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POLICY BRIEF

Lacking Copyright: A Policy Brief on the Prohibition on the Public Education Sector of the Philippines to Own Copyright and Its Consequences

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Abstract: The COVID-19 pandemic has brought about numerous consequences upon the global community, whether socially or economically. The education sector has not been isolated from the effects of the pandemic, having to largely suspend face-to-face classes, its traditional approach to learning, in favor of alternative modalities in teaching. To ensure learning continuity despite the difficulties caused by the pandemic, the Department of Education - Philippines promulgated a series of DepEd Orders directing public and private schools to adopt alternative methods of learning such as online distance learning and the preparation of Self Learning Modules. The resort to the different learning modalities brings about untold possible issues and consequences faced by the basic education sector primarily the inability of the government to assert copyright over its work. The lack of copyright over its own works means that the government will be at a disadvantage when it comes to ensuring that government works, specifically self-learning modules and other educational materials, will not be the subject of alteration, modification, and/or appropriation by third parties and individuals that may possibly deviate from the standard set by the government. This paper seeks to suggest a change in policy on the current intellectual property laws in the Philippines in light of the identified issue. It proposes a change in what is covered by works of government and the application of the Sweat of the Brow Doctrine to protect works that are not laws or edicts of Government.

Keywords: Copyright, Works of Government, Edicts of Government, Sweat of the Brow Doctrine, Modules, Basic Education

Introduction

The COVID-19 pandemic has brought the biggest disruption in education in recent history. The impact is particularly glaring in many developing nations. In the United Nations Educational, Scientific and Cultural Organization (UNESCO) Global Monitoring Report for 2020, many countries were forced to adapt to the circumstances of the pandemic. However, in many developing nations, universal access to the internet and subsequently online media and platforms is limited. As cited in the report, in Organisation for Economic Co-operation and Development (OECD) countries, 1 in 20 students, and almost 1 in 10 of those attending disadvantaged schools, lack an internet connection at home. Many countries are also unable to provide access to online educational materials uniformly and regularly due to infrastructural problems.

Notwithstanding the lack of infrastructural and technological support, many nations continued to adopt non-face-to-face modalities such as online distance learning due to the glaring health risks posed by physical classes and the relative unavailability of vaccines and uncertainty of having children of all ages undergo mass vaccinations.

Responding to the Unprecedented COVID-19 Pandemic

The Philippines, through the Department of Education (DepEd), promulgated DepEd Order No. 12, s. 2020 which adopted the Basic Education Learning Continuity Plan for School Year 2020-2021 in the Light of the COVID-19 Public Health Emergency. This order emphasized the need for the State to capitalize on alternative methods of learning to ensure that education can be delivered nationwide while considering the health risk in each locality. These alternative methods of learning were compressed to the following modalities (area-to-area basis based on the severity and risk of contraction of COVID-19): face-to-face, distance learning (Online, Modular, and TV/Radio Based), blended learning, and homeschooling.

DepEd Order No. 12, s. 2020 facilitated the conduct of classes through distance learning as an alternative delivery mode, primarily through the use of Self-Learning Modules (SLMs) by the students. As part of the shift to this learning modality, SLMs were developed and made available in print and digital

format for the use of schools. Materials were uploaded in the DepEd Learning Resource Portal and DepEd Commons.

Previously, under Republic Act (R.A.) No. 10618 or the “Rural Farm Schools Act,” Alternative Delivery Modes (ADM) were originally intended to be used in a smaller scale, i.e. marginalized and rural landscapes. However, DepEd Order No. 12, s. 2020 required schools, whether public or private to resort to ADMs thus, resulting in its large-scale usage. Under DepEd Order No. 17, s. 2020 dated July 17, 2020 or the “Additional Provisions to DepEd Order No. 013, s. 2020 (Readiness Assessment Checklist for Learning Delivery Modalities in the Learning Continuity Plan of Private Schools”), private schools have also been encouraged to avail of DepEd’s learning resources in aid of the learning and teaching process i.e., self-learning modules, DepEd Commons, and the Learning Resources and Management Portal.

The shift in the utilization and definition of ADM and SLMs is exhibited in the passage of DepEd Order No. 18, s. 2020 dated July 20, 2020 or the Policy Guidelines for the Provision of Learning Resources in the Implementation of the Basic Education Learning Continuity Plan” 18, s. 2020. This DepEd Order redefined ADMs or SLMs as “*self-contained, self-instructional, self-paced, and interactive learning resources for public schools intended for learning a specific topic or lesson where the learner interacts actively with the instructional material rather than reading the material passively*”.

The sudden shift in the usage of ADMs or SLMs may lead to policy gaps in the production of SLMs through the lens of intellectual property law.

Scope and Delimitation

The scope of this paper is limited to the SLMs of basic education institutions since it is the teachers, employed by DepEd, who are tasked to develop SLMs that cannot and are not protected by Copyright. They differ from higher educational institutions because higher education institutions have broader academic freedoms enshrined in Section 5(2), Article XIV of the 1987 while basic education institutions are beholden to stricter regulation on the part of the State to ensure the delivery of quality basic education in primary and secondary levels of education.

To illustrate this stricter regulation, DepEd promulgated DepEd Order No. 13, s. 2020 (Readiness

Assessment Checklist for Learning Delivery Modalities in the Learning Continuity Plan of Private Schools). This required that private basic educational institutions comply with the minimum standards prescribed by DepEd, including having appropriate SLMs for their students.

Problems amidst existing Philippine Intellectual Property Laws on Copyright

In the Philippine context, the State is taking the lead in the development of modules and materials necessary for distance learning. However, the massive development of such assets may pose complications in quality control and accountability due to the restrictions in Philippine Copyright law, i.e. its inability of the government to assert copyright protection.

DepEd Order No. 12, s. 2020 recognizes the need to comply with various principles of Intellectual Property with respect to creation, production, distribution, and utilization. Further, under DepEd Order No. 18, s. 2020, the unauthorized uploading, printing, and conduct of activities involving the sharing of digital files for purposes other than what was intended are prohibited and may be the ground of sanctions. Noticeably, there are no further interpretations of the provisions of the Intellectual Property Code and its provisions on Copyright.

Copyright has two types: economic rights and moral rights (WIPO, 2016). Economic rights would allow owners to derive financial reward from the use of their works by others. Moral rights allow authors and creators to take certain actions to preserve and protect their link to their work. The author or creator may be the owner of the economic rights, or those rights may be transferred to one or more copyright owners.

In the Philippine context, economic rights involve exclusive rights to reproduction, preparation of derivative works, the first public distribution, rental, public display and performance and other communications (R.A. No. 8293, Sec. 177). On the other hand, the protection of an author's moral right further incentivizes creation of artistic and literary works by protecting the rights of authors to attribution and the protection of the integrity of their works (R.A. No. 8293, Sec. 193). While economic rights may be licensed or assigned (R.A. No. 8293, Sec. 180), moral rights may only be waived through a written instrument (R.A. No. 8293, Sec. 195).

Copyright can be integral to protecting one's economic rights and at the same time foster innovation and creativity. This has been explained by the World Intellectual Property Organization (2016) when it enumerated the reasons why intellectual property laws should be recognized and protected by countries, to wit: (1) give statutory expression to the rights of creators and innovators in their creations and innovations, vis-a-vis the public interest in accessing creations and innovations; and (2) to promote creativity and innovation, which in turn contributes to economic and social development.

In the context of basic education, there are many intellectual creations that can be developed in the course of a regular school year from science and technology fairs, essay writing competitions, down to the very texts used in the curriculum. In the case of SLM development, copyright tends to fall along the lines of literary and artistic creations, such as books, audiovisual works, musical compositions, and drawings.

However, Section 176 of R.A. No. 8293 expressly excludes works of government from copyright protection. The Intellectual Property Office of the Philippines (IPOP) Memorandum Circular No. 2020-024, the Copyright Rules and Regulations for the Government, further defined work of the government as "*a work created by an officer or employee of the Philippine Government or any of its subdivisions and instrumentalities, including government-owned or controlled corporations, as a part of the officer or employees' regularly prescribed official duties*". The Intellectual Property Code only permits the government in carrying out proprietary rights, such as: (1) prior approval and the imposition of payment of royalties if government works were to be exploited for profit (R.A. 8293, Sec. 176.1); and (2) for the government to be a transferee of copyright, which means works created by someone else and not an employee of the government performing official duties.

The rationale for the exclusion of artistic and literary creations of government employees and entities is rooted in the fact that like other government services, they are public goods which must be non-excludable and non-rivalrous (Samuelson, 1954:387). This is inconsistent with copyright which creates an exclusive right to "*carry out, authorize or prevent*" the exercise of economic rights (R.A. No. 8293, Sec. 177).

Copyright protection for Works of Government of other countries

Various jurisdictions treat Works of Government differently. In the United States Copyright Law of 1976, particularly Sec. 105, it proscribes copyright protection for works of the Federal Government. However, under Sec. 105(b), covered authors are entitled to own copyright over the works. Covered authors are further described as civilian members of the faculty of a covered institution which includes the National Defense University and the United States Military Academy.

According to the 1957 Copyright Act of India, government works, which include works published under the direction or control of the Government of India or any department of the Government, any legislature in India and any court, tribunal, or other judicial authority in India, are first owned by the Government if there is no agreement to the contrary.

In the United Kingdom, they have Crown Copyright which are “works made by Her Majesty or by an officer or servant of the Crown in the course of his duties” and are, under Section 163 of the Copyright, Designs and Patents Act of 1988, entitled to copyright protection. Crown Copyright guarantees the integrity and authenticity of official government publications (Fitzgerald, n.d.). Works which are made under the House of Lords or the House of Commons are likewise entitled to Parliamentary Copyright. In both situations, the Crown and the Parliament are first owners of the works.

In Japan’s Act No. 48 or its Copyright Act, works that are expressly not entitled to copyright includes their “Constitution and other laws and regulations, notifications, instructions, circular notices, and other similar materials issued by a national or local government agency, judgments, decisions, orders, and decrees of the court as well as rulings and decisions made by administrative agencies; and translations and compilations.”

The different reiterations of the Copyright Law in the Philippines have been consistent in disallowing copyright protection to works of Government. The Philippines’ Act 3134 (1924) entitled “An Act to Protect Intellectual Property”, which is based on the US Copyright Law of 1909, declared that there is “no copyright in any publication and official document of the Philippine Government and in speeches, lectures, sermons, addresses and dissertations pronounced

or read in courts of justice, before administrative tribunals, in deliberative assemblies, and in meetings of public character” (Intellectual Property Office Website). Presidential Decree No. 49 or the Decree on Protection of Intellectual Property maintained that no copyright should exist in any work of the Government; and it provided that prior approval or condition should be required for the use for any purpose of “statutes, rules and regulations, and speeches, lectures, sermons, addresses, and dissertations pronounced, read or rendered in courts of justice before administrative agencies, in deliberative assemblies, and in meetings of public character.”

Another effect of the absence of protection of works of government is the creation of what may be considered as derivative works. Section 173 of R.A. No. 8293, as amended, provides copyright protection to derivative works. DepEd Order No. 17, s. 2020 encourages Private Schools to adapt SLMs for their own utilization. If the intended use is for academic/ education purposes, this may allow for the modification of the work or resources albeit with modifications to conform to the individual plans of the private schools. However, with the application of edits and differences in original government works, these may be interpreted as derivative works, entitled to its own protection and no longer necessitating approval from the government for republication or commercial exploitation since the underlying work has no copyright protection. This may leave private schools able to appropriate most of the content of the materials, regardless of whether such appropriation would be for commercial gain or a decrease in the quality of the educational standard sought to be upheld. The government would, however, be ill-equipped under the law to contest the misuse of such materials owing to the lack of copyright.

Plagiarism is unsuitable to enforce the right of government. There is no law that punishes plagiarism in the Philippines as it is mostly an ethical construct employed by universities (Arnold & Levin, 2021). Plagiarism cannot be used to make a person liable for reproducing SLMs or for selling them or displaying its contents without Government’s permission or authority.

It must be emphasized that the recognition of government copyright over its own works and not necessarily of works assigned to it does not mean it will curtail the general public’s access to such works. The various aforementioned DepEd Orders highlight how

the Philippine government, through the DepEd, has granted access to its learning resources free of charge. However, this grant of free access by the government does not mean that the government should be deprived of effective means of enforcing its rights.

More importantly, we must also reconcile the realities that copyright infringement can be motivated by economic or financial gain. As the Supreme Court, citing the case of *Simms v. Stanton*, C.C. Cal 75 F. 6 [1896], has stated in the case of *Habana v. Robles* (G.R. No. 131522 July 19, 1999):

“The essence of intellectual piracy should be essayed in conceptual terms in order to underscore its gravity by an appropriate understanding thereof. Infringement of a copyright is a trespass on a private domain owned and occupied by the owner of the copyright, and, therefore, protected by law, and infringement of copyright, or piracy, which is a synonymous term in this connection, consists in the doing by any person, without the consent of the owner of the copyright, of anything the sole right to do which is conferred by statute on the owner of the copyright.” (Underscoring supplied)

Hence, for the government to effectively assert protection over its own rights, these should first be protected under the law. Absent such recognition and protection conferred by law, the government’s basis to avail of such protection is limited.

Effect of the absence of copyright protection on moral rights

Since the Government of the Philippines cannot protect the SLMs created by government employed teachers because “no copyright shall subsist in any work of the Government of the Philippines” (R.A. No. 829, Sec. 176), the unauthorized reproduction of a work will not amount to copyright infringement. The lack of copyright on the part of the State may likewise create ambiguity in the enforcement of any Moral Rights.

Moral Rights can exist independently of economic rights, but it is not accurate to say that moral rights can exist without copyright. In Section 370 of Singapore’s Copyright Act of 2021, it states that “moral rights... apply only in relation to authorial work in which copyright subsists”. Meanwhile, in the United Kingdom, Section 77 of the Copyright, Designs and

Patents Act of 1988 recognizes that the “author of a copyright literary, dramatic, musical or artistic work, and the director of a copyright film, has the right to be identified as the author or director of the work...” In the French Copyright Act, Article L111-1 specifies that “an exclusive incorporeal property right shall include attributes of an intellectual and moral nature as well as attributes of an economic nature”. In the Philippines, Justice Antonio T. Carpio ratiocinated in the case of *In Re: Charges of Plagiarism Against Associate Justice Mariano C. Del Castillo*, A.M. No. 10-17-17-SC, February 8, 2011, to quote:

“The moral rights under Section 193 of the Intellectual Property Code arise only if the work of an author is copyrighted. If the work is not copyrighted, then there are no moral rights to the work. If the passages in a textbook, journal article, or other non-work of the government are merely quotations from Works of the Government, like sentences or paragraphs taken from judicial decisions, then such passages if copied by a judge do not require attribution because such passages, by themselves, are Works of the Government. The same is true for works in the public domain.”

This shows that there will always be a possibility that moral rights will not be completely protected if the Statute does not specifically protect government works with copyright.

Interplay of Copyright and State Mandate of Quality Education

The Philippines has bound itself to several international obligations with respect to maintaining and ensuring that quality education is delivered to the public. The Philippines is a state party to the International Covenant on Economic Social and Cultural Rights (ICESCR). Article 13 of the ICESCR recognizes the right of everyone to education. It bears emphasis that State Parties are bound to recognize that primary education shall be compulsory and available free to all and that secondary education shall be made generally available and accessible to all by every appropriate means, and, by the progressive introduction of free education. This was further elaborated upon through General Comment No. 13 of the United Nations Committee on Economic, Social and Cultural

Rights. Specifically, that education in all its forms and at all levels shall exhibit the following interrelated and essential features: Availability, Accessibility, Acceptability, and Adaptability. These international obligations are similarly reflected in Section 1, Article XIV of the 1987 Philippine Constitution which explicitly provides that the State shall protect and promote the right of all citizens to quality education at all levels.

Copyright protection incentivizes the creation of artistic and literary works as it creates an assurance that any work created will not be reproduced or used without their consent. Of equal importance is the possibility of economic compensation for individual authors which is not necessarily made available by the grant of moral rights. Eventually, this assurance leads to the creation of more work that contributes to the goal of copyright: exchange of ideas and knowledge.

Government employees, specifically teachers for this discussion, need remuneration for investing their time and labor in creative pursuits instead of other activities that might result in higher rewards (Loren and Miller, 2018). Without any clear claim over their work, there is no additional inducement to improve the materials which might lead to subpar and perfunctory SLMs.

It may be argued that without copyright protection, dissemination of the SLMs is unhampered. This argument, however, undermines the contribution of Copyright to circulate work and at the same time, make sure that the information contained in the SLMs are correct, factual, and authentic. In affording protection to artistic and literary works of the government, there is recognition of the labors of the government teachers

which would motivate them to create better SLMs to comply with Constitutional and international obligation of providing quality education for its citizens.

Receiving salary for creating SLMs is not enough, as a study from the WIPO had shown, to incentivize creativity. The study showed that while money is a factor, “*reputational rewards and returns from altruistic behavior are important sources of artists’ satisfaction*” and that “*prizes and grants generate appreciation and recognition for artistic work that exceed satisfaction derived from transferring money and annuities (income/prize money alone)*” (Miller and Cuntz, 2018).

Without copyright protection being afforded to SLMs, there is no deterrent to the possible proliferation of substandard educational materials. This is a sufficient harm which merits re-examination of the tenets of copyright protection by the State under R.A. No. 8293.

Considering the absence of copyright protection for government works, the primordial issue is whether government policies are capable, in theory, of protecting the integrity of educational materials created by government teachers. Secondarily, how should educational materials developed by government teachers be protected to foster the proliferation of knowledge required under quality education?

Discussion

DepEd Order No. 12, s. 2020 lists among those learning and resources and SLMs in continuous production and refinement, as follows:

Table 1

Table of intellectual property assets being developed by the Department of Education - Philippines in the Basic Education sector. Source: DepEd Order No. 12, s. 2020

Grade Level	List of Materials
Kindergarten	Kindergarten to Grade 3 - story books Competition Writing, Kindergarten Activity Sheets, ADM K Learning Kit
Grade 1 to 3	Primer Lessons for Grade 1, Story books through Competition Writing, Grade 1 English Activity Sheets, Learning Materials (LMs) and Teacher’s Guides (TGs)
Grade 4 to 6	LMs and TGs for Grade 4, Teacher’s Manual (TMs) and Textbook (TXs) for Grades 5 and 6
Grade 7 to 10	TXs and TMs, TGs and LMs
Grade 11 to 12	TXs and TMs LMs, and TGs, Readers, Manuals, PRIMALS PLUS Self-Learning Modules for Core Subjects

As shown above, the Department of Education is the primary producer of SLMs in the Philippines. This necessitates the analysis of the policies affecting it and the works being created to comply with the State's Constitutional mandate of providing quality basic education.

Limitations on Government Works under the Philippine Copyright Law

The threat of infringement is not only local in nature but potentially international with the use of social media. Digital platforms have provided an avenue for individuals, who are protected by the veil of anonymity, to profit from government works that are unprotected by copyright. In the absence of a clear right against these individuals, the State cannot simply institute cases that are cognizable by courts despite the existing DepEd rules and other legal authorities that could facilitate administrative complaints and actions against named individuals.

Remarkably, neither the Berne Convention nor the Paris Convention, to which the Philippines acceded to, include any express provision of States being disallowed copyright over its own works or over the works carried out by its employees under its instruction. Hence, Philippine laws on copyright should be given a closer inspection with respect to how it would be responsive to the international obligations of the Philippines in the delivery of quality education.

Providing an alternative interpretation for "works of government"

The lack of protection for SLMs underscores a philosophical problem for the blanket non-protection of government works. Section 176 of the Intellectual Property Code specifies government works to include "*speeches, lectures, sermons, addresses, and dissertations, pronounced, read, or rendered in courts of justice, before administrative agencies, in deliberative assemblies and in meetings of public characters*". This provision is also found in Act No. 3134 and Presidential Decree No. 49. What these literary expressions have in common is that they are by-products of governments' exercise of law-making or rule-making powers in the performance of its Constitutional duties to enact laws, to enforce the law or to interpret the law. The purpose of their works being part of public domain is more tethered to the underlying reason that no one can own laws.

This, however, does not explain why creative works of government employees which are not directly, or even remotely, related to crafting laws are similarly excluded from copyright protection.

The Supreme Court of the United States in *Georgia et. al., v. Public Resource Org* (590 U. S. __ [2020]) declared that Public.Resource.Org did not commit infringement when it posted the Official Code of Georgia Annotated on its website because the statute, and the non-binding annotations that followed the statutes, were not entitled to copyright protection. In this decision, the US Supreme Court utilized the "edicts of government doctrine" which means that "officials empowered to speak with the force of law cannot be authors of the works they create in the course of their official duties". To further explain this doctrine, the Court underscored *Callaghan v. Myers* (128 U.S. 617 [1888]), wherein it declared that a judge cannot claim to be an author of the decision he pens but an official reporter has copyright over the explanatory materials that the latter had crafted "because they came from an author who had no authority to speak with the force of law".

Section 176 of the Intellectual Property Code can then be interpreted to allow copyright protection to works of government that are outside of the Edicts of the Government Doctrine. This would result in copyright protection for works of officials or government employees if it does not amount to having the force and effect of law even if the works are created in relation to their official governmental duties. By application, copyright protection must be afforded to government teachers tasked to create SLMs, for these works have no force and effect of law and neither are created in contemplation of the executive department's power to implement the laws.

Application of the Sweat of the Brow Doctrine in educational materials

The preparation and production of modules requires work from teachers. While this is arguably part of their functions, attribution over work created could facilitate accountability therefrom and enhance productivity and performance.

In view of the principle of equity and social justice, it is suggested that there be an application of "the sweat of the brow" doctrine insofar as moral rights may be concerned. The sweat of the brow doctrine, as summarized by the US Supreme Court, rewards

with copyright protection the hard work that went into compiling facts (*Feist Publications, Inc., v. Rural Telephone Service Co.*, 499 U.S. 340). This doctrine appeared first in the case of *Jeweler's Circular Publishing Co.*, (281 F., at 88), to quote:

“The right to copyright a book upon which one has expended labor in its preparation does not depend upon whether the materials which he has collected consist or not of matters which are *publici juris*, or whether such materials show literary skill or originality, either in thought or in language, or anything more than industrious collection. The man who goes through the streets of a town and puts down the names of each of the inhabitants, with their occupations and their street number, acquires material of which he is the author. He produces by his labor a meritorious composition, in which he may obtain a copyright, and thus obtain the exclusive right of multiplying copies of his work.”

This might prove difficult to implement in this jurisdiction because our current laws do not recognize effort and hard work as original. Section 172 of the Intellectual Property Code lists the artistic and literary creations that are protected by copyright if they are original. Originality in the Philippines, as discussed by the Supreme Court in the case of *Ching v. Salinas* (G.R. No. 161295, June 29, 2005), means that “the material was not copied, and evidences at least minimal creativity; that it was independently created by the author and that it possesses at least minimal degree of creativity”. To distinguish copyright from other forms of intellectual property, copyright protects only expression.

In addition, this doctrine has not been ruled upon by the Philippine Supreme Court, however, it has fallen out of favor in the United States in 1991 by virtue of the *Feist Publications, Inc., v. Rural Telephone Service Co.*, (499 U.S. 340) case. In this case, the Supreme Court of the United States denied copyright protection to names, addresses and phone numbers in a telephone directory because protection was being sought for facts and ideas rather than the expression itself. This barrier does not exist for SLMs because these works would have been protected either under Section 172 or Section 173.1(b) as collections of literary, scholarly, or artistic

works, and compilations of data and other materials had they been created by private schools.

Finally, Section 176 of the Intellectual Property Code allows the government to impose the payment of royalties for the utilization of its works, if and only if, done for profit. DepEd has not promulgated guidelines as to how royalties may be assessed, collected, and used in the context of copyright. The lack of a clear policy creates a gap as to compensation that the State and government employees may be entitled to, should there be the need or requirement for the payment of such royalties.

Conclusions

The Self Learning Modules created by the private educational sector are protected by copyright upon its creation. As such, it can be commercialized, and license fees may be charged for their use by persons, entities, and other private schools. In addition, any reproduction or subsequent publication is an actionable wrong that can be addressed through criminal or civil suits.

The susceptibility of SLMs to infringement by private schools extends also to private and public employees acting in their personal capacity. While the State may exercise administrative and disciplinary control over public officials and employees, the ability to institutionalize legal proceedings against private individuals is limited.

Given that limitations on government rights over its own artistic and literary works appears to be self-imposed through domestic law rather than international treaty obligations, the Philippines can arguably provide more protection over its own work by adopting changes to its policies on Copyright.

Recommendations

With respect to granting copyright to works of Governments

It is recommended that a revision of Section 176 of the Intellectual Property Code be made, to allow for recognition of government copyright from the moment of its creation. It should read as follows:

Section 176. Works of the Government. – 176.1.
No copyright shall subsist in any work of the

Government of the Philippines. However, prior approval of the government agency or office wherein the work is created shall be necessary for exploitation of such work for profit. Such an agency or office may, among other things, impose as a condition the payment of royalties. No prior approval or conditions shall be required for the use of any purpose of statutes, rules and regulations, and speeches, lectures, sermons, addresses, and dissertations, pronounced, read or rendered in courts of justice, before administrative agencies, in deliberative assemblies and in meetings of public character. **Provided that, works as used in this section is limited to those artistic and literary works that have the force and effect of law.**

This amendment of Section 176 of the Intellectual Property Code incorporates the interpretation of works of government which is consistent with the principle of Edict of the Government.

This recommendation carries with it the inherent right of the Philippine government to claim copyright ownership over its own works, in the context of the basic education sector, not only by means of transfer and assignment, but by its inherent creation. The automaticity in copyright protection over works created by public school teachers in relation to their work, encourages accountability over government works by the educational institutions. This recommended amendment further recognizes without any sliver of doubt that the effort in creating artistic and literary works is protected.

Apart from that, copyright will enable the government to commence administrative, civil, or criminal proceedings against erring individuals. It would also provide the government with the means of protecting itself within the domestic and international community, especially in light of digital migration due to the COVID-19 pandemic.

With this amendment, not only will it afford protection for SLMs created because of the pandemic but it would also allow the State a more efficient method of asserting ownership. This in turn, enables lawful exploitation or commercialization of works created by virtue of government research funding grants. All these contributes to promoting the ends of copyright “to protect expression without discouraging others from freely building upon the ideas and

exercising exclusivity over facts” (Feist Publications, Inc., v. Rural Telephone Service Co., 499 U.S. 340)

The adoption of our recommended legislative amendment can clearly be the basis for incentives which may be awarded to those engaged in additional duties of the production of IP assets should it significantly take up much of their time, resources, and creativity. More so, if these works are to be distributed to private schools for the latter’s use or for any commercialization. Authors of these works will not only be entitled to moral rights but may, as a matter of right, be given a maximum of five (5%) percent from the gross proceeds of the sale or lease of original manuscripts, like SLMs, subsequent to the first public distribution (R.A. No. 8293, Sec. 200). This resale right of authors is an available right since the law does not make any distinction as to the type of manuscript that must be subject of compensation as long as it is independently created and has a modicum of creativity (*Ching v. Salinas*, G.R. No. 161295, June 29, 2005).

Further, to give life to the amended provisions of Section 176, the DepEd should promulgate guidelines for the valuation of the works of government employees to determine the basis for actual damages that may be awarded by courts.

Finally, the DepEd should clarify if the creation of SLMs is part of the main functions of teachers, and if not, then it should be considered as their own creation and not owned by the Government. If the latter is the case, to fully gain ownership over these materials, a licensing contract may be executed by the teachers in favor of DepEd to enable it to enforce copyright against other entities.

Declarations

This statement is to certify that all Authors have seen and approved the manuscript being submitted. We warrant that the article is the Authors’ original work. We warrant that the article has not received prior publication. On behalf of all Co-Authors, the corresponding Author shall bear full responsibility for the submission. This paper has not been submitted for publication nor has it been published in whole or in part elsewhere.

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References

- An Act Establishing Rural Farm Schools as Alternative Delivery Mode of Secondary Education and Appropriating Funds Thereof, Rep. Act No. 10618, (Sep. 3, 2013) (Phil.), <https://www.officialgazette.gov.ph/2013/09/03/republic-act-no-10618/>
- An Act Prescribing the Intellectual Property Code and Establishing the Intellectual Property Office, Providing for its Powers and Functions, and for Other Purposes, Rep. Act No. 8293, (Jun. 6, 1997) (Phil.), <https://www.officialgazette.gov.ph/1997/06/06/republic-act-no-8293/>
- An Act to Protect Intellectual Property, Act No. 3134, (Mar. 6, 1924) (Phil.), <https://lawyerly.ph/laws/view/15082>
- An Act to repeal and re-enact the Copyright Act (Chapter 63 of the 2006 Revised Edition) to provide for copyright, the protection of performances and related rights, and to make related and consequential amendments to certain other Acts. (2021) (Singapore), <https://wipolex-res.wipo.int/edocs/lexdocs/laws/en/sg/sg154en.html>
- Arnold, M., & Levin, S. (2021, June 22). The Difference Between Plagiarism and Copyright Infringement. Retrieved on 10 June 2022 from <https://copyrightalliance.org/differences-copyright-infringement-plagiarism/>
- Callaghan v. Myers, 128 U.S. 617 (1888). <https://supreme.justia.com/cases/federal/us/128/617/>
- Ching v. Salinas, G.R. No. 161295 (Jun. 29, 2005) (Phil.), <https://elibrary.judiciary.gov.ph/thebookshelf/showdocs/1/43469>.
- Code de la propriété intellectuelle [Intellectual Property Code] (Fr.) <https://www.legifrance.gouv.fr/codes/id/LEGITEXT000006069414/>
- Constitution of the Philippines. <https://www.officialgazette.gov.ph/constitutions/1987-constitution/>
- Copyright Act, Act No. 48 of 1970, (Japan). <https://wipolex-res.wipo.int/edocs/lexdocs/laws/en/jp/jp081en.pdf>
- Copyright, Designs and Patents Act, c. 48 (UK). <https://www.legislation.gov.uk/ukpga/1988/48/contents>
- Decree on the Protection of Intellectual Property, Pres. Dec. 49, (Nov. 14, 1972) (Phil.), <https://www.officialgazette.gov.ph/1972/11/14/presidential-decree-no-49-s-1972/>.
- Department of Education, Additional Provisions to DepEd Order No. 13, s. 2020 (Readiness Assessment Checklist for Learning Delivery Modalities in the Learning Continuity Plan of Private Schools), DepEd Ord. No. 017 s. 2020. (Jul. 17, 2020) (Phil.), https://www.deped.gov.ph/wp-content/uploads/2020/07/DO_s2020_017.pdf
- Department of Education, Adopting the Basic Education Learning Continuity Plan for School Year 2020-2021 in the Light of the Covid-19 Public Health Emergency, DepEd Ord. No. 012 s. 2020. (Jun. 19, 2020) (Phil.), https://www.deped.gov.ph/wp-content/uploads/2020/06/DO_s2020_012.pdf
- Department of Education - Philippines Commons. Retrieved on 25 August 2021 from <https://commons.deped.gov.ph/>
- Department of Education - Philippines Learning Resources Portal. Retrieved on 25 August 2021 from <https://lrmds.deped.gov.ph/>
- Department of Education, Stipulating Policy Guidelines for the Provision of Learning Resources in the Implementation of the Basic Education Learning Continuity Plan, DepEd Ord. No. 018 s. 2020. (Jul. 20, 2020) (Phil.), https://www.deped.gov.ph/wp-content/uploads/2020/08/DO_s2020_018.pdf
- Feist Publications, Inc., v. Rural Telephone Service Co. Inc., 499 U.S. 340 (1991). <https://supreme.justia.com/cases/federal/us/499/340/>
- Fitzgerald, A. (n.d.). *Crown Copyright*. Retrieved on 25 August 2021 from University of Sydney Library: https://ses.library.usyd.edu.au/bitstream/handle/2123/7326/FitzgeraldA_9781920899714_TEXT.pdf?sequence=1&isAllowed=y#:~:text=The%20central%20justification%20for%20recognizing,an%20accurate%20and%20reliable%20form,quoting%20Copyright%20Law%20Review%20Committee,Crown%20Copyright,2005,para%204.66,at%20p%2053,available%20at%20www.clrc.gov.au/www/agd/agd.nsf/Page/RWPBB79ED8E4858F514CA25735100827559
- Georgia v. Public.Resource.Org, Inc., 590 U.S. ____ (2020). <https://supreme.justia.com/cases/federal/us/590/18-1150/>
- Habana v. Robles, G.R. No. 131522 (Jul. 19, 1999) (Phil.), <https://elibrary.judiciary.gov.ph/thebookshelf/showdocs/1/37317>
- In the Matter of the Charges of Plagiarism, etc., Against Associate Justice Mariano C. Del Castillo, A.M. No. 10-7-17-SC (Feb. 8, 2011) (Phil.), <https://elibrary.judiciary.gov.ph/thebookshelf/showdocs/1/52091>
- Jeweler's Circular Pub. Co. v. Keystone Pub. Co., 281 F. 83 (2nd Cir. 1922). <https://cite.case.law/f/281/83/>
- Loren, L., & Miller, J. (2018). *Intellectual Property Law: Cases & Materials*. Semaphore Press.
- Miller, A. L., & Cuntz, A. (n.d.). *Unpacking predictors of income and income satisfaction for artists*. WIPO Publication. https://www.wipo.int/edocs/pubdocs/en/wipo_pub_econstat_wp_50.pdf
- The Copyright Act, 1957, (Jun. 4, 1957) (India). <https://copyright.gov.in/documents/copyrightrules1957.pdf>
- The intellectual property system: a brief history*. (n.d.). Retrieved 10 June 2022 from <https://www.ipophil.gov.ph/news/the-intellectual-property-system-a-brief-history/>
- Samuelson, P. A. (1954). The Pure Theory of Public Expenditure. *The Review of Economics and Statistics*, 36(4), 387–389. <https://doi.org/10.2307/1925895>

UN Committee on Economic, Social and Cultural Rights (CESCR), General Comment No. 13: The Right to Education (Art. 13 of the Covenant), 8 December 1999, E/C.12/1999/10. Retrieved on 25 August 2021 at <https://www.refworld.org/docid/4538838c22.html>

United Nations Educational, Scientific and Cultural Organization (UNESCO). Global Education Monitoring Report 2020. 20120. Retrieved on 2 November 2021 from <http://creativecommons.org/licenses/by-sa/3.0/igo/>
World Intellectual Property Organization. (2016). Understanding Copyright and Related Rights. Retrieved on 10 June 2022 from https://www.wipo.int/edocs/pubdocs/en/wipo_pub_909_2016.pdf