

**FILIPINO SOCIETY OF COMPOSERS AND PUBLISHERS, PETITIONER,
VS. WOLFPAC COMMUNICATIONS, INC., RESPONDENT.***G.R. No. 184661, February 25, 2025*

Ponente: LOPEZ, M., J.

Read online (full-text search, related cases, audio case brief): <https://batas.org/library/g-r-no-184661/>**LOPEZ, M., J.:**

The advent of digital technology paved the way for the development of copyrights. In this age where the unauthorized utilization and exploitation of literary and artistic works can be done in a matter of seconds, different kinds of rights, such as communication to the public and public performance, emerged to protect copyright owners.[1] In some jurisdictions, communication to the public is a form of public performance. But since the Intellectual Property (IP) Code provides a dichotomy between public performance and communication to the public, the Court is duty bound to differentiate these two rights.

Central in this Petition for Review on Certiorari[2] assailing the Judgement[3] dated June 16, 2008 and the Order[4] dated September 16, 2008 of Branch 93, Regional Trial Court, Quezon City (RTC) in Civil Case No. Q-05-54775,[5] is whether allowing potential consumers to listen to sample ringtones constitutes public performance of songs belonging to the Filipino Society of Composers and Publishers' (FILSCAP) repertoire.

FACTS

FILSCAP is an aggrupation of copyright owners in the Philippines. Its members executed individual deeds of assignment authorizing FILSCAP to grant permission or licenses to third persons who intend to perform, mechanically reproduce, or synchronize their musical works.[6] This arrangement allows FILSCAP to collect license fees or royalties. Meanwhile, Wolfpac Communications, Inc. (Wolfpac) markets and promotes mobile phone applications and aggregates a collection of third-party content and mobile applications for distribution by its partner-operator, like Smart Communications, Inc., through a Global System for Mobile Communication Wireless Application Protocol and other similar facilities.[7]

Sometime in 2004, FILSCAP came across an advertisement[8] in the Lifestyle Section of the May 28, 2004 issue of the Philippine Daily Inquirer. The advertisement promoted the downloading of ringback tones for mobile phones from the website <http://ring.smart.com.ph>. The website also allows a prospective consumer to listen to a 20-second portion of a song by clicking the "pre-listening function" before downloading the ringback tone—hence, the advertisement's come-on phrase "Listen B4 U Download." When FILSCAP discovered that Wolfpac operated the website, they demanded Wolfpac to secure the necessary performance licenses and pay the appropriate royalties since some of the ringback tones are part of their repertoire of copyrighted works. Wolfpac did not secure the licenses and refused to pay royalties because the pre-listening function of their website does not constitute public performance.[9]

Consequently, FILSCAP filed a Complaint[10] for copyright infringement and damages against Wolfpac, and alleged that Wolfpac must secure a performance license and pay the royalties for the use of copyrighted musical works. In its Answer, Wolfpac argued that there is no public performance. First, the pre-listening service is free.

Second, it is intended to be performed privately by potential consumers using their computers. Third, the samples have no independent commercial value. Fourth, Wolfpac neither performs the samples nor makes the samples audible to the public since the samples are only available to potential consumers. Even assuming that there is public performance, Wolfpac claimed that it has memoranda of agreements with the composers authorizing the public performance of the musical works.[11]

On June 16, 2008, the RTC dismissed FILSCAP's Complaint[12] and ruled that Wolfpac's transmission of data or downloading of ringtones constitutes communication to the public. However, the 20-second pre--listening function does not constitute public performance for which Wolfpac may be held liable for copyright infringement. Moreso that Wolfpac's pre--listening function comes under the fair use doctrine. The RTC explained that it is natural for people to sample a product before buying it as afforded by Wolfpac's 20-second sample available in its website. Wolfpac is justified in its use of the sample for promotional purposes, even without a performance license, as there were deeds of assignment executed in their favor. The RTC opined that playing of samples is inherent in assigning the musical works to be converted into ringback tones.[13] Moreover, the RTC found that to sample ringtones is fair use considering that: (a) the composers authorized Wolfpac to convert their musical works into ringtones; (b) the nature of musical work requires audio exhibition; (c) the 20-second duration of the samples is insubstantial; and (d) allowing the playing of samples will foster patronization of the musical works.[14]

FILSCAP filed a Motion for Reconsideration,[15] but it was denied in an Order[16] dated September 16, 2008. Hence, this recourse.[17]

First, FILSCAP insists that Wolfpac's pre-listening function constitutes public performance for which Wolfpac is required to secure a license and pay royalties.[18] Second, FILSCAP argues that the RTC erred in considering the pre-listening function as justified under the fair use doctrine because it serves no public purpose. Instead, it is a commercial activity that falls outside the fair use doctrine.[19] Third, the authority granted to Wolfpac under the deeds of assignment does not include the playing of samples. The agreements merely grant mechanical rights to Wolfpac to reproduce the songs into ringtone format, and to offer and sell them to the public. The reproduction of the musical works is separate and distinct from public performance.[20]

For its part,[21] Wolfpac contends that FILSCAP raises questions of fact as to whether there is proof of the effect of the pre-listening service on the potential market of the copyrighted work and whether the memoranda of agreement in favor of Wolfpac are genuine.[22] Anent the substantive issues in the Petition, Wolfpac stresses that the composers assigned their musical works for conversion into ringtones, with the corollary right to offer and sell the ringtones, as well as to market them through the pre-listening function.[23] Wolfpac also argues that the pre-listening service is not public performance but communication to the public, which is an exception to public performance.[24] Finally, the fair use doctrine is applicable because the samples have no independent commercial value, precluding FILSCAP from claiming remuneration.[25]

On March 19, 2009, FILSCAP filed its Reply,[26] reiterating that its Petition raises only questions of law. FILSCAP maintains that even if the Petition raises questions of fact, the Court can still resolve these issues because the RTC's findings are grounded on speculation, surmises, or conjecture, the inference made is manifestly mistaken, absurd, or impossible, there is grave abuse of discretion, and the judgment is based on a misapprehension of facts.[27]

Upon the Court's Resolution[28] dated October 28, 2009, the parties submitted their respective Memoranda.[29]

ISSUES

- Whether the use of sample ringtones in the pre-listening function on Wolfpac's website constitutes public performance or communication to the public.
- Whether Wolfpac's use of the samples constitutes copyright infringement.

THE COURT'S RULING

The Petition is partly meritorious. The deeds of assignments in favor of Wolfpac do not include the assignment of the songs for use in a pre-listening device. However, the Court cannot hold Wolfpac liable for copyright infringement in using the sample ringtones under the fair use doctrine.

Petitioners raised questions of law,
direct recourse to this Court proper

Rule 41, Section 2(c) of the Rules of Court provides that if only questions of law are raised or involved, the appeal shall be taken to this Court by petition for review on certiorari under Rule 45. A pure question of law exists when the doubt or difference arises as to what the law is on a certain set of facts, and not as to the truth or falsity of the facts involved. The test is whether the Court can resolve the issues without examining the probative value of the evidence presented by the parties.[30] Here, FILSCAP raised pure questions of law—whether the pre-listening function on Wolfpac's website constitutes public performance, the applicability of the fair use doctrine, and FILSCAP's entitlement to royalties.[31] The facts, which are undisputed, raised no factual issue and leaves this Court to determine the application of the law.

Moreover, the novel character of the case is one of the well-defined exceptions to the doctrine of the hierarchy of courts.[32] There are special and compelling reasons for this Court to proceed with the review considering that the issues involved are of distinct significant consequence and value.[33] The RTC decided a question of substance when it dismissed FILSCAP's Complaint and ruled that Wolfpac's pre-listening function is not public performance and constitutes fair use.[34] Notably, there is no legal precedent on the matter at the time of the RTC's ruling and that the RTC had to consult foreign jurisprudence. Thus, apart from determining the rights and obligations of the parties, the resolution of the untold issues will greatly contribute to the pedagogical development of the country's intellectual property jurisprudence.

I.

Wolfpac's use of sample ringtones in
a pre-listening function is
communication to the public

The IP Code provides seven types of copyrights or economic rights: reproduction, derivative, distribution, rental and lending, public performance, communication to the public,[35] and resale.[36] The two exclusive rights most relevant to this case are public performance and communication to the public of musical works.

Public performance and communication to the public can be traced back to Article 11(1)[37] of the Berne Convention. Public performance covers live performances given by actors and singers on the spot and performances using recordings, such as discs, cassettes, tapes, and videograms, while communication to the public covers all public communication except broadcasting.[38]

In 1996, the World Intellectual Property Organization Copyright Treaty (WCT) provided a more defined concept of communication to the public, viz.:

Article 8
Right of Communication to the Public

Without prejudice to the provisions of Articles 11(1)(ii), 11bis(1)(i) and (ii), 11ter(1)(ii), 14(1)(ii) and 14bis(1)(i) of the Berne Convention, authors of literary and artistic works shall enjoy the exclusive right of authorizing any communication to the public of their works, by wire or wireless means, including the making available to the public of their works in such a way that members of the public may access these works from a place and at a time individually chosen by them. (Emphasis supplied)

The Philippines acceded to the WCT only in 2002, but Congress adopted the WCT's definition of communication to the public[39] in enacting the IP Code.

Foreign jurisprudence on public performance and communication to the public

For the past years, both the litigants and the courts have relied on US cases in interpreting certain provisions of our copyright laws because Act 3134 was patterned after the United States (US) Copyright Law of 1909.[40] Senator Raul Roco, in his sponsorship speech during the second reading of the Senate Intellectual Property Rights Bill, also acknowledged the persuasive effect of US courts' decisions on Philippine courts for the same reason, viz.:

Of particular importance is the inclusion of Section 174 on Fair Use which was taken from the US Copyright Law. This is significant because through this Section, the decisions of U.S. courts, which have persuasive effect on Philippine courts for copyright could serve as important references in the resolution of complex copyright issues such as the determination of whether or not the decompilation of a computer program would not constitute an infringement of copyright.[41] (Emphasis supplied)

Before recognizing the persuasive effects of US courts' decisions and determining whether they might help the Court in deciding the complex issues in this case, it is imperative to consider the relevant portions of the US Copyright Laws first. For instance, it appears that Section 101[42] of the US Copyright Laws considers communication to the public as a form of public performance. However, communication to the public and public performance are defined as two separate rights under the IP Code. Thus, the Court cannot simply rely on the alleged similarities of the facts in this case with the facts of the following cases raised by the parties to support their contentions: *Bonneville International Corporation v. Peters*[43] (*Bonneville*), *Cartoon Network v. CSC Holdings*[44] (*Cartoon Network*), and *In re Application of Cellco Partnership d/b/a Verizon Wireless*[45] (*Verizon*). These cases are not on all fours with the present controversy.

First, FILSCAP argues that the pre-listening function is like "streaming" or the digital transmission of programming over the internet, which requires Wolfpac to secure a public performance license for its use of the samples. It cited *Bonneville* where the US district court considered "streaming" as a public performance, requiring a public performance license and payment of royalties.[46]

The issue in *Bonneville* is whether US Copyright Laws exempting radio broadcasters engaged in nonsubscription broadcast transmission from paying royalties to record producers and recording artists still apply when the radio broadcasters digitally transmit the same broadcasts over the internet, a practice known as "streaming." The US court upheld the US Copyright Office's ruling that radio broadcasters engaged in "streaming" ("webcasters") are not exempt from paying royalties because webcasting is made by computer transmitters that relay signals anywhere in the world, unlike nonsubscription broadcast transmission which is made by terrestrial broadcast stations.

Notably, Section 106[47] of the US Copyright Laws expressly grants the copyright owner's authority to allow the performance of sound recordings publicly through digital audio transmission. In Our jurisdiction, the IP Code

does not provide that digital audio transmissions of sound recordings constitute public performance. Thus, the Court cannot apply *Bonneville* to determine whether a pre-listening function that uses music samples, and which may constitute digital audio transmission, is a form of public performance.

Second, *FILSCAP* cites the US Court of Appeals' general statement in *Cartoon Network* that transmission is made to the public even if the recipients are not gathered in a single place.[48] But then, an examination of *Cartoon Network* reveals that allowing the consumers to record and later play cable programs or "Remote Storage DVR System" (RS-DVR playback) is not public performance of movies and television programs. In reaching this conclusion, the US Court of Appeals examined who is "capable of receiving" or the potential audience of the particular transmission of a performance to determine whether the transmission is to the public. The US Court of Appeals noted that the RS-DVR system only makes transmissions to one subscriber using a copy made by that subscriber. For this reason, the person capable of receiving an RS-DVR transmission is the single subscriber whose self-made copy is used to create the transmission.

Third, *Wolfpac* finds support in *Verizon* where the US district court held that downloading and playing ringtones do not constitute a public performance.[49] The US district court explained that the downloading of ringtone or transmission was not made to the public because only one subscriber is capable of receiving the transmission. *Verizon* is also not liable for public performance every time ringtones play in public to signal incoming calls. The US Copyright Laws[50] exempt the performance or transmission to the public if made without any purpose of direct or indirect commercial advantage and payment of any fee or other compensation for the performance. However, the IP Code does not specifically provide that absence of payment of any fee or other compensation for the performance or communication to the public, on its own, is a limitation on copyright. More, the facts of *Verizon* are different from this case. The issue in *Verizon* is whether there is public performance every time a consumer's phone rings in public. On the contrary, the issue in this case, is whether *Wolfpac*'s pre-listening function is a form of public performance.

Despite the foregoing inconsistencies, We note that the US cases cited by the parties reveal the importance of examining who is "capable of receiving" the communication to the public or who is "capable of perceiving" the performance of a work. As will further be discussed, focusing on who is "capable of receiving" or "capable of perceiving" will help the Court differentiate public performance and communication to the public.

Communication to the public and public performance of musical compositions under Philippine law and jurisprudence

Musical compositions are among the literary and artistic works that are subject of copyright under Section 172 of the IP Code. To be protected, the musical composition must be embodied in a sound recording or other forms of fixation.[51] The IP Code defines sound recording as the fixation of the sounds of a performance or other sounds, or representation of sound, other than in the form of a fixation incorporated in a cinematographic or other audio-visual work.[52] In general, fixation is the embodiment of sounds, or its representations, from which they can be perceived, reproduced, or communicated through a device.[53]

There are two separate rights in music. First is the right over the notes and lyrics. This pertains to the song itself created by the music composer and the lyricist, fixed in some form like music sheets. The second is the right over what is audible. This pertains to a particular version of a person's performance, which is fixed in a sound recording.[54]

Musical compositions can be communicated to the public or publicly performed. In Our copyright laws, communication to the public and public performance are defined as two separate rights under Sections 171.3 and 171.6 of the IP Code, respectively.

Section 171.3 of the IP Code, as amended,[55] defines communication to the public, viz.:

171.3 'Communication to the public' or 'communicate to the public' means any communication to the public, including broadcasting, rebroadcasting, retransmitting by cable, broadcasting and 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. (Emphasis supplied)

A reading of Section 171.3 shows that communication to the public by wire or wireless means has two aspects: (a) the act of making the work available to the public; and (b) the option on the part of the members of the public to access the work from a place and time individually chosen by them.

Meanwhile, Section 171.6 of the IP Code considers public performance as:

171.6 "Public performance," in the case of a work other than an audiovisual work, is the recitation, playing, dancing, acting or otherwise performing the work, either directly or by means of any device or process; in the case of an audiovisual work, the showing of its images in sequence and the making of the sounds accompanying it audible; and, in the case of a sound recording, making the recorded sounds audible at a place or at places where persons outside the normal circle of a family and that family's closest social acquaintances are or can be present, irrespective of whether they are or can be present at the same place and at the same time, or at different places and/or at different times, and where the performance can be perceived without the need for communication within the meaning of Subsection 171.3[.] (Emphasis supplied)

Similarly, public performance has two aspects: (a) actual performance of the work, showing the work, or making the work audible, depending on the type of work; and (b) actual or possible public perception without the need for communication to the public.

The above interpretations of communication to the public and public performance rights are demonstrated in the recent cases of *FILSCAP v. Anrey*[56] (Anrey), *FILSCAP v. COSAC*[57] (COSAC) and *Philippine Home Cable Holdings, Inc. v. FILSCAP*[58] (Home Cable).

In *Anrey*, the Court held that Anrey's use of a loudspeaker in playing radio broadcasts in its restaurant falls under public performance, thus:

Following a run-down of the above definitions, a sound recording is publicly performed if it is made audible enough at a place or at places where persons outside the normal circle of a family, and that family's closest social acquaintance, are or can be present. The sound recording in this case, is the copyrighted music broadcasted over the radio which Anrey played through speakers loud enough for most of its patrons to hear. But the big question is whether radio reception is, to begin with, a performance.

We believe that the act of playing radio broadcasts containing copyrighted music through the use of loud speakers (radio-over--loudspeakers) is in itself, a performance.

In the American case of *Buck v. Jewell-LaSalle Realty Co.* (Jewell), the respondent, a hotel proprietor, played copyrighted musical compositions received from a radio broadcast throughout the hotel by using public speakers for the entertainment of its guests. ASCAP notified the hotel of its copyrights and advised that unless a license was obtained, performance of any of its copyrighted musical composition of its members is forbidden. Suits for injunction and damages were brought against the hotel. The hotel argued that radio receiving cannot be held to be performing. The federal court denied relief against ASCAP, but on appeal, the

SCOTUS ruled that the act of respondent in playing copyrighted musical compositions received from a radio broadcast throughout the hotel by means of a public speaker system was a "performance" within the meaning of the US Copyright Act of 1909. The court reasoned that a reception of radio broadcast and its translation into audible sound was not a mere playing of the original program, but was a reproduction, since complicated electrical instrumentalities were necessary for its reception and distribution.

Then came the case of *Twentieth Century Music Corp. v. Aiken* (Aiken), which temporarily abandoned the concept that radio reception is a performance. In Aiken, a restaurant received songs broadcasted in the radio and this was heard all throughout the area using four speakers. The station that broadcasted the songs is licensed by ASCAP but the restaurant did not hold such a license, thus it was sued for copyright infringement. On the sole question on whether radio reception constituted copyright infringement, the SCOTUS ruled in the negative. It stated that those who listen do not perform, therefore do not infringe. The said court used the analogy that if a radio station "performs" a musical composition when it broadcasts it, then it would require the conclusion that those who listen to the broadcast through the use of radio receivers do not perform the composition.

Finally, the case of *Broadcast Music, Inc. v. Claire's Boutiques, Inc.* (Claire's) reverted back to the same rationale laid down in *Jewell*. As it stands now, an establishment that plays radio-over-loudspeakers is said to have publicly performed them. . .

. . . .

A radio reception creates a performance separate from broadcast. This is otherwise known as the doctrine of multiple performances which provides that a radio (or television) transmission or broadcast can create multiple performances at once. The doctrine was first conceived in *Jewell* wherein the SCOTUS noted that the playing of a record is "a performance under the Copyright Act of 1909," and that "the reproduction of the radio waves into audible sound waves is also a performance." Ultimately, the SCOTUS in *Jewell* concluded that the radio station owner and the hotel operator simultaneously performed the works in question. . .[59] (Emphasis supplied; citations omitted)

Meanwhile, in *COSAC*, the Court held that performance by live bands and the playing of sound recordings in restaurants constitute public performance, to wit:

The IPC, before its amendment in 2013, did not distinguish if the public performance was conducted or made possible by the owners of the establishment, the performers, or other individuals and entities. Undeniably, however, the public performance of the copyrighted works, either directly or by means of any device or process, reached persons outside the normal circle of a family and that family's closest social acquaintances. This is how *Off the Grill* "performed" the copyrighted musical works under FILSCAP's repertoire[.]

. . . .

[A]s owner of *Off the Grill*, it allowed the commission of infringing acts when it permitted musical artists or bands to perform copyrighted music (secondary infringer), and played sound recordings as background music (primary infringer) without first procuring a license from the copyright owners (or assignees) of the songs and paying the fee.[60] (Emphasis supplied)

The Court, in *Home Cable*, considered cablecasting of karaoke channels as communication to the public because the karaoke is accessible to the public from a place or time individually chosen by them:

Here, petitioner's act of cablecasting the karaoke channels cannot be considered an exercise of the public performance rights over the subject musical compositions. Concededly, the works were performed by means of certain processes, and because the musical compositions were fixed in sound recordings in a videoke format, they were made audible "at a place or places where persons outside the normal circle of a family and that

family's closest social acquaintances are or can be present, irrespective of whether they are or can be present at the same place and at the same time, or at different places and/or at different times." However, the fact that "performance" of the musical composition requires the process described in Subsection 171.3 — using wireless means to make the musical compositions available to the members of the public in such a way they may access these compositions from a place and time individually chosen by them — in order to be perceived places the act complained of outside Subsection 171.6.

It must be noted a later amendment to the Intellectual Property Code, in Republic Act No. 10372, further expanded the scope of "communication to the public" to include broadcasting, rebroadcasting, retransmitting by cable, and retransmitting by satellite: 'Communication to the public' or 'communicate to the public' means any communication to the public, including broadcasting, rebroadcasting, retransmitting by cable, 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.

Nonetheless, even prior to the amendment, playing a musical composition, fixed in an audiovisual derivative work, over cable television to paying subscribers is making that work accessible to members of the public from a place or time individually chosen by them. This is the essence of the "communication to the public" right.[61] (Emphasis supplied; citations omitted)

As pointed out by Associate Justice Alfredo Benjamin S. Caguioa, the Court clarified in *Home Cable* that if the possibility of perceiving the performance requires the means of communicating the works to the public, such as broadcasting, rebroadcasting, retransmitting by cable, broadcasting and retransmitting by cable, broadcasting and retransmitting by satellite, and 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, then it is considered as an exercise of the right of "communication to the public." [62]

Considering that *Home Cable* is the prevailing doctrine, the Court reiterates the same test in this case. Communication to the public requires making the works available to the public through broadcasting, rebroadcasting, retransmitting by cable, broadcasting and retransmitting by cable, broadcasting and retransmitting by satellite, wire, or wireless means. The Court now focuses on the public's access to the works from a place and time individually chosen by them as part of the test.

To better understand the differences between communication to the public and public performance, *Cartoon Network* teaches us that examining who is capable of receiving the performance is important to determine the existence of public performance. With this, the Court focuses on the communicator and the performer on the one hand, and the public on the other.

In *COSAC*, the company that owns and operates the restaurant made the sound recordings audible by allowing the band to play copyrighted music in its restaurant where its consumers are or can be present. On the other hand, in *Home Cable*, the cable company made the karaoke available to its subscribers who can access the copyrighted music by turning on their television from a place and time individually chosen by them. Evidently, the subscribers' access allows them to choose when and where they would watch the karaoke.

Therefore, based on the above discussions, the public should have access to the copyrighted work at a time and place individually chosen by them to constitute communication to the public. Actual or possible public perception is unnecessary to show that communication to the public was made. As long as the communicator provides the public with the means to perceive the works, there is communication to the public. In public performance, actual or possible public perception is necessary while the public's access to the copyrighted work at a time and place individually chosen by them is not. As long as the performance is made at a place or at places where persons

outside the normal circle of a family and that family's closest social acquaintances are or can be present, irrespective of whether they are or can be present at the same place and at the same time, or different places and/or at different times, and where the performance can be perceived, there is a public performance.

All told, the differences between communication to the public and public performance are summarized as follows:

As to the act complained of: under Section 171.3, communication can be done by making the works available to the public by wire or wireless means, including broadcasting, rebroadcasting, retransmitting by cable, broadcasting, and retransmitting by satellite. Meanwhile, performance under Section 171.6 can be done in three ways, depending on the kind of work involved. In works other than audiovisual work, performance means the recitation, playing, dancing, acting, or otherwise performing the work by means of any device or process. In audiovisual works, performance constitutes the showing of images in sequence and making the accompanying sounds audible. Lastly, the performance of sound recordings is making the recorded sound audible.

As to the role of the accused or infringer: the accused, in communication to the public, is responsible for making the works available to the public by using the means provided under Section 171.3.[63] On the other hand, the accused performs, shows, or makes the work audible in public performance.[64]

As to the role of the public: in communication to the public by wire or wireless means, the members of the public have access to the works from a place and time individually chosen by them,[65] regardless of whether they actually accessed or received the works.[66] In public performance, the members of the public should actually or could possibly perceive the performance of the works without the need for communication to the public.[67]

The pre-listening function is a form of communication to the public—not public performance

In this case, the act complained of is Wolfpac's use of musical works, belonging to FILSCAP's repertoire, on its website's pre-listening function. FILSCAP contends that the pre-listening function is public performance because the sample ringtones are made audible to an unlimited number of people through the website.[68] Meanwhile, Wolfpac considers the pre-listening function as a communication to the public because the prospective buyers of the ringtones may listen to the samples from a place and time individually chosen by them.[69]

A scrutiny of the facts would show that the pre-listening function constitutes communication to the public. To recall, the two aspects of communication to the public by wire or wireless means are: (a) the act of making the work available to the public; and (b) the option on the part of the members of the public to access the work from a place and time individually chosen by them.

The agreement between Wolfpac and the composers allows Wolfpac to convert the content or musical works into ringtones, which can be downloaded through the Caller Ring Tune Service. Before potential consumers download the ringback tone, Wolfpac encourages them to listen to the sample first. The first aspect of communication to the public is apparent. Wolfpac's act of placing the pre-listening function makes the musical work available to the public through the use of the internet. The musical works are not yet audible; thus, the first aspect of public performance is still absent. The musical work becomes audible only when the potential consumer clicks the play button to hear the sample song. This is where the second aspect of communication to the public becomes apparent. Considering that the samples are available on Wolfpac's website, any member of the public can access the samples from a place and time individually chosen by them. Thus, there is communication to the public by wireless means because the members of the public can access the samples from Wolfpac's website at a place and time individually chosen by them.

Performance can also be present once the potential consumer plays the sample. In this scenario, the person who makes the sample audible is the potential consumer—not Wolfpac. Put simply, the performance was not made by Wolfpac. The members of the public individually perform the works by clicking the play button and making the samples audible. Such performance is not actionable because the potential consumers performed the musical work in private before deciding whether they would purchase the ringback tone. There is no public perception in such a way that persons outside the potential consumer's normal circle of family and their family's closest social acquaintances are or can be present. It must be stressed that what is prohibited is a public performance, not performance per se.

At the onset, the facts of this case show the characteristics of communication and performance of musical works. But then, only public communication is present when Wolfpac made the pre-listening function available to the public. There is no public performance on Wolfpac's part because the potential consumers were the ones who made the samples audible before deciding to purchase the ringback tone. Hence, the circumstances do not warrant the finding of public performance when Wolfpac's participation ends in providing the means for the public to access the sample ringtones.

II.

Wolfpac's use of the samples does not constitute copyright infringement, it falls under fair use

In broad terms, copyright infringement is a trespass on a private domain owned and occupied by the copyright owner. Infringement consists in the doing by any person, without the consent of the copyright owner, of anything that the copyright owner is allowed to exclusively do under the law.[70] The IP Code, subject only to the rules of fair use, prescribes a strict liability for copyright infringement such that good faith, lack of knowledge of the copyright, or lack of intent to infringe is not a defense.[71]

Copyright infringement is thus committed by any person who shall use the copyrighted works without the copyright owner's consent in a manner that violates the copyright owner's economic rights. For a claim of copyright infringement to succeed, the evidence on record must demonstrate: (a) ownership of a validly copyrighted material by the complainant; (b) violation of the copyright owner's economic right under Section 177[72] of the IP Code by the respondent; and (c) violation does not fall under any of the limitations on copyright under Section 184 of the IP Code or amounts to fair use of a copyrighted work if raised by the respondent as a defense.[73]

Not all the elements of copyright infringement are present in this case.

a.

Ownership of the copyrighted songs and FILSCAP's right to enforce communication to the public right

The parties do not dispute that the samples of songs used in the pre--listening function belong to the composers, but Wolfpac questions FILSCAP's authority to file the Complaint on behalf of the copyright owners. Relevantly, the Court already acknowledged FILSCAP's right as a Collective Management Organization and assignee of copyright owners to collect royalties "from anyone who intends to publicly play, broadcast, stream, and to a certain extent (reproduce) any copyrighted local and international music of its members and the members of its affiliate foreign societies"[74] and sue for copyright infringement in Anrey.

To be sure, the standard Deed of Assignment[75] in favor of FILSCAP, in this case, provides that "FILSCAP shall own, hold, control, administer and enforce said public performing rights [public performance and communication to the public] on an exclusive basis for as long as ASSIGNOR remains a member of FILSCAP." [76] Consequently, the first element is satisfied.

b.

Violation of the composers' communication to the public right

It is a basic principle that a contract is the law between the parties.[77] If the terms of a contract are clear and leave no doubt upon the intention of the contracting parties, Article 1370[78] of the Civil Code dictates that the literal meaning of its stipulations shall control. When it comes to the general terms of a contract, Article 1372[79] states that they shall not be understood to comprehend things that are distinct and cases that are different from those upon which the parties intended to agree. Further, the various stipulations of a contract shall be interpreted together as provided under Article 1374.[80]

Wolfpac's authority to convert the musical works into downloadable ringtones proceeds from the memoranda of agreement that it entered with the composers, who are also FILSCAP's members. The excerpt of the agreement in Wolfpac's favor reads:

2.1 to provide Content to WOLFPAC and permit the same to convert the Content into a form which can be downloaded through Caller Ring Tune Service, and to offer and sell the same to the general public via the Partner Operator[.][81] (Emphasis supplied)

The same agreement requires Wolfpac to seek other licenses and consent before using the content in a manner not provided under the agreements, to wit:

[T]he grant of herein does not include any right or authority not expressly authorized herein. All other rights of the Provider (composer) are deemed reserved. Any other licenses and consents required in connection with the use of Content (musical works) not otherwise granted herein shall be obtained by WOLFPAC[.][82] (Emphasis supplied)

The agreements between Wolfpac and the composers are the formal expression of their rights, duties, and obligations. Since the terms of their agreements were reduced into writing, it is considered as containing all the terms agreed upon by the parties. The court cannot stipulate for the parties or amend their agreements.[83]

Wolfpac stresses that the composers assigned their musical works for conversion into ringtones, with the corollary right to offer and sell the ringtones, as well as to market them through the pre-listening function.[84] However, a plain reading of the assignments in Wolfpac's favor reveals that the use of the musical works is limited to converting them into ringtones that can be downloaded by the public for a fee.

There are two communication to the public acts in this case. The first one is when Wolfpac made the ringtones available to the public for a fee. Wolfpac's exercise of communication to the public is necessary to convert the songs into a downloadable form. It is not the same with the second communication to the public act which pertains to Wolfpac's act of uploading the ringtones so that the public can listen to the ringtones for free. Communication to the public is not inherent in offering and marketing the ringtones to the public. Wolfpac can still offer and market the ringtones without providing a pre-listening function. This is supported by an advertisement in a newspaper showing the list of Ragnarok. ringtones and their ID Nos.[85] Wolfpac admitted the

existence of the print advertisement in its Answer.[86] Given these, Wolfpac can simply provide the list of songs and add the names of the singers. In releasing the print advertisement, Wolfpac exercised its right to offer the ringtones to the public. But in uploading the sample songs in the pre-listening function, Wolfpac exercised the composers' communication to the public right without their consent.

Surely, the agreement allows Wolfpac to offer the ringback tones, and advertisement is one way of offering it to the public. Even so, the agreement does not expressly allow the use of the songs in marketing the ringtones. Therefore, the Court cannot presume that communication to the public of songs through a pre-listening function is impliedly included under the general grant of authority "to offer and sell" and that the composers allowed their musical works to be used in a pre-listening function free of charge. Otherwise, this constitutes a waiver of communication to the public right on the composers' part. Such waiver is invalid when the terms of the assignment do not explicitly and clearly evince the composers' intent to abandon their communication to the public right through the pre-listening function.[87] In contrast, the composers' intention to reserve all their other rights is clear under the agreements. Moreover, in filing the infringement case against Wolfpac, the copyright owners, through FILSCAP, signify their clear intent to exclude the use of their songs in the pre-listening function.

In essence, the first communication to the public act is sanctioned under the agreement between Wolfpac and the composers, while the second one is not. The grant of rights in favor of Wolfpac is limited to the conversion of musical works into downloadable ringtones. The agreement presupposes that the public can only hear the composers' musical works after purchasing the ringtones. It did not sanction the use of ringtones in the pre-listening function for marketing or advertising purposes.

In fine, a ruling that Wolfpac's use of copyrighted songs in a pre--listening function falls under its right "to offer and sell" the ringtones violates Articles 1372 and 1374 of the Civil Code and completely ignores the composers' reservation of rights. As discussed, the general terms of a contract shall not be understood to comprehend things that are distinct and cases that are different from those upon which the parties intended to agree. The composers allowed Wolfpac to offer and sell the ringback tones to the public. This general grant of right "to offer and sell" could not have included the use of the ringback tones in a pre-listening function because the composers specifically reserved all other rights not expressly granted under the agreement. Making the sample of the works available to the public for free is beyond the scope of the right granted by the composers to Wolfpac. Hence, Wolfpac violated the composers' communication to the public right under Section 177 of the IP Code when it used samples of the musical works in the pre-listening function.

C.

Wolfpac's use of the sample ringtones is not a limitation on copyright, but it falls under fair use.

The IP Code provides limitations to copyright. These limitations allow the use of copyrighted works that would otherwise be considered copyright infringement absent some or all of the requirements. Section 184[88] enumerates these limitations, such as the recitation or performance of copyrighted works in private and free of charge or for a charitable or religious institution or society, for information purposes involving works delivered in public or published works, as part of reports of current events, for teaching purposes, to serve the public interest, for charitable or educational purposes, in any judicial proceedings or in giving professional legal advice.

On the other hand, fair use is a privilege to use the copyrighted work in a reasonable manner without the copyright owner's consent. It is an exception to the copyright owner's monopoly of the use of work to avoid

stifling the very creativity that the intellectual property law is designed to foster.[89] Specifically, Section 185 provides that the use of copyrighted works for criticism, comments, news reporting, teaching, scholarship, research, and similar purposes is fair use. The same section also enumerates the four factors to be considered in determining fair use of copyrighted work, thus:

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. (Emphasis supplied)

Notably, the IP Code used the term "include" in enumerating the factors. This means that the enumeration of factors is not exclusive,[90] and the courts can consider other factors in determining fair use. In some cases, some factors may be more important than the others.[91]

As to the first factor, the IP Code's use of the term "including" suggests that the commercial nature of the use is but one of the many considerations in determining the purpose and character of the use. Together with the commercial nature of the use, the courts may also consider the purposes cited in the first paragraph of Section 185, namely: criticism, comment, news reporting, research, and similar purposes. Again, the IP Code gives the courts wider discretion in looking into other similar purposes to determine if the use of the copyrighted works constitutes fair use. In other words, the examination of the first factor should not end in determining whether the use is for commercial purposes.[92] A finding that the use is commercial does not automatically bar the application of fair use. Conversely, the existence of non--profit educational purposes does not always indicate fair use.

The Court discussed, in *ABS-CBN Corporation v. Gozon*[93] (*ABS-CBN*), the relevance of the transformative test in examining the purpose and character of the use. The transformative test determines whether the use adds a new expression, meaning, or message.[94]

If there is a huge difference between the purpose and character of the copyrighted work and the complained use of the copyrighted work, the first factor tends to favor the finding of fair use because the use aims to accomplish some other purpose. If there is a smaller difference, fair use is less likely since the use of the copyrighted work achieves the same or similar purpose to that of the copyrighted work. Thus, the use of a copyrighted work is transformative if the use has a further purpose and different character.[95]

At this juncture, it must be stressed that the transformative test in examining the first factor does not necessarily pertain to the copyright owner's derivative right or the right to transform the copyrighted work. The transformative test focuses on the difference in the purpose and character of the use of the copyrighted work and is not limited to the transformation of the copyrighted work.[96]

Altogether, the first factor concentrates on whether the use of the copyrighted work serves a purpose different from that of the copyrighted work. If the other purpose is for criticism, comment, news reporting, research, or

other similar purpose, the use of the copyrighted work can be weighed in favor of fair use.

Regarding the second factor, the examination of the nature of the copyrighted work requires the courts to evaluate the level of creativity of the copyrighted work. If the copyrighted work is more creative than informational or functional, its use does not generally favor fair use.[97]

Anent the third factor, the Court explained in ABS-CBN that the exact reproduction of the copyrighted work weighs against the finding of fair use. However, there are instances when the use of the entire copyrighted work is still considered fair use because of the purpose of the use. Therefore, this factor focuses on the reasonableness of the amount, as well as the quality and importance, of the portion used to accomplish the purpose of the use.[98]

Lastly, the fourth factor focuses on the economic rights of the copyright owner. This factor requires the courts to examine the effect of the use on the potential market of the copyrighted work and the value of the copyrighted work. If the use had or will have negative effects on the copyrighted work's market, it cannot fall under fair use.[99]

In the recent case of *Anrey*, the Court applied the four factors in determining whether the playing of radio broadcasts in restaurants constitutes fair use. The Court found that all four factors do not favor fair use of musical works. First, the purpose and character of *Anrey's* act of playing the copyrighted songs throughout the restaurants are for the entertainment of its customers. Second, the nature of the songs is creative. Third, *Anrey* played the copyrighted songs in its entirety. Fourth, the unrestricted and widespread playing of copyrighted songs through radio-over-loudspeakers in commercial public places, e.g., bars, clubs, and other commercial establishments, for the public's entertainment would substantially affect the potential market of the copyrighted songs. Hence, the finding of copyright infringement.

Inarguably, the facts of this case do not squarely fall under any of the limitations provided in Section 184.1 of the IP Code. But then, an examination of the purpose and character of *Wolfpac's* use of the song samples in a pre-listening function and its effect on the value of the copyrighted works would show that *Wolfpac's* action comes under fair use.

To recall, *Wolfpac* converted the songs into downloadable ringtones. Before the potential consumers download the ringtones, *Wolfpac* encourages them to listen to the song samples first through a pre-listening function on their website. *Wolfpac* admits that the purpose of the pre-listening function is to market the ringback tones. Indeed, *Wolfpac's* use is commercial. However, this does not automatically mean that *Wolfpac's* use cannot come under fair use.

The first factor requires the Court to examine whether *Wolfpac's* use serves a purpose different from the songs. The main purpose of the songs is to entertain, but *Wolfpac* used it to provide potential consumers with means to make an informed choice before deciding to download the songs. Although the songs are unaltered, *Wolfpac's* use of the song samples in a pre-listening function changed the purpose of the songs. As pointed out by Senior Associate Justice Marvic M.V.F. Leonen, the pre-listening function provides potential consumers with comprehensive information on the ringback tones. It can confirm the title of the work, its artist or composer.[100] Therefore, the Court finds that the purpose of the pre-listening function is not purely commercial. It also allows the potential consumers to make an informed decision before downloading the ringback tones. As explained by Associate Justice Amy C. Lazaro-Javier, the pre-listening function allows potential consumers to identify or confirm if the ringback tones being offered are the songs that they wish to download.[101] This only shows that the pre-listening function also serves as a protection on the part of the potential consumers. Thusly, *Wolfpac's* use of copyrighted songs is transformative.

It must be stressed that the pre-listening function could work both ways. It can encourage and, at the same time, discourage the public from downloading the ringtones. It does not always result in increased sales and profit on Wolfpac's part. Hence, the pre-listening function also serves a public purpose, i.e., consumer protection. Consumer protection may be considered as a similar purpose under Section 185 because the pre-listening function provides information about the ringback tones.

For these reasons, the first factor of fair use favors Wolfpac. Meanwhile, the second factor is weighed against Wolfpac.

The Court has held in *Anrey* that the nature of songs is more creative than factual.[102] Similarly, the nature of the copyrighted works in this case is creative, albeit only portions of the songs were used by Wolfpac in the pre-listening function.

Regarding the third factor, the Court finds that the portion used in the pre-listening function is significant. Wolfpac's use of an approximately 20-second preview of the copyrighted works is aimed at encouraging potential consumers to purchase the ringtone. This only shows that the portion used is significant to incite a person to buy the ringtone. Even Wolfpac admitted in its Memorandum before the Court that an average consumer should be able to identify the musical work through the samples.[103] Nevertheless, the use of a substantial portion of the songs is reasonable and necessary to achieve Wolfpac's purpose of providing the potential consumers with information about the ringback tones.

As to the fourth factor, the Court finds that Wolfpac's use of the sample songs in the pre-listening function would not cause substantial economic harm to the composers. As discussed, the purpose of Wolfpac's use is to encourage potential consumers to download the ringback tones by allowing them to listen to song samples. While the samples are significant, they cannot accomplish the purpose of the copyrighted work, which is to provide entertainment. Neither does it serve as a substitute for the paid ringtones because the potential consumers cannot download the songs to their phones using the pre-listening function. Thus, the pre-listening function cannot serve as a market replacement for the copyrighted work.

All told, the Court cannot uphold the composers' reservation of rights since the use of the copyrighted works falls under fair use. As pointed out by Senior Associate Justice Marvic M.V.F. Leonen, fair use under the IP Code may supersede the reservation of rights made by the copyright owners.[104] In this case, the Court stresses that this is only limited to Wolfpac's act of making the song samples available to the public for purposes of allowing the potential consumers to make an informed decision before downloading the songs. Consequently, Wolfpac's use of the sample songs in the pre-listening function does not constitute copyright infringement.

A final note. The doctrine of fair use allows the courts to deviate from strictly applying the copyright laws when their rigid application would stifle the creativity that they are designed to foster[105] and when it would frustrate the State's function to promote the diffusion of knowledge and information.[106] In determining whether the complained act falls under fair use, the four initial factors laid down by the IP Code and the other factors particular in each case must be considered altogether. The courts must weigh the factors with great care and in consideration of the interests of both the creators and the public.

ACCORDINGLY, the Petition for Review on Certiorari is DENIED. The Judgment dated June 16, 2008 and the Order dated September 16, 2008 of Branch 93, Regional Trial Court, Quezon City in Civil Case No. Q-05-54775 are AFFIRMED.

SO ORDERED.

Gesmundo, C.J., Inting, Gaerlan, Rosario, J. Lopez, Marquez, and Kho, Jr., JJ., concur.
Leonen, SAJ. and Caguioa, JJ., see concurring opinion.
Hernando,[*] J., no part and on official leave.
Lazaro-Javier, J., see concurrence and dissent.
Zalameda and Singh, JJ., see separate concurring and dissenting opinion.
Dimaampao, J., see separate concurring opinion.

[*] No part and on Official Leave.

[1] See II Record, Senate, 10[th] Congress, 2[nd] Session (October 8, 1996), p. 15.

[2] Rollo, pp. 3-27.

[3] Id. at 35-39. Penned by Presiding Judge Ramon Paul L. Hernando (now a member of this Court),

[4] Id. at 32-34.

[5] "Civil Case No. Q-05-54475" in some parts of the records.

[6] Rollo, p. 35.

[7] Id. at 5-6.

[8] RTC Records, pp. 1858-1859.

[9] Rollo, pp. 35-36.

[10] Id. at 36.

[11] Id.

[12] Id. at 39. The dispositive portion of the Judgment reads:

ACCORDINGLY, on the foregoing ratiocinations, the complaint subject of this suit is hereby DISMISSED for lack of merit. Defendants' counterclaims are, in like manner, DISMISSED for want of merit. No costs.

SO ORDERED. (Emphasis in the original)

[13] Id. at 38.

[14] Id. at 39.

[15] Dated July 1, 2008; id. at 40-52.

[16] Id. at 32-34.

[17] Id. at 3-27.

[18] Id. at 8-16.

[19] Id. at 16-19.

[20] Id. at 19-22.

[21] Id. at 59-82.

[22] Id. at 64-66.

[23] Id. at 76-77.

[24] Id. at 67-68.

[25] Id. at 75-76.

[26] Id. at 91-96.

[27] Id. at 92-94.

[28] Id. at 125-126.

[29] Id. at 182-213, 217-258.

[30] See *Republic v. Lacap*, 546 Phil. 87, 98 (2007) [Per J. Austria-Martinez, Third Division].

[31] Rollo, p. 35.

[32] See *De Lima v. Guerrero*, 819 Phil. 616, 690 (2017) [Per J. Velasco, Jr., En Banc].

[33] See *Kumar v. People*, 874 Phil. 214, 229-230 (2020) [Per J. Leonen, Third Division].

[34] Rollo, pp. 37-39.

[35] See INTELL. PROP. CODE, sec. 177.

[36] See INTELL. PROP. CODE, sec. 200.

[37] Article 11

(1)

Authors of dramatic, dramatico-musical and musical works shall enjoy the exclusive right of authorizing:

(i)

the public performance of their works, including such public performance by any means or process;

(ii)

any communication to the public of the performance of their works.

[38] World Intellectual Property Organization, Guide to Berne Convention for the Protection of Literary and Artistic Works, 64-65, available at https://www.wipo.int/edocs/pubdocs/en/copyright/615/wipo_pub_615.pdf (last accessed on February 25, 2025).

[39] See INTELL. PROP. CODE, sec. 171.3, which provides:

Section 171.3 'Communication to the public' or 'communicate to the public' means 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[.]

[40] *Republic v. Heir of Tupaz IV*, 881 Phil. 625, 647 (2020) [Per J. Leonen, Third Division].

[41] II Record, Senate, 10[th] Congress, 2[nd] Session (October 8, 1996), p. 20.

[42] Section 101 – Definitions

....

To perform or display a work "publicly" means—

(1) to perform or display it at a place open to the public or at any place where a substantial number of persons outside of a normal circle of a family and its social acquaintances is gathered; or

(2) to transmit or otherwise communicate a performance or display of the work to a place specified by clause (1) or to the public, by means of any device or process, whether the members of the public capable of receiving the performance or display receive it in the same place or in separate places and at the same time or at different times.

... (Emphasis supplied)

[43] 153 F. Supp. 2d 763 (2001).

[44] 536 F. 3d 121 (2008).

[45] 663 F. Supp. 2d 363 (2009).

[46] Rollo, pp. 14-16.

[47] Section 106. Exclusive rights in copyrighted works

Subject to sections 107 through 122, the owner of copyright under this title has the exclusive rights to do and to authorize any of the following:

....

(6) in the case of sound recordings, to perform the copyrighted work publicly by means of a digital audio transmission.

[48] Rollo, pp. 11-14.

[49] *Id.* at 130-131.

[50] See Section 110 (4) of the US Copyright Laws which provides:

Section 110 — Limitations on exclusive rights: Exemption of certain performances and displays

(4) performance of a nondramatic literary or musical work otherwise than in a transmission to the public, without any purpose of direct or indirect commercial advantage and without payment of any fee or other compensation for the performance to any of its performers, promoters, or organizers, if—(A) there is no direct or indirect admission charge[.]

[51] See Article 2 (2) of the Berne Convention.

[52] See INTELL. PROP. CODE, sec. 202.2.

[53] See INTELL. PROP. CODE, sec. 202.4.

[54] DEBORAH E. BOUCHOUX, *INTELLECTUAL PROPERTY: THE LAW OF TRADEMARKS, COPYRIGHTS, PATENTS, AND TRADE SECRETS* 201-202, 219 (5th ed., 2016).

[55] See Republic Act No. 10372 (2012), sec. 4.

[56] 927 Phil. 577 (2012) [Per J. Zalameda, En Banc].

[57] G.R. No. 222537, February 28, 2023 [Per J. Hernando, En Banc].

[58] G.R. No. 188933, February 21, 2023 [Per J. Leonen, En Banc].

[59] *FILSCAP v. Anrey*, 927 Phil. 577, 594-597 (2022) [Per J. Zalameda, En Banc]; citations omitted.

[60] *FILSCAP v. COSAC*, G.R. No. 222537, February 28, 2023 [Per J. Hernando, En Banc] at 23, 38. This pinpoint citation refers to the copy of the Decision uploaded to the Supreme Court website.

[61] *Philippine Home Cable Holdings, Inc. v. FILSCAP*, G.R. No. 188933, February 21, 2023 [Per J. Leonen, En Banc] at 23-24. This pinpoint citation refers to the copy of the Decision uploaded to the Supreme Court website.

[62] J. Caguioa, Concurring Opinion, pp 9-10.

[63] See *INTELL. PROP. CODE*, sec. 171.3. See also *Philippine Home Cable Holdings, Inc. v. FILSCAP*, G.R. No. 188933, February 21, 2023 [Per J. Leonen, En Banc] at 23-24. This pinpoint citation refers to the copy of the Decision uploaded to the Supreme Court website.

[64] See *INTELL. PROP. CODE*, sec. 171.6. See also *FILSCAP v. COSAC*, G.R. No. 222537, February 28, 2023 [Per J. Hernando, En Banc] at 33. This pinpoint citation refers to the copy of the Decision uploaded to the Supreme Court website; and *FILSCAP v. Anrey*, 927 Phil. 577, 593-594 (2022) [Per J. Zalameda, En Banc].

[65] See *INTELL. PROP. CODE*, sec. 171.3.

[66] J. Zalameda, Separate Concurring Opinion in *Philippine Home Cable Holdings, Inc. v. FILSCAP*, G.R. No. 188933, February 21, 2023 [Per J. Leonen, En Banc] at 5. This pinpoint citation refers to the copy of the Separate Concurring Opinion uploaded to the Supreme Court Website.

[67] See *INTELL. PROP. CODE*, sec. 171.6.

[68] *Rollo*, pp. 13-16.

[69] *Id.* at 67-68.

[70] *Habana v. Robles*, 369 Phil. 764, 779 (1999) [Per J. Pardo, First Division].

[71] *ABS-CBN Corporation v. Gozon*, 755 Phil. 709, 782 (2015) [Per J. Leonen, Second Division].

[72] Section 177. Copyright or Economic Rights. - Subject to the provisions of Chapter VIII, copyright or economic rights shall consist of the exclusive right to carry out, authorize or prevent the following acts:

177.1. Reproduction of the work or substantial portion of the work;

177.2. Dramatization, translation, adaptation, abridgment, arrangement or other transformation of the work;

177.3. The first public distribution of the original and each copy of the work by sale or other forms of transfer of ownership;

177.4. Rental of the original or a copy of an audiovisual or cinematographic work, a work embodied in a sound recording, a computer program, a compilation of data and other materials or a musical work in graphic form, irrespective of the ownership of the original or the copy which is the subject of the rental;

177.5. Public display of the original or a copy of the work;

177.6. Public performance of the work; and

177.7. Other communication to the public of the work.

[73] *FILSCAP v. Anrey*, 927 Phil. 577, 583-584 (2022) [Per J. Zalameda, En Banc]; and *Olaño v. Lim Eng Co*,

783 Phil. 234, 250 (2016) [Per J. Reyes, Third Division].

[74] *FILSCAP v. Anrey*, 927 Phil. 577, 585 (2022) [Per J. Zalameda, En Banc].

[75] RTC Records, pp. 39-41.

[76] *Id.* at 40.

[77] *Roxas v. De Zuzuarregui, Jr.*, 516 Phil. 605, 622 (2006) [Per J. Chico-Nazario, First Division].

[78] Article 1370. If the terms of a contract are clear and leave no doubt upon the intention of the contracting parties, the literal meaning or its stipulations shall control[.]

[79] Article 1372. However general the terms of a contract may be, they shall not be understood to comprehend things that are distinct and cases that are different from those upon which the parties intended to agree.

[80] Article 1374. The various stipulations of a contract shall be interpreted together, attributing to the doubtful ones that sense which may result from all of them taken jointly.

[81] *Rollo*, p. 21.

[82] *Id.* at 47-48.

[83] *Norton Resources and Development Corporation v. All Asia Bank Corporation*, 620 Phil. 381, 391-392 (2009) [Per J. Nachura, Third Division].

[84] *Rollo*, pp. 76-77.

[85] RTC Records, pp. 1858-1859.

[86] *Id.* at 249.

[87] See *Guy v. Court of Appeals*, 533 Phil. 446, 453 (2006) [Per J. Ynares-Santiago, First Division].

[88] Section 184. Limitations on Copyright. —

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

(a) 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 society;

(b) 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 mentioned;

(c) The reproduction or communication to the public by mass media of articles on current political, social, economic, scientific or religious topic, lectures, addresses and other works of the same nature, which are delivered in public if such use is for information purposes and has not been expressly reserved: Provided, That the source is clearly indicated;

(d) 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 purpose;

(e) 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 mentioned;

(f) 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 which are part of the general cinema repertoire of feature films except for brief excerpts of the work;

(g) The making of ephemeral recordings by a broadcasting organization by means of its own facilities and for use in its own broadcast;

(h) The use made of a work by or under the direction or control of the Government, by the National Library or by educational, scientific or professional institutions where such use is in the public interest and is compatible with fair use;

(i) 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 Regulations;

(j) 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 title; and

(k) Any use made of a work for the purpose of any judicial proceedings or for the giving of professional advice by a legal practitioner.

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

[89] ABS-CBN Corporation v. Gozon, 755 Phil. 709, 757 (2015) [Per J. Leonen, Second Division].

[90] See Commissioner of Internal Revenue v. East Asia Utilities Corporation, 890 Phil. 192, 209-211 (2020) [Per J. M. Lopez, Second Division].

[91] See Google LLC v. Oracle America, Inc., 593 U.S. 1 (2021).

[92] Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569 (1994).

[93] 755 Phil. 709 (2015) [Per J. Leonen, Second Division].

[94] Id. at 759.

[95] See Andy Warhol Found for the Visual Arts v. Goldsmith, 143 S. Ct. 1258 (2023).

[96] Id.

[97] See Google LLC v. Oracle America, Inc., 593 U.S. 1 (2021).

[98] ABS-CBN Corporation v. Gozon, 755 Phil. 709, 759-760 (2015) [Per J. Leonen, Second Division].

[99] Id. at 760.

[100] J. Leonen, Separate Concurring Opinion, p. 5.

[101] J. Lazaro-Javier, Concurrence and Dissent, p. 3.

[102] See *FILSCAP v. Anrey*, 927 Phil. 577, 610 (2022) [Per J. Zalameda, En Banc].

[103] Rollo, p. 253.

[104] J. Leonen, Separate Concurring Opinion, p. 11.

[105] *Andy Warhol Found for the Visual Arts v. Goldsmith*, 143 S. Ct. 1258 (2023).

[106] See *INTELL. PROP. CODE*, sec. 2.

SEPARATE CONCURRING OPINION

LEONEN, SAJ.:

As early as 1918, this Court has recognized that the author has proprietary rights over their literary, scientific, or artistic work's production, reproduction, annotation, improvement, or other forms of its exploitation:

In addition to what has been said, according to article 428 of the Civil Code, the author of a literary, scientific, or artistic work, has the right to exploit it and dispose thereof at will. In relation to this right, there exists the exclusive right of the author, who is the absolute owner of [their] own work, to produce it, according to article 2 of the Law of January 10, 1879, and consequently, nobody may reproduce it, without [their] permission, not even to annotate or adduce it, without [their] permission, not even to annotate or add something to it, or to improve any edition thereof, according to article 7 of said law. Manresa, in his commentaries on article 429 of the Civil Code 9 (vol. 3, p. 633, 3d ed.) says that the concrete statement of the right to literary properties is found in the legal doctrine according to which nobody may reproduce another person's work, without the consent of its owner, or even to annotate or add something to it or to improve any edition thereof. And on page 616 of said volume, Manresa says the following: "He who writes a book, or carves a statue, or makes an invention, has the absolute right to reproduce or sell it, just as the owner of land has the absolute right to sell it or its fruits. But while the owner of land, by selling it and its fruits, perhaps fully realizes all its economic value, by receiving its benefits and utilities, which are represented, for example, by the price, on the other hand the author of a book, statue or invention, does not reap all the benefits and advantages of his own property by disposing of it, for the most important form of realizing the economic advantages of a book, statue[,] or invention, consists in the right to reproduce it in similar or like copies, every one of which serves to give the person reproducing them all the conditions which the original requires in order to give the author the full enjoyment thereof. If the author of a book, after its publication, cannot prevent its reproduction by any person who may want to reproduce it, then the property right granted him is reduced to a very insignificant thing and the effort made in the production of the book is in no way rewarded."

Indeed the property right recognized and protected by the Law of January 10, 1879, on Intellectual Property, would be illusory if, by reason of the fact that said law is no longer in force as a consequence of the change of sovereignty in these Islands, the author of a work, who has the exclusive right to reproduce it, could not prevent another person from so doing without [their] consent, and could not enforce this right through the courts of justice in order to prosecute the violator of this legal provision and the defrauder or usurper of [their] right, for [they] could not obtain the full enjoyment of the book or other work, and [their] property right thereto, which is recognized by law, would be reduced, as Manresa says, to an insignificant thing, if [they] should have no more right than that of selling [their] work.[1]

However, the dominion of a creator over their intellectual creation is not absolute. Intellectual property, as with all property, has been recognized in our laws as having uses that bear a social function. Article XII, Section 6 of the Constitution states:

SECTION 6. The use of property bear a social function, and all economic agents shall contribute to the common good. Individuals and private groups, including corporations, cooperatives, and similar collective organizations, shall have the right to own, establish, and operate economic enterprises, subject to the duty of the State to promote distributive justice and to intervene when the common good so demands.

In recognition of this, the Intellectual Property Code declares that for national development and progress and the common good, the State shall promote the diffusion of knowledge and information:

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

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

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

Thus, it is the task of this Court to strike the appropriate balance between the common good and the rights of authors and artists to their intellectual creations.

Before this Court is a Petition for Review on Certiorari that assails the Regional Trial Court's Judgment[2] and Order[3] dismissing petitioner Filipino Society of Composers, Authors, and Publishers, Inc.'s (FILSCAP) copyright infringement complaint against respondent Wolfpac Communications, Inc. (Wolfpac). In the course of offering "ringback tones" for mobile phones for sale on a website, Wolfpac allegedly infringed on copyrights by allowing prospective purchasers to listen to 20-second portions of each ringback tone as a "pre-listening function" prior to a sale.[4]

I concur in the differentiation between public performance and communication to the public rights, in accordance with the modifications introduced by *Phil. Home Cable Holdings, Inc. v. Filipino Society of Composers, Authors, and Publishers, Inc.*[5] to *Filipino Society of Composers, Authors, and Publishers, Inc. v. Anrey, Inc.*[6] I further agree that Wolfpac's acts, as described, were exercises of the communication to the public right over the musical works, and not the public performance right:

The agreement between Wolfpac and the composers allows Wolfpac to convert the content or musical works into ringtones, which can be downloaded through the Caller Ring Tune Service. Before potential consumers download the ringback tone, Wolfpac encourages them to listen to the sample first. The first aspect of communication to the public is apparent. Wolfpac's act of placing the pre-listening function makes the musical work available to the public through the use of the internet. The musical works are not yet audible; thus, the first aspect of public performance is still absent. The musical work becomes audible only when the potential consumer clicks the play button to hear the sample song. This is where the second aspect of communication to the public becomes apparent. Considering that the samples are available on Wolfpac's website, any member of the public can access the samples from a place and time individually chosen by them. Thus, there is communication to the public by wireless means because the members of the public can access the samples from Wolfpac's website at a place and time individually chosen by them.

Performance can also be present once the potential consumer plays the sample. In this scenario, the person who makes the sample audible is the potential consumer—not Wolfpac. Put simply, the performance was not made by Wolfpac. The members of the public individually perform the works by clicking the play button and making

the samples audible. Such performance is not actionable because the potential consumers performed the musical work in private before deciding whether they would purchase the ringback tone. There is no public perception in such a way that persons outside the potential consumer's normal circle of family and their family's closest social acquaintances are or can be present. It must be stressed that what is prohibited is a public performance, not performance per se.[7]

Next, the ponencia finds that the pre-listening function was outside the scope of the memoranda of agreement between Wolfpac and FILSCAP members-composers, which only authorized Wolfpac "to convert [the musical works] into a form which can be downloaded" and "to offer and sell the same to the general public." [8] According to the ponencia, this provision, in relation to another provision that expressly withholds the exercise of the composers' rights outside the terms of the agreements, [9] leads to a conclusion that Wolfpac is only authorized to make ringback tones and offer them for sale, but not to advertise the sale of the ringback tones by letting potential buyers preview a portion of it free of charge. [10] In this regard, the ponencia asserts that while advertisements are a way to offer the ringback tones to the public, "the agreement does not expressly allow the use of the songs in marketing the ringtones." [11]

Musical works are "intangible work[s] of art composed of a combination of sounds perceptible to the senses." [12] They are not readily identifiable unless otherwise made tangible in the form of sheet music or something similar, or as sounds that may be heard. The title of a musical work, if any, does not always suffice to differentiate the work from another, because it is the original combination of sounds that makes a musical work a work of art protected by copyright. Inevitably, multiple musical works may share the same title, and composers may even reuse titles for different musical works, resulting in the works only being distinguishable from each other when they are made perceptible to the senses.

Here, the ringback tone offered for sale by Wolfpac is not equivalent to a musical work by a FILSCAP member. Ringback tones are a transformation of compositions fixed in a particular format by some technical processes. [13] Because of the nature of the format and the processes involved in transforming the musical work, a ringback tone will not necessarily approximate the sound of other fixations—sound recordings—of the musical work.

Hence, it appears that in order to provide comprehensive information on the ringback tones for sale, Wolfpac allowed potential buyers to listen to 20-second portions of the ringback tones. The pre-listening function may confirm to potential buyers that the title of the work, its artist or composer, and other song metadata correspond to a specific musical work. Potential buyers may use the pre-listening function to determine whether the ringback tone is an acceptable transformation, approximation, or version of a musical work they may be familiar with, and if they are willing to pay to obtain it.

It may be reasonably construed that the provision of such information serves as an enticement or encouragement to consumers to purchase the ringback tones. Succinctly put, the pre-listening function is advertising [14] for the ringback tones, the intended result of which is to increase the sales of the ringback tones, with a corresponding portion of the profits to be apportioned to the composers according to their agreements with Wolfpac.

The provision of a portion of the musical work offered for sale is all the more necessary when the commerce takes place on a digital marketplace. An analog mode of advertising intangible goods, such as in a print publication, offers an incomplete accounting of the goods' features to consumers, because the actual essence of the intangible good cannot be perceived in that medium. To reiterate, what is being sold is a musical work; it is practical that the musical work itself be presented to the buying public for their consideration. Further, the mechanics of the pre-listening function, including the method of accessing the sample of the ringback tone and the duration available, serves as an assurance that a potential buyer is not satiated by a freely-available portion of the ringback tone. A 20-second portion of a ringback tone on a website is an imperfect substitute for a ringback tone, which

must still be purchased and downloaded to a mobile phone to be of actual use.[15]

Thus, finding that "to offer and sell" does not necessarily include reasonable means of advertising the goods for sale according to the design of the platform through which they are being sold fails to consider the scope of what the offer and sale of goods—especially of intangible goods through a digital marketplace—may entail. A too-narrow definition of what a third-party seller is permitted to do to sell goods based on works under license from another may, in fact, be to the detriment of the licensor's expected share of the profits, and contrary to the reason for why the works were licensed in the first place.

Nonetheless, I agree with the ponencia that the pre-listening function constitutes fair use, and thus, no infringement took place.[16]

Before resolving whether the pre-listening function is fair use, this Court must first reckon with whether it was proper for Wolfpac to invoke fair use at all. To emphasize, this case involves a licensee granted some but not all rights to certain works, who is claimed by the licensor to have exercised a right that they did not pay the privilege to exercise for. The licensee now invokes as a defense against the infringement claim that their use was, in fact, fair use, notwithstanding the terms of the agreement between the parties.

The exclusive bundle of rights granted to authors and creators in our copyright laws is not absolute. The Intellectual Property Code admits of several exceptions where certain uses of a work do not infringe on the copyright holder's rights, even if the use is unauthorized or unlicensed. These limitations on the exclusive rights of authors and creators are in line with the State policy that the private economic rights embodied in intellectual property laws may give way to the public good.[17] As explained by the Intellectual Property Office of the Philippines in its Guidelines on Statutory Fair Use in the Intellectual Property Code:

Copyright is not an absolute right. The exclusive rights afforded by law to authors and creators over their works were never meant to be all-encompassing, for to make such rights unlimited in scope and application would be an affront to the State's policy of "promot[ing] the diffusion of knowledge and information for the promotion of national development and progress and the common good." Thus, the framers of the present Intellectual Property Code of the Philippines (IP Code) deemed it necessary to include in the law certain acts which, when committed by a user of a copyrighted work, would not constitute copyright infringement even if these were done without first securing a license from the copyright owner. Statutorily, these acts are described as limitations on copyright. We know them by the more common term "fair use." [18] (Citation omitted)

Section 184 of the Intellectual Property Code enumerates several limitations to copyright which pertain to minimal, private, noncommercial, or publicly beneficial uses of copyrighted work:

SEC. 184. Limitations on Copyright. – 184.1. Notwithstanding the provisions of Chapter V, the following acts shall not constitute infringement of copyright:

- (a) 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 society;
- (b) 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 mentioned;
- (c) The reproduction or communication to the public by mass media of articles on current political, social, economic, scientific[,] or religious topic[s], lectures, addresses[,] and other works of the same nature, which are delivered in public if such use is for information purposes and has not been expressly reserved: Provided, That the source is clearly indicated;

(d) 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 purpose;

(e) 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 of the name of the author, if appearing in the work, are mentioned;

(f) 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 which are part of the general cinema repertoire of feature films except for brief excerpts of the work;

(g) The making of ephemeral recordings by a broadcasting organization by means of its own facilities and for use in its own broadcast;

(h) The use made of a work by or under the direction or control of the Government, by the National Library[,] or by educational, scientific[,] or professional institutions where such use is in the public interest and is compatible with fair use;

(i) 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 Regulations;

(j) 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 title; and

(k) Any use made of a work for the purpose of any judicial proceedings or for the giving of professional advice by a legal practitioner[;]

(l) The reproduction or distribution of published articles or materials in a specialized form 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 publication.

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

Private reproductions of published works,[19] reprographic reproduction by libraries,[20] and reproduction of computer programs[21] under certain conditions may also be done even without the copyright holder's consent.

Another limitation to copyright is the fair use of a copyrighted work, provided in Section 185.1 of the Intellectual Property Code, as amended by Republic Act No. 10372:

SEC. 185. Fair Use of a Copyrighted Work. – 185.1. The fair use of a copyrighted work for criticism, comment, news reporting, teaching including limited number of copies for classroom use, scholarship, research, and similar purposes is not an infringement of copyright.

Decompilation, which is understood here to be the reproduction of the code and translation of the forms of a computer program to achieve the interoperability of an independently created computer program with other programs may also constitute fair use under the criteria established by this section, to the extent that such

decompilation is done for the purpose of obtaining the information necessary to achieve such interoperability. In determining whether the use made of a work in any particular case is fair use, the factors to be considered shall include: (a) The purpose and character of the use, including whether such use is of a commercial nature or is for non-profit educational purposes;

(b) The nature of the copyrighted work;

(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.

Should fair use be invoked as a defense to an allegation of copyright infringement, all four factors must be considered based on the facts of the case.[22] Some limitations to copyright in Section 184 refer to fair use, such that they "require the application of the General Fair Use Principle in Section 185 of the [Intellectual Property] Code in addition to the conditions that govern the specific act." [23]

In this case, the Regional Trial Court in its June 16, 2008 Judgment found that the pre-listening function was fair use, and thus, did not infringe the copyright of FILSCAP's members.[24] The ponencia now upholds the trial court's analysis.

While a contract is the law between the parties,[25] this Court has nevertheless ruled that pursuant to Article 1306 of the Civil Code,[26] provisions of law which may regulate certain contracts are deemed written therein and shall govern the contracting parties' relations.[27] Regarding the transfer, assignment, or licensing of works under copyright, Section 180 of the Intellectual Property Code provides:

SEC. 180. Rights of Assignee or Licensee. – 180.1. The copyright may be assigned or licensed in whole or in part. Within the scope of the assignment or license, the assignee or licensee is entitled to all the rights and remedies which the assignor or licensor had with respect to the copyright.

180.2. The copyright is not deemed assigned or licensed inter vivos, in whole or in part, unless there is a written indication of such intention.

180.3. The submission of a literary, photographic[,] or artistic work to a newspaper, magazine[,] or periodical for publication shall constitute only a license to make a single publication unless a greater right is expressly granted. If two (2) or more persons jointly own a copyright or any part thereof, neither of the owners shall be entitled to grant licenses without the prior written consent of the other owner or owners.

180.4. Any exclusivity in the economic rights in a work may be exclusively licensed. Within the scope of the exclusive license, the licensee is entitled to all the rights and remedies which the licensor had with respect to the copyright.

180.5. The copyright owner has the right to regular statements of accounts from the assignee or the licensee with regard to assigned or licensed work.

Section 180 does not explicitly place any restrictions on what may be agreed upon by the parties in a copyright transfer, assignment, or licensing agreement. In contrast, Section 195 renders invalid by operation of law any waiver of moral rights that has certain injurious effects to the author:

SEC. 195. Waiver of Moral Rights. – An author may waive [their] rights mentioned in Section 193 by a written instrument, but no such waiver shall be valid where its effects is to permit another: 195.1. To use the name of the author, or the title of [their] work, or otherwise to make use of [their] reputation with respect to any version or adaptation of [their] work which, because of alterations therein, would substantially tend to injure the literary or artistic reputation of another author; or

195.2. To use the name of the author with respect to a work [they] did not create.

It is undisputed that the memoranda of agreement between Wolfpac and FILSCAP contains an exclusivity clause. This clause expressly reserves all other rights of FILSCAP's members, and states that those rights and authorities not expressly authorized in the memoranda are excluded.[28] The rights licensed to Wolfpac are thus delimited by the terms of its contract with FILSCAP. The controversy in this case arose when FILSCAP contested Wolfpac's pre-listening function as an act within the scope of the right it granted to Wolfpac to "offer and sell the [ringback tones] to the general public." [29]

Fair use is a matter of defense in copyright infringement.[30] Here, the root of the alleged infringement is conflicting interpretations of the reasonable extent of a right already licensed by the copyright holder. I agree that Section 185 of the Intellectual Property Code, as amended, may at times supersede the grants and reservations of copyright mutually agreed upon by the contracting parties in a copyright licensing contract. Under circumstances such as the one prevailing in this case, which concerns a breach of contract where the breach is tantamount to copyright infringement, the alleged infringer may invoke fair use regardless of their previous consent to be bound to exercise only those rights included in the contract.

Considering the factors enumerated in Section 185.1, Wolfpac's use of the copyrighted works by means of the pre-listening function is fair use. The pre-listening function is a truncated distribution of an authorized transformation of musical compositions which ultimately redound to the benefit of the copyright holders. While the use is of a commercial nature—a way by which Wolfpac's products may be selected for purchase—it does not appear that Wolfpac generates additional profit other than that of a successful sale by providing this pre-listening function to potential buyers. As discussed, the very nature of musical works as being uniquely identifiable to the average consumer only when in a form audible to them makes audible versions of said works a logical mode of presenting them. Moreover, as pointed out by in the ponencia, the pre-listening excerpt is of a "reasonable and necessary" portion of the work, enough to fulfill its advertising purpose but not be a substitute for the ringback tone due to the technical requirements to utilize ringback tones as intended.[31] In sum, even without a finding that Wolfpac's pre-listening function is a reasonable interpretation of the right granted to it to offer and sell ringback tones, the pre-listening function still constitutes fair use by an entity already authorized to use the copyrighted works.

As a result of the evolution of intellectual property laws into their modern-day conception, copyright is practically indispensable to our present culture and discourse:

Copyright is profoundly intertwined with culture. Many, if not all, copyrighted works can and do shape identities of persons, groups, communities, and nations. Copyright is not merely economic; it also embodies "discursive power—the right to create, and control, cultural meanings." The State recognizes this not just with copyright law, but also with laws that promote and protect art, literature, culture workers, and the preservation and development of national cultural heritage.[32] (Citations omitted)

A robust and effective copyright system is vital. Yet, by virtue of copyright as "legal superstructure,"[33] those who benefit from the unchecked accumulation of wealth through their monopoly over intellectual creations may not be the individual human authors of intellectual creations, but monolithic corporations:

Technologies do not create great fortunes by themselves, as any inventor knows. But the laws that determine who owns technology have created monumentally wealthy corporations and individuals into whose hands the revenue flows. It is not just that the richest corporations in the world are owners of copyrights and patents and little else, nor that sixteen of the fifty richest people in the world have fortunes derived in whole or part from copyright industries. These mountainous moneybags are fed every hour of every day by the purchase of products and services around the globe that could be provided for far less – and in some cases for free – if the

laws of copyright were written way. Intellectual property is now precisely what its nineteenth-century opponents complained about, on a scale they could not have imagined. In place of the "tax on reading" that they feared, we have taxes on viewing, listening, playing games and cuddly toys.

The cost of copyright to ordinary people is not to be measured only by the addition it makes to the price of schoolbooks, music downloads and movie tickets. Its taxing effect also increases the cost of access to television and radio, since the broadcasters have to pay license fees. In fact, because so many things are now protected by copyright – even the design of your flat-pack, sofa and the cartoon on your breakfast cereal packet – there is probably no way of computing what share of your expenditure trickles upwards through retailers and distributors and manufacturers to the ultimate owner of the almost everlasting rent-generating monopolies created by patent and copyright laws. By any manner of reckoning, it is quite a chunk. One of the few economists to have tried to do the sums put the figure for 2018 at [USD] 6,000 per person per year.

Copyright is the elephant in the room when it comes to understanding the origins of the wealth gap in modern societies. It is a major engine of inequality in the twenty-first century.[34] (Citations omitted)

The globalized regime of intellectual property laws also carries with it the danger of disproportionately favoring the interests and desired outcomes of so-called highly-industrialized nations, to the detriment of the Global South:

An essential instrument in the process of neo-colonialization by economic means is the establishment of a legal framework of international trade, which confers legally enforceable rights that support and safeguard economic penetration and control. This includes, as a prerequisite for the making of an "informal empire" like in colonial times, the creation of property rights and the guarantee of protection of foreign property rights in dependent regions. However, unlike in the colonial era, the most important property rights, which fulfill this role in the twenty-first century, are intellectual property rights. This is because intellectual property rights do not attach to objects of physical substance, like kind, raw material or plant and machinery, but are abstract legal concepts of unlimited flexibility as regards extent and time.[35]

This Court must be mindful that "[c]opyright regulation should not be reduced to economic exercises by individuals." [36] In a zealous defense of copyright, courts must take care to curtail the rent-seeking [37] behavior of copyright holders that benefits neither the mind that created the work nor the audiences that benefit from access to it. Laudable efforts to protect proprietary entitlements due to this nation's creative citizens must not undermine, but instead strengthen and reinforce, fundamental policies in favor of the common good.

ACCORDINGLY, I vote to DENY the Petition for Review on Certiorari and AFFIRM the June 16, 2008 Judgment and September 16, 2008 Order of Branch 93, Regional Trial Court, Quezon City in Civil Case No. Q-05-54475.

[1] *Laktaw v. Paglinawan*, 44 Phil. 855, 864-865 (1918) [Per J. Araullo, En Banc].

[2] *Rollo*, pp. 35-39. The June 16, 2008 Judgment in Civil Case No. Q-05-54775 was penned by Presiding Judge Ramon Paul L. Hernando (now a Member of this Court) of Branch 93, Regional Trial Court, Quezon City.

[3] *Id.* at 32-34. The September 16, 2008 Order in Civil Case No. Q-05-54775 was penned by Presiding Judge Ramon Paul L. Hernando (now a Member of this Court) of Branch 93, Regional Trial Court, Quezon City.

[4] *Ponencia*, p. 2.

[5] G.R. No. 188933, February 21, 2023 [Per J. Leonen, En Banc].

[6] 927 Phil. 577 (2022) [Per J. Zalameda, En Banc].

[7] Ponencia, p. 16.

[8] Id. at 18-19, citing rollo, p 21.

[9] Id.

[10] Id.

[11] Id. at 20.

[12] *Cosac, Inc. v. Filipino Society of Composers, Authors, and Publishers, Inc.*, G.R. No. 222537, February 28, 2023 [Per J. Hernando, En Banc] at 15. This pinpoint citation refers to the copy of the Decision uploaded to the Supreme Court website.

[13] See *Phil. Home Cable Holdings, Inc. v. Filipino Society of Composers, Authors, and Publishers, Inc.*, G.R. No. 188933, February 21, 2023 [Per J. Leonen, En Banc].

[14] Republic Act No. 7394. art. 4(b), The Consumer Act of the Philippines. Article 4(b) defines advertising as "the business of conceptualizing, presenting or making available to the public, through any form of mass media, fact, data or information about the attributes, features, quality or availability of consumer products, services or credit."

[15] Ponencia, p. 2.

[16] Id. at 21-26.

[17] See *ABS-CBN Corporation v. Gozon*, 755 Phil. 709, 757 (2015) [Per J. Leonen, Second Division].

[18] Intellectual Property Office of the Philippines, Guidelines on Statutory Fair Use in the Intellectual Property Code (2024), p. 1.

[19] INTELL. PROP. CODE, sec. 187 states:

SEC. 187. Reproduction of Published Work. – 187.1. Notwithstanding the provision of Section 177, and subject to the provisions of Subsection 187.2, 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.

187.2. The permission granted under Subsection 187.1 shall not extend to the reproduction of:

- (a) A work of architecture in the form of building or other construction;
- (b) An entire book, or a substantial part thereof, or of a musical work in graphic form by reprographic means;
- (c) A compilation of data and other materials;
- (d) A computer program except as provided in Section 189; and
- (e) Any work in cases where reproduction would unreasonably conflict with a normal exploitation of the work or would otherwise unreasonably prejudice the legitimate interests of the author.

[20] INTELL. PROP. CODE, sec. 188 states:

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

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

(b) Where the works are isolated articles contained in composite works or brief portions of other published works and the reproduction is necessary to supply them; when this is considered expedient, to persons requesting their loan for purposes of research or study instead of lending the volumes or booklets which contain them; and
(c) Where the making of such limited copies is in order to preserve and, if necessary in the event that it is lost, destroyed or rendered unusable, replace a copy, or to replace, in the permanent collection of another similar library or archive, a copy which has been lost, destroyed or rendered unusable and copies are not available with the publisher.

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

[21] INTELL. PROP. CODE, sec. 189 states:

SEC. 189. Reproduction of Computer Program. – 189.1. Notwithstanding the provisions of Section 177, the reproduction in one (1) 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.

189.2. No copy or adaptation mentioned in this Section shall be used for any purpose other than the ones determined in this Section, and any such copy or adaptation shall be destroyed in the event that continued possession of the copy of the computer program ceases to be lawful.

189.3. This provision shall be without prejudice to the application of Section 185 whenever appropriate.

[22] ABS-CBN Corporation v. Gozon, 755 Phil. 709, 758 (2015) [Per J. Leonen, Second Division].

[23] Intellectual Property Office of the Philippines. Guidelines on Statutory Fair Use in the Intellectual Property Code (2024), p. 2. See also Habana v. Robles, 369 Phil 764 (1999) [Per J. Pardo, First Division].

[24] Ponencia, p. 2.

[25] CIVIL CODE, art. 1159 states:

Article 1159. Obligations arising from contracts have the force of law between the contracting parties and should be complied with in good faith.

[26] CIVIL CODE, art. 1306 states:

Article 1306. The contracting parties may establish such stipulations, clauses, terms[,] and conditions as they may deem convenient, provided they are not contrary to law, morals, good customs, public order, or public policy.

[27] Heirs of San Miguel v. Court of Appeals, 416 Phil. 943, 954 (2001) [Per J. Pardo, First Division].

[28] Ponencia, p. 18.

[29] Id. at 19.

[30] ABS-CBN Corporation v. Gozon, 755 Phil. 709, 761-762 (2015) [Per J. Leonen, Second Division].

[31] Ponencia, p. 25.

[32] J. Leonen, Dissenting Opinion, in Filipino Society of Composers, Authors, and Publishers, Inc. v. Anrey, Inc., 927 Phil. 577, 742-743 (2022) [Per J. Zalameda, En Banc].

[33] DAVID BELLOS & ALEXANDRE MONTAGU, WHO OWNS THIS SENTENCE?: A HISTORY OF COPYRIGHTS AND WRONGS 25 (2024).

[34] Id. at 325-326.

[35] Andreas Rahmatian, Neo-Colonial Aspects of Global Intellectual Property Protection, 12(1) J. WORLD INTELLECTUAL PROPERTY 40, 41-42 (2009).

[36] J. Leonen, Dissenting Opinion in Filipino Society of Composers, Authors, and Publishers, Inc. v. Anrey, Inc., 927 Phil. 577, 740 (2022) [Per J. Zalameda, En Banc].

[37] Richard Posner, The law & economics of intellectual property, 131(2) D/EDALUS: J. OF THE AMERICAN ACADEMY OF ARTS & SCIENCES 5, 8-9 (2002).

CONCURRING OPINION

CAGUIOA, J.:

The facts of the case relevant for the Court's resolution of the issues are as follows:

(1)

Several composers entered into Memoranda of Agreement (MOAs) with WOLFPAC COMMUNICATIONS, INC., (Wolfpac), where the former agreed to allow the latter to convert musical works into downloadable ringtones and sell the same to the public. Pertinently, the MOAs provide the composers' undertaking to: "provide Content to [Wolfpac] and permit [the latter] to convert the Content into a form which can be downloaded through Caller Ring Tune Service, and to offer and sell the same to the general public via the Partner Operator[.]"[1]

(2)

The MOAs also require Wolfpac to seek other licenses and consent before using the content in a manner not provided under the agreements, viz.: "[T]he grant...does not include any right or authority not expressly authorized herein. All other rights of the Provider (composer) are deemed reserved. Any other licenses and consents required in connection with the use of the Content (musical works) not otherwise granted herein shall be obtained by [Wolfpac]."[2]

(3)

In selling the ringtones, Wolfpac also allows the public to "Listen B4 U Download," i.e., Wolfpac allows prospective consumers to listen to a 20-second portion of a song by clicking the "pre-listening function" before downloading the ringback tone.[3]

(4)

Complainant Filipino Society of Composers, Authors and Publishers, Inc. (FILSCAP) filed a complaint for copyright infringement against Wolfpac because the latter refused to secure licenses from FILSCAP and pay

royalties.[4]

One of FILSCAP's main arguments is that the pre-listening function constitutes "public performance" for which Wolfpac is required to secure a license and pay royalties. On the other hand, Wolfpac argues mainly that the use of songs for the pre-listening function is not a "public performance" and argues that even assuming that this manner of use falls within the definition of "public performance," the same is allowed under Wolfpac's MOAs with the composers.[5]

The two issues for the Court's resolution are as follows:

- whether the use of sample ringtones in the pre-listening function on Wolfpac's website constitutes public performance or communication to the public;
- whether Wolfpac's use of the samples constitutes copyright infringement.[6]

I concur with the ponencia's dismissal of FILSCAP's complaint for copyright infringement. I agree that the pre-listening function is considered as "communication to the public" and that Wolfpac's use of the samples in such pre-listening function is not considered as copyright infringement because it falls under fair use.

One important difference between "communication to the public" and "public performance" is whether a performance can be perceived without the need for communication within the meaning of Subsection 171.3 of the Intellectual Property Code [IP Code]

I agree with the ponencia's main discussion relating to the nature of the rights of "public performance" and "communication to the public," especially its stance on the applicability of United States (US) copyright jurisprudence to Philippine jurisprudence relative to these concepts, viz.:

Foreign Jurisprudence on Public Performance and Communication to the Public

For the past years, both the litigants and the courts have relied on US cases in interpreting certain provisions of our copyright laws because Act 3134 was patterned on the US Copyright Law of 1909. Senator Raul Roco in his sponsorship speech during the second reading of the Senate Intellectual Property Rights Bill, also acknowledged the persuasive effect of US courts' decisions on Philippine courts for the same reason, viz.:Of particular importance is the inclusion of Section 174 on Fair Use which was taken from the U.S. Copyright Law. This is significant because through this Section, the decisions of U.S. courts, which have persuasive effect on Philippine courts for copyright could serve as important references in the resolution of complex copyright issues such as the determination of whether or not the decompilation of a computer program would not constitute an infringement of copyright.

Before recognizing the persuasive effects of US courts' decisions and determining whether they might help the Court in deciding the complex issues in this case, it is imperative to consider the relevant portions of the US Copyright Laws first. For instance, it appears that Section 101 of the US Copyright Laws considers communication to the public as a form of public performance. However, communication to the public and public performance are defined as two separate rights under the IP Code.[7] (Emphasis supplied)

However, I respectfully submit that, to avoid confusion, the Court should make it clear that radio-over-loudspeakers should no longer be considered as an example of public performance in light of recent jurisprudence.

While I fully recognize that the majority has ruled this to be so in the case of *FILSCAP v. Anrey*,^[8] I maintain the stance previously stated in my Separate Concurring Opinion therein. More importantly, I respectfully submit that whether radio-over-loudspeakers can continue to qualify as "public performance" has already been clarified in a subsequent En Banc case, *Philippine Home Cable Holdings, Inc. v. Filipino Society of Composers, Authors & Publishers, Inc.*,^[9] (*Philippine Home Cable*).

I expound on these points below.

Separate Concurring Opinion in *FILSCAP v. Anrey*

For ease of reference, I maintain the relevant points previously stated in my Separate Concurring Opinion for *FILSCAP v. Anrey*, viz.:

While I agree with the ponencia's ruling that *FILSCAP* is authorized to exercise, on behalf of its members, both economic rights, I disagree with its conclusion that this case involves a violation of *FILSCAP*'s right of public performance only. On the contrary, it is my view that *Anrey* exercised only the right of "communication to the public" as defined under Section 171.3 of the IP Code.

...D.

Anrey exercised only the right of communication to the public, and not the right of public performance

In view of the foregoing discussion, while I agree with the ponencia's application of the "new public" concept, I disagree with the ponencia's categorization of *Anrey*'s radio reception of copyrighted work and use of loudspeakers as a "performance" under Section 177.6 of the IP Code. Corollarily, I disagree with the ponencia's application of the doctrine of multiple performances under US jurisprudence, as this inaccurately assumes that a radio reception done via loudspeaker is a "public performance."

In the present case, it is not disputed that *Anrey*'s restaurants played radio broadcasts of copyrighted music. Simply put, other than the communication to the public by "wire or wireless means x x x" of musical works in *FILSCAP*'s repertoire, *Anrey* did not commit any other act which could separately qualify as a public performance. Hence, I respectfully submit that it would be a grave mistake to sweepingly conclude that "the act of playing radio broadcasts containing copyrighted music through the use of loudspeakers (radio-over-loudspeakers) is in itself, a performance."

On this score, I submit that the ponencia's reliance on American authorities, particularly on the decisions in *Broadcast Music, Inc. v. Claire's Boutiques, Inc.* (*Claire's*) and *Buck v. Jewell-La Salle Realty Co.* (*Jewell*), is misplaced.

Noting that the provision of the US Copyright Law defining "public performance," on which *Claire's* was based, is "similarly worded to our own definition thereof," the ponencia quotes with approval the following discussion in *Claire's*, viz.:

....

Proceeding from the foregoing, the ponencia also asserts, based on the "doctrine of multiple performances" — a doctrine which was first conceived in *Jewell* — that a radio (or television) transmission or broadcast can create multiple performances at once, such that a radio station owner and a hotel operator can simultaneously "perform" a copyrighted work.

However, contrary to the ponencia's assertion, said provision of the US Copyright Law defining "public performance" (17 U.S.C. § 101) is not "similarly worded" to the provision defining the same under the IP Code. Notably, the said provision under the US Copyright Law lumps together under "public performance" the following: (i) the actual performance of a work to the public, and (ii) the "transmis[sion] or otherwise communicat[ion] [of] a performance x x x of the work x x x to the public, by means of any device or process[.]" Hence, under the US Copyright Law as cited in *Claire's* and *Jewell*, "communication to the public"

as contemplated under the IP Code is subsumed within the blanket definition of "public performance."

In stark contrast however, the IP Code, as discussed above: (i) expressly recognizes a right to "communicate to the public" separate and distinct from "public performance" (IP Code, Sections 177.6 and 177.7); and (ii) explicitly carves out from the scope of "public performance" those performances which require "communication within the meaning of Section 171.3" in order to be perceived (IP Code, Section 171.6 in relation to Section 171.3).

Indeed, with PD 49 and its predecessor, Act No. 3134 having been modeled after US copyright laws, the Court has time and again turned to US jurisprudence to aid in resolving issues involving copyright. After all, where local statutes are patterned after or copied from those of another country, the decisions of the courts in such country construing those laws are entitled to great weight in the interpretation of such local statutes.

However, the foregoing is true only if what is being adopted is reasonable and in harmony with justice, public policy and other local statutes on the subject. Thus, where the local law and the foreign statute from which the former was patterned differ in some material aspects, or where the adopting state has given the statute its own interpretation, the presumption that the foreign construction was adopted with the adoption of the statute no longer obtains. In the latter case, the local law must perforce be construed "in accordance with the intent of its own makers, as such intent may be deduced from the language of each law and the context of other local legislation related thereto."

Here, as extensively discussed above, Congress expressly (i) carved out from the IP Code's definition of "public performance" other "performances" which cannot be "perceived without the need for communication within the meaning of Section 171.3" and (ii) identified the public performance right and the right to communicate to the public as two separate and distinct economic rights. This distinction, however, is notably absent in the provision of the US Copyright Law cited in Claire's and Jewell. Thus, I submit that the ponencia's reliance on the same is misplaced.

Likewise, I submit that the ponencia's reliance on the doctrine of multiple performances not only is improper, in light of the distinction under the IP Code between public performance and communication to the public, but is also unnecessary. For one, the playing of radio broadcasts via loudspeaker or otherwise by "wire or wireless means x x x" is not a "performance," but a "communication" within the context of Section 177.7 in relation to 171.3 of the IP Code. Contrary to the statement in the ponencia, communication through "wire or wireless means" is not only limited to interactive on-demand systems like the internet. While the cited [World Intellectual Property Organization (WIPO)] Guide in the ponencia indeed explains that "the making available to the public of works in a way that the members of the public may access the work from a place and at a time individually chosen by them" covers, in particular, on-demand, interactive communication through the internet, this clarification is not intended to narrow down the scope of communication to the public to exclude broadcasting, as the ponencia states. This is clear from the same cited WIPO Guide which also states that the WIPO Copyright Treaty recognizes "a broader right of communication to the public" apart from the rights recognized by the Berne Convention. In other words, apart from the right of broadcasting — which, as discussed, is included in the right of "communication to the public" — the WIPO Copyright Treaty expanded the coverage of the right by including, in particular, on-demand, interactive communication through the Internet. Verily, the right of communication to the public also covers other wire or wireless channels like the use of a loudspeaker.

To be sure, the interpretation proffered by the ponencia that the right of communication to the public is only limited to on-demand, interactive communication through the Internet is directly in conflict with the IP Code, as amended by [Republic Act No.] 10372 in 2013. To recall, [Republic Act No.] 10372 refined the definition of "communication to the public" to eliminate the misconception that broadcasting, rebroadcasting, retransmitting by cable, broadcasting and retransmitting by satellite are not included in the definition of "communication to the public."

For another, reliance on this US law doctrine is unnecessary, as the act of transmitting said radio broadcasts by Anrey's restaurants to a "new public," i.e., the customers dining at these restaurants, is already covered by the definition of "communication to the public" under Section 171.3 the IP Code in relation to Article 11bis of the Berne Convention.

To be sure, I agree with the ponencia that "it is immaterial if the broadcasting station has been licensed by the copyright owner," but not "because the reception becomes a new public performance requiring separate protection," under the doctrine of multiple performances. Rather, it is immaterial because any communication to a "new public" beyond the original broadcast is a separate exercise of the right to communicate to the public, pursuant to Section 177.7 in relation to 171.3 of the IP Code and Article 11bis of the Berne Convention.

In sum, I proffer that absent any showing that the musical pieces played by Anrey on the radio were not simply sound recordings, but were likewise being played live before an audience (which could theoretically constitute, separately, as a "performance" in itself), as in this case, it would be improper to hold, as the ponencia does, that "the act of playing radio broadcasts containing copyrighted music through the use of loudspeakers (radio-over-loudspeakers) is in itself, a performance." I respectfully disagree that the playing of radio broadcasts as background music through a loudspeaker by Anrey's restaurants is "public performance." On this score, contrary to the conclusion reached by the ponencia, I submit that such radio broadcasts constitute an infringement only of the right to communicate to the public, and not of the right of public performance.

Lest I be misconstrued, however, I stress that I concur with the ponencia that Anrey, by playing radio broadcasts as background music in its restaurants despite not having obtained any license from FILSCAP, is guilty of copyright infringement.[10] (Emphasis supplied)

The subsequent case of *Philippine Home Cable Holdings, Inc. v. FILSCAP* emphasizes that the statutory definition of "public performance" cannot include the processes involved in the definition of "communication to the public" in Subsection 171.3 of the IP Code

After the promulgation of *FILSCAP v. Anrey* on August 9, 2022, the Court En Banc clarified on February 21, 2023 in *Philippine Home Cable* that if a "performance" requires any process described in Subsection 171.3 of the IP Code, it is considered as "communication to the public."

For context, in *Philippine Home Cable*, the lower courts mistakenly ruled that the act of cablecasting karaoke channels is an exercise of both "public performance" and "communication to the public." The relevant discussion on the difference between the two rights reads:

In respondent's Complaint, it alleged that petitioner has been "playing or otherwise performing or communicating to the public" the subject musical compositions. Both the Regional Trial Court and the Court of Appeals determined that petitioner did both when it cablecast[ed] — engaged in program origination of — the two karaoke channels. But the application of Section 177 is inexact. Based on petitioner's acts complained of, only an infringement of the "communication to the public" right has been committed.

. . . .

Here, petitioner's act of cablecasting the karaoke channels cannot be considered an exercise of the public performance rights over the subject musical compositions. Concededly, the works were performed by means of certain processes, and because the musical compositions were fixed in sound recordings in a videoke format they were made audible "at a place or at places where persons outside the normal circle of a family and that family's closest social acquaintances are or can be present, irrespective of whether they are or can be present at the same place and at the same time, or at different places and/or at different times." However, the fact that "performance" of the musical composition requires the process described in Subsection 171.3 — using wireless means to make the musical compositions available to the members of the public in such a way they may access these compositions from a place and time individually chosen by them — in order to be perceived places the act

complained of outside Subsection 171.6.

It must be noted that a later amendment to the Intellectual Property Code, in Republic Act No. 10372, further expanded the scope of "communication to the public" to include broadcasting, rebroadcasting, retransmitting by cable, and retransmitting by satellite:

....

Nonetheless, even prior to the amendment, playing a musical composition, fixed in an audiovisual derivative work, over cable television to paying subscribers is making that work accessible to members of the public from a place or time individually chosen by them. This is the essence of the "communication to the public" right.[11] (Emphasis supplied)

To emphasize more clearly, in *Philippine Home Cable*, the Court correctly stated that:

[c]oncededly, the works were performed by means of certain processes, and because the musical compositions were fixed in sound recordings in a videoke format, they were made audible at a place or at places where persons outside the normal circle of a family and that family's closest social acquaintances are or can be present, irrespective of whether they are or can be present at the same place and at the same time, or at different places and/or at different times.[12]

Thus, driving home the point that this act can technically fall under the broad statutory definition of public performance IF NOT FOR THE FACT THAT the "performance" of the musical composition requires the process described in Subsection 171.3 of the IP Code (which defines "communication to the public"). Indeed, both the IP Code and *Philippine Home Cable* make it clear that—in case of confusion as to whether the act is considered as "public performance" or "communication to the public"—the litmus test is whether the performance can be perceived without the need for "communication to the public," which includes broadcasting, rebroadcasting, retransmitting by cable, broadcasting and retransmitting by cable, broadcasting and retransmitting by satellite, and 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.

In sum, if the "performance" can be perceived without the use of the means specified in Subsection 171.3 of the IP Code, it is considered as an exercise of the right of "public performance." On the other hand, if the possibility of perceiving the "performance" requires broadcasting, rebroadcasting, retransmitting by cable, broadcasting and retransmitting by cable, broadcasting and retransmitting by satellite, and 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, then it is considered as an exercise of the right of "communication to the public."

As can be gleaned from the foregoing clarification in *Philippine Home Cable*, the act of radio-over-loudspeakers can no longer be considered as "public performance" because it involves a radio broadcast, which is expressly specified as a process under Subsection 171.3 of the IP Code.

Notably, the definition of "public performance" under Subsection 171.6 of the IP Code does not qualify whether the communication (e.g., the broadcast by a radio station) is being "performed" by another person or entity, viz.:

171.6. "Public performance", in the case of a work other than an audiovisual work, is the recitation, playing, dancing, acting or otherwise performing the work, either directly or by means of any device or process; in the case of an audiovisual work, the showing of its images in sequence and the making of the sounds accompanying it audible; and, in the case of a sound recording, making the recorded sounds audible at a place or at places where persons outside the normal circle of a family and that family's closest social acquaintances

are or can be present, irrespective of whether they are or can be present at the same place and at the same time, or at different places and/or at different times, and where the performance can be perceived without the need for communication within the meaning of Subsection 171.3[.] (Emphasis supplied)

At the risk of repetition, if the possibility of perceiving the "performance" requires the use of any of the means specified in Subsection 171.3 of the IP Code—regardless if the person carrying out the "performance" is the same person or entity primarily carrying out the specified means in Subsection 171.3 of the IP Code—then it is considered as an exercise of the right of "communication to the public." Thus, since the example of radio--over-loudspeakers involves a radio broadcast (regardless of the party carrying out the broadcast), it can no longer be considered as an exercise of "public performance" consistent with a plain reading of the provisions of the IP Code and the Court's En Banc ruling in *Philippine Home Cable*.

It must be underscored that treating radio-over-loudspeakers as a "communication to the public" is not the same as conflating and treating as singular (1) the act of the radio broadcaster doing its broadcast; and (2) the person playing the radio reception over loudspeakers. To be clear, both parties—the radio station and the person playing the broadcast over loudspeakers—are doing separate acts of "communication to the public." Since the possibility of perceiving the performance or any communication requires the use of any of the means specified in Subsection 171.3 of the IP Code in both acts, they should both be treated as separate acts of "communication to the public."

From the perspective of the radio station, there is no question that it is exercising the right of "communication to the public" because it broadcasts the musical works.

From the perspective of the person playing a song:

- If the person is simultaneously playing a radio broadcast over loudspeaker for the public, it is an act of "communication to the public." The person playing the radio over loudspeaker for the public could not have done it without a broadcast from another entity.
- However, if the consumer is not using any radio broadcast but is instead publicly playing a locally stored song from a device or a sound recording from a CD player, it is an act of "public performance" because the possibility of perceiving the performance or any communication does not require the use of any of the means specified in Subsection 171.3 of the IP Code in that instance of playing the locally stored audio file.

In sum, if the question is whether someone is exercising the right of "public performance" or "communication to the public," the test is if the "performance" can be perceived without the use of the means specified in Subsection 171.3 of the IP Code. If the possibility of perceiving the "performance" requires the use of any of the means specified in Subsection 171.3 of the IP Code, it is an exercise of the right of "communication to the public." As explained above, this interpretation is supported not only by recent jurisprudence but also the plain meaning of the law as it is written.

Wolfpac's violation of the composers' right of "communication to the public" and fair use

I agree with the ponencia's discussion regarding Wolfpac's violation of the composers' right of "communication to the public" in offering the pre--listening function, which necessitates the discussion of whether Wolfpac's acts constitute fair use.

The relevant discussion in the ponencia reads:

There are two communication to the public acts in this case. The first one is when Wolfpac made the ringtones

available to the public for a fee. Wolfpac's exercise of communication to the public is necessary to convert the songs into a downloadable form. It is not the same with the second communication to the public act which pertains to Wolfpac's act of uploading the ringtones so that the public can listen to the ringtones for free. Communication to the public is not inherent in offering and marketing the ringtones to the public. Wolfpac can still offer and market the ringtones without providing a pre-listening function. This is supported by an advertisement in a newspaper showing the list of Ragnarok ringtones and their ID Nos. Wolfpac admitted the existence of the print advertisement in its answer. Given these, Wolfpac can simply provide the list of songs and add the names of the singers. In releasing the print advertisement, Wolfpac exercised its right to offer the ringtones to the public. But in uploading the sample songs in the pre-listening function, Wolfpac exercised the composers' communication to the public right without their consent.

Surely, the agreement allows Wolfpac to offer the ringback tones, and advertisement is one way of offering it to the public. Even so, the agreement does not expressly allow the use of the songs in marketing the ringtones. Therefore, the Court cannot presume that communication to the public of songs through a pre-listening function is impliedly included under the general grant of authority "to offer and sell" and that the composers allowed their musical works to be used in a pre-listening function free of charge. Otherwise, this constitutes a waiver of communication to the public right on the composers' part. Such waiver is invalid when the terms of the assignment do not explicitly and clearly evince the composers' intent to abandon their communication to the public right through the pre-listening function. In contrast, the composers' intention to reserve all their other rights is clear under the agreements. Moreover, in filing the infringement case against Wolfpac, the copyright owners, through FILSCAP, signify their clear intent to exclude the use of their songs in the pre-listening function.

In essence, the first communication to the public act is sanctioned under the agreement between Wolfpac and the composers, while the second one is not. The grant of rights in favor of Wolfpac is limited to the conversion of musical works into downloadable ringtones. The agreement presupposes that the public can only hear the composers' musical works after purchasing the ringtones. It did not sanction the use of ringtones in the pre-listening function for marketing or advertising purposes.[13] (Emphasis supplied)

For easy reference, Wolfpac's MOAs with composers pertinently contain:

-

the composers' undertaking to "provide Content to [Wolfpac] and permit [the latter] to convert the Content into a form which can be downloaded through Caller Ring Tune Service, and to offer and sell the same to the general public via the Partner Operator[.]"[14]

-

Wolfpac's obligation to seek other licenses and consent before using the content in a manner not provided under the agreements, viz.: "[t]he grant...does not include any right or authority not expressly authorized herein. All other rights of the Provider (composer) are deemed reserved. Any other licenses and consents required in connection with the use of the Content (musical works) not otherwise granted herein shall be obtained by [Wolfpac]."[15]

Associate Justice Amy C. Lazaro-Javier (Associate Justice Lazaro--Javier) submits that Wolfpac's act of providing the pre-listening function is sanctioned in the MOAs. Thus, there is no violation of the composers' rights and there is no further need to discuss whether Wolfpac's act falls under fair use, viz.:

Musical work is intangible. As audible work, it may only be perceived and recognized by the public once it is played, and it would be unreasonable to expect ordinary people to identify a specific song by title and author alone without hearing its tune, nor can they be expected to recognize a musical work by being presented with the written musical composition. It may also be possible that prospective consumers are not familiar with some

of the songs offered and only encountered the song for the first time in Wolfpac's roster.

Realistically speaking, therefore, consumers obtain the necessary information to make an informed choice whether to purchase the ringback tone only upon hearing at least a portion of the musical work. This would then allow them to identify or confirm that the work being offered is indeed the work they wish to purchase. To be sure, even composers and singers perform first their new musical works publicly before offering their albums for sale for the very same reason.

Verily, in this context, I humbly submit that the agreement between the parties for Wolfpac "to offer" the musical works for sale necessarily includes reasonable means of advertising the same for purposes of enticing prospective consumers to make a purchase. As such, in my view, the pre-listening function utilized by Wolfpac falls within the purview of offering the musical works to the public, and by authorizing Wolfpac "to offer" their works for sale, FILSCAP and its member-composers gave their consent for Wolfpac to make a reasonable communication to the public of their musical work.

On this score, FILSCAP's claim of copyright infringement already fails. Consent having been effectively given by FILSCAP through this provision in its MOA with Wolfpac, it is no longer necessary to determine whether the 20-second pre-listening function constitutes fair use of the copyrighted work. For fair use has been defined 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.[16] (Emphasis supplied)

I respectfully disagree with Associate Justice Lazaro-Javier's position.

Firstly, as correctly discussed in the ponencia, under Article 1370 of the Civil Code, where "the terms of a contract are clear and leave no doubt upon the intention of the contracting parties, the literal meaning of its stipulations shall control." Further, Article 1372 provides that "[h]owever general the terms of a contract may be, they shall not be understood to comprehend things that are distinct and cases that are different from those upon which the parties intended to agree." [17]

Accordingly, a plain reading of the provisions of the MOAs indicates that the authority "does not include any right or authority not expressly authorized..." [18] Indeed, it is not the province of the Court to read its own commercial stipulations into a contract. As pointed out in the ponencia, Wolfpac can offer and sell the ringtones without exercising any additional rights of the composers by simply providing the list of songs and indicating the names of the singers. That said, nothing prevented Wolfpac from seeking authorization from the composers to include a 20-second sample of the song as part of its marketing efforts.

Secondly, the fact that songs or audible works may be recognized by the public once played is not a justification to expand the authority granted to Wolfpac. This line of reasoning would conceivably allow Wolfpac to automatically exercise any and all rights belonging to the composers—such as publicly performing the 20-second clips in physical kiosks, for example—as long as Wolfpac can shoehorn these acts as falling within the authority "to offer and sell" the songs to the general public. Such automatic expansion of the authority granted to Wolfpac goes against the plain meaning of the provisions of the MOAs and unjustifiably diminishes the rights of the copyright owners over the works involved.

In view of the foregoing, I vote to DISMISS the Petition.

[1] Ponencia, p. 18-19. (Emphasis supplied)

[2] Id. at 19. (Emphasis supplied)

[3] Id. at 2.

[4] Id. at 3.

[5] Id.

[6] Id. at 5.

[7] Ponencia, p. 7.

[8] G.R. No. 233918, August 9, 2022 [Per J. Zalameda, En Banc], available at <https://elibrary.judiciary.gov.ph/thebookshelf/showdocs/1/68646>.

[9] G.R. No. 188933, February 21, 2023 [Per SAJ Leonen, En Banc], available at <https://elibrary.judiciary.gov.ph/thebookshelf/showdocs/1/68958>.

[10] J. Caguioa, Separate Concurring Opinion in Filipino Society of Composers, Authors and Publishers, Inc. v. Anrey, Inc., supra note 8.

[11] Philippine Home Cable Holdings, Inc. v. Filipino Society of Composers, Authors & Publishers, Inc., supra note 9.

[12] Id.

[13] Ponencia, pp. 19-20.

[14] Rollo, p. 21

[15] Id. at 47-48.

[16] J. Lazaro-Javier, Opinion, pp. 3-4.

[17] Ponencia, p. 19.

[18] Rollo, pp. 47-48.

CONCURRENCE AND DISSENT

LAZARO-JAVIER, J.:

The ponencia absolved respondent Wolfpac Communications, Inc. (Wolfpac) of copyright infringement and dismissed the complaint filed by petitioner Filipino Society of Composers, Authors, and Publishers, Inc. (FILSCAP), an aggregation of copyright owners in the Philippines individually authorized by its member-composers to collect license fees or royalties on their behalf.[1]

To recall, Wolfpac entered into Memoranda of Agreement (MOA) with certain composers wherein the latter authorized Wolfpac to convert their works "into a form which can be downloaded through Caller Ring Tune Service" and "to offer and sell" the same to the public.[2] To facilitate the sale, Wolfpac advertised the musical works on a website, which allows prospective consumers to listen to a 20-second portion of a song by clicking the "pre--listening function" before downloading the ringback tone (20-second pre--listening function). FILSCAP sued Wolfpac, arguing that the latter did not secure the licenses and did not pay the appropriate royalties for the 20-second pre-listening function, hence, is liable for copyright infringement.[3]

The ponencia identified the 20-second pre-listening function as communication to the public instead of public performance allegedly because: (1) Wolfpac's act of placing the pre-listening function makes the musical work available to the public through the use of the internet; and (2) any member of the public can access the samples from a place and time individually chosen by them,[4] so they have the option to choose what work to perceive,

and when, where, and how they will perceive the work.

In any event, the ponencia found that FILSCAP or its member--composers did not authorize Wolfpac under the MOA to advertise the musical work via the 20-second pre-listening function, and the same does not fall under any of the limitations on copyright under the Intellectual Property Code (IPC). The ponencia, however, ordained that such communication constitutes fair use of a copyrighted work.[5]

I concur with the sound differentiation by the ponencia between the right of copyright owners to communicate to the public vis-à-vis the right to public performance. But I disagree that the 20-second pre-listening function is not sanctioned under the MOA.

I elucidate.

A copyright is the right granted by statute to the proprietor of an intellectual production to its exclusive use and enjoyment to the extent specified in the statute.[6] Under Section 177 of the IP Code, these rights include the following:

- 177.1. Reproduction of the work or substantial portion of the work;
- 177.2. Dramatization, translation, adaptation, abridgment, arrangement or other transformation of the work;
- 177.3. The first public distribution of the original and each copy of the work by sale or other forms of transfer of ownership;
- 177.4. Rental of the original or a copy of an audiovisual or cinematographic work, a work embodied in a sound recording, a computed program, a compilation of data and other materials or a musical work in graphic form, irrespective of the ownership of the original or the copy which is the subject of the rental;
- 177.5. Public display of the original or a copy of the work;
- 177.6. Public performance of the work; and
- 177.7 Other communication to the public of the work. (Emphasis supplied)

It is the execution of any of the foregoing exclusive rights of the copyright owner sans his or her consent which constitutes copyright infringement. In essence, copyright infringement is a trespass into a domain owned and occupied by the copyright owner; it is a violation of a private right protected by law.[7]

As enumerated in the ponencia, for a claim of copyright infringement to prevail, the evidence on record must demonstrate: (1) ownership of a validly copyrighted material by the complainant; (2) infringement of the copyright by the respondent; and (3) the violation does not fall under any of the limitations on copyright under Section 184 of the IPC or amounts to fair use of copyrighted work.

There is no question on the presence of the first element. I thus focus on the second and third elements.

The ponencia ordained that Wolfpac was not authorized to advertise the copyrighted works because the relevant provision of the MOA simply reads:

- 2.1. To provide Content to WOLFPAC and permit the same to convert the Content into a form which can be downloaded through Caller Ring Tune Service, and to offer and sell the same to the general public via the Partner Operator.[8] (Emphasis supplied)

Verily, a plain reading of the MOA purportedly reveals that the use of musical work is limited to converting it into ringtones that can be downloaded by the public for a fee, and presupposes that the public can only hear the musical work after purchasing the ringtones and not any time before.[9]

I humbly disagree. For to construe the plain meaning of the provision in such a way disregards the nature of the work subject of the agreement.

Musical work is intangible. As audible work, it may only be perceived and recognized by the public once it is played, and it would be unreasonable to expect ordinary people to identify a specific song by title and author alone without hearing its tune, nor can they be expected to recognize a musical work by being presented only with the written musical composition. It may also be possible that prospective consumers are not familiar with some of the songs offered and only encountered the song for the first time in Wolfpac's roster.

Realistically speaking, therefore, consumers obtain the necessary information to make an informed choice whether to purchase the ringback tone only upon hearing at least a portion of the musical work. This would then allow them to identify or confirm that the work being offered is indeed the work they wish to purchase. To be sure, even composers and singers perform first their new musical work publicly before offering their albums for sale for the very same reason.

Verily, in this context, I humbly submit that the agreement between the parties for Wolfpac "to offer" the musical work for sale necessarily includes reasonable means of advertising the same for purposes of enticing prospective consumers to make a purchase. As such, in my view, the pre-listening function utilized by Wolfpac falls within the purview of offering the musical work to the public, and by authorizing Wolfpac "to offer" their work for sale, FILSCAP and its member-composers gave their consent for Wolfpac to make a reasonable communication to the public of their musical work.

On this score, FILSCAP's claim of copyright infringement already fails. Consent having been effectively given by FILSCAP through this provision in its MOA with Wolfpac, it is no longer necessary to determine whether the 20-second pre-listening function constitutes fair use of the copyrighted work. For fair use has been defined 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.[10]

Associate Justices Benjamin S. Caguioa and Henri Jean Paul B. Inting, in their erudite Separate Opinions, however, riposte:

First, the MOA clearly indicates that the authority granted to Wolfpac "does not include any grant or authority not expressly authorized ..."[11] Such stipulation being clear and unambiguous, it must be construed in its literal meaning, i.e., Wolfpac was only authorized "to offer and sell" the musical works without exercising any additional rights of the composers by simply providing the list of songs and indicating the names of the singers and the Court must not read its own commercial stipulations into a contract.[12]

Second, the fact that songs or audible works are recognizable once played is not a justification to expand the authority granted to Wolfpac as it would consequently allow Wolfpac to exercise any and all rights belonging to the composers as long as the same is done within the authority "to offer and sell" the songs to the general public.[13]

The relevant stipulation of the MOA reads:

2.1 to provide Content to WOLFPAC and permit the same to convert the Content into a form which can be downloaded through Caller Ring Tune Service, and to offer and sell the same to the general public via the Partner Operator[.]

[T]he grant of herein does not include any right or authority not expressly authorized herein. All other rights of the Provider (composer) are deemed reserved. Any other licenses and consents required in connection with the use of Content (musical works) not otherwise granted herein shall be obtained by WOLFPAC. (Emphasis and

underscoring supplied)

I focus on the sentence, "[t]he grant of herein does not include any right or authority not expressly authorized herein." Associate Justices Caguioa and Inting interpret this sentence to mean that Wolfpac's authority to offer the converted musical works to the general public is limited to means that do not involve the exercise of the copyright owners' economic rights other than what was "expressly authorized."

I respectfully submit, however, that this an erroneous construction of the stipulation. For it purports to limit the means or the manner in which Wolfpac may execute its obligation under the MOA. Yet, a holistic reading of the term shows that what this sentence qualifies is not how Wolfpac may offer the converted musical works to the public, but what else Wolfpac may be authorized to do pursuant to the MOA other than converting the musical works, offering them to the general public, and selling them. This is made obvious by the following sentence which clarifies, "[a]ll other rights of the Provider (composer) are deemed reserved."

Indeed, a quick reference to the first paragraph above shows that "[t]he grant of herein" pertains to the grant of authority by the composers to Wolfpac and the right and authority "expressly granted" by the MOA to Wolfpac is to "convert" the Content and "to offer and sell" the same. Therefore, what the proviso just really means is that Wolfpac is not allowed to exercise any other right or authority outside converting the musical works and offering and selling them to the public.

Had FILSCAP truly intend to narrowly construe the term "to offer," it could have specifically so indicated in the MOA, but it did not. To be sure, nothing hindered FILSCAP from specifying the manner in which it expected Wolfpac to advertise the composers' works. It would be highly unfair to place blame and find liability on Wolfpac who merely relied on the literal meaning of "to offer" as it was notably generally indicated in the MOA.

After all, construed in its literal meaning, "to offer" is a verb which means "to present or proffer something for someone to accept or reject as so desired."^[14] I thus reiterate my submission that, by their nature, copyrighted works like songs, images, films, and other literary and artistic creations may be offered to the public by first presenting the same to them in some form of a sample, e.g., teasers of movies are released to encourage the public to consume the entire film while synopses of novels are publicly released to entice readers to purchase the entire book. Clearly, "to offer" in this case means, as well, presenting a sample of the converted musical works to the public—in this case through the 20-second pre-listening function—to lure the public to purchasing the ringback tones.

THUS, I express my concurrence in the dismissal of the complaint for copyright and damages filed by FILSCAP but on the ground that FILSCAP and its member-composers gave their consent for the advertisement of their musical works under its MOA with Wolfpac.

[1] Ponencia, p. 2.

[2] Id. at 16.

[3] Id. at 2.

[4] Id. at 15.

[5] Id. at 16.

[6] *Habana v. Robles*, 369 Phil. 764 (1999) [Per J. Pardo, First Division].

[7] Id.

[8] Ponencia, p. 16.

[9] Id. at 20.

[10] COSAC v. FILSCAP, G.R. No. 222537, February 28, 2023 [Per J. Hernando, En Banc].

[11] JABSC's Reflection, p. 14; JHJPI's Reflection, p. 3.

[12] Id.

[13] Id.

[14] Oxford Dictionary.

SEPARATE CONCURRING AND DISSENTING OPINION

ZALAMEDA, J.:

Petitioner Filipino Society of Composers and Publishers' (FILSCAP) presents Us with another interesting intellectual property question, i.e., whether the act of allowing potential consumers to listen to sample ringtones constitutes public performance.

The present case involves the "pre-listening feature" provided in <http://ring.smart.com.ph>, the website operated by Wolfpac Communications, Inc. (Wolfpac). To promote the downloading of ringback tones for mobile phones operated under the network SMART, the website provides a "pre--listening feature" where a prospective consumer may listen to a 20-second portion of a song before downloading the ringback tone. FILSCAP demanded Wolfpac to secure the necessary performance licenses and pay the appropriate royalties since some of the ringback tones are part of its repertoire. Wolfpac argued that there is no public performance and considered the same as communication to the public as the prospective buyers of the ringback tones may listen to the samples from a place and time individually chosen by them.

The ponencia declared that the pre-listening function on the website operated by Wolfpac amounted to communication to the public, but it is a protected activity under the doctrine of "fair use."

I concur with the disposition of the case, specifically insofar as the ponencia preserves the hairline distinctions between two economic rights of the copyright owner laid down in the landmark case of *FILSCAP v. Anrey, Inc.* (Anrey)[1]: 1) the right to public performance defined under Section 171.6[2] of Republic Act No. 8293, otherwise known as the "Intellectual Property Code of the Philippines" (IPC); and 2) the right to communicate to the public the copyrighted work under Section 171.3.[3] However, I have reservations on the implication of the ponencia's discussion relative to the right involved in radio--over-loudspeakers.

Wolfpac's pre-listening feature amounts to communication to the public that is protected under the fair use doctrine

Indeed, the pre-listening function is a form of communication to the public, and not public performance, as differentiated in the landmark case of *Anrey*.

In *Anrey*, the Court determined an overlap between the right to public performance and the right to communicate to the public. This observation is based on the Berne Convention and excerpts from the World Intellectual Property Organization (WIPO) Guidelines:

ARTICLE 11

Right of Public Performance

Article 11, paragraph (1)

Scope of the Right

(I) Authors of dramatic, dramatico-musical and musical works shall enjoy the exclusive right of authorizing:

(i)

the public performance of their works, including such public performance by any means or process;

(ii)

any communication to the public of the performance of their works.

ARTICLE 11bis

Right of Broadcasting

Article 11bis, paragraph (1)

Scope of the Right

(1) Authors of literary and artistic works shall enjoy the exclusive right of authorizing:

(i)

the broadcasting of their works or the communication thereof to the public by any other means of wireless diffusion of signs, sounds or images;

(ii)

any communication to the public by wire or by rebroadcasting of the broadcast of the work, when this communication is made by an organization other than the original one;

(iii)

the public communication by loudspeaker or any other analogous instrument transmitting, by signs, sounds or images, the broadcast of the work.

11.3. The paragraph splits the right into two. The author has the exclusive right to authorise public performance of his work.

....

11.5. The second leg of this right is the communication to the public of a performance of the work. It covers all public communication except broadcasting which is dealt with in Article 11bis.

Noticeably, the Berne Convention does not recognize public communication as a right separate and independent from the author's right to public performance or from the right of broadcasting. In 2002, the Philippines became a member of WIPO. As a member, the State had to adhere to the WIPO Copyright Treaty (WCT). The WCT led to changes in our copyright law. In particular, Section 171.3 of Republic Act No. 8293 was lifted directly from Article 8 of the WCT.[4] Article 8 reads:

Article 8

Right of Communication to the Public

Without prejudice to the provisions of Articles 11(1)(ii), 11bis(1)(i) and (ii), 11ter(1)(ii), 14(1)(ii) and 14bis(1)

of the Berne Convention, authors of literary and artistic works shall enjoy the exclusive right of authorizing any communication to the public of their works, by wire or wireless means, including the making available to the public of their works in such a way that members of the public may access these works from a place and at a time individually chosen by them. (Emphasis supplied)

Article 8 of the WCT was introduced to cover situations in the ever-growing and fast-paced digital environment. The explanatory note to the WCT strengthens this point:

The WIPO Copyright Treaty (WCT) is a special agreement under the Berne Convention that deals with the protection of works and the rights of their authors in the digital environment.

As to the rights granted to authors, apart from the rights recognized by the Berne Convention, the Treaty also grants: (i) the right of distribution; (ii) the right of rental; and (iii) a broader right of communication to the public.

The right of communication to the public is the right to authorize any communication to the public, by wire or wireless means, including "the making available to the public of works in a way that the members of the public may access the work from a place and at a time individually chosen by them." The quoted expression covers, in particular, on-demand, interactive communication through the Internet.[5] (Emphasis supplied)

As a result of the accumulation of treaties, international conventions, legislative history, and other secondary sources, We made the following distinction: if "public communication" was done using traditional forms such as radio-over-loudspeakers, then the right involved is the public performance right under Section 177.6 of the IPC. On the other hand, if the communication was done in the digital landscape such as the internet, then the right violated is the separate economic right to publicly communicate the work under Section 177.7 of the IPC.

To illustrate, a streaming service in the United Kingdom named TVCatchup offers live streams of free-to-air UK television broadcasts over the internet. The UK High Court referred to the Court of Justice of the European Union (CJEU) whether TVCatchup's streaming activities were a communication to the public. The CJEU held that the retransmission of protected works and broadcasts over the internet was a new communication to the public and therefore must be authorized by the authors concerned.[6]

Another illustrative case is *Nils Svensson v. Retriever Sverige AB*.^[7] The applicants, all journalists, wrote press articles that were published in the *Göteborgs-Posten* newspaper and freely accessible on the *Göteborgs-Posten* website. Retriever Sverige operates a website that provides its clients, according to their needs, with lists of clickable internet links (hyperlinks) to articles published by other websites. The CJEU held that the activity of linking to third-party works on the internet is described as an act of public communication, irrespective of the type of link (the judgment makes no distinctions) users may have before them.

Unauthorized links to radio streams are also a violation of the right to communication to the public. In *TuneIn Inc. v. Warner Music UK Ltd. & Anor*,^[8] the claimants either represent, own, or hold exclusive licenses to copyrights in sound recordings of music. On the other hand, defendant TuneIn is a company that operates TuneIn Radio, which enables users in UK to access radio stations from around the world by broadcasting the same on the internet. The appellate court of England and Wales clarified that every transmission or retransmission of the work by a specific technical means must be individually authorized by the copyright holder. Further, for purposes of determining whether there is "communication," the appellate court explained that the work must be made available to the public in such a way that they may access it, whether or not they actually access the work. It confirmed that there is communication to the public in the "transmission of television and radio broadcasts, and sound recordings included therein, to the customers of hotels, public houses, spas, café-restaurants and rehabilitation centers by means of television and radio sets." As TuneIn is a different kind of communication

targeted at a different public in a different territory, the court concluded that the rights of the copyright holders were violated.

Here, the alleged infringing act is the "pre-listening feature" on Wolfpac's website providing for a 20-second clip of a song. This is a clear demonstration of the right to communicate to the public (Section 171.3), or for other Member States, they regard this as the "making available to the public" right. The distinguishing feature of the "making available to the public" right is that the transmission of the protected work can be accessed by the public with discretion, not just to the place, but also discretion to the time, which is only possible on Internet-based or On-Demand platforms (such as Netflix, Spotify, or Youtube). The "pre-listening feature" falls under the same category since prospective customers may access the audio clips on the website operated by" Wolfpac any place, anytime, at their own convenience. However, Wolfpac did not acquire such right as the copyright owners limited the assignments they made to the right of public performance.

The same is true with FILSCAP. It did not sufficiently establish a cause of action considering that it failed not only in alleging the compositions that were infringed, but also in proving that it acquired the right to communicate to the public the said compositions.

It must be pointed out that although FILSCAP is deputized through agreements it entered into with various composers, authors and publishers, record labels, and other foreign societies, it does not mean that FILSCAP is the sole assignee of each and every copyright owner. Thus, it would be prudent to at least enumerate some of the compositions allegedly infringed. It's no easy task but nonetheless necessary to prevent FILSCAP from making a shotgun approach where the court would simply rely on FILSCAP's claims without verifying or cross-referencing if indeed it was the assignee. Otherwise, FILSCAP's authority may be far too overreaching and anti-competitive.

Further, FILSCAP has consistently based its cause of action for infringement on its alleged right to public performance. This makes it suspect that FILSCAP does not possess the right to "communicate to the public" or "make available to the public" the copyrighted work.

Assuming FILSCAP acquired the right to "communicate to the public" or the "make available to the public" the disputed musical compositions, the use of the pre-listening function is a protected activity under the fair use doctrine. Sections 184 and 185 of the IPC provide for instances that amount to fair use (statutory fair use) and, hence, do not constitute copyright infringement, thus:

Section 184. Limitations on Copyright. — 184.1. Notwithstanding the provisions of Chapter V, the following acts shall not constitute infringement of copyright:

- (a) 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 society; ([Section] 10(1), [Presidential Decree] No. 49)
- (b) 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 mentioned; ([Section 11(3)], Presidential Decree No. 49)
- (c) The reproduction or communication to the public by mass media of articles on current political, social, economic, scientific or religious topic, lectures, addresses and other works of the same nature, which are delivered in public if such use is for information purposes and has not been expressly reserved: Provided, That the source is clearly indicated; ([Section] 11, [Presidential Decree] No. 49)
- (d) 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

purpose; ([Section] 12, [Presidential Decree] No. 49)

(e) 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 of the name of the author, if appearing in the work, are mentioned;

(f) 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 which are part of the general cinema repertoire of feature films except for brief excerpts of the work;

(g) The making of ephemeral recordings by a broadcasting organization by means of its own facilities and for use in its own broadcast;

(h) The use made of a work by or under the direction or control of the Government, by the National Library or by educational, scientific or professional institutions where such use is in the public interest and is compatible with fair use;

(i) 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 Regulations; (n)

(j) 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 title; and

(k) Any use made of a work for the purpose of any judicial proceedings or for the giving of professional advice by a legal practitioner.

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

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.

Obviously, the pre-listening feature does not fall under any of the specific instances of statutory fair use. Nonetheless, the said activity may still be categorized as fair use under general fair use principles, particularly, by applying the four fair use factors enumerated in the second portion of Section 185.1, thus: (1) the purpose and character of the use, including whether such use is of a commercial nature or is for non-profit educational purposes; (2) the nature of the copyrighted work; (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and (4) the effect of the use upon the potential market for or value of the copyrighted work.[9]

As to the first factor, I agree with the ponente that the pre-listening function is not necessarily commercial. To second this notion, the pre-listening function is a necessary feature of a sanctioned commercial activity that Wolfpac is licensed to undertake. As correctly ruled by observed by the trial court, [h]uman nature is such that

one has to "sample" a product first before setting one's eyes on it with finality.[10] Consumers would generally want to hear first the song before purchasing the same as their ringtone. Thus, the first factor should be weighed in favor of fair use.

On the second fair use factor, the *Anrey* case, citing *Google v. Oracle*,^[11] made a distinction between copyrights that have a functional purpose against the creative and artistic types. The Supreme Court of the United States (SCOTUS) ruled that computer programs differ to some extent from many other copyrightable works because computer programs always serve a functional purpose. Because of this difference, the SCOTUS accorded lesser protection to computer programs "by providing a context-based check that keeps the copyright monopoly afforded to computer programs within its lawful bounds." The fact that computer programs are primarily functional makes it difficult to apply traditional copyright concepts in that technological world. Copyright's protection may be stronger where the copyrighted material is fiction, not fact, where it consists of a motion picture, rather than a news broadcast, or where it serves an artistic rather than a utilitarian function.^[12] Music falls under the more artistic and creative aspect that deserve more protection than other copyright works. Clearly, the copyrighted materials are artistic in nature, hence the second factor should be taken against fair use.

Third, the pre-listening feature on the website operated by Wolfpac only utilizes a short portion of the copyrighted material. It holds no other purpose other than to identify the musical work and entice the consumers to purchase the ringback tone. Thus, I agree that the length of the clip is not only short but is also inconsequential, which should be taken in favor of fair use.

As to the fourth fair use factor, Wolfpac's use of the sample songs in the pre-listening function would not cause substantial economic harm to the composers, but would actually do them good as the pre-listening function serves as an effective marketing tool for them to sell the ringback tones they commissioned Wolfpac for.

Musical compositions are protected from the moment of their creation

I agree with the ponente's discussion that musical compositions are among the literary and artistic works that are subject of copyright under Section 172 of the IPC. However, I respectfully submit that musical compositions are protected from the moment of their creation and does not require that it must be embodied in a sound recording or other forms of fixation.^[13] This is in accordance with Sections 172 and 178 of the IPC, which provide:

Section 172. Literary and Artistic Works. — 172.1. Literary and artistic works, hereinafter referred to as "works", are original intellectual creations in the literary and artistic domain protected from the moment of their creation and shall include in particular:

....

(f) Musical compositions, with or without words;

....

Section 178. Rules of Copyright Ownership. — Copyright ownership shall be governed by the following rules:

178.1 Subject to the provisions of this section, in the case of original literary and artistic works, copyright shall belong to the author of the work[.][14] (Emphasis supplied)

The Court in *Cosac, Inc. v. Filipino Society of Composers, Authors and Publishers, Inc.*^[15] explained that:

A musical composition is an intangible work of art composed of combination of sounds perceptible to the

senses. It is separate and distinct from the tangible object that embodies it, such a sheet music as described by Section 181 of the IPC:

....

Chapters XII and XIII of the IPC govern the fixations of sounds in the form of sound recordings. These chapters provide for the moral rights of the performers, the rights of producers of sound recordings, and limitations on the said rights.

A distinction exists between a musical composition which is protected by copyright and the performance or fixation of a musical composition. Such distinction is relevant since not only the composers, authors, and publishers, but also the performers and sound recording producers should be remunerated when the fixation or performance of their sound recording is being performed in public[.]

Clearly, musical compositions are protected from the moment of their creation. Sound recording or other forms of fixation is necessary in neighboring rights as provided for by the IPC.

Radio-over-loudspeakers remains to be a form of public performance

I observed, however, that the ponencia in a way abandoned the Court's ruling in *Anrey* in that the act of radio-over-loudspeakers can no longer be considered "public performance" in view of the clarification made in *Philippine Home Cable Holdings, Inc. v. FILSCAP*.^[16] The ponencia states that "if the possibility of perceiving the performance requires the means of communicating the works to the public, such as broadcasting, rebroadcasting, retransmitting by cable, broadcasting and retransmitting by satellite, and 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, then it is considered as an exercise of the right of "communication to the public."^[17]

I maintain that radio-over-loudspeakers does not amount to broadcasting, rebroadcasting, retransmission by satellite. Neither does it amount to retransmission by cable. Thus, it cannot be considered as "communication to the public."

For ease of reference, I will reproduce the relevant points previously stated in my Concurring Opinion for *Philippine Home Cable Inc. v. Filscap*, viz:

What is complained as infringing in this case is the cablecasting of videoke laser disc recordings done by Philippine Home Cable Holdings, Inc. (Home Cable), pursuant to an agreement with Precision Audio Videoke Service. These videoke recordings were played by Home Cable in three of its cable channels (the Home Cable Case).

The IPC does not specifically define cablecasting but secondary sources define the act as:

"[C]ablecasting" means the transmission by wire for public reception of sounds, images or sounds and images or of the representations thereof. Transmission by wire of encrypted signals is "cablecasting" where the means for decrypting are provided to the public by the cablecasting organization or with its consent. "Cablecasting" shall not be understood as including transmissions over computer networks or any transmission where the time and place of reception may be individually chosen by members of the public[.]

In *Anrey*, what was involved is a secondary transmission of a radio broadcast and We perceived such secondary transmission as a public performance. On the other hand, the present Home Cable case involves an original transmission made by Home Cable. For the ponente, cablecasting falls under the right to public

communication for this amounts to making that work accessible to members of the public from a place or time individually chosen by them, which is the very essence of the "communication to the public" right in the IPC.

Perhaps this statement is taken from the 1997 version of [Section] 171.3 of the IPC which states:

"Communication to the public" or "communicate to the public" means 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.

Due to its very restricted application, Member States has regarded this as the restricted right of "making available to the public" the copyrighted material. In the U.S., this right is reserved to control interactive, on-demand dissemination of copyrighted works over the Internet, including provision of access to streams or downloads. Also, the European Union, under Recitals 24-27 of Article 3, Directive 2001/29/EC provide a background on this right:(24) The right to make available to the public subject-matter referred to in Article 3(2) should be understood as covering all acts of making available such subject-matter to members of the public not present at the place where the act of making available originates, and as not covering any other acts.

(25) The legal uncertainty regarding the nature and the level of protection of acts of on-demand transmission of copyright works and subject-matter protected by related rights over networks should be overcome by providing for harmonised protection at Community level. It should be made clear that all rightholders recognised by this Directive should have an exclusive right to make available to the public copyright works or any other subject-matter by way of interactive on-demand transmissions. Such interactive on-demand transmissions are characterised by the fact that members of the public may access them from a place and at a time individually chosen by them.

(26) With regard to the making available in on-demand services by broadcasters of their radio or television productions incorporating music from commercial phonograms as an integral part thereof, collective licensing arrangements are to be encouraged in order to facilitate the clearance of the rights concerned.

(27) The mere provision of physical facilities for enabling or making a communication does not in itself amount to communication within the meaning of this Directive.

However, We noticed that the ponencia used the disjunctive word "OR" when the law used the conjunctive word "AND" in the phrase "from a place and time individually chosen by them." This has the tendency to significantly change the meaning of the provision.

The provision uses the word "AND" which implies that the transmission of the protected work should be accessible by the public with discretion not just to the place, but also discretion to the time. This for me is the exact essence of the "communication to the public" right under [Republic Act No.] 8293, which should be limited to On-Demand platforms (such as Netflix, Spotify, or Youtube) since these platforms offer discretion to access communication of the work at a place AND time of their own choosing. It is only the Internet that makes such discretion possible.

Even the Intellectual Property Office of the Philippines (IPOPHIL) recognizes such distinction. In an official publication issued by the IPOPHIL for the WIPO, the IPOPHIL enumerates public performance and public communication right, on the one hand; and the making of the works available on the Internet for on-demand access by the public, on the other; as among the economic rights of the copyright owner.

Finally, the ponencia made reference to the definition under RA 10372 of "communication to the public" which includes "broadcasting, rebroadcasting, retransmitting by cable, broadcasting and retransmitting by satellite."

Following the above disquisitions, I agree with the ponente that the right infringed is the "communication to the public" right. If we are to harmonize the definition of "communication to the public" under [Republic Act No.]

8293 with the present definition of the term under [Republic Act No.] 10372, then it may very well be argued that the modern day formulation of the term should prevail.

The definition of the term "communication to the public" under RA 10372 is the result of the State's joint accession to the WCT17 and the WIPO Performances and Phonograms Treaty (WPPT) in [July 4,] 2002. Although [Republic Act No.] 10372 took effect as an amendment to the IPC only in 22 March 2013, both the WCT and the WPPT were concluded in 1996. As the ponencia states, in a sense both treaties were integrated in our domestic legislation even before the amendment to the IPC was made by [Republic Act No.] 10372.

In fine, the acts constituting "communication to the public" under [Republic Act No.] 10372 reflects the true scope of the "communication to the public" right. Having said this, I would like to tread on this very carefully so as not to undesirably overexpand the coverage of this right.

There are only five variations in which the expanded "communication to the public" covers: 1) broadcasting; 2) rebroadcasting; 3) retransmitting by cable; 4) broadcasting and retransmitting by satellite; and 5) making the 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. The fifth is known as the limited right of "making the work available" to the public the coverage of which have been sufficiently discussed above.

Broadcasting has been defined by [Republic Act No.] 10372 (which was lifted from the WPPT) as the transmission by wireless means for the public reception of sounds or of images or of representations thereof such transmission by satellite is also "broadcasting" where the means for decrypting are provided to the public by the broadcasting organization or with its consent. The last phrase should be interpreted as retransmitting by satellite under the fourth enumeration.

Our law does not define rebroadcasting but Article 3(g) of the Rome Convention defines "rebroadcasting" as the "simultaneous broadcasting by one broadcasting organization of the broadcast of another broadcasting organization." We acceded to the Rome Convention on [June 25,] 1984. Likewise the Rome Convention is integrated in the WPPT. Rebroadcasting under the Rome Convention is limited to over-the-air transmissions

Retransmitting by cable or cable retransmission is the communication to the public by wire of a broadcast by an organization other than the original one. Cable-originated transmissions or cablecasting is not specifically enumerated but some states, accord them protection the same way as broadcasting.

Following a rundown of these definitions, how this impacts the Court's ruling in the Anrey case is completely negligible. Radio-over-loudspeakers, for obvious reasons, does not amount to broadcasting, rebroadcasting, retransmission by satellite. Neither does it amount to retransmission by cable. Although it uses cable wires, it does not amount to cable retransmission. Besides, the Berne Convention sees this as a separate and distinct act, apart from broadcasting, and rebroadcasting.[18]

From the foregoing disquisitions, I concur with the ponencia, save for the reservations expressed above, and vote to DENY the Petition.

[1] 927 Phil. 577 (2022) [Per J. Zalameda, En Banc].

[2] Section 171.6. "Public performance," in the case of a work other than an audiovisual work, is the recitation, playing, dancing, acting or otherwise performing the work, either directly or by means of any device or process; in the case of an audiovisual work, the showing of its images in sequence and the making of the sounds accompanying it audible; and, in the case of a sound recording, making the recorded sounds audible at a place or

at places where persons outside the normal circle of a family and that family's closest social acquaintances are or can be present, irrespective of whether they are or can be present at the same place and at the same time, or at different places and/or at different times, and where the performance can be perceived without the need for communication within the meaning of Subsection 171.3[.]

[3] Section 171.3. 'Communication to the public' or 'communicate to the public' means 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[.] As amended by Republic Act No. 10372, February 28, 2013.

[4] Right of Communication to the Public, December 20, 1996, available at <https://wipolex.wipo.int/en/text/295166> (last accessed on July 10, 2024), art. 8. The Philippines ratified the WCT on July 4, 2002.

[5] Id.

[6] *ITV v. TVCatchup*, CJEU 7.3.2013, C-607/11.

[7] CJEU 2.13.2014, C-466/12.

[8] [2021] EWCA Civ 441.

[9] Section 185, Republic Act No. 8293.

[10] Rollo, p. 38.

[11] 593 U.S. ____ (2021).

[12] Id. at 15. see also *Stewart v. Abend*, 495 U.S. 207, pp. 237-238 (1990). *Harper & Row, Publishers, Inc. v. Nation Enterprises*, 471 U.S. 539, p. 563 (1985).

[13] Ponencia, p. 9.

[14] Sections 172 & 178 of the Intellectual Property Code.

[15] G.R. No. 222537, February 28, 2023 [Per J. Hernando, En Banc].

[16] G.R. No. 188933, February 21, 2023 [Per SAJ. Leonen, En Banc].

[17] Ponencia, pp. 13-14.

[18] Concurring opinion.

SEPARATE CONCURRING OPINION

DIMAAMPAO, J.:

I concur in the dismissal of the complaint for copyright infringement filed by the Filipino Society of Composers and Publishers (FILSCAP) against Wolfpac Communications, Inc. (Wolfpac). As aptly elucidated in the ponencia, I submit that Wolfpac's "pre-listening function" constitutes fair use.

Further to the discussion of the application of the four-factor test, specifically on the purpose and character of the use, an examination of American jurisprudence provides guidance in ascertaining whether Wolfpac's use is, in fact, transformative. This, in turn, is determinative of whether the first factor favors Wolfpac. As aptly mentioned in the ponencia, "the decisions of U.S. courts, which have persuasive effect on Philippine courts for copyright could serve as important references in the resolution of complex copyright issues".[1]

While one must be circumspect on whether the facts of American cases are on all fours with the case at hand, it is undeniable that foreign jurisprudence can provide insight on how to tackle novel and intricate copyright issues in the Philippine context. The U.S. courts' elucidations on the concept of "transformative use" in the cases of *Kelly v. Arriba Soft Corp.*[2] and *Authors Guild, Inc. v. HathiTrusi*[3] are particularly instructive to the case at bench.

In retrospect, the examination of the nature and character of the use aims to uncover whether there is a difference in the character and purpose of the use of the copyrighted work. Added value or utility is not the test: a transformative work is one that serves a new and different function from the original work and is not a substitute for it, thus:

The central purpose of this investigation is to see ... whether the new work merely supersede[s] the objects of the original creation, or instead adds something new, with a further purpose or different character, altering the first with new expression, meaning, or message; it asks, in other words, whether and to what extent the new work is transformative.[4]

To illustrate, in *Kelly*, the U.S. Court of Appeals for the Ninth Circuit ruled that the reproduction of plaintiff's photos as thumbnail images served an entirely different purpose, i.e., as a tool to help index and improve access to images on the internet and their related web sites.[5] Meanwhile, in *Author's Guild*, the U.S. Court of Appeals for the Second Circuit ruled that the creation of a full-text searchable database of books is a "quintessentially transformative use"[6] and the same should not be considered as a substitute for the books searched.

Applying the foregoing precepts to the case at hand, the following conclusions may be reached:

First, it is irrefragable that Wolfpac's pre-listening function served a commercial function, as pointed out by the ponencia. However, as also correctly pronounced, "[a] finding that the use is commercial does not automatically bar the application of fair use."[7] In this regard, as in *Kelly*, while the use was admittedly commercial, the use was "more incidental and less exploitative in nature"[8] than other types of commercial use. Particularly, the use in this case was only in furtherance of and merely incidental to the pre-existing agreement between Wolfpac and the composers whom FILSCAP represents. To be sure, Wolfpac was using the 20-second preview of the songs to advertise the sale of the ringback tones. Nonetheless, it was not exploitative in the sense that, through the use of the pre-listening function, Wolfpac did not seek to profit in a way that exceeds the original contract agreed upon by the composers and Wolfpac. Thus, since the use of the songs was not highly exploitative, the commercial nature of the use weighs only slightly against a finding of fair use.

Second, it may reasonably be concluded that Wolfpac's use is indeed transformative. Even though the samples of the musical works were directly lifted from the songs, these were limited to 20-second segments which undeniably served a different function than the composers' songs. Verily, the use in this instance has now been twice removed from the original use of the songs. For one thing, the composers' songs intend to entertain. For another, the ringback tones which are based on said songs has the basic purpose of signaling that the phone of the party called is ringing. Meanwhile, the pre--listening function, which are based on the ringback tones, seek to provide potential consumers with means to make an informed choice before deciding to download the songs. The records are bereft of any evidence that the composers have composed their songs for the purpose of allowing the public to use them as ringback tones, nor to listen to them through the pre-listening function. It can also be

surmised that users cannot make use of the pre--listening function other than for what it was intended since the same cannot be downloaded. The inherent brevity of the songs used in the pre-listening function perforce does not give it any entertainment value. Therefore, the pre--listening function does not merely repackage nor republish the original musical scores, but is laden with an entirely new function which may be safely regarded as transformative.

Finally, the Intellectual Property (IP) Code itself acknowledges that the effective intellectual and industrial property system is vital, among others, to the development of creative activity. To safeguard the future use of artistic works for educational, scholarly, critical, and journalistic purposes, Congress adopted the fair use exception. Proceeding from the above disquisitions, Wolfpac's use of segments of the composers' songs promotes the goals of the IP Code and the fair use exception. The pre-listening function does not stifle artistic creativity because they are not used for entertainment purposes and therefore do not do not supplant the need for the originals. In addition, it benefits the public, as explained by the ponencia, by enhancing consumer protection.

[1] Ponencia, p. 7.

[2] 336 F. 3d 811 (9th Cir. 2002).

[3] 755 F. 3d 87 (2d Cir. 2014).

[4] See *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 579, 114 S.Ct. 1164, 127 L.Ed.2d 500 (1994).

[5] See *Kelly v. Arriba Soft Corp.*, 336 F.3d 811, 818 (9th Cir. 2002).

[6] *Author's Guild, Inc. v. HathiTrust*, 755 F. 3d 87 (2d Cir. 2014).

[7] Ponencia, p. 22.

[8] *Kelly v. Arriba Soft Corp.*, 336 F.3d 811, 818 (9th Cir. 2002).

CONCURRING AND DISSENTING OPINION

SINGH, J.:

In this case, the Filipino Society of Composers, Authors and Publishers, Inc. (FILSCAP) entered into Memoranda of Agreement (MOAs) with Wolfpac Communications, Inc. (Wolfpac), allowing the conversion of FILSCAP's musical works into downloadable ringtones for sale to the public.[1] Later, FILSCAP came across an advertisement in the Lifestyle Section of the May 28, 2004 issue of the Philippine Daily Inquirer, which promoted the downloading of ringback tones for mobile phones from a website. The website also allows a prospective consumer to listen to a 20-second portion of a song by clicking the "pre-listening function" before downloading the ringback tone—hence, the advertisement's come-on phrase "Listen B4 U Download." When FILSCAP discovered that Wolfpac operated the website, it filed a complaint for copyright infringement.[2] FILSCAP alleged that the pre--listening function constitutes "public performance," for which Wolfpac is required to secure a license and pay royalties.[3]

In its defense, Wolfpac claimed that when the composers assigned their musical works for conversion into ringtones, along with the associated right to distribute and sell them, the assignment inherently included the right to market the ringtones through the pre-listening feature. Wolfpac also argued that the pre-listening service is not "public performance" but "communication to the public." Finally, the fair use doctrine applies because the

samples have no independent commercial value, thus precluding FILSCAP from claiming remuneration.[4]

The Court is thus faced with these questions: (1) Was the use of sample ringtones in the pre-listening feature of Wolfpac's website public performance or communication to the public? and (2) Was it fair use of FILSCAP's work?[5]

In dismissing FILSCAP's claim, the ponencia held that: (1) the pre--listening function should be considered as communication to the public; and (2) Wolfpac's use of the samples constitutes fair use.[6] Thus, while the MOAs between FILSCAP and Wolfpac exclude the assignment of the songs for use in a pre-listening device, the Court cannot hold Wolfpac liable for copyright infringement in using the sample ringtones under the fair use doctrine.

I concur with the finding that the pre-listening feature constitutes communication to the public rather than public performance. However, I respectfully disagree that the use of the ringtone samples on Wolfpac's pre--listening page qualifies as fair use.

Public performance v. Communication to the public

In my concurring and dissenting opinion in *FILSCAP v. Anrey, Inc.*[7] and concurring opinion in *Home Cable Holdings, Inc. v. FILSCAP*,[8] I explained that the key distinction between "public performance" and "communication to the public" lies in the method that the copyrighted work is made available to the public.[9]

Section 171.6[10] of the IP Code defines "public performance," in the case of a sound recording, as "making the recorded sounds audible at a place or at places where persons outside the normal circle of a family and that family's closest social acquaintances are or can be present, irrespective of whether they are or can be present at the same place and at the same time, or at different places and/or at different times, and where the performance can be perceived without the need for communication within the meaning of Subsection 171.3."

Meanwhile, Section 171.3[11] of the IP Code defines "communication to the public" as "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." Section 202.9 of the IP Code further defines "communication to the public of a performance or a sound recording" as "the transmission to the public, by any medium, otherwise than by broadcasting, of sounds of a performance or the representations of sounds fixed in a sound recording."

Based on the foregoing definitions, the ponencia correctly set out the two aspects of "communication to the public" as (1) the act of making the work available to the public by wire or wireless means; and (2) the option on the part of the members of the public to access the work from a place and time individually chosen by them.[12] The elements of "public performance," on the other hand, are (1) actual performance of the work, showing the work, or making the work audible, depending on the type of work; and (2) actual or possible public perception without the need for communication to the public.[13]

Based on the facts of the case, the ponencia correctly concluded that the pre-listening function constitutes "communication to the public." [14] The first aspect of "communication to the public" is evident. Wolfpac's implementation of the pre-listening function makes the musical work available to the public through the internet. At this stage, the musical works are not yet audible, meaning the first element of "public performance" is not present. The works only become audible when a potential consumer clicks the play button to listen to the sample song. This is where the second element of "communication to the public" becomes apparent. Since the samples

are accessible on Wolfpac's website, any member of the public can access them from a location and time of their choosing. Thus, "communication to the public" by wireless means occurs, as members of the public can access the samples from Wolfpac's website at a place and time individually chosen by them.

Therefore, I concur with the ponencia that the pre-listening function on Wolfpac's website constitutes "communication to the public."

Fair use

Under the IP Code, copyright or economic rights consist of the exclusive right to perform the following:

SECTION 177. Copyright or Economic Rights. – Subject to the provisions of Chapter VIII, copyright or economic rights shall consist of the exclusive right to carry out, authorize or prevent the following acts:

177.1. Reproduction of the work or substantial portion of the work;

177.2. Dramatization, translation, adaptation, abridgment, arrangement or other transformation of the work;

177.3. The first public distribution of the original and each copy of the work by sale or other forms of transfer of ownership;

177.4. Rental of the original or a copy of an audiovisual or cinematographic work, a work embodied in a sound recording, a computer program, a compilation of data and other materials or a musical work in graphic form, irrespective of the ownership of the original or the copy which is the subject of the rental;

177.5. Public display of the original or a copy of the work;

177.6 Public performance of the work; and

177.7 Other communication to the public of the work. (Emphasis supplied)

These economic rights are exclusive in nature.[15] Thus, the use of any copyrighted material without the consent of the copyright owner or its assignee, and which violates these economic rights, shall amount to copyright infringement.[16] Section 177 has expanded the scope of copyright infringement from merely the unauthorized duplication of a literary, artistic or scientific work to the unauthorized performance of the acts enumerated in said Section.[17] In *Habana v. Robles*,^[18] as quoted in *Home Cable v. FILSCAP*,^[19] the Court stated:

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.^[20]

Two elements must be proved to uphold a claim of copyright infringement. One, the plaintiffs ownership of a validly copyrighted material, and two, the respondent's exercise of any the enumerated economic rights without the consent of the copyright owner or holder.^[21] As to the second element, the Court has held that it must further be shown that the exercise of the economic right was inconsistent with any of the limitations on copyright^[22] and permissible unauthorized reproductions and importations under Sections 187-190 of the IP Code. Alternatively, the respondent could demonstrate that its use of the economic right qualifies as fair use.^[23]

Here, Wolfpac did not dispute the composers' ownership of the copyrighted material. FILSCAP's authority to represent said composers was also established through the standard Deed of Assignment presented by FILSCAP, which provides that "FILSCAP shall own, hold, control, administer and enforce said public performing rights [public performance and communication to the public] on an exclusive basis for as long as ASSIGNOR remains a member of FILSCAP."^[24] The assignment of copyright, in whole or in part, is sanctioned under Section 180 of

the IP Code. Thus, the first element of copyright infringement is satisfied.

As to the second element, the ponencia correctly established that Wolfpac's use of the subject ringtones in the pre-listening function constitutes "communication to the public" that is unauthorized under the parties' contract. Wolfpac did not claim that the pre-listening function falls under the permissible unauthorized reproductions and importations under Sections 187-190 of the IP Code. However, it claimed that the authority to market the ringtones through the pre-listening function is corollary to the right to offer and sell said ringtones provided under the MOA.[25] Nonetheless, the ponencia correctly held that a plain reading of the assignments in Wolfpac's favor reveals that the use of the musical works is limited to converting them into ringtones that can be downloaded by the public for a fee.[26] Thus, Wolfpac's act of using portions of the ringtones in the pre-listening function falls under neither of the first two limitations to copyright.

The other limitation to copyright under the IP Code is fair use.[27]

The Court has defined 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." [28] It is an exception to the copyright owner's monopoly of the use of the work to avoid "stifling the very creativity which that law is designed to foster." [29] Determining fair use requires the application of the four-factor test: [30]

SECTION 185. Fair Use of Copyrighted Work. – [. . .]

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. (Emphasis supplied)

Applying these factors, [31] the ponencia concluded that Wolfpac's use of the sample songs in the pre-listening function constitutes fair use. The ponencia provides the following rationale:

(1)

The purpose of the pre-listening function is not purely commercial. It also serves a public purpose, i.e., consumer protection, as it allows potential consumers to make an informed decision before downloading the ringback tones; and

(2)

The effect on the work's potential market goes both ways, such that it can either encourage or discourage the public from downloading the ringtones. Thus, it does not always result in increased sales and profit for Wolfpac.

However, in my view, the argument that the pre-listening function serves a consumer protection purpose, and thus constitutes fair use, is for the consumer or public to invoke as a defense to a copyright infringement charge. In this case, the parties involved entered into a contract that expressly excludes the act in question—the use of FILSCAP's songs in Wolfpac's pre-listening function—from the authority granted by the copyright holder.

To recall, the authority of Wolfpac under the MOA is to "offer and sell" the ringtone versions of the songs. The

excerpt of the agreement in Wolfpac's favor reads:

2.1 to provide Content to WOLFPAC and permit the same to convert the Content into a form which can be downloaded through Caller Ring Tune Service, and to offer and sell the same to the general public via the Partner Operator[.]

The MOA expressly excludes other licenses not specified in the agreement:

[T]he grant of herein does not include any right or authority not expressly authorized herein. All other rights of the Provider (composer) are deemed reserved. Any other licenses and consents required in connection with the use of Content (musical works) not otherwise granted herein shall be obtained by WOLFPAC.[32]

I also disagree that the use of FILSCAP's ringtones in Wolfpac's pre-listening function constitutes fair use for serving a public purpose. As Wolfpac highlighted in its Petition, the objective of the pre-listening function is to market the ringtones:

Anent the substantive issues in the Petition, Wolfpac stresses that the composers assigned their musical works for conversion into ringtones, with the corollary right to offer and sell the ringtones, as well as to market them through the pre-listening function.[33] (Emphasis supplied)

Moreover, Wolfpac's MOAs with the composers precisely provide that the conversion of their songs into ringtones is toward the end of selling them to the public:

2.1 to provide Content to WOLFPAC and permit the same to convert the Content into a form which can be downloaded through Caller Ring Tune Service, and to offer and sell the same to the general public via the Partner Operator[.][34] (Emphasis supplied)

Even if the pre-listening function provides some degree of public benefit, the primary goal of the pre-listening feature is commercial – to promote or advertise the ringtones, and generate more sales. As with other widely-used music platforms and services, the provision of song previews to users is a form of advertising aimed toward the promotion of the platform's offerings. They are designed to attract potential buyers by showcasing the works available for purchase. Spotify, for instance, offers Audio Preview Clips or snippets of songs to allow listeners to preview music before deciding to listen to the full track or add it to their playlists.[35] The previews are in place to encourage subscriptions, which allow users to save, download or share the sampled work.[36] YouTube or Netflix likewise post samples or trailers to encourage paid downloads of their movie and TV show offerings.

Although the pre-listening or sampling feature could be seen as having a consumer protection aspect, its main objective remains largely commercial. The ultimate aim is profit-making.

A review of the acts listed as limitations to copyright or fair use under Sections 184 and 185 of the IP Code shows that they qualify as exceptions to the general rule – that unauthorized exercise of economic rights is copyright infringement – because of a clear and predominantly public purpose attached to said acts:

SECTION 184. Limitations on Copyright. –

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

(a) 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 society; [. . .]

(c) The reproduction or communication to the public by mass media of articles on current political, social, economic, scientific or religious topic, lectures, addresses and other works of the same nature, which are delivered in public if such use is for information purposes and has not been expressly reserved: Provided, That

the source is clearly indicated;

(d) 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 purpose;

(e) 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 mentioned;

(f) 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 which are part of the general cinema repertoire of feature films except for brief excerpts of the work; [. . .]

(h) The use made of a work by or under the direction or control of the Government, by the National Library or by educational, scientific or professional institutions where such use is in the public interest and is compatible with fair use;

(i) 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 Regulations; [. . .]

(k) Any use made of a work for the purpose of any judicial proceedings or for the giving of professional advice by a legal practitioner.

...

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. (Emphasis supplied)

Additionally, Section 185 outlines specific examples of acts which the law considers fair use, i.e., criticism, comment, news reporting, teaching including multiple copies for classroom use, scholarship and research. While it does not restrict fair use to these acts, the provision states that any act sought to be included within the concept of fair use will have to serve "similar purposes." The advertisement of the ringtones for sale through the pre--listening feature does not align with these purposes under Section 185, which are evidently intended for educational, public service or similar objectives.

In *ABS-CBN Corporation v. Gozon*,^[37] the Court stressed the importance of the purpose and character requirement. It further stressed that the purpose and character of the use of the copyrighted material must fall under those listed in Section 185:

First, the purpose and character of the use of the copyrighted material must fall under those listed in Section 185, thus: 'criticism, comment, news reporting, teaching including multiple copies for classroom use, scholarship, research, and similar purposes.' The purpose and character requirement is important in view of copyright's goal to promote creativity and encourage creation of works. Hence, commercial use of the copyrighted work can be weighed against fair use.

The '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. 'Meta-use' can also occur without necessarily transforming the copyrighted work used.^[38] (Emphasis supplied)

Moreover, in enumerating the factors that determine fair use, Section 185 states the first factor in this wise:

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

"Commercial use or purpose" is contrasted with "non-profit educational purposes." A reasonable interpretation of this provision is that the use of a particular work may either be commercial (not fair use), or for non-profit educational purposes (fair use). Again, in this case, Wolfpac's pre-listening function falls under commercial use, as it clearly does not serve a non-profit educational, or at least similar, purpose.

In *Gozon*, the Court stated that in the case of new work, profiting from the same, or the absence of the non-profit aspect, may be excused if the new work "clearly has a transformative use and value." Conversely, if the new work has no transformative value, and is commercial in nature, the first factor will most likely be weighed against a finding of fair use. Given that fair use restricts the exercise of exclusive economic rights, a similar justifying function should reasonably be expected in cases involving abridgement or sampling.

First Factor of Fair Use: The Purpose and Character of the Use

The purpose and character of the use of the copyrighted work, whether it is for commercial or nonprofit educational purposes, should be determined. Thus, "if the new work clearly has transformative use and value, a finding of fair use is more likely even if the user stands to profit from his or her new work. Conversely, if the new work merely supplants the object of the original work, i.e., it has no transformative value, and is commercial in nature, the first factor will most likely be weighed against a finding of fair use. Needless to state, if the new work has transformative use and value, and was created for a noncommercial purpose or use, the scale will highly likely be swayed in favor of fair use." To illustrate, examples of transformative use are those listed in Section 185 of the IPC, i.e., for criticism, comment, news reporting, teaching, scholarship, research, and similar purposes. (Emphasis supplied)

Lastly, Section 185 on fair use should be read together with Section 184.2, which provides that the unlicensed use of a work, under the premise that it is fair use, must not go beyond the normal exploitation of the work or unreasonably prejudice the right holder's rights:

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

In my view, the unauthorized use of portions of FILSCAP ringtones in Wolfpac's advertisement, espousing the slogan "Listen B4 U Download," goes beyond the normal exploitation of FILSCAP's copyright. More than

encouraging the download of FILSCAP's ringtones, the advertisement also serves to promote Wolfpac as a platform which offers such mobile phone services. Again, this particular use of FILSCAP's copyright in the advertisement of the pre-listening feature, and Wolfpac itself, is not covered by the MOAs, nor was FILSCAP informed of such use. Therefore, in my view, the same unreasonably prejudices FILSCAP's copyright, which takes it out of fair use, as provided under Section 184.2 of the IP Code.

Thus, I respectfully submit that Wolfpac is liable for copyright infringement against FILSCAP in this case, and vote to GRANT the Petition.

[1] Draft ponencia, p. 18.

[2] Id. at 2.

[3] Id. at 3.

[4] Id. at 4.

[5] Id. at 4-5.

[6] Id. at 18.

[7] G.R. No. 233918, August 9, 2022 [Per J. Zalameda, En Banc].

[8] Home Cable Holdings, Inc. v. FILSCAP, G.R. No. 188933, February 21, 2023 [Per J. Leonen, En Banc].

[9] Concurring Opinion, Home Cable Holdings, Inc. v. FILSCAP, G.R. No. 188933, February 21, 2023 [Per J. Leonen, En Banc].

[10] Section 171.6 "Public performance," in the case of a work other than an audiovisual work, is the recitation, playing, dancing, acting or otherwise performing the work, either directly or by means of any device or process; in the case of an audiovisual work, the showing of its images in sequence and the making of the sounds accompanying it audible; and, in the case of a sound recording, making the recorded sounds audible at a place or at places where persons outside the normal circle of a family and that family's closest social acquaintances are or can be present, irrespective of whether they are or can be present at the same place and at the same time, or at different places and/or at different times, and where the performance can be perceived without the need/or communication within the meaning of Subsection 171.3[.]

[11] Section 171.3 "Communication to the public" or "communicate to the public" means any communication to the public, including broadcasting, rebroadcasting, retransmitting by cable, broadcasting and 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[.]

[12] Draft Decision, p. 10.

[13] Id. at 11.

[14] Id. at 16.

[15] FILSCAP v. COSAC, G.R. No. 222537, February 28, 2023 [Per J. Hernando, En Banc].

[16] Id.

[17] Home Cable Holdings, Inc. v. FILSCAP, G.R. No. 188933, February 21, 2023 [Per J. Leonen, En Banc].

- [18] 369 Phil. 764 (1999) [Per J. Pardo, First Division].
- [19] Home Cable Holdings, Inc. v. FILSCAP, G.R. No. 188933, February 21, 2023 [Per J. Leonen, En Banc].
- [20] Id. at 779.
- [21] Olaño v. Lim Eng Co, 783 Phil. 234, 250 [Per J. Reyes, Third Division].
- [22] ABS-CBN Corporation v. Gozon, 755 Phil. 709, 723 (2015) [Per J. Leonen, Second Division].
- [23] Home Cable Holdings, Inc. v. FILSCAP, G.R. No. 188933, February 21, 2023 [Per J. Leonen, En Banc].
- [24] Main Decision, pp. 17-18.
- [25] Id. at 19.
- [26] Id. at 19.
- [27] Section 184.
- [28] Habana v. Robles, 369 Phil. 764 (1999) [Per J. Pardo, First Division].
- [29] ABS-CBN Corporation v. Gozon, 755 Phil. 709, 782 (2015) [Per J. Leonen, Second Division]
- [30] 755 Phil. 709, 782 (2015) [Per J. Leonen, Second Division].
- [31] Section 185 of the IP Code, as cited and discussed in ABS-CBN Corporation v. Gozon, 755 Phil. 709, 782 (2015) [Per J. Leonen, Second Division].
- [32] Main Decision, p. 18.
- [33] Draft ponencia, p. 4.
- [34] Id. at 18.
- [35] PREVIEW MUSIC, PODCASTS, AND AUDIOBOOKS ON SPOTIFY HOME (March 8, 2023) <https://newsroom.spotify.com/2023-03-08/spotify-previews-clips-music-podcasts-audiobooks-home-feed/>
- [36] Id.
- [37] ABS-CBN Corporation v. Gozon, 755 Phil. 709 (2015) [Per J. Leonen, Second Division].
- [38] Id. at 758-759.

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