

The Philippines: Impact of copyright rules on access to education

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Summary

1. Through its 5th Country Program for Children, the Filipino government has taken positive steps to implement the Convention on the Rights of the Child (CRC). As a State party to the CRC, the Philippines recognizes the right to education and has a legal obligation to fulfil it "with a view to achieving this right progressively and on the basis of equal opportunity."¹ The Philippines also recognizes the right to education under the Universal Declaration of Human Rights² and the International Covenant on Economic, Social and Cultural Rights.³ Further, the Filipino constitution stipulates that "the 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."⁴

2. Yet, due to acute social and economic inequalities, millions of Filipino children do not enjoy a decent education. For children from low-income families, the indirect costs of education, such as exercise books and text books, are a significant barrier to their access to education. High prices of text books are in part due to copyright rules. A copyright provides the rights-holder with near monopoly control over publications.⁵ Developing countries like the Philippines need flexibilities within copyright legislation to ensure the supply of text books at low prices to make them affordable. However, the Philippines is planning to start negotiations for a new bilateral trade agreement with the US which may lead to more stringent copyright legislation and hamper access to education.

3. 3D → Trade - Human Rights - Equitable Economy is a not-for-profit NGO based in Geneva, Switzerland. 3D aims to ensure that trade and trade-related rules are developed and applied in ways that promote an equitable economy. We believe that human rights mechanisms such as the Committee on the Rights of the Child can help attain this objective by holding States to account and ensuring that their trade commitments are compatible with their legal obligation to uphold human rights.

4. 3D submits this paper to the Pre-Sessional Working Group of the CRC in collaboration with the IBON Foundation, a Philippines based non-stock, non-profit development institution committed to serving the Filipino people through various programs in "research-education-information". Through this joint submission, our goal is to highlight the impact of copyright rules on the affordability of text books and the enjoyment of the right to education in the Philippines.

Impact of copyright on access to educational materials

5. The neoliberal policy-framework implemented by Filipino governments since the 1980s has had severe consequences on access to education for the most disadvantaged families. Public expenditure on education has declined over the past years and deficiencies due to resource constraints are notorious on many levels. There are backlogs for hiring new teachers, building classrooms and providing text books, desks and seats. For the school year 2003-2004, there was only one book for every four elementary students.⁶ Because many households have limited resources for education, their children are often not able to finish elementary school.

¹ *Convention on the Rights of the Child*, Art. 28(1), 20 November 1989 (date of adoption), 2 September 1990 (entry into force), <http://www2.ohchr.org/english/law/crc.htm>

² Art. 26, UN General Assembly, 10 December 1948, <http://www.un.org/en/documents/udhr/>

³ Art. 13-14, 16 December 1966 (date of adoption), 3 January 1976 (entry into force),

<http://www2.ohchr.org/english/law/cescr.htm>

⁴ *The 1987 Constitution of the Republic of the Philippines*, Art. 14(1),

http://www.gov.ph/index.php?option=com_content&task=view&id=200034&Itemid=26

⁵ The generally applied term of protection at international level is the life of the author and 50 years after his death.

⁶ Del Rosario-Malonzo, Jennifer, 'Economics of Philippine Education: Serving the Global Market', IBON Foundation, *Mula Tore Patungong Palengke: Neoliberal Education in the Philippines*, Quezon City, IBON Books, 2007.

Limitations and exceptions to copyright

For developing countries, an important international mechanism for protecting access to educational materials is provided by the Appendix of the Berne Convention,⁷ which entered into force in the Philippines in 1951. The Berne Appendix provides flexibilities for the right of translation and the right of reproduction. This means that the competent authorities of a country can grant a compulsory license, authorizing companies or individuals to reproduce and publish works without the copyright owner's consent.⁸ However, these flexibilities have generally been poorly used, because the conditions of use are complex.⁹ In addition to the rights under the Berne Convention, the Philippines formerly had domestic legislation (namely the Presidential Decree 1203) allowing for the granting of compulsory licenses to reprint educational, scientific or cultural books. However, this legal provision was repealed in 1998 with the implementation of the Intellectual Property Code.¹⁰

6. The International Intellectual Property Alliance (IIPA), which exclusively represents US copyright-based industries, has exerted pressure to keep the Philippines in the US Trade Representative Special 301 priority watch list for book piracy.¹¹ Book piracy refers to the illegal use or reproduction of copyrighted books. According to the IIPA, the Filipino compulsory license regime has been used in the past as an "excuse" for book piracy.¹² Nevertheless, compulsory licenses regulated by the competent authorities help provide access to educational books for the most disadvantaged groups. Without compulsory licenses the book prices tend to inflate due to the copyright holders' monopolies.¹³ The Special 301 watch list represents a policy tool that has been implemented by the US "to promote strong intellectual property laws and effective enforcement worldwide".¹⁴ In the Philippines, this policy could further be strengthened in the context of the planned negotiations for a future US-Philippines Free Trade Agreement (FTA).¹⁵

7. Like all Members of the World Trade Organization (WTO), the Philippines has ratified the Agreement on Trade Related Intellectual Property Rights (TRIPS). The TRIPS Agreement contains minimum standards on copyright and related rights.¹⁶ While WTO Members must fulfill certain minimum standards to protect copyrights, TRIPS also includes a 3-step test which allows States to apply some limitations and exceptions (L&E) to copyrights at the national level. L&E permit a State certain flexibilities that can be used to promote access and dissemination of copyrighted works.¹⁷ According to the 3-step test, the WTO Members "shall confine limitations and exceptions to exclusive rights a) to certain special cases, b) which do not conflict with a normal exploitation of the work, and c) do not unreasonably prejudice the legitimate interests of the rights holder."¹⁸ Despite this flexibility, there is debate and uncertainty about how to apply the test, because the linkages between international law (namely the Berne Convention and the TRIPS Agreement) and domestic copyright

⁷ *Berne Convention for the Protection of Literary and Artistic Work*, 9 September 1886, amended on 28 September 1979, http://www.wipo.int/treaties/en/ip/berne/trtdocs_wo001.html - P447_86233

⁸ Such a license can be granted according to the conditions listed in the Appendix and has to provide a compensation for the copyright owner, according to Article IV(6)(a) of the Appendix, Berne Convention, *op.cit.*

⁹ Okediji, Ruth, *Fostering Access to Education, Research and Dissemination of Knowledge through Copyright*, draft paper prepared for the UNCTAD-ICTSD Dialogue on Moving the pro-development IP agenda forward: Preserving Public Goods in health, education and learning, Bellagio, 29 November – 3 December 2004.

¹⁰ *The Intellectual Property Code of the Philippines, Republic Act 8293*, Republic of the Philippines, 1998, <http://www.ipophil.gov.ph/IPCode/IPCodeMain.htm>

¹¹ International Intellectual Property Alliance (IIPA), *2009 Special 301 Report, Philippines*, <http://www.iipa.com/rbc/2009/2009SPEC301PHILIPPINES.pdf>

¹² *Ibid.*

¹³ See: a2knetwork.org, *Consumers International IP Watch List Report 2009*, Philippines, <http://a2knetwork.org/reports2009/philippines>

¹⁴ Office of the United States Representative, *Intellectual Property*, Mai 2009, http://www.ustr.gov/Trade_Sectors/Intellectual_Property/Section_Index.html

¹⁵ This FTA would build on a previously established Bilateral Trade and Investment Framework Agreement (TIFA) between the two countries.

¹⁶ Art. 9-14, 15 April 1994 (date of adoption), 1 January 1995 (entry into force), http://www.wto.org/english/docs_e/legal_e/27-trips_01_e.htm

¹⁷ Okediji, Ruth, *op.cit.*

¹⁸ Art. 13, TRIPS Agreement, *op.cit.*

law are complex and unclear.¹⁹ This has resulted in relatively low use of L&E flexibilities in copyright legislations of developing countries,²⁰ including the Philippines.

8. In the Philippines, L&E for copyright-protected works are recognized under a 'fair use' clause in the Intellectual Property Code, which allows the government and specified public institutions to use copyrighted works where such use is in the public interest.²¹ The fair use clause allows, for example, using multiple copies for teaching purposes. In practice, however, this means that in general only a few and partial copies can be used for educational ends and they should not affect negatively the financial gain of the copyright holder. Similarly, for research and private study only one copy of a copyrighted publication can be used but it is not allowed to copy an entire book or a substantial part of it. Further, there is no specific mention of distance and online education in the Intellectual Property Code.²² Those factors indicate a low level of flexibilities and limit access to educational materials for Filipino children who cannot afford expensive text books.

Copyright and Article 28(1) of the CRC

9. Under the CRC Article 28(1), the Filipino government has an obligation to a) make primary education compulsory and available free to all, b) make secondary education accessible and available to every child by introducing free education and offering financial assistance in case of need, and c) make higher education accessible on the basis of capacity by every appropriate means.

10. In her report *Human rights obligations: making education available, accessible, acceptable and adaptable*,²³ the former Special Rapporteur on the right to education, Katarina Tomasevski, elaborated on the importance of the principles of availability, accessibility, acceptability and adaptability for the fulfilment of the right to education. Availability, accessibility and acceptability are particularly relevant in the context of copyright legislation. Availability refers to the idea that education must not only be free but also requires sufficient teachers and teaching materials, such as exercise books and text books, for the right to be fulfilled.²⁴ Accessibility means that everyone must have access to school, without discrimination. From an economic perspective, accessibility implies that education must be affordable for all, taking into account the indirect costs of text books.²⁵ Further, to comply with the principle of acceptability, education has to be of quality, which includes a sufficient quantity of text books.²⁶

Criminalizing the photocopying of books around universities

11. Another matter of concern is the criminalizing of photocopying of books around universities. The IIPA denounces the "illegal commercial-scale photocopying" of university text books, technical books, professional medical and nursing books that takes place on or around Filipino university campuses and the illegal reprinting of these copyrighted works.²⁷ Current Filipino copyright law imposes stiff penalties for infringement and the law does not distinguish between individual and corporate infringements; both are subject to criminal sanctions.²⁸ Many students, however, cannot afford the expensive original books and do not have other options than using photocopies. Thus, in the end students are penalized because there are no cheaper academic books available.

Copyright and internet access to educational materials

12. The World Intellectual Property Organization Copyright Treaty (WCT)²⁹ entered into force in the Philippines in 2002. This Treaty contains rules to control and restrict access to copyrighted works on internet through technological and legal protection measures. The WCT was first implemented by the

¹⁹ Hinze, Gwen, *Making Knowledge Accessible Across Borders: the Case for Mandatory Minimum International Copyright Exceptions and Limitations for Education, Capacity Building and Development*, Electronic Frontier Foundation, November 2008, p. 3, <http://www.eff.org/files/eff-making-knowledge-accessible-whitepaper.pdf>

²⁰ *Ibid.*

²¹ *The Intellectual Property Code of the Philippines, op.cit.*, Part IV, Chapter VIII, Art. 184.1(h).

²² a2knetwork.org, *op.cit.*

²³ *Right to education primers No. 3, 2001*, <http://www.right-to-education.org/sites/r2e.gn.apc.org/files/B6g%20Primer.pdf>

²⁴ Right to education project, 'Education and the 4As', *Availability*, <http://www.right-to-education.org/node/227>

²⁵ *Ibid.*, *Accessibility*, <http://www.right-to-education.org/node/228>

²⁶ *Ibid.*, *Acceptability*, <http://www.right-to-education.org/node/ec229>

²⁷ IIPA, *op.cit.*

²⁸ a2knetwork.org, *op.cit.*

²⁹ *WIPO Copyright Treaty*, 20 December 1996 (date of adoption), http://www.wipo.int/treaties/en/ip/wct/trtdocs_wo033.html

US in its 1998 Digital Millennium Copyright Act. If the Philippines decides to incorporate the WCT according to the US model, access to learning materials on internet is likely to be strongly curtailed. Experiences in the US and EU, where such technological and legal protection measures of copyrighted works in internet have been introduced, show how they seriously affect access to works online, hampering for instance scientific research.³⁰ The Philippines has not yet adopted an enabling law that would allow copyright holders to control their works on internet. However, the Intellectual Property Coalition (IPC), a federation of Philippine trade associations, is lobbying for such a law.³¹ The Business Software Alliance, representing some of the world's biggest software companies, is among those pushing for domestic legislation through the IPC.³²

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Recommendations: In line with its obligations under Article 28(1) of the CRC, we encourage the Filipino government to use available flexibilities under the Berne Convention and the TRIPS Agreement to ensure copyright legislation supports access to text books and other teaching materials at all educational levels. To achieve this goal, we recommend that the government extends the list of limitations and exceptions within the Intellectual Property Code to include detailed provisions for all aspects of educational activities. This should include a provision allowing the government to grant compulsory licenses to ensure the supply of affordable text books.

As a State Party to the CRC, the Filipino government has the obligation to take the right to education into account when negotiating and implementing multilateral, bilateral and regional trade agreements. It should therefore conduct impact assessments before negotiating such agreements to ensure that the copyright provisions they include do not impede children's access to educational materials.

Further, we encourage the Filipino government to make sure that future legislation related to copyright for works on the internet fully takes into account the right to education. If the government asks for international technical assistance to implement the WIPO Copyright Treaty, this should be done in accordance with Article 28(3) of the CRC and facilitate "access to scientific and technical knowledge and modern teaching methods".

Questions: What steps have been taken to ensure that copyright laws within the Intellectual Property Code of the Philippines promote access to educational materials?

What steps have been taken to ensure that the Philippines trade, copyright and economic policies do not undermine the access of children to education, protected by Article 28 of the CRC?

Please describe the steps taken by the State party to assess the impacts on access to education, particularly for vulnerable groups, of the Free Trade Agreement planned to start with the US later this year. Please indicate whether human rights impact assessments are conducted as part of the preparations for the negotiations.

Please describe the measures in place to ensure that the government's implementation of the WIPO Copyright Treaty will promote children's online access to education.

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³⁰ South Center, *The Threat of Technological Protection Measures to a Development Oriented Information Society*, Policy Brief No. 9, August 2007, p. 5, available to download on http://www.southcentre.org/index.php?option=com_content&task=view&id=63

³¹ Ike Suarez, 'Philippines must remain in IPR watchlist-IP watchdog', *The Manila Times*, 10 March 2008.

³² *Ibid.*