate, copyright is a bundle of rights. The author, or the owner of the copyright as the case may be, enjoys a number of exclusive rights, which encompasses virtually all economically significant uses of copyright.[11] Thus, a copyright owner has a full complement of ways of commercially exploiting his work. These rights may be properly categorized as falling under economic rights, moral rights and *droit de suite*.

1. Economic Rights

Subject to such limitations as the law specifies, the copyright holder has the exclusive rights to authorize, carry out or prevent any of the following acts:

i. The reproduction of the work or a substantial portion of the work;
ii. The preparation or creation of derivative works based on the copyrighted work;

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[8] VICENTE AMADOR, COPYRIGHT LAW UNDER THE INTELLECTUAL PROPERTY CODE 21-22 (1998) (hereinafter V. AMADOR, COPYRIGHT LAW).

[9] INTELLECTUAL PROP. CODE, sec. 175.

[10] INTELLECTUAL PROP. CODE, sec. 176.1.

[11] V. AMADOR, COPYRIGHT LAW, *supra* note 8, at 258.

iii. The distribution of the original and subsequent copies of the work by sale or other forms of transfer of ownership;
iv. The 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;
v. The display of the copyrighted work publicly;
vi. The performance of the copyrighted work publicly; and
vii. The communication to the public of the work in any other manner.[12]

Among these rights, the right of reproduction is the most basic. This right limits to the author the right to reproduce or to make copies of his protected work. The work may not be replicated, in whole or in part, without the author's consent.

The author has the right of derivation or the right to make other transformation of the work he has created. A derivative work, by definition, is substantially similar to the underlying work, thus, the reservation to the author of the right to create them. By conferring this right to the author, the law simply tries to provide an incentive for the creation of new works based on pre-existing works but does not seek to sanction the unauthorized uses of the underlying work. Therefore, a person who wishes to create a new work based on an existing creation must obtain the consent of the latter's author, otherwise he will be infringing on the original author's right of derivation.

The exclusive right to control the first distribution of the copyrighted work belongs to the author as well. This right is taken in conjunction with the first sale doctrine in copyright law. The right of distribution is exhausted by the first authorized sale of the original work.[13] Thus, no one but the author may cause the sale, or transfer of ownership by other means, of the original work for the first time to the public. But once the author has parted with the ownership of the work, the new owner of the work or of a lawfully made copy, can treat the object as his own and can then freely use, sell, lease, or lend the work to another.[14]

Neither does anyone, apart from the author, may authorize the 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

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[12] INTELLECTUAL PROP. CODE, sec. 177.
[13] V. AMADOR, COPYRIGHT LAW, *supra* note 8, at 299.
[14] DEBORAH BOUCHOUX, INTELLECTUAL PROPERTY, THE LAW ON TRADEMARKS, COPYRIGHTS, PATENTS, AND TRADE SECRETS 159 (2000).

the copy which is the subject of the rental.[15] This means that even if the copyright holder is no longer the owner of the original or a copy of the above named works, he still exercises rental rights over them, and though a person has lawfully acquired ownership of the works, he may not rent them out to others without the consent of the copyright proprietor.[16]

The author also has the exclusive right to the public display of his work. This covers any showing of a "copy" of the work either directly or by means of film, slide, television image, or any other device or process.[17] A display is public if made at a place open to the public or at any place where a substantial number of persons outside of a normal circle of a family and its social acquaintances is gathered[18] irrespective of whether they are or can be present at the same place and at the same time, or at different places or at different times, and where the performance can be perceived.[19] The author may also prohibit the recitation, playing, dancing, acting or otherwise performing the work, either directly or by means of any device or process, in full exercise of his right to authorize the public performance of his work. In case of an audiovisual work, the showing of its images in sequence and the making of the sounds accompanying it audible are prohibited as well as making the recorded sounds of a sound recording audible.

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 is constitutive of the author's right of communication to the public. This right covers any means or process other than the distribution of physical copies.

Any or all of the above named rights may be transferred to another. A transfer of exclusive rights, either in whole or in part, must be in writing to be valid.[20] It must be noted that a transfer of the copyright does not necessarily include the transfer of the material object. Neither does the transfer of the material object include the transfer of the copyright.[21]

2. Moral Rights

Our law recognizes certain personal and non-economic rights of authors in their works to protect their honor and reputation, even after they have sold their

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[15] INTELLECTUAL PROP. CODE, sec. 175.4.
[16] V. AMADOR, COPYRIGHT LAW, *supra* note 8, at 310.
[17] *Id.*
[18] D. BOUCHOUX, *supra* note 14, at 159.
[19] INTELLECTUAL PROP. CODE, sec. 171.6.
[20] INTELLECTUAL PROP. CODE, sec. 180.2.
[21] INTELLECTUAL PROP. CODE, sec.181.

work. These personal rights are called moral rights. The term moral right is a translation of the French *le droit moral*,[22] which refers to rights of a spiritual, non-economic and personal nature. It is believed that an artist in the process of creation injects his spirit into the work. Thus, it is only just that his personality, as well as the integrity of the work, be protected and preserved. This belief led to the conception of the artist's moral rights.[23] Under our IP Code, moral rights exist independently of the author's economic rights. The former consist, primarily, of the right of attribution or paternity right and the right of integrity; and secondarily, of the right of alteration or non-publication and the right not be identified with work of others or with distorted versions of his work.[24]

The right of attribution includes the right of the author to be recognized by name as the creator of his work, the right to publish anonymously or pseudonymously, as well as the right to prevent the author's work from being attributed to someone else. The right of attribution also encompasses the right of the author not to be identified with a work created by others, including distorted editions of the author's original work.

The right to integrity allows the author to prevent any deforming or mutilating changes to his work, notwithstanding the transfer of ownership of the physical work. In addition, the author may alter his work with impunity. He is also reserved the right to withhold his work from publication.

The moral rights of an author last during his lifetime and for fifty (50) years after his death and are not assignable and not subject to license.[25]

3. Droit de Suite

Droit de suite is simply the right of the author to share in the gross proceeds "from every sale or lease of an original work of painting or sculpture or of the original manuscript of a writer or composer, subsequent to the first disposition thereof by the author."[26] The grant of this right is based on the recognition that in cases of artistic and literary works, the economic value of the copyright is to a large extent based on the display or sale of the original. For instance, a *Manansala* increases its value upon its transfer from hand to hand. This is the rationale behind the participation of the artist in the subsequent sale or lease of his work.

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[22] V. AMADOR, COPYRIGHT LAW, *supra* note 8, at 569, *citing* Carter v. Helmsley Spear, Inc., 71 F.3d 77 (1995).

[23] *Id.*

[24] INTELLECTUAL PROP. CODE, sec. 193.

[25] INTELLECTUAL PROP. CODE, sec. 198.1.

[26] INTELLECTUAL PROP. CODE, sec. 200.

D. Copyright Ownership and Transfers

Determining the ownership of copyright is important because a wide variety of rights flow from copyright ownership. Ownership of the copyright generally belongs to the author.[27] An author is referred to as the person who creates a copyrightable work or the corporate employer of a person who creates a copyrightable work.[28] If there are two or more authors, they shall be original owners and their rights, in the absence of agreement, shall be governed by the rules on co-ownership. If the work consists of parts, and the parts can be separated and the author of each part can be identified, the author of each part shall be the original author of each part.[29]

This principle, however, does not apply to works for hire.[30] Copyright over works for hire automatically pertains to the hirer of the author and not to the author himself, if the work is a result of him having performed his regularly assigned duties. An agreement between the employer and the employee may be made either express or implied, reserving the ownership of the copyright to the employee. Such an agreement will prevent the automatic vesting of the copyright to the employer. There are instances, however, wherein employees still own intellectual property rights over their works in the absence of any agreement. Copyright over a work belongs to the employee if he created the work outside of his regular duties. This holds true notwithstanding the fact that the employee uses the time, facilities and materials of the employer in the process of creating the work.

In case of a work commissioned by a person other than the employer of the author,[31] the person who so commissioned the work shall have ownership of the work, but the copyright thereto remains with the creator, unless there is a written stipulation to the contrary.[32] In case of audiovisual work, the copyright belongs to the producer, the author of the scenario, the composer of the music, the film director, and the author of the work so adapted.[33] In respect of letters, the copyright belongs to the writer.[34]

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[27] INTELLECTUAL PROP. CODE, sec. 178.1.

[28] V. AMADOR, COPYRIGHT LAW, *supra* note 8, at 257.

[29] INTELLECTUAL PROP. CODE, sec. 178.2.

[30] V. AMADOR, COPYRIGHT LAW, *supra* note 8, at 354.

[31] INTELLECTUAL PROP. CODE, sec. 178.2. The person must have paid for the work and the work is made in pursuance of the commission.

[32] INTELLECTUAL PROP. CODE, sec. 178.4.

[33] INTELLECTUAL PROP. CODE, sec. 178.5.

[34] INTELLECTUAL PROP. CODE, sec. 178.6.

As stated earlier, nothing prevents the owner of copyright from assigning his rights to another. The only requirement that the law imposes is that transfer must be made in writing.

E. Copyright Infringement

1. Concept of Infringement

Copyright law gives to the author the exclusive right to carry out, authorize or prevent the acts solely granted unto him and falling under his economic rights, moral rights, and *droit de suite*. Infringement under our law is committed by any person whose conduct violates any of these exclusive rights as well as the rights of performers, producers of sound recordings and broadcasting organizations under Chapters XII, XIII and XIV of the IP Code. Infringement may either be direct or indirect. Direct infringement is committed by a person who himself carries out any of the acts in violation of the aforementioned exclusive rights of the author. Otherwise, indirect infringement results.

2. Direct and Contributory Infringment

While direct infringement is statutorily recognized under the copyright law, indirect infringement in the form of contributory infringement is not. The latter has its origin in tort law and is derived from the precept that one who directly contributes to another's infringement should be held accountable. However, the common law doctrine that one who knowingly participates in or furthers a tortious act is jointly and severally liable with the joint tortfeasor, should also be made applicable under our copyright law.[35] Authorities opine that that the addition of the words "to authorize" when referring to the rights of an author, appears best understood as merely clarifying that the copyright law contemplates liability for contributory infringement, and that the bare act of "authorization" can suffice.[36]

The exclusive rights accorded to a copyright owner under the Act are "to do and to authorize" any of the activities specified in the numbered clauses. The use of the phrase "to authorize" is intended to avoid any questions as to the liability of contributory infringers. For example, a person who lawfully acquires an authorized copy of a motion picture would be an infringer if he or she engages in the business of renting it to others for purposes of unauthorized public performance. Contributory infringement has been described as an outgrowth of enterprise liability, and imposes liability where one person knowingly contributes to the infringing conduct of another. Thus, one who, with knowledge of the infringing activity,

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[35] V. AMADOR, COPYRIGHT LAW, *supra* note 8, at 632.

[36] *Id.* at 631.

induces, causes or materially contributes to the infringing conduct of another, may be held liable as a contributory "infringer."[37] Moreover, the IP Code, in criminalizing copyright infringement, provides for penalties to be imposed on persons who infringe any right secured under this law, as well as on persons who aid or abet such infringement.[38]

3. Prosecution of Copyright Infringement

Copyright infringement could be successfully prosecuted provided that the plaintiff shows proof of the following: (1) valid copyright in the work allegedly infringed; and (2) that the defendant infringed the plaintiff's copyright by copying protected elements of the plaintiff's work.

The first requirement is not a difficult hurdle since copyright is presumed. Works are protected from the fact of creation. A presumption also exists with respect to authorship. The natural person whose name is indicated on a work in the usual manner as the author, is presumed to be the author of the work whether the name is a pseudonym, where the pseudonym leaves no doubt as to the identity of the author. The same holds true for audio-visual works. The second requisite, on the other hand, needs a more thorough discussion.

To prove an actionable copying, the plaintiff must first establish that the alleged infringer actually used the copyrighted material to create his own work. There are several ways to prove copying. Plaintiff may choose to present direct evidence of copying or in its absence, evidence that shows that defendant had access to the copyrighted material and that there is substantial similarity between the copyrighted work and the supposed infringing material. In addition, plaintiff must also demonstrate that the materials copied constitute the protected elements of the work.[39]

Direct evidence of copying is seldom available since the actual act of copying is rarely documented or witnessed. Copying then may be inferred from a showing that the defendant had access to the copyrighted work such that the defendant had a reasonable opportunity to copy the work.[40] On top of this, plaintiff must also show that there exist substantial similarities between the copyrighted work and the supposed infringing materials.[41] Normally, there is no physical proof of copying other than the offending material itself. Plaintiff must

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[37] *See* Fonovisa, Inc. v. Cherry Auction, Inc., 76 F.3d 259 (1996).

[38] INTELLECTUAL PROP. CODE, sec. 217.1.

[39] V. AMADOR, COPYRIGHT LAW, *supra* note 8, at 659, *citing* Frickers v. Mnemonics, 79 F.3d 1532 (1996).

[40] *See* James Grubb v. KMS Patriots, 88 F.3d 1 (1996).

[41] *See* James Lipton v. The Nature Company, 71 F.3d 464 (1995).

therefore be able to show that the similarities between the works are so substantial that a reasonably prudent man would conclude that the defendant unlawfully appropriated the plaintiff's protected expression by taking material of substance and value. Dissimilarities among some aspects of the works will not automatically relieve the infringer of liability, for no copier may defend the act of plagiarism by pointing how much he had not copied.[42]

4. Remedies in an Infringement Action

A person guilty of infringement may be proceeded against civilly or administratively.[43] In addition, plaintiff may institute a criminal action against any person infringing any right secured under the copyright law as well as any person aiding or abetting such infringement.[44]

The plaintiff in an infringement suit may ask the court to grant any and all of the following reliefs:

i. an injunctive order;
ii. the payment to the copyright proprietor or his assigns or heirs such actual damages;
iii. the delivery of, for impounding during the pendency of the action, sales invoices and other documents evidencing sales, all articles and their packaging alleged to infringe a copyright and implements for making them;
iv. the delivery, for destruction without any compensation, of all infringing copies or devices, as well as all plates, molds, or other means for making such infringing copies; and
v. the payment of moral and exemplary damages, wise and equitable, and the destruction of infringing copies of the work.[45]

Injunction may be prayed for either as a provisional remedy or as a principal relief. In a claim for copyright infringement, the court may issue an order enjoining the defendant to refrain from doing the acts complained of during the pendency of the action provided that plaintiff proves that (1) in some likelihood, he will prevail in the merits of his claim; (2) there is no adequate remedy at law; and (3) he will suffer irreparable harm if the injunctive relief is not granted.[46] This order may lapse into permanence upon the Court's final determination of the rights of the plaintiff and his entitlement to the remedies prayed for.

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[42] *See* Williams v. Crichton, 84 F.3d 581 (1996).
[43] INTELLECTUAL PROP. CODE, sec. 7.2 and sec. 10.2.
[44] INTELLECTUAL PROP. CODE, sec. 217.
[45] INTELLECTUAL PROP. CODE, sec. 216.
[46] *See* Country Kids 'N City Slicks v. Sheen, 77 F.3d 180 (1996).

The amount of actual damages that maybe awarded to the plaintiff may include legal costs and other expenses, as the plaintiff may have incurred due to the infringement. The profits that the infringer may have made due to such infringement may also be awarded to the plaintiff. Under the law, the plaintiff in proving profits is only required to prove sales and nothing else. It is incumbent upon the defendant to prove the expenses he has incurred in relation to said sales. In the absence of proof of actual damages, the court may award such damages, which to the court shall appear to be just.

5. Liabilities of an Infringer

The above named reliefs are available against direct and indirect infringement. However, before one can be held liable for contributory infringement, there must be direct infringement through any violation of the exclusive rights of authors, artists, performers, producers of sound recordings and broadcasting organizations.[47] For instance, a manufacturer of a video recorder may be absolved from charges of infringement upon proof that the recording by means of VTRs of copyrighted works for purposes of home viewing is a fair use of the copyrighted work and does not constitute infringement.[48]

A person found liable for direct infringement is directly liable for any of the reliefs granted by the court. A contributory infringer is likewise liable to the same extent as the direct infringer. In the United States, officers of a cooperative, which was held guilty of infringement for making copies of televised copyrighted works later shown in classrooms, were found to have either caused or materially contributed to these copyright infringements and were declared guilty of contributory infringement. As all united in infringing, all are responsible for the damages resulting from the infringement. As a result all defendants were held jointly and severally liable for costs and damages in said action.[49]

6. Defenses to Copyright Infringement

In reiteration, copyright is designed to strike a balance between the legitimate, albeit competing, interests of the author, on one hand, and the public, on the other. Pursuant to this, the law saw it fit to impose limitations on the copyright of an author. The public is given permission to use copyrighted works absent the author's consent provided the use is made under the conditions set forth by law.[50]

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[47] V. AMADOR, COPYRIGHT LAW, *supra* note 8, at 633.

[48] *See* Sony Corp. v. Universal City Studios, Inc., 464 U.S. 417 (1984).

[49] *See* Encyclopaedia Britannica v. Crooks, 558 F. Supp. 1247 (1983).

[50] INTELLECTUAL PROP. CODE, sec. 184.

"Sec. 184. *Limitations on Copyright.*

Thus, lifting quotations from a published work for research purposes is not infringing for as long as the name of the author and the source of the quotation are mentioned. Neither is the reproduction of articles on current political, social, economic, scientific or religious topic, lectures, addresses and other works of the same nature, which are delivered in public, infringing if the same is for information purposes and the source is clearly indicated.

In addition, the doctrine of fair use is among those that destabilize the copyright control exercised by the author over his work. Section 185 of the IP Code

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184.1. Notwithstanding the provisions of Chapter V, the following acts shall not constitute infringement of copyright:

(a) the recitation or performance of a work, once it has been lawfully made accessible to the public, if done privately and free of charge or if made strictly for a charitable or religious institution or society; (Sec. 10(1), P. D. No. 49)

(b) The making of quotations from a published work if they are compatible with fair use and only to the extent justified for the purpose, including quotations from newspaper articles and periodicals in the form of press summaries: *Provided*, That the source and the name of the author, if appearing on the work, are mentioned; (Sec. 11, Third Par., P. D. No. 49)

(c) The reproduction or communication to the public by mass media of articles on current political, social, economic, scientific or religious topic, lectures, addresses and other works of the same nature, which are delivered in public if such use is for information purposes and has not been expressly reserved: *Provided*, That the source is clearly indicated; (Sec. 11, P. D. No. 49)

(d) The reproduction and communication to the public of literary, scientific or artistic works as part of reports of current events by means of photography, cinematography or broadcasting to the extent necessary for the purpose; (Sec. 12, P. D. No. 49)

(e) The inclusion of a work in a publication, broadcast, or other communication to the public, sound recording or film, if such inclusion is made by way of illustration for teaching purposes and is compatible with fair use: *Provided*, That the source and of the name of the author, if appearing in the work, are mentioned;

(f) The recording made in schools, universities, or educational institutions of a work included in a broadcast for the use of such schools, universities or educational institutions: *Provided*, That such recording must be deleted within a reasonable period after they were first broadcast. *Provided, further*, That such recording may not be made from audiovisual works which are part of the general cinema repertoire of feature films except for brief excerpts of the work;

(g) The making of ephemeral recordings by a broadcasting organization by means of its own facilities and for use in its own broadcast;

(h) The use made of a work by or under the direction or control of the Government, 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;

(i) The public performance or the communication to the public of a work, in a place where no admission fee is charged in respect of such public performance or communication, by a club or institution for charitable or educational purpose only, whose aim is not profit making, subject to such other limitations as may be provided in the Regulations; (n)

(j) Public display of the original or a copy of the work not made by means of a film, slide, television image or otherwise on screen or by means of any other device or process: Provided, That either the work has been published, or, that original or the copy displayed has been sold, given away or otherwise transferred to another person by the author or his successor in title; and

(k) Any use made of a work for the purpose of any judicial proceedings or for the giving of professional advice by a legal practitioner.

184.2. The provisions of this section shall be interpreted in such a way as to allow the work to be used in a manner which does not conflict with the normal exploitation of the work and does not unreasonably prejudice the right holder's legitimate interest."

provides that 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. Fair use is thus a privilege to use copyrighted materials without permission of the copyright owner. The rationale for allowing certain uses of copyrighted materials is to benefit the public and to promote arts and sciences.[51] There is no hard and fast rule in determining if the use made of a work is consistent with fair use. The law, nevertheless, provided the criteria to guide the courts in applying this exception. The factors to be considered 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.

None of the four factors are meant to be conclusive. Courts examine each factor and weigh all considerations in determining whether the use made of a work falls under permissible fair use or infringing use. Each case is determined on its own merits.

III. COPYRIGHT ISSUES IN THE INTERNET

The amount of information available in the electronic medium has grown at an unprecedented rate. The Internet as a consequence, has become a major global data pipeline through which large amounts of intellectual property are moved. As this pipeline is increasingly used in the mainstream of commerce to sell and deliver creative content and information across transnational borders, issues of intellectual property protection for the material available in and through the Internet are of increasing importance.[52] To date, much of the materials that are available on the net are works of authorship such as musical works, novels, movies, software and the like, which are matters subject of copyright protection.

The copyright laws have remained static amidst the exponential advances in communications technology that the Internet has the occasion to achieve. This unfortunate situation undermines the applicability of traditional copyright laws to Internet activities. The problem is rooted on the basic fact that traditional copyright laws focus on tangible objects as the paradigm for transfer of information while the

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[51] D. BOUCHOUX, *supra* note 14, at 212.

[52] David Hayes, *Advance Copyright Issues on the Internet*, *at* http://www.fenwick.com/pub/ip_pubs/Advanced_Copyright_Issues_2002/Advanced_Copyright_Issues_2002.htm (last visited Sept. 20, 2002).

Internet focuses on electronic transmissions as the paradigm for transfer of information.[53] In a world of tangible distribution, it is fairly easy to determine whether a copy was made.[54] Not so in the Internet. Its very nature lends extreme difficulty in determining whether a copy is in fact made and whether this constitutes infringement under our law. Electronic online medium requires that data be "copied" as it is transmitted through the various nodes of the network. Since copyright is essentially a right to prevent others from making unauthorized copies of a work, various issues arise from the transmittal of protected subject matter to the "World Wide Web".[55]

A. Economic Rights and the Internet

As already discussed, a copyright holder enjoys a number of rights, namely, the right of reproduction, the right to create derivative works, the right to first public distribution, the right to rent out, the right to public display, the right to public performance, and the right to other communication of the work. Among these rights, it is regarded that the right of reproduction is most affected by the transmission and use of works in the Internet.

To illustrate, consider the example of downloading a picture from a website. Since information is transmitted throughout the Web through packet-switching, no less than seven copies of the picture may be made as said picture gets re-routed: the modem at the receiving and transmitting computers buffer each byte of the data, so does the router, the receiving computer, the Web browser, the video decompression chip, and the video display board. These copies are in addition to the one that may be stored on the recipient computer's hard disk.[56]

Transmission of a work in the Internet also impacts on the right of an author to public distribution. When a copy is distributed to the public by sale, rental, lease, or through other means of transferring ownership, the right of the author to public distribution of his work is impaired.

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[53] *Id.*

[54] *Id.*

[55] The World Wide Web or simply the "Web" is a system of Internet servers, which supports specially formatted documents written in a language known as Hypertext Markup Language or HTML. The documents may contain text, image, video, and audio files. In the Internet language, these documents are otherwise referred to as Web pages. The Web pages may also include links to other documents containing information or resources allowing the viewer to access the link while maintaining connection to the main Web page. These links facilitate the accessibility and organization of information on the Internet, regardless of its status or physical location. Moreover, the links allow people to locate and view related information even if such information is stored on numerous computers all around the world. *See* Grossman and Rigamonti, *infra* note 67.

[56] *Id.*

For instance, copyrighted pictorial images uploaded onto a computer in Italy that could be accessed by users in the United States constituted a public distribution in the United States.[57] Placement of files containing copyrighted clip art on the Web page of another constituted a direct violation of the copyright holder's distribution right because the files were then made available for downloading by Internet users and were transmitted to Internet users upon request. [58] Distribution is deemed public when the copyrighted work is transmitted to an audience that may receive the transmission at different times, at different places, or both. The fact that recipients may download these works at dispersed times does not diminish the public nature of such distribution.[59]

Corollary to this right is the right of public display. Public distribution is carried out by transmitting to the public a copyrighted work, which may be accessed at different places and times, public display in the Internet is accomplished in much the same terms. When photographs are posted on a Bulletin Board Service (BBS),[60] and these are made accessible to users, such conduct constitute public display, even though the display was limited to subscribers, and subscribers viewed the photographs only upon downloading the photographs from the BBS on demand. Thus, making material available through the Internet even to only a small and select audience may still constitute a public display. Merely making available the files for downloading was sufficient for liability to attach, because "once the files were uploaded onto the Web server, they were available for downloading by Internet users and the server transmitted the files to some Internet users when requested."[61]

The right given to authors pertaining to the public performance of their works may also be impinged on by online activity. Audiovisual works and sound recordings are easily uploaded to the net and are made accessible to online users at the latter's pleasure. The all encompassing right of communication to the public is likely to be prejudiced by online transmission as well since this right expressly affords the author the exclusive right to control any "communication to the public" of a work "by wire or wireless means, which is applicable to electronic transmission of work".

B. Basic Internet Activities and their Copyright Implications

The Internet is aptly called the information superhighway since a multitude of information can be retrieved all at the same time and in different ways. Basic

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[57] *See* Playboy Enterprises, Inc. v. Chuckleberryn Publishing, Inc., 939 F. Supp. 1032, 1039 (1996).

[58] *See* Playboy Enterprises, Inc. v. Webbworld, Inc., 45 U.S.P.Q.2d 1641 (1997).

[59] *See* On Demand Video Corp. v. Columbia Pictures Industries, Inc., 777 F. Supp. 787 (1991).

[60] *See* Playboy Enterprises, Inc. v. Webbworld, Inc., 45 U.S.P.Q.2d 1641 (1997).

[61] *See* Marobie-FL, Inc. v. National Association of Fire Equipment Distributors, 45 U.S.P.Q.2d 1236 (1997).

Internet activities used to search and retrieve information in the Web, while essential, nonetheless bear serious repercussions on fundamental copyright principle of preventing the copying of a work. Among these activities are browsing, embedding links, framing, caching and mirroring.

1. Browsing

Browsing is the most basic activity on the Internet. It is probably the single most common activity of users on the Internet today.[62] It entails viewing of the Web pages with a Web browser, which is a special software application such as Internet Explorer or Netscape Navigator. These browsers connect via the Internet to remote computers, request documents, and then format the resulting documents for viewing on the user's computer.[63] The Web browser uses the unique "URL"[64] of the document in order to retrieve it. The computer user may provide the appropriate URL by typing it into a "URL" window offered by the browser or by using a pre-existing link on a pre-existing Web page.

The process of browsing involves the following steps. When a user wishes to view a Web site, he types in the Web site address in the URL window of his browser software. The browser contacts the Web server containing the Web site and establishes a connection to that computer. The requested information is then sent by the Web site computer to the user's computer. The user's browser software retrieves the data and displays it. Thereafter, the user's computer and the Web server containing the Web site disconnects from one another.[65] As a result of this process, more than seven intermediate copies of the site's content may be made.[66]

The basic Internet activity of browsing is simply an act of viewing.[67] This simple act of viewing, however, provides a graphic illustration of the difficulty and uncertainty of applying traditional copyright rights to the Internet.[68] Browsing a Web page is no different from viewing a page of a commercially available book. The passive act of viewing the printed pages of a book, however, does not raise any

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[62] Hayes, *supra* note 52.

[63] Allison Roarty, *Link Liability: The Argument for Inline Links and Frames as Infringements of the Copyright Display Right*, 688 FORDHAM L. REV. 1013, 1014-1015 (1999).

[64] In order to facilitate retrieval and viewing, every Web page has an identifying address containing the protocol used and the domain name of the Web site to which the Web page belongs, which is called the Uniform Resource Locator (URL). *See* Grossman and Rigamonti, *infra* note 67.

[65] *Id.*, *citing* RAY E. MERTZ & GAIL JUNION-MERTZ, USING THE WORLD WIDE WEB AND CREATING HOME PAGES 5 (1996).

[66] *Id.* at 1015, *citing* M. Zimmerman, *Copyright in the Digital Electronic Environment*, in UNDERSTANDING BASIC COPYRIGHT LAW 43, 591 (1998).

[67] Jon D. Grossman and Cyrill P. Rigamonti, *Internet Basics and Copyright* Law, JOURNAL OF INTERNET LAW (1998), *at* http://www.gcwf.com/articles/journal/jil_june98_2.html (last visited Sept. 20, 2002).

[68] *Id.*

problems under copyright laws. Individuals enjoy the privilege of viewing any literary or artistic work in its tangible form without fear of being held liable for copyright infringement. Only when an unauthorized viewing occurs, that is when what are being viewed are unauthorized copies, can someone be held liable. That someone is not the viewer, but rather the person distributing the copy. This may not hold true, however, with regard to browsing.

Technically, a computer program can only be run if it is loaded, as a whole or in part, from a permanent storage device into the RAM (Random Access Memory) of the computer to be used. For this purpose, the permanently stored copy is temporarily duplicated in the RAM. Since Web pages are computer programs, the same technical process applies to them. The only difference is that in Web pages, the copy loaded into the RAM is not stored in the hard drive of the same computer but in a remote server. Additional transmission through the RAMs of several computers is necessary in order to retrieve the Web page before loading it into the RAM of the computer being used. In this process, the requested Web page is first duplicated several times, either as a whole or in parts, before it is displayed on the user's monitor ready for viewing. Although these duplications are merely temporary to enable transmission and display, they raise problematic issues in copyright law because the mere act of viewing a digital work requires that the work be duplicated.

Thus, unlike in the case of traditional media, the viewing, reading or use of a copyrighted work on the Internet generally requires the making of a "copy" of the work and may also require the distribution, transmission, and access of the work. Though viewing, reading or using are not within the copyright holder's exclusive rights, copying, distribution and transmission, and access are. Since these exclusive rights are necessarily incidental to Internet browsing, such browsing may be considered to infringe multiple rights of the copyright holder.[69]

2. Embedding Links and Framing

Written documents are not the only types of information found in the Internet. Multimedia applications such as pictures, sound recordings, and video clips may also be retrieved from the Internet. Another set of HTML codes is used to retrieve multimedia applications stored in separate files and embed them into an HTML document. These are referred to as embedding links, which incorporate multimedia applications into one single document, rather than having to switch between different documents. As a result of this automatic retrieval and display, the

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[69] *Id.*

user does not realize that there is a link and does not understand where the linked files are located.[70]

Framing, on the other hand, refers to an HTML code that allows Web page creators to divide the browser window into separate sub-windows, usually called "frames".[71] Contents of each frame are taken from different Web pages,[72] allowing two or more Web sites to appear on the user's screen simultaneously.[73] This technique is used to display one static frame with ownership information, advertisements, and table of contents, and one dynamic frame containing the actual information of interest to the user, which will exclusively be updated if new information is retrieved.

Embedding and framing links have also given rise to certain problematic issues with regard to copyright laws. As discussed earlier, embedding and framing are quite similar to each other since both result in retrieving and incorporating material into a pre-existing Web page. Embedding involves the retrieval of a single multimedia file, which is a portion of a Web page, while framing involves the retrieval of a whole Web page.

Embedding links are usually activated automatically. They may also be activated manually with the multimedia applications to be loaded only upon request of the user. On the other hand, framing usually requires the manual activation of an HREF link. It may also be possible for a remote Web page to be incorporated into a framing page by default and is displayed automatically when the framing page is loaded.

Embedding and framing often hide the origin or the URL of the retrieved material, because the embedding or framing page is not replaced, but incorporated within another page. In effect, an image, text, or audio clip is retrieved from another's Web page and displayed in the current Web page without attributing the source of the information. Moreover, the frames may or may not have visible borders such that the user is led to believe that all the information displayed is from the same Web site.[74] In fact the user does not realize that the source or origin of a framed page or an embedded multimedia application is different from the source or origin of the framing or embedding page. As a result, problems arise with regard to traditional copyright laws.

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[70] *Id.*

[71] *Id.*

[72] *Id.*

[73] A. Roarty, *supra* note 63, at 1018.

[74] Jo Dale Carothers, *Protection of Intellectual Property on the World Wide Web: Is the Digital Millenium Copyright Act Sufficient?*, 41 ARIZ. L. REV. 943 (1999).

First, the retrieved copyrighted material, which is either a multimedia application (with regard to embedding) or a whole Web page (with regard to framing), is not viewed as intended to. Necessarily this would involve the adaptation rights of the authors. Just like in browsing, in order to access the Web page or a multimedia application, the same must be retrieved from a remote server. After the retrieval, the information is incorporated into the retrieving Web page. Such incorporation is crucial since the incorporated digital material is loaded into the RAM and is fully duplicated on the computer screen display by using the parts of the incorporated page. Not only are the parts of the incorporated page used, the screen display of the retrieved page itself is altered.[75] This may thus constitute a creation of an unauthorized derivative work as if a material is clipped from a printed source and placed in one's own material.[76]

Second, the original source is not revealed.[77] This becomes problematic because the embedding link or framing causes a reproduction of the linked material to be pulled in to the linking site. A user looking at A's Web page will see on that page image, text, or audio clip that was actually "pulled in" from site owner B's Web page.[78] Although the secondary site is viewed within the frame, the first site's URL is displayed on the user's browser.[79] The technical process therefore may cause an infringement of the right of reproduction, display, or performance since the user is led to believe that what he is viewing is the creative work of the first site's programmer.[80]

Considering that the use of embedding links and frames may constitute copyright infringement, a third problem arises. Who becomes liable for the infringement? In cases of automatic retrieval, the creator of the linking Web page may be liable for direct infringement because he himself was responsible for the creation of the derivative work.[81] With regard to manual retrieval, the linking Web page's creator may be liable for contributory infringement particularly if its Web page is promoting the copying, transmission, public display or public performance of material at the linked site.[82] But before one can be held liable for contributory infringement, there must first be a direct infringement. In this case, the user is guilty of direct infringement since he himself activated the link and caused the direct act of incorporation. Others argue, however, that the user is not guilty of any infringement because he only passively views the derivative work already prepared by the Web

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[75] Grossman and Rigamonti, *supra* note 67.
[76] Hayes, *supra* note 52.
[77] Grossman and Rigamonti, *supra* note 67.
[78] Hayes, *supra* note 52.
[79] A. Roarty, *supra* note 63.
[80] Hayes, *supra* note 52.
[81] Grossman and Rigamonti, *supra* note 67.
[82] Hayes, *supra* note 52.

page author. Although it is necessary for him to activate the link to access the page, the acts of activating and viewing the derivative work neither directly nor contributorily infringes the copyright of the incorporated page.[83]

3. Caching and Mirroring

Caching is another activity that is virtually ubiquitous on the Internet. It simply means storing copies of material from an original source site or Web Page for later use when the same material is requested again.[84] Mirroring, on the other hand, refers to the storing of the content of an entire Web site.[85]

The interconnection of millions of computers to the Internet is facilitated through analog phone lines that are not designed for high-speed transmission favorable to graphically rich Web pages. Transmission bandwidth limitations, together with the increasing number of Internet users, have resulted in Internet traffic, i.e. information retrieval over the Internet dramatically slows down from seconds to hours. In order to reduce the congestion due to repeated downloading of the same data, copies of material from the original source are made at the user level referred to as local caching or at the server level or proxy caching. In local caching, if a user wants to access the same data again, the Web browser loads it from the random access memory ("memory caching") or from the hard disk ("disk caching") rather than retrieving it from the original source. Many Internet service providers use proxy caching. Once a user has downloaded data from the original site, it remains available to other users connected to the same server without downloading it again from the original site.

The technique is used not only for reducing congestion, but also generally for backing up information already stored on one server. Usually the cached information is temporarily stored, although the storage time may vary from a few seconds to a few days, weeks, or more.

Caching and mirroring involve the making of permanent copies on either the server or the user's hard drive.[86] Such a technique necessarily presents an obvious problem of possible infringement of the author's right of reproduction. In addition, proxy caching may give rise to infringement of the author's rights of public distribution, public display, and public performance because the server might

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[83] Grossman and Rigamonti, *supra* note 67.
[84] Hayes, *supra* note 52.
[85] Grossman and Rigamonti, *supra* note 67.
[86] Grossman and Rigamonti, *supra* note 67.

distribute, display, or perform the copyrighted works to the users again and again as long as the copy is retained in the cache server.[87]

IV. THE E-COMMERCE ACT: THE ANSWER TO PIRACY

It is conceded that the Philippine copyright law remains static amidst the exponential advances in information technology owing to the advent of the Internet. The sophistry of the legislature was simply not too progressive to take cognizance of the likelihood that the Internet technology was bound to take the country into a neck breaking speed of development in the information super highway and inevitably into a pit full of legal complexities. The evident inadequacy of the present law to protect the interests of authors over works navigating the digital environment prompted the lawmakers to supplement the same and thereby afford protection transcending traditional copyright protection. This they did through the enactment of Republic Act 8792 otherwise known as the E-Commerce Act of 2002.

The E-Commerce Act undertakes to uphold the legal validity of electronic transactions and contracts and to create a secure legal environment, which is expected to spur the growth of electronic commerce in the country.[88] The law provides recognition and protection of electronic commercial transactions. It grants to electronic legal documents the same legal status as paper documents;[89] elevates electronic signatures to the level of manually-signed signatures;[90] allows the use of electronic documents and electronic signatures in commercial and non-commercial transactions;[91] and mandates the Government to conduct its business electronically within two years.[92] To give significance to such recognition, the law imposes penal sanctions to certain activities pertaining to electronic transactions. Among those penalized is on-line piracy.

Section 33 (b) of the law provides:

> Piracy or the unauthorized copying, reproduction, dissemination, distribution, importation, use, removal, alteration, substitution, modification, storage, uploading, downloading, communication, making available to the public, or broadcasting of protected material, electronic signatures or copyrighted works including legally protected sound recordings or phonograms or information material on protected works, through the use of telecommunication networks such as but not limited

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[87] *Id.*

[88] J. Disini, *The E-Commerce Act Part I: Salient Points*, THE PHIL. STAR, July 10, 2000, http://www.philstar.com/philstar/index.htm (last visited Feb. 6, 2001).

[89] Rep. Act 8792 (2002), sec. 7.

[90] Rep. Act 8792 (2002), sec. 8.

[91] Rep. Act 8792 (2002), secs. 6-26.

[92] Rep. Act 8792 (2002), sec. 28.

> to the internet in a manner that infringes intellectual property rights shall be punished by a minimum of one hundred thousand pesos and a maximum commensurate to the damage incurred and a mandatory imprisonment of six months to three years.

Otherwise known as the Anti-Piracy provision,[93] sec. 33(b) has four constitutive elements; to wit, the acts penalized, the works protected, the means of communication, and the prejudice caused.[94]

The protection extended by this provision applies to protected materials, electronic documents, and copyrighted works. The broad language of the law covers all kinds of works that are traditionally protected under the rubric of Intellectual Property Law. Any copying, reproduction, dissemination, distribution, importation, use, removal, alteration, substitution, modification, storage, uploading, downloading, communication, making available to the public, or broadcasting of these works is criminalized if done without securing the author's permission. Whether or not there is criminal intention is of no moment. What is required, however, is that these acts must be committed through the use of telecommunication networks, including but not limited to the use of the Internet, and in a manner that infringes intellectual property rights.

Thus, a person who enjoys a humorous comic strip cannot simply attach it to his e-mail and send it to his friends without making himself susceptible to charges of infringement. An eight-year boy cannot simply download a picture of his favorite cartoon character without exposing himself to liabilities for on-line piracy.

V. IS E-COMMERCE ENOUGH?

A. Assessment

At first glance, sec. 33(b) of the E-Commerce Act seems to have met the inadequacies of the IP Code with regard to intangible works of authorship. It is clear that the piracy provision recognizes the existence of works in the digital environment and the concomitant protection these works require. The recognition, however, does not completely disentangle the web of legal complexities of intellectual property protection in the Internet. In fact, this provision leaves copyright owners and the public with more questions and fewer answers.

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[93] VICENTE AMADOR, THE E-COMMERCE ACT AND OTHER LAWS@CYBERSPACE 229 (2002) (hereinafter V. AMADOR, E-COMMERCE)

[94] *Id.*

1. Interpreting the Anti-Piracy Provision

Foremost among the problems is the relation of the anti-piracy provision with the extant laws of copyright. Considering that the provision does not expressly refer to the IP Code, an authority suggests that it should be construed without relation to the rights and benefits accorded to authors and users by the IP Code.[95] The mere acts of copying, reproduction, dissemination, distribution, importation, use, removal, alteration, substitution, modification, storage, uploading, downloading, communication, making available to the public, or broadcasting of the works in the Internet constitute an infringement without recognizing the traditional limitations to copyright. Following this line of thought, a user, who commits any of the enumerated acts through the Internet, may be fined and imprisoned, notwithstanding the possible defenses available to an alleged infringer under the IP Code. Thus, the anti-piracy provision unilaterally prohibits, in favor of the copyright owner, the enumerated acts without any consideration of the purposes for which their users have employed the copyrighted works. This is in sharp contrast to the statutory fair uses exempting the user from any infringement liability under section 177 of the IP Code. Thus, even students, teachers, researchers and other academics become potentially liable for infringement under the piracy provision when they use the Internet for their research needs.[96]

Such a suggestion, however, fails to take into account the existence of words and phrases in the anti-piracy provision that relate to copyright under the IP Code. Among the acts prohibited under the anti-piracy provision includes those already covered by the IP Code; to wit, copying, reproduction, dissemination, distribution, importation, removal, communication to the public. Note that these activities are simply a reiteration of what the IP Code confers upon the author as within his exclusive right to authorize, carry out or prevent others from doing.

Neither does the statute carry a definition of what copyrighted works are. They are simply grouped with protected materials and electronic documents. Notice that only electronic documents are defined in the Act. Therefore, a proper identification of what constitutes copyrighted works is indispensable in order to effectuate the anti-piracy provision of the law. A resort must be had to the existing copyright law for a precise determination of the applicability of this provision.

Moreover, the provision penalizes only those acts, which are done "*in a manner that infringes intellectual property.*" In order to give effect to this provision, it is necessary to define how the enumerated acts are committed in a manner that infringes intellectual property. The rules of statutory construction provide that a

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[95] V.AMADOR, E-COMMERCE, *supra* note 93, at 248.

[96] V.AMADOR, E-COMMERCE, *supra* note 93, at 247.

provision or section, which is by itself ambiguous, may be made clear by reading and construing it in relation to the whole.[97] However, no other provision of the E-Commerce Act refers to or defines the phrase "*in a manner that infringes intellectual property*" so as to present a logical construction of the anti-piracy provision. If the phrase were left undefined by the E-Commerce Act then the anti-piracy provision will be incapable of interpretation and rendered ineffectual.

Thus, to give life to this provision, it is essential to turn to another rule of statutory construction. It is the rule that a statute should be construed not only to be consistent with itself but also to harmonize it with other laws on the same subject matter, as to form a complete, coherent and intelligible system. The fact that the no reference is made to the prior statute does not mean that the two laws should stand in isolation of each other.[98] Considering then that the subject matter of the anti-piracy provision and the IP Code is copyright infringement, both should be construed together to attain the purpose of an express national policy of promoting the progress of science and the useful arts while recognizing the rights of authors.

In addition, it is a well-known rule of legal hermeneutics that penal laws are strictly construed. The language of the penal provision cannot be enlarged beyond the ordinary meaning of its terms in order to carry into effect the general purpose for which the statute was enacted. Where a statute penalizes the commission of an act on certain specific occasions, it cannot be construed to penalize it on all occasions.[99] Accordingly, the anti-piracy provision cannot be construed to penalize the commission of the enumerated acts at all instances. Any of the enumerated acts when committed in a manner not constituting infringement under the IP Code should not be penalized.

Most importantly, words and phrases that have a general or technical sense should be interpreted according to the sense in which they have been previously used. The presumption is that the language used in the statute, which has a technical or well-known legal meaning, is used in that sense by the legislature. No meaning other than the technical or legal meaning of a word used in a statute should be adopted in the construction of the statute, in the absence of any qualification or intention to the contrary. Therefore, it is without a doubt that the use of this phrase clearly points to the legislator's intent that the anti-piracy provision should be construed in the light of the subsisting provisions of the copyright law, otherwise, no one will be penalized for acts of digital piracy.

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[97] RUBEN AGPALO, STATUTORY CONSTRUCTION 209 (3rd ed. 1995).

[98] *Id.*

[99] R. AGPALO, *supra* note 97, at 226.

Unlike the subsequent section,[100] which made reference to the Consumer Act, sec. 33(b) is devoid of any like allusion. This is because the anti-piracy provision was inserted in the bill as a concession to the lower house during the bicameral conference. The House bill initially made no mention of piracy until the joint meeting of the Committee on Trade and Industry and the Committee on Science and Technology. The inclusion of this provision was made upon the instance of a guest during the meeting.[101] The proposed House bill did not seek to penalize on-line piracy in the beginning; it was only included in the provision containing the definition of terms and nowhere else. How it found its way into the penal section of the bill is by way of response to the observation that the definition of piracy in electronic commerce enumerates prohibited acts and therefore must be enforced through the imposition of penalties.[102] Its counterpart bill in the Senate, however, does not contain a provision of similar import since the authors[103] of the bill were of the opinion that piracy is already addressed by the IP Code. Hence, it may be inferred that said section is not in any way intended to stand apart from the pertinent provisions of the IP Code.

2. Insufficient Remedies under the Anti-Piracy Provision

One other shortfall of this new legislation is its inability to provide fuller protection to authors. The anti-piracy provision recognizes that infringement can be committed on works available on-line. It has even gone to the extent of providing penalties for the commission of an infringement. Nonetheless, it has failed to compensate or at the very least mitigate the damages brought about by the infringement. Compensation for damages is important to authors considering that acts of infringement prejudice their economic opportunities. Revenues in the form of sales profits and license fees are bound to be stolen away by infringers.

Furthermore, the anti-piracy provision has not provided for adequate remedies against any infringing conduct. Though the infringer may be imprisoned or fined, the infringing acts remain unabated. Unlike the IP Code, the anti-piracy provision does not provide any injunctive relief against the infringing acts. It is

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[100] Section 33(c) of the E-Commerce Act provides: "Violations of the Consumer Act or Republic Act No. 7394 and other relevant or pertinent laws through the transactions covered by or using electronic data messages or electronic documents, shall be penalized with the same penalties as provided in those laws."

[101] Atty. Julieta Jesse Eustaquio, a private practitioner, said that the advent of electronic commerce and the entry of Internet technology have greatly increased the scope and the means for infringement of protected material. The piracy of protected works in the Internet such as literary writings, compositions, sounds recordings and phonograms has escalated to almost uncontrollable proportions. It is therefore believed that electronic commerce legislation must address the concerns of rightholders. (Comm. on Trade and Industry and Comm. on Science and Technology, March 7, 2000).

[102] Rep. Yotoko-Villanueva, H. No. 9971, 11th Cong., 2nd Sess. (2000).

[103] Senators Juan Flavier and Jun Magsaysay.

highly possible then, that the infringing material will continue to navigate the Internet and be accessible to anyone.

It is also important to consider, that a successful prosecution for infringement requires the availability of evidence to be presented in court. Under the IP Code, the plaintiff in an infringement action may seek a court order requiring the defendant-infringer to deliver to the court the infringing copies of the work. However, the applicability of such a remedy in the Internet is doubtful considering that the infringing materials are in the form of digitized works.

Furthermore, the remedies of impounding and destruction of infringing materials, which is available in the IP Code, may also be found inapplicable to the Internet considering its digital spectrum.

Hence, in order to secure ample protection from infringement, the copyright holder must be given a whole arsenal of remedies like those granted under the IP Code, considering that the economic prejudice suffered by an author in the digital milieu is much increased owing to the facility of access and transmission of materials in the Internet.

3. The Anti-Piracy Provision vis-à-vis the nature of the Internet

As previously discussed, the Anti-Piracy provision penalizes the acts of copying, reproduction, dissemination, distribution, importation, use, removal, alteration, substitution, modification, storage, uploading, downloading, communication, making available to the public, or broadcasting, without regard to the defenses available to an alleged infringer such as the statutory defenses and the doctrine of fair use. Such penal provision is discriminatory to Internet surfers since to penalize the acts enumerated would mean a complete restraint on their Internet activities. Although it is apparent that the usual Internet activities of browsing, embedding and framing links, and caching and mirroring constitute acts that are anathema to copyright, it must be recognized that in the world of the Internet, copying is ubiquitous; reproduction is apparent; display is omnipresent. Penalizing such acts is therefore an outrage to the very nature of the Internet. Besides, if the Anti-Piracy provision of the Act is given untrammeled application, the principle enshrined in the copyright law, that is the promotion of science and the useful arts, will be set to naught.

B. Recommendations

Notwithstanding the legislature's attempt to enact a law recognizing copyright protection in the digital environment and providing penalties for a

violation thereof, it is quite clear that the copyright issues posed by the technology of the Internet are highly sophisticated to be answered by a single provision of the E-Commerce Act.

An amendment to sec. 33(b) of the E-Commerce Act should be made. There is a need to clarify the applicability of the copyright provisions of the IP Code to the anti-piracy provision. In order not to leave the anti-piracy provision in perpetual ambiguity, it is necessary that the provision should carry with it an express reference to the applicability of the IP Code, in particular, the provisions on limitations to copyright and to fair uses of copyright works under sections 184 to 190 of the IP Code.

Moreover, it is incumbent upon the legislature to enact a new piece of legislation that should specifically focus on copyright protection on the Internet. Indubitably, the extant copyright laws of the Philippines cannot cope with the fast paced development of the Internet technology. Neither can the Anti-Piracy provision, which was inadvertently inserted in the E-Commerce Act, be so construed as to apply to all works of authorship found on the Internet.

The digital world is complex and profound. Problems and issues exist, such as:

i. What constitutes digital works of authorship?
ii. What amount of copyright protection is extended to such works?
iii. Who are liable as infringers?
iv. What is the extent of their liabilities?
v. What are the legal remedies available to the author and corresponding defenses available to a supposed infringer?

These are some of the questions that should be answered by subsequent legislation.

VI. CONCLUSION

Intellectual property protection in general and copyright law in particular will play a major role in shaping who owns what and how they can use it on the Internet, since much of the content moving across the Internet will be works of authorship, including textual matter, software, music, movies, and multimedia and other audiovisual works. Copying, the quintessential subject of copyright law, is simply a ubiquitous activity on the web. One cannot simply access the Web without making repeated reproduction of material in the course of access. Add to this the

ease of reproduction and dissemination of digital works, it then becomes clear that copyright law is significant in the Internet.

Congress should be applauded for recognizing that the Internet is a venue for exploiting the rich literary and artistic heritage of our country therefore necessitating the enactment of a punitive legislation for the protection of artists and authors alike. Nevertheless, Congress must not lose sight of the fact that not all Internet uses are prejudicial to the interests of copyright holders. As discussed, the nature of the Internet is anathema to what copyright law holds secure for the authors. The legislature must therefore take into account this inimitable condition in order to create measures which are responsive and will better address the peculiar protection needed by copyright holders, while preserving the privilege of the public to access the works and make legitimate use of them.

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