

**LEGAL REPORT ON THE ARCHIVAL PROJECT, “THE NATION, PEDAGOGY &  
CINEMA: THE UNIVERSITY OF THE PHILIPPINES FILM INSTITUTE  
AV ARCHIVES COLLECTIONS”**

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## INTRODUCTION

This report addresses the legal considerations arising from the partnership between the University of the Philippines Film Institute (UPFI) Audiovisual Archives and the University of California, Los Angeles (UCLA) Modern Endangered Archives Program (MEAP) Planning Grant. It specifically outlines a legal framework for the digitization and potential public dissemination of the UPFI's U-matic and Open Reel collections, in accordance with applicable intellectual property and archival standards.

The Modern Endangered Archives Program (MEAP) program provides financial support to initiatives aimed at documenting, digitizing, and ensuring the accessibility of endangered archival collections of historical and sociocultural significance.<sup>1</sup> These collections include various formats like print, photographs, film, audio recordings, and digital files.

Established in 1976 as part of the UP Film Center (UPFC), the UPFI Film Archives & Library is one of the earliest film archives in Southeast Asia. It functions as both an audiovisual repository and academic service arm, integrated into the University of the Philippines library system. In 2003, the UPFC was officially merged with the College of Mass Communication's Department of Film and Audiovisual Communication. Renamed the University of the Philippines Film Institute (UPFI), the merger unified and restructured both units to strengthen the institution's role in advancing Filipino film education, creative practice, and scholarly research.

The UPFI Archives holds significant historical collections, namely:

1. **Open Reels Collection comprises 2463 reels, out of which 2,367 reels or 96.1%—is categorized as Malacañang Open Reels, which document the official engagements of then President Ferdinand E. Marcos Sr. and First Lady Imelda Marcos. These were created by the defunct state media outfit National Media Production Center (NMPC). The collection was rescued from the Malacañang Presidential Palace by the UPFC Film Archives team after the public uprising in 1986. The UPFC Film Archives became**

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<sup>1</sup>Modern Endangered Archives Program, UCLA Library, <https://meap.library.ucla.edu>

custodian of the Open Reels Collection since 1986 before it was transferred to the CMC Library in 2010 for a digitisation project. Of the 2,367 open reels, 544 were catalogued. In 2021, the whole collection was transferred to the UPFI AV Archives . . .

2. **U-matic Tapes Collection included in the catalog is comprised of 864 U-matic tapes** containing United Nations materials, UPFC short film workshop outputs and documentations, and other AV materials from institutional collaborators from 1960s to 1990s. The UPFC short films in these collections are copies of orphan films, originally shot in 8mm and 16mm film then transferred to U-matic tapes for archiving. The original films are either lost to time or transferred to the Philippine National Archive. These were originally housed in the UPFC Film Archives Facility and transferred to the CMC Library in 2010 for a digitisation project. The whole collection remains uncatalogued. In January 2023, the collection was transferred to the current UPFI AV Archives.<sup>2</sup>

Due to the deteriorating quality of the UPFI AV collections, the latter seeks to provide a publicly accessible inventory, through the support of the MEAP Planning Grant. This project highlights the beginnings of the country's cinematic tradition cultivated during periods of social unrest and cultural revolution.

#### *Pertinent Provisions of the MEAP Planning Grant*

Through the support of the Modern Endangered Archives Program (MEAP) Planning Grant, the University of the Philippines Film Institute (UPFI) Audiovisual Archives, hosted by the Society of Filipino Archivists, Inc., is undertaking a comprehensive survey of its Open Reel and U-matic Tapes collections. The project duration extends from **June 15, 2024, to June 1, 2025**.<sup>3</sup> Over this period, the project will:

- a. develop a comprehensive inventory of all the items in the two collections with a unified collection management framework; and

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<sup>2</sup> *Id.*, at 3,

<sup>3</sup> MEAP Agreement between The Regents of the Univ. of Cal. & Soc'y of Filipino Archivists, Inc., UCLA Ref. No. 20243088-08 (on file with author).

- b. Preparing detailed survey reports that summarize the scope, significance, copyright status, physical conditions, and proposed conservation strategies for each collection.<sup>4</sup>

The project must adhere strictly to open access and digital preservation wherein any digital materials resulting from the grant, including heritage documentation repositories, must be made freely accessible online, taking into account protection of confidential, proprietary, and sensitive data, as well as indigenous and minority rights.<sup>5</sup>

It is important to note that Under Article 11 of the MEAP contract, the UCLA and the Arcadia Charitable Trust ("Prime") hold an irrevocable, non-exclusive, worldwide, royalty-free license to use, reproduce, distribute, and publicly display materials produced through this grant, strictly for educational or research purposes.

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<sup>4</sup> *Id.*, at 7.

<sup>5</sup> *Id.*, at 23.

## DESCRIPTION OF THE ARCHIVAL MATERIALS TO BE SURVEYED

This section outlines the pertinent details and classifications regarding the selected collection to be digitized and uploaded for public access, as funded by the MEAP grant. It is to note that not all reels from the UPFI AV collections are selected.

### *Type of Collection*

Type of Collection	Frequency (%)
Open Reels Collection	2,463 (74%)
U-Matic Collection	864 (26%)
TOTAL	3,327 (100%)

Table 1. Frequency of the Type of Collection under the MEAP Grant.

As shown in Table 1, the archival materials surveyed comprise two primary collections totaling 3,327 reels:

1. **Open Reels Collection:** Consisting of 2,463 reels (74% of the surveyed materials), this collection primarily includes audio recordings of former President Ferdinand Marcos Sr.'s official speeches, conferences, and meetings from 1966 to 1974, with a total of 2,367 (96% of the Open Reels Collection). These reels were originally produced by the Presidential Press Office and subsequently rescued from Malacañang Palace by UP Film Center archivists during the 1986 People Power Revolution.

The rest of the Open Reels Collection, numbering to 96 reels (4% of the Open Reels Collection), consists of mixed content, with 10 tapes associated with the UP Film Center.

2. **U-matic Tapes Collection:** Containing 864 reels (26%), this collection consists of audiovisual recordings that document short films created through the UP Film Center workshops, as well as materials from various institutional collaborations, spanning the 1960s to the 1990s.

Majority of the U-matic tapes, consisting of 557 tapes (65% of the U-matic tapes), were produced or are affiliated with the United Nations. The rest of the tapes, 307

(36% of the U-matic tapes), are a diverse collection of local and international content, including films, recordings, programs, and other mixed-theme reels.

A unique sample from this collection are a group of donated TV Show Reels, consisting of eight (8) reels, from the production series, “The Shahani Perspective”. The show was led by former Philippine Senator and former United Nations Assistant Secretary-General for Social and Humanitarian Affairs Leticia R. Shahani as part of her advocacy promoting moral and ethical values development of the nation, featuring cultural and social themes. It is also worth noting that several U-Matic tapes in the collection were donated by former Senator Shahani, having been entrusted to her by her friend, UPFI Founder Ms. Virginia Moreno.

#### *Major Creators and Publishers*

<b>Creator</b>	<b>Frequency (%)</b>
Presidential Press Office / National Media Production Center	2366 (71%)
United Nations	533 (16%)
Others	325 (10%)
Untitled / Cannot be Determined	103 (3%)

Table 2. Frequency of known Creators of the Reel to be collected.

Significant creators and contributing organizations identified within the archival collections include the Presidential Press Office and the defunct National Media Production Center, and United Nations-related materials, comprising 71% of the total collection. Approximately 3% of the items have undetermined creators or are untitled. The rest of the collections, numbering 10%, include various other contributors such as independent film directors, radio broadcasting corporations, and private individuals, reflecting the diversity of the content and origins of the archived reels being preserved.

#### *Whether the Reels are beyond or within the 50-year Copyright Protection Term*

<b>Beyond the 50-year Term?</b>	<b>Frequency (%)</b>
Yes	2,342 (70%)
No	318 (10%)

Undetermined / Undated	667 (20%)
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Table 3. Frequency of Collections with respect to the 50-year Copyright Protection Term.

Table 3 shows the number and percentage of reels in the collection that are beyond or within the 50-year copyright protection term. The majority of the collection, comprising 70% of the total collection, are beyond the 50-year term, hence in the public domain. Some reels, comprising 20%, are undated. Ten percent (10%) of the reels are still within the copyright protection term.

#### *Application on a Sample Reel*

For further appreciation, take for example the Open Real Collection, titled “PFM - Courtesy Call of Filipinos from Hawaii.” The classification of the reel is as follows:

1. Type of Collection. - Open Reels Collection. This is evident as this is part of the collection of the speeches of Former President Ferdinand Marcos, Sr.
2. Creator. - Presidential Press Office. Hence, can be classified as government work. Government works will be explored in the discussion on legal issues.
3. Copyright Protection Term. - Beyond the 50-year period. Hence, this reel is considered part of the public domain.

By this information, the reel in question can be legally digitized and uploaded for full public access. This will be explained further in the discussion on legal issues.



## LEGAL FRAMEWORK

### *Intellectual Property*

Intellectual Property (IP) is defined as intangible assets resulting from the creative work of an individual or organization. It also refers to creations of the mind, such as inventions, literary and artistic works, and symbols, names, images, and designs used in commerce.<sup>6</sup> Under Philippine law, such creations are recognized as property, and ownership may be acquired through intellectual creation.<sup>7</sup> This form of ownership is conferred upon authors, composers, painters, sculptors, scientists, and other creators, with authors and composers holding ownership even prior to publication.<sup>8</sup>

### *Intellectual Property in the Philippines*

The legal framework governing IP in the Philippines is rooted in the 1987 Constitution and Republic Act No. 8293 or the Intellectual Property Code of the Philippines (IP Code). The Constitution mandates the State to protect the exclusive rights of scientists, inventors, artists, and other gifted citizens to their creations, particularly when they benefit the public.<sup>9</sup> Complementing this, the IP Code emphasizes that a robust IP system enhances creative activity, facilitates technology transfer, attracts foreign investment, and improves market access for Philippine products.<sup>10</sup>

Additionally, the Philippines is also a signatory to several international IP treaties such as the Berne Convention, the WIPO Copyright Treaty, the TRIPS Agreement, and the Rome Convention, demonstrating its commitment to global IP standards.

The IP Code outlines several categories of intellectual property rights, including copyright, patents, trademarks, industrial designs, geographic indications, layout designs, and protection of undisclosed information. Among these, the most commonly encountered and fundamental rights are those related to copyright, patents, and trademarks. In *Pearl & Dean v. Shoemart*,<sup>11</sup> the Supreme Court of the Philippines emphasized the distinct legal nature of

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<sup>6</sup> §4, Rep. Act No. 10055, Philippine Technology Transfer Act of 2009.

<sup>7</sup> Art. 712, NCC

<sup>8</sup> Art. 721-722, NCC

<sup>9</sup> §13, Art. XIV, 1987 Constitution

<sup>10</sup> §2, R.A. No. 8293, Intellectual Property Code of the Philippines.

<sup>11</sup> G.R. No. 148222, August 15, 2003

each: trademarks distinguish goods and services, copyrights protect original intellectual creations in literary and artistic domains, and patents cover new, inventive, and industrially applicable solutions to problems.

### *Copyright Law*

Copyright law, arguably the most nuanced among IP rights, protects literary and artistic works from the moment of creation.<sup>12</sup> Black's Law Dictionary defines copyright as the statutorily granted exclusive right of an author to multiply and publish copies of their original work. The IP Code enumerates protected works, including books, articles, lectures, musical compositions, paintings, sculptures, computer programs, audiovisual works, and more.<sup>13</sup> It also protects derivative works like adaptations, translations, and compilations, provided they do not infringe on the original works' existing copyrights.<sup>14</sup> Copyright ownership vests in the author, with specific provisions for joint authorship, employee-created works, commissioned works, audiovisual creations, and personal correspondence.<sup>15</sup> Generally, if a work is created outside of an employee's regular duties, the employee retains copyright. However, if it arises from regular functions, the employer owns it unless agreed otherwise. In commissioned works, the client owns the material object, but copyright remains with the creator unless stipulated otherwise.<sup>16</sup>

Copyright grants both economic and moral rights. Economic rights include the exclusive authority to reproduce, adapt, distribute, rent, publicly display or perform the work, and communicate it to the public.<sup>17</sup> Moral rights, on the other hand, allow the author to demand attribution, object to distortions of the work that harm their reputation, and restrain the use of their name in unauthorized ways.<sup>18</sup> Authors are also entitled to a resale royalty of 5% from sales or leases of original works of art or manuscripts, valid for their lifetime and 50 years post-mortem.<sup>19</sup>

The IP Code further extends rights to performers, producers of sound recordings, and

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<sup>12</sup> § 172, RA 8293

<sup>13</sup> *Id.*

<sup>14</sup> § 173.

<sup>15</sup> § 178

<sup>16</sup> *Id.*

<sup>17</sup> § 177

<sup>18</sup> § 198

<sup>19</sup> § 200.

broadcasting organizations. Performers can authorize or prevent the broadcasting and fixation of their performances and claim identification. Producers can control the reproduction, distribution, and rental of recordings. Broadcasting organizations have rights over rebroadcasting and recording of their programs, as confirmed in *ABS-CBN v. Gozon*.<sup>20</sup>

### *Copyright Protection Term*

The term of copyright protection generally lasts for the life of the author plus 50 years after death. For joint works, protection extends until 50 years after the death of the last surviving author. Anonymous and pseudonymous works are protected for 50 years from publication unless the author's identity becomes known. Works of applied art are protected for 25 years from creation, and photographic and audiovisual works for 50 years from publication or creation.<sup>21</sup> All terms begin on January 1 of the year following the qualifying event.<sup>22</sup> For related rights, performers' and producers' rights last 50 years, while broadcasters' rights last 20 years.<sup>23</sup>

### *Limitations of Copyright Protection*

Some materials, however, are excluded from copyright protection. The IP Code states that ideas, methods, discoveries, and news of the day are not protected, even if expressed in a creative work.<sup>24</sup> Additionally, government works are not copyrightable, although the government may authorize their use for profit and retain rights transferred to it.<sup>25</sup> In *Domingo v. Civil Service Commission*,<sup>26</sup> the Court ruled that government-owned materials are free for public use.

Certain acts are likewise exempt from copyright infringement which include the recitation or performance of a lawfully accessible work if done privately and without profit, or for charitable or religious purposes; quotations compatible with fair use from published works provided the source and author are credited; mass media reproduction of publicly

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<sup>20</sup> G.R. No. 195956, March 11, 2015

<sup>21</sup> §213

<sup>22</sup> §214

<sup>23</sup> *Supra* note 21

<sup>24</sup> §175

<sup>25</sup> §176

<sup>26</sup> G.R. No. 236050, June 17, 2020

delivered lectures or articles on current topics not expressly reserved; and the reproduction of works for reporting current events via photography or broadcast to the extent necessary.

Also exempt are educational uses such as illustrative inclusion in broadcasts or classroom materials (with due attribution), school recordings for internal use (subject to timely deletion), ephemeral recordings by broadcasting organizations, and uses by the government or public institutions aligned with fair use.<sup>27</sup>

Other non-infringing uses include the public display of original works not shown via screen or projection, legal advice and judicial uses, and nonprofit reproductions in formats accessible to the visually impaired.<sup>28</sup> In general, these exceptions are governed by a twin requirement: the use must not conflict with the normal exploitation of the work and must not unreasonably prejudice the legitimate interests of the copyright holder.<sup>29</sup>

### *Application of Fair-Use*

Important to note is the doctrine of fair use. It allows the use of copyrighted material for criticism, comment, news reporting, teaching (including classroom copies), scholarship, and research. Decompilation of computer programs to achieve interoperability may also fall under fair use. Four factors determine fair use: (a) the purpose and character of the use, including whether it is commercial or non-profit educational; (b) the nature of the copyrighted work; (c) the amount and substantiality of the portion used; and (d) the effect of the use on the market value of the original work.<sup>30</sup> The unpublished status of a work does not bar a fair use finding.<sup>31</sup>

For copyright infringement to be found, there must be proof of (1) valid copyright ownership, (2) unauthorized violation of economic rights, and (3) the act must not fall within fair use or other statutory exceptions.<sup>32</sup> In the case of Anrey's Restaurant, a commercial establishment playing radio music without charging admission, the Court found no fair use. Even if no fee was charged for the music, its use enhanced the restaurant's appeal and

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<sup>27</sup> §184

<sup>28</sup> *Id.*

<sup>29</sup> *Id.*

<sup>30</sup> §185

<sup>31</sup> *Id.*

<sup>32</sup> FILSCAP v. Anrey, G.R. 233918, Aug. 9, 2022

profitability. Commercial use typically weighs against fair use, and unlicensed public performance can negatively affect the market for musical works. The reception created a new performance requiring separate licensing, reinforcing the concept of a “new public” that justifies licensing fees for each use.

## DISCUSSION ON LEGAL ISSUES

The digitization, and public dissemination of archival audiovisual collections raise key legal concerns, particularly in relation to copyright status, ownership, and limitation under Philippine law and International Law. This section outlines the principal legal issues and considerations necessary to ensure compliance and legality of the project.

### *Preliminary Considerations*

For the digitization and public dissemination of the project's collections, careful consideration of applicable copyright laws is essential. To mitigate risks of infringement, it is recommended first to classify the materials based on whether the latter are exempted by copyright or certain limitations apply. This section discusses the recommended legal strategy to ensure the compliance of the project to copyright.

#### 1. Term of Protection for Copyrighted Works

The important consideration to discuss is the maximum protection term afforded to copyrighted works where this protection would cease after the stipulated term and the respective work would enter the public domain, thus free from copyright restriction.

It is provided by the Intellectual Code of the Philippines that there exists a 50-year protection term for copyrighted works, to wit:

Section 213. Term of Protection. - 213.1. Subject to the provisions of Subsections 213.2 to 213.5, the copyright in works under Sections 172 and 173 shall be protected during the life of the author and for fifty (50) years after his death. This rule also applies to posthumous works.

213.2. In case of works of joint authorship, the economic rights shall be protected during the life of the last surviving author and for fifty (50) years after his death.

213.3. In case of anonymous or pseudonymous works, the copyright shall be protected for fifty (50) years from the date on which the work was first lawfully published: Provided, That where, before the expiration of the said period, the author's identity is revealed or is no longer in doubt, the provisions of Subsections 213.1. and 213.2 shall apply, as the case may be: Provided, further, That such works if not published before shall be protected for fifty (50) years counted from the making of the work.

213.4. In case of works of applied art the protection shall be for a period of twenty-five (25) years from the date of making.

213.5. In case of photographic works, the protection shall be for fifty (50) years from publication of the work and, if unpublished, fifty (50) years from the making.

213.6. In case of audio-visual works including those produced by process analogous to photography or any process for making audio-visual recordings, the term shall be fifty (50) years from date of publication and, if unpublished, from the date of making.<sup>33</sup>

The protection term of 50 years is also provided in the Beijing Treaty on Audiovisual Performances, as follows:

The term of protection to be granted to performers under this Treaty shall last, at least, until the end of a period of 50 years computed from the end of the year in which the performance was fixed.<sup>34</sup>

For a tape or reel to be free from copyright restriction, the 50-year period stipulated for audio-visual works must be followed, either from the date of publication or, if unpublished, from the date of making.<sup>35</sup> From the Collection, around 70% of the tapes are beyond the 50-year threshold, hence can be legally digitalized and uploaded to the digital platform of the project. However, there exists cases where the tape is within the 50-year

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<sup>33</sup> §213, Rep. Act No. 8293.

<sup>34</sup> Art. 14

<sup>35</sup> §213.6.

period which requires other considerations to be used.

## 2. Government Works

Government works are generally exempted by the Intellectual Property Code from copyright, 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 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. (Sec. 9, first par., P.D. No. 49)

176.2. The author of speeches, lectures, sermons, addresses, and dissertations mentioned in the preceding paragraphs shall have the exclusive right of making a collection of his works. (n)

176.3. Notwithstanding the foregoing provisions, the Government is not precluded from receiving and holding copyrights transferred to it by assignment, bequest or otherwise; nor shall publication or republication by the Government in a public document of any work in which copyright is subsisting be taken to cause any abridgment or annulment of the copyright or to authorize any use or appropriation of such work without the consent of the copyright owner.<sup>36</sup>

Furthermore, Government works are further defined to be, “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 part of his regularly prescribed

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<sup>36</sup> §176.



official duties.”<sup>37</sup> The exemption of government works from copyright is further illustrated in the case of *Domingo v. Civil Service Commission* where the Petitioner used materials from the National Archive of the Philippines (NAP) to deliver a lecture without prior approval from the authorized officer.<sup>38</sup> However, the Supreme Court held that since the materials were owned by the government, they were not subject to copyright under the Intellectual Property Code and can be used freely by the public.

However, not all government works may be exempted from copyright regulation. As stated, any exploitation of the said work for profit must first require approval from the respective agency. It is further provided by law that any work of the government done outside of prescribed official duties may be protected by copyright, upon the request of the government official.<sup>39</sup>

Care must also be given to government works that are considered confidential or classified by the respective authorities. Executive Order No. 02 or the Executive Order on Freedom of Information (FOI) aims to promote an open government by increasing the transparency of the executive branch and its agencies. It strengthens the right to information as enshrined by the constitution.

However, there are limits to what data or information may be freely given to the public, as illustrated in the Inventory of Exceptions to the FOI. As to date, the following have been added to the said Inventory of Exemptions:

1. Information covered by Executive privilege (which covers Presidential conversations, correspondence, and discussions in closed-door Cabinet meetings and Matters covered by deliberative process privilege).
2. Privileged information relating to national security, defense or international relations;
3. Information concerning law enforcement and protection of public and personal safety;

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<sup>37</sup> Rule 2, par. 8, Philippines Copyright Safeguards and Regulations.

<sup>38</sup> G.R. 236050, June 17, 2020.

<sup>39</sup> Rule 5, Sec. 1, par. 3, Philippines Copyright Safeguards and Regulations.

4. Information deemed confidential for the protection of the privacy of persons and certain individuals such as minors, victims of crimes, or the accused;

5. Information, documents or records known by reason of official capacity and are deemed as confidential, including those submitted or disclosed by entities to government agencies, tribunals, boards, or officers, in relation to the performance of their functions, or to inquiries or investigation conducted by them in the exercise of their administrative, regulatory or quasi-judicial powers;

6. Prejudicial premature disclosure;

7. Records of proceedings or information from proceedings which, pursuant to law or relevant rules and regulations, are treated as confidential or privileged;

8. Matters considered confidential under banking and finance laws, and their amendatory laws; and

9. Other exceptions to the right to information under laws, jurisprudence, rules and regulations.<sup>40</sup>

However, the law is silent on whether these exemptions cover the digitalization and public access of said exempted material. In order for certain confidential government works to be published, it is required that there must be prior approval from the respective government agency or representative, provided that the 50-year period has not yet transpired.

For any government works that are deemed or marked as confidential, it is recommended that the issuing agency is notified and asked for consent to be archived and published by the Project. Other government works not marked as confidential are exempt

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<sup>40</sup> Mem. Circ. No. 15 (March 15, 2023).

from copyright restrictions, provided that the Project does not earn commercially from the publishing of the collections.

### 3. Fair Use

For any collection not applicable for the previous considerations stated, another recourse would be to argue that the archiving and collecting of such materials of the Project is under the fair-use principle. As provided in the Intellectual Property Code:

Section 185. Fair Use of a Copyrighted Work. - 185.1. The fair use of a copyrighted work for criticism, comment, news reporting, teaching including multiple copies for classroom use, scholarship, research, and similar purposes is not an infringement of copyright. Decompilation, which is understood here to be the reproduction of the code and translation of the forms of the computer program to achieve the inter-operability of an independently created computer program with other programs may also constitute fair use. 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;

(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.<sup>41</sup>

Hence, in order for fair-use to apply, we need to determine the purpose and character of the archiving and publishing operations of the Project, the nature of the

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<sup>41</sup>§185.1, Rep. Act No. 8293.

copyrighted works of the collection, the amount and substantiality of the portion of the individual work taken, and the effect of the Project upon the potential market.

On the purpose and character of the Project, it must fall under those listed in Section 185 of the Intellectual Property Code, namely: criticism, comment, news reporting, teaching including multiple copies for classroom use, scholarship, research, and similar purposes.<sup>42</sup> Additionally, the Supreme Court of the Philippines held that “[t]he 'transformative test' is generally used in reviewing the purpose and character of the usage of the copyrighted work. This court must look into whether the copy of the work adds 'new expression, meaning or message' to transform it into something else.”<sup>43</sup> If it is transformative, fair-use can be applied. Most importantly, if the purpose is not commercial in nature, such work favors fair-use.<sup>44</sup>

On the nature of the copyrighted work, care must be used in distinguishing whether the work is factual or fictional and artistic as fair use defense carries more weight in case of factual works compared to fiction and fantasy, since generally, there is a greater need to disseminate the former than the latter.<sup>45</sup> Moreover, "the closer the work is to the core of copyright protection – i.e., the more creative, imaginative, or original the copied work is, the more likely will fair use be rejected as a defense against infringement."<sup>46</sup>

On the amount and substantiality of the portion used, “[a]n 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.”<sup>47</sup>

On the potential effect of the Use upon the Potential Market Value of the Copyrighted Work, this factor obliges courts to assess not just the specific market harm caused by the alleged infringer's actions, but also whether allowing such

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<sup>42</sup> G.R. 222537, *Cosac, Inc., Petitioner, Vs. Filipino Society Of Composers, Authors And Publishers, Inc., Respondent*.

<sup>43</sup> *Id.*

<sup>44</sup> *Id.*

<sup>45</sup> *Id.*

<sup>46</sup> *Id.*, citing *Separate Concurring Opinion of Associate Justice Alfredo Benjamin S. Caguioa*, p. 18.

<sup>47</sup> *Id.*

conduct broadly and without restriction would significantly harm the potential market for the original work and its derivatives.<sup>48</sup> However, it is also noted that permitted use of copyrighted materials which are non-profit, such as for educational purposes, are ruled to have no significant impact on the copyright holders' exclusive economic rights, and aligns with the principle that copyright law should foster creativity and the advancement of knowledge for the public benefit.<sup>49</sup>

Applying the fair-use doctrine to the Project, it is clear that the archiving and publishing of the materials are non-commercial and for educational and teaching purposes, in line with Section 185 as stated. The aims of the Project are to collect and publish historical materials for the use of students, researchers and the general public - free of charge. Hence, the first test on the purpose and character of the project is satisfied.

The second test on the nature of the copyrighted work delineates between whether the work is factual or artistic. The Project consists of factual works such as documentaries, speeches of government officials, and the like. Such works are more favorable to the fair-use doctrine and may be archived and published. However, for works that are more artistic in value, such as movies, performances, and other related materials, it is better for the Project to wait for the protection term of 50 years before publication to avoid possible copyright infringement.

Referring to the third test on the amount and substantiality of the copyrighted work, the Project, by its nature, will use the totality of an individual reel for publication. It is provided that even though an entirety of the work is used, if the purpose aligns with fair-use, then the latter is applicable. Based on the first test as earlier mentioned, the purpose of the Project is for non-commercial and educational purposes, hence the third test is satisfied.

On the last test on the potential adverse effects on the market value upon use of the Copyrighted Work, provided that the purpose aligns with fair-use, the last test is satisfied. Given that the project is non-profit and for educational purposes, this test is

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<sup>48</sup> *Id.*

<sup>49</sup> *Id.*

satisfied. Additionally, it is our opinion being that most of the collection came from defunct publishers, negligible losses are accrued by the market for these works.

To conclude, the rule on whether or not fair-use applies to the Project, hinges on the nature of the work to be digitized, uploaded, and published. Fair-use is more favorable for factual works compared to artistic works. Hence, in order for the latter to be free from any copyright restrictions, it is recommended for the Project to wait for the 50-year protection term before publishing.

#### 4. Special Case on UN-produced U-Matic tapes

The project currently contains from its U-matic tapes collection, UN-produced U-Matic tapes forming the majority of said collection. UN-produced materials are owned by the United Nations itself. The latter maintains specific policies regarding the reproduction and use of its content, as follows:

The Film and Video Archives of the United Nations provide over 60 years' worth of historical film and video materials for use in news, documentaries and other productions related to the aims of the United Nations. To seek permission to use a video, please submit your request to [<https://media.un.org/avlibrary/en/contact>].<sup>50</sup>

However excerpts of certain materials are exempt from written permissions, as follows:

No permission is necessary to reproduce excerpts from a non-sales publication provided that proper credits are given.

xxx

No permission is necessary to reproduce excerpts from speeches delivered by UN staff in their official capacity provided that proper credits are given along with the date and context. As for speeches delivered at the United Nations (all

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<sup>50</sup> Rights & Permissions, United Nations, <https://shop.un.org/rights-permissions>.

Secretariat locations) by non UN staff, requests must be addressed to the speaker.<sup>51</sup>

While these exceptions provide some allowance for limited use, they do not extend to full-length audiovisual works such as the large-scale digitization envisioned under the project. In these cases, express written permission is still required.

Henceforth, it is recommended that the UPFI-MEAP formally submit the stated written permission form of the UN before digitizing and uploading all the UN U-matic tapes to avoid possible copyright infringement.

## 5. Special Case on Orphan Works

Currently, 3% of the collections have yet unverifiable owners or publishers. These collections are then classified as Orphan works which are not in public domain, but the copyright holder cannot be discovered or contacted.<sup>52</sup>

The law is still silent in the Philippines regarding the regulation of Orphan Works. The Intellectual Property Office of the Philippines (IPOHIL) is currently proposing a bill to Congress to revise the Intellectual Property Code, including provisions on orphan works.<sup>53</sup> Under the proposed changes concerning orphan works, a license must be obtained from the Bureau of Copyright and Related Rights, with the corresponding payment treated similarly to royalties. The licensee will be protected from infringement suits. If no rightful claimant comes forward within two years, the license payment may be utilized by the licensee. However, if a claimant emerges within that period, the payment will be released to them.

Since the proposed bill is still not in effect, for those classified as orphan works in the Collection, it is recommended for the Project to wait until the 50-year protection subsides before publication.

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<sup>51</sup> *Id.*

<sup>52</sup> Black's Law Dictionary 9th Edition.

<sup>53</sup> *Correspondence with* Bayaras, Jeremy John, personal communication, March 13, 2025.

An example of this is the Shahani Perspective tapes which were earlier discussed. The tapes in question were produced by the defunct Radio Philippines Network, Inc. (RPN), with unclear copyright vestment upon donation of Former Senator Shahani. In cases like this, there is a potential risk of infringement should a rightful copyright holder later assert ownership. To mitigate this risk, it is prudent to wait for the expiration of the 50-year copyright protection term before making the tapes publicly accessible, thereby allowing them to enter the public domain.

*Whether the Collection can be digitalized and uploaded for public access*

The determination of whether the collection may be digitized and uploaded to the Project's website revolves around whether this use of the copyrighted materials falls under fair use.

This matter is clarified in the American case of *Authors Guild v. Google, Inc.*<sup>54</sup> This is a copyright infringement case involving Google's large-scale digitization of books through its Google Books project. Google, Inc. collaborated with major research libraries to scan over twenty million books and indexed them all online, many of which were under copyright, without securing prior permission or paying license fees to the rights holders. The Authors Guild and other individual copyright owners filed suit, claiming that this massive scanning effort constituted copyright infringement. The issue of the case is whether it was fair use to digitally copy entire books from library collections, without permission or payment, and to make the digital copies available for library collections and for the public to search electronically using a search engine.

The Second Circuit Court, in determining whether fair-use applies in this case, applied the four-factor test:

- a. On the purpose and character of the use. - Google's use is “transformative” as utilizing a search function in its digitized collection improves public access to information about the books without significantly substituting the copyrighted material or its derivatives. The court also ruled that providing digital copies to libraries for legitimate uses is not infringement, and the unlikely possibility of

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<sup>54</sup> *Authors Guild v. Google, Inc.*, No. 13-4829 (2d Cir. 2015)



those libraries infringing does not make Google liable for contributing to infringement.

- b. On the nature of the copyrighted work being used. - Contrary to Philippine Jurisprudence, it was held that the nature of a work, i.e., whether it is factual or fictional, should not affect the question of Fair Use. The nature of the use of the copyrighted work combines with the “purpose and character” of such use. If the purpose is determined to favor fair-use, the second factor is also satisfied. Therefore, by the second factor, Google is not liable for copyright infringement.
- c. Concerning the "amount and substantiality" of the works used, the circuit court concurred with the lower court's decision that Google's act of copying entire books to power the Google Books "full-text search function" didn't automatically disqualify it from fair use. This was because Google restricted the amount of text visible to users in their search results.
- d. On the issue of how Google Books might affect the market or value of the copyrighted works, the circuit court determined that while the search function could cause "some loss of sales," the brief and disjointed snippets provided through the snippet view were too inconvenient and incomplete to act as a real substitute for purchasing the author's book.

By these arguments, the Circuit Court determined that the digitization and subsequent use of the copyrighted works fell under fair use, leading to a summary judgment for Google.

The case supplemented the Intellectual Property Code by underscoring the importance of the purpose of the use of copyrighted works and the permissibility of digitizing entire works when the output provides limited access to the extent of the material.

Applying the aforementioned to the Project, the legal permissibility of digitizing and uploading the UPFI Audiovisual Archives for public access hinges on a nuanced application of Philippine copyright law, informed by the principles established in *Authors Guild v. Google, Inc.*

## 1. On the Legality of Digitization of the Collection

The act of digitizing the collection for preservation and archival purposes is likely favorable to fair-use given that the purpose thereof is non-commercial and for preservation of historical data and educational purposes. Furthermore, digitization enables the archive to manage and potentially provide access in legally compliant ways, such as through carefully controlled excerpts or for specific fair use applications, without causing undue infringement.

## 2. On Public Access to the Collection

This issue requires more careful consideration and depends on several factors:

- a. Copyright Status. - Materials already in the public domain (those exceeding the 50-year protection term) can be freely uploaded for public access. Similarly, non-confidential government works are exempt from copyright and can be made publicly accessible.
- b. Fair-Use Application. - For copyrighted materials still within the protection term and not in public domain, it is safer to: a) limit the access to verified researchers and students from the University of the Philippines and UCLA; b) limit the extent of the work accessed such as low-resolution previews and excerpts; and c) wait for the 50-year protection term for copyrighted audiovisual works before uploading for public access. The latter is recommended as it is the safest route, considering existing Philippine law and jurisprudence on the matter.

## RECOMMENDATION

In light of the foregoing analysis, it is recommended that the UPFI Audiovisual Archives proceed with the digitization of the U-matic and Open Reel collections for preservation purposes, while observing legal limitations on public access. Specifically:

1. Materials beyond the 50-year period – All audiovisual materials determined to be beyond the 50-year copyright term or otherwise clearly in the public domain should be prioritized for digitization and made publicly accessible online..
2. Government Works – Materials created by government agencies as part of official duties and not marked as confidential may be digitized and uploaded without the need for prior approval. For works labeled confidential or “closed-door,” consent must first be secured from the relevant government agency.
3. Copyrighted Materials Within the Protection Period – Digitization of these materials is permitted for internal archival purposes. However, public access should be limited to:
  - a. Verified academic and research users from UP and UCLA;
  - b. Low-resolution previews or excerpts;
  - c. Controlled digital environments (e.g., password-protected platforms);
  - d. Full public access only after the expiration of the copyright term.
4. Orphan Works – For works whose copyright owners remain unknown or unverifiable, public access should be deferred until either (a) a license framework under Philippine law becomes available, or (b) the 50-year term lapses and the material enters the public domain.
5. Application of Fair Use – In select cases, especially where the material is factual, non-commercial, and intended for education or research, the Project may rely on fair use. Nonetheless, caution is advised, and the four-factor test should be applied on a case-by-case basis, particularly for complete works or creative content.