Transformative Adaptation, Performance, and Fair Use of Literary and Dramatic Works: Delineating the Rights of Playwrights and Adapters

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> *In truth, in literature, science and in art, there are, and can be, few, if any, things which, in an abstract sense, are strictly new and original throughout. Every book in literature, science and art, borrows and must necessarily borrow, and use much which was well known and used before. If no book could be the subject of copyright which was not new and original in the elements of which it is composed, there could be no ground for any copyright in modern times, and we would be obliged to ascend very high, even in antiquity, to find a work entitled to such eminence.*
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> *- Justice Joseph Story*[1]

> *If I have seen further it is only because I have stood upon the shoulders of giants.*
>
> *- Sir Isaac Newton*[2]

I. INTRODUCTION

The history of theater in the Philippines is marked with the fusion of the indigenous and the foreign, the local and the colonial. Building upon a mimetic tradition already existing in various tribal communities scattered across the Islands,[3] the Spanish *conquistadores* transformed local pagan rituals into distinctive theatrical forms, developing at last into the style and treatment of the uniquely Hispanic *zarsuela*, *comedia*, *sinakulo*, and *moro-moro*.

The coming of the Americans at the turn of the last century gave this already vibrant theater tradition a uniquely pedagogical character, using the stage as a tool in teaching the English language.[4] This sea-change in idiom,

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1. Emerson v. Davies, 8 F.Cas. 615, 619 (1845).
2. Letter from Sir Isaac Newton to Robert Hooke (Feb. 5, 1676).
3. DOREEN G. FERNANDEZ, *From Ritual to Realism*, *in* PALABAS: ESSAYS ON PHILIPPINE THEATER HISTORY 2, 18 (1996). Professor Doreen G, Fernandez writes:

   > The Spaniard Vicente Barrantes said in 1890 that 'all tagalog theater was definitely derived from Spanish theater, and that there had been none of it before Spanish contact.' Later, the historian Wenceslao Retana, noting that Barrantes's proof consisted more of arguments rather than documents, sifted through all extant accounts, but finally himself came to the same conclusion that there was no proof that the Tagalogs had any *representacion escencia* before 1571, the year of the founding of Manila. However, while formal theater as the Spanish had known it may not have existed in the pre-colonial communities, there nonetheless existed various rituals and ceremonies which, if one is to consider drama as 'action' or 'deed' involving mimesis or mimicry, would certainly qualify as indigenous Philippine drama.

   Id. at 5.
4. *Id.* at 7.

coupled with the ready access to material in the English language, resulted in the gradual shift from the *zarzuelas* of the previous century to the *cowboys* and *indians* of the next. Philippine theater had now decidedly taken a turn towards the English language, and with this turn, followed a love for all things American.

The writing and staging of English plays, or Philippine plays written in English, became the norm in the succeeding three decades following 1910, with most of the activity centered in schools and universities, which were, naturally, the centers of written and spoken English.

The result of such an enthusiasm for the language and the literature was the marginalization of Filipino as a tool for efficient and proper communication. In fact, many felt that the vernacular had become laden with grammatical jargon and obtuse expression that it had lost its quicksilver as a tool for significant and animated discourse.[5] Furthermore, literary material in Filipino often paled in comparison with those composed in English, as Filipino had not yet reached the level of precision, creativity, and maturity that the English language had attained.[6] The feeling that Filipino was a "provincial" language, therefore, pervaded not only the school setting, but the consciousness of the cultural elite as well, with English quickly becoming the *lingua franca* of the educated and the *intelligentsia*.[7]

Nevertheless, even as English had established itself as the language of education and commerce in the Philippines by the 1960s, the appreciation for the stage remained disappointingly limited.[8] Theater could not penetrate the consciousness of the *masa*. Some blamed this on the general public's lack

5. ARTHUR P. CASSANOVA, KASAYSAYAN AT PAG-UNLAD NG DULANG PILIPINO 56 (1984).

6. ONOFRE R. PAGSANGHAN, SINTA AND OTHER PLAYS 17 (1984).

7. *See* Bienvenido L. Lumbera, *Pilipino Goes to Town*, THE MANILA CHRONICLE, Dec. 13, 1967, at 8. In the same article, Bienvenido L. Lumbera observes:

> Writers in Pilipino seem to accept the fact that theirs is a language of the simple folk — the usual subject matter of their stories, poems, and plays confirms their attitude. Local movies have picked up this attitude, so that a city-slicker, society matron, or college student is frequently given English lines to say. The resulting impression is that Pilipino can handle only certain materials: those deriving from rural life or life among the poor.

Id.

8. FERNANDEZ, *supra* note 3, at 21.

of exposure to the medium;[9] others cited a need for education.[10] A few realized, however, that the problem was really linguistic: "English was still not the language of the heart, much less of the gut of the majority of Filipinos."[11] Thus, audiences were limited to the highly educated and to those already devoted to theater.

Indeed, of this poverty of culture, an observation by the great Jesuit Fr. Horacio dela Costa is worth quoting:

> You know, we are a remarkably poor people: poor, not only in material goods, but even in the riches of the spirit. I doubt whether we can claim to possess a truly national literature. No Shakespeare, no Cervantes has yet been born among us to touch with immortality that in our landscape, in our customs, in our history which is most vital, most original, most ourselves. If we must give currency to our thoughts, we are forced to mint them in the coinage of a foreign tongue; for we do not even have a common language.[12]

Acting upon this realization, Onofre R. Pagsanghan, with his background in drama at the Ateneo de Manila University under Fr. Henry L. Irwin, adapted Thornton Wilder's *Our Town* into *Doon Po sa Amin*. Following this seminal breakthrough, one prompted by necessity rather than artistic daring,[13] he translated, or in his words, "transplanted," Tom Jones's and Harvey Schmidt's *The Fantasticks* into *Sinta!*, the longest running play in Philippine theater history.

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9. BIENVENIDO L. LUMBERA, PHILIPPINE THEATER, 1972-1979: A CHRONICLE OF GROWTH UNDER CONSTRAINT 12 (1987) [hereinafter LUMBERA, PHILIPPINE THEATER].

10. CASSANOVA, *supra* note 5, at 42. Another noted theater critic put it more bluntly: "Philippine theater, at least as we know it in Manila, is sick. It's mainly malnutrition — a dearth of playwrights and intelligent directors, the absence of a tradition with which to identify if not to depart from, and the lack of an intelligent, critical audience." Sylvia Mayuga, *The Playful Innocents*, THE SUNDAY TIMES MAGAZINE, May 4, 1969, at 31.

11. FERNANDEZ, *supra* note 3, at 22.

12. Horacio V. Dela Costa, S.J., *The Jewels of the Pauper*, *in* 1 HORACIO DELA COSTA, S.J.: THE WRITINGS OF HIS YOUTH 248 (Roberto M. Paterno ed., 2002).

13. The impetus for the adaptation, Pagsanghan says, was really to raise funds for the seminary education of students living in the slums of Balic-Balic, Tondo. *See* PAGSANGHAN, *supra* note 6, at 14. One writer related her experience of watching the play. She said, "*May sasarap pa bang bigkasin gaya ng sariling wika sa pagpapahayag ng sariling buhay at damdamin? Iyong mga nagpapalagay na ang pag-asa lamang ng panitikang Pilipino ay nasa mga nagsusulat sa Ingles, inaanyayahan naming manood ng Doon Po sa Amin*." Paraluman S. Aspillera, Doon Po sa Amin, MANILA TIMES, Feb. 7, 1969, at 8-A.

Meanwhile, Rolando Tinio, fresh from his M.F.A. at the University of Iowa and theater training in England, deciding that Filipino was absolutely as capable as English in containing the whole range of ideas and emotions found in western drama, translated and staged such plays as Tennessee Williams's *The Glass Menagerie* (*Laruang Kristal*), August Strindberg's *Miss Julie*, and Arthur Miller's *Death of a Salesman* (*Ang Pahimagas ng Isang Ahente*).[14]

Not to be left behind in this tide of Filipinization was Cecile Guidote, founder of the Philippine Educational Theater Association (PETA), who staged Virginia Moreno's *Straw Patriot*, in its translation, *Bayaning Huwad*, and Nick Joaquin's *Portrait of the Artist as Filipino*, translated into *Larawan*.[15]

With these landmark efforts, and coupled with the nationalistic fervor that swept the country in the 1960s,[16] Philippine theater charted a new course in expression which could rightfully be called uniquely and decidedly Filipino.[17] These works, while often translations or adaptations of foreign material, have offered the first real breakthrough in the use of the national language[18] and have undoubtedly become part of Philippine literary and theater history. These plays, and others like them of that era, are rightfully considered watershed events in the struggle to develop a truly Filipino language and cultural identity.

The adaptation and translation of material, both local and foreign, have played a crucial role in the development of Philippine theater, and to this day, continues to provide a steady flow of material for local theater companies. Such adaptations and translations, however, while fruitful in the realm of theater and the arts, also involve issues of a legal character.

While adapted or translated almost 40 years ago, the legal status of these seminal works is placed into doubt when understood within the context of intellectual property law, particularly, Philippine laws on copyright. This is complicated further by the question of whether these plays may still be legitimately performed, notwithstanding the fact of such adaptation or translation. The problem takes on added urgency as some of these plays have, in fact, been squarely challenged as infringements, resulting in difficulties in publication and performance. Representative of these

14. *See* FERNANDEZ, *supra* note 3, at 21.

15. *Id*.

16. LUMBERA, PHILIPPINE THEATER, *supra* note 9, at 15.

17. FERNANDEZ, *supra* note 3, at 25.

18. Alfredo R. Roces, *The Heart of Theater*, THE MANILA CHRONICLE, Dec. 6, 1967, at 11.

groundbreaking works is Onofre R. Pagsanghan's *Sinta!*, translated and adapted from Tom Jones's and Harvey Schmidt's *The Fantasticks*.

This Article, therefore, attempts to address these twin questions of adaptation and performance with respect to dramatic or literary works. A two-fold treatment will be employed. The first part of this Article will place close scrutiny on the nature of adaptation and translation, with a keen emphasis on the nature of dramatic or literary works as transformative. The purpose of this is to delineate the precise parameters within which adaptations and translations may use an original work without infringing upon the rights of original authors under copyright law. Certainly, a mere visual comparison of the subsequent play and the work upon which it is based would be insufficient in determining this similarity, as the nature of the works involved include a myriad of elements that must each be addressed and evaluated. Ultimately, an understanding of adaptation and translation as transformative will be developed.

The second part of this Article involves the question of performance. Indeed, the mere adaptation or translation of an already existing literary or theatrical work onto the stage is merely half of the endeavor. Translation and adaptation is useless if such works cannot later on be performed. Even here, copyright laws hold sway. If, from the first part of this inquiry, the questioned adaptation or translation has been found to qualify as an independent creation, then the problem of performance would be resolved as a matter of course. Assuming, however, that such subsequent adaptation or translation, notwithstanding its transformative nature, is considered an infringing work displaying substantial similarity, may such work nevertheless be performed under the provisions on Fair Use and *Limitations to Copyright* found in Sections 185 and 184, respectively, of the Intellectual Property Code (I.P. Code)? Would not such provisions unduly prejudice the rights of original authors and playwrights over works copyrighted either in this jurisdiction or abroad?

II. TRANSFORMATIVE ADAPTATIONS: TESTING SUBSTANTIAL SIMILARITY AND THE IDEA-EXPRESSION DICHOTOMY

Section 173 of the I.P. Code declares as protected new works the following creations considered to be derivate works:

> 1. Dramatizations, translations, adaptations, abridgements, arrangements, and other alterations of literary or artistic works; and,
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> 2. Collections of literary, scholarly or artistic works, and compilations of data and other materials which are original by reason of the selection or coordination or arrangement of their contents.

Seen together with the exclusive economic right of creators to make dramatizations, translations, adaptations, abridgements, arrangements, or other transformations of their original work, the law considers the products

of such continued creativity as distinctly protected apart from their original underlying work.

Furthermore, the law also recognizes that such original works may be used by other individuals to create independent works which may likewise qualify for copyright protection as a new work. Nevertheless, the law is also quick to add that in this situation, such copyright protection "shall not affect the force of any subsisting copyright upon the original works employed or any part thereof, or be construed to imply any right to such use of the original works, or to secure or extend copyright in such original works."[19] This means that if an individual uses the copyrighted work of another in order to create a proper derivative work, he would nonetheless be bound to respect the copyright subsisting in the original underlying work. Consent from such original author would still be necessary.

The law, of course, is clear in its language. But could there be a situation where, notwithstanding its derivative quality, such subsequent work may be granted independent copyright without being bound to the copyright of the original underlying work upon which it is made? May translations or adaptations be considered a unique kind of derivative work?

A. Nature of Derivative Works

To set the proper tone and perspective in the discussion of the nature of derivative works and transformative adaptations, it would be appropriate to begin with an observation by Justice Joseph Story in *Emerson v. Davies*,[20] where he pointed out that because all works are in some degree derived from already existing works, almost all intellectual creations may be considered derivative works. He said,

> In truth, in literature, in science and in art, there are, and can be, few, if any, things which, in an abstract sense, are strictly new and original throughout. Every book in literature, science and art, borrows and must necessarily borrow, and use much which was well known and used before … If no book could be the subject of copyright which was not new and original in the elements of which it was composed, there could be no ground for any copyright in modern times, and we would be obliged to ascend very high, even in antiquity, to find a work entitled to such eminence. Virgil borrowed much from Homer; Bacon drew from earlier as

19. An Act Prescribing the Intellectual Property Code and Establishing the Intellectual Property Office, Providing for Its Powers and Functions, and for Other Purposes [INTELLECTUAL PROPERTY CODE OF THE PHILIPPINES], Republic Act No. 8293, § 173.2 (1998).

20. Emerson v. Davies, 8 F.Cas. 615 (1845).

> well as contemporary minds; Coke exhausted all the known learning of his profession; and even Shakespeare and Milton … would be found to have gathered much from the abundant stories of current knowledge and classical studies of their days.[21]

The I.P. Code does not define the extent and nature of derivative works. It borrowed, however, from its counterpart statute in the United States, the Copyright Act of 1976, WHICH defines a derivative work as one "based upon one or more pre-existing works"[22] and includes "any form in which a work may be recast, transformed, or adapted."[23] Indeed, this definition may well apply to the instances enumerated by the I.P. Code under Section 176. Whether seen from the point of view of the American or the Philippine copyright statute, however, this definition of a derivative work, as one "based upon one or more pre-existing works," is clearly imprecise, as not all works that borrow from pre-existing works may be properly considered a derivative work. Otherwise, *any* work based upon a prior work, however loose or inconsequential, would be considered derivative, and thereby require prior permission from the original author.

A more precise definition of a derivative work would place it as a subsequent intellectual creation that displays some degree of *distinguishable variation* from a prior work and, at the same time, is nonetheless *substantially similar* to the original.[24] A proper derivative work under the I.P. Code, therefore, would display both a distinguishable variation from a prior work — thus entitling it to independent copyright protection by virtue of the quality of originality — and, at the same time, a substantial similarity to the original, necessitating prior permission from the original author as required by the I.P. Code. It is in the nexus between these seemingly conflicting requirements of distinguishable variation and substantial similarity that the determination of the existence of a derivative work lies. Consequently, the limits of adaptation and translation are circumscribed within such a tension.

B. Variation and Similarity: the Nexus of Copyrightability in Derivative Works

The link that ties a subsequent work to an original upon which it is based lies in the interplay between distinguishable variation and substantial similarity. While distinguishable variation may entitle an alleged derivative work to separate copyright protection, its substantial similarity to the original would require prior permission from the original author. Absent such authorization, the secondary author would be liable for infringement.

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21. *Id.* at 619.

22. 17 U.S.C. § 101 (2007).

23. *Id.*

24. MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT, § 3.01 (2002).

Indeed, it has been said that all legal questions are in the last analysis questions of degree, requiring judicial line-drawing.[25] In the area of derivative works, the question of translation and adaptation present such a variance of degrees. While both may display distinguishable variation from an underlying original work — thus entitling it to its own copyright as a work of original intellectual creation — the degree of substantial similarity to an original work may vary due to the nature of the adaptation or translation, so much so that the resulting subsequent work may be properly considered a distinct and separate intellectual creation altogether.

While the I.P. Code enumerates translations and adaptations as derivative works, it is silent as to specific standards upon which the nexus of variation and similarity may be determined. What degree of variation would be considered distinguishable? What level of similarity would be considered substantial? Fortunately, American copyright experience may provide a workable answer.

1. Distinguishable Variation: More than Mere Originality

American copyright practice has laid down a liberal construction of "originality." This means that almost any independent effort on the side of sufficient originality[26] is sufficient to be entitled to copyright protection. Indeed, what is relevant is not novelty, in the sense of "newness" of the work, rather, what is sought is the actual authorship of the author — that, in fact, the author was its progenitor.[27] This is echoed by British copyright practice, where originality is considered limited to the mere "skill, labor, and judgment" of the author.

The word "original" does not in this connection mean that the work must be the expression of original or inventive thought. Copyright Acts are not concerned with the originality of ideas, but with the expression of thought and, in the case of "literary work," with the expression of thought in print or writing. The originality which is required relates to the expression of the thought. The Act does not require that the expression must be in an original or novel form, but that the work must not be copied from another work — that it should originate from the author.[28]

25. *Id.* § 2.01 [B].

26. *Id.* § 2.01 [A].

27. *Id.*

28. University of London Press Ltd. v. University Tutorial Press Ltd., (1916) 2 Ch. 601, at 608 (U.K.).

Translations and adaptations, being in themselves independent intellectual creations, must, like original works, display the same characteristic of originality in order to be entitled to copyright protection.[29] By definition, however, derivative works are *always* to be understood as based on pre-existing originals. Such a low standard of originality would therefore imply that mere copying of the underlying work, as in word for word reproduction, or in some cases, transliteration or translation, would entitle the resulting work to copyright protection, as evidence of the secondary author's "skill, labor, and judgment." This, however, is not the case.

a. The L. Batlin & Son, Inc. Case

While individual skill, labor, and judgment may be sufficient to grant copyright protection to an *original work* under American and British practice, this seemingly all inclusive and minimal measure of originality was defined and fine-tuned in the case of derivative works, as illustrated in the landmark case of *L. Batlin & Son, Inc. v. Snyder*.[30] Here, the Second Circuit of the United States Court of Appeals decided on whether or not a copyright obtained by importers of an "Uncle Sam" coin bank which closely resembled an already copyrighted antique coin bank of a *different material* was valid. The court noted that the imported coin banks made of plastic were practically identical with the antique coin banks made of cast iron. The only obvious difference was found in the materials used. The court, therefore, ruled that the imported coin banks could not validly be granted copyright, notwithstanding the fact that they did display sufficient skill in craftsmanship, having been executed in a different medium.

L. Batlin & Son, Inc. reiterated that the need for variation to support a separate copyright must not only be original, but also *significant and not trivial.* This meant that mere copying of the work, even onto a different medium, did not, of itself, create substantial variation to entitle it to copyright protection. The plastic coin bank can, therefore, not be considered a derivative, much less, an independent work. Mere "physical skill" or "special training," the court noted, was insufficient, as "[a] considerably higher degree of skill is required, true artistic skill, to make the reproduction copyrightable."[31] This was the necessary consequence of the constitutional demand of promoting progress in the arts, which the court related to freedom of use in the public domain.

Absent a genuine difference between the underlying work of art and the copy of it for which protection is sought, the public interest in promoting

29. 18 AM. JUR. 2D *Copyright and Literary Property* § 42 (1985).

30. L. Batlin & Son, Inc. v. Snyder, 536 F.2d 486 (1976).

31. *Id.* at 491.

progress in the arts could hardly be served. To extend copyrightability to minuscule variations would simply put a weapon for harassment in the hands of mischievous copiers intent on appropriating and monopolizing public domain work.[32]

Thus, while originality is required of copyrightable works as a general rule, such requirement is understood somewhat differently with respect to derivative works. While an author's "effort, skill, and judgment" would remain the minimum standard for the grant of copyright protection in general, such originality would be manifested through such "distinguishable variations" in derivative works, including translations and adaptations. Failing to create any "distinguishable variation," he has not produced anything that "owes its origin" to him.[33] Originality must therefore be coupled with meaningful differences, absent which, the derivative work would merely be a copy or reproduction of the original. Consequently, such copies or reproductions would be improper subjects of copyright protection. *Any* variation therefore, will not suffice.

b. Distinguishable Variation in Translations and Adaptations

i. Translations and Transliterations

The general and common understanding of a translation is the rendering into another language of the pre-existing literary or dramatic work.[34] Transliteration, meanwhile, which requires far less skill, is the process by which words, letters, or characters of one language are represented or spelled in the letters or characters of another language.[35] For example, a person who spells out Greek words using Roman letters has transliterated the work; he may further translate the transliterated Greek words into the English language.

By the very nature of the process employed, a secondary work that has been strictly translated or transliterated from a pre-existing work clearly displays substantial, if not actual similarity, to the original work. In this respect, it may be considered a derivative work under the second requirement of substantial similarity, and would therefore require permission from the original author before such translation may be properly made.

32. *Id.* at 492.

33. NIMMER & NIMMER, *supra* note 24, § 2.01 [A].

34. 3 WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 2429 (7th ed., 1966).

35. *Id.*

Whether such translation or transliteration could be protected with a separate copyright, however, is another matter.

Indeed, it has already been said that Section 173.2 of the I.P. Code recognizes that derivative works, among them, translations or transliterations, may themselves be the subject matter of a copyright separate from the underlying work. This, however, is without prejudice to the rights of the original copyright holder. Nevertheless, this copyright does not arise as a matter of course. Being a proper derivative work, it must also display *distinguishable variation* from the original underlying work. The mere fact that it is a translation or transliteration does not *ipso facto* entitle it to separate copyright protection absent distinguishable variation. Without such variation, the questioned translation or transliteration would be considered a mere *copy* of the original, which, although displaying substantial similarity to the underlying work, cannot be considered a proper subject of copyright. In fact, the work would be considered as a strict infringement, absent permission from the underlying author.

This is not to say that translations and transliterations may not be copyrighted; they may. These works, however, may only be copyrighted to the extent that they involve originality in the form of distinguishable variation to the degree described in *L. Batlin & Son, Inc.*. It is not the translation of the individual words that makes such works copyrightable, but rather the originality contributed by the translator's contribution.[36] Indeed, the threshold for originality in derivative works is low. Nonetheless, it is still there.

The same conclusion has been reached in American jurisprudence where a foreign book translated into English has been found to display sufficient originality and distinguishable variation to merit copyright protection. On the contrary, the translation of a list of words from English into Arabic and their further transliteration from Arabic into Roman letters were found uncopyrightable since such operations were fairly mechanical processes requiring little, if any, originality.[37]

ii. Dramatic Adaptations

Dramatic adaptations, on the other hand, involve more than mere rendering of letters and language and involve the recasting of the underlying work into a narrative, often by means of dialogue and action.[38] Here, elements of the underlying work are taken from its original context and recast upon a different medium or manner of expression. Not uncommon, in fact, is the

36. 18 AM. JUR. 2D *Copyright and Literary Property* § 42 (1985).

37. *See* Signo Trading International, Ltd. v. Gordon, 535 F.Supp. 362 (1981).

38. NIMMER & NIMMER, *supra* note 24, § 2.06 [A].

dramatization onto the stage or screen of other literary or dramatic works. For example, the addition of music, the changing of the plot or dialogue, even the preliminary translation of the work from one language to another using creative linguistic devices may complicate the question of similarity and thereby negate the need to obtain publication and performance permission. As the Professors Melville and David Nimmer stated, "If a work in dramatic form is not substantially similar to its underlying work, then it cannot by definition be regarded as a dramatization of such work within the context of a derivative work."[39] Consequently, being a separate work, the subsequent creation may not require prior permission from the original author.

Indeed, various permutations of creative expression may result from such a process; thus, there is a difficulty of determining the extent of substantial similarity of the resulting work. The threshold when such dramatic adaptation may be considered transformative so as to warrant independent copyright is, therefore, a question of degree which the following sections will attempt to sketch.

2. Substantial Similarity

The previous section has outlined the need for translations and adaptations to display some distinguishable and meaningful variation from the original underlying work to be entitled to a separate, albeit limited, copyright. To qualify, however, as a proper derivative work, such translation or adaptation must, on the other end of the spectrum, also display substantial similarity to the original, so as to evince some procession from the original to the derivative. The determination of such a substantial similarity is crucial in determining whether permission from the copyright owner of the original is necessary, because absent such substantial similarity, the derivative work, already displaying originality on its own, could be copyrighted independent of the consent of the original author. It would become, for all intents and purposes, a different and unconnected work. , Nevertheless, if displaying such substantial similarity, the subsequent work, considered as a proper derivative work, would be subject to the rights of the original author, including the need for permission and consent.

While the determination of distinguishable variation hinges upon questions of originality and meaningful difference — requirements that could be called minimum factors — the parameters of substantial similarity are somewhat more problematic, as they border on more subjective and ephemeral grounds. The question of substantial similarity, therefore, is a

39. *Id.* § 2.06 [B].

technical one upon which courts will have to exercise great discretion. It cannot be answered by mere perfunctory examination of the original and alleged infringing work. For a long time, American courts have sought an analytic approach in answering the issue of substantial similarity, as embodied in the *Abstractions Test*, and later, the *Abstractions-Filtration-Comparison Test*. It was only when faced with more recent technologies that a more synthetic and holistic measure was developed in the *Total Concept and Feel Test*, with varying degrees of success.

a. The Nichols and Altai Cases and the Abstractions Tests

Nichols v. Universal Pictures Corporation[40] attempted to determine the degree of similarity between two works by recognizing varying degrees of abstractions from idea to expression. This method was later known to be the *Abstractions Test*. Judge Learned Hand recognized that in determining the similarity between two works, a necessary reduction had to be made from the expression towards the idea at the center of each work.[41] A clear distinction must therefore be made between *idea* and *expression*.

In *Nichols*, the author of the popular play *Abie's Irish Rose* sued the producers of a movie, *The Cohens and the Kellys* for infringement. Both plots involved children of Irish and Jewish families who marry secretly because of the prejudice of their parents. In judging whether there was infringement, Judge Hand ruled that in judging an infringement case, the determining factor is often the level of abstraction at which the court conceives the expression as derived from the idea.[42] An *a priori* selection is, therefore, necessary as to the degree of allowable abstraction upon which a judgment of similarity or dissimilarity may be made.[43]

On the one hand, if the court chooses a low level of abstraction, i.e., only the literal words an author used, then a copier may take the plot, exposition, and all other original material as his own, even though these may be the most important ingredients of the first author's contribution. Here, only the literal words would be the benchmark of infringement. As a practical matter, this would mean that anyone could produce the work in a new medium without involving the permission of the original author, notwithstanding the law's grant of privilege to make "derivative works." If, on the other hand, the court should select a high level of abstraction, the original author may claim protection for whole genres of work, over and above the actual words, expressions, and scenes used. This would thereby

40. Nichols v. Universal Pictures Corporation, 45 F.2d 119 (2d Cir. 1930).

41. *Id.* at 121.

42. *Id.* at 120.

43. *Id.* at 121.

result in giving copyright protection of mere "ideas," where copyright law should only protect "expression."

In deciding *Nichols*, the court laid the plots and characters of the two works side by side, and with the basic principle that general plots cannot be copyrighted, proceeded to analyze the similarities and differences between the four main characters. The court found that the characters depicted in the play *Abie's Irish Rose* were "stock characters," and thus, the creator of the allegedly infringing work did not take from the first author "more than their prototypes have contained for many decades."[44] The court said that to allow the first author to claim copyright over such general elements would be to allow her "to cover what was not original with her."[45] The court therefore ruled that no copyright was infringed.

In concluding its decision, the court candidly acknowledged the inherent difficulty at determining substantial similarity through an exposition of the dichotomy between idea and expression, but nonetheless affirmed the need for such a determination:

> Still, as we have already said, her copyright did not cover everything that might be drawn from her play; its content went to some extent into the public domain. We have to decide how much, and while we are as aware as anyone that the line, wherever it is drawn, will seem arbitrary, that is no excuse for not drawing it; it is a question such as courts must answer in nearly all cases. Whatever may be the difficulties *a priori*, we have no question on which side of the line this case falls. A comedy based upon conflicts between Irish and Jews, into which the marriage of their children enters, is no more susceptible of copyright than the outline of Romeo and Juliet.[46]

The more recent case of *Nash v. CBS, Inc.*,[47] however, pointed out that the *Abstractions Test* as presented in *Nichols* is not a test at all. Rather, "[i]t is a clever way to pose the difficulties that require courts to avoid either extreme of the continuum of generality."[48] In short, *Nichols* recognized an approach at setting a standard of substantial similarity, but it did not say what that standard was. It took the case of *Computer Associates International, Inc. v. Altai, Inc.*[49] to particularize and apply the *Abstraction Test* to a workable method of

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44. *Id.* at 122.

45. *Id.*

46. Nichols v. Universal Pictures Corporation, 45 F.2d 119, at 122 (2d Cir. 1930).

47. Nash v. CBS, Inc., 899 F.2d 1537 (7th Cir. 1990).

48. *Id.* at 1540.

49. Computer Associates International, Inc. v. Altai, Inc., 982 F.2d 693 (2d Cir. 1992).

comparison. While the case deals with the more modern issue of infringement of computer programs, their source codes, and other non-literal elements, the basic method, as hewn from *Nichols*, is equally applicable to more conventional literary and artistic translation and adaptation.

In *Altai*, a three-step analysis was developed, which has come to be known as the *Abstraction-Filtration-Comparison Test*, where the court separated the allegedly infringed work into its constituent parts in order to examine it for incorporated ideas and elements taken from the public domain.[50] The court then sifted out those materials which could not be protected, and compared the remaining material to determine whether the elements which may have been protected are substantially similar to the alleged infringing or derivative work.

Further development of the test since *Altai* has resulted in a uniform stream of cases that have examined both literal similarities such as verbatim copying and non-literal similarities such as paraphrased elements. Again, while these cases dealt mainly with alleged computer program infringements, the basic premise is the same: if the material is taken to its barest elements of expression, would a comparison yield substantial similarities? Courts have therefore focused their analysis on three types of similarities to determine substantial similarity:

1. Unprotectable similarities, or those elements which are not protected under copyright law;
2. Literal similarities, or verbatim copying or identical duplication found in the alleged infringing or derivative work, and;
3. Non-literal similarities, or paraphrasing, modifications, and other borrowing of expressions.

Generally, courts have understood unprotectable similarities as those aspects of a work not protected under copyright law such as facts, ideas, common dramatic stock elements, information taken from public documents or other common sources, and material in the public domain. Meanwhile, literal similarities are those word-for-word or note-for-note reproductions of the original work. Non-literal similarities, on the other hand, are not exact duplications but are paraphrasing or modifications of the original work which may be incorporated in the infringing or derivative work. In cases of non-literal similarities, it is not how much is taken, but whether the defendant has appropriated the fundamental essence or structure of the original work.

Indeed, these tests, quite notably, do not expressly define what substantial similarity is or lay down the standards upon which such similarity is to be judged. After the reduction is made, for example, how can the court

50. *Id*. at 706.

say that what is remaining of the two works is substantially similar? Clearly, this question remains to be within the province of courts, exercising discretion and judgment, which, in the first instance, are proper triers of facts and evidence. The value of these tests, however, lies in providing a method by which to simplify the elements upon which such discretion is to be applied, and thereby providing for a more objective and heuristic, rather than subjective and metaphysical, appraisal of the similarities of the work.

b. The Roth Greeting Cards Case and the Total Concept and Feel Test

Another approach which has gained popular use in American courts in determining substantial similarity is the so-called *Total Concept and Feel Test* which was based on a 1970 Ninth Circuit Court of Appeals case, *Roth Greeting Cards v. United Card Co.*[51] The case involved the determination of infringement on the part of United Card Company (United) over greeting cards designed and copyrighted by Roth Greeting Cards (Roth). The trial court found in favor of United and denied the claim of infringement on the ground that while Roth's designs were indeed copyrightable, the wording or textual matter of each of the greeting cards consisted of common and ordinary English words and phrases which were in the public domain prior to the first use by Roth.

The Circuit Appeals Court, however, found infringement in favor of Roth. The court reasoned that while the textual matter found in the greeting cards was, of itself, not original and therefore not protected by copyright, an analysis of all the elements of each card, "including the text, arrangement of the text, art work, and association between the art work and text" showed a clear infringement of the rights of the original creator.[52] The court here chose to consider the question of infringement from the point of view of an "ordinary lay observer," and how he or she would consider the similarity between the underlying tone or mode of the alleged derivative and the original conception of the pre-existing work.[53]

From the method employed by the court, it is apparent that the *Total Concept and Feel Test* plays upon a synthetic rather than analytic requirement: the works in issue should not be dissected into their separate components, but rather, compared as an integral whole. In determining substantial similarity, such an approach thereby goes beyond the seemingly mechanical standards set down by *Nichols* and *Altai*, sometimes to include even aesthetic appeal.

51. Roth Greeting Cards v. United Card Co., 429 F.2d 1106 (9th Cir. 1970).

52. *Id.* at 1110.

53. *Id.* at 1111.

While some have commented that the *Nichols* holding, as particularized in the *Altai* decision, has overly mechanized the determination of substantial similarity in determining infringement,[54] others have also noted that the *Total Concept and Feel Test* swings the pendulum to the opposite end, inviting judicial determination of purely aesthetic matters.[55] The nature of modern technology has furthermore questioned the applicability of such a test upon software and internet infringement, as such technologies must, of necessity, borrow from the same basic elements and designs.[56] They have noted that the treatment is likely to overprotect uncopyrightable expression, as the distinction between idea and expression becomes blurred. As a result, the free use of non-copyrightable material would be greatly affected and, thereby, limited.[57]

54. James Tunney, The Reflexive Relationship between Computer Games Technology and the Law, *available at* http://www.bileta.ac.uk/Document%20Library/1/The%20Reflexive%20Relationship%20between%20Computer%20Games%20Technology%20and%20the%20Law.pdf (last accessed Dec. 12, 2008).

55. Rebecca Tushnet, *Copyright as a Model for Free Speech Law: What Copyright Has in Common with Anti-Pornography Law, Campaign Finance Reform, and Telecommunications Regulation*, 42 B.C.L. REV. 1 (2000). On the difficulty at determining substantial similarity, Rebecca Tushnet writes:

> It is unsurprising, then, that judges often disagree amongst themselves about when it is necessary to use a particular fragment of expression or whether the idea could have been expressed in some other, non-copying way. Particularly since infringement can be found even without verbatim copying, in cases of "substantial similarity," it is difficult to distinguish idea from expression. Worsening the uncertainty, the modern idea of a work's "total concept and feel" allows a finding of infringement when the overall mood of two works is essentially the same, despite the fact that there might be no single element that is literally copied. Neil Netanel suggests that the problem of sorting idea from expression has become even less tractable now that derivative works — works based on other copyrighted works such as a film inspired by a novel — are explicitly protected.

Id. at 25.

56. Gregory J. Wrenn, *Federal Intellectual Property Protection for Computer Software Audiovisual Look and Feel: The Lanham, Copyright, and Patent Acts,* 4 BERKELEY TECH. L.J. 279 (1989), *available at* http://www.law.berkeley.edu/journals/btlj/articles/vol4/Wrenn.pdf (last accessed Dec. 12, 2008).

57. Pamela Samuelson, Copyright and Censorship: Past as Prologue?, *available at* http://www.ime.usp.br/~is/ddt/mac333/aulas/pamela.html (last accessed Dec. 12, 2008).

Perhaps the most astute statement of the difficulties with the *Total Concept and Feel Test* is found in *Nash v. CBS, Inc.*[58] which questioned the "ordinary lay observer" paradigm so integral to the test.

Who is the "ordinary" observer, and how does this person choose the level of generality? Ordinary observers, like reasonable men in torts, are fictitious characters of the law; they are reminders that judges must apply objective tests rather than examine their own perceptions. They do not answer the essential question: at what level of generality? After 200 years of wrestling with copyright questions, it is unlikely that courts will come up with the answer any time soon, if the indeed there is "an" answer, which we doubt.[59]

In reaction to such valid difficulties, the Ninth Circuit, in later cases, fine-tuned the *Total Concept and Feel Test* to include "extrinsic/intrinsic" dualities to prove substantial similarity.[60] These inclusions were no doubt made to place an added dimension of objectivity to the similarity analysis. The intrinsic portion of the test measures whether an observer "would find the total concept and feel of the works" to be substantially similar.[61] The extrinsic portion of the test, meanwhile, is an objective analysis of similarity based on "specific criteria that can be listed and analyzed."[62] Affinities to the *Abstraction-Filtration-Comparison* test can clearly here be traced.

The difficulty, of course, with the *Total Concept and Feel* approach is that it has the tendency to call for an artistic, if not subjective, judgment rather than objective appraisal of the similarities of the works in issue. Indeed, the danger of allowing judges to determine the originality or value of a work based on artistic merits has already been discussed by Justice Oliver W. Holmes: "It would be a dangerous undertaking for persons trained only to the law to constitute themselves judges of the worth of pictorial illustrations."[63] The fact that American courts have tended to move away from this test, and have adverted to more objective standards such as the *Abstraction-Filtration-Comparison Test*, is recognition of the intrinsic difficulty of such a standard.

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58. Nash v. CBS, Inc., 899 F.2d 1537 (7th Cir. 1990).

59. *Id.* at 1540.

60. Sid & Marty Krofft Television Productions, Inc. v. McDonald's Corp., 562 F.2d 1157 (9th Cir. 1977).

61. *See* Pasillas v. McDonald's Corp., 927 F.2d 440, 442 (9th Cir. 1991).

62. *See* Brown Bag Software v. Symantec Corp., 960 F.2d 1465, 1475 (9th Cir. 1992).

63. Bleistein v. Donaldson Lithographing, Co., 188 U.S. 239, 250 (1903).

The shift, however, is understandable, owing to the greater propensity of controversy with modern technological mediums where similarities cannot be easily determined without thorough analysis. Indeed, source codes and computer programs are hardly susceptible of mere judgment by the "ordinary lay observer."

With respect to the more traditional works of literature, translation, and adaptation, nevertheless, the *Total Concept and Feel Test* remains an indispensable tool in determining substantial similarity by allowing the totality of intangibles to also be considered and judged. Indeed, while the "ordinary lay observer" standard may not apply to modern technologies, the difficulty would not be as pronounced in such traditional media, where the level of creativity and similarity does not require special knowledge or skill to determine.

C. The Idea-Expression Dichotomy

The essence of these tests, of course — and, ultimately, the line that determines substantial similarity — is recognition of the relationship between idea and expression so fundamental in the law on copyrights. This dichotomy, which undercuts all of copyright law, is in fact the basis upon which Judge Hand fashioned his *Abstractions Test* in *Nichols*, where he explained:

> Upon any work, and especially upon a play, a great number of patterns of increasing generality will fit equally well, as more and more of the incident is left out. The last may perhaps be no more than the most general statement of what the play is about, and at times might consist only of its title; but there is a point in this series of abstractions where they are no longer protected, since otherwise the playwright could prevent the use of his "ideas," to which, apart from their expression, his property is never extended. Nobody has ever been able to fix that boundary, and nobody ever can. In some cases the question has been treated as though it were analogous to lifting a portion out of the copyrighted work; but the analogy is not a good one, because, though the skeleton is a part of the body, it pervades and supports the whole. In some such cases we are rather concerned with the line between expression and what is expressed. As respects plays, the controversy chiefly centers upon the characters and sequence of incident, these being the substance.[64]

The framing of the dichotomy between idea and expression by Judge Hand was perceptive. However, while such pronouncements suggested how a line might be drawn to separate idea and expression, *Nash* has observed, quite correctly, that no guidance is provided on where exactly to draw it. Indeed, the judicial determination of such a line is crucial to determine not

64. Nichols v. Universal Pictures Corporation, 45 F.2d 119, at 121 (2d Cir. 1930).

only the fact of infringement, in case of adaptation of *expression,* but also the question of independent creation, in the case of adaptation of *idea*.

The I.P. Code itself clearly sets out in clear language that no protection shall extend "to any idea, procedure, system, method, or operation, concept, principle, discovery or mere data as such, even if they are expressed, explained, illustrated or embodied in a work."[65] What copyright law protects, therefore, is not the idea, but the expression of such an idea.

1. Plots and Themes in Philippine Jurisprudence

A manifestation of this dichotomy between idea and expression is found in various American decisions, *Nichols* one among them, which have ruled that themes and general plots are beyond copyright protection as they are within the realm of unexpressed ideas. The Philippine Supreme Court has had the occasion of dealing with such issues in the leading case of *Joaquin, Jr. v. Drilon*.[66]

The case stemmed from a complaint filed by Francisco Joaquin, Jr. against Gabriel Zosa, the producer of *It's a Date*, for alleged infringement of the copyright which the former held over *Rhoda and Me*, a dating game show aired from 1970 to 1997. Both game shows displayed the same general elements. The prosecutor found probable cause to file an information against Zosa, which, however, was reversed on appeal by the Secretary of Justice.

In answering the contention that the investigating prosecutor had sufficient ground to find probable cause for the charge of infringement based upon similarities of format and mechanics, the Court, through Justice Vicente Mendoza, said that the elements upon which the alleged infringement was anchored were not copyrightable to begin with.

The Court based its decision upon a reading of the provisions of Section 2 of the then Decree on the Protection of Intellectual Property[67] (P.D. No. 49) of 1972, which enumerated the works which may be protected by copyright.[68] The Court ruled that nowhere in the said list of protected works was the format and mechanics of a television show. "Since copyright is a purely statutory right," the Court reasoned, "the rights are only such as the statute confers and may be obtained and enjoyed only with respect to the

65. INTELLECTUAL PROPERTY CODE OF THE PHILIPPINES, § 175.

66. Joaquin, Jr. v. Drilon, 302 SCRA 225 (1999).

67. Decree on the Protection of Intellectual Property, Presidential Decree No. 49 (1972).

68. *Id.* § 2.

subjects and by the persons, and on terms and conditions specified in the statute."[69]

Over what, therefore, did Joaquin, Jr. hold copyright? The Court clarified that since no copyright may be obtained over the format and mechanics of the show *Rhoda and Me*, Joaquin, Jr. could only protect the audio-visual recordings of *each* episode of the show, as these were specifically enumerated as protected works in P.D. No. 49. The Court quoted with approval the ruling of the Secretary of Justice when he said, "[a] television show includes more than mere words can describe because it involves a whole spectrum of visuals and effects, video and audio, such that no similarity or dissimilarity may be found by merely describing the general copyright/format of both dating game shows."[70]

Indeed, while affirming this dichotomy between idea and expression found in the I.P. Code, the Court failed to provide standards by which to determine the existence of substantial similarity between any two intellectual creations. After all, while plot and theme may indeed not be copyrightable, the fact that these are elements of a non-literal nature would necessitate a more thoughtful consideration of where exactly the dividing line in idea and expression lies. Would it not be possible that in borrowing the format of *Rhoda and Me*, *It's a Date* also took elements that were nonetheless protected by copyright, notwithstanding the fact that they were non-literal?

While it was admitted that "mere description by words of the general format of the two dating game shows is insufficient (to determine substantial similarity),"[71] and therefore required the presentation of the master tapes in evidence to determine probable cause, no method was put forward by which to analyze these allegedly similar elements. In fact, no analysis at all was made by the Court, relying as it did on its primary reasoning of strict construction of the subject-matter of copyright protection.[72] On this question of substantial similarity, it merely adverted to the findings of the Secretary of Justice, who, no doubt, merely relied upon a *visual* examination of the questioned episodes or upon circumstantial evidence of their alleged infringement.[73]

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69. *Joaquin, Jr.*, 302 SCRA at 238.

70. *Id.* at 240.

71. *Id.* at 239.

72. *Id.* at 238.

73. *Id.* This attitude taken by the Supreme Court in merely adopting the findings of the Secretary of Justice as to the absence of substantial similarity would be understandable, since the case merely involved the question of probable cause, which, being a primarily factual question, would be best determined by the investigating prosecutor. Nevertheless, substantial similarity in itself is a properly legal question upon which courts must necessarily rule. It is a "mixed question

No help may be found in other decisions of the Court, as no case has yet been decided involving the same issues of substantial similarity, idea, and expression. While many recent cases involving infringement of motion picture copyrights — which ostensibly may involve questions of idea, expression, and substantial similarity — have been ruled upon by the Court, these cases involved mere determinations of the legality of seizures made of allegedly infringing works.[74] These works were, no doubt, outright copies anyway, and cannot be considered derivative works, much less adaptations or translations. No issue of substantial similarity, therefore, was involved.

Furthermore, passing upon other Court decisions requiring a determination of substantial similarity, analysis was often limited to an examination of the *literal elements* of the works involved. Perhaps this was unavoidable, as the materials in question were often literary works, whose similarities would be best determined by mere textual comparison. None involved plots or themes; thus, non-literal analysis was unnecessary. In the early case of *Serrano v. Paglinawan*,[75] for example, the Court found infringement where eighty-eight per cent of the words in a dictionary were copied by another author.[76] Also in the more recent case of *Habana v. Robles*,[77] the Court found infringement against the author of an English grammar book which had the same style and manner of presentation and used the same examples as an earlier work.[78]

More instructive, perhaps, were two old decisions of the Court of Appeals involving issues of plot, idea, and expression. The first case, *Cristobal v. Santos*,[79] involved an alleged infringement of a novella entitled, *Buntot Page*, which was adapted, following its broadcast over the radio, using the same title, but now with colored illustrations, in an issue of "Tagalog

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of law and fact" … "[f]air use is a mixed question of law and fact." Harper & Row Publishers, Inc. v. Nation Enterprises, 471 U.S. 539, 560 (1985). The Supreme Court, in glossing over the question of substantial similarity in this case, may have passed off as unprotected non-literal elements in the original work which, if analyzed more closely, may in fact have been rightfully covered by copyright protection.

74. *See* Columbia Pictures, Inc. v. Court of Appeals, 262 SCRA 219 (1996); Columbia Pictures, Inc. v. Court of Appeals, 261 SCRA 144 (1996); Columbia Pictures v. Court of Appeals, 237 SCRA 367 (1994).

75. Serrano Laktaw v. Paglinawan, 44 Phil. 855 (1914).

76. *Id.* at 861.

77. Habana v. Robles, 310 SCRA 511 (1999).

78. *Id.* at 525.

79. Cristobal v. Santos, 4 C.A.R. 21 (Court of Appeals 1963).

Klasiks." Meanwhile, the second case, *Abiva v. Weinbrenner*,[80] resolved whether the maker of printed Christmas cards which depicted scenic spots in the Philippines could prevent a third party from making similar Christmas cards which were photographed in the same way.

In *Cristobal*, the Court of Appeals ruled that the mere fact that a subsequent adapter used the same title to a work, but employed a different plot, could not support a finding of infringement.[81] What is interesting in this decision is that the court, making a synopsis of both works, based its ruling upon a comparison of the plots and characters involved. This same approach, if it may be recalled, was made in *Nichols*, but unfortunately, the Court of Appeals fell short of actually identifying the need to distinguish idea from expression or setting down definite standards for determining substantial similarity. But the court was on the right track.

Meanwhile, in *Abiva*, the same court, in determining substantial similarity, employed the *Total Concept and Feel* standard of "whether an ordinary observer comparing the works can readily see that one has been copied from the other"[82] and, on the strength of this standard, ruled that no infringement had occurred. Together with this finding that "a comparison of the two works does not give one the impression that one has been copied from another,"[83] the Court also said that "even if the subjects thereof are similar, the treatment of the subject matter is different."[84] Although not framed in precise language, the Court clearly had an awareness, although perhaps not nascent, of the distinction between idea and expression, and chose to resolve this distinction by adverting to the standard of the "ordinary observer:" there is substantial similarity when the subsequent work "comes so near the original as to give every person seeing it the idea created by the original."[85]

2. Mergers and *Scènes-à-faire*

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80. Abiva v. Weinbrenner, 6 C.A.R. 1023 (Court of Appeals 1964).

81. *Cristobal*, 4 C.A.R. at 30. The court said:

> *El mero hecho de que el demandado haya adaptado para su cuento el titulo de 'Buntot Page' no constituye una infracción de propriedad literaria del demandante puesto que "Rabo de Raya" es el rabo de una clase de pez marino…y el demandante no puede registrar las dos palabras como propriedad literaria.*

Id. at 31.

82. *Abiva*, 6 C.A.R. at 1028.

83. *Id.* at 1029.

84. *Id.*

85. *Id.* at 1027 (citing 18 C.J.S. *Copy* p. 130 (1939)).

Another important matter which derives from this dichotomy between idea and expression and bears upon this issue of substantial similarity, especially of translations and adaptations involving literary and dramatic works, is the doctrine of *scène-à-faire*. American courts have defined such scenes as "those sequences of events necessarily resulting from the choice of setting or situation, or incidents, characters or settings that are indispensable in the treatment of a given topic."[86] Courts have, therefore, recognized that there are certain situations where there is essentially no other way to express a particular idea except by using certain elements and manners of expression. These elements or forms of expression are called *scènes-à-faire*.

The case of *Ets-Hokin v. Skyy Spirits, Inc.*[87] is instructive. In this case, Joshua Ets-Hokin was a professional photographer hired by Skyy Spirits, Inc. to take photographs of its vodka bottle for purposes of commercial advertisement. Skyy Spirits, Inc. later hired two additional photographers to take new photographs of the same bottle without the knowledge or consent of Ets-Hokin. As a consequence, Ets-Hokin sued, claiming that the new photographs were infringements of his original photographs, grounding his arguments upon issues of substantially similarity.

In resolving the issue, the court held in favor of Ets-Hokin, affirming that his photographs contain at least sufficient originality to be copyrightable,[88] but noted that such protection was limited by the doctrines of merger and *scènes-à-faire*, which apply because of the narrow range of artistic expression available in the context of a commercial product shot.[89] The court further explained that *scènes-à-faire* cannot be protected under copyright in the same way that expressions *merged* with ideas cannot be protected.

Under the merger doctrine, courts will not protect a copyrighted work from infringement if the idea underlying the work can be expressed only in one way, lest there be a monopoly on the underlying idea. In such an instance, it is said that the work's idea and expression "merge." Under the related doctrine of *scènes-à-faire*, courts will not protect a copyrighted work from infringement if the expression embodied in the work necessarily flows from a commonplace idea; like merger, the rationale is that there should be no monopoly on the underlying unprotectable idea.[90]

86. Hoehling v. Universal City Studios Inc., 618 F.2d 972, 979 (2d Cir. 1980).

87. Ets-Hokin v. Skyy Spirits, Inc., 225 F.3d 1068 (9th Cir. 2000).

88. *Id.* at 1071.

89. *Id.* at 1073.

90. *Id.* at 1074.

Distilling from both the *Joaquin, Jr.* decision, the *Cristobal* and *Abiva* holdings by the Court of Appeals, and the American doctrines of merger and *scènes-à-faire*, it would seem that the line which would separate idea from expression would be the degree of its *particularity*, coupled with a positive *act of fixation*. This would follow from the premise that expression can never occur if the idea itself upon which it derives is not particular.

The converse, however, is not necessarily true. In other words, the more particular the idea, the more it approaches the realm of expression. A positive *act*, however, is still necessary to bring the potential creation into reality. The concept must be made real. It is the interplay between particularity and fixation, therefore, which determines the line between idea and expression. As held by Justice Hand in *Nichols*: "the less developed the characters, the less they can be copyrighted; that is the penalty an author must bear for marking them too indistinctly."[91] Fixation, then, is the functional key.

It must be stressed, however, that while fixation is the positive act which separates idea from expression, the act of fixation does not thereby dissolve the idea into pure expression, and thereby, render it fully protected. Rather, it is the expression of the idea that is protected, not the idea itself. Their separate identities remain intact. Thus, to constitute the existence of a derivative work, the substantial similarity between the original and subsequent work must be found in the protected *expression*, and not merely in the similarity of ideas. Absent such similarity in protected expression, the subsequent work may be considered an entirely different creation, notwithstanding similarities in the underlying idea of the two works compared.

Of course, the difficulty with providing for clear limits to translation and adaptation through the use of the above-described tests and approaches, and drawing the line between adaptation as derivative work, on the one hand, and independent copyrightable expression, on the other, is that such standards are more often than not relevant *after* the subject work has already been produced. Such tests are, therefore, descriptive rather than prescriptive.

The role of the courts, therefore, cannot be gainsaid, because while an outline of the limits of translation and adaptation may be useful to delineate the rights of adapters and authors over works which are *yet to be made*, such tests will only be truly beneficial when placed in the hands of judicial triers of facts who can definitively determine not only the copyrightability of such translations and adaptations, but more importantly, of the existence of substantial, if not actual, similarity.

D. The Limits of Translation and Adaptation

91. Nichols v. Universal Pictures Corporation, 45 F.2d 119, 141 (2d Cir. 1930).

To finally begin to sketch the limits of translation and adaptation, this inquiry will inadvertently have to contend with the concept of copyright infringement, inherent in the above discussions on originality and substantial similarity in derivative works. This question of infringement, after all, is only the other side of the need for prior permission from authors of original underlying works — so central, as has been discussed, to the legality of *bona fide* derivative works. It is from this understanding of infringement that a sketch of the limits of translation and adaptation are brought to a sharper and more definite focus.

According to the Supreme Court in *20th Century Fox Film Corp. v. Court of Appeals*,[92] "[t]he essence of a copyright infringement is the similarity or at least substantial similarity of the purported pirated works to the copyrighted work."[93] This pronouncement in *20th Century Fox Film Corp.* was quoted in various decisions which ruled on the existence of probable cause in the issuance of search warrants, and the need to present master tapes to determine such probable cause.[94] It would be necessary to point out, however, that while the formulation may be satisfactory for purposes of disposing of questions of probable cause, it would be an insufficient yardstick for determining whether infringement had indeed taken place. Mere similarity of one work to another does not *ipso facto* constitute infringement. This was earlier on pointed out by Justice Learned Hand when he said, "[i]f by some magic a man who had never known it were to compose anew Keats's 'Ode to a Grecian Urn,' he would be an 'author' and if he copyrighted it, others might not copy that poem though they might of course copy Keats's."[95] This expresses the principle that copyright law does not prevent the creation of identical works; it only prevents *copying*. Thus, one may have produced a work that is substantially similar with an earlier copyrighted work, but this does not, of itself, constitute infringement.

Perhaps more in point to determine the existence of infringement is the following pronouncement in *Arnstein v. Porter*:[96] "In applying that standard here, it is important to avoid confusing two separate elements essential to a

92. 20th Century Fox Film Corp. v. Court of Appeals, 164 SCRA 655 (1988).

93. *Id.* at 663.

94. *See* Joaquin, Jr. v. Drilon, 302 SCRA 225 (1999); Columbia Pictures, Inc. v. Court of Appeals, 262 SCRA 219 (1996); Columbia Pictures, Inc. v. Court of Appeals, 261 SCRA 144 (1996); Columbia Pictures v. Court of Appeals, 237 SCRA 367 (1994).

95. Sheldon v. Metro-Goldwyn Pictures Corporation, 81 F.2d 49, 54 (2d Cir. 1936).

96. Arnstein v. Porter, 154 F.2d 464 (2d Cir. 1946).

plaintiff's case in such a suit: (a) that defendant copied from plaintiff's copyrighted work and (b) that the copying (assuming it to be proved) went so far as to constitute improper appropriation."[97]

In *Arnstein*, copyright infringement was said to be composed of two elements: *copying* and *appropriation*. It must be demonstrated that the infringer not only copied the work but that, in so doing, appropriated the work in a manner and to a degree that is improper under the law. No matter how similar the alleged infringer's work is to the original, there can be no copyright infringement absent such act of copying. This would mean that absent this proof of copying, any substantial similarity displayed by the subsequent work cannot be considered against its maker. There is, simply, no infringement. Consequently, the question of appropriation would be negated.

The question of translation and adaptation falls squarely within this first element of *copying*, while appropriation properly refers to the question of Fair Use discussed in the next section.

When, therefore, is there copying under the law? American courts have recognized the difficulty at establishing the fact of copying since there is seldom any direct proof of such fact. Thus, a person alleging copyright infringement must ordinarily direct his proof to showing that the alleged infringer had *access* to the copyrighted work and that the infringing work is substantially similar to the copyrighted work.[98] Nevertheless, with respect to translated and adapted works, access is given as a fact. The claim that it is a species of derivative work would, by definition, mean that it is precisely copied from an original underlying work. Thus, the question of infringement would necessarily turn upon a finding of substantial similarity.

The interplay between distinguishable variation and substantial similarity has already been discussed at length to illustrate strategies that may be used in determining variation, on the one hand, and similarity, on the other. Clearly, these two elements in every derivative work play on degrees of opposites; they are reciprocal in nature. A mere literal copy of an underlying work, for example, cannot be considered a derivative work, because it lacks distinguishable variation and, at the same time, exhibits not only substantial but *actual* similarity to an original work. It is, for all intents and purposes, a mere *copy*. On the other hand, an independently copyrightable work, while nonetheless based upon an underlying work, would display distinguishable variation and, simultaneously, an absence of substantial similarity.

1. The Nature of the Subsequent Work

97. *Id.* at 468.

98. 18 AM. JUR. 2D *Copyright and Literary Property* § 204 (1985).

The first question that must be considered, therefore, in determining infringement and substantial similarity and, at the same time, the existence of independent copyright, is the nature of the subsequent work. Is the work a mere translation of the original underlying work, or, in addition to such translation, have other elements been added?

In case of a literal translation, the subsequent work would certainly display substantial similarity to the original, although it may, of itself, exhibit sufficient variation to be entitled to a separate copyright under Section 173.2 of the I.P. Code. Clearly, permission of the original author would be required for both the act of translation, and, if the translator is so minded, publication. Indeed, this much has been recognized by the Court of Appeals in the early case of *Villanueva v. Enriquez*,[99] which held that the translation of a work without the knowledge and consent of the author is an infringement of the copyright.

In this sense, Filipino works which have been merely translated into the vernacular, such as Tinio's *Laruang Kristal* and *Ang Pahimagas ng Isang Ahente*, may require license from the original author; otherwise, such works would be considered an infringement upon the original author's exclusive right of translation. Furthermore, publication rights would consequently be denied, as that would further deny the original author of profits and exposure which he is entitled to under the law.

Plays that have been adapted, however, rather than merely translated from original works, would require more thoughtful analysis because they involve not only literal elements but also non-literal incorporations. The complexity of the matter would be compounded further by the transformative nature of the adaptation.

There would be little doubt that such adaptations exhibit originality and distinguishable variation to support its own copyright as a proper derivative work. Hence, the analysis would center on the determination of whether such works are still substantially similar to the original, notwithstanding the varying degrees of transformation such underlying works have undergone at the hands of subsequent adapters.

While translations have in fact been made from original works, as in the case of Pagsanghan's *Sinta!*, these translations have nonetheless departed from the original texts and have added new elements of music, plot, character, setting, stage design, and treatment, so that the efforts made upon the original work may be properly considered transformative. A straightforward

99. Villanueva v. Enriquez, C.A.-G.R. No. 3657-R, June 9, 1950 (Court of Appeals 1950).

determination of substantial similarity, therefore, becomes difficult to make, and a general impression of similarity is not sufficient to prove infringement.

2. Literal and Non-Literal Similarities: Elemental Analysis Test

Beyond the language used in the dramatic adaptation, non-literal factors such as dialogue, scene, setting, characterization, music, and stage direction must factor into the analysis. The consideration of such elements cannot obviously be made by mere cursory comparison. For this reason, in determining whether substantial similarity exists in a work already adapted, the idea-expression dichotomy becomes the appropriate tool of reckoning.

Initially, of course, a *level of abstraction* must be determined, as suggested by *Nichols*, upon which the distinction between idea and expression may be calibrated. Repeating only what was discussed above, a high level of abstraction would result in the idea being dissolved into the expression, thus making otherwise free and unprotected elements part of the protected material. On the other hand, a low level of abstraction would focus more on the literal expressions used, and thereby consider as unprotected non-literal elements which may be protected as non-literal expression.

In choosing the appropriate level of abstraction, therefore, the trier of fact — whether the adapter himself or the courts — may well consider the liberalized treatment accorded to derivative works under the I.P. Code as shown by the grant of copyright protection to such derivative works even without the *consent* of the creator of the underlying work. This is reflected in Section 173.2, which provides that such adaptations shall be protected "as new works." Here, no prior consent from the original author is mentioned. This is in stark contrast to the previous regime under P.D. No. 49 which required *prior authorization and consent* from the original author before such derivative work may be considered protected by a separate copyright.[100] Therefore, considering such liberal treatment extended by the I.P. Code to adaptations as derivative works, a level of abstraction which leans more on the minimum may be justified as the reckoning standard which separates idea and expression.

This dichotomy between idea and expression is put into concrete use by an *Elemental Analysis Test* suggested by the *Abstraction-Filtration-Comparison Test* in *Altai* where literal and non-literal elements are compared following

100. *See* Presidential Decree No. 49, § 8. This section provides that such derivative works, "when produced with the consent of the creator or proprietor of the original works on which they are based," shall be protected as new works. Such new works, however, shall not affect the force of any subsisting copyright upon the original works employed or any part thereof, or be construed to imply an exclusive right to such use of the original works, or to secure or extend copyright in such original works.

an abstraction and filtering of elements which are not protected by copyright.

a. Non-Protected Elements: Subject Matter, Theme, and Plot

The first step in this analysis in determining substantial similarity in translations and particular adaptations would involve the identification of the subject matter, theme, and plot which correspond to the underlying ideas that drive a dramatic presentation and are, incidentally, unprotected by copyright. Any similarity between these elements found in the adapted work and the original work must therefore be discounted, as these elements may be legally used by any playwright as unprotected idea.

What, therefore, is the *subject matter* of an adaptation? Subject matter in this case involves the general category in which the play falls, whether drama, comedy, tragedy, suspense, or romance. In other words, when an adaptation is made from a tragedy, for example, Tinio's *Ang Pahimagas ng Isang Ahente*, the adapted play cannot be considered an infringement simply on the ground that, like the original, it is also a tragedy. Clearly, similarities at this level of generality are given over to unprotected ideas.

Still involving the realm of ideas is the *theme* of the two works involved. Here, what is considered is the statement that the creative work wishes to convey, the significant human experience it aims to impart as a creative work. As with the element of subject matter, the similarity of themes does not also result in a finding of infringement, as what is again involved is a mere general idea that may yet be expressed in various ways by means of character, dialogue, and setting, among others.

More careful consideration, however, must be placed upon similarities in *plot*, especially where the adaptation into a subsequent adapted work includes more than mere appropriation of general strings of occurrences, but involves the taking of complete stories or sequences of specific events.

There is no doubt that general plots are not copyrightable, as evidenced by American practice, and impliedly affirmed by the Supreme Court in *Joaquin, Jr.* The plot or format of a work is beyond copyright protection. Nevertheless, while general plot lines may arguably be mere ideas still left unexpressed, the appropriation of a highly developed plotline may constitute the taking of the expression itself. Here, the plot has crossed from being a mere idea and has been transformed by the author into a definite and particular expression.

Thus, the general plot involving a boy and a girl, manipulated by their parents through a contrived feud, to fall in love is not copyrightable because it is merely a general string of events. In spite of this, when such a string of

events has been molded into a tight series of scenes, so that its progression and development form an integrated whole, then the plotline has ceased to be a general idea. It has become the expression of that very idea itself, and any subsequent use of such same plotline may constitute a violation of copyright. Clearly, therefore, the *particularity* of the plot becomes the determining factor for a claim of protection and a corollary claim of infringement.

Such is the case with Pagsanghan's *Sinta!*. Similar not only in subject matter and theme — unprotected elements in copyright law — the Filipino adaptation also uses the same plotline as that of the original. In fact, this is not denied and is in fact even acknowledged at the start of every production. It must be remembered that while *The Fantasticks* itself is an adaptation of an earlier play by Edmond Rostand, *Les Romanesques*, Schmidt and Jones wrote and produced a second act which was likewise appropriated by Pagsanghan in transplanting *Sinta!* to the Philippine stage. The artistry and originality of the subsequent author in adapting the work, therefore, is found not so much in the use of the plotline, but in the manner by which such plotline was treated to fit Filipino sensibilities and culture.

b. Literal Elements: Dialogue, Lyrics, or Libretto

Following an identification of the unprotected elements found in subject matter, theme, and plot, a movement towards protected expression can now be made, first, by an examination of the literal elements of both the adaptation and the original. By literal elements are here meant the *verbatim* duplication or paraphrased rendition of the literal elements of the work, which include the dialogue, lyrics, or libretto of the two works.

A preliminary comparison of these literal elements had already been made with the determination of the nature of the work involved — that of being a mere translation, or a translation *cum* adaptation. With adapted works also translated, the nature of these literal elements must also consider the various nuisances that adaptation into a different language may bring, the words that the adapter may choose to use in rendering the original work in his own native tongue, and the fact that some new meaning or idea may be expressed or lost in that translation.

What is important to remember, even in this analysis of literal elements, is that the expression employed by both the adapter and the original author remains the consideration. The idea underlying this expression must be discarded as irrelevant to the analysis, being unprotected by copyright. For example, in considering the similarity of dialogue between the underlying and subsequent work, the meaning or sense of the statement is secondary only to the manner in which the statement is made, i.e. what words are actually used in expressing the idea, as well as the arrangement and phrasing of such words.

Looking at *Sinta!* and *The Fantasticks*, it has already been noted that the Filipino adaptation uses the exact plotline of the American play. This in itself may already bear heavily upon a claim of substantial similarity. Furthermore, the central symbols of the play are the same: the moon, the sun, and the rain; a wall; vegetation and the turning of the seasons.

Notwithstanding these obvious similarities, the literal expression of the works also differs in important respects, mainly due to the change in the idiom used. First is the fact that *Sinta!* is written in perfect prose poetry. Second, the Filipino adaptation "Filipinizes" the American original, with references to "Lola Basyang,"[101] "Florante at Laura,"[102] and "*mga tula ni* Balagtas,"[103] to name only a few. Even plot elements and settings were adapted to locales and experiences familiar to most Filipinos. The snow was transplanted as rain. A cumquat was translated as a "*kamatis*," a plum was rendered as an "*atis*." Narding and Sinta speak of their "*lihim na kawayanan*," where Matt and Luisa have their "forest where the woodchucks woo"[104] half a world away.

The Filipino adaptation, therefore, not only adds to the original literary expression by appealing to the natural sonority of the Filipino language, but brings the plotline closer to the Filipino experience by appealing not only to common language but also common experience. Reading both selections side-by-side, it is clear that while one may indeed contain the ideas and concepts conveyed by the first, the subsequent work cannot be considered a mere translation of literal expression from English to Filipino. Much more is involved.

c. Non-Literal Elements: Setting, Scenes, Characterization, Music, and Stage Direction

A play is more than just the verbalization of words on a page; it is an orchestration of many elements that contribute to the total artistry of the production.[105] Thus, an examination of the literal similarities between an

101. PAGSANGHAN, *supra* note 6, at 94.

102. *Id.* at 99.

103. *Id.* at 104.

104. TOM JONES & HARVEY SCHMIDT, THE FANTASTICKS 54 (1964).

105. EARL W. KINTNER & JACK L. LAHR, AN INTELLECTUAL PROPERTY LAW PRIMER 399 (1975). According to the authors,

> The area that contains most of the decisions relating to the line between ideas and expression is the field of narrative and dramatic works. Of course, where merely the dialogue or the wording of a narrative or dramatic work is allegedly infringed, it will be held that

adaptation and an underlying work would be raw and incomplete, because in addition to this form of expression, the central ideas of such work may also be expressed in other, perhaps more evocative, non-literal ways.

Indeed, a subsequent work may adapt and translate the literal elements of a prior work, and yet present it in an entirely new and novel fashion, as was earlier noted in *Sinta!*. Here, the adapter, while translating the play into Filipino, had transplanted the play into the Filipino locale, using familiar names and places in order to better connect with its audience.[106]

From this, it is clear that setting, scene, characterization, music, and stage direction of both the adapted and the original work must also be considered and compared. Again, what is paramount in this analysis is not the idea behind these elements, but the expression of that idea through the said elements. Therefore, in determining the substantial similarity of a character in an adaptation with its original, one must consider whether the character portrayed is highly abstract, thus, hewing to the idea, or concrete, thus approximating expression. Stock characters common to both works cannot therefore be considered infringements, while highly individual and developed characters taken from the original may show a pattern of copying. The qualities of the character portrayed can therefore be useful in determining such similarity. For example, are the genders of the characters in both plays the same? Are they wearing the same costumes? Are their characterization, capabilities, and personalities the same? Are their motivations similar? Indeed, as was laid down by Justice Hand in *Nichols*, "the less developed the characters, the less they can be copyrighted; that is the penalty an author must bear for marking them too indistinctly."[107]

Important also in considering these non-literal elements are the already established doctrines of merger and *scènes-à-faire*. Thus, a typical *scène-à faire*

> the copyrighted expression has been appropriated when the second author's paraphrasing comes too close to the original. But clearly, there is more to the expression of a narrative work than its arrangement and choice of words, as there is more to a play than mere dialogue. To be meaningful, copyright protection of such works must extend to the very heart of the author's expression. With respect to narrative and dramatic works, one often quoted commentator has said that copyright protection should cover the pattern of a work as embodied in its 'sequence of events, and the development and interplay of [its] characters.
>
> *Id*.

106. The same device was used by Pagsanghan in his earlier transplantation of Wilder's "Our Town" into *Doon Po sa Amin*, where he turned Grover's Corners into Barrio San Roque, the editor into a high school principal, the soda fountain into a *halo-halo* corner, among others.

107. Nichols v. Universal Pictures Corporation, 45 F.2d 119, 122 (2d Cir. 1930).

in a set design might be the living room set. All such sets will contain combinations of sofas, chairs, lamps, artworks, and coffee tables. Certain arrangements of such furniture are so common that they are unlikely in themselves to be protected. Specific choices of colors, patterns, and styles, taken together, however, might be sufficiently detailed that their appropriation would be an infringement.

Dissecting the non-literal elements found in *Sinta!* and *The Fantasticks*, similarities in setting, scene, stage direction, and characterization are apparent. For one, both *Sinta!* and *The Fantasticks* employ the minimalist approach in play production. Both plays hardly use any stage props.

Furthermore, because the adaptation takes its plotline from the original, it is unavoidable that the motivations and qualities of the characters would be similar. Narding, for example, like Matt, is full of youthful confidence and exuberance, believing naively that he can conquer the world. Sinta, like the American Luisa, is also dreamy and love-struck, swept off her feet by the dashing Matang Lawin after having been disillusioned by her first love, Narding. Both, however, return to each other, wizened by the experience of hurt and "the world."

Notwithstanding these similarities, however, subtle differences can be perceived. Indeed, as the characters were imbued with Filipino names, they were also imbued with Filipino sensibilities. Again, this flows from the change of idiom, coupled with a desire to paint the protagonists in a more provincial and, therefore, more Philippine manner. The most palpable difference is in the manner by which the character of Sinta is written. She is, in Pagsanghan's words, more "demure than brassy Luisa."[108]

Indeed, if there is anything uniquely different in *Sinta!*, it is its music. While the lyrics may have been based upon those of the original, most may stand as originals on their own were it not for the fact that they are part of a larger work. The melody and musical accompaniment are also new.

Original in its composition, the instrumentation and arrangement are thoroughly and unmistakably Filipino. It is a blend of "Filipino folksong and Filipino kundiman, with just a peppering of the Filipino *vod-a-vil* that was."[109] Here, Pagsanghan chose to use the gentler and more provincial sound of the guitar and the flute, as opposed to the loud and often complicated harmonies of the piano found in *The Fantasticks*. The songs, most of all, are simple in their composition. Pagsanghan describes them in this wise:

108. PAGSANGHAN, *supra* note 6, at 91.

109. *Id.* at 92.

> There are twelve songs. Very simple songs. No subtleties; no sophistication. Provincial almost in their artlessness and candor. Hardly any flats; hardly any sharps, because the composer cannot handle them. Key of C almost straight through — the only key the composer is comfortable in. And sentiment, lots of it, saved only by a certain naïve sincerity, from becoming downright sentimental.[110]

3. The Total Concept and Feel of the Play

In judging the degree of similarity an adapted work displays in relation to an underlying work upon which it is based, it is often important to note not only the various individual elements of an adaptation, but also the work as an integrated whole. After all, the degree to which a subsequent playwright has transformed an original work can only be fully appreciated when taken as a complete work. All the elements of the adaptation are therefore pooled together and judged in its totality, alongside the original underlying work. This *Total Concept and Feel* approach would necessarily depart from the objective criteria afforded by the *Elemental Analysis Test* suggested above, and consider unquantifiable factors such as total treatment and audience response, offering an additional parameter in judging the presence or absence of substantial similarity in a subsequent adapted work.

No doubt, the standard to be employed in appreciating the totality of the play would appropriately be that of the "ordinary reasonable person." A stricter standard would run counter to the liberal attitude extended by the I.P. Code to derivative works. Thus, following *Abiva*, the trier of fact would be correct to ask whether the subsequent work "comes so near the original as to give every person seeing it the idea created by the original."[111]

The test finds most useful application in adaptations that have *added*, rather than merely modified, elements from a prior work. The addition of music, songs, and scenes, for example, may bear upon the total concept and feel of a work to contribute to its separate copyright.

Concretely, therefore, in applying the *Total Concept and Feel* approach to *Sinta!*, one must ask: would an ordinary observer comparing the works readily see that one has been copied from another?[112] The answer would obviously be in the negative — the subsequent work, in fact, has added new elements to the original underlying work. The composition of new melodies and instrumentation in Pagsanghan's *Sinta!*, coupled with the fine nuances employed in translating the play into the Filipino language and the Filipinization of its setting and characterization, have transformed the

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110. *Id.* at 93.

111. Abiva v. Weinbrenner, 6 C.A.R. 1023, 1027 (Court of Appeals 1964) (citing 18 C.J.S. *Copy* p. 130 (1939)).

112. *Id.* at 1028.

adapted work to such a degree that a person watching the play would no doubt come to the conclusion that the Filipino play is not a mere copy.

The analysis, however, does not end here. Because of the identity of theme, plot, and treatment, the same person viewing both works would nonetheless arrive at the same ideas insipient in the two works.[113] Taking them side-by-side, therefore, and discounting the clear difference in language, idiom, and literal expression, an ordinary lay observer would come to the conclusion that, taken on its totality, Pagsanghan's *Sinta!* is still substantially similar to the original.

This conclusion is supported by the previous *Elemental Analysis Test* where both literal and non-literal elements in *Sinta!* were found to be substantially similar with *The Fantasticks*. Indeed, while there may be notable divergences between the two works, the close identity of plot and treatment belies any claim of independent copyright protection as an original work.

Indeed, in translations and adaptations, rarely does one find a subsequent creation that surpasses the original in expression and craftsmanship. Such is the case with Pagsanghan's *Sinta!*. With its creative use of the Filipino language and its ability to connect with the innocence of the Filipino soul, it has, no doubt, become a favorite in Philippine theater. Unfortunately, however, the requirements of the law are less forgiving. While there may not be literal similarity between *Sinta!* and *The Fantasticks*, the inevitable conclusion following an application of both the *Elemental Analysis Test* and the *Total Concept and Feel* approach is that the subsequent work displays substantial similarity to the original, and therefore risks an action for infringement under prevailing copyright standards.

III. FAIR USE AND TRANSFORMATIVE ADAPTATION

Following an outline of the nature of derivative works and the dichotomy between idea and expression, the previous section presented various strategies that may be employed, both by the courts and by adapters and translators themselves, in determining the existence of substantial similarity between an original and its derivative adaptation or translation. Such determination will be crucial in judging whether a subsequent work is an independent work under copyright law, thus dispensing with the need for prior permission or consent.

Certainly, these parameters may prove useful to adapters and translators of works which are yet to be made, as they may use these guidelines to tailor

113. *Id.* at 1027 (citing 18 C.J.S. *Copy* p. 130 (1939)).

their creations in such a manner as to take from original works only those elements which the law allows them to use.

The same cannot be said, however, for works which have *already* been adapted and translated, as with Pagsanghan's *Sinta!*. Here, there is almost little doubt — and often, such fact is even admitted by the subsequent playwright — that the work is an adaptation of the original. While an argument may be made as to the independence of the work through an absence of substantial similarity, this position is greatly diminished by that fact that it is a work still *based* upon the original work. For translations most especially — works which no doubt display substantial similarity to the underlying work — prosecution for infringement becomes a stark possibility, and the requirement of prior permission a legal necessity.

The *Doctrine of Fair Use*, however, may serve as an additional alternative to the necessity of permission and the possibility of an action for infringement in adaptations and translations, especially with respect to works already adapted or translated without the original author's knowledge or consent. As the determination of substantial similarity would, in the end, require judicial line-drawing, the possibility of infringement absent prior permission is a danger all adapters and translators face, whether with respect to works already made or those yet to be created. The *Doctrine of Fair Use*, alongside these parameters for substantial similarity, allows for a potent deterrent against and an effective defense in a litigation for copyright infringement.

A. Origin and Nature

The need to fashion specific exceptions to the use of copyrighted work arose from the realization, prevalent especially in the British and American jurisdictions, that the grant of copyright protection included a virtual monopoly over the use of information. The need to grant such monopoly was clear: creators of works must be rewarded for the fruits of their intellectual efforts. Nevertheless, while creative work is to be encouraged and rewarded, it was also clear that private motivation must ultimately serve the cause of promoting broad public availability of literature, music, and other arts. The imposition of periods after which works lapsed into the public domain was a step towards that direction, but it was not sufficient. What was necessary was *immediate* use of *timely* material. Thus, authorities were hard-pressed to create a balance within which the public could legitimately use copyrighted works, notwithstanding the grant of exclusive rights. It is from this tension that the *Doctrine of Fair Use* developed.

Fair Use in the United States grew out of the English common law doctrine of *fair abridgement*.[114] It was first applied in the United States in *Folsom v. Marsh*,[115] where the alleged infringer had copied 353 pages from the original author's 12-volume biography of George Washington to make a two-volume work. The court rejected the infringer's Fair Use defense with the following explication of the doctrine:

> a reviewer may fairly cite largely from the original work, if his design be really and truly to use the passages for the purposes of fair and reasonable criticism. On the other hand, it is as clear, that if he thus cites the most important parts of the work, with a view, not to criticize, but to supersede the use of the original work, and substitute the review for it, such a use will be deemed in law a piracy.[116]

From *Folsom*, the doctrine developed into a privilege granted to persons other than the original author to use copyrighted material in a reasonable manner *without prior consent*, notwithstanding the monopoly granted to the owner by copyright. "It is a rule of reason fashioned by judges to balance the author's right to compensation for his work on the one hand against the public's interest in the widest possible dissemination of ideas and information on the other."[117]

Being a privilege of use granted to third persons, it may therefore be pleaded as an *affirmative defense* to allegations of copyright infringement. This would imply that such use would amount to a technical infringement but is excused because of attendant and justified circumstances. In other words, the defense of Fair Use would be unnecessary if the use is not an infringement of copyright to begin with. If, on the other hand, the original author proves that such person had in fact committed an infringing act, the alleged infringing user has the burden of proving that his use, while technically an infringement, is justified under Fair Use. A defense of Fair Use would

114. BRAD SHERMAN & LIONEL BENTLEY, THE MAKING OF MODERN INTELLECTUAL PROPERTY LAW 302 (2000).

115. Folsom v. Marsh, 9 F.Cas 342 (Circ. Mass. 1841). The earliest use of the phrase "fair use" is recorded in *Lawrence v. Dana*. *See* Lawrence v. Dana, 15 Fed.Cas. 26, 60 (1869). Earlier though, the term was used as a phrase, and not as a legal concept. *See* Lewis v. Fullarton, 48 Eng. Rep. 1080 (1839).

116. *Id*. at 358.

117. 18 AM. JUR. 2D *Copyright and Literary Property* § 80 (1985) (citing Triangle Productions, Inc. v. Knight-Rider Newspapers, Inc., 626 F.2d 1171, 1174 (5th Circ. Fla, 1980)).

necessarily, therefore, *admit* the fact of infringement. Infringement is a necessary condition for the application of the *Doctrine of Fair Use*.[118]

While the privilege has been widely recognized in many jurisdictions,[119] the scope of such protection has been the subject of many judicial determinations. In the United States, cases following *Folsom* went on to formulate the basis for the factors that must be used in an analysis of a Fair Use defense. Indeed, such a doctrine continued to be a purely judge-made rule until it was finally codified as part of the 1976 Copyright Act.[120] The statute, which incorporated court standards, sought to restate such judicial doctrines, without adding or subtracting from its substance.[121]

B. Philippine Provisions on Fair Use

1. Fair Use under Section 185

In this jurisdiction, the *Doctrine of Fair Use* is found in Section 185 of the I.P. Code, which the Supreme Court has defined as a privilege to use a copyrighted material in a reasonable manner without the consent of the copyright owner or as copying the theme or ideas rather than their expression.[122] The provision is, in fact, an almost *verbatim* reproduction of the American provisions on Fair Use as codified under Section 107 of the 1976 Copyright Law.[123] Like its American counterpart, Section 185 of the I.P. Code provides that the Fair Use of a copyrighted work for criticism, comment, news reporting, teaching including multiple copies for classroom use, scholarship, research, and similar purposes is a valid defense against a

118. This is important to note especially when considering the question of substantial similarity, which is discussed in the previous section. If the questioned work is not found to be substantially similar, then there would be no finding of infringement. Consequently, the defense of Fair Use would be superfluous. Conversely, if substantial similarity is judged to be present, the use of the original work without prior consent from the original author would be justified as Fair Use. Here, there is a technical infringement, but is excused because of the use has been judged by the court to be fair.

119. *See* Ruth Okediji, *Toward an International Fair Use Doctrine*, 39 COLUM. J. TRANSNAT'L L. 75 (2000).

120. 17 U.S.C. § 107 (2007).

121. 18 AM. JUR. 2D *Copyright and Literary Property* § 80 (1985).

122. *See* 18 AM. JUR. 2D *Copyright and Literary Property* § 109 (1985) (citing Toksvig v. Bruce Pub. Co., 181 F.2d 664 (7th Cir. 1950); Bradbury v. Columbia Broadcasting System, Inc., 287 F.2d 478 (9th Cir. 1961); Shipman v. R.K.O. Radio Pictures, Inc., 100 F.2d 533 (2nd Cir. 1938)). *See also* Dennis Funa, *An Overview of the Fair Use Doctrine in Copyright Law*, 16 LAW. REV. 2 (2003).

123. The implication of this, of course, is that American judicial pronouncements interpreting Fair Use may be cited as persuasive authority in this jurisdiction.

claim of copyright infringement. Also, similar to its American counterpart, the same section enumerates various factors in determining whether or not the use of copyrighted work is fair:

> (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.

Clearly, while Section 185 lists four non-exclusive factors in determining Fair Use, it does not provide any guidance for the actual application of such factors, except for distinguishing commercial and non-profit educational use in factor one. Presumably, this is because Fair Use is a fact-intensive determination and all the factors are to be applied to each work alleged to have been infringed on a case-to-case basis. Thus, the United States Supreme Court has ruled that, contrary to lower court rulings, the fourth factor is no more important than the other three, and that all the factors are to be considered together.[124]

The important point is that the purpose of the factors is to protect the marketing monopoly of the copyright owner against unfair intrusion and both the type of work and the kind of use involved must be related to that purpose.[125] Further, the factors are not exclusive and the relevance of the additional factors will vary according to the type of work and the kind of use intended.[126]

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124. Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569 (1994). This ruling clarifies Circuit Court of Appeals cases which held that of the four factors, the last factor covering effect of use upon the potential market of the copyrighted work was generally determinative of Fair Use. *See* American Geophysical Union v. Texaco Inc., 60 F.3d 913 (2d Cir. 1994); National Rifle Association of America v. Handgun Control Federation of Ohio, 15 F.3d 559 (6th Cir. 1994); Los Angeles News Service v. Frank Tullo, 973 F.2d 791 (9th Cir. 1992).

125. VICENTE B. AMADOR, COPYRIGHT UNDER THE INTELLECTUAL PROPERTY CODE 483 (1998).

126. Board of Regents of the University System of Georgia, Regents Guide to Understanding Copyright and Educational Fair Use, *available at* http://www.usg.edu/legal/copyright/#part3d4 (last accessed Dec. 12, 2008).

With regard to the purpose and character of use of the original copyrighted work, this test indicates that a preference for Fair Use will be granted to works that are created for noncommercial or educational purposes rather than for commercial purposes.[127] Moreover, the degree of transformation accomplished by the new work may also be considered. Thus, a determination of whether the new work merely supplants the original copyrighted work or whether it adds something entirely new to the copyrighted work would be proper.[128]

The second Fair Use factor generally attempts to determine the degree of copyright protection that should be afforded the copyrighted work. The scope of Fair Use may be greater when an "informational" work, such as a work of facts or information, a work of scholarship or of news reporting, as opposed to a more "creative" work, such as a work of fiction, is involved, or when a work is designed to inform or educate rather than to entertain.[129]

The third Fair Use factor, meanwhile, looks at the amount and substantiality of the copying in relation to the copyrighted work as a whole. The critical determination is whether the quality and value of the materials copied are reasonable in relation to the purpose of the copying, so that no more of the original material was taken than was necessary to achieve the copier's purpose.[130]

Finally, the fourth Fair Use factor which looks into the effect of the use upon the potential market or value of the copyrighted work, considers the extent of harm to the market or potential market for the copyrighted work caused by the new work. If the new work becomes a *substitute* for, or makes the purchase unnecessary of, the appropriated copyrighted work itself, this use may not be sanctioned as Fair Use. Thus, if there is commercial gain from the new work, unless the use is transformative and not superseding, there will be a heavy burden to prove that the underlying work was not financially damaged.[131]

2. Statutory Limitations to Copyright under Section 184

In addition to the provision on Fair Use, the I.P. Code has also provided for 11 additional statutory limitations on the right of the copyright holder over and above those traditionally granted under American Fair Use Standards,[132]

127. *See* 17 U.S.C. § 107.

128. *See Campbell*, 510 U.S. at 574.

129. AMADOR, *supra* note 125, at 457 (citing Princeton University Press v. Michigan Document Services, Inc., 99 F.3d 1381 (6th Cir. 1996)).

130. *Id.* at 459.

131. *See* Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 593 (1994). *See also* Suntrust Bank v. Houghton Mifflin Co., 268 F.3d 1257 (11th Cir. 2001).

132. AMADOR, *supra* note 125, at 383.

where consent from the original author would also not be required. These situations are found under Section 184 of the I.P. Code as *Limitations on Copyright*. Some exceptions under this section were copied from the P.D. No. 49, but many were new formulations of the Code. Section 184 reads:

> Sec. 184. Limitations on Copyright.
>
> 184.1. Notwithstanding the provisions of Chapter V, the following acts shall not constitute infringement of copyright:
>
> (a) The recitation or performance of a work, once it has been lawfully made accessible to the public, if done privately and free of charge or if made strictly for charitable or religious institution or society;
>
> (b) The making of quotations from a published work if they are compatible with fair use and only to the extent justified for the purpose, including quotations from newspaper articles and periodicals in the form of press summaries: *Provided*, That the source and the name of the author, if appearing on the work, are mentioned;
>
> (c) The reproduction or the communication to the public by mass media of articles on current political, social, economic, scientific or religious topic, lectures, addresses and other works of the same nature, which are delivered in public if such use is for information purposes and has not been expressly reserved: *Provided*, That the source is clearly indicated;
>
> (d) The reproduction and communication to the public of literary, scientific or artistic works as part of reports of current events by means of photography, cinematography or broadcasting to the extent necessary for the purpose;
>
> (e) The inclusion of a work in a publication, broadcast or other communication to the public, sound recording or film, if such inclusion is made by way of illustration for teaching purposes and is compatible with fair use; *Provided*, That the source and the name of the author, if appearing on the work, are mentioned;
>
> (f) The recording made in schools, universities, or educational institutions of a work included in a broadcast intended for such schools, universities or educational institutions: *Provided*, That such recording must be deleted within a reasonable period after they were first broadcast; and Provided, further, that such recording may not be made from audiovisual works which are part of the general cinema repertoire of feature films except for brief excerpts of the works;
>
> (g) The making of ephemeral recordings by a broadcasting organization by means of its own facilities and for use in its own broadcast;

> (h) The use made of a work by or under the direction or control of the Government, by the National Library or by educational, scientific or professional institutions where such use is in the public interest and is compatible with fair use;
>
> (i) The public performance or the communication to the public of a work, in a place where no admission fee is charged in respect of such public performance or communication, by a club or institution for charitable or educational purpose only, whose aim is not profit making, subject to such other limitations as may be provided in the regulations;
>
> (j) Public display of the original or a copy of the work not made by means of a film, slide, television image or otherwise on screen or by means of any other device or process: *Provided*, That either the work has been published, or, that the original or the copy displayed has been sold, given away or otherwise transferred to another person by the author or his successor in title; and,
>
> (k) Any use made of a work for the purpose of any judicial proceedings or for the giving of professional advice by a legal practitioner.

The purpose of these limitations on copyright is immediately gleaned from a perusal of its intended applications, which involve the promotion of public information, education, research, and charity. The virtual monopoly granted to copyright holders is therefore tempered by Constitutional fiat in order to promote public good and welfare. Indeed, as has been repeatedly mentioned, exclusive rights of creators over their works are not absolute.[133]

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133. A matter of practical importance which bears upon this limitation upon copyright is the over-inflated copyright notices contained in many written works, particularly academic and scholarly publications. These notices are phrased so as to read as though the copyright holder's right to copy is absolute, saying, for example, that no one may copy any portion of the book in any manner without the written permission of the publisher. Literal compliance with such inflated notices would do away with the right of Fair Use, a clear signal that such notices are incorrect. This conclusion is supported by numerous holdings of the United States Supreme Court that there is a constitutional right to copy public domain material from a copyrighted work, which could not be exercised if the copyright holder's right to copy were absolute. As recently as 1994, the court said: "We have often recognized the monopoly privileges that Congress has authorized … are limited in nature and must ultimately serve the public good." Feist Publications, Inc. v. Rural Telephone Service Co., 499 U.S. 340, 349 (1991). Copyright notices that assert rights of the copyright holder beyond those granted by the copyright statute are therefore extra-legal and inefficacious. The statute provides that a copyright notice shall consist of the word "Copyright" or the letter "C" in a circle, the name of the copyright owner, and the date. One may disregard extraneous matter in copyright notices and rely on Section 185 of the I.P. Code for determining what may be copied

Moral rights and pecuniary interests of original authors are nonetheless protected by the requirement — replete in many situations covered by the provision — of either acknowledgment of the original creator in every use of the work, or limitation of the exploitation of the work to uses consistent with Fair Use.

By providing for these well-defined protections extended to copyright holders, the provisions reflect an adherence to the *Three-Step-Test*[134] found in both the Berne Convention for the Protection of Literary and Artistic Works[135] and the Agreement on Trade Related Aspects of Intellectual Property Rights, Including Trade in Counterfeit Goods, or the TRIPS Convention,[136] concerning the power of national governments to limit copyright protection that creators may be entitled to within their jurisdiction. The test provides that "[m]embers shall confine limitations and 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 rights holder."[137] The I.P. Code adapted this language in the application of Section 184, so that in interpreting these limitations to copyright, the provisions of the law must be construed in such a way "as to allow the work to be used in a manner which does not conflict

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as a matter of fair use. *See* Board of Regents of the University System of Georgia, *supra* note 126.

134. The author discusses the consequences of the *Three-Step Test* and its application to limitations on the exclusive rights of authors over performance in Chapter Seven of the original thesis entitled, *The Right of Performance: Transformative Adaptations and Fair Use*.

135. Berne Convention for the Protection of Literary and Artistic Works, Sep. 9, 1886, 1 B.D.I.E.L. 715. Article 9 (2) of the Berne Convention reads: "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." *Id*. art. 9 (2). Thus, under the Berne Convention, the *Three-Step-Test* was limited to reproduction rights only. Succeeding copyright treaties, however, which adapted the Berne Convention expanded the scope of the test to cover all limitations which national authorities may impose on economic rights of copyright holders.

136. Agreement on Trade Related Aspects of Intellectual Property Rights, Including Trade in Counterfeit Goods, art. 13, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization-Results of the Uruguay Round, 33 I.L.M. 1125 (1994) [hereinafter TRIPS Convention].

137. *Id*.

with the normal exploitation of the work and does not unreasonably prejudice the right holder's legitimate interests."[138]

In any event, what is clear is that Section 184 grants to the public affirmative rights over the use of works within such well-defined and limited purposes. By declaring that the uses enumerated under the section *do not constitute infringement*, the I.P. Code has expressly provided for specific *statutory Fair Uses*[139] that are separate and distinct from Fair Use under Section 185.

Unlike the provision on Fair Use found in Section 185, therefore, it may be argued that the *Limitations to Copyright* under Section 184 are not properly *defenses* upon a claim of copyright infringement; they are affirmative rights. This means that, once the specified elements of use set down by the section have been satisfied by the subsequent user, the burden of proof lies with the original copyright owner to show that the use of his work on the part of the subsequent user was *unfair*. This is in stark contrast to the provision on Fair Use found in Section 185 where, being an affirmative defense, the burden of proving the fairness of the use of the original work falls upon the subsequent user.

As a consequence, and in light of this affirmative declaration, the specific acts covered by these provisions on *Limitation to Copyright* no longer need to be subjected to analysis under the Fair Use factors under Section 185, which may be used in all other situations not covered by Section 184.[140] This is because no judicial determination requiring the use of specific Fair Use standards is necessary to declare such uses fair. It is the law itself that declares the use as justified.

Unfortunately, Section 184 does not provide for a statutory limitation on the right of the original copyright holder with respect to the adaptation or translation of his work. An adapter or translator can therefore find no relief under this section upon a charge of infringement, nor, on the strength of these enumerated acts, can he deny the need for consent; these acts being exceptions to the general rule, they must be strictly construed.[141] This does not mean, however, that adapters and translators of works bearing substantial similarity to the original must, in all cases, obtain authorization from such original author or are without defense to a charge of infringement. While Section 184 affords neither relief nor positive rights to such adapters or

138. INTELLECTUAL PROPERTY CODE OF THE PHILIPPINES, § 184.2.

139. AMADOR, *supra* note 125, at 383.

140. *Id.*

141. While Section 184 may not provide for rights with respect to adaptation or translation of original works, its provisions find full application to the question of performance of original works, as illustrated in Chapter Seven of the author's original thesis.

translators for the translation or adaptation of original works, Section 185 on Fair Use may provide a potent alternative.

C. Fair Use and Transformative Adaptation

The relationship between transformative works and Fair Use has been thoroughly explored in American jurisprudence. The United States Supreme Court, in its latest ruling on Fair Use,[142] has recognized the value of transformative works in the scheme of copyright law, and that, therefore, is particularly worthy of the mantel of Fair Use protection.

Although such transformative use is not absolutely necessary for a finding of fair use, the goal of copyright, to promote science and the arts, is generally furthered by the creation of transformative works. Such works thus lie at the heart of the fair use doctrine's guarantee of breathing space within the confines of copyright, and the more transformative the new work, the less will be the significance of other factors, like commercialism, that may weigh against a finding of fair use.[143]

The standard used by American courts in determining whether a work is transformative has been whether or not "the new work merely supersedes the objects of the original creation, or instead adds something new, with a further purpose or different character, altering the first with new expression, meaning, or message."[144] While such a standard may apply to a myriad of situations involving derivative works, recent American decisions have had opportunity to deal with the transformative nature of subsequent works only in cases involving Fair Use as parody.[145]

This is probably due to the very nature of the form of expression itself, as parody, being a method of criticism, must inevitably make use of another creative work in order to achieve a humorous or satirical effect.[146] This

142. Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569 (1994).

143. *Id.* at 579 (citing Pierre N. Leval, *Toward a Fair Use Standard,* 103 HARV. L. REV. 1105, 1111 (1990)).

144. *Id.*

145. *See* Suntrust Bank v. Houghton Mifflin Co., 268 F.3d 1257, 1264 (11th Cir. 2001); Lyons Partnership v. Giannoulas, 179 F.3d 384 (5th Cir. 1999); Liebovitz v. Paramount Pictures Corp., 137 F.2d 109 (2d Cir. 1998).

146. 2 WEBSTER, *supra* note 34, at 1643. The United States Supreme Court has defined parody, for purposes of copyright law, as:

> the use of some elements of a prior author's composition to create a new one that, at least in part, comments on the author's works … Parody needs to mimic an original to make its point, and so has some

creates an inherent conflict between the creator of the work that is being parodied and the creator of the parody, as certainly, no self-respecting person would like to be criticized, made fun of, or ridiculed. It is therefore unlikely that a copyright owner will grant permission or a license to a parodist to use copyright protected work in such a manner. Parody was therefore justified as a Fair Use of the underlying material, having been located as "criticism" expressly declared by the provisions the 1976 Copyright Act as Fair Use.[147]

Such a pattern of practice would imply that in order for a work to be properly transformative, it must be able to tack itself onto a use expressly declared by the law as fair, whether it be "criticism, comment, news reporting, teaching[,] … scholarship, [or] research,"[148] following the principle of *ejusdem generis*. The scope of protection of such transformative works would therefore depend upon the purpose for which it was created, as related to and limited by the express instances specifically laid down by law.

Understood in this way, the motive behind Pagsanghan's adaptation of *The Fantasticks*, therefore, while transformative within the standard used, would hardly be considered an attempt to parody or criticize the original work. Should these works, then, be denied a finding of Fair Use in this jurisdiction?

The answer appears to be in the negative. This strict interpretation of the *Doctrine of Fair Use* cannot be justified, considering the purpose and intent of the doctrine as an "equitable rule of reason" meaning to promote the free exchange of ideas and encourage the spread of communication.[149] Indeed, each claim of Fair Use must be considered on a case-to-case basis,[150] and, therefore, the specific enumeration of activities under Section 185 (as with Section 107 of the United States Copyright Law of 1976) would not be controlling. It is merely a guide that may be used to point to the "nature and

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> claim to use the creation of its victim's (or collective victims') imagination, whereas satire can stand on its own two feet and so requires justification for the very act of borrowing.

Campbell, 510 U.S. at 580-81.

147. Notably, however, before parody may be allowed a Fair Use defense, the court must be satisfied that the work is in fact a *proper* parody of the original and has also satisfied the tests for Fair Use provided by the statute. *See Suntrust Bank*, 268 F.3d at 1267.

148. INTELLECTUAL PROPERTY CODE OF THE PHILIPPINES, § 185; 17 U.S.C. § 107.

149. *See* Neil W. Netanel, *Locating Copyright Within the First Amendment Skein*, 54 STAN. L. REV. 1 (2001); Robert C. Denicola, *Copyright and Free Speech: Constitutional Limitations on the Protection of Expression*, 67 CAL. L. REV. 283 (1979).

150. Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 577 (1994).

purpose of the selections made,"[151] but cannot be determinative of the actual subjects of such use. This is supported by the declaration of the Eleventh Circuit Court of Appeals which said that "[i]n assessing whether a use of a copyright is a fair use under the statute, we bear in mind that the examples of possible fair uses given are illustrative rather than exclusive."[152]

It is the actual or potential *use* of the material as filtered through the four factors provided by the law that determine the existence of Fair Use, not the activities expressly enumerated in the law. The determination of Fair Use upon transformative adaptations and translations of literary and dramatic works, particularly Pagsanghan's *Sinta!*, must necessarily apply the factors laid down by Section 185, notwithstanding the fact that it may not directly tack itself onto a use enumerated by the statute itself.

1. The Purpose and Character of the Use

The 1960s saw the first stirrings of a truly Filipino identity following centuries of foreign rule. It was at that time when authors, realizing the need to fashion a more Filipino literary and theater culture, decided that Filipino was absolutely as capable as English in containing the whole range of ideas and emotions found in western drama.[153] It was then that Pagsanghan began adapting and translating English works into Filipino: the first furtive steps towards a truly Filipino literary identity. Whatever personal motives may have impelled him in producing such works, it can be safely claimed that the overt purpose for such adaptation and translation was clearly nationalistic, if not, purely pedagogical. It was an expression of a felt need of the time — to bring to these shores the best of what the world had to offer, but expressed in an idiom to which a greater number of Filipinos could relate and learn from. The motivation, therefore, was to educate, enlighten, and humanize.

Furthermore, it is important to note that *Sinta!*, from its very first performance, has never been produced as a commercial endeavor. In fact, Pagsanghan believes that the reason why the play has survived for so long is because it has managed to keep itself small.[154] Not one of the actors in the play has been paid for their performances, with high school students as leads, and high school and college students its primary audience. The adapter himself has also not profited from his labors. All proceeds of the play, in fact, have been applied to the expenses of running the Dulaang Sibol Theater or

151. Folsom v. Marsh 9 F.Cas 342, 348 (Circ. Mass. 1841).

152. Suntrust Bank v. Houghton Mifflin Co., 268 F.3d 1257, 1265 (11th Cir. 2001).

153. FERNANDEZ, *supra* note 3, at 22.

154. PAGSANGHAN, *supra* note 6, at 76.

donated to various charitable and educational foundations, such as the Sibol-Hesus Foundation, Inc. and the Laura Vicuña Foundation for street children.

It may be argued, however, that while the purpose and character of the use of *Sinta!* are not commercial, the play itself as adapted or translated is, nonetheless, a *commercial product*. In other words, while the purpose of use is not commercial, the work itself may still be used for commercial purposes. The United States Supreme Court recognized this when it ruled that "[t]he crux of the profit/nonprofit distinction is not whether the sole motive of the use is monetary gain but whether the user stands to profit from exploitation of the copyrighted material without paying the customary price."[155]

The recent trend in American jurisprudence, however, is to apply a different rule with respect to works which are properly transformative in character. The court said that while a preference for Fair Use will be granted to works that are created for noncommercial or educational purposes rather than for commercial purposes, "[t]he more transformative the new work, the less will be the significance of commercialism, that may weigh against a finding of fair use."[156] In these cases, commercial gain is not necessarily controlling.[157]

Indeed, this is again reflective of the liberal attitude displayed towards derivative transformative works. As the nature of *Sinta!* as transformative cannot be doubted — it is indeed a work that "adds something new, with a further purpose or different character, altering the first with new expression, meaning, or message" — any incidental commercial benefit that may be gained from such transformative adaptation cannot militate against a claim of Fair Use under this first standard.

2. The Nature of the Copyrighted Work

The second factor, the nature of the copyrighted work, recognizes that there is a hierarchy of copyright protection in which original, creative works are afforded greater protection than derivative works or factual compilations. Thus, original works would be afforded the greatest degree of protection under copyright law.

Then again, it must also be noted that these original works upon which subsequent adaptations and translations were based have also all been made

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

156. Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 579 (1994).

157. In fact, the United States Supreme Court declared that the fact that a work is sold — and hence is "commercial" — does not make it presumptively unfair under the first factor, as "'[n]o man but a blockhead ever wrote, except for money.'" *Campbell*, 510 U.S. at 584 (citing 3 BOSWELL'S LIFE OF JOHNSON 19 (G. Hill ed., 1934)).

available to the public and have, in fact, become classics in their own right. This is the case with *The Fantasticks* which itself was adapted from a prior existing work.[158]

No doubt, it was precisely the popularity and universal appeal of this original work that prompted Pagsanghan to adapt or translate it. The choice of work was not an arbitrary act or accidental choice. *The Fantasticks* was not *merely* a play written in English. It was a play which, in Pagsanghan's judgment, captured a universal reality which he believed could speak to the Filipino, at that time, in that clime. Obviously, therefore, it is precisely because of its nature as publicly known expression that *Sinta!*, the transformative adaptation, was made. As in parody, the nature of the copyrighted work is not crucial in determining Fair Use when dealing with transformative adaptations because these works have invariably taken already "publicly known, expressive works,"[159] not to mention universal themes and ideas, as expressed in these well-known intellectual creations.

3. The Amount and Substantiality of the Portion Used in Relation to the Copyrighted Work as a Whole

As a transformative adaptation, *Sinta!* must necessarily spring from an original underlying work but, at the same time, add something different and unique, altering the first with new expression, meaning, or message. To attain the purpose envisioned by the adaptive playwright, however, the adaptation must necessarily retain so much of the original in order for the audience to recognize the original work's essential character; if not, *Pahimagas ng Isang Ahente* would not be *Death of a Salesman*, it would be something else. The same is true for *Sinta!*

As with many transformative adaptations of foreign works into Filipino, the very motive behind the adaptation of foreign plays is precisely that they are considered excellent works of theater and literature and, therefore, the local playwrights meant that their adaptations and translations clearly proceed from the universal appeal of the original. Thus, these transformative works must be able to distill at least enough of the original to make the translation or adaptation effective.

The taking of original elements, however, cannot be done indiscriminately. Cases involving transformative works in the United States

158. The play was adapted from Rostand's *Les Romanesques*, but it added a second act. PAGSANGHAN, *supra* note 6, at 80 (citing THE GENIUS OF THE FRENCH THEATER 375 (Albert Bermel ed., 1961)).

159. *Campbell*, 510 U.S. at 586.

have said that while an identification with the original is characteristic of such work, the elements taken from the original must be "no more than necessary"[160] to achieve its purpose. What amount is sufficient and what is overbroad would, in the end, require judicial determination.

What is clear, however, is that the more transformative the work, the less of the original work can be perceived. Thus, a finding of substantial taking of what is "more than necessary" would be minimized. Necessarily, adaptations such as *Sinta!* which, more than mere translation, have contributed additional elements to the work, would be accorded more positive preference for Fair Use under this factor than straight translations such as, for example, *Pahimagas ng Isang Ahente*. The point, of course, is that Pagsanghan took "no more than was necessary" to produce his transformative adaptation and achieve his purpose.

4. The Effect of the Use upon the Potential Market for or Value of the Copyrighted Work

Because of the nature of transformative adaptations and translations, it is more likely that the derivative work will not affect the market for the original work. This is because the subsequent adaptation or translation, being a distinct creation separable from the original, would not result in the *substitution* of the original work, as the market for the original and the transformative work are seldom co-extensive. If any, the adaptation or translation would, in fact, encourage its audience to later on view the play in the original.

Any claim of economic dislocation, in this case, is further undermined by the fact that many of these adapted and translated plays were derived from works written and staged in the United States. The adaptation, translation, and subsequent performance of such works in this country cannot in any direct way interfere with the economic opportunities of original works staged half way across the globe, with audiences which are undeniably distinct and separate. *Sinta!*, for example, which was adapted almost 40 years ago, could not be said to affect the economic viability of *The Fantasticks*, the play upon which it is based, as the latter had thrived even with the existence of the adaptation and had in fact dropped its final curtain only in 2002, making it the longest running play in American theater history.

D. Recapitulation

The position of transformative adaptation and translation is unique because it straddles various concepts which lie at the heart of copyright law. The nature of derivative works, the dichotomy between idea and expression, and the *Doctrine of Fair Use* all bear upon the question, not only of the status of works

160. Suntrust Bank v. Houghton Mifflin Co., 268 F.3d 1257, 1262 (11th Cir. 2001).

already adapted or translated, but also of the rights of adapters and original authors in general.

This inquiry has thus far discussed the nature of derivative works as displaying both meaningful variation and substantial similarity. Because meaningful variation has been shown to be a minimum concept, the determinative factor in judging the existence of a derivative work (as opposed to a mere copy, on the one hand, and an independent work, on the other) would often be a finding of substantial similarity. The existence of a derivative work therefore hinges upon a balance of opposites: an absence of distinguishable variation because of actual identity between works would result in a mere copy, which is not copyrightable as a derivative work; an absence of substantial similarity because of elemental divergences in expression, meanwhile, would result in two independent works separately protected by copyright. In this latter case, a finding of infringement cannot be made and a requirement of authorization, unnecessary.

The task of determining substantial similarity, however, is not easy. With respect to transformative adaptations and translations, various elements of the original work have either been modified or augmented with new elements, that a straightforward finding would often result in an inaccurate conclusion, one which would tend to overly protect either unprotected ideas or overly prejudice protected expression. Thus, various strategies distilled from the *Abstraction-Filtration-Comparison Test* and the *Total Concept and Feel Test* were presented to provide for possible objective methods to determine substantial similarity. In applying these tests, a basic distinction between idea and expression became necessary, as it was the filter upon which these tests operate. To determine substantial similarity, therefore, ideas and expressions between two works must be identified, separated, and compared.

Because substantial similarity is often a question of degree, however, a definitive finding would still be elusive outside of judicial determination. Even here, the courts have been known to be indecisive. Thus, even assuming that such substantial similarity exists between an original work and a transformative adaptation (which, candidly speaking, would often be the case), a transformative adaptation or translation may be saved from the requirement of prior consent from the original author, and, corollarily, a judgment of infringement, by the *Doctrine of Fair Use*. The point here is that if a new work merely recasts an original copyrighted material in a different medium, then it is strictly a derivative work and, absent prior consent from the original author, would be considered an infringement. But if the later work builds upon the earlier version and adds new content so as to transform the original in an appreciable way, then it may be considered Fair Use, and

thereby saved from the requirement of consent, and a finding of infringement.

This same *Doctrine of Fair Use*, coupled with the liberal treatment extended by both the I.P. Code and the American courts, figure prominently in the following chapter which discusses the logical consequence of, and primary motive behind, every adaptation or translation of a literary or dramatico-musical work — its performance.

IV. THE RIGHT OF PERFORMANCE: TRANSFORMATIVE ADAPTATIONS AND FAIR USE

The adaptation or translation of literary or dramatico-musical works is often just half of the endeavor. Translation and adaptation are useless if such theater pieces cannot later on be performed on the stage. Otherwise, these works would be nothing more than "cabinet plays," languishing on the shelves of zealous playwrights fearing copyright prosecution.

Of course, there would be no legal hindrance to performance if the adaptation or translation to be performed is or has been found to be an independent work. The right to perform, after all, would be included in the absolute copyright granted over such independent work.

The problem arises, however, in situations where the translation or adaptation is found to be substantially similar to the original underlying work, thus requiring the consent of the original author, not only for its adaptation or translation, but also for its subsequent performance. Without such consent, the adaptation or translation would infringe upon the original author's right to create a derivative work; any performance of such work would not only be a performance of an infringed work, but also a violation of the original author's right of performance itself.

Thus, in situations where the subsequent work displays substantial similarity with the original as a proper derivative work, may such work nonetheless be performed as an exception to the exclusive right of performance of the original author? In other words, using the twin elements of infringement presented in *Arnstein,* assuming that the subsequent author had in fact *copied* the underlying work, would the performance of such work constitute improper *appropriation*?

A. The Right of Performance

The right of public performance is expressly reserved as another exclusive right of the author under the I.P. Code, together with the right of adaptation and translation.[161] While Section 177.6 of the Code does not appear to limit such right to specific classes of intellectual creation, it is quite

161. INTELLECTUAL PROPERTY CODE OF THE PHILIPPINES, § 177.6.

obvious that certain types of works, by their very nature, cannot be given over to any form of performance and, therefore, by obvious implication, cannot be covered by the right of public performance. For example, an artist can never *perform* a painting; however, he is free to display the work as an exclusive right.

American copyright law has recognized this inherent limitation by extending performance rights to "literary, musical, dramatic, and choreographic works, pantomimes, and motion pictures, and other audiovisual works" only.[162] In terms of the enumeration of original works in Section 172 of the I.P. Code, therefore, works of drawing, painting, sculpture, engraving, and lithography;[163] original ornamental designs or models for articles of manufacture;[164] illustrations, maps, plans, sketches, charts, and three dimensional works relative to geography, topography, architecture or science;[165] drawings of plastic works of a scientific or technical character;[166] photographic works including works produced by a process similar to photography;[167] and pictorial illustrations and advertisements[168] are *not* covered by the right of public performance under the I.P. Code. Unlike American copyright law which does not extend public performance rights to sound recordings,[169] however, the I.P. Code does not make such exclusions.[170]

1. Definition

Public performance under the I.P. Code is "the recitation, playing, dancing, acting, or otherwise performing the work, either directly or by means of any

162. 17 U.S.C. § 106 (4).

163. INTELLECTUAL PROPERTY CODE OF THE PHILIPPINES, § 172 (g).

164. *Id.* § 172 (h).

165. *Id.* § 172 (i).

166. *Id.* § 172 (j).

167. *Id.* § 172 (k).

168. *Id.* § 172(m).

169. 17 U.S.C. § 114 (a). It was only in the subsequent enactment in 1995 of the Digital Performance Right in Sound Recordings Act that the American Congress extended the performance right to sound recordings. Nevertheless, this right was limited to the digital, rather than the analog realm, and otherwise subject to minute regulation. NIMMER & NIMMER, *supra* note 24, § 8.01.

170. In fact, Chapters XII and XIII of the I.P. Code augment rather than limit the performance rights of producers of sound recordings.

device or process."[171] Such a definition would connote some manner by which the work, itself capable of being performed, is rendered or presented before an audience in a manner, if not dramatic, is at least mimetic. British copyright practice even makes the observation that such performance, to be properly protected, must be made live,[172] but such observation is of doubtful significance in instances where audiovisual recordings are involved. For purposes of dramatic and dramatico-musical performance, however, the observation may be accepted.

Another way to define the parameters of the performance right would be by distinguishing it with two other exclusive rights of *display* and *reproduction* which are seemingly similar in nature.

The right of public display, while involving some form of presentation to an audience, properly pertains to works not covered by the performance right, precisely because they are not susceptible of performance at all. Examples of these works include photographs, graphical representation, and sculptures, which, by their organic composition may only be displayed, not performed.

Meanwhile, the right of reproduction involves not the rendering, or even displaying of a work, but rather, the making of copies[173] in a form or medium that is fixed and permanent. It is only the reproduction of such material objects that is encompassed in the reproduction right.[174] By way of example, the Professors Nimmer says that the performance right is not infringed unless a performance is made that copies from an original author's work, but even with such copying, the performance *per se* does not result in the reproduction of the original work in material objects.[175] For the reproduction right to be infringed in this case, the performance must also be recorded onto fixed media.

2. The Necessity of Publicity

Only those performances which are made *publicly* are included in the performance right under the I.P. Code.[176] It would, of course, be

171. INTELLECTUAL PROPERTY CODE OF THE PHILIPPINES, § 171.6. The Code makes special definitions for the performances of an audiovisual work and of a sound recording.

172. WILLIAM CORNISH & DAVID LLEWELYN, INTELLECTUAL PROPERTY: PATENTS, COPYRIGHT, TRADE MARKS AND ALLIED RIGHTS 524 (5d ed. 2003).

173. INTELLECTUAL PROPERTY CODE OF THE PHILIPPINES, § 171.9.

174. NIMMER & NIMMER, *supra* note 24, § 8.02.

175. *Id.*

176. INTELLECTUAL PROPERTY CODE OF THE PHILIPPINES, § 177.6.

unthinkable, not to mention absurd, for an infringement to arise every time someone, for his own amusement, or that of his friends, were to read a book aloud or to sing a song.[177] The I.P. Code, however, is silent as to the degree of publicity required for a performance to be considered public. Here, problems of degree and interpretation again arise. American copyright law and jurisprudence on the matter are instructive.

Section 101 of the 1976 Copyright Law provides that a work is performed publicly if it is performed "at a place open to the public or at any place where a substantial number of persons outside of a normal circle of a family and its social acquaintances is gathered."[178] This definition clearly turns upon considerations of venue, on the one hand, and composition of audience on the other. Performances made to members of the family[179] and invited guests, for example, are considered private performances and, therefore, beyond the scope of the performance right. More so are performances made in places not even open to the public, with only members of the family and invited guests as audience.

Nevertheless, a more troublesome situation exists where the performance is not open to the public at large, but a substantial number of persons outside of a normal family circle and their social acquaintances have been gathered. This question was raised in the early case of *Metro-Goldwyn Mayer Distribution Corporation v. Wyatt*,[180] then still under the 1909 Copyright Law. Here, the Maryland Copyright Office held that a performance made in a club, not considered a public place, where only members and invited guests were present was *not* a public performance. Meanwhile, performances that also occurred in clubs that catered primarily to their own members, but did not place effective restrictions on attendance by the general public, were held to be public.[181]

177. *See* Twentieth Century Music Corp. v. Aiken, 422 U.S. 151 (1975). The United States Supreme Court ruled that: "No license is required by the Copyright Act, for example, to sing a copyrighted lyric in the shower." *Id.* at 155.

178. 17 U.S.C. § 101 (2007).

179. The Committee reports of the drafting of the 1976 Copyright Law provided that the term "family" would include an individual living alone, so that a gathering confined to the individual's social acquaintances would normally be regarded as private. NIMMER & NIMMER, *supra* note 24, § 8.02.

180. *Id.* (citing Metro-Goldwyn Mayer Distribution Corporation v. Wyatt, 21 Copyright Off. Bull. 203 (D. Md. 1932)).

181. *See* Lerner v. Club Wander, Inc., 174 F.Supp 731 (D. Mass. 1959); M. Witmark & Sons v. Tremond Social & Athletic Club, 188 F.Supp. 787 (D. Mass. 1960).

It seems that the deciding factor in these cases was the existence of certain limitations imposed upon the attendance of the viewing audience, so that only a particular group, as opposed to the general public, had access to the performance. This implied that a performance was never considered "public" as long as the audience was in some way limited; the size of such group or audience seemed immaterial. Actual viewing was not even necessary; the potential of attendance was sufficient.

Such an approach, however, has been abandoned with the enactment of the 1976 Copyright Law. According to the Professors Nimmer, "if a substantial number of persons outside of a normal circle of family and its social acquaintances is gathered," the performance is thereby rendered "publicly," even if the performance does not occur at "a place open to the public," even if some restrictions on who may attend are imposed.[182] Thus, while the question of publicity hinges upon the twin factors of venue and composition of audience, the latter takes precedence over the former.[183] Furthermore, the fact that only an insubstantial number of people actually attend a performance will not derogate from its character as a public performance, if under the restrictions imposed, a substantial number of persons outside of a normal family circle and their social acquaintances *could* have attended.[184]

It would be correct to say, therefore, that a performance made in a theater — a clearly public place — but which is *not* open to the public, with only family members and their acquaintances as audience, would remain to be considered *private*. In this situation, the publicity of the venue is of no moment as the composition of the audience remains the main consideration. After all, a public venue cannot be open to the public if its audience is already limited to family members and their acquaintances alone. On the other hand, a performance made in the same theater with only family

182. NIMMER & NIMMER, *supra* note 24, § 8.14 [C] [1].

183. *See* Columbia Pictures Industries, Inc. v. Redd Horne Inc., 568 F.Supp. 494 (W.D. Pa. 1983). In this case, the performance was allegedly made at "a place open to the public," but a substantial number of persons outside of family and acquaintances were not permitted to view the performance. The court here ruled that the performance was public because it was made at a place open to the public. Nevertheless, the circumstances of the case showed that while the facilities were in fact open to the public, the performances themselves were not available to the public at large. To this, the court adverted to the composition of the audience by stating that "the potential exists for a substantial portion of the public to attend such performances over a period of time." The courts, therefore, adverted to the composition of the audience, notwithstanding the publicity of the performance venue. *Id.* at 523. *See* NIMMER & NIMMER, *supra* note 24, § 8.14 [B].

184. Los Angeles News Service v. Conus Communications Co. Ltd., 969 F.Supp. 579, 584 (C.D. Cal. 1997).

members and their acquaintances *actually* attending would not thereby be rendered private, if the restrictions imposed do not foreclose the attendance of the general public. The venue remains to be a place *open* to the public.

B. The Performance Right and Fair Use under the Intellectual Property Code

Any performance by a third person of an original or derivative work created by an author, if made publicly in the manner described above without the said author's consent, would infringe upon his exclusive right of performance. Consent is crucial, unless the work to be performed has already lapsed into the public domain.

Nevertheless, just as the I.P. Code expressly provides for limitations on the exclusive rights of authors with respect to the adaptation and translation of original works, the Code also provides for limitations to the exclusive rights of performance over the same copyrighted works. The Fair Use provisions found in Sections 184 and 185 of the Code, in fact, apply with equal force to this question of performance. Due to the nature of the underlying work as an adaptation or translation, however, certain qualifications have to be made.

1. Performance and Fair Use under Section 185

The provisions on Fair Use in Section 185 which are applicable to adaptation and translation apply with equal force to the performance of *original* works in general. The flexible and situational nature which American courts have given in interpreting the doctrine would also conceivably allow the performance of original works by third parties (without adapting, translating, or transforming the work), provided such performance passes the four Fair Use standards required by law. Thus, a performance for educational purposes of Wilder's *Our Town,* an *original* work, may be justified as Fair Use, thereby dispensing with the requirement of consent from the original author. This is supported by the fact that I.P. Code itself, in certain circumstances described in Section 184, declares such performances of original works to be Fair Use.[185]

Nevertheless, with respect to the performance of adaptations and translations — works *based* upon other original works — the situation requires further analysis. Involved here would be two exclusive rights reserved by the I.P. Code to the original author — the right of adaptation and translation, and the right of performance. Because the performance of a work would necessarily depend upon the existence of *something* to perform,

185. INTELLECTUAL PROPERTY CODE OF THE PHILIPPINES, § 184.1 (a) & (i).

such performance would necessarily depend upon the underlying status of the adaptation or translation.[186]

In instances of substantial similarity, it has already been said that the subsequent adaptation or translation would require the prior consent of the original author, absent which, such *act* would constitute infringement upon the original author's exclusive rights. The subsequent playwright would be saved from infringement only upon a finding that his act of adaptation or translation constitutes Fair Use. Upon such a finding, no consent would be required from the original author.

If the subsequent act is therefore justified as Fair Use, it would follow that its performance *may* also qualify as Fair Use, although this finding does not happen as a matter of course. Because what are involved are two distinct rights, a finding of Fair Use for adaptation or translation does not necessarily involve an automatic finding of Fair Use for performance.

Nevertheless, in the event that the adaptation or translation of the underlying work is found to be beyond the purview of Fair Use, any subsequent performance of the same work without the consent of the original author *cannot* be justified under any circumstance. What would be involved here is a performance of an infringement, which the law will, in no instance, consider as a Fair Use of an original work. To hold otherwise would be to sanction an illegal act. Thus, without the consent of the original author, the performance of the already infringing adaptation or translation would amount to a veritable *double infringement*.

In the performance of adaptations or translations as proper derivative works, therefore, the important factor to consider is the status as Fair Use of the adaptation or translation to be performed. If the said work is an independent work, there is no controversy. It may be performed without legal impediment. If, on the other hand, the work displays substantial similarity, then it must, of necessity, first be found to be within the bounds of Fair Use *as an adaptation or translation* before any consideration of its performance may be made. A prior finding of Fair Use of the adaptation or translation to be performed is a pre-condition to its performance as Fair Use.

As a matter of practical consideration, however, the need for making such fine qualifications may not be necessary, as a determination of Fair Use with respect to performance often occurs in conjunction with a determination of Fair Use with respect to the creation of a derivative work. This is especially true in transformative adaptations and translations, where

186. This, of course, is under the assumption that the adaptation or translation is not an independent work qualified for independent and separate copyright. In this case, there would certainly be no controversy, as the grant of unqualified copyright protection would imply the right to perform the work freely without need of prior consent from the original author.

the intent to perform or communicate is taken as a necessary consequence of the act of adaptation or translation itself. American courts, in fact, have not made any clear distinction between the act of transformation and the act of performance in ruling upon the Fair Use of a particular work, probably because it is the violation of the performance right that most likely bears directly upon the economic rights of the original author. The implication, of course, is that if the performance of the transformative work is found to be fair, then the act of transformation of the original work would also, of necessity, be considered fair.

Thus, in determining whether the performance of transformative adaptations and translations may constitute Fair Use, the same pronouncements in the determination of Fair Use upon the act of transformation would also apply. Important here to note is the liberal attitude generally extended to adaptations and translation which are transformative.

The practical importance of this attitude involves a situation where the transformative adaptation or translation is made for a commercial purpose. Here, the United States Supreme Court has held that "[the] [f]act that a work is sold — and, hence, is "commercial" — does not make it presumptively unfair under the first factor."[187] Hence, the commercial nature of the performance is not controlling, as "[a]ll four factors are to be explored, and the results weighed together, in light of the purposes of copyright."[188] Finally, "[t]he more transformative the new work, the less will be the significance of other factors, like commercialism, that may weigh against a finding of fair use."[189]

2. Limitations on Copyright under Section 184

Together with these provisions on Fair Use, the I.P. Code has also provided for additional statutory limitations on the right of the copyright holder, where consent from the original author would not be required. With respect to the right of performance, these exemptions are found Sections 184 (a) and 184 (i) of the I.P. Code, the former, a reproduction of Section 10 (1) of P.D. No. 49, the latter, an entirely new provision.[190]

187. Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 584 (1994).

188. *Id.* at 578.

189. *Id.* at 579.

190. *See* Ranhilio C. Aquino, *Special Problems in the Law on Copyrights,* 16 LAW. REV. 5 (2002).

Section 184 (a) expressly declares that "[t]he recitation or performance of a work, once it has been lawfully made accessible to the public, if done privately and free of charge or if made strictly for a charitable or religious institution or society" shall not constitute an infringement of copyright. To invoke this limit, the author must first have made the work "lawfully accessible to the public." This is in line with the exclusive right of the author to the first public distribution of the work provided under Section 177.3.[191] Under this section, two situations are contemplated as exempt from infringement:

(a) A performance or recitation done privately or free of charge; or,

(b) A performance made strictly for a charitable or religious institution.[192]

Clearly, a performance of a copyrighted work made, even publicly, would be permitted provided that it be made strictly "for a charitable or religious institution or society." This would imply that, unlike the provisions on Fair Use that foreclose any form of profit motive, such performances may generate some form of revenue, provided that they be made for such eleemosynary ends. Clearly, still, while schools may not invoke such an exemption for purely educational ends, they may nonetheless perform such work if proceeds from such performance go entirely to such charitable or religious institutions.

In the same manner, Section 184 (i) provides that "the public performance or communication to the public of a work, in a place where no admission fee is charged in respect to such public performance or communication, by a club or institution for charitable or education purpose only," likewise does not constitute infringement of copyright. Unlike Section 184 (a), this provision does not require that the work had earlier been made accessible to the public. Furthermore, educational ends may be used to justify performance. Notably, however, performance under this sub-section must be in a place where no admission fee is charged "in respect of such performance." This would imply that fees may nonetheless be charged, provided that they are not made in payment for such public performance. Thus, the performance contemplated here will not include those for the purpose of generating funds or income, even by charitable or educational clubs or institutions, and even for charitable and educational purposes. Any profit motive is effectively foreclosed.

191. INTELLECTUAL PROPERTY CODE OF THE PHILIPPINES, § 177.3. This section provides that copyright or economic rights shall consist of the exclusive right to carry out the following act: "The first public distribution of the original and each copy of the work by sale, or other forms of transfer of ownership."

192. *Id.* at § 184.1 (a).

3. The Three-Step-Test

An important factor to consider in the application of Section 184 of the I.P. Code, especially when considering original works copyrighted in a foreign country but extended copyright protection in this jurisdiction, derives from constraints which international commitments, particularly the Berne Convention, have imposed upon possible limitations and exceptions to exclusive rights found under national copyright laws.

These limitations are collectively known as the *Three-Step-Test*, and were first applied to the exclusive right of reproduction by Article 9 (2) of the Berne Convention. Since then, it has been transplanted and extended into the TRIPS Agreement[193] and the World Intellectual Property Organization (W.I.P.O.) Copyright Treaty,[194] instruments binding upon the Philippines.

The most important version of the test is that included in Article 13 of TRIPS Agreement, which provides that "Members shall confine limitations and 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 rights holder."[195] The three-step test may prove to be extremely important for nations that attempt to reduce the scope of copyright protection provided by such international agreements, as absent a declaration by the World Trade Organization (WTO) that such exceptions comply with the test, states enacting such limitations may be made liable through the imposition of trade sanctions.

The *Three-Step Test* has also been incorporated into Section 184 of the I.P. Code, but only as an aid to implementing the provision. The substance of this test, however, was meant not only an aid to the implementation of national laws, but goes into the very validity of any national limitation on the exclusive rights of authors. This means that the limitations provided for in Section 184 (a) and (i) of the I.P. Code are considered valid only if these provisions (a) apply to special cases, (b) do not conflict with a normal exploitation of the work, and (c) do not unreasonably prejudice the legitimate interests of the rights holder.

But what do these standards mean? To date, only one case before the WTO dispute settlement panel has actually required an interpretation of the

193. TRIPS Convention, *supra* note 136.

194. World Intellectual Property Organization Copyright Treaty, Dec. 20, 1996, 36 I.L.M. 65 (1997).

195. TRIPS Convention, *supra* note 136, art. 13.

test.[196] In that decision, the WTO Dispute Resolution Panel held that the three conditions set forth in Article 13 apply on a cumulative basis, "each being a separate and independent requirement that must be satisfied."[197] Failure to comply with any one of the three conditions results in the Article 13 exception being disallowed.

With respect to the first requirement that the exception must apply to special cases, the Panel held this to mean that the scope of the national exception must not only be well-defined, but also narrowly limited in application and reach.[198] Thus, exceptions covering a broad range of subject matter or of uses would not be permissible.

Meanwhile, in interpreting the second requirement involving normal exploitation, the Panel, turning to the 1967 Stockholm Revision Conference that drafted Article 9.2 of the Berne Convention, found that to constitute normal exploitation, the questioned national exception "should not enter into economic competition"[199] with the right holder. According to the report, "all forms of exploiting a work, which have, or are likely to acquire, considerable economic or practical importance, must be reserved to the authors."[200] Thus, it appears that one way of measuring the normal exploitation is to consider, in addition to those forms of exploitation that currently generate significant or tangible revenue, those forms of exploitation which, with a certain degree of likelihood and plausibility, could acquire considerable economic or practical importance.[201] Ultimately, the Panel, in applying this *economic competition* standard, stated:

> We believe that an exception or limitation to an exclusive right in domestic legislation rises to the level of a conflict with a normal exploitation of the work … if uses, that in principle are covered by that right but exempted under the exception or limitation, enter into economic competition with

196. World Trade Organization 2000 Dispute Resolution Panel Report on Section 110 (5) of the U.S. Copyright Act, *available at* http://www.wto.org/english/tratop_e/dispu_e/1234da.pdf (last accessed Dec. 12, 2008) [hereinafter WTO Panel Resolution]. The case involves United States copyright exemptions allowing restaurants, bars, and shops to play radio and television broadcasts without paying licensing fees, passed in 1998 as a rider to the Sonny Bono Copyright Term Extension Act. In this case, prompted by complaints filed by the European Union the WTO declared the exemption a violation of the United States' treaty obligations under the TRIPS Agreement, as the exception unduly extended copyright exception to the prejudice of legitimately protected works.

197. *Id.* ¶ 6.97.

198. *Id.* ¶ 6.112.

199. *Id.* ¶ 6.179.

200. *Id.* ¶ 6.180.

201. *Id.*

> the ways that right holders normally extract economic value from that right to the work … and thereby deprive them of significant or tangible commercial gains.[202]

Turning finally to the last requirement of prejudice, the Panel noted that the provision as worded did allow some level of prejudice to the legitimate interests of the rights holder, provided that they were not "unreasonable." It further determined that the prejudice would reach an "unreasonable" level "if an exception or limitation causes or has the potential to cause an unreasonable loss of income to the copyright owner."[203] Thus, the prejudice might be brought back to tolerable levels were compensation is at least provided: "in cases where there would be a serious loss of profit for the copyright owner, the law should provide him with some compensation."[204]

C. The Performance of Transformative Adaptations

The provisions on Fair Use, as well as Section 184 (a) and (i) of the I.P. Code, allow the performance of transformative adaptations and translations. While a more liberal treatment of transformative adaptation and translation have been espoused in more recent court decisions in the United States construing the provisions on Fair Use, the attitude taken by the I.P. Code by its inclusion of well-defined limitations on the performance rights held by original copyright holders appears to restrict the performance of such derivative works to specific instances, considering further, that what is involved are two exclusive rights afforded to original authors. An analysis of Fair Use under Section 185 of the Code, while employing the four-factor test, must no doubt consider the performance right as potentially more disruptive of the original author's economic right with the added publicity and communication inherent in performance. This is different from the *act* of adaptation and translation which essentially involves a private act. The transformative nature of the work must, therefore, be balanced with the specific limitations imposed by the Code on its performance, notwithstanding a claim of Fair Use. The conservative conclusion to be adapted with respect to the performance of transformative translation and adaptation, therefore, is that it may be justified as Fair Use in this jurisdiction only when commercial gain are absent, or at least merely incidental to the performance of the work.

The relationship of Section 185 to the specific provisions on copyright limitations and performance provided in Section 184 (a) and (i) cannot be

202. WTO Panel Resolution, *supra* note 196, ¶ 6.183.

203. *Id.* ¶ 6.229.

204. *Id.*

gainsaid. Section 184 serves to focus the Fair Use provision found in Section 185. Nevertheless, for as long as compliance with the parameters of Section 184 are observed, performance of transformative adaptations and translations — which underlying *act* of transformation must first qualify as Fair Use — cannot be opposed. Neither may an invocation of international agreements protecting the rights of original copyright holders enjoin such use, as compliance with the *Three-Step-Test* is apparent.

First, the limitations found in Section 184 (a) and (i) refer to *certain special cases*. They are well-defined and narrowly limited in application and reach. In Section 184 (a), performance is allowed only when the work has previously been made available to the public, and only if the performances are made in private and free of charge, or for *strictly* for charitable or religious institutions or societies. Meanwhile, Section 184 (i) limits the performance to non-profit engagements made by a club or institution "for charitable or educational purpose only." The limiting language in both provisions evinces a clear delineation of the purposes and extent of the privilege of performance and the limitation on the exclusive rights of the original author.

Secondly, the statutory limitations cannot be said to conflict with the normal exploitation of the underlying work. The purpose of such limitations is to promote public need for education, as well as to raise funds for charitable or religious institutions. No profit motive is involved. While funds may indeed be raised as a result of such performances, it is doubtful that, with the specific purposes allowed by the provision, "considerable economic or practical importance" will result. The performances of such works under Section 184 cannot therefore pose any substantial economic competition with the original work, especially with foreign works upon which many transformative adaptations have been made. Financial damage or market displacement would be minimal. This absence of economic competition would also imply the absence of, or at the most, reasonable prejudice on the part of the original copyright holder. This reasonability is bolstered by the fact that these limitations are intended for a clear public purpose.

Indeed, the I.P. Code provides for the fair performance of transformative adaptations and translations, but within the parameters set forth by law. Under Section 184, the Code therefore grants positive rights of performance in favor of adapters and translators within narrow specifications required by the *Three-Step-Test*. The character and use of the work, bearing so important a qualification with respect to the act of transforming an original work, must necessarily imply non-commercial purposes, considering that the performance of a transformative adaptation or translation involves a possible double infringement of the original author's exclusive rights.

V. CONCLUSION AND RECOMMENDATIONS

The journey of original literary or dramatico-musical works into subsequent adaptation and performance is long and sinuous indeed, and yet the themes of some works are so honest in expression and so universal in experience that some Filipino playwrights, if they are indeed honest to their profession, cannot but help transplant them yet again into different forms and different expressions. While Filipino theater has far developed from the performance of borrowed American plays with borrowed American accents, the movement of the creative impulse continues to demonstrate the need to adapt, not only of foreign, but also local creative endeavors.

The result has been the creation, both in decades past as well as in contemporary times, of transformative adaptations and translations which not only supersede the objects of the original creation upon which they are based, but also add something new and unique, altering the original expression with new expression, meaning, or message.

A. Consent, Substantial Similarity, and Fair Use

The most practical and immediate question that confronts these transformative adaptations and translations is the need for consent, both with respect to its adaptation and to its performance. Mere copies, of course, require such consent as an absolute matter of law; otherwise, any adaptation or performance would be an infringement of the original author's right. When the work is transformative, the necessity for consent, being based upon substantial similarity, becomes somewhat more unclear, as the basis of substantial similarity to the original may be put in issue.

The question of substantial similarity, while vague both in the I.P. Code and in Philippine jurisprudence, may be placed into sharper focus by the application of both an *Elemental Analysis* of the constitutive elements of the original and derivative work, and a *Total Concept and Feel* approach that considers both works as a whole. Essentially based upon the dichotomy between idea and expression, the tests are useful not only in determining the substantial similarity of works to determine the need for consent in proper derivative works, but also in questions of infringement of the exclusive rights of creators when access to the original work is denied.

In addition to this determination of the existence of substantial similarity, transformative adaptations and translations may be spared from the requirement of consent by a finding that the initial act of transformation and its subsequent performance constitutes a Fair Use sanctioned by the I.P. Code as a permissible limitation on the original author's rights. The nature of the work itself as transformative lends much to a positive finding of Fair Use.

Indeed, the progressive interpretation of the provisions of Fair Use in the United States, which may find suitable application in this jurisdiction, extends also to transformative works, including adaptations and translations. These creations hold a preferred position in the hierarchy of derivative works as the very embodiment of the Constitutional vision of promoting the creative impulse by allowing access to other creative works. Therefore, the act of transforming an original work in a manner that enhances, augments, and expresses such original work in a new way is allowed, and in fact, even promoted by the *Doctrine of Fair Use.*

Nevertheless, while the act of transformation may find positive application, the performance of such work does not enjoy the same extensive liberality. This is because the I.P. Code, while providing for limitations to the exclusive rights of authors of original works, has nonetheless circumscribed such limitations within well-defined parameters and purposes which are clearly directed to the public good. Necessarily, any performance outside such well-defined parameters, including commercial and economic motives, cannot be considered as Fair Use.

B. The Liberal Treatment of Transformative Works

The relationship of substantial similarity and Fair Use only points to the nascent but clearly perceivable liberality with which the I.P. Code has treated, and should treat, derivative works, especially, transformative adaptations and translations. Not only does the I.P. Code extend separate copyright to such derivative works without need of consent from the original author or creator, the positive trend in the interpretation of the provisions of Fair Use in favor of transformative adaptation and translation illustrates the basic thrust of promoting the free exchange of knowledge and ideas so indispensable in any free society. This liberal attitude therefore vivifies the very concept of copyright as a balance between the rights of the author and creator, and the interests of the public in general.

C. Recommendations: Delineating the Rights of Authors and Adapters

1. Continued Performance of Existing Transformative Adaptations and Translations

The performance of *Sinta!*, as well as other plays of notable cultural and theatrical importance, must not be held hostage by the economic interests of authors, who, although are the source and inspiration for these derivative works, have a far weaker claim upon the derivative work precisely because of its transformative nature. Indeed, such original author's rights under copyright law are not absolute. This is for the act of adapting only.

When it comes to the performances of such works, however, another set of parameters must be remembered. Transformative though these works may

be, the finding of Fair Use for public performance is circumscribed by the copyright law within well-defined parameters of purpose. Only those performances aimed to benefit charitable or religious institutions, or those purely educational in character, are justified. There must be no commercial or economic gain involved or, if present, is merely incidental.

2. Defenses for the Alleged Infringer for Works Already Created

The interplay between substantial similarity and Fair Use also suggests possible alternatives that may be open to an adapter or translator over works *already* created, either upon a suspicion that the work is an infringement of another work or upon a suit filed on the same ground.

a. No Litigation Scenario

i. Step One

Was there access? If the author suspects that his work may have infringed upon the work of another, the first question is to determine whether he had *access* to the other work prior to the creation of his work. Absent such access, any substantial similarity which may exist between his work and the other work cannot give rise to a finding of infringement, as the law punishes not similarity, but copying. Two persons may in fact *independently* come up with the same intellectual creation. If the work is an adaptation or translation, however, even if properly transformative, access is given.

ii. Step Two

If there was, in fact, access, or if circumstantial evidence is strong that copying occurred — as in the case of adaptations or translations — are the elements found in the alleged infringing work, which are similar to or taken from the other work, protected expression? To determine this, the *Elemental Analysis Test* may be used. Again, the unprotectable ideas must be identified and separated from the protected expression. If the similarities in his work and that of the third work involve the following elements, then no finding of infringement may be had:

(a) Subject matter

(b) Plot

(c) Theme

(d) *Scènes-à-Faire* and Merged Ideas

(e) Elements already in the Public Domain

Other elements outside of the above unprotected ideas, however, may be found in both works. Thus, the playwright must analyze the literal elements of both works, which include the dialogue, libretto, and song lyrics, if any. What must be focused on is the expression, more than the idea, behind the expression.

Finally, non-literal elements must be considered. Again, these are the elements of setting, scenes, characterization, music, and stage direction present in both works, still bearing in mind the dichotomy between idea and expression. The playwright may also apply the *Total Concept and Feel Test* to view both works.

iii. Step Three

On the suspicion that a work has infringed a prior existing work, the playwright may deem it wise to admit the affinity of his work with that of another, and request consent to the adaptation or translation. Indeed, one need not engage in detailed analysis finding substantial similarity for him to step forward and obtain consent or permission, both for adaptation and performance.

Practically, the effect of such a request would not only inform the original author of the existence of a derivative work, it would be an implied admission that the subsequent author's work is, in fact, a derivative work. This may prove relevant in any infringement litigation where prescription of the action may be used as a defense. In this jurisdiction, the violation of the exclusive rights of an original author prescribes four years from the perpetration of the infringement,[205] not from knowledge thereof.

b. Litigation Scenario

In the event that a case for copyright infringement has been filed against a playwright for his adaptation or translation, he may raise the following claims and defenses:

First, the adapter or translator may also claim that the work upon which the adaptation or translation was based has already lapsed into the public domain.

Second, while access may be apparent from the fact of adaptation or translation, the subsequent work cannot be considered an infringement because there is no substantial similarity, or because the elements taken are either ideas unprotected by copyright law, or have already lapsed into the public domain. The prior request for consent described in Step Three above, however, may serve to as an estoppel against the alleged infringer from claiming substantial *dis*similarity of his subsequent work.

205. INTELLECTUAL PROPERTY CODE OF THE PHILIPPINES, § 46.2.

Third, if the defense of absence of substantial similarity is unavailable, the subsequent playwright may claim that the adaptation or translation of his work, and the performance thereof, if any, constitutes Fair Use.

3. Guidelines for Adaptors and Translators

The judicial determination of the existence of substantial similarity and Fair Use would more properly apply to works that have already been adapted or translated. Nonetheless, the same principles underlying the judicial determination of substantial similarity and Fair Use may guide would-be playwrights in the creation of future works, avoiding, indeed, the possible difficulties of a claim of copyright infringement.

i. Step One

What is the nature of the work? If the work is an original creation, the playwright need not worry. It must be remembered that what copyright law punishes is copying, not similarity.[206]

On the other hand, the situation is different with respect to adaptation and translation. Any translation, of course, would require the consent of the original author, as translation is an expressly reserved exclusive right. Without such consent, the translation would be considered an infringement, unless the work has already lapsed into the public domain.

With adaptations, however, a more thoughtful choice of elements and concepts is allowed. Of course, there is nothing which should prevent the adapter, if his intended work is in fact a clean adaptation of an original, to request permission from the author of the work to be adapted. Again, the evidentiary consequences of such a course of action must be borne in mind.

ii. Step Two

In writing an adaptation (or an alleged original work nonetheless based upon another work), authors and adapters would best keep in mind the dichotomy between idea and expression. They would be safe if they confine themselves to adapting subject matters, themes, and plots. Here, no clear case of infringement may stand. Added to these are similarities based on *scènes-à-faire* and those covered by the *Merger Doctrine*. Not to mention, of course, are elements already lapsed into the public domain.

Meanwhile, the further adaptation of literal and non-literal elements such as dialogue, setting, scene, characterization, among others, would

206. *Id.* at § 190.2.

increase the risk of a finding of infringement. While the adapter or translator may well determine, through the application of the *Elemental Analysis* or *Total Concept and Feel Test*s, whether what he has taken consists of protected expressions or merely unprotected ideas behind the expression, it is ultimately the courts who are the final judges of such questions of degree. The better part of prudence would therefore require that adapters limit their use to clearly non-protected elements.

Following the creation of such translations and adaptations, the playwright may well consider the performance of such works. The first consideration, of course, is whether or not the performance is to be made in public or in private. A private performance of such translation or adaptation would not transgress the economic rights of the original author. In determining the publicity of performance, therefore, the following factors must be considered:

(a) Is the venue itself open to the public?

(b) Is the audience limited to persons within the normal circle of family and its social acquaintances?

Indeed, while the question of publicity hinges upon these twin factors of venue and composition of audience, the latter takes precedence over the former. Thus, a performance made in a public theater but which is *not* open to the public with only family members and their acquaintances as audience would remain to be considered *private* and, therefore, outside the ambit of infringement. On the other hand, a performance made in the same theater with only family members and their acquaintances *actually* attending would not thereby be rendered private, if the restrictions imposed do not foreclose the attendance of the general public. The venue remains to be "a place *open* to the public."

If the performance is therefore made publicly, adherence to be strict limits provided by Section 184 on *Limitations to Copyright* must be followed. If the performance is to be made where tickets are to be sold to the public, such performance must be "strictly for charitable or religious institutions or societies." Nevertheless, if the performance is to be made for purely educational purposes, such performance must be in a place "where no admission fee is charged in respect to such public performance."

All in all, the transformative adaptation and performance of such literary and dramatico-musical works, like all questions of copyright protection, must, in the end, balance the interests of the original author, on the one hand, and the needs of the public in general, on the other. By recognizing the rights of original creators and laying down the limits of adaptation and performance of subsequent authors, the integrity of transformative adaptations and translations may be reconciled with the legitimate interests of original authors. Within such well-defined

parameters and guidelines, therefore, creative ideas and expression is assured and promoted, resulting, in the end, in the promotion of the greater good and the growth of creativity and culture.