

Today's Challenge: Protecting Copyright in the Internet

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I. INTRODUCTION

In his book, *Future Shock*, Alvin Toffler described man's long history of existence in terms of his "800 lifetimes."¹ He said that, "if the last 50,000

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years of man's existence were divided into lifetimes of approximately [62] years each, there [would] have been about 800 such lifetimes. Of these 800, fully 650 were spent in caves.”²

He continued:

Only during the last [70] lifetimes has it been possible to communicate effectively from one lifetime to another — as writing made it possible to do. Only during the last six lifetimes did masses of men ever see a printed word. Only during the last four has it been possible to measure time with any precision. Only in the last two has anyone anywhere used an electric motor. And the overwhelming majority of all the material goods we use in daily life today have been developed within the present, the 800th, lifetime.³

Toffler made the above observation in the 70s, or roughly 43 years ago. Yet, he would be so amazed at how man spends his daily routine today, or, how different his 800th lifetime from today's 801st. Most of the amazing things man sees and enjoys today may have happened or been invented only during the last 15 years.

Today, man reads his news of the day through an internet news website, like the Wall Street Journal portal, or via a million other similar websites providing various news content of every language. In addition, he checks on his Twitter for “hour-on-the-hour” developments “tweeted” by fellow “tweeters.”

He attends to his social life more easily, if not more frequently, by being able to touch base with friends and relatives through Facebook or with business associates through LinkedIn, or other profession-oriented social networks.

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1. ALVIN TOFFLER, *FUTURE SHOCK* 16 (1971 ed.).
2. *Id.*
3. *Id.*

He can reach and talk to any person, for business or leisure, anywhere in the world, face-to-face and in real time via Facetime, Google+, or Viber, or other state-of-the-art video-conferencing facilities.

He can “surf” the World Wide Web, find and access information on almost any kind of subject through “search engines,” like Google or Yahoo!, and find Wikipedia, a *de facto* online encyclopedia.

He does not need to go to the post office to send letters, notes, or pictures as every computer terminal with an Internet connection and an email client can send and receive the same within seconds by merely pressing a button. The printed word is not viewed on paper, but on a screen monitor.

He does not need to go to a brick and mortar store to buy or rent movie digital versatile discs (DVDs) or music compact discs (CDs) for his entertainment. He can simply “download” or “stream” them from the Internet and immediately enjoy them.

This facility of communication brought about by new technologies has made possible the dissemination of knowledge and information to the greatest number of people at paces heretofore unheard of. In a symbiotic fashion, the unprecedented availability of information to masses has fed the explosive growth of knowledge.

All these are made possible because of Internet technology.

II. WHAT IS THE INTERNET, ANYWAY?

Technically, “[t]he Internet is an international network of interconnected computers.”⁴ By the way it operates, the Internet is “a unique and wholly new medium of worldwide human communication.”⁵

The Internet provides a “wide variety of communication and information retrieval methods,”⁶ like electronic mail (“email”), automatic mailing list services (“mail exploders,” sometimes referred to as “listservs”), “newsgroups,” “chat rooms,” and the “World Wide Web.”

These methods are by no means exclusive, because they continue to evolve and improve. They can “transmit text ... sound, pictures, and moving

4. Robert E. Kahn & Vinton G. Cerf, What is The Internet (And What Makes It Work) (An Unpublished Article Prepared for the Corporation of National Research Initiatives), available at http://www.cnri.reston.va.us/what_is_internet.html (last accessed Feb. 28, 2013). See also *Reno v. American Civil Liberties Union, et al.*, 521 U.S. 844, 844 (1997).

5. *Reno*, 521 U.S. at 850.

6. *Id.* at 851.

video images.”⁷ Digital technology allows the conversion of this content into a digital form through “digitization” and enables their transmission over the Internet as “digital content.”⁸

In *Reno v. American Civil Liberties Union, et al.*,⁹ Justice John Paul S. Stevens spoke about the overall effect of Internet technology. He declared that “[t]aken together, these tools constitute a unique medium — known to its users as ‘cyberspace’ — located in no particular geographical location but available to anyone, anywhere in the world, with access to the Internet.”¹⁰

Any person or entity may create websites in the World Wide Web and upload data as they see fit, as “government agencies, educational institutions, commercial entities, advocacy groups, and individuals”¹¹ do. For them, the Internet “constitutes a vast platform from which to address and hear from a worldwide audience of millions of readers, viewers, researchers, and buyers.”¹²

These new technologies have impacted on the way people live and threatened to redefine the rules by which people relate with one another.

III. WHAT ARE COPYRIGHT AND RELATED (OR NEIGHBORING) RIGHTS AND WHY ARE THEY IMPORTANT?

Copyright pertains to the bundle of rights of authors or creators over their literary and artistic works, such as novels, poems and plays, films, musical works, drawings, paintings, photographs and sculptures, and architectural designs.¹³ Upon the other hand, “related or neighboring rights” are rights granted to or recognized in favor of performing artists with respect to their performances, producers of phonograms with respect to their recordings, and broadcasters with respect to their radio and television programs¹⁴ of some

7. *Id.*

8. See World Intellectual Property Organization (WIPO), The Impact of the Internet on Intellectual Property Law, available at http://www.wipo.int/copyright/en/ecommerce/ip_survey/chap3.html (last accessed Feb. 28, 2013).

9. *Reno v. American Civil Liberties Union, et al.*, 521 U.S. 844 (1997).

10. *Id.* at 851.

11. *Id.* at 853.

12. *Id.*

13. WIPO, What is Intellectual Property?, available at <http://www.wipo.int/about-ip/en/> (last accessed Feb. 28, 2013) [hereinafter WIPO, What is IP?].

14. *Id.*

copyrighted work.¹⁵ Because of this conceptual proximity, these rights are called “related or neighbouring rights.”¹⁶

The World Intellectual Property Organization (WIPO) considers copyright and related rights as one of two categories that make up Intellectual Property (IP). The other category is referred to as industrial property, which covers patents (inventions, utility models, and industrial designs) and trademarks (symbols, names, images, and others used in commerce.) IPs, as a whole, are described as “creations of the mind.”¹⁷

IP, of which copyright and related rights are a major component, “is a ‘power tool’ for economic development and wealth creation that is not yet being used to optimal effect in all countries, particularly in the developing world.”¹⁸ This “IP-for-national-development” theory is etched as a basic policy in the 1987 Philippine Constitution and further amplified in the IP Code.¹⁹

Copyright and related rights are “legal concepts and instruments.”²⁰ Together with patents, designs, and trademarks, copyright and related rights are the “major means to establish ownership of inventions and creative ideas in their various forms.”²¹ As a consequence,

[t]his provides a legal foundation to generate tangible benefits from innovation for companies, workers[,] and consumers. Without this framework[,] the creators of [IP] would tend to lose the economic fruits of their labour, thereby reducing the incentive to undertake the investments necessary to develop IP in the first place. In addition, without IP protection, the inventor or creator who had invested time and money in

15. *Id.*

16. *See generally* United Nations Educational, Scientific, and Cultural Organization (UNESCO), Basic Notions About Copyright and Neighbouring Rights, available at http://www.unesco.org/fileadmin/MULTIMEDIA/HQ/CLT/creativity/pdf/copyright/basic_notions_en.pdf (last accessed Feb. 28, 2013).

17. WIPO, What is IP?, *supra* note 13.

18. KAMIL IDRIS, INTELLECTUAL PROPERTY: A POWER TOOL FOR ECONOMIC GROWTH 1 (2d ed. 2003).

19. An Act Prescribing the Intellectual Property Code and Establishing the Intellectual Property Office, Providing for Its Powers and Functions, and for Other Purposes [INTELLECTUAL PROPERTY CODE], Republic Act No. 8293 (1997).

20. WIPO, About Copyright, available at <http://www.wipo.int/copyright/en/general/> (last accessed Feb. 28, 2013).

21. Andre van der Merwe, How Can Intellectual Property Affect the Economy of a Country?, available at http://www.dmkisch.com/sites/default/files/published_works/INTELLECUAL%20PROPERTY%20AND%20HOW%20IT%20CAN%20AFFECT%20THE%20ECONOMY%20OF%20A%20COUNTRY.pdf (last accessed Feb. 28, 2013).

developing a new product or service would be at a disadvantage to the firm that could simply copy and market that product without having to make a major investment, or recoup any investment costs, or to pay higher salaries required by those with the necessary creative talents and skills.²²

According to the WIPO, “[t]he purpose of copyright and related rights is two-fold: to encourage a dynamic creative culture, while returning value to creators so that they can lead a dignified economic existence, *and to provide widespread, affordable access to content for the public.*”²³

IV. BEGINNINGS OF COPYRIGHT PROTECTION: A MEANS TO AN END

The invention of the printing press, then a new form of copying equipment, gave rise to what Justice Stevens of the United States (U.S.) Supreme Court described as the “original need” to protect copyright.²⁴ When enterprising men who had access to the facility of a printing press started copying books without the permission of their authors being obtained, it became clear that some law was needed to address a brewing conflict between the authors and the rest of society who, understandably, wanted to enjoy, use, or partake of these works.

Should the author’s ownership of his works be protected over the general public interest to access them? Or, should the public interest prevail over the private right of the authors?

In 1841, Thomas Babington MacCaulay, in a speech delivered on the floor of the House of Commons, provided an answer to this dilemma:

It is good that authors should be remunerated; and the least exceptionable way of remunerating them is by a monopoly. Yet monopoly is an evil. For the sake of the good we must submit to the evil; but the evil ought not to last a day longer than is necessary for the purpose of securing the good.²⁵

This formulation of the rational basis for copyright protection which Fr. Ranhilio C. Aquino happens to describe as an “odious aspect of copyright,”²⁶ has found support over the years and across jurisdictions.

22. *Id.*

23. WIPO, Copyright and Related Rights, *available at* <http://www.wipo.int/copyright/en> (last accessed Feb. 28, 2013) (emphasis supplied).

24. Sony Corporation of America, et al. v. Universal City Studios, Inc., 464 U.S. 417, 430 (1984).

25. RANHILIO AQUINO, INTELLECTUAL PROPERTY LAW: COMMENTS AND ANNOTATIONS 14 (2003 ed.) (citing Thomas Babington Macaulay, Speech Delivered in the House of Commons, (Feb. 5, 1841) (transcript *available at* <http://homepages.law.asu.edu/~dkarjala/opposingcopyrightextension/commentary/MacaulaySpeeches.html>) (last accessed Feb. 28, 2013)).

26. AQUINO, *supra* note 25, at 14.

Referring to that “monopoly” granted to authors of copyrightable works to enjoy the fruits of their labor, the U.S. Supreme Court in the case of *Sony Corporation of America, et al. v. Universal City Studios, Inc.*²⁷ declared that this monopoly is “neither unlimited nor primarily designed to provide a special private benefit.”²⁸ It is understood to be a means to an end.

The U.S. Supreme Court further explained:

Rather, the limited grant is a means by which an important public purpose may be achieved. It is intended to motivate the creative activity of authors and inventors by the provision of a special reward, and to allow the public access to the products of their genius after the limited period of exclusive control has expired.²⁹

In relation to this, the Court said in *Sony* citing *United States v. Paramount Pictures, Inc., et al.*³⁰ that

[t]he copyright law, like the patent statutes, makes reward to the owner a secondary consideration. In *Fox Film Corp. v. Doyal*, Chief Justice Hughes spoke as follows respecting the copyright monopoly granted by Congress [—] ‘[t]he sole interest of the United States and the primary object in conferring the monopoly lie in the general benefits derived by the public from the labors of authors.’ It is said that reward to the author or artist serves to induce release to the public of the products of his creative genius.³¹

In addition, the U.S. Supreme Court cited *Twentieth Century Music Corporation et al. v. Aiken*,³² thus

[t]he limited scope of the copyright holder’s statutory monopoly, like the limited copyright duration required by the Constitution, reflects a balance of competing claims upon the public interest: Creative work is to be encouraged and rewarded, but private motivation must ultimately serve the cause of promoting broad public availability of literature, music, and the other arts. The immediate effect of our copyright law is to secure a fair return for an ‘author’s’ creative labor. *But the ultimate aim is, by this incentive, to stimulate artistic creativity for the general public good.* ‘The sole interest of the United States and the primary object in conferring the monopoly,’ this Court has said, ‘lie in the general benefits derived by the public from the labors of authors.’ When technological change has rendered its literal terms

27. *Sony Corporation of America, et al. v. Universal City Studios, Inc.*, 464 U.S. 417 (1984).

28. *Id.* at 429.

29. *Id.*

30. *Sony*, 464 U.S. at 429 (citing *United States v. Paramount Pictures, Inc., et al.*, 334 U.S. 131 (1948)).

31. *Id.* at 158.

32. *Twentieth Century Music Corporation, et al. v. Aiken*, 422 U.S. 151 (1975).

ambiguous, the Copyright Act must be construed in light of this basic purpose.³³

V. COPYRIGHT LIMITATIONS

The limitations on copyright and related rights repeatedly mentioned are those that lock in the period during which their enjoyment and exploitation are exclusively reserved to their authors or creators. Generally, this period lasts the lifetime of the author plus 50 years after his death.³⁴ This rule may vary, however. Some countries, like the U.S., provide protection for the duration of the lifetime of the author, plus 70 years after his death.³⁵

At the same time, notwithstanding their exclusive character, certain uses and enjoyment of works subject of copyright and related rights are allowed to other persons by way of exceptions. Some limited use of the works without need to secure the consent of the author are allowed in cases of use “compatible with fair practice”³⁶ or “where reproduction would unreasonably conflict with a normal exploitation of the work or would otherwise unreasonably prejudice the legitimate interests of the author.”³⁷

Similar kinds of restrictions, in the form of limitations of the period of exclusivity and the nature of use of the property, apply to related rights.³⁸

VI. COPYRIGHT: BALANCING PRIVATE RIGHT VERSUS PUBLIC INTEREST

It is thus clear that the grant of a limited monopoly to authors is a means to achieve a public good. To encourage the creation of works that will eventually redound to the benefit of society, authors are granted exclusive rights over their works to enjoy and profit from them. After the expiration of the monopoly, the public freely gains access to the works.

This paradigm lies at the core of copyright law. The monopoly, packaged as a bundle of exclusive rights granted to authors to enjoy and profit from their works is merely a “secondary consideration.” It is designed to move authors to harness their talents to create. The “primary object” is

33. *Id.* at 156 (emphasis supplied).

34. See Berne Convention for the Protection of Literary and Artistic Works art. 7, ¶ 1, *opened for signature* July 14, 1967, 828 U.N.T.S. 221 [hereinafter Berne Convention] & INTELLECTUAL PROPERTY CODE, § 213.1.

35. 17 U.S.C.A. § 302 (West, Westlaw through P.L. 112- 207).

36. Berne Convention, *supra* note 34, art. 10, ¶ 1.

37. INTELLECTUAL PROPERTY CODE, § 187.2 (e).

38. See International Convention for the Protection of Performers, Producers of Phonograms, and Broadcasting Organizations art. 15, ¶ 2, *opened for signature* Oct. 26, 1961, 496 U.N.T.S. 43.

that, after the lapse of said monopoly, the works become part of the public domain freely accessible by the public.

To effectively “motivate the creative activity of authors,” the “special reward” must be real and really protected. Else, the avowed objective of gaining public access to the authors’ products of intellect after the lapse of the monopoly will not happen.³⁹

VII. INTERNET: BANE OR BOON TO COPYRIGHT AND RELATED RIGHTS

Much of the digital content that is digitized and transmitted over the Internet are works that are traditionally the subject of protection of copyright and related rights.

Therefore, there is serious concern if and when these works, converted into digital form, are circulated and made available in the Internet without the authorization of their authors or creators. As will be discussed below, on the Internet, the latter may easily lose effective control over the use and enjoyment of their properties.

The Internet has been described as “the world’s biggest copy machine.”⁴⁰ As WIPO explains: “On the Internet, ... one can make an unlimited number of copies, virtually instantaneously, without perceptible degradation in quality.”⁴¹ Worse, these copies “can be transmitted to anywhere in the world in a matter of minutes.”⁴²

Earlier technologies, like the copying machine, the video recorder, and the tape recorder, also allowed the copying of protected works of authors, performers, and sound producers. But, these old technologies “allow[ed] mechanical copying by individual consumers[;] they [did] so in limited quantities, requiring considerable time, and resulting in copies of lesser quality.”⁴³

From one point of view, the new technologies empower the masses to acquire easy and untrammled access to copyrighted digital content in the Internet. This looks like the ultimate fulfillment of the objective of Copyright Law to make available to the public the works of authors and other creators. However, while the same works are within the exclusive rights of their authors and creators, any unauthorized access to them, made

39. *Sony*, 464 U.S. at 429.

40. WIPO, *The Impact of the Internet on Intellectual Property Law*, available at http://www.wipo.int/copyright/en/ecommerce/ip_survey/chap3.html (last accessed Feb. 28, 2013) [hereinafter WIPO, *Impact of Internet*].

41. *Id.*

42. *Id.*

43. *Id.*

so easily possible by the new technologies, would be infringement of the rights of the authors and creators.

As the Internet is just another “medium of worldwide human communication,”⁴⁴ there is no question that copyright and related rights apply equally in the online environment, as well as in the real world. But the real question is not whether the law provides legal protection in the Internet. While existing copyright law does apply to digital works just as they do to traditional works, in the digital environment, it has become more difficult for copyright owners to enforce their copyright and to protect their works.

Lawrence Lessig has described the Internet, thus “[f]or the holder of the copyright, cyberspace appears to be the worst of both worlds — a place where the ability to copy could not be better, and where the protection of the law could not be worse.”⁴⁵

VIII. HOW SERIOUS IS THE PROBLEM OF COPYRIGHT INFRINGEMENT ON THE INTERNET?

In its latest submission⁴⁶ to the United States Trade Representative in connection with the latter’s annual Special 301 Review,⁴⁷ the International Intellectual Property Alliance (IIPA) cited a January 2011 study by Envisional which

concluded that an astonishing 23.76% of all worldwide Internet traffic is copyright infringing, broken down by the following technologies: 11.4%

44. *Reno*, 521 U.S. at 850.

45. An Examination of Next-Generation Secure Computing Base and its Impact on Access and Control Rights (An Unpublished Final Thesis Submitted to Professor Olav Torvund on Aug. 15, 2003) 6, available at <https://duo-prod01.uio.no/dspace/xmlui/bitstream/handle/10852/65141/FinalxThesis.pdf?sequence=2> (last accessed Feb. 28, 2013) (citing LAWRENCE LESSIG, *CODE AND OTHER LAWS OF CYBERSPACE* 125 (1999 ed.)).

46. International Intellectual Property Alliance (IIPA), IIPA Written Submission Regarding 2012 Special 301 Review: Identification of Countries under Section 182 of the Trade Act of 1974: Request for Public Comment and Announcement of Public Hearing Request to Testify at 2012 Special 301 Hearing (76 Fed. Reg. 81555, Dec. 28, 2011), available at <http://www.iipa.com/pdf/2012SPEC301COVERLETTER.pdf> (last accessed Feb. 28, 2013).

47. The Special 301 provisions of the US Trade Act of 1974 require the United States Trade Representative (USTR) “to identify foreign countries that deny adequate and effective protection of intellectual property rights or fair and equitable market access for U.S. Businesses.” Once the foreign countries are identified, the USTR classifies and lists them into “Priority Foreign Country,” “Priority Watch List,” and “Watch List,” among other classifications. 19 U.S.C. § 2411, as amended (West, Westlaw through P.L. 112- 207).

illegal BitTorrent downloading; 5.1% illegal downloading from infringing distribution hubs; 1.4% was illegal video streaming; and 5.8% was other P2P file-sharing (eDonkey, gnutella) or Internet protocols, such as Usenet, that are used for file sharing.⁴⁸

It also cited each copyright industry sector's "own unique experience with online piracy phenomena most harmful to them,"⁴⁹ as follows:

- (a) The motion picture industry's windows for distribution (including theatrical, on-demand, Pay TV, home video, and legitimate online services) have been decimated by the availability of Internet downloads or streaming of their films[;]
- (b) Online piracy is by far the greatest priority issues for the music industry, which faces a global Internet piracy problem estimated at 95%. ... Mobile piracy (e.g., through the use of 'apps' to illegally download content onto a mobile device) is also becoming more prominent, especially in countries with significant mobile penetration and mobile broadband (WAP, 3G, Wifi)[;]
- (c) Online piracy of entertainment software continues to be overwhelmingly international[;]
- (d) Book and journal publishers are plagued by sites that provide and deliver unauthorized digital copies of medical and scientific journal articles on an illegal subscription basis. With the rapid adoption of electronic reading devices (e-readers) and tablets, online piracy affecting trade books (fiction and non-fiction) and academic text books has increased significantly[;]
- (e) Counterfeit business software products are prevalent on certain auction and e-commerce sites, as well as on well-constructed sites and services that fool consumers, selling well-packaged but poor quality counterfeit copies of language-learning and other software[; and]
- (f) Internet cafes continue to provide opportunities, particularly in developing countries, for getting access to infringing music, motion pictures[,] and videogames.⁵⁰

In the Philippines, the IIPA declared that Internet piracy remains an "emerging issue in 2011,"⁵¹ saying that

48. IIPA, *supra* note 46, at 4.

49. *Id.* at 5.

50. *Id.*

51. IIPA, The Philippines: IIPA 2012 Special 301 Report on Copyright Protection and Enforcement (A Special Report on Piracy and Copyright Protection in the Philippines) 227, available at <http://www.iipa.com/rbc/2012/2012SPEC301PHILIPPINES.PDF> (last accessed Feb. 28, 2013) [hereinafter IIPA Philippine Report].

[i]nternet piracy remains an emerging issue in 2011, with Internet penetration nearing [30] million people, and broadband penetration topping six million people by mid-2011 according to industry statistics (although higher speed connections remain mostly cost-prohibitive). Most of the Internet piracy experienced in the Philippines is over peer-to-peer (P2P) filesharing services, through the use of deep linking sites, and the use of one-click hosting sites (sometimes referred to as cyberlockers) whereby those engaged in piracy on those sites sell passwords to their stored infringing materials. The Motion Picture Association of America (MPAA) notes that Peer Media Technologies reported that during 2011, users initiated over 12 million downloads/uploads of unauthorized copies of major U.S. movie titles via certain P2P protocols in the Philippines.⁵²

Taking note of the fact that the mobile penetration in the Philippines exceeded 90 million in 2011, out of a total population of 94 million, it reported that “there are increasing reports of infringing wireless application providers (WAP) which provide pirate content directly through wireless communications onto mobile phones/devices”⁵³ giving rise to “mobile device piracy.”⁵⁴ Truth to tell, with the emerging 4G and LTE technologies fast becoming available to the public, the unauthorized downloads of movies, music, and other copyrighted digital content via mobile devices (i.e., cellular phones and tablets) may be the next biggest copyright-related nightmare.

Significantly, the IIPA tagged the passage of the amendments to the copyright provisions of the IP Code as a “top priority in 2012.”⁵⁵ Yet, there are far more powerful reasons why the country must afford protection to copyright and related rights, among other intellectual property rights (IPRs).

The Philippines, at least under former President Gloria Macapagal-Arroyo, fully recognizes that “protection of IPR is first and foremost in the interest of the Filipino people.”⁵⁶ President Arroyo said,

[W]hile we appreciate the U.S. government’s recognition of our efforts to protect [IPRs], we must [not] lose sight of the fact that protection of IPR is first and foremost in the interest of the Filipino people. The protection and promotion of IPR means giving more impetus for Filipino creativity[.] Fighting piracy is fighting poverty because it enables Filipino excellence

52. *Id.*

53. *Id.* at 225.

54. *Id.* at 223.

55. *Id.* at 222.

56. Gloria Macapagal-Arroyo, Former President of the Philippines, Remarks at the Thanksgiving Lunch with the Officials of the Intellectual Property Office (IPO) at the Heroes Hall in Malacañang Palace (Feb. 20, 2006) (transcript available at http://www.papt.org.ph/news.aspx?id=2&news_id=25&paging=6 (last accessed Feb. 28, 2013)).

and enterprise to rise in the global arena, expanding opportunities and jobs along the way. 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.⁵⁷

IX. WHAT ARE THE WIPO INTERNET TREATIES?

The term “WIPO Internet Treaties” is used to refer to the WIPO Copyright Treaty (WCT)⁵⁸ and the WIPO Performances and Phonograms Treaty (WPPT),⁵⁹ which were drafted in 1996 “to address issues emerging out of the digital environment.”⁶⁰ Stated differently, the very objective of WCT and WPPT is to provide protection to copyrighted digital properties in the Internet.

These treaties came into force in the Philippines on 4 October 2002.⁶¹ As a signatory to these treaties, the Philippines assumed the obligation to ensure that copyright and related rights over digital works are equally protected in the Internet.⁶²

A. Technological Protection Measures

One such obligation is found in Article 11⁶³ of the WCT and Article 18⁶⁴ of the WPPT. While the WCT speaks about “rights of authors” and the

57. *Id.*

58. WIPO Copyright Treaty (WCT), *entered into force* Mar. 6, 2002, 2186 U.N.T.S. 121.

59. WIPO Performances and Phonograms Treaty (WPPT), *entered into force* May 20, 2002, 2186 U.N.T.S. 203.

60. Centre for Innovation Law and Policy, Digital Copyright Reform in Canada: The WIPO Treaties, *available at* <http://www.innovationlaw.org/archives/projects/dcr/reform/wipo.htm> (last accessed Feb. 28, 2013).

61. *See* WIPO, Contracting Parties, *available at* http://www.wipo.int/treaties/en/ShowResults.jsp?country_id=ALL&start_year=ANY&end_year=ANY&search_what=C&treaty_id=16&treaty_id=20 (last accessed Feb. 28, 2013).

62. WCT, *supra* note 58, pmbl. & WPPT, *supra* note 59, pmbl.

63. Article 11 of WCT provides:

Contracting Parties shall provide adequate legal protection and effective legal remedies against the circumvention of effective technological measures that are used by authors in connection with the exercise of their rights under this Treaty or the Berne Convention and that restrict acts, in respect of their works, which are not authorized by the authors concerned or permitted by law.

WCT, *supra* note 58, art. 11.

64. Article 18 of the WPPT provides:

WPPT about those of performers or producers of phonograms, both treaties exhort member states to “provide adequate legal protection and effective legal remedies against the circumvention of effective technological measures[.]”⁶⁵

The phrase “technological protection measures” (TPM) is not defined either in the WCT or the WPPT. Nevertheless, it is a “broad term that covers many different types of technologies used to control access to copyright content, or to prevent users from copying protected content.”⁶⁶ TPMs may be grouped into “access control” and “copy control” measures. “Access control” measures “are deployed to limit access to protected content to users who are authorized to such access.”⁶⁷ Examples include: “cryptography, passwords, and digital signatures.”⁶⁸ “Copy control” measures seek to control “the use of protected content once users have access to the work.”⁶⁹ Examples are: “serial copy management systems for audio digital taping devices, and scrambling systems for DVDs that prevent third parties from reproducing content without authorization.”⁷⁰

B. Rights Management Information

Another obligation that member states must perform has something to do with the so-called “rights management information (RMI),” found in Article 12 of the WCT⁷¹ and Article 19 of the WPPT.⁷² Both the WCT and WPPT

Contracting Parties shall provide adequate legal protection and effective legal remedies against the circumvention of effective technological measures that are used by performers or producers of phonograms in connection with the exercise of their rights under this Treaty and that restrict acts, in respect of their performances or phonograms, which are not authorized by the performers or the producers of phonograms concerned or permitted by law.

WPPT, *supra* note 59, art. 18.

65. WCT, *supra* note 58, art. 11 & WPPT, *supra* note 59, art. 18.

66. Smartcopying, Technological Protection Measures, *available at* <http://www.smartcopying.edu.au/scw/go/pid/522> (last accessed Feb. 28, 2013).

67. WIPO, How do technological protection measures work?, *available at* <http://www.wipo.int/enforcement/en/faq/technological/faq03.html> (last accessed Feb. 28, 2013).

68. *Id.*

69. *Id.*

70. *Id.*

71. Article 12 of the WCT provides:

- (a) Contracting Parties shall provide adequate and effective legal remedies against any person knowingly performing any of the following acts knowing, or with respect to civil remedies having reasonable grounds to know, that it will induce, enable, facilitate

impose the common obligation upon states to “provide adequate and effective legal remedies” against persons “knowing, or with respect to civil remedies, having reasonable grounds to know, that it will induce, enable,

or conceal an infringement of any right covered by this Treaty or the Berne Convention:

- (i) to remove or alter any electronic rights management information without authority;
 - (ii) to distribute, import for distribution, broadcast or communicate to the public, without authority, works or copies of works knowing that electronic rights management information has been removed or altered without authority.
- (b) As used in this Article, “rights management information” means information which identifies the work, the author of the work, the owner of any right in the work, or information about the terms and conditions of use of the work, and any numbers or codes that represent such information, when any of these items of information is attached to a copy of a work or appears in connection with the communication of a work to the public.

WCT, *supra* note 58, art. 12.

72. Article 19 WPPT provides:

Obligations concerning Rights Management Information

- (a) Contracting Parties shall provide adequate and effective legal remedies against any person knowingly performing any of the following acts knowing, or with respect to civil remedies having reasonable grounds to know, that it will induce, enable, facilitate or conceal an infringement of any right covered by this Treaty:
 - (i) to remove or alter any electronic rights management information without authority;
 - (ii) to distribute, import for distribution, broadcast, communicate or make available to the public, without authority, performances, copies of fixed performances or phonograms knowing that electronic rights management information has been removed or altered without authority.
- (b) As used in this [a]rticle, “rights management information” means information which identifies the performer, the performance of the performer, the producer of the phonogram, the phonogram, the owner of any right in the performance or phonogram, or information about the terms and conditions of use of the performance or phonogram, and any numbers or codes that represent such information, when any of these items of information is attached to a copy of a fixed performance or a phonogram or appears in connection with the communication or making available of a fixed performance or a phonogram to the public.

WPPT, *supra* note 59, art. 19.

facilitate[,] or conceal an infringement of rights” of authors, performers, and sound producers to knowingly engage in the unauthorized removal or alteration of any electronic rights management information in works or copies of works, fixed performances, and phonograms or sound recordings; as well as the distribution, importation for distribution, broadcast, or communication thereof, without authority and with knowledge that electronic rights management information has been removed or altered without authority.⁷³

RMI, as defined in Article 12 (2) of the WCT and Article 19 (2) of the WPPT, are “items of information” that are attached to a copy of a work, fixed performance, or phonogram or which appear in connection with the communication thereof to the public.⁷⁴ Such information may identify the work and its author, or the performance and its performer, the phonogram and its producer, the owner of any right in the performance or phonogram, or information about the terms and conditions of use of the work, performance or phonogram, and any numbers or codes that represent such information.⁷⁵

TPMs and RMIs are collectively referred to as “digital rights management” systems.⁷⁶

Why is it necessary to provide for adequate protection and effective legal remedies against circumvention of TPMs, or removal or alteration of RMIs and distribution of products with altered RMIs? As explained by WIPO, merely providing for rights in the internet is not enough:

[I]t is not sufficient to provide for appropriate rights in respect of digital uses of works, particularly uses on the Internet. In such an environment, no rights may be applied efficiently without the support of technological measures of protection and [RMI] necessary to license and monitor uses.⁷⁷

WIPO further explains that

73. WCT, *supra* note 58, art. 12 & WPPT, *supra* note 59, art. 19.

74. *See* WCT, *supra* note 58, art. 12 (2) & WPPT, *supra* note 59, art. 19 (2).

75. *Id.*

76. PowerPoint: Mihály J. Ficsor, Ph.D., Lecture, *Digital Rights Management (DRM) and Its Co-existence with Copyright Exceptions* at the Sub-regional Seminar on the Protection of Computer Software and Databases organized by the World Intellectual Property Organization (WIPO), the Romanian Copyright Office (ORDA), and the State Office for Inventions and Trademarks (OSIM) (Aug. 25-27, 2010) available at http://www.wipo.int/edocs/mdocs/mdocs/en/wipo_ip_mng_10/wipo_ip_mng_10_ref_t12.pptx (last accessed Feb. 28, 2013).

77. WIPO Seminar for Asia and the Pacific Region on the Internet and the Protection of Intellectual Property Rights, Apr. 28-30, 1998, *WIPO Copyright Treaty*, 8, WIPO Doc. No. WIPO/INT/SIN/98/4 (Apr. 1998).

[n]o matter how ingenious the technology used to protect works against unauthorized use, equally ingenious ways may be developed to circumvent it. The resulting level of insecurity could prevent rightsholders from disseminating their valuable works on the Internet. Given the inability to achieve total security, a realistic goal is to make the technology sophisticated enough to deter the ordinary consumer from seeking to circumvent, while granting legal redress against those who represent a greater threat — hackers and those engaged in circumvention as a business.⁷⁸

X. THE PHILIPPINES' LEGAL FRAMEWORK TO PROTECT COPYRIGHT AND RELATED RIGHTS

The Philippines does have a legal framework that aims to encourage the creation and promotion of copyrightable content and to protect the rights of authors to their works within the context of an intellectual and industrial property system. But, as earlier posited, even if it is granted that copyright and related rights are protected in the Internet, the bigger question is, how?

A brief survey of relevant laws leads to the conclusion that these laws do not address the challenges of the Internet.

A. *Intellectual Property Code*

The IP Code, which took effect on 1 January 1998, declares a state policy that IP is “vital” to economic growth.⁷⁹ The same state policy, echoing Article XIV, Section 13 of the Constitution,⁸⁰ mandates protection of the “exclusive rights of scientists, inventors, artists[,] and other gifted citizens to their intellectual property and creations, particularly when beneficial to the people, for such periods as provided in this Act.”⁸¹ At the same time, it declares that the “use of intellectual property bears a social function”⁸² and “[t]o this end, the State shall promote the diffusion of knowledge and information for the promotion of national development ... [,] progress[,] and

78. World Intellectual Property Organization (WIPO), *The Impact of the Internet on Intellectual Property Law*, available at http://www.wipo.int/copyright/en/ecommerce/ip_survey/chap3.html (last accessed Feb. 28, 2013) (citing *Digital Rights and Wrongs*, THE ECONOMIST, July 17, 1995, at 91 & M. Stefik, *Trusted Systems*, SCIENTIFIC AMERICAN, March 1997, at 78).

79. INTELLECTUAL PROPERTY CODE, § 2.

80. PHIL. CONST. art. XIV, § 13.

81. INTELLECTUAL PROPERTY CODE, § 2.

82. *Id.*

the common good.”⁸³ Last, but not least, the state policy seeks to “enhance the enforcement of IPRs in the Philippines.”⁸⁴

Prior to the IP Code, Presidential Decree No. 49,⁸⁵ as amended, already carried provisions compliant with the Berne Convention and Rome Convention, to which the Philippines had acceded in 29 June 1950⁸⁶ and 25 June 1984,⁸⁷ respectively. Superseding Presidential Decree No. 49, the IP Code was enacted to make Philippine laws on copyright and other IP laws (such as trademarks and patents), once again, “consistent” with the WTO’s Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS).⁸⁸

The TRIPS was negotiated in the 1986–94 Uruguay Round, and it expanded the coverage of copyright to computer programs⁸⁹ and databases.⁹⁰ Among other provisions, it also provided for “rental rights” in favor of authors in respect of, at least, computer programs and cinematographic works,⁹¹ and in favor of producers of phonograms in respect of sound recordings.⁹²

As oft repeated, the challenge is how to enforce protection of copyright and related rights in the digital environment. Notwithstanding the retooling of the IP Code in 1998 to comply with TRIPS, it does not contain provisions that directly address the protection of copyright and related rights in the Internet.

83. *Id.*

84. *Id.*

85. Decree on the Protection of Intellectual Property [Decree on Intellectual Property], Presidential Decree No. 49 (1972).

86. WIPO, Contracting Parties, Berne Convention, *available at* http://www.wipo.int/treaties/en/ShowResults.jsp?lang=en&treaty_id=15 (last accessed Feb. 28, 2013).

87. WIPO, Contracting Parties, Rome Convention, *available at* http://www.wipo.int/treaties/en/ShowResults.jsp?lang=en&treaty_id=17 (last accessed Feb. 17, 2013).

88. Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement), *opened for signature* Apr. 15, 1994, 1869 U.N.T.S. 299. *See* Ameurfin A. Melencio-Herrera, *Foreword to AQUINO*, *supra* note 25, at v.

89. TRIPS Agreement, *supra* note 89, art. 10, ¶ 1.

90. *Id.* art. 10, ¶ 2.

91. *Id.* art. 11.

92. *Id.* art. 14, ¶ 4.

B. Optical Media Law

Republic Act (R.A.) No. 9239, or the Optical Media Act of 2003,⁹³ was signed into law on 10 February 2004. This law was enacted in response to the clamor of the copyright-based industries in the Philippines, both local and foreign, to address the seemingly unmitigated proliferation of CDs, VCDs, DVDs, and other forms of optical media which carried unauthorized marketable digital content, like motion pictures and other audio-visual works, computer software, games and programs, music and sound recordings, and electronic books.

The Act reorganized the Videogram Regulatory Board (created under Presidential Decree No. 1987)⁹⁴ into the Optical Media Board (OMB)⁹⁵ to address principally the problem of copyright infringement facilitated by the use of optical media technology. While the law vests in the OMB vast powers to address optical media piracy,⁹⁶ there is sufficient basis to argue that, in the digital environment, there is little that the OMB can do. The OMB was not configured to deal with copyright infringement in the Internet.

C. Anti-Camcording Law

Last 13 May 2010, R.A. 10088, also known as the Anti-Camcording Act of 2010,⁹⁷ was signed into law. The following acts are penalized as a criminal offense:

- (a) [U]se or attempt to use an audiovisual recording device to transmit or make a copy of any performance in an exhibition facility of a cinematographic film or other audiovisual work or its soundtrack, or any part thereof;
- (b) [H]ave in his/her possession, an audiovisual recording device in an exhibition facility, with the intent of committing [the acts above]; or

93. An Act Regulating Optical Media, Reorganizing for This Purpose the Videogram Regulatory Board, Providing Penalties Therefor, and for Other Purposes [Optical Media Act of 2003], Republic Act No. 9239 (2004).

94. An Act Creating the Videogram Regulatory Board, Presidential Decree No. 1987 (1985).

95. See Optical Media Act of 2003, § 4.

96. *Id.* § 10.

97. An Act to Prohibit and Penalize the Unauthorized Use, Possession and/or Control of Audiovisual Recording Devices for the Unauthorized Recording of Cinematographic Films and Other Audiovisual Works and/or Their Soundtracks in an Exhibition Facility, Providing Penalties Therefor and for Other Purposes [Anti-Camcording Act of 2010], Republic Act No. 10088 (2010).

- (c) [A]id, abet[,] or connive in the commission of the acts under this section.⁹⁸

The imperative of enacting a camcording-specific legislation cannot be overemphasized. According to the Motion Picture Association of America, Inc., an international industry organization of motion picture producers, “[i]llegal recordings of movies in the theater are the single largest source of fake DVDs sold on the street and unauthorized copies of movies distributed on the Internet.”⁹⁹ It added that “[t]ypically, camcord [copies] are reproduced and distributed via Internet file-sharing and through the sale of unlicensed optical discs.”¹⁰⁰ Considering the ease by which digital content may be copied in the Internet, one can imagine how fast these illegal digital copies get to millions of users around the world, thereby undermining the operations of the legitimate distributors of these movies.

While its avowed objectives are laudable, the law has been criticized¹⁰¹ for some flaws in its craftsmanship, leading to some unexpected consequences that may have constitutional implications. Nevertheless, according to the Motion Picture Association of America, Inc., an international industry organization of motion picture producers, “[i]n 2011, only one illegal camcording of a movie produced by Hollywood studios was forensically matched to the Philippines, compared to 20 in 2010 and 22 in 2009.”¹⁰² The Law itself, therefore, has provided an effective deterrent against illegal camcording.

As observed by Koch and company,

[a]lthough no one has been convicted under the Act, interviewees reported that the Act’s educational components have succeeded in raising public awareness about the harms caused by camcording. Moreover, they reported that the law itself highlighted the importance of the issue. This suggests that

98. *Id.* § 3.

99. Motion Picture Association of America, *Camcorder Laws by State*, available at <http://www.mpa.org/contentprotection/camcorder-laws> (last accessed Feb. 28, 2013).

100. Jason D. Koch, et al., *Camcording and Film Piracy in Asia-Pacific Economic Cooperation Economies (An Unpublished Joint Report Between the International Intellectual Property Institute (IIPi) and the United States Patent and Trademark Office (USPTO)) 1*, available at <http://iipi.org/wp-content/uploads/2011/09/Camcording-and-Film-Piracy-in-APEC-Economies.pdf> (last accessed Feb. 28, 2013).

101. See, e.g., Julius Rocas, *Dissecting the Anti-Camcording Law*, available at <http://jrocas.com.ph/archives/dissecting-the-anti-camcording-law> (last accessed Feb. 28, 2013).

102. Matikas Santos, *Anti-Camcording Law reduced film piracy in PH — group*, PHIL. DAILY INQ., July 5, 2012, available at <http://business.inquirer.net/69271/anti-camcording-law-reduced-film-piracy-in-ph-group> (last accessed Feb. 28, 2013).

camcording-specific legislation may have important symbolic benefits that go beyond its provisions.¹⁰³

While the law focuses on camcording, which has become a bigger problem because of the Internet, it nevertheless does not address the problem of protecting copyright and related rights in the Internet.

D. Electronic Commerce Act of 2000

The Electronic Commerce Act of 2000¹⁰⁴ was enacted to “to promote the universal use of electronic transaction in the government and general public.”¹⁰⁵

Under its Section 30, the Act defines the extent of liability of an internet service provider (ISP) in connection with its operations.¹⁰⁶ An ISP will not be liable for the

making, publication, dissemination[,] or distribution of such material or any statement made in such material, including possible infringement of any right subsisting in or in relation to such material, *Provided, that*

- (i) [it] possesses no actual knowledge, is not aware of facts or circumstances from which it is apparent, that the making, publication, dissemination[,] or distribution of such material is unlawful or infringes any rights subsisting in or in relation to such material;
- (ii) [it] does not knowingly receive a financial benefit directly attributable to the unlawful or infringing activity; and
- (iii) [it] does not directly commit any infringement or other unlawful act and does not induce or cause another person or party to commit any infringement or other unlawful act and/or does not benefit financially from the infringing activity or unlawful act of another person or party.¹⁰⁷

This limitation of liability, however does not affect a) any contractual obligation; b) the ISP’s obligations as such under the law; or, c) any obligation imposed under any written law; or d) “the civil liability of any party to the extent that such liability forms the basis for injunctive relief issued by a court under any law requiring that the [ISP] take or refrain from

103. Koch, et al., *supra* note 100, at 30.

104. An Act Providing for the Recognition and Use of Electronic Commercial and Non-commercial Transactions and Documents, Penalties for Unlawful Use Thereof and for Other Purposes [Electronic Commerce Act of 2000], Republic Act No. 8792 (2000).

105. *Id.* § 3.

106. *Id.* § 30.

107. *Id.*

actions necessary to remove, block[,] or deny access to any material[] or to preserve evidence of a violation of law.”¹⁰⁸

Under its Section 33, the Act penalizes the acts of “hacking” and “piracy.”¹⁰⁹ On the one hand, hacking or cracking, is defined as the

unauthorized access into or interference in a computer system [or] server or information and communication system; or any access in order to corrupt, alter, steal, or destroy using a computer or other similar information and communication devices, without the knowledge and consent of the owner of the computer or information and communications system, including the introduction of computer viruses and the like, resulting in the corruption, destruction, alteration, theft[,] or loss of electronic data messages or electronic document[.]¹¹⁰

Piracy, upon the other hand, is

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 signature[,] 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 to, the [I]nternet, in a manner that infringes intellectual property rights[.]¹¹¹

Summing it up, IIPA asserted that “the legal framework and enforcement infrastructure to deal with Internet piracy in the Philippines has not caught up with the technology.”¹¹²

XI. R.A. NO. 10372: THE COPYRIGHT AMENDMENTS TO THE IP CODE

After a very long and arduous campaign by copyright stakeholders, R.A. No. 10372¹¹³ (“Copyright Amendments Law”), a law that seeks to address the serious problems of copyright piracy in the Internet, was signed into law last February 28, 2013.

The question that now cries out for an answer is: does it meet the challenges of effectively protecting copyright in the Internet?

108. *Id.*

109. *Id.* § 33.

110. Electronic Commerce Act of 2000, § 33.

111. *Id.*

112. IIPA Philippine Report, *supra* note 51, at 227.

113. An Act Amending Certain Provisions of Republic Act No. 8293, Otherwise Known as the “Intellectual Property Code of the Philippines,” and for Other Purposes, Republic Act No. 103272 (2013).

To directly address this question, this Article the specific provisions that implement Articles 11 and 12 of the WCT and Articles 18 and 19 of the WPPT.

A. Liability of Internet Service Providers

The amended Section 216 identifies certain acts by which a person may be held liable for copyright infringement. By its terms, infringement may be committed by a person who “directly” exercises the exclusive rights of the author, performer, or sound producer with respect to the latter’s works, performance or phonogram, without authorization or consent; “benefits” from the infringement of another person, but only *if* he has notice of such infringement commits an infringement and he has the right and ability to control the activities of the other person; and, knowing the infringement, “induces, causes[,] or materially contributes to the infringing conduct of another person.”¹¹⁴ This new Provision is welcome in that it expressly clarifies that, apart from liability for direct infringement, there can be vicarious liability, as in the case contemplated in Article 216 (b), and liability for contributory infringement, as in the case envisioned in Article 216 (c).¹¹⁵

“Vicarious liability,” as referred to here, attaches to a person who, having notice of an infringement by another person and exercising the right and ability to control the former, benefits from the infringement.¹¹⁶ As this looks quite different from the “vicarious liability” subject of various Philippine cases which mostly interpret the meaning of Article 2180 of the Civil Code,¹¹⁷ this concept is, truthfully, ground-breaking under Philippine law.

114. Article 216 of Republic Act No. 8293, as amended, reads as follows —

Sec. 216. *Infringement.* A person infringes a right protected under this Act when one:

- (a) Directly commits an infringement;
- (b) Benefits from the infringing activity of another person who commits an infringement if the person benefiting has been given notice of the infringing activity and has the right and ability to control the activities of the other person;
- (c) With knowledge of the infringing activity, induces, causes[,] or materially contributes to the infringing conduct of another.

See S.B. No. 2842, § 20 & H.B. No. 3841, § 20.

115. *Id.*

116. *Id.*

117. See *Keppel Cebu Shipyard, Inc. v. Pioneer Insurance and Surety Corporation*, 601 SCRA 96 (2009) & *Orix Metro Leasing and Finance Corporation v. Mangalino*, 664 SCRA 87 (2012).

When the copyright industries, including the authors, motion picture producers, computer programmers, performers, and producers of phonograms found themselves helpless and unable to exercise their exclusive rights over their digital properties in the Internet, they soon realized that the Internet, while providing a new platform to market their works, also threatened the very foundation of their existence. When they witnessed that their properties could be copied and distributed with seeming impunity, they had to find ways to fight back; to protect themselves and to identify the culprit.

It was easy to blame the ISPs which were always “around” when the innumerable instances of unauthorized copying of copyrighted materials were happening or being perpetrated; where the ISPs even provided the service and facility to perform the acts.¹¹⁸ But, are the ISPs to blame?

Addressing the question, WIPO arrived at an Agreed Statement that “[i]t is understood that the mere provision of physical facilities for enabling or making a communication does not in itself amount to communication within the meaning of [the WCT] or the Berne Convention.”¹¹⁹ Simply stated, the mere provision by an ISP of facility and service to its subscribers is not *per se* a violation of any of the exclusive rights of copyright or related rights holders.

On this point, WIPO concedes that, depending on the circumstances, the ISP “may still be liable on another basis, such as contributory or vicarious liability.”¹²⁰

However, because liability issues are “very complex [and] the knowledge of a large body of statutory and case law is needed in each country so that a given case may be judged,”¹²¹ such issues have been left to each member-state to resolve.

It is in this context that the amended Section 216 of the IP Code must be appreciated. Article 216 (b) is seen as providing the principle of landlord liability in identifying persons who commit infringement.

118. See Alfred Yen, *Internet Service Provider Liability for Subscriber Copyright Infringement, Enterprise Liability, and the First Amendment*, 88 GEORGETOWN L.J. 1, 2-4 (2000).

119. International Bureau of WIPO, *The WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT)* (A Paper on the WCT and WPPT by the International Bureau of WIPO) 6, available at http://www.wipo.int/copyright/en/activities/wct_wppt/pdf/wct_wppt.pdf (last accessed Feb. 28, 2013).

120. *Id.*

121. *Id.*

Referring to a similar provision from House Bill (H.B.) No. 3841, the IIPA observed that Article 216 (b) appears “in the physical environment to create a structure for landlord liability, and in the online space ... provides a modified form of contributory liability as understood in the U.S.”¹²² Although the use of the word “contributory” is unfortunate, IIPA was in fact referring to the legal procedure adopted in Section 512 of the U.S. Digital Millennium Copyright Act (DMCA)¹²³ “which provide[s] ISPs safe harbors from liability as long as they adopt specified ‘good citizenship’ policies including the termination of subscribers who commit copyright infringement and the removal of alleged infringing material from the Internet.”¹²⁴

Under Section 512 of the DMCA, such procedure is, as follows:

An ISP shall not be liable if it:

- (A) (i) does not have actual knowledge that the material or an activity is infringing;
 - (ii) in the absence of such actual knowledge, is not aware of facts or circumstances from which infringing activity is apparent; or
 - (iii) upon obtaining such knowledge or awareness, acts expeditiously to remove, or disable access to, the material;
- (B) does not receive a financial benefit directly attributable to the infringing activity, where the service provider has the right and ability to control such activity; and
- (C) upon notification of claimed infringement ... , responds expeditiously to remove, or disable access to, the material that is claimed to be infringing or to be the subject of infringing activity.¹²⁵

The foregoing “notification of claimed infringement” under Section 512 (c) (3) (A) serves as the legal basis for the popular (or, unpopular, depending on the person looking at it) DMCA “notice and take-down” procedure.

The Philippines has apparently adopted the same approach and attitude towards ISPs as the DMCA. Reading Section 216 (b) together with Section 30 of the Electronic Commerce Act, one can discern the broad outlines of a “notice-and-take-down” procedure. However, Section 216 (b) lamentably fails to include a provision similar to the DMCA’s Section 512.

122. IIPA Philippine Report, *supra* note 51, at 231.

123. Digital Millennium Copyright Act (DMCA), Pub. L. No. 105-304, 112 Stat. 2860 (1998) (U.S.).

124. Yen, *supra* note 118, at 5.

125. *Id.* at 46 (citing 17 U.S.C. §§ 512 (c) (1) (A)-(C)).

Happily, all is not lost as the same, being procedural in character, may be included in the law's Implementing Rules and Regulations, as mandated under Section 29.

B. Definition and Scope of TPM's

Section 171.12 of the amended IP Code defines "technological measure" as "any technology, device[,] or component that, in the normal course of its operation, restricts acts in respect of a work, performance[,] or sound recording, which are not authorized by the authors, performers[,] or producers of sound recordings concerned or permitted by law."¹²⁶ The Senate version (S.B. No. 2842) was adopted over the House version of this definition.¹²⁷

However, as observed by Dr. Mihály J. Ficsor, recognized as having played a "decisive role in the preparation, negotiation[,] and adoption of the [WIPO] Internet Treaties,"¹²⁸ an earlier version of this Provision found in Senate Bill (S.B.) No. 2628, gives the better definition:

171.12 'EFFECTIVE TECHNOLOGICAL MEASURE' MEANS ANY TECHNOLOGY, DEVICE OR COMPONENT THAT, IN THE NORMAL COURSE OF ITS OPERATION, CONTROLS ACCESS TO A PROTECTED WORK, SOUND RECORDING, OR OTHER SUBJECT MATTER, OR PROTECTS ANY COPYRIGHT OR ANY RIGHTS RELATED TO COPYRIGHT AS PROVIDED BY THIS ACT.¹²⁹

He said,

I presented in detail the reasons for which it follows from the text and the documents of the negotiation history of the WCT and the WPPT that adequate protection be granted both to 'access control' measures and 'rights control measures' (the latter category frequently being referred to just as 'copy control' measures) and that, consequently, the protection should not be limited to those measures the circumvention of which may result in infringements. Therefore, *in this case, the provision of the [S.B.] seems to be correct since it contains this clarification by the phrase: 'controls access to a protected*

126. See S.B. No. 2842, § 6 & H.B. No. 3841, § 7.

127. See Joint Explanation of the Conference Committee on the Disagreeing Provisions of Senate Bill No. 2842 and House Bill No. 3841, 15th Cong., 3d Reg. Sess. (2012).

128. Copyright See-Saw, Short Biography — Mihály J. Ficsor, Ph.D., available at <http://www.copyrightseesaw.net/short-biography%20/> (last accessed Feb. 28, 2013).

129. S.B. No. 2628, § 1, 15th Cong., 1st Reg. Sess (2010) (emphasis supplied).

*work, sound recording or other subject matter, or protects copyright or any rights related to copyright as provided by this act.*¹³⁰

In a manuscript,¹³¹ Ficsor further explained that “access-control” TPMs are those “which protect works and objects of related rights against unauthorized access”¹³² while “copy-control” refers to those TPMs “which protect works and objects of related rights against unauthorized copying.”¹³³

With due respect to Ficsor, he sounded as if the present language of the amended Section 171.12 is inadequate for failure to specifically mention “access control” and “copy control” measures, or worse, “not correct.”

The fact is that the subject provision is an almost *verbatim* restatement of Article 11 of the WCT and Article 18 of the WPPT. The important point to make is that, notwithstanding the perceived deficiency in the language, there is nothing in such provision that negates the idea that both “access-control” and “copy-control” TPMs are actually contemplated and intended to be within the meaning and spirit of the law.

In any event, this seeming omission can and must be clarified in the Implementing Rules and Regulations.

C. Implementation of the TPMs and RMIs by the Copyright Amendments

TPMs and RMIs, which provide the foundation for protection of copyright and related rights in the online environment, are embodied in the amended Sections 216 (b) and 217.2 of the IP Code.

1. Section 216.1 (b): Award of Double Damages if Infringement is Attended by Circumvention of TPM or Removal or Alteration of RMI

Under the amended Section 216.1 (b), an infringer shall be liable for actual damages and profits in cases where he a) circumvents effective technological measures; or b) having reasonable grounds to know that it will induce, enable, facilitate, or conceal the infringement, removes[,] or alters any electronic rights management information from a copy of a work, sound

130. Mihály J. Ficsor, Ph.D., Comments on two Bills to amend the copyright provisions of the Intellectual Property Code of the Philippines (Comments Regarding the Proposed Amendments to the IPC) (on file with author) (emphasis supplied).

131. Mihály J. Ficsor, Ph.D., Protection of “Digital Rights Management” under the WIPO “Internet Treaties” — Interpretation, Implementation and Application (Manuscript of a Chapter Found in the book “Copyright Enforcement and the Internet” of the Wolters Kluwer Information Law Series 2010) (on file with author) [hereinafter Ficsor, Protection].

132. *Id.* at 8.

133. *Id.*

recording, or fixation of a performance, or distribute, import for distribution, broadcast, or communicate to the public works or copies of works without authority, knowing that electronic rights management information has been removed or altered without authority (hereinafter “Anti-Circumvention Provisions”), and the infringer shall be liable for double the amount of damages.¹³⁴ Stated otherwise, the existence of the anti-circumvention provisions signified the award of double damages. Stated otherwise, the commission of any of the acts listed in the Anti-Circumvention Provision warrant the award of double damages.

2. Section 216.1 (b): At the Option of Copyright or Related Rights Owner, Statutory Damages Equivalent to Amount of Filing Fees, But Not Less Than ₱50,000.00

If the copyright owner (or proprietor of related rights) decides not to prove his damages and profits, he may opt to recover statutory damages before final judgment in a sum equivalent to the filing fee of the infringement action but not less than fifty thousand pesos (₱50,000.00).¹³⁵

134. The amended Law provides:

216.1 Any person infringing a right protected under this law shall be liable:

...

- (b) To pay to the copyright proprietor or his assigns or heirs such actual damages, including legal costs and other expenses, as he may have incurred due to the infringement as well as the profits the infringer may have made due to such infringement, and in proving profits the plaintiff shall be required to prove sales only and the defendant shall be required to prove every element of cost which he claims, or, in lieu of actual damages and profits, such damages which to the court shall appear to be just and shall not be regarded as penalty. Provided, That the amount of damages to be awarded shall be doubled against any person who:
- (i.) Circumvents effective technological measures; or
 - (ii.) Having reasonable grounds to know that it will induce, enable, facilitate[,] or conceal the infringement, remove or alter any electronic rights management information from a copy of a work, sound recording, or fixation of a performance or distribute, import for distribution, broadcast, or communicate to the public works or copies of works without authority, knowing that electronic rights management information has been removed or altered without authority.

See S.B. No. 2842, § 20 & H.B. No. 3841, § 20.

135. S.B. No. 2842, § 20 & H.B. No. 3841, § 20.

The Provision further states that “[i]n awarding statutory damages, the court may consider the following factors: (1) The nature and purpose of the infringing act; (2) The flagrancy of the infringement; (3) Whether the defendant acted in bad faith; (4) The need for deterrence; (5) Any loss that the plaintiff has suffered or is likely to suffer by reason of the infringement; and (6) Any benefit shown to have accrued to the defendant by reason of the infringement.”¹³⁶

The legislature clearly intended that the court shall exercise its judicial discretion, guided by the enumerated factors and circumscribed by upper and lower limits (“a sum equivalent to the filing fee of the infringement action but not less than [f]ifty [t]housand [p]esos (₱50,000.00)”), to determine the award of statutory damages, where the plaintiff opts for it. The rationale is that the concept of statutory damages dispenses with the necessity for the plaintiff to prove his damages and profits. As a result, the disposition of the case is accelerated. This is a welcome development.

However, the Provision fails to state whether, in this particular case, the damages will be doubled if the infringement is attended by circumvention of TPMs or removal or alteration of RMIs. This Author strongly believes that, yes, double damages must be awarded because the objective is to deter acts of circumvention of TPMs or removal or alteration of RMIs. Unfortunately, the law is deafeningly silent on this point.

One may argue that having to prove any of the acts listed in the Anti-Circumvention Provision will contravene the concept of statutory damages, inasmuch as the presentation of evidence to prove the the said acts must necessarily delay the case. The fact is that such proof will have to be made, in any case, as part of proving the infringement. Therefore, it will not hamper the exercise of discretion by the court in determining the amount of statutory damages.

3. Section 216.1 (b): Award of Double Damages if Infringement in Good Faith is attended by Circumvention of TPM or Removal or Alteration of RMI

The Law further states that, in case the infringer “was not aware and had no reason to believe that his acts constitute an infringement of copyright,”¹³⁷ the court, in its discretion, may reduce the “award of statutory damages” to a sum of not more than ten thousand pesos (₱10,000.00), except when the infringer:

- (i) Circumvents effective technological measures; or

¹³⁶. *Id.*

¹³⁷. *Id.*

- (ii) Having reasonable grounds to know that it will induce, enable, facilitate[,], or conceal the infringement, remove or alter any electronic rights management information from a copy of a work, sound recording, or fixation of a performance, or distribute, import for distribution, broadcast, or communicate to the public works or copies of works without authority, knowing that electronic rights management information has been removed or altered without authority.¹³⁸

In the latter case, the award of damages shall be doubled.

The aforementioned Provision covers infringements “in good faith.” In such cases, it is provided that “the court in its discretion may reduce the award of statutory damages” to a sum of not more than [t]en [t]housand [p]esos (₱10,000.00)” except when the infringement is attended by circumvention of TPMs or removal or alteration of RMIs.¹³⁹

May the award of damages and profit *proven* by the plaintiff be reduced if the defendant successfully proves that he “was not aware and had no reason to believe that his acts constitute an infringement of copyright?” It would seem so.

The question, however, needs to be asked because the Provision appears to limit the judicial discretion to reduce only to “statutory damages.”

As earlier discussed, it was observed that, where the plaintiff opts for statutory damages, the law is silent on whether damages must still be doubled if the infringement is attended by circumvention of TPMs or removal or alteration of RMIs. For the reasons given, this Author opines that, yes, double damages must be awarded, even if the law was silent on the matter.

Instead of repeating the Anti-Circumvention Provisions, the following paragraph at the bottom of Section 216 (b) could have prevented this seeming *lacuna legis* and made clearer the law:

In all cases of infringement where the infringer:

- (a) Circumvents effective technological measures; or
- (b) Having reasonable grounds to know that it will induce, enable, facilitate or conceal the infringement, remove[s] or alter[s] any electronic rights management information from a copy of a work, sound recording, or fixation of a performance; or,
- (c) Distribute[s], import[s] for distribution, broadcast[s], or communicate[s] to the public[,], works or copies of works, fixed performances and phonograms or sound recordings without authority,

138. *Id.*

139. *Id.*

knowing that electronic rights management information has been removed or altered without authority

the court shall double the amount of damages.¹⁴⁰

4. Section 217.2: Circumvention of TPM or Removal or Alteration of RMI are Made Aggravating Circumstances in Infringement

Under the amended Section 217.2, it is provided that the maximum penalties stated in Section 217.1 (a), (b), and (c) shall be imposed when the infringement is committed by:

- (a) The circumvention of effective technological measures; or
- (b) The removal or alteration of any electronic rights management information from a copy of a work, sound recording, or fixation of a performance, by a person, knowingly and without authority; or
- (c) The distribution, importation for distribution, broadcast, or communication to the public of works or copies of works, by a person without authority, knowing that electronic rights management information has been removed or altered without authority.¹⁴¹

The amended Section 217 speaks about “Criminal Penalties.” When criminal infringement is attended by circumvention of TPMs or removal or alteration of RMIs, then the maximum penalties provided in Section 217.1 shall be imposed.¹⁴²

5. Section 216.1 (b) and Section 217.2: Missing Reference to Objects of Related Rights, i.e., “[F]ixed [P]erformances and [P]honograms or [S]ound [R]ecordings”

As earlier stated, both the WCT and WPPT impose the common obligation upon states to provide adequate and effective legal remedies against persons who knowingly engage in the distribution, importation for distribution, broadcast or communication not only of works or copies of works of authors but also of fixed performances and phonograms or sound recordings without authority and with knowledge that electronic rights management information has been removed or altered without authority.¹⁴³

However, perusing the three instances of the Anti-Circumvention Provision (including the two instances in Section 216 (b)), it is observed that the *objects* of the acts of “distribution, importation for distribution, broadcast,

140. *Contra* S.B. No. 2842, § 20 & H.B. No. 3841, § 20.

141. *See* S.B. No. 2842, § 21 & H.B. No. 3841, § 21.

142. S.B. No. 2842, § 21 & H.B. No. 3841, § 21.

143. WCT, *supra* note 58, arts. 11 & 12 & WPPT, *supra* note 59, arts. 18 & 19.

or communication to the public” refer only to “works or copies of works.” “Fixed performances and phonograms or sound recordings” are omitted.

This omission is lamentable because it can only be corrected by a legislative amendment.

Because of these omissions, the following questions arise:

- (1) After the plaintiff successfully proves his damages and profits, may the court impose an award of double damages in a case where the defendant “distribute[s], import[s] for distribution, broadcast[s], or communicate[s] to the public [fixed performances and phonograms or sound recordings] without authority, knowing that electronic rights management information has been removed or altered without authority?”¹⁴⁴
- (2) Or, in case the infringer proves that he “was not aware and had no reason to believe that his acts constitute an infringement of copyright,” may the court, impose an award of double the statutory damages because he “distribute[d], import[ed] for distribution, broadcast, or communicate[d] to the public [fixed performances and phonograms or sound recordings] without authority, knowing that electronic rights management information has been removed or altered without authority?”¹⁴⁵
- (3) Finally, in a criminal infringement case, are acts of “distribut[ion], import[at]ion] for distribution, broadcast, or communicat[ion] to the public [fixed performances and phonograms or sound recordings] without authority, knowing that electronic rights management information has been removed or altered without authority”¹⁴⁶ to be considered an aggravating circumstance?

6. The Philippines’ Obligation to “[P]rovide [A]dequate [L]egal [P]rotection and [E]ffective [L]egal [R]emedies” (in the case of TPMs) and “[A]dequate and [E]ffective [L]egal [R]emedies” (in the case of RMIs)

What is the meaning of “adequate legal protection and effective legal remedies,” as used in the WCT and “adequate and effective legal remedies,” as used in the WPPT?¹⁴⁷ According to Ficsor, the WIPO Internet Treaties

144. S.B. No. 2842, § 20 & H.B. No. 3841, § 20.

145. *Id.*

146. *Id.*

147. WCT, *supra* note 58, art. 11 & WPPT, *supra* note 59 art. 18.

“do not determine the details how Contracting Parties may and should provide adequate legal protection.”¹⁴⁸ He continues,

What they do determine, however, is the obligation to provide legal machinery that is able to produce, as a result, such protection. The protection must be adequate; that is, according to the dictionary definition ‘enough in quantity, or good enough in quality, for a particular purpose or need.’ Within this definition, the word ‘enough’ (of which the word ‘sufficient’ is a synonym) and the ‘particular purpose’ are the key terms. In this case, the particular purpose is the protection of effective technological measures against circumvention, and the legal machinery made available for this purpose by a Contracting Party must be sufficient to achieve it. This is a result-based performance obligation.¹⁴⁹

Ficsor further opined that, for the protection to be adequate and the remedy, effective, against the circumvention of TPMs, said protection must cover not only the very acts of infringement themselves, but also “preparatory acts” leading thereto.¹⁵⁰ Citing the WIPO Guide to the WCT, he referred to the need for criminal penalties, not only for acts of infringement, but also for “manufacture, importation and distribution of illicit circumvention devices[.]”¹⁵¹

Commenting on the relevant provision of H.B. No. 3841,¹⁵² which is substantially similar to the amended Section 216, Ficsor said that

the consequence of circumvention is that the weight of certain remedies and sanctions are doubled. *This is hardly sufficient to provide adequate protection against circumvention.*¹⁵³

148. Mihály J. Ficsor, Ph.D., *Protection of “Digital Rights Management” under the WIPO “Internet Treaties” — Interpretation, Implementation and Application*, in COPYRIGHT ENFORCEMENT AND THE INTERNET 259 (Irina A. Stamatoudi ed., 2010) [hereinafter Ficsor, Protection].

149. *Id.* (citing OXFORD ADVANCED LEARNER’S DICTIONARY OF CURRENT ENGLISH 15 & 417 (6th ed. 2000)).

150. Mihály J. Ficsor, Ph.D., *Protection of “Digital Rights Management” under the WIPO “Internet Treaties” — Interpretation, Implementation and Application*, in COPYRIGHT ENFORCEMENT AND THE INTERNET 259 (Irina A. Stamatoudi ed., 2010).

151. *Id.* at 296 (citing MIHÁLY J. FICSOR, PH.D., GUIDE TO THE COPYRIGHT AND RELATED RIGHTS TREATIES ADMINISTERED BY WIPO 218 (2003)).

152. H.B. No. 3841, 15th Cong., 1st Reg. Sess. (2010).

153. Letter from Mihály J. Ficsor, Ph.D., International Copyright Consultant, to Ricardo Blancaflor, Director General, Intellectual Property Office, (Mar. 31, 2011) (on file with author) (emphasis supplied) [hereinafter Letter from Ficsor to Blancaflor].

Ficsor expressed preference¹⁵⁴ for the provisions of S.B. No. 2628 authored by Senator Loren B. Legarda which, independently of infringement, penalize the acts of

- (a) circumventing without authority TPMs;¹⁵⁵
- (b) manufacturing, importing, exporting, distributing, offering to the public, providing or otherwise trafficking in devices, products and components, or providing services that
 - (i) Are promoted, advertised or marketed for the purposes of circumventing TPMs independently of copyright infringement, or
 - (ii) Have only a limited commercially significant purpose or use other than to circumvent TPMs¹⁵⁶
- (c) “Knowingly and without authority remov[ing] or alter[ing] electronic rights management information from a” work, fixed performance or sound recording;¹⁵⁷
- (d) “Without authority distributes, imports for distribution, broadcasts, communicates[,] or makes available to the public” work, fixed performance[,] or sound recording from which electronic rights management information had been removed;¹⁵⁸ or
- (e) “Alter[ing] electronic rights management information without authority, knowing ... that such ... will enable or facilitate infringement.”¹⁵⁹

Ficsor said that the above

prohibits both acts of circumvention and ‘preparatory acts’ (trafficking in circumvention devices, products and components or offering circumvention services), and it also clarifies that the prohibition of those acts is independent of any infringements that may occur as a result of circumvention. Furthermore, it follows from the requirements of the WCT and the WPPT to provide for adequate protection and effective legal

154. *Id.*

155. S.B. No. 2628, § 22.

156. *Id.*

157. *Id.*

158. *Id.*

159. *Id.*

remedies against circumvention that the remedies should also include criminal penalties against trafficking in circumvention devices, etc.¹⁶⁰

To be sure, the copyright amendments do not make any of the above acts an independent cause of action for the recovery of damages and other legal remedies. At most, the above acts, except the one in Paragraph (b), provide only a basis for doubling damages occasioned by infringement in some instances described in Section 216 (b).¹⁶¹

Likewise, the amended Section 217 does not define any of the above acts as criminal. Except for Paragraph (b), these acts are merely deemed aggravating circumstances, as defined in the Revised Penal Code, and have the effect of only maximizing the impossible penalty for an act of infringement.¹⁶²

The acts enumerated in Paragraph (b) are those referred to by Ficsor as “preparatory acts” which should carry criminal penalties.¹⁶³ Sadly, they are not in the law.

This brings to mind Section 33 of the Electronic Commerce Act which penalizes “hacking” and “piracy.”¹⁶⁴ Do they play any supplemental role in providing adequate legal protection and effective legal remedies?

“To circumvent technological measure” means to “descramble a scrambled work, to decrypt an encrypted work, or otherwise to avoid, bypass, remove, deactivate, or impair a technological measure, without the authority of the copyright owner”¹⁶⁵ under U.S. Copyright Law. Arguably, “circumvention” may be considered as part of hacking. In reality, by hacking, one must impair or defeat TPMs; an “information and communication system” may actually be a protected work. Even if is not, hacking, as a stand-alone criminal offense, can still (hopefully) act as a deterrent to circumvention.

Section 33 (b), however, may present a different picture. “Piracy” is actually an enumeration of specific acts, committed “through the use of telecommunication networks, such as, but not limited to, the [I]nternet.”¹⁶⁶ The acts must be performed “in a manner that infringes intellectual property

160. Letter from Mihály J. Ficsor, Ph.D., International Copyright Consultant, to Ricardo Blancaflor, Director General, Intellectual Property Office, (Mar. 31, 2011) (on file with author).

161. See Part IX C 1 of this Article.

162. See Part IX C 4 of this Article.

163. S.B. No. 2628, § 22.

164. Electronic Commerce Act of 2000, § 33.

165. 17 U.S.C. § 1201 (a) (3) (2006).

166. Electronic Commerce Act of 2000, § 33 (b).

rights.”¹⁶⁷ The penalty is a “minimum fine of one hundred thousand pesos (₱100,000.00) and a maximum commensurate to the damage incurred and a mandatory imprisonment of six (6) months to three (3) years.”¹⁶⁸

Upon the other hand, Section 217 penalizes criminal infringement with increasing periods of imprisonment and fines, “imprisonment from one (1) year to three (3) years plus a fine ranging from fifty thousand pesos (₱50,000.00) to one hundred fifty thousand pesos (₱150,000.00), for the first offense,”¹⁶⁹ to “imprisonment of six (6) years and one (1) day to nine (9) years plus a fine ranging from five hundred thousand pesos (₱500,000.00) to one million five hundred thousand pesos (₱1,500,000), for the third and subsequent offenses.”¹⁷⁰

As stated, maximum penalties may apply if the offender engaged in circumvention of TPMs, removal or alteration of RMIs and distribution, etc. of products with altered RMIs.¹⁷¹

Not all the acts enumerated in Section 33 (b) of the Electronic Commerce Act may amount to infringement. For example, importation or removal are not among the acts expressly reserved to authors under Section 177. In this sense, “piracy” becomes an animal that is different from a violation of Section 217, in relation to Section 177, 203, 208 or 211, committed “through the use of telecommunication networks, such as, but not limited to, the [I]nternet.”

The question that will need a separate study is: Does the amended Section 217 repeal by implication Section 33 (b) of the Electronic Commerce Act?

All said, do the copyright amendments comply with the obligation to “provide adequate legal protection and effective legal remedies”?

D. Etching the Protection of TPMs and RMIs in Stone

“From its beginning, the law of copyright has developed in response to significant changes in technology.”¹⁷² That it has taken the Philippines around 10 years to craft this law is a matter of significant concern. Truly, this did not have to be.

167. *Id.*

168. *Id.*

169. INTELLECTUAL PROPERTY CODE, § 217.1 (a).

170. *Id.* § 217.1 (c).

171. S.B. No. 2842, § 21 & H.B. No. 3841, § 21.

172. *Sony*, 464 U.S. at 430.

But, given the even faster pace of technological development, we can reasonably expect newer human experiences that will demand more immediate and responsive legal intervention. The Filipino cannot afford to wait for 10 years each time.

In the U.S., an administrative procedure has been set up whereby, every three years, the U.S. Librarian of Congress is tasked to make a determination on “whether the implementation of access control measures is diminishing the ability of individuals to use copyrighted works in ways that are not infringing and to designate any classes of works with respect to which users have been adversely affected in their ability to make such non-infringing uses.”¹⁷³ This procedure rests on a realization that the legal prohibition against the circumvention of TPMs is not etched in stone and that, based on evidence that a TPM prevents non-infringing uses of a protected work, certain exceptions may be carved out.

Hence, as early as 2006, jailbreaking of mobile phones was deemed legal “when circumvention is accomplished for the sole purpose of lawfully connecting to a wireless telephone communication network.”¹⁷⁴ The same exception has been renewed in “where circumvention is accomplished for the sole purpose of enabling interoperability of such applications, when they have been lawfully obtained, with computer programs on the telephone handset.”¹⁷⁵ This exception was renewed last year effective 28 October 2012.¹⁷⁶

There, sadly, is no similar procedure provided by the copyright amendments. The Filipinos are then faced with the prospect of having to wait for a legislative amendment to be considered. Hopefully, not after another 10 years.

XII. CONCLUSION

At the end of the day, the IP Code, with the amendments, remains the same: far from perfect. However, it is significant in that the amendments seek to bring Philippine law to the doorsteps of the digital age. The WIPO Internet

173. Exemption to Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies, 77 Fed. Reg. 65260, 65261 (proposed Oct. 26, 2012) (to be codified at 37 C.F.R. pt. 201).

174. United States Copyright Office, Statement of the Librarian of Congress Relating to Section 1201 Rulemaking, *available at* http://www.copyright.gov/1201/docs/2006_statement.html (last accessed Feb. 28, 2013).

175. United States Copyright Office, Statement of the Librarian of Congress Relating to Section 1201 Rulemaking, *available at* <http://www.copyright.gov/1201/2010/Librarian-of-Congress-1201Statement.html> (last accessed Feb. 28, 2013).

176. Exemption, *supra* note 173, at 65620.

Treaties, principally designed to protect copyright and related rights in the online environment, came into force in the Philippines as early as 4 October 2002. The Philippines assumed the international obligation to provide adequate protection and effective legal remedies for owners of copyright and related rights who make available their works and products in the internet. The amendments are, therefore, way long overdue.

The amendments barely scratch the surface of the gigantic challenge that is the internet as it dawns upon the Filipino, but he has at least acknowledged things are rapidly changing and new problems are emerging. The debate to find answers and solutions must now begin.