

A Critical Review of Philippine Copyright System vis-à-vis Access to Information and New Media Technology

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The Philippine copyright system, though geared towards fostering innovation that would ultimately benefit the public, tends to mostly protect the intellectual property monopolies of developed countries and limit Filipinos' access to national cultural and knowledge requirements. This paper examines the current copyright systems' limitations and explores alternative interpretations of the system that consider the rapid advances in today's technology, as well as the unique needs of the developing Filipino nation.

Introduction

The Internet and new optical media technology have increased freedom and possibilities for global exchange of “cultural goods”: information, knowledge, music, films, and the like. These goods—some of which are copyrighted intellectual property material—can now be produced, reproduced, and distributed at a rapid rate and in a much wider scale without decreasing quality. As a result, industries from developed countries that depend on the export of these goods for profit have demanded stricter enforcement of prevailing copyright systems and increased private rights. They have also introduced anti-encryption technologies which reduce the potentials of the new technologies to allow widespread access to information and other cultural goods (Okediji, 2006; Michalopoulos, 2003).

As laws become increasingly restrictive, a developing country such as the Philippines – a net importer of intellectual property and one that could stand to benefit from better access to cultural goods – must critically examine the assumptions behind

its local copyright system. This paper explores whether or not the current copyright system fulfills its acknowledged, significant social function of promoting national development via the diffusion of knowledge and information.

Overview of the Philippine Copyright System

Intellectual property (IP), as commonly defined by law, refers to the creative works of artists, scholars and inventors. According to the World Intellectual Property Organization (WIPO)¹, IP may be divided into two categories: industrial property and copyright. Industrial property includes scientific or technical works such as industrial designs, inventions (patents), and trademarks. Copyright—the focus of this paper—includes artistic work such as poetry, novels, musical compositions, paintings, films, textbooks, letters, newspapers, and dissertations.

Copyright under the Philippine Intellectual Property Code

Philippine copyright law gives authors of original literary and artistic works various economic and moral rights to profit from and be credited for their works. Ideally, copyright systems, especially in developing countries, are mechanisms for rewarding creativity, stimulating innovation, and helping cultural trade and industry (Commission on Intellectual Property Rights, 2002). Derivative works such as translations, abridgements, compilations, and other alterations on scholarly or artistic work are similarly protected. All copyrighted works are protected during the lifetime of the authors and up to 50 years after their death whereupon the work automatically moves to the public domain and becomes legally accessible for general access and use.

The creators' economic rights exclusively entitle them to carry out or authorize reproduction, dramatization, transformation, first public distribution by sale or other forms of transfer of ownership, rental, and public communication of their work. On

the other hand, creators' moral rights include the license to require attribution for their works, alter their works prior to publication, withhold publication, and object to derogatory modification of their works.

It is interesting to note that from the original provision requiring the registration of creative works for copyright protection three weeks after its first publication, Presidential Decree No. 49 changed it to conform to the Berne Convention on the protection of artistic and literary works. Since then, all original literary or artistic works produced by every citizen subject to Philippine copyright law is protected "from the moment of creation." Due to this shift in policy, the number of copyrighted works in the country significantly increased (J. Disini, personal interview, September 8, 2006).

Fair use and other limitations to copyright

Intellectual property systems serve public interest by securing the optimal provision of knowledge goods while also protecting the exclusive rights of creators over their work for a set period of time. Ruth Okediji, one of the leading authorities in the United States on International Intellectual Property Law, states that access to such goods is important to facilitate the dissemination of knowledge which, in turn, generates social welfare gains and benefits downstream creators who rely on the availability of a robust public domain from which to draw resources for productive ends (Okediji, 2006).

The Philippine IP Code or Republic Act No. 8293 reflects these developmental goals. It recognizes copyright's social function in terms of encouraging "the diffusion of knowledge and information for the promotion of national development and progress and the common good" (1997). Balancing the protection it provides for rights holders with its stated goal of promoting the diffusion of knowledge and information, the Philippine copyright law contains provisions under Sections 184 and 185 for limiting

copyright in particular situations. These provisions enumerate uses of copyrighted work that do not infringe on copyright such as recording, reproducing, or communicating protected works as parts of news reports or for educational or research purposes (RA 8293, 1997).

Section 185 goes on to enumerate four important factors that must be considered in determining whether certain uses of copyrighted material constitute “fair use” and are not classified as copyright infringement. These four factors are:

- (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. (RA 8293, 1997)

New media technology, copyright, and piracy

New media technologies conveniently, cheaply, and efficiently reproduce digital copies of various IP goods such as music, books, videos, movies, and software. In many cases, mere replication of these materials or optical media² may be technically classified as infringement of an IP owner’s copyright. As far as IP industries are concerned, technological advances have made the distribution of various forms of optical media easier and more efficient, thus threatening their business.

Industries are quick to compute for “losses” brought about by unauthorized copying and distribution of IP materials. On a national scale, estimates on the “losses” brought about by piracy have been estimated to amount to billions of pesos. Book piracy is being blamed for around P2 billion losses yearly (Singson, 2004; Bollag, 2004). Decrease in music and video sales has been blamed

on piracy (The IP Coalition Report I: Copyright in the Philippines, 2004). The International Data Corporation, for example, estimated losses from software piracy in 2005 to be around P3.9 billion pesos or US\$76 million. Piracy rates remained at 71 percent (Oliva, 2006).

To respond to these “losses”, in 2005, the Business Software Alliance (BSA) formed the Pilipinas Anti-Piracy Team (PAPT)³ which has been working with the Intellectual Property Office of the Philippines (IPOPHIL) to train lawyers and judges on handling intellectual property rights (IPR) cases. IPOPHIL has even made plans of creating a special court handling only IPR cases (Villafana, 2006). As of 2006, there have been more than 50 cases on intellectual property that have resulted in convictions (Domingo, 2006).

Rationales behind anti-piracy campaigns emphasize how the strict and broader copyright enforcement protect creators’ interests and promote innovation, investment, industry growth, and employment (The IP Coalition Report I: Copyright in the Philippines, 2004). The speech President Gloria Macapagal-Arroyo delivered to the officials of the Intellectual Property Office last February 20, 2006 sums up the commonly held notions about intellectual property protection:

...[W]e mustn’t lose sight of the fact that protection of IPR is first and foremost in the interest of the Filipino people.

Upholding IPR promotes diffusion of knowledge, develops local talent and creativity, and at the same time encourages more foreign investors to endow their strong qualities in the Philippine market.

It appears, however, that Filipinos have ambivalent perceptions and attitudes towards piracy. Studies have shown that since average Filipino consumers cannot afford original copies of various cultural goods, they would turn to the cheaper pirated

versions (Leones & Lorredo, 2005; Irinco & Martinez, 2002; Santos, 2003). At other times, poor distribution is a factor, forcing some to acquire pirated copies instead of the original material which is not available in the country (Leones & Lorredo, 2005).

While many Filipinos purchase pirated goods for their entertainment, many also turn to them for educational needs. It is interesting to note that textbooks on highly specialized courses such as medicine and engineering are reported to be the most pirated volumes. In provinces where textbooks are generally scarce, piracy has become the norm (Singson, 2004).

In a survey conducted among Internet users in 2005, 55% of respondents agreed that piracy harmed certain sectors of society, and 58% said that they would not recommend that other people buy pirated products. Respondents agreed that piracy was theft (75%), that it should be stopped (58%), and that it was an immoral practice as a whole (60%). Yet when asked if they wanted piracy to be prohibited, 47% gave a neutral response (Leones & Lorredo, 2005).

Moreover, belying their stated attitudes on the practice of piracy, 92% of the Internet users surveyed admitted to having purchased pirated products in the past. About three out of 10 claimed to have made copies of original material while 15% said that they re-copied pirated optical media in the past. These statistics show that respondents did not have one definite attitude towards piracy and that the practice is widespread among them (Leones & Lorredo, 2005).

What largely accounts for the ambivalence towards piracy is the undeniably more affordable price of pirated products. Based on the same survey of Filipino Internet users, 96% believed that fewer people would buy pirated products if their original counterparts became more affordable. The study's respondents and focus group discussants likewise agreed that piracy thrives because it gives people access to products the original or legitimate copies of which are too expensive for mass consumption.

There are a lot of benefits for average people who can't afford really expensive [material]. With the quality of life we have now, why would you put in that much money for your entertainment? You'll find a way to make it cheaper or more accessible to you. ("Claire", FGD, January 5, 2005, Leones & Lorredo, 2005)

Framework and Methodology

While the current copyright system does provide incentives for innovation, its limitations have become increasingly pronounced with the entry of the media technologies. In his doctoral dissertation, Trosow (2002) questions the underlying framework that informs intellectual property policies today. He then proposes a critical theoretical framework which can avoid limitations of liberal pluralist and orthodox instrumentalist theories of policy analysis.

Trosow states that information resources are not discrete assets of private firms but are societal resources whose creation, dissemination and use are social processes. As technology is able to expand the utility of information beyond its physical container, private firms' efforts in expanding the scope of intellectual property protection are now simply strategies to allow for further accumulation. These private firms clash with the very authors they claim to protect since the interests of authors/inventors are in open access within the public domain (Trosow, 2002).

It is within this kind of discourse that the authors conducted their secondary analysis of data gathered from their study on the file-sharing (FS) perceptions and practices of Filipino Internet users and their relevant social, political and economic environment. Findings gleaned from reviews of additional literature and from a key informant interview with a legal authority on the Internet and copyright were organized according to select concepts of Trosow's framework.

Critical Views on International Trends and the Current Philippine Copyright System

Public Domain, Innovation and Freedom of Expression

History and a vibrant public domain are viewed as important aspects of the creative process. Intellectual property should always be viewed less as a commodity and more of a social process, given that creativity and innovation generally build on pre-existing works and are influenced by social factors in the environment (Okediji, 2006; Trosow, 2002).

Writers and creators do not exist or create in a vacuum. Indeed, certain genres of works, styles of creativity, and modes of expression specifically and deliberately incorporate, reproduce, or transform pre-existing works. Modern examples include the practice of “sampling” in the music industry, narrative styles in literature and creative writing, programming software for interoperability, fan fiction and fan films, and blogging. In short, the innovative and creative process is in part backward-looking and in part forward-moving. (Okediji, 2006)

Creators of works draw upon their experiences and take inspiration from them. According to Jesus Disini, Jr., head of the UP College of Law Internet and Society Program, increased access to IP goods through means that may be classified as copyright infringement may even, at times, boost creativity.

I think we have a vibrant local music scene. We have bands influenced by kinds of music that I’ve never even heard of that you won’t hear on the radio. Why? Because they downloaded it from the Web. They’re exposed to it whereas before they were not...They get inspiration from things that they draw from [the Internet]. And a

lot of this is technically piracy. (J. Disini, personal interview, September 8, 2006)

Disini states that strict implementation of Philippine copyright law may at times even hinder creativity and innovation. For example, artists may experience difficulties should they, inspired by another work of art, desire to express their feelings about it through a cover, tribute, or an adaptation. The artists will have to first automatically assume the work is copyrighted before being able to express or publicly communicate their creative adaptation or reaction to the creation. Then, they will still have to determine who the rights holder is (a creator or a corporate entity) and get permission of the rights holder. Under certain circumstances, copyright can then impede both innovation and artists' rights to express themselves (J. Disini, personal interview, September 8, 2006).

Copyright: Interests of the Few Over the Many

As mentioned earlier, copyright laws, especially in developing countries, must balance between providing optimal access to information and protecting the owners' rights. But in determining how this balance can be achieved, it is also crucial to examine who mainly benefits from the kind of copyright and optical media laws enacted in the country.

Foreign Business Interest Over Local Benefit

The publishing, entertainment, and software industries in Europe and North America own and profit from most of the world's copyright. In 2005, 87.8% of the inventions patented and 64.4% trademarks registered in the Philippines were foreign-owned (IPO, 2005). Switching on the TV or the radio, looking at the volumes in the best-selling aisles in bookstores today, and comparing the number of foreign and local movies being shown at malls would

confirm the definite edge foreign copyrighted materials have over their local counterparts. Mass media music from the Northern American countries held a 60% market share in 1996, and much of the locally generated 35% was music imitative of or derived from the international Top 40 (Pasadilla & Lantin, n.d.). The preferences of Filipino file-sharers reflect this trend as they were found to download mostly foreign material, or both foreign and local material in equal amounts (Leones & Lorredo, 2005).

Developing nations, which have greater technological and knowledge needs considering the enormous “knowledge” gap between them and developed countries, end up becoming net importers of copyright goods. This places them at a significant disadvantage in the face of stronger copyright regimes (Commission on Intellectual Property Rights, 2002; Michalopolous, 2003; J. Disini, personal interview, September 8, 2006). Hence, the Philippine intellectual property and copyright system, while geared towards the protection of the rights of all owners regardless of nationality, ends up mostly protecting foreign business and interests.

Citizens of developing countries experience an undersupply of and limited access to cultural goods. With their limited material and technological resources, people from impoverished countries can ill-afford goods set by copyright owners and/or distributors at what seem to be less-than optimal prices (Okediji, 2006; Commission on Intellectual Property Rights, 2002). The monopoly of foreign industries on the pricing and accessibility of IP goods, together with other economic factors, drive Filipinos to look for cheaper alternatives to satisfy their needs for cultural and knowledge goods. The alternative comes in the form of pirated materials (Irinco & Martinez, 2002; Lagrimas & Buena, 2003; Leones & Lorredo, 2005).

Piracy and the Conflict Between Creators and Monopolistic Corporations

Intellectual property companies are quick to point out that piracy is directly accountable for losses in their sales. However, this assumption is problematic.

The film industry, for example, has been very active in spreading the message that buying pirated video/digital video discs (VCDs/DVDs) is theft – equating the purchase of these materials to essentially taking away profit from the producers and from those responsible for creating and marketing the film. However, the industry missed emphasizing that other factors aside from piracy also account for its decreased revenue. Examples of these are escalating film production costs, exorbitant taxes, and the entry of cable television (Pasadilla & Lantin, n.d.).

Within the Philippine music industry, record labels talk about losses and how Filipino musicians lament the royalties they are deprived of every time someone buys a pirated version of their album or downloads their music for free. However, the question as to whether these consumers would have bought legitimate versions of these products at current market prices without the cheaper pirated alternatives has not been answered.

Indeed, the industry would do well to look into its marketing and distribution strategies. Instead of lobbying for increased protection of their private rights, record labels should work towards ensuring efficient marketing and utilizing the varied options provided by technological advances today. One Filipino file-sharer who participated in a focus group discussion expressed the following view:

[D]apat i-adjust ang structure ng distribution saka ang pagkita ng mga music industry. ...[M]ag-host sila ng more tours, concerts, hindi ba mas malaki talaga ang [kita] nila doon? Pag-isipan nilang mabuti kung paano nila mama-maximize ang Internet... Nariyan ang Internet para makatulong din sa music industry.

[The structure of distribution and means for profit of the music industry should be adjusted. For example, instead of CD sales, they can market their materials on the Internet then promote more tours and concerts since they really get more from those activities...The Internet is there to help the music industry].(“Kim”, FGD, January 16, 2005; Leones & Lorredo, 2005)

That artists’ royalties are minuscule compared to the record companies’ profits and that artists earn more from gigs, concerts, and advertisement endorsements than record sales is a reality that is glossed over in discussing the issue of piracy. Interviewed for an article in 2002, Jal Taguibao of the band Sugarfree opposed what record labels claim about musicians being the ones who suffer most from piracy, saying that “the war versus piracy is the labels’ fight, not the artists’.”

...bakit ganoon kamahal yun CD na binebenta ng major labels [...why are the CDs sold by major labels that expensive]? And...supposedly the major labels already have the machinery and the structure to produce and distribute and reproduce [at a cheaper rate]. And if you were to ask me how much the artist is getting from it, it’s not even close to seven percent. It’s basically between four to six [percent], unless you’re Rivermaya or Eraserheads or Martin Nievera [who] can demand higher royalties. So ang talo talaga, may piracy man o wala, yung talent. [So it’s really the talent who loses regardless of piracy.] And that’s the injustice. (Mendoza, 2002)

Marc Abaya, vocalist of Sandwich at the time of the interview, expressed appreciation for the promotional benefits provided by piracy. He shared that he received around P10,000 in royalties from the sales of his band’s last album. According to him, he could have earned as much in two months playing gigs (Mendoza, 2002).

Distributors of copyright, as well as artists and creators, could do well to adapt to the new technology. Multinational companies of copyrighted materials could consider lowering their prices through making economy versions of their goods, or subsidizing the production of these materials within the country and limiting their export (Leones & Lorredo, 2005). Consumers have exhibited a demand for the copyrighted knowledge and cultural goods, as well as a preference for cheaper versions despite some slight product quality differences. It is the producers' and distributors' role to satisfy these needs which are not addressed by strengthening copyright and further limiting access.

Access to Information, Cultural Goods, and Public Interest

As mentioned earlier, most media content in developing countries originates from IP-exporting countries. Hence, these countries – having more resources and technical know-how on copyright protection – are those that are most aggressive in implementing restriction policies or standards.

Developing countries have been pressured to adopt stricter standards which, as the Trade-Related Aspects of Intellectual Property Rights (TRIPS) agreement's special and differential provisions premise, put them at the disadvantage. While “special and differential” treatment provisions are present in international treaties like the TRIPS agreement, bilateral trade agreements between developed and developing nations at times do not follow these guidelines – leading to “TRIPS-plus” measures or standards beyond TRIPS provisions (Michalopolous, 2003).

Meanwhile, Bello (2003) also criticizes current TRIPS standards. He states that TRIPS would make industrialization quite difficult, if not downright impossible. He notes the irony in the fact that the very leaders in industrial advancement – US, Germany, Japan, and South Korea – owed their success to relatively easy access to and modification of cutting-edge technology. But what

was technological diffusion from the point of view of late industrializers is now “piracy” from that of the industrial leader.

In the Philippines, it is the pressure from IP-exporting countries that are highly influential in the World Trade Organizations (WTO) that primarily drives the Philippine government to protect intellectual property rights (E. De Dios, personal interview, 2005). However, what most multinational companies – and even legislators – may tend to overlook is that the endgoal of copyright is the enrichment of the public domain and the promotion of public interest.

Indeed, the benefits that the public must derive from works must outweigh any private personal benefit that creators gather from their copyright. In other words, copyright protection is only permitted to secure a particular end (promoting the progress of science and useful arts), is only applicable to certain categories (writings and discoveries of authors and inventors) and is to last only for a limited time (Trosow, 2002). Ultimately, information resources should be freely available to those who need it, openly accessible to all and should be distributed through institutions which are accountable to the public (Masterman, 1985).

The Philippines may stand to benefit from a copyright system that views information dissemination and the protection of educational and non-commercial use over protection of mostly private foreign business interests. While the Intellectual Property Code may have sections on the limitations of copyright and declares its goal towards public welfare, it may be observed that RA 8293 is decidedly author-centered, addressing mostly how authors may exploit their works for profit. Further, interpretations of the RA 8293 tend to assume that intellectual property rights are inherent moral rights when in fact these are merely artificial and arbitrary rights dictated by a particular copyright system (J. Disini, personal interview, September 8, 2006).

In the face of all these challenges, there are steps which developing countries can take. Developing countries can: 1) ensure that they maintain and, where appropriate, adopt exemptions to

copyright for education, research and similar non-commercial uses in their national legislation; and 2) prevent the adoption of any international standards or rules that limit their ability to do so (Michalopolous, 2003). The prospect of copyright systems oriented towards national development appears to be promising, as there has been evidence that relatively relaxed levels of copyright enforcement in developing nations increased the dissemination of knowledge (Commission on Intellectual Property Rights, 2002).

Conclusion: What Can Be Done

To a certain extent, the current Philippine copyright system provides some incentives and rewards for authors to create and innovate. As a stable legal framework, it also supports various local industries that help distribute authors' works. However, the implementation of the current Philippine copyright system tends to protect mostly foreign international companies' private rights. It also pays little heed to the national intellectual property requirements and Filipinos' limited economic resources. Moreover, access to information and other cultural goods that new media technology provides remain limited due to poor distribution, as well as other financial and technological constraints.

In light of all these, there is a need for national discussions that would optimistically lead to a developmental copyright system more attuned to the average Filipino media consumer's needs and resources. Ideally, these discussions should be held without the threat of trade sanctions from institutions mostly protecting the interests of developed countries.

Public offices such as IPOPHIL can facilitate the discussions and redirect their funds towards other more pressing concerns addressing the real cultural and educational needs of Filipinos instead of merely focusing on IPR enforcement. De Quiros (2006), for example, posits that the money allotted for the Optical Media Board should be used to take advantage of

technology to promote government educational programs which were junked in favor of more commercial programs.

IPOPIL could also conduct more development-oriented studies and work together with the Department of Education on programs that address the educational and research requirements of Filipino students, especially those in remote areas. In relation to this, they could dialogue with local and international publishers to work for more efficient distribution and more affordable pricing of textbooks that could be subsidized and limited to the local market.

Another option for the relevant public offices, as well as concerned media practitioners and consumers, would be to discuss and generate awareness on initiatives such as the Creative Commons and on-line libraries like the Google Book Project. Creative Commons is a Web-based project that promotes alternative forms of limited copyright – reserving various combinations of only some rights – based on the author’s preference. This allows consumers easier and increased access to works while still protecting authors’ intellectual property rights (“Some rights reserved”, n.d.).

The Google Book Project, on the other hand, through uploading books and other references online, allows Internet users to search through its collection providing limited access to the materials on the basis of fair use. This project is being undertaken in partnership with some publishing companies and academic institutions such as Harvard University, the University of Michigan, the New York Public Library, Oxford University, and Stanford University. Current debates on the project revolve around balancing social benefits with commercial benefits as some publishers continue to protest Google efforts (Jesdanun, 2005).

Private and non-mandatory enforcement of IP rights should be maintained while wider provisions for fair use should be promoted. More limitations for copyright owners should be enforced while increased recognition and protection for personal,

research, and non-commercial use of intellectual property should be encouraged.

There must be a shift in focus in the discussion of copyright toward the ideas of fair use, enrichment of the public domain, and the social process of innovation. Artists, inventors, and authors must start utilizing the many avenues new media technology offer in providing cheaper and easier distribution of their works as well as fresh and creative means of promotion. Instead of hindering the progress current media technologies have achieved in efficiently reproducing and distributing IP goods, concerned industries must learn to adapt, adopt, and encourage these developments in the interest of growth, public welfare, and progress.

Notes

- ¹ WIPO is a specialized agency of the United Nations that was formed in 1974 to administer international treaties on intellectual property and generally help facilitate the development of measures for international IP protection. Together with WIPO treaties, the World Trade Organization's (WTO) Agreement on Trade-Related Aspects of Intellectual Property Rights guide today's international intellectual property regimes.
- ² Optical Media, as defined in the Optical Media Act, is a storage medium or device in which information, including sounds and/or images, or software code, has been stored, either by mastering and/or replication, which may be accessed and read using a lens scanning mechanism employing a high intensity light source such as a laser or any such other means as may be developed in the future. (RA 9239, 2004).
- ³ The PAPT is made up of the Optical Media Board, National Bureau of Investigation, Philippine National Police and the Intellectual Property Coalition.

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