

Into the New World: An Examination of the Application of Copyright Laws to the Digitization of Archive and Library Collections

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I. INTRODUCTION.....	293
A. <i>Background of the Study</i>	
B. <i>Statement of the Problem</i>	
C. <i>Objectives</i>	
D. <i>Significance of the Study</i>	
E. <i>Scope and Limitations</i>	
F. <i>Methodology</i>	
II. THE MOVE TO THE DIGITAL SPACE.....	339
A. <i>The Move from Traditional Libraries to Digital Libraries</i>	
B. <i>The Practice of Digitization</i>	
C. <i>Relevance in a Post Pandemic Future</i>	
D. <i>Controlled Digital Lending: The Concept</i>	
III. LIBRARIES AND COPYRIGHT	355
A. <i>Relations Between Libraries and Copyright Laws</i>	
B. <i>Copyright: The Balancing of Interests</i>	
C. <i>Copyright Exceptions in General</i>	
D. <i>Safe Harbor Statutes</i>	
E. <i>Section 188: The Philippine Library Exception</i>	

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IV. THE FUNDAMENTAL DOCTRINE.....	376
A. <i>The Doctrine of Fair Use</i>	
B. <i>Philippine Jurisprudence on Fair Use</i>	
C. <i>The Factors of Fair Use</i>	
D. <i>Fair Use and Digitization</i>	
V. ANALYSIS OF DIGITIZATION PRACTICES	387
A. <i>Under the IP Code</i>	
B. <i>Under Fair Use</i>	
VI. CRAFTING A DIGITAL REPRODUCTION EXEMPTION	397
A. <i>The Framework of the Current Exemption</i>	
B. <i>The Metes and Bounds of a New Exemption</i>	
VII. CONCLUSION & RECOMMENDATION.....	401
A. <i>Conclusion</i>	
B. <i>Recommendation</i>	
ANNEX: PROPOSED AMENDMENT.....	407

I. INTRODUCTION

*To ask why we need libraries at all,
when there is so much information available elsewhere,
is about as sensible as asking if roadmaps are necessary
now that there are so very many roads.*

— Jon Bing¹

A. *Background of the Study*

1. Libraries and Their History

Libraries are fundamental to society as they serve as “gateways to knowledge and culture[.]”² Alongside the development of nations across history has been the upkeep of libraries as centers of knowledge and archives of culture. The

1. Jon Bing, Quote of the Day, *available at* <https://www.librarianshipstudies.com/2019/05/to-ask-why-we-need-libraries-at-all.html> (last accessed July 31, 2023) [<https://perma.cc/JA3V-SVLW>].

2. Ben White, Guaranteeing Access to Knowledge: The Role of Libraries, *available at* https://www.wipo.int/wipo_magazine/en/2012/04/article_0004.html#1 (last accessed July 31, 2023) [<https://perma.cc/NX86-5Y3A>].

concept of libraries has spanned a few millennia.³ Historians regard the library of Nineveh established by Assyrian ruler Ashurbanipal in the seventh century BCE as the first systemically organized library, housing 30,000 cuneiform tablets on various topics of archival, scholarly, and literary forms.⁴ Many great civilizations soon followed with their own libraries — the Great Library of Alexandria, the Bayt al-Ḥikmah (House of Wisdom) in Baghdad, and the Imperial Library of Constantinople, to name a few.⁵

In the Philippines, the first collections of books started with those brought to the islands by Spanish missionaries.⁶ Records trace the first library back to a private collection owned and maintained by a certain Bishop Domingo de Salazar.⁷ An important landmark is the establishment of the Museo-Biblioteca de Filipinas through the Royal Decree of 12 August 1887.⁸ The Museo-Biblioteca was the first of its kind in the archipelago as a “true public library” with a full catalog, professional staff, and open services to the general public.⁹ Today, the Museo-Biblioteca exists as the National Library of the Philippines, serving as “the repository of the printed and recorded cultural heritage of the country and other intellectual, literary[,] and information sources.”¹⁰

3. Don Vaughan, A Brief History of Libraries, *available at* <http://web.archive.org/web/20220527112912/https://www.britannica.com/story/a-brief-history-of-libraries>.

4. *Id.*

5. *Id.*

6. Vicente S. Hernández, Trends in Philippine Library History, *available at* <https://origin-archiv.ifa.org/IV/ifla65/papers/039-138e.htm> (last accessed July 31, 2023) [<https://perma.cc/L7AZ-94MA>]. (This paper was presented as part of the 65th International Federation of Library Associations and Institutions (IFLA) Council and General Conference held in Bangkok, Thailand on Aug. 20–28 1999.).

7. *Id.*

8. National Library of the Philippines, History, *available at* <https://web.nlp.gov.ph/history> (last accessed July 31, 2023) [<https://perma.cc/7ABF-LCU9>].

9. Hernández, *supra* note 6.

10. National Library of the Philippines, Vision/Mission, *available at* <https://web.nlp.gov.ph/vision-mission> (last accessed July 31, 2023) [<https://perma.cc/XKZ2-PVKE>].

“For centuries, libraries have put books into the hands of those who need them, helping millions to build better lives and creating informed citizens.”¹¹ While many may have surmised that libraries would soon become a thing of the past, libraries and their communities have continually shown a resilience in adapting to changing times. In the 1990s, libraries adapted to the automation of its services, incorporating then new technology of computers into their operations.¹² In the modern 21st century, libraries are once again facing change as they adapt to the digital revolution.

2. Libraries and the Right to Education

The right to education has long been enshrined as a foundational human right. The Universal Declaration of Human Rights proclaims that “[e]veryone has the right to education.”¹³ The International Covenant on Economic, Social, and Cultural Rights provides —

Article 13. 1. The States Parties to the present Covenant recognize the right of everyone to education. They agree that education shall be directed to the full development of the human personality and the sense of its dignity, and shall strengthen the respect for human rights and fundamental freedoms. They further agree that education shall enable all persons to participate effectively in a free society, promote understanding, tolerance[,] and friendship among all nations and all racial, ethnic[,] or religious groups, and further the activities of the United Nations for the maintenance of peace.¹⁴

To be compliant with the ideals mandated by international treaty obligations, education must be possessed with four essential features: availability, accessibility, acceptability, and adaptability.¹⁵ On the feature of availability, there is a focus on the provision of functioning educational institutions and programs.¹⁶ Among the necessary resources for a sufficiently

11. Wendy Hanamura, et al., Video, *Controlled Digital Lending Explained*, INTERNET ARCHIVE, Feb. 10, 2021, available at <https://archive.org/details/controlled-digital-lending-explained> (last accessed July 31, 2023) (the directly quoted text begins at 00:27).

12. Hernández, *supra* note 6.

13. Universal Declaration of Human Rights, G.A. Res. 217 (III) A, art. 26, ¶ 1, U.N. Doc. A/810 (Dec. 8, 1948).

14. International Covenant on Economic, Social and Cultural Rights art. 13, ¶ 1, adopted Dec. 16, 1966, 993 U.N.T.S. 3 (entered into force Jan. 3, 1976).

15. Office of the High Commissioner for Human Rights, *General Comment No. 13: The Right to Education (Art. 13)*, ¶ 6, U.N. Doc. E/C.12/1999/10 (Dec. 8, 1999).

16. *Id.* ¶ 6 (a).

functioning educational institution that were listed in General Comment No. 13 is a library.¹⁷

The Philippine Constitution likewise puts high priority on the right to education. Article II, Section 17 of the Constitution states that “[t]he State shall give priority to education, science and technology, arts, culture, and sports to foster patriotism and nationalism, accelerate social progress, and promote total human liberation and development.”¹⁸ The provision highlights the State’s view that “education and total development [is] the gateway not only to intellectual and moral development but also to economic advancement and the cultivation of the yearning for freedom and justice.”¹⁹

Article XIV, Section 1 provides that “[t]he State shall protect and promote the right of all citizens to quality education at all levels and shall take appropriate steps to make such education accessible to all.”²⁰ In defining education, Fr. Joaquin G. Bernas, S.J., expressed during the 1987 Constitutional deliberations that “[e]ducation is a combination of many things. It involves *acquisition of information*, development of critical thinking, one’s artistic talents, moral qualities[,] his sensitivity to the needs of others, and so forth. *All of these, as much as possible, should be maximized.*”²¹

The intersecting relationship between education and libraries is indubitable. In a way, one could say that “libraries are synonymous with education.”²² From school libraries of the early years of childhood to academic libraries for institutions of higher education to public libraries that serve as the “people’s library,”²³ libraries are access points to a lifetime of learning and vehicles for both formal and informal education. For the attainment of a learned and informed citizenry, education must not only be viewed as formal instruction in classrooms and lecture halls, but it must also be viewed as continuous opportunities to access information, learn from it, and enrich

17. *Id.*

18. PHIL. CONST. art. II, § 17.

19. JOAQUIN G. BERNAS, S.J., *THE 1987 CONSTITUTION OF THE REPUBLIC OF THE PHILIPPINES: A COMMENTARY* 91 (2009) (citing 4 *RECORD OF THE CONSTITUTIONAL COMMISSION*, No. 72, at 173-74 (1986)).

20. PHIL. CONST. art. XIV, § 1.

21. 4 *RECORD OF THE CONSTITUTIONAL COMMISSION*, No. 74, at 260 (1986) (emphases supplied).

22. White, *supra* note 2.

23. Michael Jato, et al., *Library and Education: Any Relationship in the Internet Age?*, 2 *INT’L. J. BUS. MGMT. & ECON. REV.* 94, 98-101 (2019).

oneself throughout one's lifetime. Libraries are key institutions in the realization of this.

As the International Federation of Library Associations and Institutions (IFLA) concluded, “[i]f the right to education is to be a reality throughout life, the need for libraries is clear. Libraries need to be a core part of education, training[,] and lifelong learning strategies, engaged in conversations, and supported accordingly.”²⁴

3. Libraries and Copyright

Libraries are placed in a unique position of balancing the intellectual property rights of authors and artists and serving the wider public interest.²⁵ It has been observed that “[t]he copyright regime has always been intricately (if not uneasily) linked with the successful building of libraries.”²⁶ In recognition of this niche role, different jurisdictions have adopted statutory exceptions for libraries to be able to freely provide their services to the public and avoid possible penalties for infringement.²⁷ In the Philippines, the library exception is contained in Section 188 of the Intellectual Property Code (“IP Code”).²⁸ Section 188 states —

24. International Federation of Library Associations and Institutions, 6 Days to Human Rights Day: The Right to Education Is the Right to a Library, *available at* <https://blogs.ifla.org/lpa/2018/12/04/six-days-until-human-rights-day-the-right-to-education-is-the-right-to-a-library> (last accessed July 31, 2023) [<https://perma.cc/9JBA-7HF9>].

25. White, *supra* note 2.

26. Ruth L. Okediji, Legal and Policy Changes for Libraries in the Age of Digital Books, *available at* <https://www.ifla.org/wp-content/uploads/2019/05/assets/hq/presidents-program/papers/okediji.pdf> (last accessed July 31, 2023) [<https://perma.cc/9JBA-7HF9>].

27. Standing Committee on Copyright and Related Rights, *Study on Copyright Limitations and Exceptions for Libraries and Archives: Updated and Revised*, at 6, WIPO Doc. SCCR/30/3 (June 10, 2015). The Study on Copyright Limitations and Exceptions for Libraries and Archives was undertaken by Dr. Kenneth D. Crews as commissioned by the World Intellectual Property Organization. The 2015 report is the third and most recent in a series of studies on copyright exceptions for libraries and archives in different member jurisdictions of WIPO. *Id.*

28. An Act Prescribing the Intellectual Property Code and Establishing the Intellectual Property Office, Providing for its Powers and Functions, and for Other Purposes [INTELL. PROP. CODE], Republic Act No. 8293 (1997) (as amended).

Section 188. Reprographic Reproduction by Libraries. — 188.1. Notwithstanding the provisions of Subsection 177.1, any library or archive whose activities are not for profit may, without the authorization of the author of copyright owner, make a limited number of copies of the work, as may be necessary for such institutions to fulfill their mandate, by reprographic reproduction:

- (a) Where the work by reason of its fragile character or rarity cannot be lent to user in its original form;
- (b) Where the works are isolated articles contained in composite works or brief portions of other published works and the reproduction is necessary to supply them; when this is considered expedient, to persons requesting their loan for purposes of research or study instead of lending the volumes or booklets which contain them; and
- (c) Where the making of such limited copies is in order to preserve and, if necessary in the event that it is lost, destroyed[,] or rendered unusable, replace a copy, or to replace, in the permanent collection of another similar library or archive, a copy which has been lost, destroyed[,] or rendered unusable and copies are not available with the publisher.

188.2. Notwithstanding the above provisions, it shall not be permissible to produce a volume of a work published in several volumes or to produce missing tomes or pages of magazines or similar works, unless the volume, tome or part is out of stock: Provided, That every library which, by law, is entitled to receive copies of a printed work, shall be entitled, when special reasons so require, to reproduce a copy of a published work which is considered necessary for the collection of the library but which is out of stock.²⁹

Section 188 only permits reproduction through reprographic means and only for such purposes as listed in the provision.³⁰ At this juncture, it is submitted that the library exception adopted in the Philippine jurisdiction is a rather narrow one, as will be shown in a later Chapter.

Libraries have depended as well on the doctrine of fair use³¹ to support its practices. As observed by the United States (U.S.) Copyright Office, fair use has become an important resort for libraries and archives to defend their practices as the gap between the library exceptions provided by statute and

29. *Id.* § 188.

30. *Id.*

31. See Fe Angela M. Verzosa, Copyright Protection for Philippine Publications, at 12-13, available at http://eprints.rclis.org/11219/1/Copyright_Protection.pdf (last accessed July 31, 2023) [<https://perma.cc/LA2G-3CW4>].

actual library methods widens more and more.³² This is all the more a reality for Philippine libraries practicing digital library practices in a jurisdiction that only provides a statutory exception for reprographic library practices.

4. Controlled Digital Lending

Controlled digital lending (CDL) is a digitization practice of libraries and archives that has become popular over the years. For this Note, the definition of the practice of controlled digital lending shall be adopted from the *Position Statement on Controlled Digital Lending*,³³ to wit —

Properly implemented, CDL enables a library to *circulate a digitized title in place of a physical one in a controlled manner*. Under this approach, a library may only loan simultaneously the number of copies that it has legitimately acquired, usually through purchase or donation. For example, if a library owns three copies of a title and digitizes one copy, it may use CDL to circulate one digital copy and two print, or three digital copies, or two digital copies and one print; in all cases, it could only circulate the same number of copies that it owned before digitization. Essentially, CDL must maintain an ‘owned to loaned’ ratio. Circulation in any format is controlled so that only one user can use any given copy at a time, for a limited time. Further, CDL systems generally employ appropriate technical measures to prevent users from retaining a permanent copy or distributing additional copies.³⁴

In essence, the aim of CDL is to replicate how in-print books are normally lent out by libraries and archives and transfer that to a digital platform. The core principles of CDL can then be summarized as:

- (1) A library must own a legal copy of the physical book, by purchase or gift;
- (2) The library must maintain a 1:1 ‘owned-to-loaned’ ratio, simultaneously lending no more copies than it legally owns; and
- (3) The library must use technical measures to ensure that the digital file cannot be copied or redistributed.³⁵

32. U.S. Copyright Office, Section 108 of Title 17: A Discussion Document of the Register of Copyrights, *available at* <https://www.copyright.gov/policy/section108/discussion-document.pdf> (last accessed July 31, 2023) [hereinafter Section 108 Discussion Document].

33. Lila Bailey, et al., Position Statement on Controlled Digital Lending, *available at* <https://controldigitallending.org/statement> (last accessed July 31, 2023) [<https://perma.cc/L28E-RMBZ>].

34. *Id.* (emphasis supplied).

35. Maria Karla Rosita V. Bernardo, When Copyright and COVID-19 Collide: Controlled Digital Lending, Fair Use, and Reprographic Reproduction by

These core principles are essential in understanding the legal basis to defend the practice. As of writing, there is no legal pronouncement in any jurisdiction to this day, whether in statute or case law, that recognizes the validity of CDL practices.³⁶ In fact, the Internet Archive, one of the most well-known institutions utilizing CDL practices, is currently facing a lawsuit directly targeting its CDL practices for the operation of its Open Library.³⁷ On 1 June 2020, several publishers sued the Internet Archive, labeling the Archive's practices as piracy and finally putting into question before the courts as to whether or not CDL is protected under the Fair Use Doctrine.³⁸

B. Statement of the Problem

Libraries and archives have been existing for centuries as centers of knowledge and culture. They have been hallmarks for the principle that property has a social function as espoused in our Constitution³⁹ and more specifically, that “[t]he use of intellectual property bears a social function.”⁴⁰ Since copyright laws applied strictly could render library activities as violative of these laws, many jurisdictions have adopted “library exceptions” to their legislation.⁴¹ Library exceptions “manifest a compromise among cultural, historical, and economic objectives, typically by permitting libraries to make socially beneficial uses of copyrighted works, while setting limits and conditions aimed at protecting the interests of copyright owners, publishers, and other rightsholders.”⁴²

In the Philippine jurisdiction, the library exception is contained in Section 188 of the IP Code.⁴³ Section 188 provides a narrow exception for libraries

Libraries in the Age of Remote Learning, PHIL. L.J., Volume No. 94 Special Online Feature, at 60 (2021) (citing Bailey, et al., *supra* note 33).

36. *Id.* at 61.

37. Aja Romano, A Lawsuit is Threatening the Internet Archive – But It’s Not as Dire as You May Have Heard, *available at* <https://www.vox.com/2020/6/23/21293875/internet-archive-website-lawsuit-open-library-wayback-machine-controversy-copyright> (last accessed July 31, 2023) [<https://perma.cc/5JGZ-T2YJ>].

38. *See* Bailey, et al., *supra* note 33.

39. *See* PHIL. CONST. art. XII, § 6.

40. INTELL. PROP. CODE, § 2.

41. Standing Committee on Copyright and Related Rights, *supra* note 27, at 6.

42. *Id.* at 7.

43. INTELL. PROP. CODE, § 188.

and archives to reproduce copies of works in their collection by way of reprographic reproduction.⁴⁴ Considering the reprographic limitation in Section 188, this leaves digitization or digital copies out of the purview of the library exception in the IP Code.

As digital practices of libraries are needed and, in fact, already practiced, this gap between current library practices and the provisions in the IP Code and jurisprudence leave institutions with questions of whether such practices are compliant with copyright law or whether their practices would already constitute copyright infringement.

Furthermore, despite the wealth of legal scholarship and research supporting CDL, it remains a legally untested theory at this point in time.⁴⁵ The current lawsuit faced by Internet Archive is still ongoing⁴⁶ and as such, the question remains as to whether or not CDL is protected under fair use.

C. Objectives

The objectives of the study are to answer the following questions:

- (1) Are digitization practices covered by the intellectual property laws of the Philippines?
- (2) Are digitization practices, particularly controlled digital lending, protected under fair use?
- (3) What legal framework can be proposed to protect the digitization practices of libraries?

D. Significance of the Study

Libraries are indubitably cornerstone institutions in the pursuit of education, the furtherance of development, and the preservation of knowledge and culture. To note, there are currently 1,599 public libraries in the Philippines⁴⁷ and a significant number of academic and private, non-profit libraries as well.

44. *Id.*

45. Bernardo, *supra* note 35, at 61.

46. *Id.* at 62.

47. National Library of the Philippines, Statistical Number of Affiliated Public Libraries, available at <https://web.nlp.gov.ph/directory-2> (last accessed July 31, 2023) [<https://perma.cc/DW2D-49BN>] (This number has increased since.).

The Philippine Association of Academic and Research Librarians has a membership of 116 institutions across the country.⁴⁸

In the last 20 years, a number of libraries in the Philippines have started digitization projects of their collections.⁴⁹ The digitization of libraries and archives serve to: (a) provide a new way of preservation of materials; (b) increase access to materials, especially during the age of online learning; and (c) address issues of access to materials that are part of niche collections or fall under orphan works.⁵⁰

One of the major roadblocks to the implementation of digitization of libraries has been the lack of “legal clarity” regarding these practices.⁵¹ Due to this lack of legal clarity, the digitization of materials and the provision of access to these digital copies have been rather limited. The libraries that have put into practices digitization and practices like CDL have only applied these methods to materials that are already in the public domain.⁵² As such, this Note aims to clarify the validity of digitization practices of libraries under the current Philippine IP laws.

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48. Philippine Association of Academic/Research Librarians, Inc., Summary of Members, *available at* <https://directory.paarl.org.ph> (last accessed July 31, 2023) [<https://perma.cc/3GWY-3MJC>] (This number has increased since.).
49. *See, e.g.*, University of the Philippines-Diliman University Library, Digitization, *available at* <https://mainlib.upd.edu.ph/digitization> (last accessed July 31, 2023) [<https://perma.cc/5EUB-NW3U>] & National Library of the Philippines, Digital Collections, *available at* <https://web.nlp.gov.ph/digital-collections> (last accessed July 31, 2023) [<https://perma.cc/6HHB-TJHU>].
50. *See* White, *supra* note 2 & American Library Association, Preservation: Digitization, *available at* <https://libguides.ala.org/libpreservation/digitization> (last accessed July 31, 2023) [<https://perma.cc/Q4AW-T3EP>].
51. Brewster Kahle, Transforming Our Libraries from Analog to Digital: A 2020 Vision, *available at* <https://er.educause.edu/articles/2017/3/transforming-our-libraries-from-analog-to-digital-a-2020-vision> (last accessed July 31, 2023) [<https://perma.cc/HM7Z-EHAT>].
52. Fernan R. Dizon, Digital Library Initiatives in Philippine Academic Libraries: the Rizal Library Experience, Remarks at the PAARL Conference on “The Power of Convergence: Technology and Connectivity in the 21st Century Library and Information Services,” St. Paul College, Pasig City (Nov. 11-13, 2009) (lecture notes *available at* <https://www.slideshare.net/PAARLOnline/digital-library-initiatives-in-philippine-academic-libraries-the-rizal-library-experience> (last accessed July 31, 2023) [<https://perma.cc/W34H-C3X8>]).

E. Scope and Limitations

This Note primarily focuses on analyzing the digitization practices of libraries under the Philippine IP framework. While there may be a variety of digitization practices, the Note focuses itself primarily on CDL and similar practices. Thus, when this Note refers to the digitization of works, it is referring to CDL and practices that operate under similar principles as CDL. Furthermore, the scope of works covered by digitization for the purposes of this study will only pertain to print media. As such, the digitization of audiovisual works and other practices of digital libraries will not be discussed in the study.

The Note is limited to discussing the potential liabilities or possible protection of libraries under Philippine copyright laws as well as international treaties to which the Philippines is party to. While references are made to the laws and practices of other jurisdictions for guidance, particularly in the examples of digital library exceptions and the application of fair use, the discussion focuses on the Philippine setting.

The Note also focuses primarily on the legal consideration of the problems concerning these digitization practices. While the Author acknowledges that the decision making behind these practices is majorly influenced by economic factors, such is not tackled.

The Note also focuses on an analysis of the Fair Use Doctrine as it is applicable to CDL. Though discussions on the legal defenses for CDL usually take up both the Doctrine of First Sale and the Doctrine of Fair Use, the main discussion in this Note only pertains to the Fair Use Doctrine. Mentions of the Doctrine of First Sale will only be cursory and will not proceed in depth as the Author assesses that such doctrine merits its own in-depth analysis and study.

F. Methodology

The Note conducts an analysis of the Philippine copyright laws concerning libraries and digital rights. Considering the dearth of domestic authorities particularly regarding copyright issues with regard to the digitization of materials, a majority of the sources cited in this study will be from foreign jurisprudence and sources derived from other jurisdictions as well as international organizations. For the Chapters on fair use, the discussion primarily derives from U.S. jurisprudence, as well as U.S. legal scholarship on such.

First, the Note provides a general overview of the development of libraries in the digital space and the digitization practices which is the focus of this Note

— namely, CDL. The overview includes explanations of how these practices developed and how they are maintained or performed.

Next, the Note then shifts to an analysis of the relationship between libraries and copyright over the years. While delving into the development of copyright law, the Note also includes an analysis of the development and necessity of “library exceptions.”

After such review, the Fair Use Doctrine is covered, particularly its development in the Philippine jurisdiction. It then shifts to a discussion of each factor of fair use and the relevant Philippine and U.S. jurisprudence for each factor. Additionally, three particular cases are discussed as to their relevance to the topic of this study, namely: *Author’s Guild v. Google Inc.*,⁵³ *Author’s Guild, Inc. v. HathiTrust*,⁵⁴ and *Cambridge University Press v. Patton*.⁵⁵

The Note then turns to applying the concepts discussed in the previous Chapters and answering the question of whether or not digitization practices are protected under Philippine copyright law. The primary focus of this section provides an in-depth fair use analysis of controlled digital lending. Finally, the Author recommends amending the IP Code, particularly Section 188, to provide stronger and more concrete protection to digital practices of libraries.

II. THE MOVE TO THE DIGITAL SPACE

Citizens of a democracy have need of such opportunities for self-education at all times.

The complexity and instability of life today make the need an urgent one.

UNESCO Public Library Manifesto⁵⁶

A. The Move from Traditional Libraries to Digital Libraries

The concept of libraries has been present since the development of ancient civilizations.⁵⁷ In the early days, these ancient libraries were repositories of the knowledge accumulated in the fields of agriculture, medicine, warfare, and the

53. *Authors Guild, Inc. v. Google, Inc.*, 804 F. 3d 202 (2d Cir. 2015) (U.S.).

54. *Authors Guild, Inc. v. HathiTrust*, 755 F. 3d 87 (2d Cir. 2014) (U.S.).

55. *Cambridge University Press v. Patton*, 769 F. 3d 1232 (11th Cir. 2014) (U.S.).

56. U.N. Educational, Scientific, and Cultural Organization, *The Public Library: A Living Force for Popular Education*, at 3, U.N. Doc. UNESCO/LBA/1 (May 16, 1949).

57. Vaughan, *supra* note 3.

like.⁵⁸ These libraries were formed “to collect knowledge, learn from it, and use it to make life better.”⁵⁹ Originally, libraries were built as archives of knowledge, usually inaccessible to the greater public and only open to scholars.⁶⁰

Libraries have since developed as important social institutions, granting access to knowledge, preserving culture, and supporting education. The growth of libraries rose in the 17th and 18th century as learning flourished among the populace in European countries.⁶¹ Academic libraries in universities and national libraries began to appear.⁶² The growth of libraries in the west showed the increasing desire for knowledge and the importance of libraries in fulfilling such desire.

While the title of the first public library in the world is contested, there is some consensus that the first free modern public library is the Peterborough (N.H.) Town Libraries.⁶³ It was established in 1833 through a town meeting proposal for the township to create a library that would be for all classes of people and to be supported through the taxes of the townspeople.⁶⁴ The Peterborough (N.H.) Town Libraries continue to serve its community until this modern age.⁶⁵ The development of public libraries, especially alongside the early democracy of the American society, cannot be understated in its value to the development of a democratic and informed nation. “The public library was a great leveler, supplying a literature by which the ordinary man

58. *Id.*

59. *Id.*

60. Laura Anna Gambos, *The History of Libraries I. – Classical Antiquity*, available at <https://princh.com/blog-the-history-of-libraries-classical-antiquity/#.YrGBt-yA7Fo> (last accessed July 31, 2023) [<https://perma.cc/UP6H-JDK7>].

61. Barbara Krasner-Khait, *Survivor: The History of the Library*, available at <http://web.archive.org/web/20190330143027/http://www.history-magazine.com/libraries.html>.

62. *Id.*

63. American Library Association, *About ALA: Before 1876*, available at <https://www.ala.org/aboutala/before-1876> (last accessed July 31, 2023) [<https://perma.cc/9VX9-KBXW>].

64. Peterborough Town Library, *Creation of the First Free Tax-Supported Public Library*, available at <https://peterboroughtownlibrary.org/history-and-renovation-9330/location/peterborough> (last accessed July 31, 2023) [<https://perma.cc/CG3H-A25S>].

65. *Id.*

could experience some of the pleasures of the rich, and providing a common ground where employer and employee could meet on equal terms.”⁶⁶

Since then, libraries have continued to flourish. The IFLA states that there are approximately 2.6 million libraries across the world.⁶⁷ While nearly everyone is familiar with the traditional physical libraries in their brick-and-mortar buildings, digital libraries and digital services of libraries have been gaining traction over the years.

A digital library is defined as “[a] library in which a significant portion of the resources are available in machine-readable format[,] as opposed to print or microform[,] accessible by means of computers. The digital content may be locally held or accessed remotely via computer networks.”⁶⁸ It must be noted that digital libraries or digital services offered by libraries can refer to a multitude of things. Digital libraries are flexible in that they can offer a variety of information such as “hypertexts, archival images, computer simulations, digital video, and [] real-time scientific data.”⁶⁹

Digital libraries are not a new phenomenon. Though compared to the long history of traditional libraries spanning millennia, digital libraries have only been around for around thirty years.⁷⁰ The early concept of a digital library is often credited to Dr. Vannevar Bush in his article “As We May Think” for the July 1945 Issue of the *Atlantic*.⁷¹ Bush wrote —

Consider a future device for individual use, which is a sort of mechanized private file and library. It needs a name, and, to coin one at random, ‘memex’ will do. A memex is a device in which an individual stores all his books,

66. SIDNEY DITZION, *ARSENALS OF A DEMOCRATIC CULTURE* 73 (1947). The quote comes from the Remarks of Lewis H. Steiner during the Opening Exercises for the Newark Public Library in 1889. *Id.*

67. International Federation of Library Associations and Institutions, *Library Map of the World*, available at <https://librarymap.ifla.org/map> (last accessed July 31, 2023) [<https://perma.cc/SW3H-D54C>] (This number has increased since.).

68. JOAN M. REITZ, *DICTIONARY FOR LIBRARY AND INFORMATION SCIENCE* 217 (2004).

69. Thomas C. Reeves, *Digital Libraries*, available at <https://www.encyclopedia.com/literature-and-arts/journalism-and-publishing/libraries-books-and-printing/digital-libraries> (last accessed July 31, 2023) [<https://perma.cc/D45B-FKSK>].

70. See Leonardo Candela, et al., *History, Evolution and Impact of Digital Libraries*, in *E-PUBLISHING AND DIGITAL LIBRARIES: LEGAL AND ORGANIZATIONAL ISSUES 2* (Ioannis Iglezakis, et al. eds., 2011).

71. Reeves, *supra* note 69.

records, and communications, and which is mechanized so that it may be consulted with exceeding speed and flexibility. It is an enlarged intimate supplement to his memory.

...

A special button transfers him immediately to the first page of the index. Any given book of his library can thus be called up and consulted with far greater facility than if it were taken from a shelf. As he has several projection positions, he can leave one item in position while he calls up another. He can add marginal notes and comments, taking advantage of one possible type of dry photography, and it could even be arranged so that he can do this by a stylus scheme, such as is now employed in the telautograph seen in railroad waiting rooms, just as though he had the physical page before him.⁷²

The first published use of the term “digital library” can actually be traced to the year 1988 and the term first gained popularity through the NSF/DARPA/NASA Digital Libraries Initiative in 1994.⁷³ The idea of digital libraries was developed and cultivated alongside the birth and growth of the internet and the awareness of the wealth of access to information newly provided by the World Wide Web then.⁷⁴ Along with the development of digital libraries by prominent universities and government agencies in jurisdictions like the U.S. came to light several ethical and technical challenges, such as questions on data privacy, security, and copyright.⁷⁵

However, the push for digital libraries remained persistent. One author, William Y. Arms, wrote —

A dream of future libraries combines everything that we most prize about traditional methods, with the best that online information can offer. Sometimes we have nightmares in which the worst aspects of each are combined. In the first years of this century, the philanthropy of Andrew Carnegie brought public libraries to the United States. Now a new form of library is emerging. Hopefully, digital libraries will attract the same passion and respect, and serve the same deep needs that have long been associated with the best of libraries and publishing.⁷⁶

72. Vannevar Bush, *As We May Think*, ATLANTIC, July 1945, at 106–07.

73. Babatunde Joseph Bamgbade, et al., *Comparative Analysis and Benefits of Digital Library over Traditional Library*, WORLD SCIENTIFIC NEWS, Issue No. 24 of 2015, at 3.

74. Reeves, *supra* note 69.

75. *Id.*

76. WILLIAM Y. ARMS, DIGITAL LIBRARIES 272 (2000).

B. *The Practice of Digitization*

A key part to creating a digital library is through the process of digitization.⁷⁷ Digitization can be simply defined as “[t]he process of converting data to digital format for processing by computer.”⁷⁸ In the context of libraries and archives, it refers to the process of “conversion of printed text or images (photographs, illustrations, maps, etc.) into binary signals using some kind of scanning device that enables the result to be displayed on a computer screen.”⁷⁹ It can “be viewed as the process of converting non-digital born documents into digital format, this includes selection of collection/materials, imaging or scanning, transcribing, creating markup and index, creating metadata, processing images, uploading to the web, preserving[,] and maintaining archival media.”⁸⁰

Many articles have been written by educators, librarians, organizations, and more on the importance of digitizing library resources. There are generally three main purposes for libraries to pursue the digitization of their resources: (1) “to preserve endangered library resources[;]” (2) to improve the “efficiency of information search mechanisms[;]” and (3) to improve “access to library resources.”⁸¹

An important benefit of digitization is the digital preservation of print materials.⁸² Libraries and archives serve important roles in the preservation of culture and history. “Preserving library collections protects and chronicles the past, communicates the present, and helps shape the future.”⁸³

In line with the benefits for digital preservation, digitization of materials is being seen as a viable solution to address the problem of orphan works as well.⁸⁴ In a study conducted by the British Library on the mass digitization of

77. REITZ, *supra* note 68, at 217.

78. *Id.* at 219.

79. *Id.*

80. Otubelu Blessing Nnenna & Leonard Emenike Ume, *Digitization of Library Resources in Academic Libraries: Challenges and Implication*, IOSR J. OF MOBILE COMPUTING & APPLICATION, May-June, 2015, Volume No. 2, Issue No. 2, at 35.

81. *Id.* at 36.

82. White, *supra* note 2.

83. Lene Palmer, Top 10 Reasons to Preserve the Library Collections, *available at* <https://www.ala.org/alcts/sites/ala.org.alcts/files/content/confevents/preswk/events/flyer.pdf> (last accessed July 31, 2023) [<https://perma.cc/MP9J-BKEX>].

84. *Id.*

works published from 1870 to 2010, the researcher found that majority of in-copyright works were orphan works and concluded that “providing cultural institutions with legal certainty over their activities are needed to ensure that highly valuable research materials [do not] remain out of reach of the vast majority of citizens.”⁸⁵

A number of institutions in the Philippines already practice the digitization of materials that are mainly focused on materials that are out of copyright and in the public domain. The National Library of the Philippines has a digital library comprised of digitized materials ranging from official government publications to cultural and historical documents.⁸⁶ Additionally, the National Library of the Philippines collaborated with the University of the Philippines, the Department of Science and Technology, the Department of Agriculture, and the Commission on Higher Education to launch the Philippine eLib, which features digitized Filipiniana materials including theses and dissertations.⁸⁷ The Filipinas Heritage Library, which is a private library of the Ayala Foundation’s Arts and Culture Division, also features a Filipiniana Online library, which offers patrons access to their collections of rare materials.⁸⁸

Academic libraries have also been practicing digitization since the start of the 2000s. Ateneo de Manila University’s own Rizal Library digitized Jose Rizal’s works under public domain for the Rizaliana Library.⁸⁹ The University of Santo Tomas’ Miguel de Benavides Library and Archives likewise partnered

85. Barbara Stratton, Seeking New Landscapes, *available at* https://www.ifla.org/wp-content/uploads/files/assets/hq/topics/exceptions-limitations/documents/bl_rights_clearance_study.pdf (last accessed July 31, 2023) [<https://perma.cc/ESP3-BW78>].

86. National Library of the Philippines, Tekno-Aklatan, *available at* <https://nlpdl.nlp.gov.ph/TechnoAklatan.htm> (last accessed July 31, 2023) [<https://perma.cc/RE43-9LLS>].

87. Philippine eLib, About, *available at* <https://www.elib.gov.ph/index.php?id=2> (last accessed July 31, 2023) [<https://perma.cc/GKC5-QXSU>].

88. Filipinas Heritage Library, Online Library, *available at* <https://www.filipinaslibrary.org.ph/online-library> (last accessed July 31, 2023) [<https://perma.cc/MB7W-HMST>].

89. Dizon, *supra* note 52.

with UnionBank of the Philippines in order to launch an online library providing digitized versions of its historical and archival collections.⁹⁰

The question then arises for the digitization of in-copyright works. As explained by Ben White, Head of Intellectual Property for the British Library

Today's citizens want access to information online. While libraries have some funds to digitize collections and put them on the web, the many challenges of clearing intellectual property (IP) rights in in-copyright materials (combined with the fact that copyright can reach back as far as the 1870s) means that libraries often prefer to digitize out of copyright material. This has led to what is referred to in the European Union as the 'black hole of the 20th century.'⁹¹

Libraries and archives are quite aware of the limitations of copyright when it comes to the digitization of works. In the Philippine setting, it is observed that libraries choose to bypass the complexities and risks of copyright law by only digitizing and providing access to those works that are no longer under copyright restrictions.⁹² In the experience of the Rizal Library, it had to seek the permission of the pertinent rightsholders for the newspapers and photographs still covered by copyright in order to proceed with the digitization of such works and the distribution of the works in a digital format.⁹³ Should libraries choose to digitize certain works for preservation, such works are granted limited access that is limited to the premises of the libraries.⁹⁴

90. University of Santo Tomas Miguel de Benavides Library and Archives, Digital Collection, available at <http://digilib.ust.edu.ph> (last accessed July 31, 2023) [<https://perma.cc/VDZ7-H53R>].

91. White, *supra* note 2.

92. Fe Angela M. Verzosa, Copyright Issues in a Library Digital Environment, Remarks at the PAARL Conference on "Planning, Developing and Managing Digitization & Research Projects for Libraries and Information Centers," Function Hall of Tourism Center, Coron, Palawan (Apr. 18-20, 2012) (lecture notes available at <https://www.slideshare.net/verzosaf/copyright-issues-in-a-digital-library-environment> (last accessed July 31, 2023) [<https://perma.cc/C6SX-6R6L>]).

93. Lourdes T. David & Stephen B. Alayon, Digital Curation Projects: *A Study of Selected Academic and Research Repositories in the Philippines*, 26 LIBRES 89, 92 (2016).

94. Verzosa, *supra* note 92.

It must be noted that even in the U.S. jurisdiction, where there is a push for the digitization of orphan works, there is still legal uncertainty as to whether the full or mass digitization of orphaned in-copyright works are protected under fair use.⁹⁵ The U.S. Copyright Office reiterated that there has been no official judicial pronouncement as to the application of fair use to orphan works.⁹⁶ While library associations like the Association of Research Libraries in their “Code of Best Practices in Fair Use for Academic and Research Libraries” recommend digitization for orphan works (especially for works that are part of a library’s special or rare collections),⁹⁷ the U.S. Copyright Office cautioned that such codes of best practices are not sufficient indexes to prove that the digitization of orphan works would be covered by fair use.⁹⁸

C. Relevance in a Post-Pandemic Future

The COVID-19 pandemic has changed many aspects of how communities and institutions function. The way libraries and archives operate have also been greatly affected. In a recent report from a survey conducted by OCLC Research with 29 library leaders from across the globe, it was observed that the “pandemic amplified many shifts in library acquisition, discovery, and fulfillment practices[.]”⁹⁹ The response to challenges, such as limitations of in-person visits and the difficulties of circulation of physical resources, “led to an increase in digital and electronic offerings[.]”¹⁰⁰ The OCLC study reported

95. U.S. Copyright Office, Orphan Works & Mass Digitization: A Report of the Register of Copyrights, at 42, available at <https://www.copyright.gov/orphan/reports/orphan-works2015.pdf> (last accessed July 31, 2023) [hereinafter Orphan Works & Mass Digitization].

96. *Id.* at 43.

97. Association of Research Libraries, Code of Best Practices in Fair Use for Academic and Research Libraries, at 19, available at <https://www.arl.org/wp-content/uploads/2014/01/code-of-best-practices-fair-use.pdf> (last accessed July 31, 2023) [<https://perma.cc/6XNU-9ZNQ>]. The Code states as a principle, “[it] is fair use to create digital versions of a library’s special collections and archives and to make these versions electronically accessible in appropriate contexts.” *Id.*

98. Orphan Works & Mass Digitization, *supra* note 95, at 45.

99. LYNN SILIPIGNI CONNAWAY, ET AL., NEW MODEL LIBRARY: PANDEMIC EFFECTS AND LIBRARY DIRECTIONS 15 (2021).

100. *Id.* at 16.

that these short-term adjustments over the pandemic will intensify long-term changes in the way library collections are accessed.¹⁰¹

While the pandemic has certainly brought issues on copyright of print materials in a digital sphere to the forefront, these issues are not new.¹⁰² As noted, digitization has already been studied by the U.S. Copyright Office though such was more in the scope of orphan works and mass digitization.¹⁰³ In the European Union, there have already been several Council Directives addressing in particular the digitization of works by libraries and archives. Directive 2001/29/EC was passed in light of technological developments and the rise of the information society.¹⁰⁴ It provides that exceptions may be granted for public libraries and archives for specific acts of reproduction¹⁰⁵ and that these institutions may provide access to digital copies of works through dedicated terminals in the premises of these institutions.¹⁰⁶ The Orphan Works Directive addresses the orphan works problem and allows the digitization and making available of such digital copies as a permitted use of orphan works.¹⁰⁷

The issue of digitization has also reached the halls of Congress in the Philippine jurisdiction. In 2019, Representative Geraldine B. Roman filed House Bill No. 514, “An Act Digitizing All Books Necessary for Public Education and Establishing the Philippine Online Library, Providing Funds Therefor, and for Other Purposes.”¹⁰⁸ Senator Ramon Bong Revilla Jr. also

101. *Id.*

102. Bernardo, *supra* note 35, at 58.

103. Orphan Works & Mass Digitization, *supra* note 95.

104. Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the Harmonisation of Certain Aspects of Copyright and Related Rights in the Information Society, 2001 O.J. (L 167) 10, 10.

105. *Id.* art. 5 (2) (c). The provision does not specify that such reproduction is limited to reprographic means. *Id.*

106. *Id.* art. 5 (3) (n).

107. *See* Directive 2012/28/EU of the European Parliament and of the Council of 25 October 2012 on Certain Permitted Uses of Orphan Works, 2012 O.J. (L 299) 5, art. 6.

108. An Act Digitizing All Books Necessary for Public Education and Establishing the Philippine Online Library, Providing Funds Therefor, and for Other Purposes, H.B. No. 514, 18th Cong., 1st Reg. Sess. (2019).

filed Senate Bill No. 2211, which largely mirrors the provisions of the House Bill No. 514.¹⁰⁹ In the explanatory note, Senator Revilla expresses —

The New Normal indicates that [the] online method of learning is here to stay. There is therefore a need to complement this evolution with a similar shift in terms of available learning materials and references. This bill aims to establish the Philippine Online Library which will house the digitized copy of all textbooks and reference books necessary for the public education of our elementary and secondary students. It envisions an entire library of essential reading materials at the children's fingertips, and easy access to a treasure trove of Filipino literature.¹¹⁰

House Bill No. 10329, “An Act Establishing the Public Schools of the Future in Technology and Appropriating Funds Therefor,” also includes a provision on the digitization of books, particularly the establishment of a Public Online Library.¹¹¹ Two bills were also filed in 2020 that mandate the

109. An Act Digitizing All Books Necessary for Public Education and Establishing the Philippine Online Library, Providing Funds Therefor, and for Other Purposes, S.B. No. 2211, 18th Cong., 2d Reg. Sess. (2021).

110. *Id.* explan. n. para. 3.

111. An Act Establishing the Public Schools of the Future in Technology and Appropriating Funds Therefor, H.B. No. 10329, art. VI, § 15, 18th Cong., 3d Reg. Sess. (2021). The provision states —

SEC. 15. Public Online Library. – The PSOFT Road Map shall include the establishment of the Public Online Library.

The DepEd, DICT, DOST, the Commission on Higher Education (CHED), and the Technical Education and Skills Development Authority (TESDA) shall, in partnership with the National Library of the Philippines (NLP), the National Book Development Board (NBDB), and other concerned government agencies, develop and maintain the Public Online Library, a repository of educational materials and digitized copies of books and publications suitable for Filipino students and researchers that shall enrich the learning experience by complementing the textbooks and reference materials prescribed for the elementary and secondary levels. The Public Online Library shall be directly connected to the website of the Philippine Statistics Authority (PSA). The DepEd and the NLP shall have joint custody over the digitized copies of textbooks and references in the Public Online Library which shall be jointly managed by the DepEd and the DICT. In this regard, the DICT shall ensure the security of the online repository system to guarantee its integrity.

digitization of textbooks from publishers who participate in the Public School Textbook Program.¹¹² In a recent hearing held by the House Committee on Creative Industry and Performing Arts, publishers, however, expressed concern about these bills being manifestly disadvantageous to the struggling publishing industry in the Philippines.¹¹³ The National Book Development Board Chairman Dante Ang agreed that the two bills are “steps in the wrong direction.”¹¹⁴

From these acts both in the domestic and international field, one can observe that copyright issues concerning digitization have grown in prominence during the pandemic and are evidently here to stay as the educational sector continues to move further and further into the digital space.

D. Controlled Digital Lending: The Concept

Controlled digital lending or CDL is a prominent practice of digitization that has arisen in the last decade. For the purposes of this Note, the concept of CDL is adopted from the papers published by its foremost proponents.

The DepEd may solicit additional reference materials and publications from the NLP, other agencies of the government, and the private sector to augment its resources.

The authors of the digitized books and publications shall be strictly covered by the protection provided for in R.A. 8293, as amended, otherwise known as the ‘Intellectual Property Code of the Philippines.’ The DepEd and all concerned agencies shall ensure that the authors of the digitized books and publications shall be properly remunerated in accordance with law.

Id.

112. An Act Amending Republic Act No. 8047, Otherwise Known as the “Book Publishing Industry Development Act,” Providing for the Scanning and Conversion of Public School Textbooks into E-books and Other Digital Formats, H.B. No. 7946, 18th Cong., 2d Reg. Sess. (2020) & An Act Amending Republic Act No. 8047, Otherwise Known as the “Book Publishing Industry Development Act,” Providing for the Scanning and Conversion of Public School Textbooks into Ebooks and Other Digital Formats, H.B. No. 8020, 18th Cong., 2d Reg. Sess. (2020).

113. Melvin Sarangay, *Book Publishing Groups Hit DepEd for Abetting Copyright Infringement*, MANILA BULL., Oct. 23, 2021, available at <https://mb.com.ph/2021/10/22/book-publishing-groups-hit-deped-for-abetting-copyright-infringement> (last accessed July 31, 2023) [<https://perma.cc/UTR3-ZXCW>].

114. *Id.*

Quoting directly from the *White Paper on Controlled Digital Lending of Library Books* —

CDL enables a library to circulate a digitized title in place of a physical one in a controlled manner. Under this approach, a library may only loan simultaneously the number of copies that it has legitimately acquired, usually through purchase or donation. For example, if a library owns three copies of a title and digitizes one copy, it may use CDL to circulate one digital copy and two print, or three digital copies, or two digital copies and one print; in all cases, it could only circulate the same number of copies that it owned before digitization. Essentially, CDL must maintain an ‘owned to loaned’ ratio. Circulation in any format is controlled so that only one user can use any given copy at a time, for a limited time. Further, CDL systems generally employ appropriate technical measures to prevent users from retaining a permanent copy or distributing additional copies.

Thus, CDL would permit circulation of copies equal to those that had been legitimately acquired by the participating libraries. When the digital copy is being read by a patron, however, the corresponding physical copy is restricted and unavailable for consultation, so there is no situation in which the library is getting use of two copies for the price of one. A library can lend a physical book to a patron through standard circulation or to another library through interlibrary loan. What CDL does do is *shift that lending to a new format* that opens up access possibilities for readers with disabilities, physical access limitations, research efficiency needs, or other needs for digitally-accessible content.¹¹⁵

The concept for CDL is largely credited to have first been explored by Michelle M. Wu in her article “Building a Collaborative Digital Collection: A Necessary Evolution in Libraries” in the *Law Library Journal*.¹¹⁶ In the article, Wu opines that the digitization of a text is merely format shifting.¹¹⁷ Thus, when a library scans a book and converts such to a digital format like a portable document format (.pdf) under CDL, the book is merely shifted over from its original physical format to a digital format. According to Wu,

115. David R. Hansen & Kyle K. Courtney, *A White Paper on Controlled Digital Lending of Library Books*, available at https://controlddigitallending.org/whitepaper#_ftn1 (last accessed July 31, 2023) [<https://perma.cc/GS3P-89E3>] (citing Bailey, et al., *supra* note 33) (emphasis supplied).

116. Michelle M. Wu, *Building a Collaborative Digital Collection: A Necessary Evolution in Libraries*, 103 L. LIBR. J. 527 (2011).

117. *Id.* at 540.

“[d]igitization changes only the form, and ‘the ‘transfer of a work between media’ does not ‘alte[r] the character of that work for copyright purposes.’”¹¹⁸

While the exact details of how CDL is practiced may vary among different libraries and archives, the main purpose of CDL is to “replicat[e] with digital lending the legal and economically significant aspects of physical lending.”¹¹⁹ In order for CDL to properly abide with copyright regulations, it is emphasized that the library must exercise control over the digital copy.¹²⁰

There are thus six requisites listed for a valid practice of CDL as defined by its proponents. As explained later in this Note, these requisites are essential in the defense of CDL as being protected under the doctrines of fair use and first sale.¹²¹ The fifth chapter of this Note discusses more particularly the doctrines of fair use and first sale.

The first three requisites primarily focus on the ownership of the works to be digitized. The first requisite is that the original works must have been obtained lawfully by the libraries or archives.¹²² Thus, libraries must have lawful possession of the book either through purchase, exchange, or donation.¹²³ The second requisite is that CDL must only be applied to books that are owned by the library or archive.¹²⁴ CDL cannot be applied to materials that are under licenses or are held by libraries under loan from other institutions. The third requisite is that the library must maintain an “owned to loaned” ratio when practicing CDL. The “owned to loaned” ratio means that the library can only maintain and circulate the same amount of digital copies of a work as it has physical copies of that work in its collection.¹²⁵

As an example, a local library has two copies of “The Book Thief” by Markus Zusak.¹²⁶ Considering the requisite of an “owned to loaned” ratio, the library practicing CDL can only circulate two copies. The variations can

118. *Id.* at 541 (citing *New York Times Co. v. Tasini*, 533 U.S. 483, 502 (2000)).

119. Hansen & Courtney, *supra* note 115.

120. *Id.*

121. *Id.*

122. *Id.*

123. Librarianship Studies & Information Technology, Acquisitions (Libraries), available at <https://www.librarianshipstudies.com/2015/05/acquisitions.html> (last accessed July 31, 2023) [<https://perma.cc/QVF4-2ASF>].

124. Hansen & Courtney, *supra* note 115.

125. *Id.*

126. MARKUS ZUSAK, *THE BOOK THIEF* (2005).

be either one physical copy and one digital copy in circulation or both digital copies in circulation. It cannot be practiced that two physical copies plus a digital copy be circulated at the same time.

The last three requisites pertain to the controls exercised by the library or archive over the lending. The fourth requisite is that the digital copy may only be loaned to a single user at a time similar to how physical lending works.¹²⁷ The fifth requisite is that the period of lending must be limited similar as well to the time limits set on physical lending. The sixth and last requisite is that the library or archive must utilize digital rights management to prevent the risk of impermissible copying or reproduction of the digital copy of the work.¹²⁸

Digital rights management is an umbrella term that embraces any technology that can be utilized to control how digital content is used.¹²⁹ Digital rights management is utilized in order to guarantee the protection of the rights of authors by controlling the methods of access to the digital copy and tracking and limiting the access of the digital copy.¹³⁰

Several institutions have already been practicing CDL, such as academic libraries. One of the prominent and pioneering practitioners of CDL has been the Internet Archive. The Internet Archive operates the “Open Library,” which describes itself as an “open, editable library catalog.”¹³¹ The Open Library is “a virtual library that allows users to freely borrow digital copies of books that are uploaded and archived through the project — both books in the public domain and books under copyright.”¹³²

In 2020, the Internet Archive faced a lawsuit from four major publishers in the United States, Hachette Book Group, Inc., HarperCollins Publishers LLC, John Wiley & Sons, Inc., and Penguin Random House LLC.¹³³ The lawsuit was triggered by the launch of the National Emergency Library. The National Emergency Library was a temporary measure aimed to bridge the

127. *Id.*

128. *Id.*

129. American Library Association, Digital Rights Management, *available at* <https://www.ala.org/ala/washoff/WOissues/copyrightb/digitalrights/digitalrightsmmanagement.htm> (last accessed July 31, 2023) [<https://perma.cc/J256-AU2P>].

130. *Id.*

131. Internet Archive, Open Library, *available at* <https://openlibrary.org> (last accessed July 31, 2023) [<https://perma.cc/AY3E-R4T6>].

132. Romano, *supra* note 37.

133. *Id.*

gap caused by the closure of physical libraries wherein the Internet Archive suspended its lending restrictions and allowed multiple people to check out the same digital copy of a book at once.¹³⁴

In their complaint, the four publisher-plaintiffs alleged that Internet Archive has been engaged in “willful mass copyright infringement.”¹³⁵ The plaintiffs described the Internet Archive’s operations to be “grossly exceed[ing] legitimate library services, do[ing] violence to the Copyright Act, and constitut[ing] willful digital piracy on an industrial scale.”¹³⁶

Despite the lawsuit, the Internet Archive and other parties who support CDL and digitization practices continue to push on. The founder of Internet Archive, Brewster Kahle, expressed —

As a library, the Internet Archive acquires books and lends them, as libraries have always done This supports publishing and authors and readers. Publishers suing libraries for lending books — in this case, protected digitized versions, and while schools and libraries are closed — is not in anyone’s interest.

...

When nonprofit libraries have been sued in the past for helping their patrons access their collections, courts have ruled that they were engaging in fair use, as in the HathiTrust case[.]¹³⁷

Additionally, the lawyers for the Internet Archive argued —

To the extent that the feared market harms are the very same ones that would flow from handing a particular copy to a library patron, or mailing it to them, rather than lending that copy digitally, those harms are not ones that copyright takes into account[. ...] Every copy Internet Archive lends out was bought from the publishers, and it is not fair to demand that libraries pay again to lend the copy they already own.¹³⁸

134. *Id.*

135. Complaint by the Plaintiffs, June 1, 2020, ¶ 2 (on file with the U.S. District Court, Southern District of New York), *in* Hachette Book Group, Inc., et al. v. Internet Archive, Case 1:20-cv-04160 (S.D.N.Y., filed June 1, 2020) (U.S.) (pending).

136. *Id.* ¶ 3.

137. Romano, *supra* note 37.

138. Andrew Albanese, Internet Archive, Publishers to Seek Summary Judgment in Book Scanning Lawsuit, *available at* <https://www.publishersweekly.com/pw/by-topic/industry-news/libraries/article/89591-internet-archive-publishers-to-seek-summary-judgment-in-book-scanning-lawsuit.html> (last accessed July 31, 2023) [<https://perma.cc/4STV-PW72>] (citing Request for Pre-Motion

As of the date of this writing, the presiding judge, Judge John G. Koetl, granted both parties' request to proceed with summary judgment motions.¹³⁹ The court's decision is eagerly anticipated as it will be the first legal pronouncement on the validity of CDL and its proponents' arguments that CDL is protected by fair use.

III. LIBRARIES AND COPYRIGHT

I do feel that we should slowly change the narrative.

*I feel that copyright should be far more embraced
in discussions as an enabler of creativity, an enabler
of the diversity of what we publish, [and] an enabler
of innovation.*

— Michiel Kolman, President of the International
Publishers' Association¹⁴⁰

*Reading ought to be furnished to all, as a matter
of public policy and duty, on the same principle
that we furnish free education, and in fact, as a
part, and a most important part, of the education of all.*

— Report of the Trustees of the Boston Public Library¹⁴¹

A. Relations Between Libraries and Copyright Laws

“[L]ibraries [] predate copyright.”¹⁴² Law professor Ariel Katz, a staunch defender of digital libraries and CDL, emphasizes that such is of importance in

Conference by the Defendant, June 9, 2022, at 2-3, (on file with the U.S. District Court, Southern District of New York), in *Hachette Book Group, Inc., et al.*, Case 1:20-cv-04160 (S.D.N.Y., filed June 1, 2020) (U.S.) (pending)).

139. Albanse, *supra* note 138.

140. Michael Healy, Publisher Voices Raised for Copyright, *available at* <https://www.copyright.com/blog/publisher-voices-raised-for-copyright> (last accessed July 31, 2023) [<https://perma.cc/578S-8ALM>].

141. ALICE GERTZOG & EDWIN BECKERMAN, ADMINISTRATION OF THE PUBLIC LIBRARY 24 (2003) (citing City of Boston, Report of the Trustees of the Public Library, City Document No. 37, at 15 (July 1952)).

142. Ariel Katz, Copyright, Exhaustion, and the Role of Libraries in the Ecosystem of Knowledge, 13 I/S 81, 84 (2016).

framing the relationship between library practices and copyright laws.¹⁴³ Libraries have been existing since the birth of early civilizations with the practice of collecting and storing knowledge in any form of a repository being “as old as civilization itself.”¹⁴⁴

The first copyright act of the world, the Statute of Anne, was passed in 1709.¹⁴⁵ Even in this earliest statute to grant copyrights to authors and publishers, a special provision was added in recognition of the special roles of libraries in society.

Provided always, and it is hereby Enacted, That Nine Copies of each Book or Books, upon the best Paper, that from and after the said Tenth Day of April, One thousand seven hundred and ten, shall be Printed and Published, as aforesaid, or Reprinted and Published with Additions, shall, by the Printer and Printers thereof, *be Delivered* to the Warehouse-Keeper of the said Company of Stationers for the time being, at the Hall of the said Company, before such Publication made, *for the Use of the Royal Library, the Libraries of the Universities of Oxford and Cambridge, the Libraries of the Four Universities in Scotland, the Library of Sion College in London, and the Library commonly called the Library belonging to the Faculty of Advocates at Edinburgh* respectively; which said Warehouse-Keeper, is hereby required, within Ten Days after Demand by the Keepers of the respective Libraries, or any Person or Persons by them or any of them Authori[z]ed to Demand the said Copy, to Deliver the same, for the Use of the aforesaid Libraries; and if any Proprietor, Bookseller or Printer, or the said Warehouse-Keeper of the said Company of Stationers, shall not observe the Direction of this Act therein, That then he and they, so making Default in not Delivering the said Printed Copies, as aforesaid, shall Forfeit, besides the value of the said Printed Copies, the sum of Five Pounds for every Copy not so Delivered, as also the value of the said Printed Copy not so Delivered, the same to be Recovered by the Queens [sic] Majesty, Her Heirs and Successors, and by the Chancellor, Masters, and Scholars of any of the said Universities, and by the President and Fellows of Sion College, and the said Faculty of Advocates at Edinburgh, with their full Costs respectively.¹⁴⁶

This provision mandating the deposit of books to libraries was explained by the British courts as a measure in order to “enable[] literary persons to

143. *Id.* at 86.

144. Krasner-Khait, *supra* note 61.

145. Katz, *supra* note 142, at 85.

146. An Act for the Encouragement of Learning, by Vesting the Copies of Printed Books in the Authors or Purchasers of Such Copies, During the Times Therein Mentioned, Statute of Anne, 8 Ann. c. 19, ¶ V (1710) (Gr. Brit.) (emphasis supplied).

access books even if they may not be able to afford purchasing them.”¹⁴⁷ Philippine copyright statutes no longer contain such type of mandatory deposit provisions. It is important to note, however, that the origins of copyright law had a high regard for libraries and their role as “levelers”¹⁴⁸ of society in providing access to knowledge.

The Philippines has also demonstrated recognition of the important role of libraries from the inception of its copyright laws. The first copyright law of the Philippines, Act No. 3134,¹⁴⁹ interestingly included, as an exemption to prohibited importation of works under copyright, instances

[w]hen [works are] imported, for use only and not for sale, not more than three copies of such work in any one invoice, in good faith for any religious, charitable, or educational society or institution duly incorporated or registered or for the encouragement of the fine arts, or for any State, school, college, university, or free public library in the Philippine Islands[.]¹⁵⁰

Our current IP Code contains a library exemption as well to grant protection to certain library practices.¹⁵¹ The Philippines has also previously passed into law Republic Act No. 7743,¹⁵² which mandates the establishment of public libraries all throughout the Philippines. In the statute’s declaration of policy, it states —

It is hereby declared the national policy to promote the moral and intellectual well-being of the people: elevate the literacy level of every Filipino to the end that illiteracy is eradicated by the end of the century; and *recognize the vital role of knowledge and information in nation-building by establishing public libraries* in every congressional district, city and municipality, and reading centers in every barangay throughout the Philippines.¹⁵³

147. Katz, *supra* note 142, at 86 (citing *Univ. of Cambridge v. Bryer*, 16 ER 317, 321 (1812) (U.K.)).

148. DITZION, *supra* note 66.

149. An Act to Protect Intellectual Property, Act No. 3134, § 22 (1924).

150. Christopher L. Lim, *The Development of Philippine Copyright Law*, 46 ATENEO L.J. 368, 369 (2001).

151. INTELL. PROP. CODE, § 188.

152. An Act Providing for the Establishment of Congressional, City and Municipal Libraries and Barangay Reading Centers Throughout the Philippines, Appropriating the Necessary Funds Therefor and for Other Purposes, Republic Act No. 7743 (1994).

153. *Id.* § 1 (emphasis supplied).

It is submitted, therefore, that the State does recognize libraries as important institutions in the elevation of the lives of Filipinos and the provision of knowledge and information necessary for nation-building. This does not mean, however, that libraries are naturally exempt from copyright laws. Rather, they are stewards of copyright law that in recognition of their valuable roles to society possess unique exceptions granted under copyright laws that are applicable to libraries and non-profit archives alone in order for such institutions to carry on their mission.¹⁵⁴

B. Copyright: The Balancing of Interests

Copyright has been observed to be “purely a statutory right.”¹⁵⁵ Unlike other rights that many may be more familiar with, it is not an inherent right, but rather one that is “a new or independent right granted by [] statute.”¹⁵⁶ Thus, this nature as a right purely created and defined by Congress leans to the concept of copyright as a legislative balancing act of interests.¹⁵⁷

This balancing of interests inherent in copyright laws, and the IP Code in general, can be gleaned from the provisions of the 1987 Philippine Constitution itself. Article XIV, Section 13 provides that “[t]he State shall protect and secure 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 period as may be provided by law.”¹⁵⁸

The IP Code likewise provides —

Section 2. *Declaration of State Policy.* — The State recognizes that an effective intellectual and industrial property system is vital to the development of domestic and creative activity, facilitates transfer of technology, attracts foreign investments, and ensures market access for our products. It shall protect and secure the exclusive rights of scientists, inventors, artists[,] and

154. American Library Association, Copyright for Libraries: General Information, available at <https://libguides.ala.org/copyright> (last accessed July 31, 2023) [<https://perma.cc/FR8E-62GB>].

155. *Joaquin, Jr. v. Drilon, G.R. No. 108946, 302 SCRA 225, 238 (1999)* (citing 18 C.J.S., *Copyrights* § 161 (1999)).

156. *Id.*

157. George H. Pike, An Update on Orphan Works, at 1, available at http://d-scholarship.pitt.edu/2666/1/An_Update_on_Orphan_Works_July-Aug2007.pdf (last accessed July 31, 2023) [<https://perma.cc/R9WT-3M8T>].

158. PHIL. CONST. art. XIV, § 13 (emphasis supplied).

other gifted citizens to their intellectual property and creations, *particularly when beneficial to the people*, for such periods as provided in this Act.

The use of intellectual property bears a social function. To this end, the State shall promote the diffusion of knowledge and information for the promotion of national development and progress and the common good.

It is also the policy of the State to streamline administrative procedures of registering patents, trademarks and copyright, to liberalize the registration on the transfer of technology, and to enhance the enforcement of intellectual property rights in the Philippines.¹⁵⁹

Being a right borne from statute, copyright is subject to the terms and limitations set by Congress through the law.¹⁶⁰ Through the copyright laws, the legislature aims to strike the balance between the private rights of authors and rights holders and the public interest.¹⁶¹ This concept of balancing of interests has also served as the scope through which to view copyright law amendments and the “essential core” of copyright law since its conception.¹⁶² Thus, it has been said that “copyright law [has undergone] a transformation which creates rights on [] both sides of the weighing scale over the intangibilities it supposes to protect and promote.”¹⁶³

The limitations to copyright, particularly the library exception that is subject of this Note, is a key example for this balancing of interests. On one hand, there are the legitimate rights and interests of authors and publishers and on the other hand, there are the public needs to be served by libraries and archives in their missions to provide access to knowledge.

C. Copyright Exceptions in General

Copyright is not just a matter of national law — it is “inevitably international.”¹⁶⁴ The concept of copyright as an exercise of the balancing of

159. INTELL. PROP. CODE, § 2 (emphases supplied).

160. *Joaquin*, 302 SCRA at 238.

161. Danilo Mandic, Balance: Resolving the Conundrum Between Copyright and Technology? (Working Paper, May 2011), at 3, available at https://www.wipo.int/edocs/mdocs/mdocs/en/wipo_ipr_ge_11/wipo_ipr_ge_11_topic2-related2.pdf (last accessed July 31, 2023) [<https://perma.cc/J58R-FKTB>].

162. *Id.*

163. *Id.* at 3-4

164. Zechariah Chafee, Jr., *Reflections on the Law of Copyright: I*, 45 COLUM. L. REV. 503, 517 (1945).

interests has also been reflected in international copyright law. In its preamble, the WIPO Copyright Treaty states that it “[emphasizes] the [] significance of copyright protection as an incentive for literary and artistic creation []” and, at the same time, “[recognizes] the need to maintain a balance between the rights of authors and the larger public interest, particularly education, research[,] and access to information.”¹⁶⁵

It must be noted that copyright is a state-granted monopoly.¹⁶⁶ Thus, in recognition of the bedrock principle that “protection should not go substantially beyond the purposes of protection[,]”¹⁶⁷ States have defined the metes and bounds of copyright protection and set forth limitations and exceptions to copyright protection. The principle that limitations or restrictions on the copyright protection granted to authors and rightsholders are granted for justified cases have long gained recognition both in domestic and international laws.¹⁶⁸ As Swiss delegate Nuna Droz expressed, “limits to absolute protection are rightly set by the public interest.”¹⁶⁹

It has been noted that “[i]n determining the scope of [] exceptions, it is incumbent on [a] State to strike a fair balance between the interests of the authors on the one hand and those of the public on the other hand.”¹⁷⁰ For copyright limitations set by national legislatures to be valid, such must abide by the three-step test. The three-step test was first introduced in Article 9 (2) of the Berne Convention for the Protection of Literary and Artistic Works.¹⁷¹

165. WIPO Copyright Treaty pmb. paras. 5 & 6, *opened for signature* Dec. 20, 1996, 2186 U.N.T.S. 121 (entered into force Mar. 6, 2002).

166. Chafee, *supra* note 164, at 506.

167. *Id.*

168. Standing Committee on Copyright and Related Rights, WIPO Study on Limitations and Exceptions of Copyright and Related Rights in the Digital Environment, at 3, WIPO Doc. SCCR/9/7 (Apr. 5, 2003).

169. *Id.* (citing ACTES DE LA CONFÉRENCE INTERNATIONALE POUR LA PROTECTION DES DROITS D'AUTEUR RÉUNIE À BERNE DU 8 AU 19 SEPTEMBRE 1884 67 (1884) (translated from French to English)).

170. GILLIAN DAVIES, COPYRIGHT AND THE PUBLIC INTEREST 276 (2d ed. 2002).

171. Berne Convention for the Protection of Literary and Artistic Works, *signed* Sept. 9, 1886, 828 U.N.T.S. 222 (as amended) [hereinafter Berne Convention] (entered into force Jan. 29, 1970).

Article 9. Right of Reproduction.

- (1) Authors of literary and artistic works protected by this Convention shall have the exclusive right of authorizing the reproduction of these works, in any manner or form.
- (2) *It shall be a matter for legislation in the countries of the Union to permit the reproduction of such works in certain special cases, provided that such reproduction does not conflict with a normal exploitation of the work and does not unreasonably prejudice the legitimate interests of the author.*¹⁷²

At that time, the provision was framed to serve more as a diplomatic compromise between nations that already crafted copyright exemptions in their own national legislations and to give a general set of criterion for proper circumstances of exemption to the right of reproduction.¹⁷³ At present, the three-step test is considered to be “at the core of copyright law[.]”¹⁷⁴ with all statutory exemptions to copyright and the neighboring rights having to comply with the test.

At the inception of the test in the Berne Convention, it was initially limited in application to exceptions to the right of reproduction.¹⁷⁵ The three-step test was soon extended to apply as well to other exclusive rights and neighboring rights of authors through succeeding treaty provisions.

Agreement on Trade-Related Aspects of Intellectual Property Rights

Article 13. *Limitations and Exceptions.*

Members shall confine limitations or exceptions to exclusive rights to certain special cases which do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the right holder.¹⁷⁶

172. *Id.* art. 9 (1) & (2) (emphasis supplied).

173. Kamil J. Koelman, *Fixing the Three-Step Test*, 2006 EUR. INTELL. PROP. REV. 407, 407 (2006).

174. *Id.*

175. See Berne Convention, *supra* note 171, art. 9.

176. Marrakesh Agreement Establishing the World Trade Organization, annex 1C (Agreement on Trade-Related Aspects of Intellectual Property Rights), art. 13, signed Apr. 15, 1994, 1867 U.N.T.S. 3 [hereinafter TRIPS Agreement].

WIPO Copyright Treaty

Article 10. *Limitations and Exceptions*

- (1) Contracting Parties may, in their national legislation, provide for limitations of or exceptions to the rights granted to authors of literary and artistic works under this Treaty in certain special cases that do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the author.
- (2) Contracting Parties shall, when applying the Berne Convention, confine any limitations of or exceptions to rights provided for therein to certain special cases that do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the author.¹⁷⁷

The three steps are intended to be cumulative factors and the failure to comply with even one step renders the exemption violative of the three-step test.¹⁷⁸ The three steps then are summarized as follows:

- (1) The exemption must be confined to ‘certain special cases.’¹⁷⁹
- (2) Such cases must not ‘conflict with a normal exploitation of the work.’¹⁸⁰
- (3) Such cases must not ‘unreasonably prejudice the legitimate interests of the author.’¹⁸¹

Interestingly enough, the three-step test has also been incorporated in the Philippine IP Code as a guideline to the interpretation of the provisions of Section 184, to wit —

Section 184. Limitations on Copyright.

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

...

184.2. The provisions of this section shall be interpreted in such a way as to allow the work to be used in a manner which does not conflict with the

177. WIPO Copyright Treaty, *supra* note 165, art. 10.

178. Tobias Schonwetter, The Three-Step Test Within the Copyright System, available at <http://pcf4.dec.uwi.edu/viewpaper.php?id=58&print=1> (last accessed July 31, 2023) [<https://perma.cc/7HLG-MJY9>].

179. Berne Convention, *supra* note 171, art. 9 (2); TRIPS Agreement, *supra* note 176, art. 13; & WIPO Copyright Treaty, *supra* note 165, art. 10.

180. *Id.*

181. *Id.*

normal exploitation of the work and does not unreasonably prejudice the right holder's legitimate interest.¹⁸²

There has thus far only been one pronouncement on the interpretation of the three-step test. Through a ruling on the validity of Section 110 (5) of the U.S. Copyright Act,¹⁸³ the World Trade Organization Panel elucidated each factor of the three-step test¹⁸⁴ as enunciated in Article 13 of the TRIPS Agreement.¹⁸⁵

The first step of provision of certain special cases means that the exemption must be clearly defined and that the exemption should be narrowly tailored in its scope and reach.¹⁸⁶ This particular step does not require for any specific public interest policy or special circumstance to justify the provision of such exemption.¹⁸⁷ The Panel observed that public policy would only be relevant in “making inferences about the scope of a limitation or exception or the clarity of its definition.”¹⁸⁸

The second step requires that the cases under the exemption must not “conflict with a normal exploitation of the work.”¹⁸⁹ The Panel construed that normal exploitation embraces not only actual or existing effects on the market but also includes potential effect on present and future market conditions.¹⁹⁰ The Panel took guidance from the point of a study group originally formed to propose several amendments to the Berne Convention on the right of reproduction.¹⁹¹

[to] limit the recognition and the exercising of that right, for specified purposes and *on the condition that these purposes should not enter into economic*

182. INTELL. PROP. CODE, § 184.

183. Copyright Act, 17 U.S.C. § 110 (5) (1976) (U.S.) (as amended).

184. Panel Report, *United States — Section 110 (5) of the Copyright Act*, WTO Doc. WT/DS160/R (June 15, 2000) [hereinafter *United States — Section 110 (5) of the Copyright Act*].

185. TRIPS Agreement, *supra* note 176, art. 13.

186. *United States — Section 110 (5) of the Copyright Act*, *supra* note 184, ¶ 6.112.

187. World Intellectual Property Office, Applying the Three Step Test in the Digital Environment, available at https://www.wipo.int/edocs/mdocs/copyright/en/sc_cr_17/sccr_17_www_111472.ppt (last accessed July 31, 2023) [<https://perma.cc/HU2T-9KC4>].

188. *United States — Section 110 (5) of the Copyright Act*, *supra* note 184, ¶ 6.112.

189. TRIPS Agreement, *supra* note 176, art. 13.

190. *United States — Section 110 (5) of the Copyright Act*, *supra* note 184, ¶ 6.184.

191. *Id.* ¶ 6.179.

*competition with these works' in the sense that 'all forms of exploiting a work, which have, or are likely to acquire, considerable economic or practical importance, must be reserved to the authors.'*¹⁹²

While potential effects on the market conditions for the work is important in evaluating conflict with a normal exploitation of the work, it is also tempered by the observation that this would not embrace all possible uses of the work, but only those that would be of “considerable or practical importance.”¹⁹³ As such, the test for normal exploitation would be to ask whether or not the particular use embraced in an exemption enters into or would enter into economic competition with the author.¹⁹⁴

The third step requires that the cases under the exemption must not “unreasonably prejudice the legitimate interests of the author.”¹⁹⁵ This third step is only relevant when the first and second steps have been proven to be satisfied.¹⁹⁶ While the immediate interests in consideration are the economic interests of the author, the WTO Panel stated that the legitimate interests are not limited to economic value alone.¹⁹⁷ In determining what is an unreasonable level of prejudice, the guideline is that the exception or limitation must not cause, whether directly or potentially, an unreasonable loss of income to the author.¹⁹⁸

The three-step test is an essential consideration in the discussion of any copyright limitation or exemption. The Philippines is a party to the Berne Convention, the TRIPS Agreement, and the WIPO Copyright Treaty,¹⁹⁹ which imposes the obligation of compliance with the test upon the State to

192. *Id.* (citing Government of Sweden & United International Bureaux for the Protection of Intellectual Property, Berne Convention for the Protection of Literary and Artistic Works: Proposals for Revising the Substantive Copyright Provisions (Articles 1 to 20), Doc. S/1 (May 15, 1966)) (emphasis supplied).

193. World Intellectual Property Office, *supra* note 187.

194. *Id.*

195. TRIPS Agreement, *supra* note 176, art. 13.

196. World Intellectual Property Office, *supra* note 187.

197. *United States — Section 110 (s) of the Copyright Act*, *supra* note 184, ¶ 6.227 (citing Panel Report, *Canada – Patent Protection of Pharmaceutical Products*, ¶ 7.6off, WTO Doc. WT/DS114/R (Apr. 7, 2000)).

198. *Id.* ¶ 6.229.

199. Intellectual Property Office of the Philippines, Philippine Acceded Intellectual Property Treaties, available at <https://www.ipophil.gov.ph/reference/philippine-acceded-intellectual-property-treaties> (last accessed July 31, 2023) [<https://perma.cc/Z93A-JLLE>].

comply with. Thus, even the exemption granted to libraries and archives must comply with such test.

D. Safe Harbor Statutes

Among the economic rights granted to an author of a work is the exclusive right to the reproduction of the work or a substantial portion thereof. In the Philippine jurisdiction, such right is provided in Section 177. “Subject to the provisions of Chapter VIII, copyright or economic rights shall consist of the exclusive right to carry out, authorize[,] or prevent the following acts: 177.1. Reproduction of the work or substantial portion of the work[.]”²⁰⁰ Reproduction is defined as “the making of one (1) or more copies, temporary or permanent, in whole or in part, of a work or a sound recording in any manner or form without prejudice to the provisions of Section 185 of this Act.”²⁰¹

Relevant to the discussion of copyright and libraries and archives is the right to the public display or communication of the work as well.²⁰² Public lending is defined as “the transfer of possession of the original or a copy of a work or sound recording for a limited period, for non-profit purposes, by an institution the services of which are available to the public, such as public library or archive[.]”²⁰³

As gleaned from Section 177,²⁰⁴ the exclusive copyright or economic rights of an author have limitations under the law. Such limitations are listed in Chapter VIII of the IP Code,²⁰⁵ including:

- (1) Specific limitations on copyright;²⁰⁶
- (2) Fair use;²⁰⁷
- (3) Private reproduction for research and study;²⁰⁸

200. INTELL. PROP. CODE, § 177.1.

201. *Id.* § 171.9.

202. *Id.* §§ 177.5-177.6.

203. *Id.* § 171.5.

204. *Id.* § 177 (“Subject to the provisions of Chapter VIII”).

205. *Id.* ch. VIII.

206. INTELL. PROP. CODE, § 184.

207. *Id.* § 185.

208. *Id.* § 187.

- (4) Reprographic reproduction by libraries;²⁰⁹ and
- (5) Permissible reproduction of computer programs.²¹⁰

Among copyright limitations, statutes of different jurisdictions often include certain exceptions or limitations that are specifically available to libraries or archives only.²¹¹ According to a study conducted for the World Intellectual Property Office – Standing Committee on Copyrights and Related Rights (WIPO-SCCR), around 161 of the 191 countries of the WIPO have at least one provision in their copyright statutes that provide an exception or limitation exclusively to libraries or archives.²¹² It was noted that “the growing prevalence of these copyright statutes in domestic legislation suggests strongly that exceptions for libraries and archives are fundamental to the structure of copyright law throughout the world.”²¹³

The WIPO-SCCR study has labelled such exceptions or limitations for libraries and archives as “library exceptions.”²¹⁴ The Author accordingly adopts such term as well throughout this Note. The WIPO-SCCR study defines a library exception as an exception or copyright limitation “that the library or other institution is permitted by the statute to use the work without permission from the author, copyright owner, or any other party, and that no payment or other remuneration is due for the use.”²¹⁵

It has been observed that statutory library exceptions may not always cover each and every library practice. This is especially the case when much time has passed between the passage of the library exception into law and the present times. In these types of situations in different jurisdictions, the “increasing gaps in the law are sometimes filled in practice by reliance on fair use[.]”²¹⁶

209. *Id.* § 188.

210. *Id.* § 189.

211. Standing Committee on Copyright and Related Rights, *Study on Copyright Limitations and Exceptions for Libraries and Archives: Updated and Revised (2017 Edition)*, at 6, WIPO Doc. SCCR/35/6 (Nov. 2, 2017).

212. *Id.*

213. *Id.*

214. *Id.* at 8.

215. *Id.*

216. U.S. Copyright Office, Section 108 of Title 17: A Discussion Document of the Register of Copyrights, at 13, available at <https://www.copyright.gov/policy/section108/discussion-document.pdf> (last accessed July 31, 2023) [<https://perma.cc/6WC5-6PMA>].

The problem with reliance upon fair use, however, is that libraries and their patrons have noted that there is a lack of certainty for those who may not have the legal or monetary resources to analyze each claim of fair use, or to defend oneself should they face copyright infringement claims.²¹⁷ As the U.S. Copyright Office noted in its report on its own jurisdiction's library exception, "[r]eliance on fair use alone will leave libraries and archives without a robust, certain safe harbor for their essential, everyday activities."²¹⁸ Additionally, touching upon their own library exception, the Society for American Archivists commented —

Section 108 has two great advantages over the fair use defense. First, Section 108 provides explicit assurance that certain actions are non-infringing. This clarity can encourage hesitant archivists who, because they are uncomfortable with their understanding of fair use or are unable to risk the cost of defending their understanding, needlessly limit public access to archival materials. Second, Section 108 authorizes some socially beneficial activities that may not constitute fair use, such as the copying of entire collections for deposit in other repositories.²¹⁹

In reflecting upon libraries' roles in cultural preservation and the role of library exceptions in this, Ben White shared —

Recognizing the cultural importance of sharing, Mahatma Gandhi said that, 'no culture can live, if it attempts to be exclusive.' The stimulus to share and reuse information and knowledge comes in many guises. Perhaps the most deep-rooted of our human instincts is the desire to preserve our culture for future generations. This is one of the most important functions of libraries.

Libraries are rich repositories of historically and culturally significant collections, many of which are not available anywhere else in the world. Without an appropriate copyright exception, a library could not preserve or replace a damaged work while it is still covered by copyright. For example, it could not lawfully copy or digitize an old newspaper or a unique sound recording to preserve it. Without appropriate library exceptions, this cultural heritage would be lost to future generations.²²⁰

217. *Id.* at 15.

218. *Id.*

219. *Id.* (citing Society of American Archivists, Issue Brief: Archivists and Section 108 of the Copyright Act, *available at* <https://www.archivists.org/statements/issue-brief-archivists-and-section-108-of-the-copyright-act> (last accessed July 31, 2023) [<https://perma.cc/5KCZ-VXYR>]).

220. White, *supra* note 2.

There is no explicit requirement for jurisdictions to provide an exception to their libraries and archives. This can be gleaned even from the fact that 28 member-States of the WIPO have no library exception in their copyright statutes.²²¹ The provision of a library exception as well as the nature of the exception is then left to the policy-making discretion of each member-State's lawmaking body. As such,

The challenges facing libraries are linked in large part to the fact that, while international copyright agreements guarantee exclusive rights for authors and other right holders, the interpretation of the exceptions and limitations that entities such as libraries depend on in order to provide their services is left to national parliaments. In sum, exceptions and limitations are national and optional, whereas the rights accruing to right holders are international and guaranteed.²²²

Jurisdictions have thus adopted different types of library exceptions with various provisions. The WIPO-SCCR study broke down the elements of such statutes as follows:²²³

General Library Exception	“[A] broad and flexible provision that permits a library or other institution to make copies of works, usually subject to various conditions, but not limited to particular purposes” ²²⁴
Copies for Research and Study	“[T]he provision permitting a library or other institution to make copies (usually single copies) at the request of a user, often specifically for that person's research or private study” ²²⁵
Making Available	“[A] statute allowing libraries to make digital works available to users on the premises, usually for their research or study” ²²⁶

221. Standing Committee on Copyright and Related Rights, *supra* note 27, at 7.

222. White, *supra* note 2.

223. Standing Committee on Copyright and Related Rights, *supra* note 27, at 8-9.

The elements breakdown has been converted to table format for easier reading.

224. *Id.* at 8.

225. *Id.*

226. *Id.*

Copies for Preservation or Replacement	“[S]tatutes that authorize the library to make copies of works for preservation, without necessarily requiring that the work first be at risk [or] ... statutes authorizing libraries to replace existing copies in the collection, or in the collection of another library, if the work is lost, damaged, deteriorated, or otherwise in jeopardy” ²²⁷
Interlibrary Loan or Document Supply	“[S]tatutes that permit libraries to make copies of works to provide to other libraries for the libraries’ use or for delivery to users at their request” ²²⁸
Anti-Circumvention	“[P]rovisions barring the circumvention of technological protection measures” ²²⁹

The report additionally noted that there are no uniform elements to library exceptions. As an example, only a minority of jurisdictions have adopted in their copyright statutes a provision regarding interlibrary loan or document supply.²³⁰ In addition, only some jurisdictions have adapted to the times and included provisions addressing technological developments and the digital age, but many have lagged behind in addressing such.²³¹

E. Section 188: The Philippine Library Exception

The Philippines has its own library exception, and such is found in Section 188 of the Intellectual Property Code.²³² Section 188 provides —

Section 188. Reprographic Reproduction by Libraries. — 188.1. Notwithstanding the provisions of Subsection 177.1, any library or archive whose activities are not for profit may, without the authorization of the author of copyright owner, make a limited number of copies of the work, as may be necessary for such institutions to fulfill their mandate, by reprographic reproduction:

227. *Id.* at 9.

228. Standing Committee on Copyright and Related Rights, *supra* note 27, at 9.

229. *Id.*

230. *Id.*

231. *Id.*

232. INTELL. PROP. CODE, § 188.

- (a) Where the work by reason of its fragile character or rarity cannot be lent to user in its original form;
- (b) Where the works are isolated articles contained in composite works or brief portions of other published works and the reproduction is necessary to supply them; when this is considered expedient, to persons requesting their loan for purposes of research or study instead of lending the volumes or booklets which contain them; and
- (c) Where the making of such limited copies is in order to preserve and, if necessary in the event that it is lost, destroyed or rendered unusable, replace a copy, or to replace, in the permanent collection of another similar library or archive, a copy which has been lost, destroyed or rendered unusable and copies are not available with the publisher.

188.2. Notwithstanding the above provisions, it shall not be permissible to produce a volume of a work published in several volumes or to produce missing tomes or pages of magazines or similar works, unless the volume, tome or part is out of stock: Provided, That every library which, by law, is entitled to receive copies of a printed work, shall be entitled, when special reasons so require, to reproduce a copy of a published work which is considered necessary for the collection of the library but which is out of stock.²³³

The origin of this library exception is traced to Section 13 of Presidential Decree No. 49.²³⁴ Section 13 provided —

Section 13. Libraries, public archives[,] and museums have the right, subject to the conditions specified in the succeeding paragraphs, to produce for purposes of their activities, by photographic means, and without the consent of the creator or proprietor, copies of a literary or artistic work.

Material forming part of the collections mentioned in the preceding paragraph which, by reason of their fragile character or rarity, cannot be lent to users in its original form, may be reproduced by photography for the purpose of loans. Nevertheless, except in cases where special reasons justify it, not more than two copies may be made.

It is equally permissible to make, by means of photography, reproductions of isolated articles contained in composite works, as well as brief portions of other published works, in order to supply them, when this is considered

233. *Id.*

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

expedient, to persons requesting their loan for purposes of research or study, instead of lending the volumes or booklets which contain them. Each person seeking loan may only receive one copy of each article or each portion of a work.

When a copy of a work is found to be incomplete, the missing portions may be reproduced by means of photography, provided they only constitute a minor portion of the total work. Nevertheless, it shall not be permitted to produce a volume of a work published in several volumes or to produce missing tomes or parts of magazines or similar works, unless the volume, tome or part is out of stock with booksellers, the printing house and the publisher.

Every library which, by law, is entitled to receive one or two copies of a printed work shall be entitled, when special reasons so require, to reproduce, by means of photography or process analogous to photography, a copy of a published work, the acquisition of which is considered necessary for the collections of the library, but which is out of stock with booksellers, the printing house and the publisher.

A work belonging to the collections mentioned in the first paragraph of this section which has not been disseminated may not be reproduced or published without the consent of the creator or proprietor. However, such work may be reproduced for purposes of preservation.²³⁵

Section 188 of the IP Code primarily reorganized the library exception found in Section 13 of P.D. 49.²³⁶ Aside from the reorganization of the provision, the library exception has substantially remained the same since its origin in 1972. A couple key amendments perhaps has been the change of the term “photography” to “reprographic reproduction” and the lowering of the amount of copies a library may produce from two copies originally to a single copy only.²³⁷

Since the passage of the IP Code into law in 1997, Section 188 was amended only once in 2013 through Republic Act No. 10372.²³⁸

Section 13. Section 188.1. of Republic Act No. 8293 is hereby amended to read as follows:

235. Decree on Intellectual Property, § 13 (1972).

236. *Compare* Presidential Decree No. 49, § 13, *with* INTELL. PROP. CODE, § 188.

237. Decree on Intellectual Property, § 13 & INTELL. PROP. CODE, § 188.

238. 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. 10372 (2013).

‘Section 188. Reprographic Reproduction by Libraries. – 188.1. Notwithstanding the provisions of Subsection 177.1., any library or archive whose activities are not for profit may, without the authorization of the author or copyright owner, make a limited number of copies of the work, as may be necessary for such institutions to fulfill their mandate, by reprographic reproduction:

...

‘(c) Where the making of such limited copies is in order to preserve and, if necessary in the event that it is lost, destroyed or rendered unusable, replace a copy, or to replace, in the permanent collection of another similar library or archive, a copy which has been lost, destroyed[,] or rendered unusable and copies are not available with the publisher.’²³⁹

Despite this single amendment of the provision in the recent decade, the limitation of reprographic reproduction was still retained. It is thus submitted that this has led to the Philippines’ own library exception to be outdated as compared to the rapid technological developments of our time and even other jurisdictions’ own developments with the library exceptions found in their statutes.

Firstly, Section 188 only permits reproduction through means of reprography.²⁴⁰ The IP Code does not define reprographic reproduction, but the National Library’s Copyright Safeguards and Regulations defines such, to wit —

Reproduction is the making of one [] or more copies of a work, including multimedia, in any manner or form. A reprographic reproduction, as authorized under certain circumstances by the IPC, *does not include a digital or machine-readable copy*, but is limited to photography, xerography and similar processes, resulting in a paper or microform copy[.]²⁴¹

The definition of reprographic reproduction under the Copyright Safeguards and Regulations explicitly excludes digital or machine-readable copies. It also specifies that reprographic copies result in paper or microform copies.²⁴² Thus, the digitization of library materials would not properly fall under library or archive practices protected by Section 188.

239. *Id.* § 13.

240. INTELL. PROP. CODE, § 188.

241. National Library of the Philippines, Copyright Safeguards and Regulations, rule 2 (17) (Aug. 13, 1999) (emphasis supplied).

242. *Id.*

Furthermore, Section 188 does not permit all types of reproduction to be performed by libraries and archives. The provision provides only three situations wherein a library may produce a reprographic copy of a material. *First*, a copy may be made by the library “where the work by reason of its fragile character or rarity cannot be lent to user in its original form.”²⁴³ This is akin to preservation and protection strategies utilized by libraries. *Second*, a copy may be made by the library when, in instances of loan requests for purposes of research or study, the works to be copied are isolated articles or brief portions of a work and it would be more expedient to lend a copy rather than the entire volume or booklet.²⁴⁴ This would pertain to interlibrary loans. *Third*, a copy may be made by the library for purposes of preservation or replacement of a lost or damaged original copy of the work.²⁴⁵

The provision in Section 188.2 must be noted wherein, notwithstanding the provisions of the prior paragraph in the Section, libraries or archives are not allowed to make reprographic copies of certain works unless such works are out of stock.²⁴⁶ Additionally, these works must be those which are required by law to have been part of the library’s collections or those which are deemed necessary to the library’s collections.²⁴⁷

At this juncture, it is important to note that libraries and archives in the Philippines have this unique exception found in Section 188 of the IP Code. Considering the specific exemption (“Reprographic Reproduction by Libraries”), libraries and archives are primarily governed by such provision for their practices.

In instances that fall outside Section 188, fair use will then be the next consideration. This is pursuant to the other exemption available in the IP Code for libraries and archives under Section 184, “the use made of a work by or under the direction or control of the Government, by the National Library or by educational, scientific or professional institutions where such use is in the public interest and is compatible with fair use[.]”²⁴⁸

243. INTELL. PROP. CODE, § 188.1 (a).

244. *Id.* § 188.1 (b).

245. *Id.* § 188.1 (c).

246. *Id.* § 188.2.

247. *Id.*

248. *Id.* § 184.1 (h).

IV. THE FUNDAMENTAL DOCTRINE

All property has its proper limit, extent[,] and bounds.

— Sir Joseph Yates²⁴⁹

A. The Doctrine of Fair Use

The Doctrine of Fair Use has proven to be a “friend” of librarians and archivists. It has been called the most important limitation of copyright, being likened to a safety valve for librarians, archivists, and the public interest that they serve.²⁵⁰ Amidst rapid technological developments, the doctrine of fair use has grown more and more to become an important refuge for libraries to defend their practices and fulfill their institutional mandates.²⁵¹

The Philippines has adopted the Fair Use Doctrine into the IP Code, to wit —

Section 185. Fair Use of a Copyrighted Work.

185.1. The fair use of a copyrighted work for criticism, comment, news reporting, teaching including limited number of copies for classroom use, scholarship, research, and similar purposes is not an infringement of copyright. Decompilation, which is understood here to be the reproduction of the code and translation of the forms of a computer program to achieve the interoperability of an independently created computer program with other programs may also constitute fair use under the criteria established by this section, to the extent that such decompilation is done for the purpose of obtaining the information necessary to achieve such interoperability. In determining whether the use made of a work in any particular case is fair use, the factors to be considered shall include:

- (a) The purpose and character of the use, including whether such use is of a commercial nature or is for non-profit educational 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

249. *Millar v. Taylor*, 98 Eng. Rep. 201, 230 (1769) (U.K.).

250. Association of Research Libraries, Fair Use, *available at* <https://www.arl.org/fair-use> (last accessed July 31, 2023) [<https://perma.cc/UKY4-378Y>].

251. Section 108 Discussion Document, *supra* note 32, at 10.

- (d) The effect of the use upon the potential market for or value of the copyrighted work.

185.2. The fact that a work is unpublished shall not by itself bar a finding of fair use if such finding is made upon consideration of all the above factors.²⁵²

Like majority of the Philippines' copyright statutory provisions, the IP Code's fair use provision can be traced to U.S. Copyright Law.²⁵³ The U.S. jurisdiction's fair use provision is as follows —

Section 105. *Limitations on exclusive rights: Fair use.* — Notwithstanding the provisions of Sections 106 and 106A, the fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified by that section, for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright. In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include —

- (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
- (2) the nature of the copyrighted work;
- (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
- (4) the effect of the use upon the potential market for or value of the copyrighted work.

The fact that a work is unpublished shall not itself bar a finding of fair use if such finding is made upon consideration of all the above factors.²⁵⁴

The similarities between the fair use provisions between the Philippine and U.S. jurisdiction is not surprising considering the roots of Philippine intellectual property laws originated from U.S. intellectual property laws itself.²⁵⁵ Corollary to this, the discussion of fair use in this Note greatly derives

252. INTELL. PROP. CODE, § 185.

253. Daniel John A. Fordan, *Liberating Information for a Learned Citizenry: Reinvigorating the Fair Use Doctrine as an Integral Component of Copyright Infringement*, at 32 (2018) (unpublished J.D. thesis, Ateneo de Manila University) (on file with the Professional Schools Library, Ateneo de Manila University).

254. Copyright Act, 17 U.S.C. § 107.

255. Intellectual Property Office of the Philippines, *The Intellectual Property System: A Brief History*, available at <https://www.ipophil.gov.ph/news/the-intellectual-property-system-a-brief-history> (last accessed July 31, 2023) [<https://perma.cc/8QEJ-4DGB>].

from prevailing U.S. jurisprudence to serve as guideposts in analyzing the fair use application in digitization practices of libraries and archives.

B. Philippine Jurisprudence on Fair Use

Before delving into the factors of fair use further, a discussion of Philippine jurisprudence on fair use would be apt. Admittedly, in contrast to the wealth of U.S. jurisprudence on the topic of fair use, there have only been two cases that have covered fair use: *Habana v. Robles*²⁵⁶ and *ABS-CBN Corporation v. Gozon*.²⁵⁷

In the case of *Habana v. Robles*, one of the issues put forth by the petitioners was whether or not the respondent abused an author's right to fair use in the alleged copying of textbook materials.²⁵⁸ The Supreme Court however did not take up the issue on fair use, focusing more on the discussion of infringement.²⁵⁹ It is in Chief Justice Davide's dissent that a brief discussion on fair use is made.²⁶⁰ Chief Justice Davide defines fair use as "a privilege to use the copyrighted material in a reasonable manner without the consent of the copyright owner or as copying the theme or ideas rather than their expression."²⁶¹ The copying of a work must also be sufficiently proved prior to any discussion of the issue of fair use.²⁶²

In the case of *ABS-CBN Corporation v. Gozon*,²⁶³ the Court took on a more extensive discussion of fair use. The *ABS-CBN* case is particularly important as it discusses two main things about the characterization of fair use. First, while the Court adopted the definition of fair use that Chief Justice Davide put forth in *Habana*,²⁶⁴ the Court added that fair use is "an exception to the copyright owner's monopoly of the use of the work to avoid stifling 'the very creativity which that law is designed to foster.'"²⁶⁵ Second, the

256. *Habana v. Robles*, G.R. No. 131522, 310 SCRA 511 (1999).

257. *ABS-CBN Corporation v. Gozon*, G.R. No. 195956, 753 SCRA 1 (2015).

258. *Habana*, 310 SCRA at 521.

259. *Id.* at 528.

260. *Id.* at 545 (C.J. Davide, dissenting opinion).

261. *Id.*

262. *Id.*

263. *ABS-CBN*, 753 SCRA.

264. *Id.* at 57 (citing *Habana*, 310 SCRA at 545 (C.J. Davide, dissenting opinion)).

265. *ABS-CBN*, 753 SCRA at 57 (citing Matthew D. Bunker, *Transforming the News: Copyright and Fair Use in News-Related Contexts*, 52 J. COPYRIGHT SOC'Y U.S.A. 309, 311 (2004-2005)).

decision confirmed that fair use is a defense against infringement.²⁶⁶ As such, when a defendant claims fair use, it is in the nature of an affirmative defense, that would require substantiation in the ensuing litigation.²⁶⁷ The Court explained further —

Whether the alleged five-second footage may be considered fair use is a matter of defense. We emphasize that the case involves determination of probable cause at the preliminary investigation stage. Raising the defense of fair use does not automatically mean that no infringement was committed. The investigating prosecutor has full discretion to evaluate the facts, allegations, and evidence during preliminary investigation. Defenses raised during preliminary investigation are subject to further proof and evaluation before the trial court.²⁶⁸

Establishing fair use as both an exception and a defense is essential in further discussion of the potential liabilities of libraries and archives in their digitization practices. To note, jurisprudence has already established that in order to establish a *prima facie* case of copyright infringement, the author or rightsholder only needs to prove “[the] ownership of a valid copyright[] and [] the copying of constituent elements of the work that are original.”²⁶⁹ Being an affirmative defense, a defendant would have the burden of proof should they allege fair use.²⁷⁰

With fair use being an exception as well, the interpretation of such would follow that established by jurisprudence. “Under the rules of statutory construction, exceptions, as a general rule, should be strictly but reasonably construed. They extend only so far as their language fairly warrants, and all doubts should be resolved in favor of the general provisions rather than the exception.”²⁷¹

Returning to the case of *ABS-CBN Corporation v. Gozon*,²⁷² the Court laid out the most extensive discussion of the four factors on fair use thus far in

266. *ABS-CBN*, 753 SCRA at 62.

267. Fordan, *supra* note 253, at 39.

268. *ABS-CBN*, 753 SCRA at 62.

269. *Feist Publications, Inc. v. Rural Telephone Service Co., Inc.*, 499 U.S. 340, 361 (1991). See *Ching v. Salinas, Sr.*, G.R. No. 161295, 462 SCRA 241, 251 (2005).

270. Fordan, *supra* note 253, at 74.

271. *Commissioner of Internal Revenue v. Court of Appeals*, G.R. No. 107135, 303 SCRA 508, 515 (1999).

272. *ABS-CBN*, 753 SCRA.

Philippine jurisprudence. The four factors of fair use are discussed further in the next section.

C. The Factors of Fair Use

As laid out in Section 185, the four factors of fair use are:

- (a) The purpose and character of the use, including whether such use is of a commercial nature or is for non-profit educational 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.²⁷³

The first factor is the purpose and character of the use.²⁷⁴ “The purpose and character requirement is important in view of copyright’s goal to promote creativity and encourage creation of works. Hence, commercial use of the copyrighted work can be weighed against fair use.”²⁷⁵ The purpose and character of the use is weighted against those listed²⁷⁶ in Section 185: “criticism, comment, news reporting, teaching including limited number of copies for classroom use, scholarship, research, and similar purposes.”²⁷⁷

It has been noted that “[t]he fact that a [use] was commercial as opposed to nonprofit is a separate factor that tends to weigh against a finding of fair use.”²⁷⁸ A finding of commercial use does not solely turn on whether or not the user’s primary motive for the use is monetary gain.²⁷⁹ The court must also consider as to whether the user would “stand[] to profit from exploitation of the copyrighted material without paying the customary price.”²⁸⁰

A key test in examining the purpose and character of the use is the transformative test.²⁸¹ The transformative test requires that a court must

273. INTELL. PROP. CODE, § 185.1.

274. *Id.* § 185.1 (a).

275. *ABS-CBN*, 753 SCRA at 59.

276. *Id.* at 58-59.

277. INTELL. PROP. CODE, § 185.1.

278. *Harper & Row Publishers v. Nation Enterprises*, 471 U.S. 539, 562 (1985).

279. *Id.*

280. *Id.*

281. *ABS-CBN*, 753 SCRA at 59.

ascertain whether the use alters the original work by adding new expression, meaning, or message to it.²⁸² This test is in line with ensuring the goal of copyright, which is “to promote science and the arts[.]”²⁸³ The U.S. Supreme Court explained that while transformative use is not a necessary factor for fair use,²⁸⁴ the finding of a more transformative nature of the use or new work will cause other factors to be less significant.²⁸⁵

The second factor is the nature of the copyrighted work.²⁸⁶ Generally, if the nature of the work leans more towards that of a factual nature as opposed to fiction or fantasy, there is more likelihood for this factor to lean more for fair use.²⁸⁷ U.S. jurisprudence has explained that this is because “[t]he law generally recognizes a greater need to disseminate factual works than works of fiction or fantasy.”²⁸⁸

The third factor pertains to the amount and substantiality of the portion used.²⁸⁹ In the *ABS-CBN* case, the Court explained that —

An exact reproduction of a copyrighted work, compared to a small portion of it, can result in the conclusion that its use is not fair. There may also be cases where, though the entirety of the copyrighted work is used without consent, its purpose determines that the usage is still fair.²⁹⁰

It is important to note that the factor requires the examination of both the amount of the work used and the substantiality of the portion used.²⁹¹ In the case of *Harper & Row Publishers v. Nation Enterprises*, the U.S. Supreme Court found the publication of a portion of an unpublished book was against fair use on the third factor.²⁹² The ruling explained that while the quoted portions were relatively insubstantial compared to the entire work, what was quoted

282. *Id.* (citing *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 579 (1994)).

283. *Campbell*, 510 U.S. at 579.

284. *Id.* (citing *Sony Corp. of America v. Universal City Studios, Inc.*, 464 U.S. 417, 455 (1984) (U.S.)).

285. *Campbell*, 510 U.S. at 579.

286. INTELL. PROP. CODE, § 185.1 (b).

287. *ABS-CBN*, 753 SCRA at 59.

288. *Harper & Row*, 471 U.S. at 563.

289. INTELL. PROP. CODE, § 185.1 (c).

290. *ABS-CBN*, 753 SCRA at 59–60 (citing *Bunker*, *supra* note 264).

291. *See* INTELL. PROP. CODE, § 185.1 (c).

292. *Harper & Row*, 471 U.S. at 564–65.

was “the heart” of the work.²⁹³ It is further noted that it is not a defense for a taking to be excused that the portion utilized was insubstantial with respect to the original work.²⁹⁴

The fourth and last factor is the “effect of the use upon the potential market for or value of the copyrighted work.”²⁹⁵ Philippine jurisprudence succinctly summarizes that “[i]f [the] court finds that the use had or will have a negative impact on the copyrighted work’s market, then the use is deemed unfair.”²⁹⁶ U.S. jurisprudence has called this factor as “undoubtedly the single most important element of fair use.”²⁹⁷

Under this factor, courts must consider the “extent of market harm caused by the particular actions of the alleged infringer”²⁹⁸ U.S. jurisprudence has explained that in order for the factor to be weighed against fair use, “one need only show that if the challenged use ‘should become widespread, it would adversely affect the *potential* market for the copyrighted work.’”²⁹⁹ With regard to this consideration of harm upon potential markets, jurisprudence has also explained that the market for both the original work as well as derivative works must then be put into consideration.³⁰⁰

D. Fair Use and Digitization

Needless to say, the rise of the digital space has thrust copyright into a new world — the Internet, dubbed often as a world without borders.³⁰¹ It must be recalled that copyright and its doctrines were born and developed in the age of print media.³⁰² Thus, with the advent of technological advancements, there has also been a need to reexamine the application of doctrines.

293. *Id.*

294. *Id.* at 565.

295. See INTELL. PROP. CODE, § 185.1 (d).

296. *ABS-CBN*, 753 SCRA at 60.

297. *Harper & Row*, 471 U.S. at 566.

298. *Campbell*, 510 U.S. at 590.

299. *Harper & Row*, 471 U.S. at 568 (citing *Sony Corp.*, 464 U.S. at 451).

300. *Campbell*, 510 U.S. at 590 (citing *Harper & Row*, 471 U.S. at 568).

301. See Austan Goolsbee, *In a World Without Borders: The Impact of Taxes on Internet Commerce*, 115 Q.J. ECON. 561, 561 (2000).

302. Anita Colyer, Copyright Law, the Internet, and Distance Education, available at http://web.archive.org/web/20190717135852/http://web.worldbank.org/archi ve/website00236B/WEB/COPY_01.HTM.

The digitization of works has already been previously tackled in U.S. jurisprudence, particularly in the cases of *Authors Guild v. Google, Inc.*,³⁰³ *Authors Guild v. HathiTrust*,³⁰⁴ & *Cambridge University Press v. Patton*.³⁰⁵ In this subchapter, the pertinent pronouncements of the U.S. courts are delved into to further provide basis for the succeeding analysis of library or archive digitization practices. It is crucial to discuss these cases as well as they have often been cited by the proponents of controlled digital lending to defend CDL practices.³⁰⁶

1. *Authors Guild, Inc. v. HathiTrust*

The case of *Authors Guild, Inc. v. HathiTrust* stemmed from a lawsuit against the HathiTrust Digital Library formed by several research universities.³⁰⁷ HathiTrust primarily permitted three uses which were subject of litigation: (a) the search engine function that permitted the general public to search for terms across all its digital copies without displaying to the user any text from any work;³⁰⁸ (b) the provision of full copies of copyrighted works compatible with adaptive technologies for certified patrons of member libraries with print disabilities;³⁰⁹ and (c) the permission for member libraries to create replacement copies of works in limited conditions, such as the loss of an original copy of a work and the unavailability of such work in the market for purchase.³¹⁰ The 2d Circuit Court ruled that such use would constitute fair use.³¹¹

Such ruling, however, must be nuanced in the facts that faced the court. The ruling explains that fair use has the important proviso that the use “must not excessively damage the market for the original by providing the public with a substitute for that original work.”³¹² Proceeding from this, the ruling undertook a fair use analysis of the digitization done by HathiTrust. However, an important note is that the digitization of full text copies were primarily

303. *Authors Guild, Inc. v. Google, Inc.*, 804 F. 3d 202 (2d Cir. 2015) (U.S.).

304. *Authors Guild, Inc. v. HathiTrust*, 755 F. 3d 87 (2d Cir. 2014) (U.S.).

305. *Cambridge University Press v. Patton*, 769 F. 3d 1232 (11th Cir. 2014) (U.S.).

306. Hansen & Courtney, *supra* note 115.

307. *HathiTrust*, 755 F. 3d at 90.

308. *Id.* at 91.

309. *Id.*

310. *Id.* at 92.

311. *Id.* at 105.

312. *Id.* at 95.

considered transformative and falling under fair use due to their necessity in the creation and operation of a searchable database³¹³ and provision of print-disabled access.³¹⁴ The ruling even points out that under the fourth factor, the search function of HathiTrust “does not serve as a substitute for the books that are being searched[]”³¹⁵ and do not cause market harm to the authors and rightsholders.

The case never discusses the digitization of books in the likes of CDL *per se* as being fair use. It must be noted that the court did not rule on the matter of whether or not the preservation of digital copies of books is copyright infringement.³¹⁶

2. *Authors Guild Inc. v. Google, Inc.*

In the case of *Authors Guild Inc. v. Google, Inc.*, Authors Guild sued Google, Inc. for its Google Books Project, alleging copyright infringement on the part of Google for scanning tens of millions of books, making digital copies of such, and establishing a publicly available search engine function.³¹⁷ Like the *HathiTrust* case, the *Google Books* decision is devoid of any pronouncement on the digitization of books in the manner of CDL. The decision, and the ensuing fair use analysis, primarily center on the search and snippet view functions.³¹⁸

The ponente of the case, Judge Pierre Nelson Leval, reiterated the prior pronouncement in *HathiTrust* that the use must not provide a substantial substitute for the copyrighted work.³¹⁹ Furthermore, the decision makes mention that the “recasting” of a novel into another format is not transformative as contemplated by a favorable fair use finding.³²⁰ It is worthy to note that the decision indirectly makes mention that a fair use finding would be different should the subject of the fair use analysis have been access to full text copies of works, instead of snippet views of works, to wit —

If Plaintiffs’ claim were based on Google’s converting their books into a digitized form and making that digitized version accessible to the public, their claim would be strong. But as noted above, Google safeguards from public

313. *HathiTrust*, 755 F. 3d at 97.

314. *Id.* at 101.

315. *Id.* at 100.

316. *Id.* at 103.

317. *Google*, 804 F. 3d at 207.

318. *Id.* at 214-24.

319. *Id.* at 207.

320. *Id.* at 215.

view the digitized copies it makes and allows access only to the extent of permitting the public to search for the very limited information accessible through the search function and snippet view. The program does not allow access in any substantial way to a book's expressive content.³²¹

3. *Cambridge University Press v. Patton*

In the case of *Cambridge University Press v. Patton*, three publishing houses filed suit against Georgia State University for their provision of digitally scanned copies of excerpts of books published by the publishing houses to their students through academic portals.³²² The 2d Circuit Court explained that a non-transformative use is one which serves the same purpose as the original work.³²³ The court ruled that the verbatim use of excerpts transferred to a digital format was not transformative at all.³²⁴ While the court eventually ruled that the first factor in this case was for fair use considering the non-profit and educational nature of the university,³²⁵ the ruling also cautions that "care must be taken not to allow too much educational use, lest we undermine the goals of copyright by enervating the incentive for authors to create the works upon which students and teachers depend."³²⁶

In the discussion of the fourth factor, the ruling emphasized the importance of the fourth factor in the overall fair use analysis due to the greater market harm posed by the use since the use of the digital excerpts was non-transformative and utilized for the same original purpose as intended.³²⁷ For the fourth factor analysis, however, the discussion was ultimately more focused on the availability of licensing for digital excerpts, rather than the digitization aspect.³²⁸

With the pertinent doctrines from these jurisprudence, the next Chapter seeks to apply them in the analysis of digitization practices of libraries and archives in the Philippine jurisdiction.

321. *Id.* at 225-226.

322. *Cambridge University Press*, 769 F. 3d at 1237.

323. *Id.* at 1262 (citing *Peter Letterese & Assocs. v. World Inst. of Scientology Enters.*, 533 F. 3d 1287, 1311 (11th Cir. 2008) (U.S.)).

324. *Cambridge University Press*, 769 F. 3d at 1262.

325. *Id.* at 1267.

326. *Id.* at 1264.

327. *Id.* at 1275.

328. *Id.* at 1276-78.

V. ANALYSIS OF DIGITIZATION PRACTICES

*An author's right to control and profit
from the dissemination of her work ought
not to be evaded by conversion of the work
into a different form.*

— *Authors Guild v. Google Inc.*³²⁹

Having established the guideposts of statutory library exemptions and the Fair Use Doctrines, the question of whether or not digitization practices of libraries and archives is answered in this Chapter.

A. Under the IP Code

Digitization primarily concerns the right of reproduction³³⁰ as the practice of digitization involves the creation of a copy of a work in whatever digital format it may be.³³¹ However, keeping in mind the institutional missions of libraries and archives to grant access to its patrons, the rights of distribution and public display of the work are necessarily considered as well.³³² It is perhaps in this issue of granting access wherein the validity of digitization is put into question. This is due to the effect of modern technology wherein the use or distribution of works have become intertwined with the reproduction of copies of works.³³³

As previously discussed,³³⁴ Section 188 of the IP Code³³⁵ is the primary library exemption in the Philippine jurisdiction. Section 188 is explicit in the limitation that the permitted reproduction by libraries and archives is only through reprographic means.³³⁶ The Copyright Safeguards and Regulations went further to add that digital or machine-readable copies are not

329. *Google*, 804 F. 3d at 225.

330. INTELL. PROP. CODE, § 177.1.

331. *See* Chapter 2 (B) of this Note.

332. INTELL. PROP. CODE, §§ 177.3 & 177.5.

333. Robert H. Rotstein, *The First Sale Doctrine in the Digital Age*, available at <http://web.archive.org/web/20230609014049/https://www.msk.com/newsroom-publications-1114>.

334. *See* Chapter 3 (E) of this Note.

335. INTELL. PROP. CODE, § 188.

336. *Id.*

contemplated in the law as reprographic reproduction.³³⁷ Thus, it is submitted that this squarely puts digitization practices outside of the ambit of protection of Section 188 of the IP Code.

Considering the lack of protection under the main library exemption under the IP Code, the next consideration would be the copyright limitation that could be applicable to libraries and archives under Section 184.1 (h) “the use made of a work by or under the direction or control of the Government, by the National Library or by educational, scientific[,] or professional institutions where such use is in the public interest and is compatible with fair use.”³³⁸ Admittedly, libraries and archives can easily argue that the digitization of works would be of use to the public interest as they are serving their patrons in providing access to works in order to support the education, scholarship, and research of many. The digitization of works is all the more a greater need in light of the global pandemic and shift to online learning.

What is of greater consideration, however, is the compatibility of the digitization of works with the bounds of fair use as established in the law and jurisprudence.

B. Under Fair Use

A determination of fair use involves both questions of law and questions of fact.³³⁹ It must be noted that while often findings of fair use are predicated on the four factors of fair use laid out in statutory law, the factors are not meant to be exclusive as other circumstances arising from the facts may be considered in an evaluation of whether a certain use may be ruled as fair or unfair.³⁴⁰ More importantly, it is emphasized that a fair use evaluation “is not to be simplified with bright-line rules”³⁴¹ and each case calls for its own thorough analysis.³⁴² Considering the necessity for a case-by-case analysis, the analysis in this chapter will endeavor to discuss in broad strokes the application of the factors of fair use to digitization practices. However, the Author notes that the specifics of every library’s practice of digitization or CDL, considering the range of institutions and methods utilized, may not be covered.

337. Copyright Safeguards and Regulations, rule 2 (17).

338. INTELL. PROP. CODE, § 184.1 (h).

339. *Harper and Row*, 471 U.S. at 560 (citing *Pacific & Southern Co. v. Duncan* 744 F. 2d 1490, 1495 n. 8 (11th Cir. 1984) (U.S.)).

340. *Harper and Row*, 471 U.S. at 560.

341. *Campbell*, 510 U.S. at 577.

342. *Id.*

I. First Factor: Purpose and Character of the Use

As already established in the case of *Cambridge University Press*, format shifting of a work from print to digital is not transformative.³⁴³ Digitization primarily involves the mere scanning of a work in its print format and the conversion of the scan into a digital file.³⁴⁴ Even the foremost proponents for CDL readily concede that the digitization practice is not transformative³⁴⁵ as it fails to “add [] something new, with a further purpose or different character, altering the [original work] with new expression, meaning, or message[]”³⁴⁶ as jurisprudence requires.

Digitization is often practiced around the globe by university libraries, public libraries, and non-profit institutions.³⁴⁷ In the Philippines as well, it can be noticed that it is those same types of institutions that are practicing digitization of collections albeit in a smaller scale compared to other jurisdictions.³⁴⁸ To recall, the first factor asks for the purpose and character of the use, particularly “whether such use is of a commercial nature or is for non-profit educational purposes.”³⁴⁹

It has been opined that digitization for academic libraries would most likely pass the first factor of fair use.³⁵⁰ This is due to the academic libraries’ direct connection to the universities they are part of as educational institutions and the clear purpose for research and scholarship that these libraries serve. Public libraries are established and supported by the National Library in partnership with the local government units.³⁵¹ They are non-profit and have been recognized as key institutions in supporting the educational development

343. *Cambridge University Press*, 769 F. 3d at 1262.

344. REITZ, *supra* note 68, at 219.

345. Hansen & Courtney, *supra* note 115.

346. *Campbell*, 510 U.S. at 579.

347. Authors Alliance, A2P2 Issue Brief: Controlled Digital Lending (September 2019), available at https://www.authorsalliance.org/wp-content/uploads/2019/11/20190901_ControlledDigitalLending.pdf (last accessed July 31, 2023) [<https://perma.cc/7BEF-JTMV>].

348. See Chapter 2 (B) of this Note.

349. INTELL. PROP. CODE, § 185.1 (a).

350. Bernardo, *supra* note 35, at 66.

351. Republic Act No. 7743, §§ 2 & 7.

of their communities.³⁵² As such, public libraries can likely pass the first factor of fair use as well.

For non-profit institutions, it is submitted that the use must clearly be shown to be non-profit and for educational purposes. Jurisprudence elaborates that the status as a non-profit organization alone does not immediately lead to a conclusion of a non-profit, educational purpose.³⁵³ To note, Internet Archive, who is currently facing a lawsuit for CDL practices, is a non-profit institution itself.³⁵⁴ There have been a few rulings from the U.S. courts of appeal that have even considered the donations received by such institutions or even recognition from the community to be gain/profit from the use that would warrant a finding against fair use.³⁵⁵

As the U.S. Supreme Court penned, “the mere fact that a use is educational and not for profit does not insulate it from a finding of infringement[.]”³⁵⁶ Thus, while this factor may be for fair use in the context of digitization of libraries, it is submitted that it highly depends on what type of institution is the subject of litigation, whether academic, public, or non-profit. Furthermore, it has been reiterated that considering the provision of access to full-text copies, the purpose of digitization serves the exact same purpose that these works are in the market for, despite such purpose being for education.³⁵⁷

Thus, digitization is obviously non-transformative and does not add or alter anything new to the work, simply shifting a work from one format to the other. While it may be recognized that the purpose and character of the use is educational, jurisprudence has also cautioned that an educational purpose does not insulate from a finding against fair use.³⁵⁸ It is submitted that the first factor

352. *See id.* § 1.

353. *See Cambridge University Press*, 769 F. 3d at 1264.

354. Plaintiffs’ Memorandum of Law in Support of their Motion for Summary Judgment, July 7, 2022, at 25 (on file with the United States District Court Southern District of New York), in *Hachette Book Group, Inc., et al.*, Case 1:20-cv-04160 (S.D.N.Y., filed June 1, 2020) (U.S.) (pending).

355. *Penguin Group (USA) Incorporated v. American Buddha*, 2015 WL 11170727, at *4 (D. Ct. Az. 2015) (U.S.) & *Society of Holy Transfiguration Monastery, Inc. v. Gregory*, 689 F. 3d 29, 59 (1st Cir. 2012) (U.S.).

356. *Campbell*, 510 U.S. at 584.

357. *Penguin Group (USA)*, 2015 WL 11170727, at *5.

358. *Campbell*, 510 U.S. at 584.

would be for fair use for the digitization done particularly by academic libraries and either neutral or against fair use for other libraries or archives.

2. Second Factor: Nature of the Copyrighted Work

An early problem with digitization has been the lack of proper guidelines as to the works that it has covered. The Internet Archive's Open Library, which hosts the digitized collections of partner public libraries and university libraries as well, features a mix of different genres of books, ranging from young adult fiction to self-help books to textbooks.³⁵⁹ Libraries often carry a multitude of genres in their collections.

Jurisprudence does find that if the nature of the work leans more towards that of a factual nature as opposed to fiction or fantasy, there is more likelihood for the second factor to lean more for fair use.³⁶⁰ However, in a number of cases involving the copying of academic works, the U.S. courts have also observed that in these types of works, there are times when the work adds "evaluative, analytical, or subjectively descriptive material that surpasses the bare facts necessary to communicate information, or derives from the author's experiences or opinions[.]"³⁶¹ In these cases, jurisprudence has guided that the courts should find that the second factor would be either neutral or against fair use, depending on the domination of original material aside from the facts laid out in the work.³⁶²

3. Third Factor: Amount and Substantiality of the Work Used

The analysis of the third factor is rather straightforward. Digitization necessarily utilizes the entirety of the work as it digitizes and provides access of the work to its patrons. The proponents for digitization argue that there are limitations on the digitized copy to render access to the work only temporary and under the technological control of the library and that such should lead to the third factor being in favor of fair use.³⁶³ It is submitted that such point is a mistaken appreciation of the third factor. The third factor of fair use does not ask if there are technological controls for the access of the work or if the access

359. Internet Archive, Open Library, *available at* <https://openlibrary.org> (last accessed July 31, 2023) [<https://perma.cc/CBG9-AXNE>].

360. *ABS-CBN*, 753 SCRA at 59.

361. *Cambridge University Press*, 769 F. 3d at 1270.

362. *Id.*

363. Hansen & Courtney, *supra* note 115.

to the work is only temporary. The third factor simply calls for an examination of the amount and substantiality of the work used.³⁶⁴

An important consideration is the amount of the work utilized that would result in the provision of a market substitute. As explained in the *Google Books* case, “[t]he larger the amount, or the more important the part, of the original that is copied, the greater the likelihood that the secondary work might serve as an effectively competing substitute for the original[] and might therefore diminish the original rights holder’s sales and profits.”³⁶⁵ This is where the third factor ties in with the fourth factor of fair use.³⁶⁶

In a District Court decision, it had been ruled that the usage of the entire work would tip the factor of fair use against the user.³⁶⁷ In a letter from the U.S. Copyright Office to a Senate inquiry specifically requesting guidance regarding the Internet Archive’s CDL practices, the U.S. Copyright Office reiterated its stand from several previously published reports that it is doubtful that the provision of digital access to complete works can be considered fair use.³⁶⁸ Thus, the third factor will be against fair use for digitization.

4. Fourth Factor: Effect of Use Upon the Market

The fourth and last factor is considered the most important factor in the overall fair use analysis.³⁶⁹ This importance is all the more bolstered for an analysis of digitization since in the first factor analysis, it was put forth that digitization is a non-transformative use and that the provision of these digitized copies serve the exact same purpose as the original works, whether for education, entertainment, or such.³⁷⁰

In the analysis of this factor, it must be recalled that fair use is an affirmative defense.³⁷¹ Thus, the burden of proof is wholly upon the party alleging fair

364. INTELL. PROP. CODE, § 185.1 (c).

365. *Google*, 804 F. 3d at 221.

366. INTELL. PROP. CODE, §§ 185.1 (c)-(d).

367. *Penguin Group (USA)*, 2015 WL 11170727, at *5.

368. Letter from Maria Strong, Acting Register of Copyrights and Director of the U.S. Copyright Office to Senator Tom Udall (May 15, 2020), available at <https://www.copyright.gov/laws/hearings/Sen-Udall-Response-National-Emergency-Library.pdf> (last accessed July 31, 2023).

369. *Harper & Row*, 471 U.S. at 566.

370. *Cambridge University Press*, 769 F. 3d at 1275.

371. *Campbell*, 510 U.S. at 590.

use to sufficiently prove the lack of market harm.³⁷² This would be a difficult task for libraries and archives to overcome. It has been observed by jurisprudence even that the lack of provision of financial data showcasing losses to a publisher–plaintiff is not fatal to its cause.³⁷³ The District Court observed even that the publisher was “under no such obligation, however, because ‘the fourth factor of the fair use inquiry cannot be reduced to strictly monetary terms.’”³⁷⁴

It is to be noted that while, traditionally, the fourth factor analysis does pertain to monetary or commercial value, courts have also considered at times other forms of harm to market factors such as industry reputation and relationship with authors, customers, and distributors.³⁷⁵ When it comes to digitization of works, the cited market harm is often to two types: licensing revenues and market substitution.³⁷⁶

In U.S. jurisprudence, courts have noted that “it is sensible that a particular unauthorized use should be considered ‘more fair’ when there is no ready market or means to pay for the use, while such an unauthorized use should be considered ‘less fair’ when there is a ready market or means to pay for the use.”³⁷⁷ The Author submits, however, that this point must be contextualized to the Philippine context, particularly, the Philippine book publishing industry. The Philippine book publishing industry has largely stuck to traditional print media.³⁷⁸ However, the e-book industry has only been developing in the Philippines within the last eight years.³⁷⁹

372. *American Geophysical Union v. Texaco Inc.*, 60 F. 3d 913, 918 (2d Cir. 1994) (U.S.).

373. *Penguin Group (USA)*, 2015 WL 11170727, at *6.

374. *Id.* (citing *Gregory*, 689 F. 3d at 64).

375. *Id.* & *Gregory*, 689 F.3d at 64.

376. Plaintiffs’ Memorandum of Law, *supra* note 354, at 30.

377. *Cambridge University Press*, 769 F. 3d at 1276-77.

378. See Anthony John Balisi, NBDB State of Book Publishing Industry, available at https://www.academia.edu/46858349/NBDB_State_of_Book_Publishing_Industry_20200924_public (last accessed July 31, 2023) [<https://perma.cc/T4AD-EM3W>].

379. Neni Sta. Romana-Cruz, Chairperson of the National Book Development Board, *State of the Book Industry Address*, Address at the Kapihan for Book Publishers and Sellers (May 22, 2014) (transcript available at <http://web.archive.org/web/20210302052721/https://booksphilippines.gov.ph/state-of-the-book-industry-address-2>).

Ultimately, the analysis of digitization under the fourth factor must center on “consider[ing] not only the extent of market harm caused by the particular actions of the alleged infringer, but also ‘whether unrestricted and widespread conduct of the sort engaged in by the [user] ... would result in a substantially adverse impact on the potential market’ for the original.”³⁸⁰ Focus must be made on the unrestricted and widespread conduct of the sort as a large concern with digitization as currently practiced by its proponents is the lack of consistent controls amongst its practitioners. Proponents of digitization range from providing access through websites accessible by any patron online from anywhere in the globe³⁸¹ to utilization of online platforms such as Google Drive or Adobe.³⁸² To note, one of the harms cited by publishers in the *Google Books* case was the exposure to risks of hacking of the digital copies held by Google.³⁸³ The Circuit Court declined to rule on such but noted that the

[exposure of] the rights holder to destruction of the value of the copyright resulting from the public’s opportunity to employ the secondary use as a substitute for purchase of the original (even though this was not the intent of the secondary user) [] might well furnish a substantial rebuttal to the secondary user’s claim of fair use.³⁸⁴

The public nature and mission of libraries and archives also lend to a ruling against the fourth factor as the potential for market harm rises. “If anyone could freely access the Works, electronically or otherwise, the [plaintiff] would have no market in which to try and publish, disseminate, or sell its [works].”³⁸⁵ Considering it is the user who has the burden of proof to prove the lack of market harm³⁸⁶ such that it does not supplant or supersede the market of the original work,³⁸⁷ it is submitted that a way to pass the fourth factor of fair use would be for the library to prove that it only serves a limited number of individuals and employs strict technological controls to the access of the

380. *Campbell*, 510 U.S. at 590 (citing *I NIMMER ON COPYRIGHT, Infringement Actions — Substantive Aspects*, § 13.05 (1963)).

381. See Internet Archive, *supra* note 359.

382. Virginia’s Academic Library Consortium, Controlled Digital Lending, available at <https://vivalib.org/va/cdl#CDL%20Mechanisms> (last accessed July 31, 2023) [<https://perma.cc/94XL-YW2K>].

383. *Google*, 804 F. 3d at 227.

384. *Id.*

385. *Gregory*, 689 F. 3d at 65.

386. *American Geophysical Union*, 60 F. 3d at 918.

387. *Sony Computer Entertainment, Inc. v. Connectix Corp.*, 203 F. 3d 596, 607 (9th Cir. 2000) (U.S.).

digitized copy. Such would be ideal for an academic library which solely serves its students and faculty members.³⁸⁸

Otherwise, the threat for market substitution is very real with the danger of exposure of the digital copies as well as the potential widespread conduct of digitization. Furthermore, the Philippine book industry is largely dependent on its textbook and educational book catalogs³⁸⁹ and have even protested against the massive losses incurred in loss of license fees due to the unauthorized and unlicensed usage of portions of their publications.³⁹⁰ Thus, it is submitted that under the fourth factor, digitization would not be considered fair use.

As gleaned from this Chapter, the current practice of digitization falls outside the ambit of protection of the library exemption in the IP Code and would not likely be protected under fair use. As lofty and laudable the goal of providing public access for the education and development of all, the Author submits that the current protocols and practices of digitization are insufficient to be considered as fair use. The third and fourth factors weigh heavily against fair use as digitization utilizes the entirety of the work and provides access to the public for substantially the same market.

VI. CRAFTING A DIGITAL REPRODUCTION EXEMPTION

“If reading can transform a man, imagine what it can do to a nation. What the reading public needs is a more diverse spectrum of genres and original content to support their interests and keep them inspired and curious. Copyright is a powerful tool that can give us that[.]”

— Rowel S. Barba, IPOPHL Director General³⁹¹

388. Bernardo, *supra* note 35, at 68.

389. Balisi, *supra* note 378.

390. Jenina P. Ibañez, *Book Industry Claims Losses of P240 Million from DepEd ‘Modules’*, BUSINESSWORLD, June 8, 2021, available at <https://www.bworldonline.com/economy/2021/06/08/374343/book-industry-claims-losses-of-p240-million-from-deped-modules> (last accessed July 31, 2023) [<https://perma.cc/JJ7V-5VL6>] & Sarangay, *supra* note 113.

391. Intellectual Property Office of the Philippines, *The Hope of the Philippine Book Publishing Industry Amid Stagnant Readership*, available at

The grant of copyright protection and limitation is a balancing of interests.³⁹² For digitization, there are the interests of authors and publishers who seek to protect their economic rights and safeguard their works from potential widespread harm in conflict with the interests of libraries and their patrons who seek to adapt to the new digital normal. It is thus proposed that the current library exemption be amended in order to embrace digitization into the protection of the IP Code. An amendment of Section 188 would be proper in order to properly balance the interests of both authors and libraries, archives, and their patrons.

A legislative amendment would also be preferable to reliance on fair use. As already established in the previous Chapter, it is highly likely that courts would rule that digitization would not constitute as fair use.³⁹³ Furthermore, it has already been expressed by library organizations as well as the U.S. Copyright Office that fair use is a tenuous haven for libraries and archives considering its lack of certainty.³⁹⁴ This is in contrast to a clear cut statutory exemption that would provide “a robust, certain safe harbor for their essential, everyday activities.”³⁹⁵ The defense of fair use would also require a thorough case-by-case analysis that coupled with the burden of proof upon the party alleging fair use and the cost of litigation would further burden libraries and archives who often struggle already with meager budgets.

A. The Framework of the Current Exemption

Despite the outdated limitation of reproduction by reprographic means, Section 188³⁹⁶ actually provides a good framework for a library exemption. It passes the requirements of the three-step test, namely the exemption being confined to certain special cases with the cases not conflicting with a normal exploitation of the work and not unreasonably prejudicing the legitimate interests of the author.³⁹⁷

<https://www.ipophil.gov.ph/news/the-hope-of-the-philippine-book-publishing-industry-amid-stagnant-readership> (last accessed July 31, 2023) [<https://perma.cc/9BWN-L8Z8>].

392. See Chapter 3 (B) of this Note.

393. See Chapter 5 (B) of this Note.

394. Section 108 Discussion Document, *supra* note 32, at 15.

395. *Id.*

396. INTELL. PROP. CODE, § 188.

397. Berne Convention, *supra* note 171, art. 9 (2); TRIPS Agreement, *supra* note 176, art. 13; & WIPO Copyright Treaty, *supra* note 165, art. 10.

Section 188 particularly narrows down the instances wherein reproduction may be availed of to three cases:

- (a) Fragile or rare works that cannot be lent to users in their original forms;³⁹⁸
- (b) Isolated articles that are contained in composite works or brief portions of other published works provided to patrons requesting such works for research and study;³⁹⁹ and
- (c) Preservation or replacement copies in the occasion that a work is ‘lost, destroyed[,] or rendered unusable ... and copies are not available with the publisher.’⁴⁰⁰

In comparison to the broad and overarching nature of current digitization practices, Section 188 provides a good foundation in delineating what specific works may be reproduced. It can be observed as well that this delineation properly safeguards the authors’ works from market harm. Section 188 was also amended from permitting a single copy to “a limited number of copies of the work, as may be necessary for such institutions to fulfill their mandate[.]”⁴⁰¹ There has been no interpretative regulations thus far on the definition of a limited number of copies.⁴⁰² However, the combination of the term “limited” and the discretion given to the institutions gives enough leeway for libraries and archives to conduct themselves accordingly under the statute.

B. The Metes and Bounds of a New Exemption

Under the IP Code, reproduction is defined as “the making of one [] or more copies, temporary or permanent, in whole or in part, of a work or a sound recording in any manner or form.”⁴⁰³ Thus, the provision embraces the making of copies in *any* form, whether digital or non-digital. This particular definition would make the transition of Section 188 rather simple as the

398. INTELL. PROP. CODE, § 188.1 (a).

399. *Id.* § 188.1 (b).

400. *Id.* § 188.1 (c).

401. *Id.* § 188.1.

402. Rosemarie Louise C. Cupin, *My Fair Copy: Balancing Intellectual Property Rights and the Right to Education in Light of the Amendment to the Fair Use Limitation on Copyright by Republic Act. No. 10372, at 79 (2015)* (unpublished J.D. thesis, Ateneo de Manila University) (on file with the Professional Schools Library, Ateneo de Manila University).

403. INTELL. PROP. CODE, § 171.9.

definition of reproduction already contemplates digital copies. It is thus proposed that the mentions of reprographic reproduction in Section 188⁴⁰⁴ be deleted and simply replaced as reproduction, referencing to the definition found in Section 171.9.⁴⁰⁵ The three instances already listed in Section 188 should be retained as a measure to limit the types of works that such reproduction, digital or reprographic, could apply to.

It is the question of access to these digital copies then that must next be answered. The ease of access that technology and the Internet provide is indeed a double-edged sword. While digital platforms have made it easier to grant access to knowledge, it has also made it far easier to pirate and disseminate works far past the fair and legal extent. Hence, a large part of the consideration in the grant of access to digital copies of works is the technological controls necessary in order to prevent the possible infringement of the work by users.⁴⁰⁶

In the U.S. library exemption, the grant of access to digital copies is limited to access within the premises of the library or archive.⁴⁰⁷ Similarly, the European Union has included as one of the limitations to copyright the

use by communication or making available, for the purpose of research or private study, to individual members of the public by dedicated terminals on the premises of establishments referred to in paragraph 2 (c) of works and other subject-matter not subject to purchase or licensing terms which are contained in their collections[.]⁴⁰⁸

It is proposed that such limitation be included as well in the Philippine library exemption. Considering that a majority of the libraries in the Philippines provide computer units within their premises and such are frequently used by patrons,⁴⁰⁹ this would ensure both ease of access to works and proper controls upon the access of such digital copies.

For the provision of access in digital or online platforms, however, it is proposed that such be added to Section 188 as well, mirroring the language of Section 184.1 (h), wherein the grant of access should be compatible with fair

404. *Id.* § 188.1.

405. *Id.* § 171.9.

406. This can be gleaned from the emphasis on sufficient technological controls by proponents of digitization. See Hansen & Courtney, *supra* note 115.

407. U.S. Copyright Act, §§ 108 (b) (2) & (c) (2).

408. Directive 2001/29/EC, *supra* note 104, art. 5 (3) (n).

409. MARIA JUANITA R. MACAPAGAL, STATUS OF PHILIPPINE PUBLIC LIBRARIES & LIBRARIANSHIP 3-4 (2018).

use.⁴¹⁰ However, the Author proposes the addition of the phrase “to be determined by the Intellectual Property Office” in order to grant authority upon the Intellectual Property Office to issue implementing regulations or guidelines as to the proper technological controls necessary to grant access to digitized works online while safeguarding the copyright of the authors. It is proposed that such regulations be issued after proper consultations with the necessary parties of interest, such as publishers and librarians.

VII. CONCLUSION & RECOMMENDATION

“But why’s she got to go to the library?”

“Because that’s what Hermione does,”

said Ron, shrugging.

“When in doubt, go to the library.”

— Harry Potter and the Chamber of Secrets⁴¹¹

A. Conclusion

Copyright law, in all its vibrancy, represents the intersection of multiple interests. As a statutory grant of right, the bounds of such right is ultimately up to Congress in its legislative wisdom to balance the scales.⁴¹² The foundation of the rights secured for authors and artists has always been the protection of their creations for the benefit of the people.⁴¹³ “The use of intellectual property bears a social function.”⁴¹⁴

Perhaps no other institution exemplifies the social function of intellectual property better than our libraries and archives. Libraries predate even the earliest copyright laws.⁴¹⁵ While the development of copyright laws from its roots in English royal statutes⁴¹⁶ to the current Philippine Intellectual Property Code⁴¹⁷ have demonstrated a recognition for the importance of libraries and

410. INTELL. PROP. CODE, § 184.1 (h).

411. J.K. ROWLING, HARRY POTTER AND THE CHAMBER OF SECRETS 298-99 (1998).

412. See Chapter 3 (B) of this Note.

413. PHIL. CONST. art. XIV, § 13.

414. INTELL. PROP. CODE, § 2.

415. Katz, *supra* note 142, at 84-85.

416. See Marshall Leaffer, et al., *Statute of Anne: Today and Tomorrow*, 47 HOU. L. REV. 1013, 1013-14 (2010-2011).

417. INTELL. PROP. CODE.

archives in the education and full development of citizens through the provision of library copyright exemptions, the roles of libraries as stewards of copyright law must also be emphasized.⁴¹⁸

As stewards of copyright law, they are bound to balance both the intellectual property rights of authors and artists whose works they possess and the great public interest which they serve.⁴¹⁹ In the past 20 years, many changes have thrust both libraries and the laws of copyright into a new frontier. The rise of the Internet, the development of new technologies, the digital shift, and a global pandemic have exacerbated the gap between statutory library exemptions and current library practices.

This gap between statute and practice is readily seen in the practice of digitization. Digitization provides a new avenue for libraries to be able to preserve certain library resources and provide access to these resources,⁴²⁰ which is all the more important in this increasingly online age. The cloud that has continuously hounded the practice of digitization by libraries, whether in the Philippines or in other jurisdictions, has been the lack of legal clarity with regard to the validity of such practices under copyright law.

This Note has approached this question by analyzing digitization: *first*, under the lens of the library exemption in the IP Code and *second*, under fair use. The library exemption found in the IP Code is in Section 188.⁴²¹ Section 188 outlines a copyright limitation solely for reprographic reproduction of works.⁴²² Digital or machine-readable copies were explicitly ruled out from inclusion in Section 188.⁴²³

As observed from the experience of other jurisdictions, an outdated library exemption leads libraries and their patrons to rely upon fair use. While the doctrine of fair use was developed in order to “avoid stifling ‘the very creativity which [copyright] law is designed to foster’,”⁴²⁴ its nature as an exception and an affirmative defense⁴²⁵ under Philippine law prove it to be a difficult and unwieldy tool for the protection of digitization practices.

418. American Library Association, *supra* note 154.

419. White, *supra* note 2.

420. Nnenna & Ume, *supra* note 80, at 36.

421. INTELL. PROP. CODE, § 188.

422. *Id.*

423. Copyright Safeguards and Regulations, rule 2 (17).

424. *ABS-CBN*, 753 SCRA at 57 (citing Bunker, *supra* note 265).

425. *ABS-CBN*, 753 SCRA at 57 & 62.

After careful perusal of both Philippine and U.S. jurisprudence on fair use, the Note ultimately concluded that digitization as it is currently practiced by its foremost proponents would not be considered fair use. Anent the first factor, i.e., purpose and character of the use, it was previously established in *Cambridge University Press* that digitization or the shifting of formats from print to digital is not transformative.⁴²⁶ While educational purpose and non-profit character of libraries would initially favor fair use, jurisprudence have cautioned that such does not immediately “insulate [] from a finding of infringement[.]”⁴²⁷ Correspondingly, digitization serves the same purpose that the works considered are being published for and jurisprudence dictates that this leads to a bolstered weight of the fourth factor in the overall fair use analysis.⁴²⁸ Thus, the first factor would be rather neutral.

Jurisprudence states that the likelihood of the second factor to lean towards fair use highly depends on the nature of the work.⁴²⁹ Based on a review of the works being digitized, such are from a mix of genres, ranging from factual to fictional works.⁴³⁰ Thus, it is submitted that the second factor, would also be neutral or against fair use, depending on the genre of works that the library is digitizing.

The third factor, the amount and substantiality of the work used, would be heavily against fair use. Digitization necessarily utilizes and provides access of the entirety of the work to its patrons.⁴³¹ The defense of the proponents of digitization argue that temporary access and technological controls exercised would temper the use of the entirety of a work.⁴³² However, such is a mistaken appreciation of the third factor which does not ask regarding the nature of access to the work, whether permanent or temporary. It cuts straight to an evaluation of the amount of the work used and the substantiality of such amount to the value of the work.⁴³³

While jurisprudence provides that the usage of the entirety of the work may still be considered fair use at certain times,⁴³⁴ the trend of U.S.

426. *Cambridge University Press*, 769 F. 3d at 1262.

427. *Campbell*, 510 U.S. at 584.

428. *Cambridge University Press*, 769 F. 3d at 1275.

429. *ABS-CBN*, 753 SCRA at 59.

430. See Internet Archive, *supra* note 359.

431. See Chapter 2 (B) & (D) of this Note.

432. Hansen & Courtney, *supra* note 115.

433. INTELL. PROP. CODE, § 185.1 (c).

434. *ABS-CBN*, 753 SCRA at 60.

jurisprudence dealing with digitization of works has revealed an acknowledgement that the usage of large amounts of the work or the entire work itself would tip the factor of fair use against the user.⁴³⁵ The U.S. Copyright Office has also confirmed that its official position is that the provision of digital access to complete works would not be considered fair use.⁴³⁶

The fourth factor, i.e., effect of use upon the market, called as the most important factor, is also heavily against the consideration of digitization as fair use. The ultimate consideration was whether digitization would lead to an “unrestricted and widespread conduct ... that would result in a substantially adverse impact on the potential market for the original.”⁴³⁷ A key question as well is whether digitization would provide an effective substitute such that substantive harm would be caused to the economic benefits of authors and other rightsholders.⁴³⁸

It is observed that there is a lack of consistent and standardized set of controls in the practice of digitization with libraries opting for different kinds of technological controls and digital platforms.⁴³⁹ Thus, the exposure to the risk of hacking and abuse of use that were earlier expressed by publisher-plaintiffs in the *Google Books* case which the Circuit Court of Appeals noted would constitute a “rebuttal to [a] claim of fair use[]”⁴⁴⁰ is present in this case. The lack of consistent controls combined with the public nature of access libraries and archives provide also lend to a conclusion that the digital copies produced through digitization would serve as market substitutes to the detriment of the value of the original works.

Thus, the current form of digitization falls outside the ambit of protection of the library exemption in the IP Code and would not likely be protected under fair use. The current protocols and guidelines from digitization practitioners prove insufficient to be considered fair use and sufficiently safeguard the economic value of the works that copyright law was created to protect.

435. *Google*, 804 F. 3d at 221 & *Penguin Group (USA)*, 2015 WL 11170727, at *5.

436. Strong, *supra* note 368.

437. *Campbell*, 510 U.S. at 590 (citing 1 NIMMER ON COPYRIGHT *Infringement Actions* — *Substantive Aspects* § 13.05 (1963)).

438. *See Google*, 804 F. 3d at 227.

439. *See Internet Archive*, *supra* note 359 & Virginia’s Academic Library Consortium, *supra* note 382.

440. *Google*, 804 F. 3d at 227.

B. Recommendation

In balancing the interests of copyright and seeking to push copyright law further into the digital age, this Note proposes the amendment of Section 188 of the IP Code⁴⁴¹ in order to embrace digitization practices into the folds of statutory protection. The amendment is necessary in order to address the interests of authors and publishers and the interests of libraries and their patrons who seek to adapt to the new digital normal. In honor of the great benefits libraries serve to their communities as well, the amendment would provide a safe harbor for libraries that have already been practicing digitization.

The IP Code already provides a definition of reproduction that embraces the making of copies in any form, whether digital or non-digital.⁴⁴² Thus, the proposed amendment would delete the mentions of reprographic reproduction and replace such with reproduction, adopting the definition from Section 171.9.

It is further proposed that a subsection be added to Section 188 to specifically outline how access may be given to digitized works. It is submitted that such is necessary in order to address the concerns previously raised regarding the greater risk of exposure to market harm that the technology and the Internet could cause. The first avenue of access, distribution of the digital copies through terminals in the premises of the library, draws inspiration from U.S. copyright law and European Union directives.⁴⁴³ The second avenue of access, the distribution through online platforms, is limited by the requirement of compatibility with fair use mirroring Section 184.1 (h)⁴⁴⁴ and the proviso that such online platforms and accompanying technological controls would be determined by the Intellectual Property Office. It is proposed that such determination would be in the authority of the Intellectual Property Office and would be arrived at after studies and consultations are conducted.

441. INTELL. PROP. CODE, § 188.

442. *Id.* § 171.9.

443. U.S. Copyright Act, § 108 (b) (2) & (c) (2) & Directive 2001/29/EC, *supra* note 104, art. 5 (3) (n).

444. INTELL. PROP. CODE, § 184.1 (h). “The use made of a work by or under the direction or control of the Government, by the National Library or by educational, scientific or professional institutions where such use is in the public interest and is compatible with fair use[.]” *Id.*

ANNEX: PROPOSED AMENDMENT

Republic Act No. ___

AN ACT AMENDING SECTION 188 OF REPUBLIC ACT NO. 8293, OTHERWISE KNOWN AS THE “INTELLECTUAL PROPERTY CODE OF THE PHILIPPINES”, AS AMENDED.

Be it enacted by the Senate and House of Representatives of the Philippines in Congress assembled:

SECTION 1. Section 188 of Republic Act No. 8293, as amended by Republic Act No. 10372, is hereby amended to read as follows:

Section 188. Reproduction by Libraries. — 188.1. Notwithstanding the provisions of Subsection 177.1, any library or archive whose activities are not for profit may, without the authorization of the author of copyright owner, make a limited number of copies of the work, as may be necessary for such institutions to fulfill their mandate:

(a) Where the work by reason of its fragile character or rarity cannot be lent to user in its original form;

(b) Where the works are isolated articles contained in composite works or brief portions of other published works and the reproduction is necessary to supply them; when this is considered expedient, to persons requesting their loan for purposes of research or study instead of lending the volumes or booklets which contain them; and

(c) Where the making of such limited copies is in order to preserve and, if necessary in the event that it is lost, destroyed or rendered unusable, replace a copy, or to replace, in the permanent collection of another similar library or archive, a copy which has been lost, destroyed or rendered unusable and copies are not available with the publisher.

188.2. Notwithstanding the above provisions, it shall not be permissible to produce a volume of a work published in several volumes or to produce missing tomes or pages of magazines or similar works, unless the volume, tome or part is out of stock: Provided, That every library which, by law, is entitled to receive copies of a printed work, shall be entitled, when special reasons so require, to reproduce a copy of a published work which is considered necessary for the collection of the library but which is out of stock.

188.3. The distribution by a library or archive of a digital copy of a work reproduced under the instances listed in the preceding paragraphs shall be permissible:

a) Where the copy that is reproduced in digital format is distributed within the premises of the library or archive in lawful possession of such copy; or

b) Where the copy that is reproduced in digital format is distributed through digital platforms under the direction and control of the library or archive in lawful possession of such copy and in a manner compatible with fair use, to be determined by the Intellectual Property Office.

SECTION 2. Repealing Clause. – All laws, decrees, executive orders, issuances or regulations inconsistent with the provisions of this Act are hereby revised or amended accordingly.

SECTION 3. Separability Clause. – If any part of this Act is declared unconstitutional or invalid, such parts of provisions thereof nor so declared shall remain valid and subsisting.

SECTION 4. Effectivity Clause. – This Act shall take effect fifteen (15) days after its publication in at least two (2) newspapers of general circulation.