INTO THE NEW WORLD:
AN EXAMINATION OF THE APPLICATION OF
COPYRIGHT LAWS TO THE DIGITIZATION OF ARCHIVE AND LIBRARY
COLLECTIONS

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ABSTRACT

The great theoretical physicist, Dr. Albert Einstein, once wrote that “[t]he only thing you absolutely have to know, is the location of the library.” While libraries have existed for centuries with their physical collections, a combination of rapid technological advances, the rise of remote or online learning, and the recent global pandemic has advanced the need for libraries to adapt to the changing needs of their patrons. These days, it is not enough to know where the library is. It must also be known how to access these libraries and their resources.

The traditional conception of the library is in its ‘brick-and-mortar’ physical iteration. Ask any individual to describe a library and the answer usually would be a hall or building with rows and rows of bookshelves, study tables, and reference rooms. However, the digital age has beckoned libraries and archives to enter the digital space for its services. Digital archives are not a new phenomenon, tracing its history back to the 1990s. In line with the move to the digital space, libraries have adopted digitization techniques to archive their physical collections and accommodate the online trend of their patron base.

A particular method that has arisen to digitize library collections is controlled digital lending. Controlled digital lending or “CDL” is the practice of libraries loaning scanned copies of books in their collection in a “lend like print” fashion. In essence, CDL utilizes lending software to grant digital access to copies of a physical resource to patrons. Through this technology, CDL limits the time of access and the number of individuals that can access the resource at the same time in order to match how many physical copies of the resource a certain library or archive possesses. The proponents for CDL anchor the validity of this practice on the elements of fair use. However, this legally untested practice is currently being challenged as the Internet Archive, one of the organizations leading the charge, faces a lawsuit for its CDL practices that was filed in 2020.

This Thesis seeks to examine CDL and like practices through the lens of the current Philippine intellectual property law regime. Through an in-depth analysis, it proposes that these digital practices are not sufficiently protected or addressed by Philippine copyright laws. While the fair use doctrine has been cited as a defense for CDL practices, fair use is not perfectly applicable
to the practices of CDL. Domestic legislation, and even treaties, have also been silent as to the balancing of interests between the rights of authors and publishers and libraries and their patrons in this area. The Thesis thus concludes that an amendment of Section 188 of the Intellectual Property Code is necessary to broaden the scope of the exception provided by libraries to include the protection of digital collections and to enable libraries to continue carrying their age-old mission of into the modern times.
CHAPTER ONE: INTRODUCTION

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

A. Background of the Study

I. Libraries and Their History

Libraries are fundamental to society as they serve as “gateways to knowledge and culture.” Alongside the development of nations across history has been the upkeep of libraries as centers of knowledge and archives of culture. The concept of libraries has spanned a few millennia. Historians regard the library of Nineveh established by Assyrian ruler Ashurbanipal in the 7th century BCE as the first systemically organized library, housing 30,000 cuneiform tablets on various topics of archival, scholarly, and literary forms. Many great civilizations soon followed with their own libraries — the Great Library of Alexandria, the Bayt al-Hikmah (House of Wisdom) in Baghdad, and the Imperial Library of Constantinople, to name a few.

In the Philippines, the first collections of books started with those brought to the islands by Spanish missionaries. Records trace the first library back to a private collection owned and maintained by a certain Bishop Domingo de Salazar. An important landmark is the establishment of the Museo-Biblioteca de Filipinas through the Royal Decree of August 12, 1887.

4 Id.
5 Id.
7 Id.
The Museo-Biblioteca was the first of its kind in the archipelago as a “true public library” with a full catalog, professional staff, and open services to the general public.9 Today, the Museo-Biblioteca exists as the National Library of the Philippines, serving as “the repository of the printed and recorded cultural heritage of the country and other intellectual, literary[,] and information sources.”10

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

II. Libraries and the Right to Education

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

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

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9 Hernandez, supra note 6.
12 Hernandez, supra note 6.
To be compliant with the ideals mandated by international treaty obligations, education must be possessed with four essential features: availability, accessibility, acceptability, and adaptability. On the feature of availability, there is a focus on the provision of functioning educational institutions and programs. Among the necessary resources for a sufficiently functioning educational institution that were listed in General Comment No. 13 is a library.

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

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

The intersecting relationship between education and libraries is indubitable. In a way, one could say that “libraries are synonymous with education.” From school libraries of the early years of childhood to academic libraries for institutions of higher education to public libraries that

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16 *Id.* ¶ 6 (a).
17 *Id.*
18 PHIL. CONST. art. II, § 17.
20 PHIL. CONST. art. XIV, § 1.
21 4 Record, PHIL. CONST., No. 74, at 260.
22 White, *supra* note 2.
serve as the “people’s library,” libraries are access points to a lifetime of learning and vehicles for both formal and informal education. For the attainment of a learned and informed citizenry, education must not only be viewed as formal instruction in classrooms and lecture halls, but it must also be viewed as continuous opportunities to access information, learn from it, and enrich one’s self throughout one’s lifetime. Libraries are key institutions in the realization of this.

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

III. Libraries and Copyright

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

25 White, supra note 2.
27 Standing Committee on Copyright and Related Rights, Study on Copyright Limitations and Exceptions for Libraries and Archives: Updated and Revised, at 6, WIPO Doc. SCCR/30/3 (June 10, 2015). The Study on Copyright Limitations and Exceptions for Libraries and Archives was undertaken by Dr. Kenneth D. Crews as commissioned by the World Intellectual Property Organization. The 2015 report is the third and most recent in a series of studies on copyright exceptions for libraries and archives in different member jurisdictions of WIPO. Id.
Section 188. Reprographic Reproduction by Libraries. — 188.1. Notwithstanding the provisions of Subsection 177.1, any library or archive whose activities are not for profit may, without the authorization of the author of copyright owner, make a limited number of copies of the work, as may be necessary for such institutions to fulfill their mandate, by reprographic reproduction:

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

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

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

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

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

29 Id.
30 Id.
Libraries have depended as well on the doctrine of fair use\textsuperscript{31} to support its practices. As observed by the U.S. Copyright Office, fair use has become an important resort for libraries and archives to defend their practices as the gap between the library exceptions provided by statute and actual library methods widen more and more.\textsuperscript{32} This is all the more a reality for Philippine libraries practicing digital library practices in a jurisdiction that only provides a statutory exception for reprographic library practices.

IV. Controlled Digital Lending

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

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

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

\begin{itemize}
  \item \textsuperscript{31} Fe Angela M. Verzosa, Copyright Protection for Philippine Publications, available at http://eprints.rclis.org/11219/1/Copyright_Protection.pdf (last accessed Aug. 27, 2022).
  \item \textsuperscript{34} \textit{Id.}\end{itemize}
1. A library must own a legal copy of the physical book, by purchase or gift;

2. The library must maintain a 1:1 “owned-to-loaned” ratio, simultaneously lending no more copies than it legally owns; and

3. The library must use technical measures to ensure that the digital file cannot be copied or redistributed.\(^\text{35}\)

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

**B. Statement Of The Problem**

Libraries and archives have been existing for centuries as centers of knowledge and culture. They have been hallmarks for the principle that property has a social function as espoused in our Constitution\(^\text{39}\) and more specifically, that “the use of intellectual property bears a social function.”\(^\text{40}\) Since copyright laws applied strictly could render library activities as violative of these laws, many jurisdictions have adopted “library exceptions” to their legislation.\(^\text{41}\) Library exceptions “manifest a compromise among cultural, historical, and economic objectives, typically by permitting libraries to make socially beneficial uses of copyrighted works, while setting limits and

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\(^{36}\) Id. at 61.


\(^{38}\) See Bailey, et al., supra note 33.

\(^{39}\) Phil. Const. art. XII, § 6.


\(^{41}\) Standing Committee on Copyright and Related Rights, supra note 27, at 6.
conditions aimed at protecting the interests of copyright owners, publishers, and other rightsholders.”

In the Philippine jurisdiction, the library exception is contained in Section 188 of the IP Code. Section 188 provides a narrow exception for libraries and archives to reproduce copies of works in their collection by way of reprographic reproduction. Considering the reprographic limitation in Section 188, this leaves digitization or digital copies out of the purview of the library exception in the IP Code.

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

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

C. Objectives
The objectives of the study are to answer the following questions:
1. Are digitization practices covered by the intellectual property laws of the Philippines?
2. Are digitization practices, particularly controlled digital lending, protected under fair use?
3. What legal framework can be proposed to protect the digitization practices of libraries?

D. Significance of the Study
Libraries are indubitably cornerstone institutions in the pursuit of education, the furtherance of development, and the preservation of knowledge and culture. To note, there are currently 1,599 public libraries in the

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42 *Id.* at 7.
44 *Id*.
46 *Id*. at 62.
Philippines and a significant number of academic and private, non-profit libraries as well. The Philippine Association of Academic and Research Librarians has a membership of 150 institutions across the country.

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

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

E. Scope and Limitations

This thesis will primarily focus on analyzing the digitization practices of libraries under the Philippine IP framework. While there may be a variety of digitization practices, the thesis will focus itself primarily on Controlled Digital Lending (CDL) and similar practices. Thus, when this study refers to the digitization of works, it is referring to CDL and practices that operate

similar principles as CDL. Furthermore, the scope of works covered by
digitization for the purposes of this study will only pertain to print media. As
such, the digitization of audiovisual works and other practices of digital
libraries will not be discussed in the study.

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

The study will also be focused primarily on the legal consideration of
the problems concerning these digitization practices. While the Proponent
acknowledges that the decision making behind these practices is majorly
influenced by economic factors, such will not be tackled.

The study will also focus on an analysis of the fair use doctrine as it is
applicable to CDL. Though discussions on the legal defenses for CDL usually
take up both the doctrine of first sale and the doctrine of fair use, the main
discussion in this study will only pertain to the fair use doctrine. Mentions of
the doctrine of first sale will only be cursory and will not proceed in depth as
the Proponent assesses that such doctrine merits its own in-depth analysis and
study.

F. Methodology

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

First, the Thesis will provide a general overview of the development of
libraries in the digital space and the digitization practices that will be the focus
of this study — namely, CDL. The overview will include explanations of how
these practices developed and how they are maintained or performed.
Next, the study will then shift to an analysis of the relationship between libraries and copyright over the years. While delving into the development of copyright law, the study will also include an analysis of the development and necessity of “library exceptions.”

After such review, the fair use doctrine will be covered, particularly its development in the Philippine jurisdiction. It will then shift to a discussion of each factor of fair use and the relevant Philippine and U.S. jurisprudence for each factor. Additionally, three particular cases will be discussed as to their relevance to the topic of this study. These cases are namely Author’s Guild v. Google Inc., Authors Guild, Inc. v. HathiTrust, and Cambridge University Press v. Patton.

The thesis will then turn to applying the concepts discussed in the previous Chapters and answering the question of whether or not digitization practices are protected under Philippine copyright law. A primary focus of this section will be an in-depth fair use analysis of controlled digital lending. Finally, there will be a recommendation to amend the IP Code, particularly Section 188, to provide stronger and more concrete protection to digital practices of libraries.

54 Authors Guild, Inc. v. HathiTrust, 755 F.3d 87 (2d Cir. 2014) (U.S.).
CHAPTER TWO: THE MOVE TO THE DIGITAL SPACE

"Citizens of a democracy have need of such opportunities for self-education at all times. The complexity and instability of life today make the need an urgent one."
- UNESCO Public Library Manifesto

A. The Move from Traditional Libraries to Digital Libraries

The concept of libraries has been present since the development of ancient civilizations. In the early days, these ancient libraries were repositories of the knowledge accumulated in the fields of agriculture, medicine, warfare, and the like. These libraries were formed “to collect knowledge, learn from it, and use it to make life better.” Originally, libraries were built as archives of knowledge, usually inaccessible to the greater public and only open to scholars.

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

While the title of the first public library in the world is contested, there is some consensus that the first free modern public library is the Peterborough (N.H.) Town Libraries. It was established in 1833 through a town meeting proposal for the township to create a library that would be for all classes of

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57 Vaughan, supra note 3.
58 Id.
59 Id.
62 Id.
people and to be supported through the taxes of the townspeople. The Peterborough (N.H.) Town Libraries continue to serve its community till this modern age. The development of public libraries, especially alongside the early democracy of the American society, cannot be understated in its value to the development of a democratic and informed nation. “The public library was a great leveler, supplying a literature by which the ordinary man could experience some of the pleasures of the rich, and providing a common ground where employer and employee could meet on equal terms.”

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

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

Digital libraries are not a new phenomenon. Though compared to the long history of traditional libraries spanning millennia, digital libraries have only been around for around thirty years. The early concept of a digital

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65 Id.
66 SIDNEY DITZION, ARSENALS OF A DEMOCRATIC CULTURE 73 (1947). The quote comes from the Remarks of Lewis H. Steiner during the Opening Exercises for the Newark Public Library in 1889. Id.
library is often credited to Dr. Vannevar Bush in his article “As We May Think” for the July 1945 Issue of the Atlantic.71 Bush wrote —

Consider a future device for individual use, which is a sort of mechanized private file and library. It needs a name, and, to coin one at random, "memex" will do. A memex is a device in which an individual stores all his books, records, and communications, and which is mechanized so that it may be consulted with exceeding speed and flexibility. It is an enlarged intimate supplement to his memory.

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

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

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

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71 Reeves, supra note 69.
72 Vannevar Bush, As We May Think, ATLANTIC, July 1945, at 106-07.
74 Reeves, supra note 69.
75 Id.
A dream of future libraries combines everything that we most prize about traditional methods, with the best that online information can offer. Sometimes we have nightmares in which the worst aspects of each are combined. In the first years of this century, the philanthropy of Andrew Carnegie brought public libraries to the United States. Now a new form of library is emerging. Hopefully, digital libraries will attract the same passion and respect, and serve the same deep needs that have long been associated with the best of libraries and publishing.\(^76\)

**B. The Practice of Digitization**

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

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

An important benefit of digitization is the digital preservation of print materials.\(^82\) Libraries and archives serve important roles in the preservation of

\(^{77}\) REITZ, supra note 68, at 217.
\(^{78}\) Id. at 219.
\(^{79}\) Id.
\(^{81}\) Id. at 36.
\(^{82}\) White, supra note 2.
culture and history. “Preserving library collections protects and chronicles the past, communicates the present, and helps shape the future.”

In line with the benefits for digital preservation, digitization of materials is being seen as a viable solution to address the problem of orphan works as well. In a study conducted by the British Library on the mass digitization of works published from 1870 to 2010, the researcher found that majority of in-copyright works were orphan works and concluded that “providing cultural institutions with legal certainty over their activities are needed to ensure that highly valuable research materials don’t remain out of reach of the vast majority of citizens.”

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

Academic libraries have also been practicing digitization since the start of the 2000s. Ateneo de Manila University’s own Rizal Library digitized Jose Rizal’s works under public domain for the Rizaliana Library.

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84 Id.
89 Dizon, supra note 52.
of Santo Tomas’ Miguel de Benavides Library and Archives likewise partnered with UnionBank of the Philippines in order to launch an online library providing digitized versions of its historical and archival collections.90

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

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

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

It must be noted that even in the U.S. jurisdiction, where there is a push for the digitization of orphan works, there is still legal uncertainty as to whether the full or mass digitization of orphaned in-copyright works are

91 White, supra note 2.
94 Verzosa, supra note 92.
protected under fair use. The U.S. Copyright Office reiterated that there has been no official judicial pronouncement as to the application of fair use to orphan works. While library associations like the Association of Research Libraries in their “Code of Best Practices in Fair Use for Academic and Research Libraries” recommend digitization for orphan works (especially for works that are part of a library’s special or rare collections), the U.S. Copyright Office cautioned that such codes of best practices are not sufficient indexes to prove that the digitization of orphan works would be covered by fair use.

C. Relevance in a Post-Pandemic Future

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

While the pandemic has certainly brought issues on copyright of print materials in a digital sphere to the forefront, these issues are not new. As noted, digitization has already been studied by the U.S. Copyright Office...

96 Id.
98 Orphan Works & Mass Digitization, supra note 95, at 45.
100 Id. at 16.
101 Id. § 171.9.
102 Bernardo, supra note 35, at 58.
though such was more in the scope of orphan works and mass digitization.\textsuperscript{103} In the European Union, there have already been several Council Directives addressing in particular the digitization of works by libraries and archives. Directive 2001/29/EC was passed in light of technological developments and the rise of the information society.\textsuperscript{104} It provides that exceptions may be granted for public libraries and archives for specific acts of reproduction\textsuperscript{105} and that these institutions may provide access to digital copies of works through dedicated terminals in the premises of these institutions.\textsuperscript{106} The Orphan Works Directive addresses the orphan works problem and allows the digitization and making available of such digital copies as a permitted use of orphan works.\textsuperscript{107}

The issue of digitization has also reached the halls of Congress in the Philippine jurisdiction. In 2019, Representative Geraldine B. Roman filed House Bill No. 514, “An Act Digitizing All Books Necessary for Public Education and Establishing the Philippine Online Library, Providing Funds Therefor, and for Other Purposes.”\textsuperscript{108} Senator Ramon Bong Revilla Jr. also filed Senate Bill No. 2211, which largely mirrors the provisions of the House Bill No. 514.\textsuperscript{109} In the explanatory note, Senator Revilla expresses —

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

\textsuperscript{103} Orphan Works & Mass Digitization, supra note 95.
\textsuperscript{105} Id. art. 5 (2) (c). The provision does not specify that such reproduction is limited to reprographic means. Id.
\textsuperscript{106} Id. art. 5 (3) (n).
\textsuperscript{109} An Act Digitizing All Books Necessary for Public Education and Establishing the Philippine Online Library, Providing Funds Therefor, and for Other Purposes, S.B. No. 2211, 18th Cong., 2nd Reg. Sess. (2021).
\textsuperscript{110} Id. explan. n. para. 3.
House Bill No. 10329, “An Act Establishing the Public Schools of the Future in Technology and Appropriating Funds Therefor,” also includes a provision on the digitization of books, particularly the establishment of a Public Online Library.\footnote{An Act Establishing the Public Schools of the Future in Technology and Appropriating Funds Therefor, H.B. No. 10329, art. VI, § 15, 18th Cong., 3d Reg. Sess. (2021). The provision states — SEC. 15. Public Online Library. — The PSOFT Road Map shall include the establishment of the Public Online Library.\text{\textcopyright} The DepEd, DICT, DOST, the Commission on Higher Education (CHED), and the Technical Education and Skills Development Authority (TESDA) shall, in partnership with the National Library of the Philippines (NLP), the National Book Development Board (NBDB), and other concerned government agencies, develop and maintain the Public Online Library, a repository of educational materials and digitized copies of books and publications suitable for Filipino students and researchers that shall enrich the learning experience by complementing the textbooks and reference materials prescribed for the elementary and secondary levels. The Public Online Library shall be directly connected to the website of the Philippine Statistics Authority (PSA). The DepEd and the NLP shall have joint custody over the digitized copies of textbooks and references in the Public Online Library which shall be jointly managed by the DepEd and the DICT. In this regard, the DICT shall ensure the security of the online repository system to guarantee its integrity. The DepEd may solicit additional reference materials and publications from the NLP, other agencies of the government, and the private sector to augment its resources. The authors of the digitized books and publications shall be strictly covered by the protection provided in R.A. 8293, as amended, otherwise known as the “Intellectual Property Code of the Philippines.” The DepEd and all concerned agencies shall ensure that the authors of the digitized books and publications shall be properly remunerated in accordance with law.\textit{Id.}} Two bills were also filed in 2020 that mandate the digitization of textbooks from publishers who participate in the Public School Textbook Program.\footnote{An Act Amending Republic Act No. 8047, Otherwise Known as the “Book Publishing Industry Development Act,” Providing for the Scanning and Conversion of Public School Textbooks into E-books and Other Digital Formats, H.B. No. 7946, 18th Cong., 2nd Reg. Sess. (2020) & An Act Amending Republic Act No. 8047, Otherwise Known as the “Book Publishing Industry Development Act,” Providing for the Scanning and Conversion of Public School Textbooks into Ebooks and Other Digital Formats, H.B. No. 8020, 18th Cong., 2nd Reg. Sess. (2020).} In a recent hearing held by the House Committee on Creative Industry and Performing Arts, publishers however expressed concern about these bills being manifestly disadvantageous to the struggling publishing industry in the Philippines.\footnote{Melvin Sarangay,\textit{ Book Publishing Groups Hit DepEd for Abetting Copyright Infringement, MANILA BULL.}, Oct. 22, 2021, available at https://mb.com.ph/2021/10/22/book-publishing-groups-hit-deped-for-abetting-copyright-infringement (last accessed Aug. 27, 2022).} The National Book Development Board Chairman Dante Ang agreed that the two bills are “steps in the wrong direction.”\footnote{\textit{Id.}}
From these acts both in the domestic and international field, one can observe that copyright issues concerning digitization have grown in prominence during the pandemic and are evidently here to stay as the educational sector continues to move further and further into the digital space.

**D. Controlled Digital Lending: The Concept**

Controlled digital lending or CDL is a prominent practice of digitization that has arisen in the last decade. For the purposes of this study, the concept of CDL is adopted from the papers published by its foremost proponents. Quoting directly from the *White Paper on Controlled Digital Lending of Library Books* —

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

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

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The concept for CDL is largely credited to have first been explored by Michelle M. Wu in her article “Building a Collaborative Digital Collection: A Necessary Evolution in Libraries” in the Law Library Journal. In the article, Wu opines that the digitization of a text is merely format shifting. Thus, when a library scans a book and converts such to a digital format like a portable document format (.pdf) under CDL, the book is merely shifted over from its original physical format to a digital format. According to Wu, “[d]igitization changes only the form, and ‘the ‘transfer of a work between media’ does not ‘alte[r] the character of’ that work for copyright purposes.”

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

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

The first three requisites primarily focus on the ownership of the works to be digitized. The first requisite is that the original works must have been obtained lawfully by the libraries or archives. Thus, libraries must have lawful possession of the book either through purchase, exchange, or donation. The second requisite is that CDL must only be applied to books that are owned by the library or archive. CDL cannot be applied to materials that are under licenses or are held by libraries under loan from other institutions. The third requisite is that the library must maintain an “owned to

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117 Id. at 540.
118 Id. at 541 (citing New York Times Co. v. Tasini, 533 U.S. 483, 502 (2000)).
119 Hansen & Courtney, supra note 115.
120 Id.
121 Id.
122 Id.
124 Hansen & Courtney, supra note 115.
loaned” ratio when practicing CDL. The “owned to loaned” ratio means that the library can only maintain and circulate the same amount of digital copies of a work as it has physical copies of that work in its collection.\(^{125}\)

As an example, a local library has two copies of “The Book Thief” by Markus Zusak.\(^{126}\) Considering the requisite of an “owned to loaned” ratio, the library practicing CDL can only circulate two copies. The variations can be either one physical copy and one digital copy in circulation or both digital copies in circulation. It cannot be practiced that two physical copies plus a digital copy be circulated at the same time.

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

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

Several institutions have already been practicing CDL, such as academic libraries. One of the prominent and pioneering practitioners of CDL has been the Internet Archive. The Internet Archive operates the “Open Library,” which describes itself as an “open, editable library catalog.”\(^{131}\) The Open Library is “a virtual library that allows users to freely borrow digital

\(^{125}\) Id.
\(^{127}\) Id.
\(^{128}\) Id.
\(^{130}\) Id.
copies of books that are uploaded and archived through the project — both books in the public domain and books under copyright.”

In 2020, the Internet Archive faced a lawsuit from four major publishers in the United States, Hachette Book Group, Inc., HarperCollins Publishers LLC, John Wiley & Sons, Inc., and Penguin Random House LLC. The lawsuit was triggered by the launch of the National Emergency Library. The National Emergency Library was a temporary measure aimed to bridge the gap caused by the closure of physical libraries wherein the Internet Archive suspended its lending restrictions and allowed multiple people to check out the same digital copy of a book at once.

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

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

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

...

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

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132 Romano, supra note 37.
133 Id.
134 Id.
135 Complaint by the Plaintiffs, June 1, 2020, ¶ 2 (on file with the U.S. District Court, Southern District of New York), in Hachette Book Group, Inc., et al. v. Internet Archive, Case 1:20-cv-04160 (S.D.N.Y., filed June 1, 2020) (pending).
136 Id. ¶ 3.
137 Romano, supra note 37.
Additionally, the lawyers for the Internet Archive argued — to the extent that the feared market harms are the very same ones that would flow from handing a particular copy to a library patron, or mailing it to them, rather than lending that copy digitally, those harms are not ones that copyright takes into account[.]. ... Every copy Internet Archive lends out was bought from the publishers, and it is not fair to demand that libraries pay again to lend the copy they already own.¹³⁸

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


¹³⁹ Id.
CHAPTER THREE: LIBRARIES AND COPYRIGHT

“I do feel that we should slowly change the narrative. I feel that copyright should be far more embraced in discussions as an enabler of creativity, an enabler of the diversity of what we publish, [and] an enabler of innovation.”
- Michiel Kolman, President of the International Publishers’ Association

“Reading ought to be furnished to all, as a matter of public policy and duty, on the same principle that we furnish free education, and in fact, as a part, and a most important part, of the education of all.”
- Report of the Trustees of the Boston Public Library

A. Relations Between Libraries and Copyright Laws

“Libraries predate copyright.” Law professor Ariel Katz, a staunch defender of digital libraries and CDL, emphasizes that such is of importance in framing the relationship between library practices and copyright laws. Libraries have been existing since the birth of early civilizations with the practice of collecting and storing knowledge in any form of a repository being “as old as civilization itself.”

The first copyright act of the world, the Statute of Anne, was passed in 1709. Even in this earliest statute to grant copyrights to authors and publishers, a special provision was added in recognition of the special roles of libraries in society.

Provided always, and it is hereby Enacted, That Nine Copies of each Book or Books, upon the best Paper, that from and after the said Tenth Day of April, One thousand seven hundred and ten, shall be Printed and Published, as aforesaid, or Reprinted and Published with Additions, shall, by the Printer and Printers thereof, be Delivered to the Warehouse-Keeper of the said Company of Stationers for the time

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140 Michael Healy, Publisher Voices Raised for Copyright, available at https://www.copyright.com/blog/publisher-voices-raised-for-copyright (last accessed Aug. 27, 2022).
143 Id. at 86.
144 Krasner-Khait, supra note 61.
145 Katz, supra note 142, at 85.
being, at the Hall of the said Company, before such Publication made, for the Use of the Royal Library, the Libraries of the Universities of Oxford and Cambridge, the Libraries of the Four Universities in Scotland, the Library of Sion College in London, and the Library commonly called the Library belonging to the Faculty of Advocates at Edinburgh respectively; which said Warehouse-Keeper, is hereby required, within Ten Days after Demand by the Keepers of the respective Libraries, or any Person or Persons by them or any of them Authorised to Demand the said Copy, to Deliver the same, for the Use of the aforesaid Libraries; and if any Proprietor, Bookseller or Printer, or the said Warehouse-Keeper of the said Company of Stationers, shall not observe the Direction of this Act therein, That then he and they, so making Default in not Delivering the said Printed Copies, as aforesaid, shall Forfeit, besides the value of the said Printed Copies, the sum of Five Pounds for every Copy not so Delivered, as also the value of the said Printed Copy not so Delivered, the same to be Recovered by the Queens [sic] Majesty, Her Heirs and Successors, and by the Chancellor, Masters, and Scholars of any of the said Universities, and by the President and Fellows of Sion College, and the said Faculty of Advocates at Edinburgh, with their full Costs respectively.\textsuperscript{146}

This provision mandating the deposit of books to libraries was explained by the British courts as a measure in order to “enable[ ] literary persons to access books even if they may not be able to afford purchasing them.”\textsuperscript{147} Our copyright statutes no longer contain such type of mandatory deposit provisions. However, it is important to note that the origins of copyright law had a high regard for libraries and their role as “levelers”\textsuperscript{148} of society in providing access to knowledge.

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

\textsuperscript{146} An Act for the Encouragement of Learning, by Vesting the Copies of Printed Books in the Authors or Purchasers of Such Copies, During the Times Therein Mentioned, Statute of Anne (1710) (U.K.) (emphasis supplied).

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

\textsuperscript{148} DITZION, supra note 66.

\textsuperscript{149} Christopher L. Lim, The Development of Philippine Copyright Law, 46 ATENEO L.J. 368, 369 (2001).
When [works are] imported, for use only and not for sale, not more than three copies of such work in any one invoice, in good faith for any religious, charitable, or educational society or institution duly incorporated or registered or for the encouragement of the fine arts, or for any State, school, college, university, or free public library in the Philippine Islands[.]

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

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

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

B. Copyright: The Balancing of Interests

Copyright has been observed to be “purely a statutory right.” Unlike other rights that many may be more familiar with, it is not an inherent right,

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151 INTELL. PROP. CODE, § 188.
152 An Act Providing for the Establishment of Congressional, City and Municipal Libraries and Barangay Reading Centers Throughout the Philippines, Appropriating the Necessary Funds Therefor and for Other Purposes, Republic Act No. 7743 (1994).
153 Id. § 1.
but rather one that is “a new or independent right granted by [ ] statute.”

Thus, this nature as a right purely created and defined by Congress leans to the concept of copyright as a legislative balancing act of interests.

This balancing of interests inherent in the copyright laws, and the IP Code in general, can be gleaned from the provisions of the 1987 Philippine Constitution itself. Article XIV, Section 13 provides that “[t]he State shall protect and secure the exclusive rights of scientists, inventors, artists, and other gifted citizens to their intellectual property and creations, particularly when beneficial to the people, for such period as may be provided by law.”

The IP Code likewise provides —

Section 2. Declaration of State Policy. — The State recognizes that an effective intellectual and industrial property system is vital to the development of domestic and creative activity, facilitates transfer of technology, attracts foreign investments, and ensures market access for our products. It shall protect and secure the exclusive rights of scientists, inventors, artists and other gifted citizens to their intellectual property and creations, particularly when beneficial to the people, for such periods as provided in this Act.

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

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

Being a right borne from statute, copyright is subject to the terms and limitations set by Congress through the law. Through the copyright laws, the legislature aims to strike the balance between the private rights of authors

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156 Id.
158 PHIL. CONST. art. XIV, § 13.
159 INTELL. PROP. CODE, § 2.
160 Joaquin, 302 SCRA at 238.
and rightsholders and the public interest.\textsuperscript{161} This concept of balancing of interests has also served as the scope through which to view copyright law amendments and the “essential core” of copyright law since its conception.\textsuperscript{162} Thus, it has been said that “copyright law [has undergone] a transformation which creates rights on [ ] both sides of the weighing scale over the intangibilities it supposes to protect and promote.”\textsuperscript{163}

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

C. Copyright Exceptions in General

Copyright is not just a matter of national law — it is “inevitably international.”\textsuperscript{164} The concept of copyright as an exercise of the balancing of interests has also been reflected in international copyright law. In its preamble, the WIPO Copyright Treaty states that it “[emphasizes] the [ ] significance of copyright protection as an incentive for literary and artistic creation” and, at the same time, “[recognizes] the need to maintain a balance between the rights of authors and the larger public interest, particularly education, research[,] and access to information.”\textsuperscript{165}

It must be noted that copyright is a State-granted monopoly.\textsuperscript{166} Thus, in recognition of the bedrock principle that “protection should not go substantially beyond the purposes of protection[,]”\textsuperscript{167} States have defined the metes and bounds of copyright protection and set forth limitations and exceptions to copyright protection. The principle that limitations or restrictions on the copyright protection granted to authors and rightsholders are granted for justified cases have long gained recognition both in domestic

\textsuperscript{162} \textit{Id}.
\textsuperscript{163} \textit{Id}.
\textsuperscript{165} WIPO Copyright Treaty pmbl. paras. 5 & 6, \textit{opened for signature} Dec. 20, 1996, 2186 U.N.T.S. 121 (entered into force Mar. 6, 2002).
\textsuperscript{166} Chafee, \textit{supra} note 164, at 506.
\textsuperscript{167} \textit{Id}.
and international laws. As Swiss delegate Nuna Droz expressed, “limits to absolute protection are rightly set by the public interest.”

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

(1) Authors of literary and artistic works protected by this Convention shall have the exclusive right of authorizing the reproduction of these works, in any manner or form.

(2) It shall be a matter for legislation in the countries of the Union to permit the reproduction of such works in certain special cases, provided that such reproduction does not conflict with a normal exploitation of the work and does not unreasonably prejudice the legitimate interests of the author.

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

At the inception of the test in the Berne Convention, it was initially limited in application to exceptions to the right of reproduction. The three-

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168 Standing Committee on Copyright and Related Rights, WIPO Study on Limitations and Exceptions of Copyright and Related Rights in the Digital Environment, at 3, WIPO Doc. SCCR/9/7 (April 5, 2003).
169 Id. (citing ACTES DE LA CONFÉRENCE INTERNATIONAL POUR LA PROTECTION DES DROITS D'AUTEUR RÉUNIE À BERNE DU 8 AU 19 SEPTEMBRE 1884 67 (1884)).
172 Id. (emphasis supplied).
174 Id.
175 See Berne Convention, supra note 171, art. 9.
step test was soon extended to apply as well to other exclusive rights and neighboring rights of authors through succeeding treaty provisions.

Agreement on Trade-Related Aspects of Intellectual Property Rights

**Article 13. Limitations and Exceptions.**

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

WIPO Copyright Treaty

**Article 10. Limitations and Exceptions**

(1) Contracting Parties may, in their national legislation, provide for limitations of or exceptions to the rights granted to authors of literary and artistic works under this Treaty in certain special cases that do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the author.

(2) Contracting Parties shall, when applying the Berne Convention, confine any limitations of or exceptions to rights provided for therein to certain special cases that do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the author.\(^{177}\)

The three steps are intended to be cumulative factors and failure to comply with only one step renders the exemption violative of the three-step test.\(^{178}\) The three steps then are summarized as follows:

1) The exemption must be confined to “certain special cases.”\(^{179}\)

2) Such cases must not “conflict with a normal exploitation of the work.”\(^{180}\)

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\(^{177}\) WIPO Copyright Treaty, supra note 165, art. 10.


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

\(^{180}\) Id.
3) Such cases must not “unreasonably prejudice the legitimate interests of the author.”

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

SECTION 184. Limitations on Copyright. —

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

...

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

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

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

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181 Id.
182 INTELL. PROP. CODE, § 184.
184 Panel Report, United States — Section 110 (5) of the Copyright Act, WTO Doc. WT/DS160/R (June 15, 2000) [hereinafter United States — Section 110 (5) of the Copyright Act].
185 TRIPS Agreement, supra note 176, art. 13.
186 Id. ¶ 6.112.
188 United States — Section 110 (5) of the Copyright Act, supra note 184, ¶ 6.112.
The second step requires that the cases under the exemption must not “conflict with a normal exploitation of the work.” The Panel construed that normal exploitation embraces not only actual or existing effects on the market but also includes potential effect on present and future market conditions. The Panel took guidance from the point of a study group originally formed to propose several amendments to the Berne Convention on the right of reproduction.

“[to] limit the recognition and the exercising of that right, for specified purposes and on the condition that these purposes should not enter into economic competition with these works” in the sense that “all forms of exploiting a work, which have, or are likely to acquire, considerable economic or practical importance, must be reserved to the authors.”

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

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

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189 TRIPS Agreement, supra note 176, art. 13.
190 United States — Section 110 (5) of the Copyright Act, supra note 184, ¶ 6.184.
191 Id. ¶ 6.179.
194 Id.
195 TRIPS Agreement, supra note 176, art. 13.
197 United States — Section 110 (5) of the Copyright Act, supra note 184, ¶ 6.227 (citing Panel Report, Canada – Patent Protection of Pharmaceutical Products, ¶ 7.60ff, WTO Doc. WT/DS114/R (April 7, 2000)).
limitation must not cause, whether directly or potentially, an unreasonable loss of income to the author.\textsuperscript{198}

The three-step test is an essential consideration in the discussion of any copyright limitation or exemption. The Philippines is a party to the Berne Convention, the TRIPS Agreement, and the WIPO Copyright Treaty,\textsuperscript{199} which imposes the obligation of compliance with the test upon the State to comply with. Thus, even the exemption granted to libraries and archives must comply with such test.

D. Safe Harbor Statutes

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

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

\textsuperscript{198} \textit{Id.} ¶ 6.229.
\textsuperscript{200} \textsc{Intell. Prop. Code}, § 177.1.
\textsuperscript{201} \textit{Id.} § 171.9.
\textsuperscript{202} \textit{Id.} § 177.5 & 177.6.
\textsuperscript{203} \textit{Id.} § 171.5.
As gleaned from Section 177, the exclusive copyright or economic rights of an author have limitations under the law. Such limitations are listed in Chapter VIII of the IP Code, including:

1. Specific limitations on copyright;
2. Fair use;
3. Private reproduction for research and study;
4. Reprographic reproduction by libraries; and
5. Permissible reproduction of computer programs.

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

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

It has been observed that statutory library exceptions may not always cover each and every library practice. This is especially the case when much

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204 Id. § 177. (“Subject to the provisions of Chapter VIII”).
205 Id. ch. VIII.
206 INTELL. PROP. CODE, § 184.
207 Id. § 185.
208 Id. § 187.
209 Id. § 188.
210 Id. § 189.
211 Standing Committee on Copyright and Related Rights, supra note 27, at 6.
212 Id.
213 Id.
214 Id. at 8.
time has passed between the passage of the library exception into law and the present times. In these types of situations in different jurisdictions, the “increasing gaps in the law are sometimes filled in practice by reliance on fair use.”

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

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

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

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

Libraries are rich repositories of historically and culturally significant collections, many of which are not available anywhere else in the world.

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216 Id. at 15.
217 Id.
218 Id.
Without an appropriate copyright exception, a library could not preserve or replace a damaged work while it is still covered by copyright. For example, it could not lawfully copy or digitize an old newspaper or a unique sound recording to preserve it. Without appropriate library exceptions, this cultural heritage would be lost to future generations.219

There is no explicit requirement for jurisdictions to provide an exception to their libraries and archives. This can be gleaned even from the fact that 28 member-States of the WIPO have no library exception in their copyright statutes.220 The provision of a library exception as well as the nature of the exception is then left to the policy-making discretion of each member-State’s lawmaking body. As such,

The challenges facing libraries are linked in large part to the fact that, while international copyright agreements guarantee exclusive rights for authors and other right holders, the interpretation of the exceptions and limitations that entities such as libraries depend on in order to provide their services is left to national parliaments. In sum, exceptions and limitations are national and optional, whereas the rights accruing to right holders are international and guaranteed.221

Jurisdictions have thus adopted different types of library exceptions with various provisions. The WIPO-SCCR study broke down the elements of such statutes as follows:222

<table>
<thead>
<tr>
<th>General Library Exception</th>
<th>“[A] broad and flexible provision that permits a library or other institution to make copies of works, usually subject to various conditions, but not limited to particular purposes”223</th>
</tr>
</thead>
<tbody>
<tr>
<td>Copies for Research and Study</td>
<td>“The provision permitting a library or other institution to make copies (usually single copies) at the request of a user, often</td>
</tr>
</tbody>
</table>

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219 White, supra note 2.
220 Standing Committee on Copyright and Related Rights, supra note 27, at 7.
221 White, supra note 2.
222 Standing Committee on Copyright and Related Rights, supra note 27, at 9. The elements breakdown has been converted to table format for easier reading.
223 Id.
Making Available

“[A] statute allowing libraries to make digital works available to users on the premises, usually for their research or study”

Copies for Preservation or Replacement

“[S]tatutes that authorize the library to make copies of works for preservation, without necessarily requiring that the work first be at risk [or] ... statutes authorizing libraries to replace existing copies in the collection, or in the collection of another library, if the work is lost, damaged, deteriorated, or otherwise in jeopardy”

Interlibrary Loan or Document Supply

“[S]tatutes that permit libraries to make copies of works to provide to other libraries for the libraries’ use or for delivery to users at their request”

Anti-Circumvention

“[P]rovisions barring the circumvention of technological protection measures”

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

**E. Section 188: The Philippine Library Exception**

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

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

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

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

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

188.2. Notwithstanding the above provisions, it shall not be permissible to produce a volume of a work published in several volumes or to produce missing tomes or pages of magazines or similar works, unless the volume, tome or part is out of stock: Provided, That every library which, by law, is entitled to receive copies of a printed work, shall be entitled, when special reasons so require, to reproduce a copy of a published work which is considered necessary for the collection of the library but which is out of stock.232

The origin of this library exception is traced to Section 13 of Presidential Decree No. 49.233 Section 13 provided —

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

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

It is equally permissible to make, by means of photography, reproductions of isolated articles contained in composite works, as well as brief portions of other published works, in order to supply them, when this is considered expedient, to persons requesting their loan for purposes of research or study, instead of lending the volumes or booklets which contain them. Each person seeking loan may only receive one copy of each article or each portion of a work.

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

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

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

Section 188 of the IP Code primarily reorganized the library exception found in Section 13 of P.D. 49.\textsuperscript{234} Aside from the reorganization of the provision, the library exception has substantially remained the same since its origin in 1972. A couple key amendments perhaps has been the change of the

\textsuperscript{234} Compare Presidential Decree No. 49, § 13, with INTELL. PROP. CODE, § 188.
term “photography” to “reprographic reproduction” and the lowering of the amount of copies a library may produce from two copies originally to a single copy only.235

Since the passage of the IP Code into law in 1997, Section 188 was amended only once in 2013 through Republic Act No. 10372.236

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

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

“x x x

“(c) Where the making of such limited copies is in order to preserve and, if necessary in the event that it is lost, destroyed or rendered unusable, replace a copy, or to replace, in the permanent collection of another similar library or archive, a copy which has been lost, destroyed or rendered unusable and copies are not available with the publisher.”237

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

Firstly, Section 188 only permits reproduction through means of reprography.238 The IP Code does not define reprographic reproduction but the National Library’s Copyright Safeguards and Regulations defines such, to wit —

235 Presidential Decree No. 49, § 13 & INTELL. PROP. CODE, § 188.
237 Id. § 13.
238 INTELL. PROP. CODE, § 188.
Reproduction is the making of one (1) or more copies of a work, including multimedia, in any manner or form. A reprographic reproduction, as authorized under certain circumstances by the IPC, does not include a digital or machine-readable copy, but is limited to photography, xerography and similar processes, resulting in a paper or microform copy.[239]

The definition of reprographic reproduction under the Copyright Safeguards and Regulations explicitly excludes digital or machine-readable copies. It also specifies that reprographic copies result in paper or microform copies.240 Thus, the digitization of library materials would not properly fall under library or archive practices protected by Section 188.

Furthermore, Section 188 does not permit all types of reproduction to be performed by libraries and archives. The provision provides only three situations wherein a library may produce a reprographic copy of a material. First, a copy may be made by the library “where the work by reason of its fragile character or rarity cannot be lent to user in its original form.”241 This is akin to preservation and protection strategies utilized by libraries. Second, a copy may be made by the library when, in instances of loan requests for purposes of research or study, the works to be copied are isolated articles or brief portions of a work and it would be more expedient to lend a copy rather than the entire volume or booklet.242 This would pertain to interlibrary loans. Third, a copy may be made by the library for purposes of preservation or replacement of a lost or damaged original copy of the work.243

The provision in Section 188.2 must be noted wherein, notwithstanding the provisions of the prior paragraph in the Section, libraries or archives are not allowed to make reprographic copies of certain works unless such works are out of stock.244 Additionally, these works must be those which are required by law to have been part of the library’s collections or those which are deemed necessary to the library’s collections.245

240 Id.
241 INTELL. PROP. CODE, § 188.1 (a).
242 Id. § 188.1 (b).
243 Id. § 188.1 (c).
244 Id. § 188.2.
245 Id.
At this juncture, it is important to note that libraries and archives in the Philippines have this unique exception found in Section 188 of the IP Code. Considering the specific exemption (“Reprographic Reproduction by Libraries”), libraries and archives are primarily governed by such provision for their practices.

In instances that fall outside Section 188, fair use will then be the next consideration. This is in pursuant to the other exemption available in the IP Code for libraries and archives under Section 184, “the use made of a work by or under the direction or control of the Government, by the National Library or by educational, scientific or professional institutions where such use is in the public interest and is compatible with fair use[.]”\footnote{\textit{Id.} § 184.1 (h).}
CHAPTER FOUR: THE FUNDAMENTAL DOCTRINE

“All property has its proper limit, extent[,] and bounds.”
- Sir Joseph Yates

A. The Doctrine of Fair Use

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

The Philippines has adopted the fair use doctrine into the IP Code, to wit —

SECTION 185. Fair Use of a Copyrighted Work. -

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

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

(b) The nature of the copyrighted work;

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(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.

185.2. The fact that a work is unpublished shall not by itself bar a finding of fair use if such finding is made upon consideration of all the above factors.250

Like majority of the Philippines’ copyright statutory provisions, the IP Code’s fair use provision can be traced to U.S. Copyright Law.251 The U.S. jurisdiction’s fair use provision is as follows —

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

(1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;

(2) the nature of the copyrighted work;

(3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and

(4) the effect of the use upon the potential market for or value of the copyrighted work.

250 INTELL. PROP. CODE, § 185.
The fact that a work is unpublished shall not itself bar a finding of fair use if such finding is made upon consideration of all the above factors.\textsuperscript{252}

The similarities between the fair use provisions between the Philippine and U.S. jurisdiction is not surprising considering the roots of Philippine intellectual property laws originated from U.S. intellectual property laws itself.\textsuperscript{253} Corollary to this, the discussion of fair use in this study will greatly derive from prevailing U.S. jurisprudence to serve as guideposts in analyzing the fair use application in digitization practices of libraries and archives.

\section*{B. Philippine Jurisprudence on Fair Use}

Before delving into the factors of fair use further, a discussion of Philippine jurisprudence on fair use would be apt. Admittedly, in contrast to the wealth of U.S. jurisprudence on the topic of fair use, there have only been two cases that have covered fair use: \textit{Habana v. Robles}\textsuperscript{254} and \textit{ABS-CBN Corporation v. Gozon}.\textsuperscript{255}

In the case of \textit{Habana v. Robles}, one of the issues put forth by the petitioners was whether or not the respondent abused an author’s right to fair use in the alleged copying of textbook materials.\textsuperscript{256} The Supreme Court however did not take up the issue on fair use, focusing more on the discussion of infringement.\textsuperscript{257} It is in Chief Justice Davide’s dissent that a brief discussion on fair use is made.\textsuperscript{258} Chief Justice Davide defines fair use as “a privilege to use the copyrighted material in a reasonable manner without the consent of the copyright owner or as copying the theme or ideas rather than their expression.”\textsuperscript{259} The copying of a work must also be sufficiently proved prior to any discussion of the issue of fair use.\textsuperscript{260}

\begin{footnotesize}
\begin{itemize}
\item[\textsuperscript{252}] Copyright Act, 17 U.S.C. § 105.
\item[\textsuperscript{254}] Habana v. Robles, G.R. No. 131522, 310 SCRA 511 (1999).
\item[\textsuperscript{255}] ABS-CBN Corporation v. Gozon, G.R. No. 195956, 753 SCRA 1 (2015).
\item[\textsuperscript{256}] Habana, 310 SCRA at 521.
\item[\textsuperscript{257}] \textit{Id.} at 528.
\item[\textsuperscript{258}] \textit{Id.} at 545 (C.J. Davide, dissenting opinion).
\item[\textsuperscript{259}] \textit{Id.}
\item[\textsuperscript{260}] \textit{Id.}
\end{itemize}
\end{footnotesize}
In the case of *ABS-CBN Corporation v. Gozon*, the Supreme Court took on a more extensive discussion of fair use. The *ABS-CBN* case is particularly important as it discusses two main things about the characterization of fair use. First, while the Court adopted the definition of fair use that Chief Justice Davide put forth in *Habana*, the Court added that fair use is “an exception to the copyright owner’s monopoly of the use of the work to avoid stifling ‘the very creativity which that law is designed to foster.’” Second, the decision confirmed that fair use is a defense against infringement. As such, when a defendant claims fair use, it is in the nature of an affirmative defense, that would require substantiation in the ensuing litigation. The Court explained further —

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

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

With fair use being an exception as well, the interpretation of such would follow that established by jurisprudence. “Under the rules of statutory

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261 *ABS-CBN*, 753 SCRA.
262 *Id.* at 57 (citing *Habana*, 310 SCRA at 545 (C.J. Davide, dissenting opinion)).
264 *ABS-CBN*, 753 SCRA at 62.
266 *ABS-CBN*, 753 SCRA at 62.
construction, exceptions, as a general rule, should be strictly but reasonably construed. They extend only so far as their language fairly warrants, and all doubts should be resolved in favor of the general provisions rather than the exception.”269

Returning back to the case of *ABS-CBN Corporation v. Gozon*,270 the Court laid out the most extensive discussion of the four factors on fair use thus far in Philippine jurisprudence. The four factors of fair use will be discussed further in the next section.

**C. The Factors of Fair Use**

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

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

(b) The nature of the copyrighted work;

(c) The amount and substantiality of the portion used in relation to the copyrighted work as a whole; and

(d) The effect of the use upon the potential market for or value of the copyrighted work.271

The first factor is the purpose and character of the use.272 “The purpose and character requirement is important in view of copyright’s goal to promote creativity and encourage creation of works. Hence, commercial use of the copyrighted work can be weighed against fair use.”273 The purpose and character of the use is weighted against those listed274 in Section 185: “criticism, comment, news reporting, teaching including limited number of copies for classroom use, scholarship, research, and similar purposes.”275

It has been noted that “[t]he fact that a [use] was commercial as opposed to nonprofit is a separate factor that tends to weigh against a finding of fair

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269 Commissioner of Internal Revenue v. Court of Appeals, G.R. No. 107135, 303 SCRA 508, 515 (1999).
270 ABS-CBN, 753 SCRA.
271 INTELL. PROP. CODE, § 185.1.
272 Id. § 185.1 (a).
273 ABS-CBN, 753 SCRA at 59.
274 Id. at 58-59.
275 INTELL. PROP. CODE, § 185.1.
use.” A finding of commercial use does not solely turn on whether or not the user’s primary motive for the use is monetary gain. The Court must also consider as to whether the user would “stand[] to profit from exploitation of the copyrighted material without paying the customary price.”

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

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

The third factor pertains to the amount and substantiality of the portion used. In the ABS-CBN case, the Court explained that — An exact reproduction of a copyrighted work, compared to a small portion of it, can result in the conclusion that its use is not fair. There may also be cases where, though the entirety of the copyrighted work is used without consent, its purpose determines that the usage is still fair.

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277 Id.
278 Id.
279 ABS-CBN, 753 SCRA at 59.
280 Id. (citing Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 579 (1994)).
281 Campbell, 510 U.S. at 579.
282 Id. (citing Sony Corp. of America v. Universal City Studios, Inc., 464 U.S. 417, 455 (1984)).
283 Campbell, 510 U.S. at 579.
284 INTELL. PROP. CODE, § 185.1 (b).
285 ABS-CBN, 753 SCRA at 59.
286 Harper & Row, 471 U.S. at 563.
287 INTELL. PROP. CODE, § 185.1 (c).
288 ABS-CBN, 753 SCRA at 59-60 (citing Bunker, supra note 263).
It is important to note that the factor requires the examination of both the amount of the work used and the substantiality of the portion used. The case of *Harper & Row Publishers v. Nation Enterprises*, the U.S. Supreme Court found the publication of a portion of an unpublished book was against fair use on the third factor. The ruling explained that while the quoted portions were relatively insubstantial compared to the entire work, what was quoted was “the heart” of the work. It is further noted that it is not a defense for a taking to be excused that the portion utilized was insubstantial with respect to the original work.

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

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

**D. Fair Use and Digitization**

Needless to say, the rise of the digital space has thrust copyright into a new world — the Internet, dubbed often as a world without borders. It must be recalled that copyright and its doctrines were born and developed in the

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289 See INTELL. PROP. CODE, § 185.1 (c).
291 Id.
292 Id. at 565.
293 See INTELL. PROP. CODE, § 185.1 (d).
294 *ABS-CBN*, 753 SCRA at 60.
296 *Campbell*, 510 U.S. at 590.
age of print media.\textsuperscript{299} Thus, with the advent of technological advancements, there has also been a need to reexamine the application of doctrines.

The digitization of works have already been previously tackled in U.S. jurisprudence, particularly in the cases of \textit{Authors Guild v. Google, Inc.},\textsuperscript{300} \textit{Authors Guild v. HathiTrust},\textsuperscript{301} \& \textit{Cambridge University Press v. Patton}.\textsuperscript{302} In this subchapter, the pertinent pronouncements of the U.S. courts will be delved into to further provide basis for the succeeding analysis of library or archive digitization practices. It is crucial to discuss these cases as well as they have often been cited by the proponents of controlled digital lending to defend CDL practices.\textsuperscript{303}

I. Authors Guild, Inc. v. HathiTrust

The case of \textit{Authors Guild, Inc. v. HathiTrust} stemmed from a lawsuit against the HathiTrust Digital Library formed by several research universities.\textsuperscript{304} HathiTrust primarily permitted three uses which were subject of litigation: a) the search engine function that permitted the general public to search for terms across all its digital copies without displaying to the user any test from any work;\textsuperscript{305} b) the provision of full copies of copyrighted works compatible with adaptive technologies for certified patrons of member libraries with print disabilities;\textsuperscript{306} and c) the permission for member libraries to create replacement copies of works in limited conditions, such as the loss of an original copy of a work and the unavailability of such work in the market for purchase.\textsuperscript{307} The 2nd Circuit Court of Appeals ruled that such use would constitute fair use.\textsuperscript{308}

However, such ruling must be nuanced in the facts that faced the court. The ruling explains that fair use has the important proviso that the use “must not excessively damage the market for the original by providing the public

\textsuperscript{299} Anita Colyer, Copyright Law, the Internet, and Distance Education, available at http://web.worldbank.org/archive/website00236B/WEB/COPY_01.HTM (last accessed Aug. 27, 2022).
\textsuperscript{300} Authors Guild, Inc. v. Google, Inc., 804 F.3d 202 (2d Cir. 2015) (U.S.).
\textsuperscript{301} Authors Guild, Inc. v. HathiTrust, 755 F.3d 87 (2d Cir. 2014) (U.S.).
\textsuperscript{302} Cambridge University Press v. Patton, 769 F.3d 1232 (11th Cir. 2014) (U.S.).
\textsuperscript{303} Hansen & Courtney, \textit{supra} note 115.
\textsuperscript{304} \textit{HathiTrust}, 755 F.3d at 90.
\textsuperscript{305} \textit{Id.} at 91.
\textsuperscript{306} \textit{Id.}
\textsuperscript{307} \textit{Id.} at 92.
\textsuperscript{308} \textit{Id.} at 105.
Proceeding from this, the ruling undertook a fair use analysis of the digitization done by HathiTrust. However, an important note is that the digitization of full text copies were primarily considered transformative and falling under fair use due to their necessity in the creation and operation of a searchable database and provision of print-disabled access. The ruling even points out that under the fourth factor, the search function of HathiTrust “does not serve as a substitute for the books that are being searched” and do not cause market harm to the authors and rightsholders.

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

II. Authors Guild Inc. v. Google, Inc.

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

The ponente of the case, Judge Pierre Nelson Leval, reiterated the prior pronouncement in HathiTrust that the use must not provide a substantial substitute for the copyrighted work. Furthermore, the decision makes mention that the “recasting” of a novel into another format is not transformative as contemplated by a favorable fair use finding. It is worthy to note that the decision indirectly makes mention that a fair use finding would

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309 Id. at 95.
310 HathiTrust, 755 F.3d at 97.
311 Id. at 101.
312 Id. at 100.
313 Id. at 103.
314 Google, 804 F.3d at 207.
315 Id. at 214-224.
316 Id. at 207.
317 Id. at 215.
be different should the subject of the fair use analysis have been access to full text copies of works, instead of snippet views of works, to wit —

If Plaintiffs’ claim were based on Google’s converting their books into a digitized form and making that digitized version accessible to the public, their claim would be strong. But as noted above, Google safeguards from public view the digitized copies it makes and allows access only to the extent of permitting the public to search for the very limited information accessible through the search function and snippet view. The program does not allow access in any substantial way to a book’s expressive content.\textsuperscript{318}

III. Cambridge University Press v. Patton

In the case of \textit{Cambridge University Press v. Patton}, three publishing houses filed suit against Georgia State University for their provision of digitally scanned copies of excerpts of books published by the publishing houses to their students through academic portals.\textsuperscript{319} The 2nd Circuit Court of Appeals explained that a non-transformative use is one which serves the same purpose as the original work.\textsuperscript{320} The court ruled that the verbatim use of excerpts transferred to a digital format was not transformative at all.\textsuperscript{321} While the court eventually ruled that the first factor in this case was for fair use considering the non-profit and educational nature of the university,\textsuperscript{322} the ruling also cautions that “care must be taken not to allow too much educational use, lest we undermine the goals of copyright by enervating the incentive for authors to create the works upon which students and teachers depend.”\textsuperscript{323}

In the discussion of the fourth factor, the ruling emphasized the importance of the fourth factor in the overall fair use analysis due to the greater market harm posed by the use since the use of the digital excerpts was non-transformative and utilized for the same original purpose as intended.\textsuperscript{324} For the fourth factor analysis, however, the discussion was ultimately more

\begin{itemize}
\item \textsuperscript{318} \textit{Id.} at 225-226.
\item \textsuperscript{319} \textit{Cambridge University Press}, 769 F.3d at 1237.
\item \textsuperscript{320} \textit{Id.} at 1262 (citing Peter Letterese & Assocs. v. World Inst. of Scientology Enters., 533 F.3d 1287, 1311 (11th Cir. 2008) (U.S.)).
\item \textsuperscript{321} \textit{Cambridge University Press}, 769 F.3d at 1262.
\item \textsuperscript{322} \textit{Id.} at 1267.
\item \textsuperscript{323} \textit{Id.} at 1264.
\item \textsuperscript{324} \textit{Id.} at 1275.
\end{itemize}
focused on the availability of licensing for digital excerpts, rather than the
digitization aspect.\textsuperscript{325}

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

\textsuperscript{325} \textit{Id.} at 1276-1278.
CHAPTER FIVE: ANALYSIS OF DIGITIZATION PRACTICES

“An author’s right to control and profit from the dissemination of her work ought not to be evaded by conversion of the work into a different form.”
- Authors Guild v. Google Inc. 326

Having established the guideposts of statutory library exemptions and fair use doctrines, the question of whether or not digitization practices of libraries and archives can now proceed to be answered in this Chapter.

A. Under the IP Code

Digitization primarily concerns the right of reproduction 327 as the practice of digitization involves the creation of a copy of a work in whatever digital format it may be. 328 However, keeping in mind the institutional missions of libraries and archives to grant access to its patrons, the rights of distribution and public display of the work are necessarily considered as well. 329 It is perhaps in this issue of granting access wherein the validity of digitization is put into question. This is due to the effect of modern technology wherein the use or distribution of works have become intertwined with the reproduction of copies of works. 330

As previously discussed, 331 Section 188 of the IP Code 332 is the primary library exemption in the Philippine jurisdiction. Section 188 is explicit in the limitation that the permitted reproduction by libraries and archives is only through reprographic means. 333 The Copyright Safeguards and Regulations went further to add that digital or machine-readable copies are not contemplated in the law as reprographic reproduction. 334 Thus, it is submitted that this squarely puts digitization practices outside of the ambit of protection of Section 188 of the IP Code.

326 Google, 804 F.3d at 225.
327 INTELL. PROP. CODE, § 177.1.
328 See infra Chapter 2 (B).
329 INTELL. PROP. CODE, § 177.3 & 177.5.
331 See infra Chapter 3 (E).
332 INTELL. PROP. CODE, § 188.
333 Id.
334 Copyright Safeguards and Regulations, Rule 2 (17).
Considering the lack of protection under the main library exemption under the IP Code, the next consideration would be the copyright limitation that could be applicable to libraries and archives under Section 184.1 (h) “the use made of a work by or under the direction or control of the Government, by the National Library or by educational, scientific[,] or professional institutions where such use is in the public interest and is compatible with fair use.” 335 Admittedly, libraries and archives can easily argue that the digitization of works would be of use to the public interest as they are serving their patrons in providing access to works in order to support the education, scholarship, and research of many. The digitization of works is all the more a greater need in light of the global pandemic and shift to online learning.

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

B. Under Fair Use

A determination of fair use involves both questions of law and questions of fact.336 It must be noted that while often findings of fair use are predicated on the four factors of fair use laid out in statutory law, the factors are not meant to be exclusive as other circumstances arising from the facts may be considered in an evaluation of whether a certain use may be ruled as fair or unfair.337 More importantly, it is emphasized that a fair use evaluation “is not to be simplified with bright-line rules”338 and each case calls for its own thorough analysis.339 Considering the necessity for a case-by-case analysis, the analysis in this chapter will endeavor to discuss in broad strokes the application of the factors of fair use to digitization practices. However, the Proponent notes that the specifics of every library’s practice of digitization or CDL, considering the range of institutions and methods utilized, may not be covered.

I. First Factor: Purpose and Character of the Use

335 INTELL. PROP. CODE, § 184.1 (h).
336 Harper and Row, 471 U.S. at 560 (citing Pacific & Southern Co. v. Duncan 744 F.2d 1490, 1495, n. 8 (11th Cir. 1984) (U.S.)).
337 Harper and Row, 471 U.S. at 560.
338 Campbell, 510 U.S. at 577.
339 Id.
As already established in the case of *Cambridge University Press*, format shifting of a work from print to digital is not transformative.\(^{340}\) Digitization primarily involves the mere scanning of a work in its print format and the conversion of the scan into a digital file.\(^{341}\) Even the foremost proponents for CDL readily concede that the digitization practice is not transformative\(^{342}\) as it fails to “add something new, with a further purpose or different character, altering the [original work] with new expression, meaning or message”\(^{343}\) as jurisprudence requires.

Digitization is often practiced around the globe by university libraries, public libraries, and non-profit institutions.\(^{344}\) In the Philippines as well, it can be noticed that it is those same types of institutions that are practicing digitization of collections albeit in a smaller scale compared to other jurisdictions.\(^{345}\) To recall, the first factor asks for the purpose and character of the use, particularly “whether such use is of a commercial nature or is for non-profit educational purposes.”\(^{346}\)

It has been opined that digitization for academic libraries would most likely pass the first factor of fair use.\(^{347}\) This is due to the academic libraries’ direct connection to the universities they are part of as educational institutions and the clear purpose for research and scholarship that these libraries serve. Public libraries are established and supported by the National Library in partnership with the local government units.\(^{348}\) They are non-profit and have been recognized as key institutions in supporting the educational development of their communities.\(^{349}\) As such, public libraries can likely pass the first factor of fair use as well.

For non-profit institutions, it is submitted that the use must clearly be shown to be non-profit and for educational purposes. Jurisprudence elaborates

\(^{340}\) *Cambridge University Press*, 769 F.3d at 1262.  
\(^{341}\) *Reitz*, supra note 68, at 219.  
\(^{342}\) Hansen & Courtney, supra note 115.  
\(^{343}\) *Campbell*, 510 U.S. at 579.  
\(^{345}\) See infra Chapter 2 (B).  
\(^{346}\) *INTELL. PROP. CODE*, § 185.1 (a).  
\(^{347}\) Bernardo, supra note 35, at 66.  
\(^{348}\) Republic Act No. 7743, §§ 2 & 7.  
\(^{349}\) See id. § 1.
that the status as a non-profit organization alone does not immediately lead to a conclusion of a non-profit, educational purpose.\textsuperscript{350} To note, Internet Archive, who is currently facing a lawsuit for CDL practices, is a non-profit institution itself.\textsuperscript{351} There have been a few rulings from the U.S. courts of appeal that have even considered the donations received by such institutions or even recognition from the community to be gain/profit from the use that would warrant a finding against fair use.\textsuperscript{352}

As the U.S. Supreme Court penned, “the mere fact that a use is educational and not for profit does not insulate it from a finding of infringement.”\textsuperscript{353} Thus, while this factor may be for fair use in the context of digitization of libraries, it is submitted that it highly depends on what type of institution is the subject of litigation, whether academic, public, or non-profit. Furthermore, it has been reiterated that considering the provision of access to full-text copies, the purpose of digitization serves the exact same purpose that these works are in the market for, despite such purpose being for education.\textsuperscript{354}

Thus, digitization is obviously non-transformative and does not add or alter anything new to the work, simply shifting a work from one format to the other. While it may be recognized that the purpose and character of the use is educational, jurisprudence has also cautioned that an educational purpose does not insulate from a finding against fair use.\textsuperscript{355} It is submitted that the first factor would be for fair use for the digitization done particularly by academic libraries and either neutral or against fair use for other libraries or archives.

II. Second Factor: Nature of the Copyrighted Work

An early problem with digitization has been the lack of proper guidelines as to the works that it has covered. The Internet Archive’s Open Library, which hosts as well the digitized collections of partner public libraries and university libraries, features a mix of different genres of books,

\textsuperscript{350} See Cambridge University Press, 769 F.3d at 1264.
\textsuperscript{353} Campbell, 510 U.S. at 584.
\textsuperscript{354} Penguin Group (USA), 2015 WL 11170727, at 5.
\textsuperscript{355} Campbell, 510 U.S. at 584.
ranging from young adult fiction to self-help books to textbooks.\textsuperscript{356} Libraries often carry a multitude of genres in their collections.

Jurisprudence does find that if the nature of the work leans more towards that of a factual nature as opposed to fiction or fantasy, there is more likelihood for the second factor to lean more for fair use.\textsuperscript{357} However, in a number of cases involving the copying of academic works, the U.S. courts have also observed that in these types of works, there are times when the work adds “evaluative, analytical, or subjectively descriptive material that surpasses the bare facts necessary to communicate information, or derives from the author’s experiences or opinions[.]”\textsuperscript{358} In these cases, jurisprudence has guided that the courts should find that the second factor would be either neutral or against fair use, depending on the domination of original material aside from the facts laid out in the work.\textsuperscript{359}

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

The analysis of the third factor is rather straightforward. Digitization necessarily utilizes the entirety of the work as it digitizes and provides access of the work to its patrons. The proponents for digitization argue that there are limitations on the digitized copy to render access to the work only temporary and under the technological control of the library and that such should lead to the third factor being in favor of fair use.\textsuperscript{360} It is submitted that such point is a mistaken appreciation of the third factor. The third factor of fair use does not ask if there are technological controls for the access of the work or if the access to the work is only temporary. The third factor simply calls for an examination of the amount and substantiality of the work used.\textsuperscript{361}

An important consideration is the amount of the work utilized that would result in the provision of a market substitute. As explained in the \textit{Google Books} case, “The larger the amount, or the more important the part, of the original that is copied, the greater the likelihood that the secondary work might serve as an effectively competing substitute for the original, and might...

\textsuperscript{356} Internet Archive, Open Library, \textit{available at} https://openlibrary.org/ (last accessed Aug. 27, 2022).
\textsuperscript{357} \textit{ABS-CBN}, 753 SCRA at 59.
\textsuperscript{358} \textit{Cambridge University Press}, 769 F.3d at 1270.
\textsuperscript{359} \textit{Id}.
\textsuperscript{360} Hansen & Courtney, \textit{supra} note 115.
\textsuperscript{361} \textsc{Intell. Prop. Code}, § 185.1 (c).
therefore diminish the original rights holder’s sales and profits.”\textsuperscript{362} This is where the third factor ties in with the fourth factor of fair use.\textsuperscript{363}

In a District Court decision, it had been ruled that the usage of the entire work would tip the factor of fair use against the user.\textsuperscript{364} In a letter from the U.S. Copyright Office to a Senate inquiry specifically requesting guidance regarding the Internet Archive’s CDL practices, the U.S. Copyright office reiterated its stand from several previously published reports that it is doubtful that the provision of digital access to complete works can be considered fair use.\textsuperscript{365} Thus, the third factor will be against fair use for digitization.

IV. Fourth Factor: Effect of Use Upon the Market

The fourth and last factor is considered the most important factor in the overall fair use analysis.\textsuperscript{366} This importance is all the more bolstered for an analysis of digitization since in the first factor analysis, it was put forth that digitization is a non-transformative use and that the provision of these digitized copies serve the exact same purpose as the original works, whether for education, entertainment, or such.\textsuperscript{367}

In the analysis of this factor, it must be recalled that fair use is an affirmative defense.\textsuperscript{368} Thus, the burden of proof is wholly upon the party alleging fair use to sufficiently prove the lack of market harm.\textsuperscript{369} This would be a difficult task for libraries and archives to overcome. It has been observed by jurisprudence even that the lack of provision of financial data showcasing losses to a publisher-plaintiff is not fatal to its cause.\textsuperscript{370} The District Court observed even that the publisher was “under no such obligation, however, because ‘the fourth factor of the fair use inquiry cannot be reduced to strictly monetary terms.’”\textsuperscript{371}

\textsuperscript{362} Google, 804 F.3d at 221.
\textsuperscript{363} INTELL. PROP. CODE, § 185.1 (c) & (d).
\textsuperscript{364} Penguin Group (USA), 2015 WL 11170727, at 5.
\textsuperscript{365} Letter from Maria Strong, Acting Register of Copyrights and Director of the U.S. Copyright Office to Senator Tom Udall (May 15, 2020) (available at https://www.copyright.gov/laws/hearings/Sen-Udall-Response-National-Emergency-Library.pdf (last accessed Aug. 27, 2022)).
\textsuperscript{366} Harper & Row, 471 U.S. at 566.
\textsuperscript{367} Cambridge University Press, 769 F.3d at 1275.
\textsuperscript{368} Campbell, 510 U.S. at 590.
\textsuperscript{369} Am. Geophysical Union v. Texaco Inc., 60 F.3d 913, 918 (2d Cir.1994) (U.S.).
\textsuperscript{370} Penguin Group (USA), 2015 WL 11170727, at 5.
\textsuperscript{371} Id.
It is to be noted that while, traditionally, the fourth factor analysis does pertain to monetary or commercial value, courts have also considered at times other forms of harm to market factors such as industry reputation and relationship with authors, customers, and distributors. When it comes to digitization of works, the cited market harm is often to two types: licensing revenues and market substitution.

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

Ultimately, the analysis of digitization under the fourth factor must center on “consider[ing] not only the extent of market harm caused by the particular actions of the alleged infringer, but also whether unrestricted and widespread conduct of the sort engaged in by the [user] ... would result in a substantially adverse impact on the potential market for the original.” Focus must be made on the unrestricted and widespread conduct of the sort as a large concern with digitization as currently practiced by its proponents is the lack of consistent controls amongst its practitioners. Proponents of digitization range from providing access through websites accessible by any patron online from anywhere in the globe to utilization of online platforms such as Google Drive or Adobe. To note, one of the harms cited by publishers in

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372 Id. & Gregory, 689 F.3d at 64.
373 Plaintiffs’ Memorandum of Law, supra note 351, at 35.
374 Cambridge University Press, 769 F.3d at 1276-1277.
377 Campbell, 510 U.S. at 590.
378 See Internet Archive, supra note 356.
the *Google Books* case was the exposure to risks of hacking of the digital copies held by Google.\(^{380}\) The Circuit Court declined to rule on such but noted that the “[exposure of] the rights holder to destruction of the value of the copyright resulting from the public’s opportunity to employ the secondary use as a substitute for purchase of the original (even though this was not the intent of the secondary user) […] might well furnish a substantial rebuttal to the secondary user’s claim of fair use.”\(^{381}\)

The public nature and mission of libraries and archives also lend to a ruling against the fourth factor as the potential for market harm rises. “If anyone could freely access the Works, electronically or otherwise, the [plaintiff] would have no market in which to try and publish, disseminate, or sell its [works].”\(^{382}\) Considering it is the user who has the burden of proof to prove the lack of market harm\(^{383}\) such that it does not supplant or supersede the market of the original work,\(^{384}\) it is submitted that a way to pass the fourth factor of fair use would be for the library to prove that it only serves a limited number of individuals and employs strict technological controls to the access of the digitized copy. Such would be ideal for an academic library which solely serves its students and faculty members.\(^{385}\)

Otherwise, the threat for market substitution is very real with the danger of exposure of the digital copies as well as the potential widespread conduct of digitization. Furthermore, the Philippine book industry is largely dependent on its textbook and educational book catalogs\(^{386}\) and have even protested against the massive losses incurred in loss of license fees due to the unauthorized and unlicensed usage of portions of their publications.\(^{387}\) Thus, it is submitted that under the fourth factor, digitization would not be considered fair use.

\(^{380}\) *Google*, 804 F.3d at 227.

\(^{381}\) *Id*.

\(^{382}\) *Gregory*, 689 F.3d at 65.

\(^{383}\) *Am. Geophysical Union*, 60 F.3d at 918.


\(^{385}\) *Bernardo*, *supra* note 35, at 68.

\(^{386}\) *Balisi*, *supra* note 375.

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

“If reading can transform a man, imagine what it can do to a nation. What the reading public needs is a more diverse spectrum of genres and original content to support their interests and keep them inspired and curious. Copyright is a powerful tool that can give us that[.]”
- Rowel S. Barba, IPOPHL Director General388

The grant of copyright protection and limitation is a balancing of interests389 For digitization, there are the interests of authors and publishers who seek to protect their economic rights and safeguard their works from potential widespread harm in conflict with the interests of libraries and their patrons who seek to adapt to the new digital normal. It is thus proposed that the current library exemption be amended in order to embrace digitization into the protection of the IP Code. An amendment of Section 188 would be proper in order to properly balance the interests of both authors and libraries, archives, and their patrons.

A legislative amendment would also be preferable to reliance on fair use. As already established in the previous Chapter, it is highly likely that courts would rule that digitization would not constitute fair use.390 Furthermore, it has already been expressed by library organizations as well as the U.S. Copyright Office that fair use is a tenuous haven for libraries and archives considering its lack of certainty.391 This is in contrast to a clear cut statutory exemption that would provide a “a robust, certain safe harbor for their essential, everyday activities.”392 The defense of fair use would also require a thorough case-by-case analysis that coupled with the burden of proof upon the party alleging fair use and the cost of litigation would further burden libraries and archives who often struggle already with meager budgets.

389 See infra Chapter 3 (B).
390 See infra Chapter 5 (B).
391 Section 108 Discussion Document, supra note 32, at 15.
392 Id.
A. The Framework of the Current Exemption

Despite the outdated limitation of reproduction by reprographic means, Section 188 actually provides a good framework for a library exemption. It passes the requirements of the three-step test, namely the exemption being confined to certain special cases with the cases not conflicting with a normal exploitation of the work and not unreasonably prejudicing the legitimate interests of the author.

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

a) Fragile or rare works that cannot be lent to users in their original forms;

b) Isolated articles that are contained in composite works or brief portions of other published works provided to patrons requesting such works for research and study; and

c) Preservation or replacement copies in the occasion that a work is “lost, destroyed or rendered unusable ... and copies are not available with the publisher.”

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

393 INTLL. PROP. CODE, § 185
394 Berne Convention, supra note 171, art. 9 (2); TRIPS Agreement, supra note 176, art. 13; & WIPO Copyright Treaty, supra note 165, art. 10.
395 INTLL. PROP. CODE, § 188.1 (a).
396 Id. § 188.1 (b).
397 Id. § 188.1 (c).
398 Id. § 188.1.
B. The Metes and Bounds of a New Exemption

Under the IP Code, reproduction is defined as “the making of one (1) or more copies, temporary or permanent, in whole or in part, of a work or a sound recording in any manner or form.” Thus, the provision embraces the making of copies in any form, whether digital or non-digital. This particular definition would make the transition of Section 188 rather simple as the definition of reproduction already contemplates digital copies. It is thus proposed that the mentions of reprographic reproduction in Section 188 be deleted and simply replaced as reproduction, referencing to the definition found in Section 171.9. The three instances already listed in Section 188 should be retained as a measure to limit the types of works that such reproduction, digital or reprographic, could apply to.

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

In the U.S. library exemption, the grant of access to digital copies is limited to access within the premises of the library or archive. Similarly, the European Union has included as one of the limitations to copyright the use by communication or making available, for the purpose of research or private study, to individual members of the public by dedicated terminals on the premises of establishments referred to in paragraph 2 (c) of works and other subject-matter not subject to purchase or licensing terms which are contained in their collections.

It is proposed that such limitation be included as well in the Philippine library exemption. Considering that majority of the libraries in the Philippines

\[\text{Intell. Prop. Code, § 171.9.}\]
\[\text{Id. § 188.1.}\]
\[\text{Id. § 171.9.}\]
\[\text{This can be gleaned from the emphasis on sufficient technological controls by proponents of digitization. See Hansen & Courtney, supra note 115.}\]
\[\text{U.S. Copyright Act, § 108 (b) (2) & (c) (2).}\]
\[\text{Directive 2001/29/EC, supra note 104, art. 5 (3) (n).}\]
provide computer units within their premises and such are frequently used by patrons, this would ensure both ease of access to works and proper controls upon the access of such digital copies.

For the provision of access in digital or online platforms however, it is proposed that such be added to Section 188 as well, mirroring the language of Section 184.1 (h), wherein the grant of access should be compatible with fair use. However, the Proponent proposes the addition of the phrase “to be determined by the Intellectual Property Office” in order to grant authority upon the Intellectual Property Office to issue implementing regulations or guidelines as to the proper technological controls necessary to grant access to digitized works online while safeguarding the copyright of the authors. It is proposed that such regulations be issued after proper consultations with the necessary parties of interest, such as publishers and librarians.

407 INTELL. PROP. CODE, § 184.1 (h).
CHAPTER SEVEN: CONCLUSION & RECOMMENDATION

“But why’s she got to go to the library?”
“Because that’s what Hermione does,”
said Ron, shrugging.
“When in doubt, go to the library.”
- Harry Potter and the Chamber of Secrets\footnote{J.K. Rowling, Harry Potter and the Chamber of Secrets 298-299 (1998).}

A. Conclusion

Copyright law, in all its vibrancy, represents the intersection of multiple interests. As a statutory grant of right, the bounds of such right is ultimately up to Congress in its legislative wisdom to balance the scales.\footnote{See infra Chapter 3 (B).} The foundation of the rights secured for authors and artists has always been the protection of their creations for the benefit of the people.\footnote{Phil. Const. art. XIV, § 13.} “The use of intellectual property bears a social function.”\footnote{Intell. Prop. Code, § 2.}

Perhaps no other institution exemplifies the social function of intellectual property better than our libraries and archives. Libraries predate even the earliest copyright laws.\footnote{Katz, supra note 142, at 84-85.} While the development of copyright laws from its roots in English royal statutes\footnote{Statute of Anne.} to the current Philippine Intellectual Property Code\footnote{Intell. Prop. Code.} have demonstrated a recognition for the importance of libraries and archives in the education and full development of citizens through the provision of library copyright exemptions, the roles of libraries as stewards of copyright law must also be emphasized.\footnote{American Library Association, supra note 154.}

As stewards of copyright law, they are bound to balance both the intellectual property rights of authors and artists whose works they possess and the great public interest which they serve.\footnote{White, supra note 2.} In the past twenty years, many changes have thrust both libraries and the laws of copyright into a new frontier. The rise of the Internet, the development of new technologies, the digital shift, and a global pandemic have exacerbated the gap between statutory library exemptions and current library practices.

\begin{itemize}
\item \footnote{J.K. Rowling, Harry Potter and the Chamber of Secrets 298-299 (1998).}
\item \footnote{See infra Chapter 3 (B).}
\item \footnote{Phil. Const. art. XIV, § 13.}
\item \footnote{Intell. Prop. Code, § 2.}
\item \footnote{Katz, supra note 142, at 84-85.}
\item \footnote{Statute of Anne.}
\item \footnote{Intell. Prop. Code.}
\item \footnote{American Library Association, supra note 154.}
\item \footnote{White, supra note 2.}
\end{itemize}
This gap between statute and practice is readily seen in the practice of digitization. Digitization provides a new avenue for libraries to be able to preserve certain library resources and provide access to these resources,\(^\text{417}\) which is all the more important in this increasingly online age. The cloud that has continuously hounded the practice of digitization by libraries, whether in the Philippines or in other jurisdictions, has been the lack of legal clarity with regard to the validity of such practices under copyright law.

This study has approached this question by analyzing digitization: first, under the lens of the library exemption in the IP Code and second, under fair use. The library exemption found in the IP Code is in Section 188.\(^\text{418}\) Section 188 outlines a copyright limitation solely for reprographic reproduction of works.\(^\text{419}\) Digital or machine-readable copies were explicitly ruled out from inclusion in Section 188.\(^\text{420}\)

As observed from the experience of other jurisdictions, an outdated library exemption leads libraries and their patrons to rely upon fair use. While the doctrine of fair use was developed in order to “avoid stifling ‘the very creativity which [copyright] law is designed to foster’,”\(^\text{421}\) its nature as an exception and an affirmative defense\(^\text{422}\) under Philippine law prove it to be a difficult and unwieldy tool for the protection of digitization practices.

After careful perusal of both Philippine and U.S. jurisprudence on fair use, the study ultimately concluded that digitization as it is currently practiced by its foremost proponents would not be considered fair use. Anent the first factor (purpose and character of the use), it was previously established in *Cambridge University Press* that digitization or the shifting of formats from print to digital is not transformative.\(^\text{423}\) While educational purpose and non-profit character of libraries would initially favor fair use, jurisprudence have cautioned that such does not immediately “insulate [ ] from a finding of infringement.”\(^\text{424}\) Correspondingly, digitization serves the same purpose that

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\(^{417}\) Nnenna & Ume, *supra* note 80, at 36.

\(^{418}\) INTELL. PROP. CODE § 188.

\(^{419}\) *Id.*

\(^{420}\) Copyright Safeguards and Regulations, Rule 2 (17).

\(^{421}\) *ABS-CBN*, 753 SCRA at 57 (citing Bunker, *supra* note 263).

\(^{422}\) *ABS-CBN*, 753 SCRA at 57 & 62.

\(^{423}\) *Cambridge University Press*, 769 F.3d at 1262.

\(^{424}\) *Campbell*, 510 U.S. at 584.
the works considered are being published for and jurisprudence dictates that this leads to a bolstered weight of the fourth factor in the overall fair use analysis.\textsuperscript{425} Thus, the first factor would be rather neutral.

Jurisprudence states that the likelihood of the second factor to lean towards fair use highly depends on the nature of the work.\textsuperscript{426} Based on a review of the works being digitized, such are from a mix of genres, ranging from factual to fictional works.\textsuperscript{427} Thus it is submitted that the second factor, would also be neutral or against fair use, depending on the genre of works that the library is digitizing.

The third factor, the amount and substantiality of the work used, would be heavily against fair use. Digitization necessarily utilizes and provides access of the entirety of the work to its patrons.\textsuperscript{428} The defense of the proponents of digitization argue that temporary access and technological controls exercised would temper the use of the entirety of a work.\textsuperscript{429} However, such is a mistaken appreciation of the third factor which does not ask regarding the nature of access to the work, whether permanent or temporary. It cuts straight to an evaluation of the amount of the work used and the substantiality of such amount to the value of the work.\textsuperscript{430}

While jurisprudence provides that the usage of the entirety of the work may still be considered fair use at certain times,\textsuperscript{431} the trend of U.S. jurisprudence dealing with digitization of works has revealed an acknowledgement that the usage of large amounts of the work or the entire work itself would tip the factor of fair use against the user.\textsuperscript{432} The U.S. Copyright Office has also confirmed that its official position is that the provision of digital access to complete works would not be considered fair use.\textsuperscript{433}

\textsuperscript{425} Cambridge University Press, 769 F.3d at 1275.
\textsuperscript{426} ABS-CBN, 753 SCRA at 59.
\textsuperscript{427} See Internet Archive, supra note 356.
\textsuperscript{428} See infra Chapter 2 (B) & (D).
\textsuperscript{429} Hansen & Courtney, supra note 115.
\textsuperscript{430} INTELL. PROP. CODE, § 185.1 (c).
\textsuperscript{431} ABS-CBN, 753 SCRA at 60.
\textsuperscript{432} Google, 804 F.3d at 221 & Penguin Group (USA), 2015 WL 11170727, at 5.
\textsuperscript{433} Strong, supra note 365.
The fourth factor (effect of use upon the market), called as the most important factor, is also heavily against the consideration of digitization as fair use. The ultimate consideration was whether digitization would lead to an “unrestricted and widespread conduct ... that would result in a substantially adverse impact on the potential market for the original.”434 A key question as well is whether digitization would provide an effective substitute such that substantive harm would be caused to the economic benefits of authors and other rightsholders.435

It is observed that there is a lack of consistent and standardized set of controls in the practice of digitization with libraries opting for different kinds of technological controls and digital platforms.436 Thus, the exposure to the risk of hacking and abuse of use that were earlier expressed by publisher-plaintiffs in the Google Books case which the Circuit Court of Appeals noted would constitute a “rebuttal to [a] claim of fair use”437 is present in this case. The lack of consistent controls combined with the public nature of access libraries and archives provide also lend to a conclusion that the digital copies produced through digitization would serve as market substitutes to the detriment of the value of the original works.

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

B. Recommendation

In balancing the interests of copyright and seeking to push copyright law further into the digital age, this thesis proposes the amendment of Section 188 of the IP Code438 in order to embrace digitization practices into the folds of statutory protection. The amendment is necessary in order to address the interests of authors and publishers and the interests of libraries and their patrons who seek to adapt to the new digital normal. In honor of the great

434 Campbell, 510 U.S. at 590.
435 See Google, 804 F.3d at 227.
436 See Internet Archive, supra note 356 & Virginia’s Academic Library Consortium, supra note 379.
437 Google, 804 F.3d at 227.
438 INTELL. PROP. CODE, § 188.
benefits libraries serve to their communities as well, the amendment would provide a safe harbor for libraries that have already been practicing digitization.

The IP Code already provides a definition of reproduction that embraces the making of copies in any form, whether digital or non-digital.\(^{439}\) Thus, the proposed amendment would delete the mentions of reprographic reproduction and replace such with reproduction, adopting the definition from Section 171.9.

It is further proposed that a subsection be added to Section 188 to specifically outline how access may be given to digitized works. It is submitted that such is necessary in order to address the concerns previously raised regarding the greater risk of exposure to market harm that the technology and the Internet could cause. The first avenue of access, distribution of the digital copies through terminals in the premises of the library, draws inspiration from U.S. copyright law and European Union directives.\(^{440}\) The second avenue of access, the distribution through online platforms, is limited by the requirement of compatibility with fair use mirroring Section 184.1 (h)\(^{441}\) and the proviso that such online platforms and accompanying technological controls would be determined by the Intellectual Property Office. It is proposed that such determination would be in the authority of the Intellectual Property Office and would be arrived at after studies and consultations are conducted.

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\(^{439}\) *Id.* § 171.9.

\(^{440}\) U.S. Copyright Act, § 108 (b) (2) & (c) (2) & Directive 2001/29/EC, *supra* note 104, art. 5 (3) (n).

\(^{441}\) INTELL. PROP. CODE, § 184.1 (h). “The use made of a work by or under the direction or control of the Government, by the National Library or by educational, scientific or professional institutions where such use is in the public interest and is compatible with fair use[.]” *Id.*
ANNEX A
PROPOSED AMENDMENT
Republic Act No. __
AN ACT AMENDING SECTION 188 OF REPUBLIC ACT NO. 8293, OTHERWISE KNOWN AS THE “INTELLECTUAL PROPERTY CODE OF THE PHILIPPINES”, AS AMENDED.

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

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

“Section 188. Reproduction by Libraries. — 188.1. Notwithstanding the provisions of Subsection 177.1, any library or archive whose activities are not for profit may, without the authorization of the author of copyright owner, make a limited number of copies of the work, as may be necessary for such institutions to fulfill their mandate:
(a) Where the work by reason of its fragile character or rarity cannot be lent to user in its original form;
(b) Where the works are isolated articles contained in composite works or brief portions of other published works and the reproduction is necessary to supply them; when this is considered expedient, to persons requesting their loan for purposes of research or study instead of lending the volumes or booklets which contain them; and
(c) Where the making of such limited copies is in order to preserve and, if necessary in the event that it is lost, destroyed or rendered unusable, replace a copy, or to replace, in the permanent collection of another similar library or archive, a copy which has been lost, destroyed or rendered unusable and copies are not available with the publisher.

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

188.3. The distribution by a library or archive of a digital copy of a work reproduced under the instances listed in the preceding paragraphs shall be permissible:
a) Where the copy that is reproduced in digital format is distributed within the premises of the library or archive in lawful possession of such copy; or
b) Where the copy that is reproduced in digital format is distributed through digital platforms under the direction and control of the library or archive in lawful possession of such copy and in a manner compatible with fair use, to be determined by the Intellectual Property Office.”

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

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

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