

Philippines: IPOPHL issues statutory fair use guidelines on copyright

The Intellectual Property Office of the Philippines recently issued Guidelines on Statutory Fair Use in the Intellectual Property Code, which expound on fair use of copyright.

In brief

Authors or creators of copyrighted works have the exclusive right to carry out, authorize or prevent, among others, the reproduction of the work or substantial portion of the work, and other forms of exploitation of the work. As a limitation in the exercise of these exclusive rights, the Intellectual Property Code provides for the concept of fair use.

The Intellectual Property Office of the Philippines (IPOPHL) recently issued **Guidelines on Statutory Fair Use in the Intellectual Property Code ("Guidelines")**, which clarify the conditions to be satisfied in the use of a copyrighted material in a manner that does not infringe on intellectual property (IP) rights.

For copyright owners, they must take note of the limitations on the use by others of their copyrighted works. For other parties who intend to use or exploit the copyrighted works without the consent of the author, creator or copyright owner, they must ensure that they comply with the requirements provided by the Guidelines in order to avoid any finding of copyright infringement.

Contents

In more detail

Introduction

Statutory Fair Uses without need for further application of the General Fair Use Principle

Statutory Fair Uses requiring the further application of the General Fair Use Principle

Other limitations on copyright

Recommended action

In more detail

Introduction

Republic Act No. 8293 or the Intellectual Property Code of the Philippines ("**IP Code**") provides for the concept of fair use as a limitation on copyright. The Supreme Court 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.¹

For this purpose, Section 185 of the IP Code lists down the following four factors in determining whether or not the use of a copyrighted work qualifies as fair use ("**General Fair Use Principle**"):

1. Purpose and character of the use, including whether such use is of a commercial nature or is for non-profit educational purposes
2. Nature of the copyrighted work
3. Amount and substantiality of the portion used in relation to the copyrighted work as a whole
4. Effect of the use upon the potential market for or value of the copyrighted work

Meanwhile, Section 184 of the IP Code provides for acts that shall not constitute infringement of copyright ("**Statutory Fair Uses**"). The IPOPHL, through the Guidelines, clarified that the acts mentioned therein can be grouped into two main categories:

1. Those that are limited to the specified acts without need for further application of the General Fair Use Principle
2. Those that require the application of the General Fair Use Principle in addition to the conditions that govern the specific act

¹ *ABS-CBN Corporation v. Felipe Gozon, et al.*, G.R. No. 195956, 11 March 2015.

Other specific statutory limitations on copyright can be found in Sections 186 to 189 of the IP Code.

Statutory Fair Uses without need for further application of the General Fair Use Principle

The following acts do not require the application of the General Fair Use Principle in Section 185 of the IP Code:

- A. **Private recitation or performance** – The recitation or performance of a work, once it has been lawfully made accessible to the public, if done privately and free of charge or if made strictly for a charitable or religious institution or society²

To avail of this exception, all the following elements must be present:

1. A work is either recited or performed (either a private or a public performance of work).
2. The work should have been already lawfully made accessible to the public prior to such recitation or performance.
3. The recitation or performance is either: (i) done privately and free of charge; or (ii) made strictly for a charitable or religious institution or society.³

- B. **Reproduction or communication to the public by mass media** – The reproduction or communication to the public by mass media of articles on current political, social, economic, scientific or religious topic, as well as lectures, addresses and other works of the same nature that are delivered in public, if such use is for information purposes and has not been expressly reserved, provided that the source is clearly indicated⁴

To avail of this exception, all the following elements must be present:

1. There exists: (i) an article; or (ii) a lecture, address and other similar work that is delivered in public.
 2. The subject of such article or lecture, address and other similar work is on current political, social, economic, scientific or religious topic.
 3. Such article or lecture, address and other similar work was either: (i) reproduced⁵; or (ii) communicated to the public.⁶
 4. The reproduction or communication to the public was done by the press or members of the mass media.⁷
 5. The reproduction or communication to the public is for the purpose of disseminating information.
 6. The reproduction or communication to the public must not contravene an express reservation (made in writing) of such right by the rightsholder.
 7. The author of the work is clearly indicated in the reproduction or communication to the public.
- C. **Reportage on current events** – The reproduction and communication to the public of literary, scientific or artistic works as part of reports of current events by means of photography, cinematography or broadcasting, to the extent necessary for the purpose⁸

To avail of this exception, all the following elements must be present:

1. A literary, scientific or artistic work was reproduced and communicated to the public.
2. The reproduction and communication to the public was made in the course of reporting on current events.

² Section 184.1(a), IP Code.

³ The Guidelines define "charitable or religious institution or society" as "a duly registered non-stock, non-profit corporation where no part of its income is distributable as dividends to its members, trustees or officers and where any profit obtained shall be used for the furtherance of its purpose."

⁴ Section 184.1(c), IP Code.

⁵ Section 171.9 of the IP Code defines "reproduction" 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" or the General Fair Use Principle.

⁶ Section 171.3 of the IP Code defines "communication to the public" as "any communication to the public, including broadcasting, rebroadcasting, retransmitting by cable, broadcasting and retransmitting by satellite, and includes the making of a work available to the public by wire or wireless means in such a way that members of the public may access these works from a place and time individually chosen by them."

⁷ Under the Guidelines, "mass media" encompasses "the print medium of communication, which includes all newspapers, periodicals, magazines, journals, and publications and all advertising therein, and billboards, neon signs, etc., and the broadcast medium of communication, which includes radio and television broadcasting in all their aspects and all other cinematographic or radio promotions and advertising."

⁸ Section 184.1(d), IP Code.

3. The report was made by any person, whether natural or juridical.
 4. The report was made by means of photography, cinematography or broadcasting.
 5. The appearance of the work in such report was only to the extent necessary for the purpose.
- D. **Recordings made in educational institutions** – The recording made in schools, universities, or educational institutions of a work included in a broadcast for the use of such schools, universities or educational institutions, provided that such recording must be deleted within a reasonable period after they were first broadcast; provided, further, that such recording may not be made from audiovisual works that are part of the general cinema repertoire of feature films, except for brief excerpts of the works of photography, cinematography or broadcasting to the extent necessary for the purpose⁹

To avail of this exception, all the following elements must be present:

1. A broadcast of a work was made for use of schools, universities or educational institutions.
 2. A recording was made in a school, university or educational institution.
 3. The recording was made by any person who is either an employee or an enrolled student of such school, university or educational institution, or one who was duly authorized by the same.
 4. The recording must be used exclusively for educational purposes by the school, university or educational institution where it was made.
 5. The recording can only be used temporarily for a time period not exceeding one academic year, after which it shall be deleted.
 6. The recording of the broadcast must not be made from audiovisual works that are part of the general cinema repertoire of feature films, except for brief excerpts of the work.
- E. **Ephemeral records** – The making of ephemeral recordings by a broadcasting organization by means of its own facilities and for use in its own broadcast¹⁰

To avail of this exception, all the following elements must be present:

1. A recording is made by a broadcasting organization:
 - a. with a valid and existing congressional franchise;
 - b. possessing the necessary licenses from the National Telecommunications Commission; and
 - c. whose headquarters and transmitters are both situated in the Philippines.
 2. The recording is made using the broadcasting organization's own facilities, tools or equipment.
 3. The work recorded is one that the broadcasting organization is authorized to broadcast, provided that in the case of cinematographic works, only isolated sequences extracted from films may be included in television programs.
 4. The broadcasting organization makes and retains only one copy of the recording.
 5. The broadcasting organization uses the recording only for its own broadcast.
 6. The broadcasting organization destroys the recording within six months from the date of its making, provided that a single copy of a recording of exceptional documentary character or enduring archival value may be preserved and retained by the broadcasting organization for historical reasons.
- F. **Use by a club or institution** – The public performance or the communication to the public of a work, in a place where no admission fee is charged in respect of such public performance or communication, by a club or institution for charitable or educational purpose only, whose aim is not profit making, subject to such other limitations as may be provided in the Implementing Rules and Regulations¹¹

To avail of this exception, all the following elements must be present:

1. A work is either publicly performed or communicated to the public.

⁹ Section 184.1(f), IP Code.

¹⁰ Section 184.1(g), IP Code.

¹¹ Section 184.1(i), IP Code.

2. Said work should have been already lawfully made accessible to the public prior to such public performance or communication to the public.
3. Such public performance or communication to the public is held in a venue that does not charge an admission fee in respect of such public performance or communication.
4. Such public performance or communication to the public is done by a club or institution solely for a charitable or educational purpose.
5. The aim of the club or institution is not profit making.¹²
- G. **Public display** – Public display of the original or a copy of the work not made by means of a film, slide, television image or otherwise on screen or by means of any other device or process, provided that either the work has been published, or that the original or the copy displayed has been sold, given away or otherwise transferred to another person by the author or his successor in title¹³

To avail of this exception, all the following elements must be present:

1. A work is displayed publicly.¹⁴
2. The work displayed must either be an original or a copy, provided that if the work is a copy, then it must be a duly authorized reproduction of the original work.
3. The display must not be made by means of a film, slide, television image or otherwise on screen or by means of any other device or process.
4. Prior to such display, the work should have been: (i) already published; or (ii) has been sold, given away or otherwise transferred to another person by the author or his successor in title.
5. The display is made by a person in actual physical possession of the work.
- H. **Use in judicial proceedings or by a legal practitioner** – Any use made of a work for the purpose of any judicial proceedings or for the giving of professional advice by a legal practitioner¹⁵

To avail of this exception, all the following elements must be present:

1. A work was used for the purpose of: (i) any judicial proceedings; or (ii) for the giving of professional advice by a legal practitioner.
2. Such work was used in any manner deemed necessary for said purpose.
- I. **Specialized format for the visually impaired** – The reproduction or distribution of published articles or materials in a specialized format, exclusively for the use of the blind, visually- and reading-impaired persons, provided that such copies and distribution shall be made on a nonprofit basis and shall indicate the copyright owner and the date of the original publication¹⁶

To avail of this exception, all the following elements must be present:

1. A work is either reproduced or publicly distributed.
2. The work should have been already published prior to such reproduction or distribution.
3. The reproduction or distribution entails the conversion of the work into a specialized format exclusively for the use of the blind, visually- and reading-impaired persons.
4. The reproduction or distribution is not for profit.
5. The converted work clearly indicates the copyright owner and the date of the original publication of the source work.

¹² Under the Guidelines, this element requires that the club or institution must be a non-profit organization, such that "no net income or asset accrues to or benefits any member or specific person, with all [its] net income or asset[s] devoted to the institution's purposes and all its activities conducted not for profit."

¹³ Section 184.1(j), IP Code.

¹⁴ Under the Guidelines, "public display" is generally accepted to mean a display at a place open to the public or where a substantial number of persons outside of a normal circle of family and its social acquaintances are gathered. A place is "open to the public" in this sense even if access is limited to paying customers.

¹⁵ Section 184.1(k), IP Code.

¹⁶ Section 184.1(l), IP Code.

Statutory Fair Uses requiring the further application of the General Fair Use Principle

The following acts require the application of the General Fair Use Principle in Section 185 of the IP Code:

- A. **Quotations from a published work** – The making of quotations from a published work if they are compatible with fair use and only to the extent justified for the purpose, including quotations from newspaper articles and periodicals in the form of press summaries, provided that the source and the name of the author, if appearing on the work, are mentioned¹⁷

To avail of this exception, all the following elements must be present:

1. A quotation was made from a work.
2. The work must have been previously published.
3. The making of the quotation must be only to the extent justified for the purpose.
4. The source and name of the author, if appearing on the work, must be mentioned.
5. It must be compatible with the General Fair Use Principle (i.e., the four fair use factors under Section 185.1 of the IP Code must be considered).

- B. **Illustration for teaching purposes** – The inclusion of a work in a publication, broadcast or other communication to the public, sound recording or film, if such inclusion is made by way of illustration for teaching purposes and is compatible with fair use, provided that the source and the name of the author, if appearing in the work, are mentioned¹⁸

To avail of this exception, all the following elements must be present:

1. A work was included in any of the following: (i) publication; (ii) broadcast; (iii) other communication to the public; (iv) sound recording; and (v) film;
2. The inclusion was made by any person, natural or juridical.
3. It was made by way of illustration for teaching purposes.¹⁹
4. The source and name of the author, if appearing in the work, are mentioned.
5. It must be compatible with the General Fair Use Principle.

- C. **Use by the government or by educational, scientific or professional institutions** – 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 use²⁰

To avail of this exception, all the following elements must be present:

1. A work is used by an educational, scientific or professional institution.
2. The use is in the public interest.²¹

It is compatible with the General Fair Use Principle.

Other limitations on copyright

- A. **Work of architecture** – Copyright in a work of architecture shall include the right to control the erection of any building that reproduces the whole or a substantial part of the work either in its original form or in any form recognizably derived from the original, provided that the copyright in any such work shall not include the right to control the reconstruction or rehabilitation in the same style as the original of a building to which that copyright relates.²²

¹⁷ Section 184.1(b), IP Code.

¹⁸ Section 184.1(e), IP Code.

¹⁹ As contemplated in the Guidelines, *teaching* includes teaching at all levels in both private and public educational institutions. Hence, the inclusion of a work for the purpose of mere scientific or personal research is not included here.

²⁰ Section 184.1(h), IP Code.

²¹ The term *public interest* is defined in the Circular as "the general welfare of the public that warrants recognition and protection."

²² Section 186, IP Code.

To avail of this exception, all the following elements must be present:

1. There is an architectural work or building²³ to be reconstructed or rehabilitated.
2. The reconstruction or rehabilitation shall be in the same style as the original architectural plans for the said building.
- B. **Private reproduction** – The private reproduction of a published work in a single copy, where the reproduction is made by a natural person exclusively for research and private study, shall be permitted, without the authorization of the owner of copyright in the work.²⁴

To avail of this exception, all the following elements must be present:

1. A work was privately reproduced.
2. The work was previously published.
3. The reproduction consists only of a single copy.
4. The reproduction was made by a natural person.
5. The reproduction is exclusively for the said person's research and private study.
6. The limitation does not apply to the reproduction of the following works: (i) a work of architecture in the form of a building or other construction; (ii) an entire book, or a substantial part thereof, or of a musical work in graphic form by reprographic means; (iii) a compilation of data and other materials; (iv) a computer program, except as provided in Sec. 189 of the IP Code; and (v) any work in cases where reproduction would unreasonably conflict with the normal exploitation of the work or would otherwise unreasonably prejudice the legitimate interests of the author.
- C. **Reprographic reproduction by libraries** – Any library or archive whose activities are not for profit may, without the authorization of the author or copyright owner, make a single copy of the work by reprographic reproduction.²⁵

There are three instances covered by this limitation.

1. Fragility or rarity of the work

The following elements must all concur:

- a. The work to be reproduced is fragile or rare.
- b. The library has no other means of procuring more copies of the fragile or rare work.
- c. By reason thereof, it cannot be lent to users in its original form.

2. Isolated articles or excerpts

The following elements must all concur:

- a. The works to be reproduced are either: (i) isolated articles contained in composite works²⁶; or (ii) brief portions of other published works.
- b. The reproduction is necessary to supply them expediently to persons needing them for purposes of research or study.

3. Preservation or replacement of lost, destroyed or usable copy

For a work in the library's own collection

- a. The work needs to be preserved.
- b. It was lost, destroyed or rendered unusable and needs to be replaced.

For a work in the collection of another library

- a. The work belongs to the library's permanent collection.

²³ Under the Guidelines, *Architectural work* or *work of architecture* refers to the design of a building as embodied in any tangible medium of expression, including a building, architectural plans, or drawings. The work includes the overall form as well as the arrangement and composition of spaces and elements in the design, but does not include individual standard features.

²⁴ Section 187, IP Code.

²⁵ Section 188, IP Code.

²⁶ A "composite work," as contemplated in the Guidelines, refers to a collection of literary or scholarly works, as provided in Sec. 173.1(b) of the IP Code.

- b. It was lost, destroyed or rendered unusable and needs to be replaced.
 - c. Copies are not available with the publisher.
- D. **Reproduction or adaptation of computer program** – The reproduction in one back-up copy or adaptation of a computer program shall be permitted, without the authorization of the author of, or other owner of copyright in, a computer program, by the lawful owner of that computer program, provided that the copy or adaptation is necessary for: (a) the use of the computer program in conjunction with a computer for the purpose, and to the extent, for which the computer program has been obtained; and (b) archival purposes, and, for the replacement of the lawfully owned copy of the computer program in the event that the lawfully obtained copy of the computer program is lost, destroyed or rendered unusable.²⁷

To avail of this exception, all the following elements must be present:

1. A computer program is reproduced or adapted.
2. The reproduction or adaptation is done by the lawful owner of the computer program.
3. The reproduction or adaptation is necessary for: (i) use of the program in conjunction with a computer for which the program was obtained; (ii) archival purposes; or (iii) replacement of the lawfully obtained copy of the computer program should the same be lost, destroyed or rendered unusable.

Recommended action

Clients are advised to take note of the IPOPHL's new guidelines for fair use for copyright to avoid infringement actions. For copyright owners, they must take note of the limitations on the use by others of their copyrighted works. For other parties who intend to use the copyrighted works without the consent of the author, creator or copyright owner, they must ensure that they comply with the requirements provided by the Guidelines in order to avoid any finding of copyright infringement.

Please feel free to reach out to Quisumbing Torres' Intellectual Property, Data and Technology Practice Group for all related queries or concerns.

²⁷ Section 189, IP Code.

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