

FILIPINO SOCIETY OF COMPOSERS, AUTHORS AND PUBLISHERS, INC., PETITIONER, VS. ANREY, INC., RESPONDENT.*G.R. No. 233918. August 09, 2022*

Ponente: ZALAMEDA, J.

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Music impacts lives; it provides entertainment; it serves as a medium to communicate; to vent and to express. Everyone listens to music. Each has their own cup of tea; the music they play and listen to. But not everyone is willing to pay for it. This debases the value due to the composers who have worked so hard to create music that sparks joy, moves or heals our hearts, accompanies us in solitude or sorrow, uplifts our spirits, and unites entire nations. In fact music is there to accompany us in almost every aspect of our daily lives. There is music to pump us up before a game; music to help us go to bed; music to calm us down; music that inspires; music that helps us vent and express how we feel. Even history and other strong messages are passed down through music.

With today's technology, music is just a click away. You hear music everywhere. From your home, during your commute, and in this particular instance, in the store or restaurant you dine. This underscores the importance of music whose benefit ranges from reeling in customers or to as little as letting someone enjoy the meal with the music on, rather than having that meal in silence.

The challenge presented by the case at bar is that it attempts to stretch even further the already thin line between what constitutes as a public performance of a copyrighted music and what does not.

The Case

In this Petition[1] for Review on Certiorari (petition) under Rule 45 of the Rules of Court, Petitioner Filipino Society of Composers, Authors and Publishers, Inc. (FILSCAP) seeks to reverse and set aside the Decision[2] dated April 19, 2017 and Resolution[3] dated August 3, 2017 promulgated by the Court of Appeals (CA) in CA-G.R. CV No. 105430. The CA affirmed the Decision dated April 15, 2015 and Order[4] dated June 30, 2015 rendered by Branch 6, Regional Trial Court (RTC) of Baguio City dismissing the Amended Complaint filed by FILSCAP.

Antecedents

The very center of controversy is the supposed right of FILSCAP to collect license fees over public performance of copyrighted works of its member artists.

FILSCAP is a non-profit society of composers, authors, and publishers that owns public performance rights over the copyrighted musical works of its members.[5] It also owns the right to license public performances in the Philippines of copyrighted foreign musical works of its members and affiliate performing rights societies abroad.[6] Such rights proceed from the contracts it has entered into with various composers, authors and publishers, and record labels, as well as the reciprocal agreements it has with affiliate foreign societies authorizing FILSCAP to license the public performance in the Philippines of musical works under their repertoire.[7]

These agreements deputized FILSCAP to enforce and protect the copyrighted works of its members or affiliates by issuing licenses and collecting royalties and/or license fees from anyone who publicly exhibits or performs music belonging to FILSCAP's worldwide repertoire.[8] In exchange, FILSCAP shall pay a portion of the fees it collects to its members and affiliates. These rights however, are being challenged by respondent Anrey, Inc. (Anrey) when they were assessed by FILSCAP to pay annual license fees for the public performance of the copyrighted works of its members. The assessment came after a representative of FILSCAP, Ms. Ivy Labayne, conducted several days (between the months of July and September 2008) of monitoring over the chain of restaurants owned by Anrey in Baguio City, which were identified to be the following establishments (the establishments):

- 1) Sizzling Plate, #116 Session Road, Baguio City
- 2) Sizzling Plate, #134 Abanao Extension, Baguio City
- 3) Sizzling Plate, SM Baguio, Luneta Hill, Baguio City.[9]

The following are some of the copyrighted music that were played during the monitoring sessions conducted by the FILSCAP representative:

DATE PLAYED

TITLE OF MUSICAL WORK

Sizzling Plate Session Road

1. July 20, 2008

Gitara

Don't Stop the Music

Wherever You Will Go

2. September 3, 2008

Impossible

Mahal Pa Rin

Check On It

Sizzling Plate Abanao Extension

1. July 8, 2008

Silver Wings

What Do I Do With My Heart

Cross My Heart

2. September 17, 2008

I Drive Myself Crazy

Let the Pain Remain In my Heart

Reachin' Out[10]

FILSCAP wrote several letters to the establishments involved, informing them that an unauthorized public performance of copyrighted music amounts to infringement and urged them to secure licenses from FILSCAP to avoid prosecution.[11] These demands fell on deaf ears, thus, FILSCAP filed a Complaint (later on Amended) for

Copyright Infringement[12] against Anrey before the RTC, asking the court to award the following: (a) P18,900.00 as compensatory damages; (b) P300,000 as nominal damages; (c) P100,000 as exemplary damages; and (d) P50,000 as attorney's fees and litigation expenses.[13]

In their Answer,[14] Anrey denied playing any copyrighted music within its establishments. It claims that the establishments it operates play whatever is being broadcasted on the radio they are tuned in. Even if the broadcast plays copyrighted music, the radio stations have already paid the corresponding royalties, thus, FILSCAP would be recovering twice: from the station that broadcasted the copyrighted music, and from it, simply because it tuned in on a broadcast intended to be heard by the public. Finally, assuming that the reception is a performance, it was not done publicly since the broadcast was played for the benefit of its staff, and not for its customers.[15]

Ruling of the RTC

After both parties were able to present and formally offer their respective evidence, the RTC dismissed FILSCAP's amended complaint for lack of merit. The dispositive portion of the Decision dated April 15, 2015, reads:

WHEREFORE, in view of the foregoing, the complaint is hereby dismissed for lack of merit. Defendant's counterclaims are likewise dismissed. No costs.

SO ORDERED.[16]

The RTC cited Sec. 184 (i) of R.A. 8293[17] in absolving Anrey from copyright infringement. The provision exempts public performances by a club or institution for charitable or educational purposes provided, they are not profit making and they do not charge admission fees.[18]

FILSCAP filed a Motion for Reconsideration[19] and a Manifestation/Supplement to the Motion for Reconsideration,[20] but these were denied by the RTC in its Order[21] dated June 30, 2015.

Ruling of the CA

On appeal,[22] FILSCAP insisted on its right to collect license fees and/or royalties. It argued that regardless of whether the establishments concerned charge admission fees or if the public performance is done by simply tuning in on a radio broadcast, it can collect the fees and/or royalties due for the copyrighted music played. The CA, however, disagreed with FILSCAP and affirmed the Decision of the RTC, the dispositive portion of which provides:

WHEREFORE, the appeal is hereby DENIED. The assailed Decision dated April 15, 2015 of the Regional Trial Court (RTC), Branch 6, Baguio City is AFFIRMED.

SO ORDERED.[23]

In denying the appeal, the CA applied what was known as the homestyle and business exemptions prevailing in the United States of America (US). These exemptions allow small business establishments to use television or radio sets within its premises, subject to the following conditions:

As such the rules of BMI and ASCAP provide that any food service and drinking establishment that is 3,750 square feet or larger must secure a license for the public performance of musical works via radio and television. [For establishments using television]: (a) it has more than four (4) television sets; (b) it has more than one (1) television set in any room; (c) if any of the television sets used has a diagonal screen with size that is greater than fifty-five (55) inches; (d) if any audio portion of the audiovisual performance is communicated by means of more than six (6) loudspeakers or four (4) loudspeakers in any one room or adjoining outdoor space; or (e) if there is any cover charge. As to the use of radiosets, it must secure a license if the following conditions apply: (a) if it has more than six (6) loudspeakers; (b) it has more than four (4) loudspeakers in any

one room or adjoining outdoor space; (c) if there is any cover charge; or (d) if there is music on hold.[24]

FILSCAP filed a motion for reconsideration, but the same was denied by the CA in its Resolution[25] dated August 3, 2017. Hence, the instant petition.

Issue

The sole issue in this case is whether the unlicensed playing of radio broadcasts as background music in dining areas of a restaurant amount to copyright infringement.

Ruling of the Court

After a thorough review of the case, the Court finds merit to the petition.

Elements of copyright infringement

Our copyright law affords protection to original and intellectual creations in the literary and artistic domain from the moment of their creation.[26] This includes "musical compositions, with or without words," while the rights afforded to copyright owners may be classified into either economic rights or moral rights.

Economic rights refer to the right of the owner to derive some sort of financial benefit from the use of his work, while moral rights refer to the non-economic interests of the owner of copyright.

Part of the economic rights of an owner is the exclusive right to carry out, authorize or prevent the following acts enumerated under Sec. 177 of the Intellectual Property Code of the Philippines (IPC):

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; (n)

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 (Sec. 5, P. D. No. 49a)

These acts, when unauthorized by the copyright owner, amount to copyright infringement. But before copyright holders may claim for infringement, two elements must be proven: (1) they must show ownership of a valid copyright; and (2) they must demonstrate that the alleged infringers violate at least one economic right granted to copyright holders[27] under Sec. 177 of the IPC. A third element may be added and that is the act complained of must not fall under any of the limitations on copyright under Section 184 of the IPC or amounts to fair use of a copyrighted work.[28]

The role of FILSCAP in the
administration and enforcement of
copyrights; right to sue for copyright
infringement

FILSCAP is a non-stock, non-profit association of composers, lyricists, and music publishers.[29] It actually breathes life to the provision under Sec. 183 of the IPC allowing copyright owners or their heirs to "designate a

society of artists, writers or composers to enforce their economic rights and moral rights on their behalf." It is accredited by the Intellectual Property of the Philippines (IPOPIL) to perform the role of a Collective Management Organization (CMO) and a member of the Paris--based International Confederation of Societies of Authors and Composers (CISAC), the umbrella organization of all composer societies worldwide.

Being the government-accredited CMO for music creators/copyright owners, FILSCAP assists music users in getting the necessary authorization to publicly play, broadcast and stream copyrighted local and foreign songs in the Philippines.[30] It is created exactly for the purpose of protecting the intellectual property rights of its members by licensing performances of their copyright music. Without FILSCAP, the individual composer would have a difficult time enforcing their rights against an infringer, not to mention the expenses and time involved in pursuing such cases. But FILSCAP eases this burden away by handling these concerns. In addition, FILSCAP, acts as an agency for the composers who deal with any third party who desires to obtain public performance rights and privileges.

The mechanics behind FILSCAP's role is plain and simple. Copyright holders assign their rights to FILSCAP. FILSCAP enters into reciprocal agreements with foreign societies such as the American Society of Composers, Authors and Publishers (ASCAP), BMI, Australian Performing Right Association (APRA), Performing Right Society Limited (PRS) of the United Kingdom and Föreningen Svenska Tonsattares Internationella Musikbyrå (STIM) of Sweden, whose roles are similar to that of FILSCAP.[31] Being the assignee of the copyright, it then collects royalties through the form of license fees 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. In return, FILSCAP does an accounting of all license fees collected and then distributes them to its members and the members of its affiliate foreign societies.

There really is no question to this as FILSCAP's authority to sue on behalf of its members remain unchallenged. But just to make sure We are not misinterpreting the extent of FILSCAP's authority, quoted below are excerpts of the pertinent provisions appearing in all deeds of assignment entered into by FILSCAP with its members:

1. DEFINITIONS

a) "copyright work" shall mean and include –

xxx

b) "right of public performance" shall, as provided in Section 171.6 of [the IP Code], mean the right in relation to the recitation playing, dancing, acting or otherwise performing of a copyright work, either directly or by means of any device or process, at a place or at places where persons outside the normal circle of a family or 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;

c) "right of communication to the public" shall mean the right in relation to the making of 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, per Section 171.3 of [the IP Code];

2. ASSIGNMENT OF PUBLIC PERFORMING RIGHTS

a. ASSIGNOR assigns to FILSCAP, the PUBLIC PERFORMING RIGHTS in ALL copyright works which have been composed or written by the ASSIGNOR at any time, whether before the date of this Assignment or during the continuance of the ASSIGNOR's membership in FILSCAP, together with all interests and shares of the ASSIGNOR in the public performing rights in all copyright works which have been composed or written by the ASSIGNOR jointly or in collaboration with any other person or persons at any such times and all public performing rights in all copyright works which are now vested in or shall hereafter be acquired by or become

vested in the ASSIGNOR during the continuance of the ASSIGNOR's membership in FILSCAP, and all parts or shares of, and interests in, such public performing rights.

b. FILSCAP shall own, hold, control, administer and enforce said public performing rights on an exclusive basis for as long as ASSIGNOR remains a member of FILSCAP. These rights of FILSCAP shall subsist and will only expire six (6) months from and after the date the ASSIGNOR ceases to be a member of FILSCAP or until this Assignment is otherwise lawfully terminated.

c. ASSIGNOR shall for as long as he/she is a member of FILSCAP, make, constitute and appoint FILSCAP as his/her true and lawful attorney, with full power and authority to execute all documents and do all acts, including licensing of the rights herein assigned, that may be necessary, proper or expedient to effectively administer/enforce the public performing rights of ASSIGNOR in all his/her copyright works.

x x x[32]

5. DISTRIBUTION OF ROYALTIES

a. FILSCAP shall from time to time pay ASSIGNOR such sums of money out of the royalties FILSCAP has collected from the exercise or licensing of the rights herein assigned in accordance with the distribution guidelines set by the FILSCAP Board of Trustees.

x x x[33]

On the other hand, the reciprocal agreements entered into by FILSCAP with other societies contain similarly worded provisions:

ARTICLE 1. By the present contract [foreign society] confers on FILSCAP the exclusive right in the territories administered by the latter Society x x x to authorize all public performances x x x of musical works, with or without lyrics, which are protected according to the national laws, bilateral agreements and multilateral international conventions relating to the author's right (copyright, intellectual property, etc.), which at present exist or which may come into existence and into force during the period when the present contract is in force.

x x x[34]

ARTICLE 2. (I) The exclusive right to authorize performances x x x, entitles each of the contracting Societies x x x:

a) to permit or prohibit x-x-x public performance of works in the repertoire of the other Society and to grant the necessary authorizations for such performances;

b) to collect all fees stipulated by virtue of these authorizations x x x;

to receive all sums due as indemnification or damages for unauthorized performances of the works concerned;.

x x x

c) to sue, either in its own name or that of the interested author, all persons or corporate bodies and all authorities, administrative or otherwise, responsible for illegal performances of the works concerned;

to transact, compromise, refer to arbitration and take any necessary legal proceedings;

d) to take any other action necessary to ensure the protection of the performing right in the works covered by the present contract.

x x x[35]

From the foregoing, it is evident that the first element of copyright infringement has been satisfied: that FILSCAP

has the authority to collect royalties and/or license fees and sue for copyright infringement. As an assignee of copyright, it is entitled to all the rights and remedies which the assignor had with respect to the copyright.[36]

The "social function" of intellectual property under the Constitution

Property in general, has been recognized to have a social function. This can be gleaned from Section 6 of Article XII of the Constitution which provides:

SECTION 6. The use of property bears 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.

It should be noted, however, that the social function of property has been interpreted in relation to the powers of the State to regulate property rights as in the exercise of police power, eminent domain, and taxation. Moreover, this should be balanced out with individual property rights which likewise deserve protection under the Constitution and statutes.

The concept of social function of property simply means that the use, enjoyment, occupation or disposition of private property is not absolute. It is restricted in a sense so as to bring about maximum benefits to all and not to a few chosen individuals.[37] This notion has been applied to real property. In *Ferrer v. Carganillo*,[38] the Court stated that the social function of private property is presented as one of the possible justifications for urban and land reform.

Likewise, in *Social Justice Society v. Atienza, Jr.*,[39] the Court has recognized the individual and social function of property in relation to the exercise of the State of its police powers, thus:

Property has not only an individual function, insofar as it has to provide for the needs of the owner, but also a social function insofar as it has to provide for the needs of the other members of society. The principle is this: Police power proceeds from the principle that every holder of property, however absolute and unqualified may be his title, holds it under the implied liability that his use of it shall not be injurious to the equal enjoyment of others having an equal right to the enjoyment of their property, nor injurious to the right of the community. Rights of property, like all other social and conventional rights, are subject to reasonable limitations in their enjoyment as shall prevent them from being injurious, and to such reasonable restraints and regulations established by law as the legislature, under the governing and controlling power vested in them by the constitution, may think necessary and expedient.[40]

Real property has been used as an example, but this also applies to intellectual property. Section 13, Article XIV of the Constitution also recognizes the protection of intellectual properties, particularly when beneficial to the people, thus:

SECTION 13. The State 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 period as may be provided by law.

The social function of the use of intellectual property is also articulated in Section 2 of the IPC, thus:

SECTION 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. (Emphasis supplied)

Under Section 2 of the IPC, the social function of intellectual property, including copyright, requires "the State to promote the diffusion of knowledge and information for the promotion of national development and progress and the common good." But at the same time, the very same section requires the State "to promote the diffusion of knowledge and information for the promotion of national development and progress and the common good." Thus, the social interest in copyright lies in the adjustment of two objectives: the encouraging of individuals to intellectual labor by assuring them of just rewards, and by securing to society of the largest benefits of their products.[41] Inasmuch as the social function of copyright restricts the benefits due to the copyright owner, it does not necessarily mean that they should be deprived of such benefits. The social function of copyright also affords protection to entice creatives to produce works with the promise that such will be protected under the regime of the IPC. In other words, a simplistic distinction between the rights of creators and the common good would otherwise be misleading since these are not mutually exclusive. The State must therefore exercise the necessary balancing act between these two social interests.

The social function concept is not exclusive to this jurisdiction. In the US, intellectual property has been regarded to possess a social utility function. This proceeds from their Constitution which grants the Congress the power "[t]o promote the progress of science and useful arts, by securing limited times to authors and inventors the right to their respective writings and discoveries." [42] The clause has been applied by the Supreme Court of the United States (SCOTUS) in several of its decisions. As early as 1932, the SCOTUS in *Fox Film Corp. v. Doyal* [43] stated that the "sole interest of the United States and the primary object in, conferring the monopoly lie in the general benefits derived by the public from the labour of authors." [44] This statement has been the cornerstone of the necessary balancing of interests between the author or creator on the one hand, and the society on the other. According to this concept, intellectual property rights are justified because they encourage creativity. Society has a need for intellectual productions in order to ensure its development and cultural, economic, technological and social progress and therefore grants the creator a reward in the form of an intellectual property right, which enables him to exploit his work and to draw benefits from it. In return the creator, by rendering his creation accessible to the public, enriches the community. [45]

What this means is that the social function of intellectual property is not one-dimensional as to simply justify the free exploitation of the work. In fact, the nature of each intellectual property renders complex the application of the social function concept. Perhaps, this may be attributed to the varying roles and functions of the different types of intellectual property. To illustrate, inventions, trademarks, utility models, industrial designs, tradenames and trade secrets require registration to be afforded protection, while copyright are protected from the moment of their creation, without need of such formalities. [46]

The term of protection for each intellectual property right is also a clear testament to this. Patents have a term of twenty (20) years; [47] utility models for a term of seven (7) years; [48] industrial design for a period of five (5) years. [49] Copyrights are treated differently. In copyright, the work is protected during the lifetime of the author and for fifty (50) years after his or her death. [50] Copyright protection extends to the expression of particular ideas rather than the ideas themselves. Patents, on the other hand, give a right in the exploitation of an idea, which explains a shorter duration (20 years) of legal protection compared to copyright (50 years). [51]

The simple nuances between the different kinds of intellectual creations show the inclination to afford protection

to copyright, more than the other forms. This also created a divide between industrial property (i.e., patents, utility models, trade marks) from copyright and neighboring rights (artistic and literary property).[52] Thus, the notion that intellectual property should redound to the common good is easier to comprehend in patents, like drugs and other inventions, since they are basically new solutions to technical problems.[53] Literary/artistic works or those subject to copyright do not operate the same way as inventions or those covered by patents. Copyright protects the form of expression of ideas; the creativity in the choice and arrangement of words, musical notes, colors, shapes, etc.[54] Thus, it can be said that copyright does not impact people's lives as much as patented inventions do.

At any rate, the present IPC already carries out the objective of balancing the interests between the rights of creators and the common good. An example would be patents. Although patents protect new inventions,[55] a patented invention may be exploited even without the agreement of the patent owner, under specified circumstances.[56]

When it comes to copyright, the economic rights of the author is balanced out by the fair use doctrine.[57] The Fair Use Doctrine is an "equitable doctrine [which] permits other people to use copyrighted material without the owner's consent in a reasonable manner for certain purposes.[58]

The issue in this case properly relates to the determination of whether the act of playing radio broadcasts which include copyrighted music in restaurants can be considered, as public performance, and consequently, copyright infringement. Guided by the foregoing principles, the Court, in this case, is called upon to interpret the provisions of the law which provides the scope and limitation of the rights of intellectual property owners.

Radio reception is a performance

The very core of the controversy is whether radio reception or by simply tuning in on the radio as background music in the restaurants owned by Anrey amounts to a violation of Section 177.6 of the IPC, or the right to public performance by FILSCAP. Anrey believes that radio reception cannot be categorized a public performance while FILSCAP insists the contrary claiming that the provision of the law defining public performance is broad enough to cover this kind of situation.

A "public performance" means:

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 acquaintance 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.[59] (Emphasis ours)

A "sound recording" means the fixation of sounds of a performance or of other sounds or representation of sound, other than in the form of a fixation incorporated in a cinematographic or other audiovisual work;[60] while a "fixation" is defined as the embodiment of sounds, or of the representations thereof, from which they can be perceived, reproduced or communicated through a device.[61]

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 loudspeakers (radio-over-loudspeakers) is in itself, a performance.

In the American case of *Buck, et. al. v. Jewell-LaSalle Realty Co.*[62] (*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 include 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*[63] (*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.*[64] (*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. In rejecting the conclusions reached in *Aiken*, the SCOTUS ruled in this wise:

Most relevant to the present case, the Supreme Court in *Twentieth Century Music Corp. v. Aiken*, dealt with a restaurant owner who played a radio with four speakers in hi's restaurant. Defendant Aiken owned a fast- food restaurant where customers usually stayed no more than ten or fifteen minutes. Following *Fortnightly*, the Court considered that the only performance in this situation is initiated by the radio station, and Aiken's largely passive act of turning on a radio was held not to be a performance. Since Aiken did not perform, he did not infringe anyone's copyright by playing his radio in his restaurant. The Court reasoned that a contrary ruling would result in practical problems because of the large number of small business establishments in the United States. As an economic matter, the Court felt that a copyright owner was adequately compensated for his work through his license fee with the radio station.

If Aiken's rationale were to apply in our case, the radio playing by Claire's store managers would not be performances and BMI would have no case. Congress, however, rejected Aiken's rationale, if not its result, in the Copyright Act of 1976. The drafters defined "perform and "perform publicly" broadly in 17 U.S.C. § 101:

To "perform" a work means to recite, render, play, dance, or act it, either directly or by means of any device or process x x x.

x x x

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.

Under these particular definitions, the restaurant owner in Aiken "performed" the works in question by "playing" them on a "device" — the radio receiver. Furthermore, the performances were "public" because they took place at a restaurant "open to the public." For the same reasons, Claire's, through the actions of its employees, engages in public performances of copyrighted works when it plays the radio during normal business hours. (Citations omitted)

It should be noted that Claire's was decided based on how the present US copyright law defines the term public performance, which is similarly worded to our own definition of the said term. Thus, the intention really is to treat a reception of a radio broadcast containing copyrighted music as a performance.

Radio reception creates a
copyrightable performance separate
from the broadcast; the doctrine of
multiple performances

Anrey advanced the theory, albeit erroneous, that it is exempt from securing a license since the radio station that broadcasted the copyrighted music already secured one from FILSCAP.

We are not persuaded.

A radio reception creates a performance separate from the 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^[65] 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."^[66] Ultimately, the SCOTUS in Jewell concluded that the radio station owner and the hotel operator simultaneously performed the works in question:

The defendant next urges that it did not perform, because there can be but one actual performance each time a copyrighted selection is rendered; and that if the broadcaster is held to be a performer, one who, without connivance, receives and distributes the transmitted selection cannot also be held to have performed it. But nothing in the Act circumscribes the meaning to be attributed to the term "performance," or prevents a single rendition of a copyrighted selection from resulting in more than one public performance for profit. While this may not have been possible before the development of radio broadcasting, the novelty of the means used does not lessen the duty of the courts to give full protection to the monopoly of public performance for profit which Congress has secured to the composer.^[67] (Citations omitted)

Thus, on whether the reception of a broadcast may be publicly performed, it is immaterial if the broadcasting station has been licensed by the copyright owner because the reception becomes a new public performance requiring separate protection.

Radio reception and the concept of a
"new public"

We also believe that the act of playing radio broadcasts containing sound recordings through the use of loudspeakers amounts to an unauthorized communication of such copyrighted music to the public, thus, violates the public performance rights of FILSCAP. This conclusion is in harmony with the guidance released by the World Intellectual Property Organization (WIPO) to the Berne Convention for the Protection of Literary and

Artistic Works, to which the Philippines is a signatory since 1951. The Philippines is also a signatory to the Convention establishing the WIPO as well as the Trade-Related Aspects of Intellectual Property Rights (TRIPS) Agreement which incorporated by reference the provisions on copyright from the Berne Convention.

The WIPO is a specialized, agency of the United Nations which has as one of its primary functions, the assembly and dissemination of information on the protection of intellectual property.[68] As one of the signatories to the convention establishing the WIPO, the WIPO guidance has a persuasive or moral effect in the interpretation of our intellectual property laws.[69] The WIPO gave the following remarks on the situation when a broadcast is publicly communicated by loudspeaker to the public:

11bis.11. Finally, the third case dealt with in this paragraph is that which the work which has been broadcast is publicly communicated e.g., by loudspeaker or otherwise, to the public. This case is becoming more common. In places where people gather (cafés, restaurants, tea-rooms, hotels, large shops, trains, aircraft, etc.) the practice is growing of providing broadcast programmes. There is also an increasing use of copyright works for advertising purposes in public places. The question is whether the license given by the author to the broadcasting station covers, in addition, all the use made of the broadcast, which may or may not be for commercial ends.

11bis.12. The Convention's answer is "no". Just as, in the case of relay of a broadcast by wire, an additional audience is created (paragraph (1) (ii)), so, in this case too, the work is made perceptible to listeners (and perhaps viewers) other than those contemplated by the author when his permission was given. Although, by definition the number of people receiving a broadcast cannot be ascertained with any certainty, the author thinks of his license to broadcast as covering only the direct audience receiving the signal within the family circle. Once this reception is done in order to entertain a wider circle, often for profit, an additional section of the public is enabled to enjoy the work and it ceases merely a matter of broadcasting. The author is given control over this new public performance of his work.

11bis.13. Music has already been used as an example, but the right clearly covers all other works as well – plays, operettas, lectures and other oral works. Nor is it confined to entertainment; instruction is no less important. What matters is whether the work which has been broadcast is then publicly communicated by loudspeaker or by some analogous instrument e.g. a television screen.[70]

The foregoing introduces the concept of a "new public." Typically, radio stations already secured from the copyright owner (or his/her assignee) the license to broadcast the sound recording. And by the nature of broadcasting it is necessarily implied that its reception by the public has been consented to by the copyright owners. But the author normally thinks of the license to broadcast as to "cover only the direct audience receiving the signal within the family circle." Any further communication of the reception creates, by legal fiction, a "new public" which the author never contemplated when they authorized its use in the initial communication to the public.

This concept was emphasized by the Court of Justice of the European Union (CJEU) in the case of *Ochranný svaz autorský pro práva k dílům hudebním o.s. v. Léčebné lázně Mariánské Lázně a.s. (OSA)*[71] There, OSA, a collecting agency for authors of musical works, was claiming fees from Léčebné lázně, a company with spa establishments. Purportedly, the spa establishments have radio and television sets installed through which works managed by OSA were made available to the patients of Léčebné lázně, without entering into a licensing agreement with OSA.

The CJEU stated that the concept of "communication" must be construed as referring to any transmission of the protected works, irrespective of the means used. For purposes of determining whether there is a "communication to the public," the CJEU explained that it would be necessary to establish that the protected work was transmitted

to a "new public", or a public which was not taken into account by the authors of the protected works when they authorized use through communication to the "original public." The CJEU confirmed that the patients of the spa establishment constitute a "new public." This is because the establishment intervenes, in full knowledge of the consequences of its actions, to give access to the protected works to its patients. Without the intervention of the spa establishment, the patients would not be able to enjoy the protected works.

Public performance v. other
communication to the public of the
work.

The disquisitions above show that Anrey infringed on the public performance right of FILSCAP when it played music by means of radio-over-loudspeakers. It is suggested that Anrey equally violated FILSCAP's right to communicate to the public the songs from its repertoire.

The Berne Convention provides that authors of musical works shall enjoy the exclusive right of authorizing the public performance of their works including the "public performance by any means or process" and "any communication to the public of the performance of the works," thus:

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.

The scope of these rights was explained in the 1978 WIPO Guide to the Berne Convention:

11.4. However, it goes on to speak of "including such public performance by any means or process", and this covers performance by means of recordings; there is no difference for this purpose between a dance hall with an orchestra playing the latest tune and the next-door discotheque where the customers use coins to choose their own music. In both, public performance takes place. The inclusion is general and covers all recordings (discs, cassettes, tapes, videograms, etc.) though public performance by means of cinematographic works is separately covered—see Article 14(1) (ii)." [underscoring supplied]

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. For example, a broadcasting organisation broadcasts a chamber concert. Article 11bis applies. But if it or some other body diffuses the music by landline to subscribers this is a matter for Article 11.[72] (Underscoring supplied)

Article 11bis of the Berne Convention further provides for the exclusive right, among others, of authorizing the "the public communication by loudspeaker or any other analogous instrument transmitting by sign, sound or images, the broadcast of the work." Again, the relevant portions of the 1978 WIPO Guide to the Berne Convention provide this explanation:

11bis.1. This provision is of particular importance in view of the place now taken by broadcasting (which, it must be remembered, includes both radio and television) in the world of information and entertainment. It is the fourth of the author's exclusive rights to be recognized by the Convention, the other three being those of

translation, reproduction and public performance. The Rome Revision (1928) was the first to recognize the right "of authorizing the communication of... works to the public by radio and television". Slightly muddled in its terms, the text was like broadcasting itself—in its infancy. It was in Brussels (1948) that the subject was more fully considered and the right broken down into its various facets in order to take account of the various ways and techniques by which it might be exploited. Neither Stockholm nor Paris made any change, other than to provide a more suitable translation in the newly authentic English text.

x x x

11bis.2. This paragraph divides the right into three.

11bis.3. The primary right is to authorize the broadcasting of a work and the communication thereof to the public by any other means of wireless diffusion of signs, sounds or images. It applies to both sound and television broadcasts. What matters is the emission of signals; it is immaterial whether or not they are in fact received."

x x x

11bis.11. Finally, the third case dealt with in this paragraph is that in which the work which has been broadcast publicly communicated e.g., by loudspeaker or otherwise, to the public. This case is becoming more common. In places where people gather (cafés, restaurants, tea-rooms, hotels, large shops, trains, aircraft, etc.) the practice is growing of providing broadcast programmes. There is also an increasing use of copyright works for advertising purposes in public places. The question is whether the license given by the author to the broadcasting station covers, in addition, all the use made of the broadcast, which may or may not be for commercial ends.

11bis.12. The Conventions answer is "no". Just as, in the case of a relay of a broadcast by wire, an additional audience is created (paragraph (1) (ii)). so, in this case too, the work is made perceptible to listeners (and perhaps viewers) other than those contemplated by the author when his permission was given. Although, by definition, the number of people receiving the broadcast cannot be ascertained with any certainty, the author thinks of his license to broadcast as covering only the direct audience receiving the signal within the family circle. Once this reception is done in order to entertain a wider circle, often for profit, an additional section of the public is enabled to enjoy the work and it ceases to be merely a matter of broadcasting. The author is given control over this new public performance of his work.[73] (Underscoring supplied)

In sum, public performance right includes broadcasting of the work [music] and specifically covers the use of loudspeakers. This is the very act Anrey is complained of infringing. As to whether Anrey also infringed on FILSCAP's right to communicate to the public, given the factual scenario of the case, this should be answered in the negative.

The infringing acts took place on 2008. At the time, the IPC defines "communication to the public or communicate to the public" as:

Sec. 171. Definitions. - For the purpose of this Act, the following terms have the following meaning:

x x x

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;

And, in relation to performances and sound recordings, Sec. 202.9 of the same law defines "communication to the public" as:

202.9. "Communication to the public of a performance or a sound recording" means 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. For purposes of Section 209, "communication to the public" includes making the sounds or representations of sounds fixed in a sound recording audible to the public.

The text of Section 171.3, particularly the phrase "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" was lifted from Article 8 of the WIPO Copyright Treaty (WCT)[74] of which the Philippines became a member in 2002. 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. (Underscoring supplied)

Apparently, the phrase "the public may access these works from a place and time individually chosen by them" refers to interactive on-demand systems like the Internet. It does not refer to other traditional forms like broadcasting and transmitting of signals where a transmitter and a receiver are required as discussed in the WIPO Guide to the Berne Convention. Here is the WIPO explanation of the WCT:

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.[75] (Underscoring supplied)

Prior to amendment of the IPC by RA 10372, communication to the public is defined 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. The WIPO, on the other hand, limited this to interactive on-demand systems like the internet.

The phrase, "other communication to the public," however, still pertains to the advanced methods of communication such as the internet. The use of the word "other" is simply to segregate its application from the traditional methods of communication such as performing the radio out loud to the public or by means of loudspeakers. The IPC under RA 8293 made use of the word "other" only to distinguish it from what has been traditionally considered part of the public performance rights of the copyright owner under the Act 3134.

It should be noted that prior to the adoption of the IPC through RA 8293, the Philippines only had Act 3134, or the Copyright Law of the Philippine Island, which was patterned from the US Copyright Law of 1909.[76] Act 3134 never mentioned of the right to communicate to the public. Nonetheless, case law in the US[77] and even the Berne Convention[78] considers the right to communicate as part of the author's right to exploit the public performance of the copyrighted work.

It is clear that Section 177.7 of the IPC on "Other communication to the public of the work" covers only the original definition of the term "Communication to the Public" under Sec. 171.3, i.e. on demand, interactive communication through the Internet. Thus, insofar as this case is concerned, it is suggested that "Public Performance" under Section 177.6 includes any communication to the public as defined in Section 171.6 and under Article 11 and Article 11bis of the Berne Convention as explained in the 1978 WIPO Guide to the Berne Convention. On the other hand, "Other communication to the public" under Section 177.7 covers all other "communication to the public" as defined in Section 171.3 and not covered in Section 171.6. In particular, the term "Other communication to the public" includes interactive on-demand systems and digital sharing on the Internet.

Exemptions and limitations to copyright infringement

The question now is, whether the case falls under any of the exceptions or limitations on copyright. Our IPC only lists the limitations on copyright:

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; (Sec. 10(1), P. D. 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; (Sec. 11, Third Par., P. D. 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; (Sec. 11, P. D. 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; (Sec. 12, P. D. 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 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.

None of these apply in this case. While the RTC considered Anrey exempt from copyright infringement under paragraph (i) of the above provision since it does not charge admission fees,[79] We find this a misapplication considering that the exemption only applies to institutions for charitable and educational purposes.[80]

On the other hand, the CA ruled that Anrey was exempt from obtaining a license since it is a small business establishment using only two loudspeakers. The CA apparently based it on US law and jurisprudence exempting small business establishments.

We disagree. The exemption granted under US law cannot be extended to determine whether or not an individual or entity in the Philippines is exempt from obtaining a license or from copyright infringement. Intellectual property is primarily a private right. Being a private right, its protection would depend on the national law of the country it seeks to enforce protection for. Put it simply, the rights and exemptions on FILSCAP's copyright shall be governed by Philippine law, even though some or most of the clients it represents are abroad.

Besides, this conclusion disregards the fact that some of the songs which FILSCAP seeks to enforce its economic rights, and which Anrey admits, are local songs whose copyrights are owned and assigned by local composers to FILSCAP.[81] Thus, it is erroneous to extend the exemption granted under foreign copyright laws to these public performances. It is settled that in the enforcement of a private right, the national law of the State shall govern. If We extend those exemptions to Anrey even if they are not expressed under the local statute, then We would, in effect, be legislating on such exemptions and usurp the functions of lawmakers.

Radio reception transmitted through
loudspeakers to enhance profit does
not constitute, and is not analogous to,
fair use

Neither does the unauthorized transmission of the radio broadcast, which plays copyrighted music, for commercial purposes be treated as fair use. Section 184 of the IPC provides for the limitations on copyright or such acts that do not constitute copyright infringement. As discussed, the public performances of the copyrighted works in this case were not done privately or made strictly for: a charitable or religious institution or society;[82] for information purposes;[83] as part of reports of current events;[84] for teaching purposes;[85] for public interest;[86] or for charitable or educational purpose;[87] or for any judicial proceeding or giving of professional legal advice.[88]

In this case, the reception was transmitted through loudspeakers within Anrey's restaurants. Anrey's restaurants

are commercial establishments open to the public Anrey is engaged in the business of running restaurants, whose end-goal is clearly profit making. While Anrey does not directly charge a fee for playing radio broadcasts over its speakers, such reception is clearly done to enhance profit by providing entertainment to the public, particularly its customers, who pay for the dining experience in Anrey's restaurants. Moreover, the purchase and maintenance costs of the radio transmitters and loudspeakers in its restaurants, although they may not be as significant as those of live performances or hiring an in-house DJ, are still operating or business expenses on the part of Anrey. Surely, Anrey would not put up such radio reception and loudspeakers if not to enhance the overall ambiance and dining experience in its establishments, all for the purpose of economic gain. Clearly, this does not fall under any of the limitations in Section 184 of the IPC.

Meanwhile, Section 185 of the IPC provides for the fair use of a copyrighted work, i.e., the use must be for criticism, comment, news reporting, teaching including multiple copies for classroom use, scholarship, research, and similar purposes. In determining whether the use of a copyrighted work amounts to fair use; the factors to be considered shall include: (1) the purpose and character 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.[89]

In *ABS-CBN Corp. v. Gozon*,[90] the Court expounded on these factors. Under the first factor, the Court stated that "commercial use of the copyrighted work can be weighed against fair use." [91] As to the second factor, if the nature of the copyrighted work is creative than factual, then fair use will be weighed against the user. As to the third, the Court stated that "an exact reproduction of a copyrighted work, compared to a small portion of it, can result in the conclusion that its use is not fair." In relation to this, the Court cited as an example of use that is not fair where the use of "a copy of a work produced purely for economic gain." And as to the fourth factor, if the use of the copyrighted work "had or will have a negative impact on the copyrighted work's market, then the use is deemed unfair."

Section 107 of the US Copyright Act provides for the same four factors to be considered in determining whether the use of a copyrighted work is fair use. In *US Songs, Inc. v. Downside Lenox, Inc.*,[92] the US District Court for the Northern District of Georgia held that the defendants therein completely failed to demonstrate how their use of the copyrighted songs, by broadcasting or playing them by means of radio-over-loudspeakers system throughout a public bar and restaurant area, constitutes as fair use. The Court held that the use in this case cannot be characterized as fair use as defined under Section 107 of the US Copyright Law. This is because "[f]irst, the performances in question were made at a bar and restaurant, clearly a commercial venture. Second, the songs were played in their entirety, not portions thereof."

On the second fair use factor, the recent case of *Google v. Oracle*,[93] 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 work 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.[94] Music falls under the more artistic and creative aspect that deserve more protection than other copyright works.

Finally, the US case of *Campbell v. Acuff-Rose Music, Inc.*,[95] ruled that as to the fourth factor in determining

fair use, courts must also consider "'whether unrestricted and widespread conduct of the sort engaged in by the defendant...would result in a substantially adverse impact on the potential market' for the original." [96] Moreover, the SCOTUS held that fair use is an affirmative defense, and thus the party invoking it carries the burden of demonstrating fair use of the copyrighted works.

It may prove helpful in illustrating the four factors on fair use if we apply them to our day-to-day activities, to wit:

- (1) An organization established to promote awareness of the hardships endured by street children arranges an enclosed gallery in the high school cafeteria showcasing its members' photographs of street children. The organization charges a viewing fee of 10 pesos to visitors to raise funds to cover its administrative and operational expenses. To improve the atmosphere of the gallery, the organization plays the entire album of Smokey Mountain which includes the song "Paraiso."
- (2) A taxi driver listens to the radio inside his car for his own indulgence but regularly receives huge tips from his passengers for playing music through his radio.
- (3) A small-carinderia owner sings the entirety of her favorite songs all day to entertain her customers who keep coming back.
- (4) A teenager plays the Eraserheads album in the background to improve the ambiance in a garage sale.
- (5) A customer sings all the hit songs of Queen onstage in a karaoke bar where more than 500 customers regularly go every night.[97]

As explained by Associate Justice Alfredo Benjamin S. Caguioa, in the first, second, and last examples, although the purpose for playing or singing the copyrighted songs is not transformative, considering the personal and noncommercial or nonprofit nature of the intended purpose for listening to and playing music in the gallery venue inside a car, and in a karaoke bar, the first factor should be weighed in favor of fair use. In the first example, although the organization charges a viewing fee, the same is not for profit since the purpose is to cover the organization's administrative and operational expenses. Similarly, the money earned by the taxi driver from tips received from his music-loving passengers is merely incidental, and should not be weighed against a finding of fair use.[98]

In all these examples, both the second and third fair use factors should be weighed against a finding of fair use. Following the rulings of the US Court, the Fair Use Doctrine should find lesser application in case of reproduction of creative works such as songs or music.[99]

Lastly, the fourth and most important element should favor a finding of fair use for all of the examples. First, the playing of songs will unlikely affect the potential market for the original and derivative works since the use of copyrighted songs are only done for a limited period of time, i.e., during the duration of the gallery, the car ride, and the garage sale. In addition, the public performance, i.e., the singing of copyrighted songs, are only done by small-scale users and should not cause considerable harm to the potential market of the original or derivative works.[100]

The present case is far from analogous from the above examples. Neither does Anrey's use permissible under Section 185 of the IPC on fair use: for comment, criticism, news reporting, teaching, scholarship, research and similar uses. And assuming that Section 185 applies, the four-factor application and analysis would not favor fair use.

First, the purpose and character of the use of the copyrighted songs are undeniably commercial, being played throughout the restaurants of Anrey, which are open to the public, for the entertainment of Anrey's customers. Commercial use excludes fair use and should be weighed against it.

Second, the nature of the copyrighted songs is creative rather than factual, and thus fair use is weighed against the user, Anrey.

Third, an exact reproduction of the copyrighted songs are made when they are played by means of radio-over-loudspeakers, and not just small portions thereof, supporting the conclusion that their use is not fair. The fact that some customers may not hear or listen to the entire copyrighted music played in the radio reception is not significant. The fact remains that the copyrighted music from the radio reception transmitted through the loudspeakers is exactly reproduced or played in whole, and not just portions thereof.

Fourth, the use of the copyrighted songs in this case could "result in a substantially adverse impact on the potential market for the [subject copyrighted songs]." The unrestricted and widespread conduct of playing copyrighted music by means of radio-over-loudspeakers in public commercial places for entertainment of the public would substantially impact restaurants, bars, clubs, and other commercial establishments, which are potential market for the subject copyrighted songs. Such use should thus be deemed unfair.

The foregoing analysis does not favor fair use of the copyrighted works of FILSCAP. The playing of copyrighted music by means of radio-over-loudspeakers in a commercial setting is not analogous to fair use as to exempt Anrey from copyright infringement.

Besides, the provision on fair use, should be read together, and must be in harmony with Sec. 184.2, thus:

"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."

The free use by commercial establishments of radio broadcasts is beyond the normal exploitation of the copyright holder's creative work. Denying the petition would gravely affect the copyright holder's market where instead of paying royalties, they use free radio reception. If we apply this exception to restaurants in this case, it will also affect other uses in similar establishments like malls, department stores, retail stores, lounges and the like. It will have a huge economic impact on the music industry in general.

It is worthy to note that FILSCAP has granted licenses to numerous businesses, including but not limited to: (1) malls and retail stores; (2) hotels, resorts, and inns; (3) music lounges; (4) transport services; (5) hospitals; (6) amusement centers; (7) restaurants; and (8) wellness centers.[101]

It follows that should there be a pronouncement expressly exempting radio reception for commercial use from the license requirement and payment of the proper fees to copyright owners, a significant number of these businesses may opt to resort to broadcast copyrighted music through the radio instead. The clear result of this is that other businesses would be allowed to profit, no matter how minimal, using another's work, with lesser income to songwriters, composers, and artists. Likewise, entities with operations similar to that conducted by FILSCAP, if any, may likewise be negatively affected by such a ruling.

This would be contrary to the provisions of our intellectual property laws, which expressly aim to protect the rights of copyright owners over their intellectual property and creations.

Comparisons overseas; the dispute mechanism by the WTO

A look into how the other member states and signatories to the Berne Convention and TRIPS Agreement perceive transmissions embodying a performance or display of a work communicated to the public without the copyright owner's consent justifies Our position on the matter.

In the EU, particularly the case of *Phonographic Performance (Ireland) Ltd v. Ireland*,^[102] involving phonogram producers, the CJEU resolved the issue of whether a hotel operator which provides in guest bedrooms televisions and/or radios to which it distributes a broadcast signal, a "user" making a "communication to the public of a broadcast phonogram. The CJEU first stressed that a "user" makes an act of communication "when it intervenes, in full knowledge of the consequences of its action, to give access to a broadcast containing the protected work to its customers." Accordingly, in the absence of the intervention, the customers would not, in principle, be able to enjoy the broadcast work even if they are within the area covered by the broadcast.

The CJEU proceeded to confirm that indeed, the action of the hotel in giving access to the broadcast work to its customers constitutes an additional service which has an influence on its standing, and ultimately, on the price of its rooms. As to whether the hotel operator must pay equitable remuneration in addition to that paid by the broadcaster, the CJEU ruled that "a hotel operator which carries out an act of communication to the public transmits a protected work to a new public, that is to say, to a public which was not taken into account by the authors of the protected work when they authorized its use by communication to the original public." Therefore, it was concluded that the hotel operator must likewise pay equitable remuneration to the phonogram producers.

Although involving an online platform, the ruling of the England and Wales Court of Appeal - Civil Division (England and Wales CA) in *TuneIn Inc. v. Warner Music UK Ltd. & Anor*^[103] is similarly instructive. In this case, 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 England and Wales CA 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 centres 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 in this case were violated.

In the OSA case^[104] the CJEU introduced the dichotomy between the "new public," or a public which was not taken into account by the authors of the protected works when they authorized use through communication to the "original public." This divide led to the logical conclusion that what was critical, for purposes of the CJEU's resolution, was to determine whether the spa establishment had an existing license with the collecting agency. Since the spa establishment was transmitting the protected works to a "new public," it would be required to obtain a license separate from those duly authorized by the copyright owners in the communication to the "original public." Applying this by analogy to the instant case, it is immaterial whether the commercial broadcasting station, from which the alleged infringer was obtaining the protected works, had an existing license. What is relevant is the determination of whether the alleged infringer had duly paid the fees for the communication or performance of the copyrighted works.

Elsewhere, the US' introduction of the business exemption triggered the dispute mechanism by the World Trade Organization (WTO), an agency which has entered into a cooperation agreement with the WIPO to facilitate the implementation of the TRIPS Agreement among nations.^[105] On January 26, 1999, a request for consultation was initiated under the auspices of the WTO by the European Communities and their member states against the US. The request relates to Section 110(5) of the US Copyright Act, as amended by the Fairness in Music Licensing Act, particularly the so-called business exemption provision, which is alleged to be inconsistent with

the obligations of the US under the TRIPS Agreement and the Berne Convention. The European Communities requested the establishment of a panel, and the panel was established by the Dispute Settlement Body on May 26, 1999. The Panel's Report was circulated on June 15, 2000.[106] As stated in the Summary of Key Panel Findings, the Panel essentially found that:

xxx the "business exemption" did not meet the requirements of Art. 13: (i) the exemption did not qualify as a "certain special case" under Art. 13, as its scope in respect of potential users covered "restaurants" (70 per cent of eating and drinking establishments and 45 per cent of retail establishments), which is one of the main types of establishments intended to be covered by Art. 11bis(1)(iii); (ii) second, the exemption "conflicts with a normal exploitation of the work" as the exemption deprived the right holders of musical works of compensation, as appropriate, for the use of their work from broadcasts of radio and television; and (iii) in light of statistics demonstrating that 45 to 73 per cent of the relevant establishments fell within the business exemption, the United States failed to show that the business exemption did not unreasonably prejudice the legitimate interests of the right holder. Thus, the business exemption was found inconsistent with Berne Convention Art. 11bis(1)(iii) and 11(1)(ii).[107]

It is notable in this case that the US did not appeal the Panel's Report and thus the case proceeded to the compliance and implementation stages where arbitration was used to evaluate both the reasonable period of time for the implementation and the award of damages due. The Arbitrator awarded 3.3 million USD for three years at issue in the case. The decision has yet to be fully implemented.[108]

The foregoing shows that even the business exemption provided under Section 110(5)(b) of the US Copyright Act, as amended, which essentially allows the amplification of music broadcasts, without an authorization and a payment of a fee, by food service and drinking establishments and by retail establishments, provided that their size does not exceed a certain square footage limit, and also allows such amplification of music broadcasts by establishments above this square footage limit, provided that certain equipment limitations are met,[109] was considered to be inconsistent with the TRIPS Agreement and the Berne Convention. Thus, the same violates the rights of copyright owners.

Applying this same logic domestically, the PSA recorded a total of 957,620 business enterprises operating in the country. Of these, 952,969 (99.51%) are Micro, Small, and Medium Enterprises (MSMEs) and only 4,651 (0.49%) are large enterprises. Micro enterprises constitute 88.77% (850,127) of total MSME establishments, followed by small enterprises at 10.25% (98,129) and medium enterprises at 0.49% (4,716).[110] This means that an exemption covering MSMEs to use copyrighted work by means of radio-over-loudspeakers would be most unfair to the author or right holder as it would have a huge impact on the economic value of the work.

In Australia, the House Committee and the Australasian Performing Right Association agreed to implement a policy granting complimentary licenses to small businesses causing public performances of copyright music in the following circumstances: a) the means of performance is by the use of a radio or television set; b) the business employs fewer than 20 people; and c) the music is not intended to be heard by customers of the business or by the general public.[111] This voluntary solution was arrived at after the Committee recognized the need for the state to preserve its international obligations and to avoid the introduction of legislation similar to the American business exemption, which in turn, might throw it open to action through the dispute resolution and enforcement measures of the WTO.[112]

Clearly, the majority view is to require business establishments separate licenses in order to play radio broadcasts as background music, and any unauthorized performance or communication of these broadcasts to the public constitutes copyright infringement. Member states are critical against deviations from this line of thought since this would create unfavorable inequities on copyright enforcement among member states.

Nevertheless, Our present position is consistent with the majority of the member states; one which accords respect to treaty obligations and recognizes the hard work put through not just by artists, but also by composers, authors, publishers and everyone responsible for making music.

Music is intangible, and at times it is difficult to appreciate something you cannot see or hold. But music has its rewards, it can deliver a wide--range of benefits. From reeling in customers or to as little as letting someone enjoy the meal with the radio on, rather than having that meal in silence, and most of the time, that is all it takes to have one happy repeat customer.

Music is intangible, but its benefits are real. Businesses should pay for such benefit.

Possible amendments under the Intellectual Property Code

Our function is to interpret the law and to adjudicate the rights of the parties in the case at bar. The present framework on copyright enables copyright owners to license the public performance or further communication to the public of sound recordings played over the radio as part of their economic rights, unless it is fair use.

We understand that the very broad definition of a public performance in the IPC is a cause for concern. By the mere definition of what a public performance is, listeners of a radio station, to some extent, risks copyright infringement. Our foreign counterparts have recognized this dilemma and some have already taken steps to address this situation.

Neither the Berne Convention nor the TRIPS Agreement prohibit States from the introduction of limitations or exceptions on copyright. However, such limitations or exceptions cannot exceed a de minimis threshold or limitations that are of minimal significance to copyright owners. At present, the WTO employs three-step test in determining whether the limitation or exception on the rights of an owner exceed the threshold: they (1) must be confined to certain special cases, (2) cannot conflict with a normal exploitation of the work, and (3) cannot unreasonably prejudice the legitimate interests of the right holder.[113] These conditions are to be applied on a cumulative basis; if any one step is not met, the exemption in question will fail the test and be found to violate the TRIPS Agreement.[114]

We no longer wish to discuss each of these steps in length, but Congress should take them into consideration, in the event it chooses to introduce changes in the IPC that affects may affect any of the given rights of copyright owners.

Remedies for Infringement

Finally, this Decision will not be complete without adjudicating the monetary claims and damages claimed by FILSCAP against Anrey for infringement of its copyright. Section 216 of the IPC, prior to its amendment by RA 10372, provides for the following remedies:

SECTION 216. Remedies for Infringement.

216.1. Any person infringing a right protected under this law shall be liable:

- (a) To an injunction restraining such infringement. The court may also order the defendant to desist from an infringement; among others, to prevent the entry into the channels of commerce of imported goods that involve an infringement, immediately after customs clearance of such goods.
- (b) To pay to the copyright proprietor or his assigns or heirs such actual damages, including legal costs and other expenses, as he may have incurred due to the infringement as well as the profits the infringer may have made due to such infringement, and in proving profits the plaintiff shall be required to prove sales only and the

defendant shall be required to prove every element of cost which he claims, or, in lieu of actual damages and profits, such damages which to the court shall appear to be just and shall not be regarded as penalty.

x x x

(e) Such other terms and conditions, including the payment of moral and exemplary damages, which the court may deem proper, wise and equitable x x x

In its Amended Complaint, FILSCAP seeks to recover the following monetary awards:

- a) P18,900.00 as compensatory damages
- b) P300,000.00 as nominal damages
- c) P100,000.00 as exemplary damages
- d) P50,000.00 as attorney's fees and litigation expenses

Being the assignee of the copyright of its members, FILSCAP is entitled to demand public performance license fees as damages from Anrey. Based on the Amended Complaint, and as substantiated by the testimonies^[115] of its witnesses, FILSCAP demanded the amount of P18,900.00, which represent the fees that should have been paid had Anrey obtained the appropriate licenses for its three stores, or P6,300.00 per store. This amount is based on the rate cards prevailing at the time for restaurants playing mechanical music only, whose seating capacity is less than a hundred.^[116]

Actual damages is awarded for the purpose of repairing a wrong that was done, compensating for the injury inflicted, and replacing the loss caused by the wrong that was done.^[117] It includes "all damages that the plaintiff may show he has suffered in respect to his property, business, trade, profession or occupation."^[118]

Article 2200 of the Civil Code provides that actual damages comprehends the value of the loss suffered and the profits which the obligee failed to obtain. Hence, there are two kinds of actual damages: (1) the loss of what a person possesses (*daño emergente*); and (2) the failure to receive as a benefit that would have pertained to him or her (*lucro cesante*).^[119]

"*Lucro cesante* is usually the price which the thing could have commanded on the date that the obligation should have been fulfilled and was not."^[120] The actual amount of loss must "be proved with a reasonable degree of certainty, premised upon competent proof and the best evidence obtainable by the injured party."^[121]

In this case, the right of FILSCAP to license public performance of the subject copyrighted musical works, the public performance of such works in Anrey's restaurants without license from FILSCAP, and the refusal of Anrey to pay the annual license fees for said works were duly established. Clearly, FILSCAP was deprived license fees due to Anrey's acts of infringement. FILSCAP failed to receive the benefit of license fees from Anrey, which publicly performed without license or authority the subject copyrighted works in the latter's restaurants for the benefit of its customers and to enhance its profit.

The *lucro cesante* or the amount of license fees which FILSCAP failed to receive from Anrey is determined by the price, or rate of license fees which the subject copyrighted works could have commanded on the dates when Anrey played the same in its restaurants.

The price or rate of the license fees or royalties of FILSCAP are based on its rate cards, which provide fixed amounts according to the nature of public performance of the copyrighted works, i.e., live and/or mechanical public performance, and the size of the establishment or place where the public performance will be conducted. However, the rates are annual fees that normally authorize access to what FILSCAP boasts to over twenty million songs in its repertoire.

Also, the Monitoring Reports submitted by FILSCAP only confirmed that copyrighted music was played in Anrey's Session Road and Abanao Extension branches.[122] Even the Amended Complaint failed to allege that copyrighted music was played in the SM Baguio branch.

Furthermore, the evidence on record proved public performance on 12 occasions: 6 songs in 2 different days in 2 locations only. Clearly, the annual license fees demanded by FILSCAP appears inequitable, especially if we are to consider Anrey's seemingly valid position on a difficult question of law.

The last portion of Section 216.1(b) states that "in lieu of actual damages and profits, such damages which to the court shall appear to be just and shall not be regarded as penalty." This may be likened to temperate damages which is normally awarded in the absence of competent proof on the amount of actual damages suffered.[123]

Such amount is usually left to the discretion of the courts but the same should be reasonable, bearing in mind that temperate damages should be more than nominal but less than compensatory.[124] To our mind, an award of temperate damages equivalent to P10,000.00 is just and reasonable considering that: (1) the license fees were charged annually and Anrey was only shown to have publicly performed FILSCAP's songs on two different days; and (2) the license fees represents the use of over 20 million songs on FILSCAP's repertoire and Anrey was only shown to have publicly performed FILSCAP's 12 songs in total.

FILSCAP also claims for the payment of nominal damages, in the amount of P300,000.00, for blatantly violating its public performance rights. But in this case, temperate or moderate damages has been awarded to FILSCAP. Nominal damages are recoverable where a legal right is technically violated and must be vindicated against an invasion that has produced no actual present loss of any kind or where there has been a breach of contract and no substantial injury or actual damages whatsoever have been or can be shown.[125]

The purpose of nominal damages is to vindicate or recognize a right that has been violated, in order to preclude further contest thereof; and not for the purpose of indemnifying the plaintiff for any loss suffered by him.[126] Temperate damages are given when some pecuniary loss has been suffered but its amount cannot be proven with certainty. Thus, in the same way that nominal damages cannot co-exist with actual or compensatory damages,[127] nominal damages are improper when temperate damages have been awarded.[128]

Neither has FILSCAP shown the right to recover exemplary damages. The purpose of exemplary damages is to serve as a deterrent to serious wrongdoings, and as a vindication of undue sufferings and wanton invasion of the rights of an injured or a punishment for those guilty of outrageous conduct. In torts and quasi-delicts, exemplary damages may be granted if the defendant acted with gross negligence.[129] The element of gross negligence was not proven in this case, hence, FILSCAP's P100,000.00-claim for exemplary damages should likewise be denied.

On the other hand, the payment of attorney's fees is justified pursuant to Sec. 216.1 (b) of the IPC, as amended, which entitles the copyright proprietor or his assigns or heirs to, in addition to actual damages, legal costs and other expenses. This award is not based on speculation but is real since the record is clear that FILSCAP was forced to litigate in order to protect its interest, as demonstrated by the several demand letters it sent and was ignored by Anrey. It also presented during trial vouchers for the legal expenses it gradually incurred in litigating the case,[130] while the amounts have been stipulated upon by the parties during the course of the trial.[131] Clearly, the award of attorney's fees is justified in this case, including the amount of 50,000.00 prayed for.

Finally, the monetary award should earn legal interest in accordance with the computation laid down in *Nacar v. Gallery Frames*,[132] thus: the rate of 12% per annum from the date FILSCAP filed the Complaint on September 8, 2009 until June 30, 2013, and thereafter, 6% per annum from July 1, 2013 until finality of this judgment. Furthermore, once this judgment has become final and executory, the monetary award shall be subject to legal

interest at the rate of 6% per annum from such finality until fully satisfied.

WHEREFORE, premises considered, the instant petition is GRANTED. The assailed Decision dated April 19, 2017 and Resolution dated August 3, 2017 promulgated by the Court of Appeals (CA) in CA-G.R. CV No. 105430, affirming the Decision dated April 15, 2015 and Order dated June 30, 2015 rendered by Branch 6, Regional Trial Court (RTC) of Baguio City, are hereby REVERSED and SET ASIDE.

Accordingly, respondent Anrey, Inc., is hereby ORDERED to pay the Filipino Society of Composers, Authors, and Publishers, Inc. P10,000.00 as temperate damages for the unlicensed public performance of the copyrighted songs on FILSCAP's repertoire and P50,000.00 as attorney's fees, plus interest at the rate of 12% per annum from September 8, 2009 until June 30, 2013, and thereafter, 6% per annum from July 1, 2013 until the finality of this judgment. Such amount shall be subject to interest at the rate of 6% per annum reckoned from the date of finality of this judgment until fully satisfied. Costs against Anrey, Inc.

Let a copy of this Decision be furnished the Intellectual Property Office of the Philippines for their guidance and information, as well as the House of Representatives and the Senate of the Philippines as reference for possible statutory amendments on the Intellectual Property Code without violating the State's commitments under the Berne Convention and the TRIPS Agreement.

SO ORDERED.

Gesmundo, C.J., Hernando, Gaerlan, Rosario, J. Lopez, Dimaampao, and Marquez, JJ., concur.

Leonen, SAJ., see dissenting opinion.

Caguioa, J., see separate concurring opinion.

Lazaro-Javier, J., with dissent.

Inting,[*] J., no part.

M. Lopez, [**] J., on official leave but left his vote.

Kho, Jr., J., I join the separate concurring opinion of Justice Caguioa.

Singh, J., see concurring and dissenting opinion.

[*] No part due to prior participation in the Court of Appeals.

[**] On Official Leave.

[1]Rollo, pp. 3-75.

[2]Id. at 86-97; penned by Associate Justice Ramon R. Garcia and concurred in by Associate Justices Leoncia R. Dimagiba and Henri Jean Paul B. Inting (now a Member of this Court).

[3]Id. at 100-101.

[4]Id. at 457-458.

[5]Id. at 212.

[6]Id.

[7]Id. at 213.

[8]Id.

[9]Id. at 140.

[10]Id. at 142.

[11]Id. at 162-166.

[12]Id. at 140-144.

[13]Id. at 144

[14]Id. at 184-188.

[15]Id. at 185.

[16]Id. at 443-444.

[17]An Act Prescribing the Intellectual Property Code and Establishing the Intellectual Property Office, Providing for its Powers and Functions, and for other Purposes, otherwise known as the "Intellectual Property Code of the Philippines" Approved: June 6, 1997.

[18]Rollo, p. 443.

[19]Id. at 445-448.

[20]Id. at 449-456.

[21]Id. at 457-458.

[22]Id. at 459-460.

[23]Id. at 97.

[24]Id. at 95.

[25]Id. at 100-101.

[26]INTELLECTUAL PROPERTY CODE OF THE PHILIPPINES, Sec. 172.1.

[27]Simpleville Music v. Mizell, 451 F. Supp. 2d 1293 (M.D. Ala. 2006).

[28]INTELLECTUAL PROPERTY CODE OF THE PHILIPPINES, Sec. 185.

[29]Rollo, p. 140.

[30] <<https://filscap.org/about-us/>> (visited June 5, 2022).

[31]Rollo, p. 481

[32]Id. at 230-231.

[33]Id. at 231.

[34]Id. at 271.

[35]Id. at 272.

[36]INTELLECTUAL PROPERTY CODE OF THE PHILIPPINES, Sec. 180.1.

[37]Ferrer v. Carganillo, 634 Phil. 557, 563 (2010).

[38]Id.

[39]568 Phil. 658 (2008).

[40]Id. at 707.

[41]Arturo M. Tolentino, The Civil Code of the Philippines 517 [1992].

[42]U.S. CONSTITUTION, Article 1, Sec. 8, Clause 8.

[43]286 U.S. 123, 127 (1932).

[44]See Christophe Geiger, "the Social Function of Intellectual Property Rights or How Ethics Can Influence the Shape and Use of IP Law," Max Planck Institute for Intellectual Property and Competition Law Research Paper No. 13-06, p. 11; citing Fox Film Corp. v. Doyal, Id.

[45]Id. at 11-12.

[46]Supra note 26, citing INTELLECTUAL PROPERTY CODE OF THE PHILIPPINES, Sec. 172.1.

[47]INTELLECTUAL PROPERTY CODE OF THE PHILIPPINES, Sec. 54.

[48]Id. at Sec. 109.3.

[49]Id. at Sec. 118.

[50]Id. at Sec. 200.

[51]Supra, note 43.

[52]See Shahid Alikhan, Socio-Economic Benefit of Intellectual Property Protection in Developing Countries, World Intellectual Property Organization, p. 10. (2009).

[53]INTELLECTUAL PROPERTY CODE OF THE PHILIPPINES, Sec. 21.

[54]Supra note 43 at 12.

[55]Supra note 53.

[56]INTELLECTUAL PROPERTY CODE OF THE PHILIPPINES, Sec. 93.

[57]Id. at Sec. 185.

[58]Lateef Mtima, Copyright Social Utility and Social Justice Interdependence: A Paradigm for Intellectual Property Empowerment and Digital Entrepreneurship, Volume 112, Issue 1, Article 7, p. 106; Campbell v. Acuff-Rose Music, Inc. 510 U.S. 569. 574-77 (1994).

[59]INTELLECTUAL PROPERTY CODE OF THE PHILIPPINES, Sec. 171.6.

[60]Id. at Sec. 202.2.

[61]Id. at Sec. 202.4.

[62]283 U.S. 191, 75 L. Ed. 971, 51 S. Ct. 410.

[63]422 U.S. 151, 95 S. Ct. 2040.

[64]949 F.2d 1482.

[65]Buck et. al v. Jewell-La Salle Realty Co. 283 U.S. 191, 75 L. Ed. 971, 51 S. Ct. 410.

[66]Id. at 283 U.S. 196.

[67]Id. at 283 U.S. 198.

[68]Convention Establishing the World Intellectual Property Organization, Article 4.

[69]Intergovernmental Committee and Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore, 14[th] Session, Geneva, June 29 to July 3, 2009.

[70]WIPO – Guide to the Berne Convention, pp. 68-69.

[71]C-351/12; ECLI:EU:C:2014:110.

[72]WIPO – Guide to the Berne Convention, pp. 64-65.

[73]Id. at 68-69.

[74] <<https://wipolex.wipo.int/en/text/295166>> (visited July 20, 2022).

[75]<https://www.wipo.int/treaties/en/ip/wct/summary_wct.html> Visited July 20, 2022).

[76] <<https://www.ipophil.gov.ph/news/the-intellectual-property-system-a-brief-history-2/>> (visited on August 9, 2012)

[77]Supra note 65.

[78]Supra note 70.

[79]Rollo, p. 443.

[80]INTELLECTUAL PROPERTY CODE OF THE PHILIPPINES, Sec. 184.1 (i).

[81]See TSN, 11 June 2014.

[82]INTELLECTUAL PROPERTY CODE OF THE PHILIPPINES, Sec 184(a).

[83]Id. at Sec. 184(c).

[84]Id. at Sec. 184(d).

[85]Id. at Sec. 184(e) & (f).

[86]Id. at Sec. 184(h).

[87]Id. at Sec. 184(i).

[88]Id. at Sec. 184(k).

[89]Id. at Sec. 185.

[90]755 Phil. 709 (2015).

[91]Id. at 758.

[92]771 F. Supp. 1220 (N.D. Ga. 1991).

[93]593 U.S. ____ (2021)

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

[95]510 U.S. 569 (1994).

[96]Id. at 590.

[97]Supra note 28.

[98]Id.

[99]Id.

[100]Id.

[101]<<https://filscap.org/wp-content/uploads/2022/03/2021-List-of-Licensees.pdf>> (visited June 5, 2022).

[102]EUECJ C-162/10 [2012].

[103]EWCA Civ 441 [2021].

[104]Supra note 71.

[105]<https://www.wto.org/english/tratop_e/trips_e/intel3_e.htm> (visited July 11, 2022).

[106] <https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds160_e.htm> (visited July 8, 2022).

[107]<https://www.wto.org/english/tratop_e/dispu_e/cases_e/1pagesum_e/ds160sum_e.pdf> (visited July 8, 2022).

<https://www.wto.org/english/tratop_e/dispu_e/cases_e/1pagesum_e/ds160sum_e.pdf> (visited July 8, 2022).

[108] Maria Strong, *Enforcement Tools in the U.S. Government Toolbox*, 40 Colum. J.L. & Arts 359 (2017), <<https://academiccommons.columbia.edu/doi/10.7916/D8T15G7N/download>> (visited July 8, 2022).

[109] <https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds160_e.html> (visited July 8, 2022).

[110] <<https://www.dti.gov.ph/resources/msme-statistics/>> (visited July 20, 2022).

[111]Chapter 5, *Distinguishing Between Direct and Indirect Playing of Music*, p. 94.

[112]Id. at 62.

[113]World Intellectual Property Organization [WIPO], *WIPO Study on Limitations and Exceptions of Copyright and Related Rights in the Digital Environment*, SCCR/9/7, April 5, 2003.

[114]Id. at 50.

[115]Rollo, pp. 212-216.

[116]Records, Vol. II, p. 549.

[117]*Algarra v. Sandejas*, 27 Phil. 284 (1914), citing *Field v. Munster*, 11 Tex Civ. Appl., 341, 32 S. W., 417, and *Reid v. Terwilliger*, 116 N.Y., 530, 22 N. E., 1091.

[118]Id., citing Gen. Stat Minn., 1894 Sec 5418.

[119]PNOC Shipping and Transport Corp. v. Court of Appeals, 358 Phil. 38, 53 (1998).

[120]Associated Realty Development Co. Inc. v. Court of Appeals, 121 Phil. 55, 69 (1965).

[121]Universal International Investment (BVI) Limited v. Ray Burton Development Corp., 799 Phil. 420, 437 (2016), citing Integrated Packaging Corp. v. Court of Appeals, 388 Phil. 835 (2000).

[122]Rollo, pp. 75-80.

[123]CIVIL CODE, Article 2224.

[124]Id.

[125]Francisco v. Ferrer, 405 Phil. 741, 751, (2001).

[126]Vda. De Medina v. Cresencia, 99 Phil. 506 (1956).

[127]Armovit v. Court of Appeals, 263 Phil. 412 (1990).

[128]See Seven Brothers Shipping Corporation v. DMC Construction Resources Inc., 748 Phil. 692 (2014).

[129]CIVIL CODE, Article 2231.

[130]Records, Vol 1, pp. 443-520.

[131]TSN, August 23, 2011, p. 8.

[132]716 Phil. 267 (2013).

DISSENTING OPINION

LEONEN, J.:

The majority granted the Petition for Review on Certiorari filed by petitioner Filipino Society of Composers, Authors and Publishers, Inc., finding that respondent Anrey, Inc. committed copyright infringement when it played radios that broadcasted copyrighted music in its restaurants, without paying the necessary license fees demanded by petitioner.

I dissent.

The reception and amplification of radio transmissions in a public space should not be considered an infringement of the copyright over musical compositions, notwithstanding the public space's proprietor lacking license from the copyright holder.

I

Article XIV, Section 13 of the Constitution lays down the State's duty to protect its citizens' intellectual property and creations:

SECTION 13. The State 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 period as may be provided by law.

This is reflected in Section 2 of Republic Act No. 8293, otherwise known as the Intellectual Property Code:

SECTION 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.

Section 2 articulates what appears to be two conflicting goals of intellectual property protection. On one hand, a monopoly is granted to scientists, inventors, artists, and other gifted citizens for the exploitation and use of their intellectual property; on the other, the diffusion of intellectual property for the common good. Specifically, for copyright, the problem today "is how best to reconcile the interest of three groups—authors, who give expression to ideas; publishers, who disseminate ideas; and the members of the public, who use the ideas." [1]

However, the conflict may be more apparent than real. No work is truly created in a vacuum, and many created works are perched on the shoulders of giants. This is recognized in our intellectual property laws, in prior art [2] for patents and derivative works [3] in copyright.

A salutary goal of intellectual property protection is the promise to creators that, should they disclose their creations to the world, they will, for a term provided by law, exclusively benefit from their creations. And, when that term expires, the public may then freely enjoy those creations. [4] In *ABS-CBN Corporation v. Gozon*: [5]

<https://www.wto.org/english/tratop_e/dispu_e/cases_e/1pagesum_e/60sum_e.pdf> (visited= july= 8, 2022).

We look at the purpose of copyright in relation to criminal prosecutions requiring willfulness:

<https://www.wto.org/english/tratop_e/dispu_e/cases_e/1pagesum_e/60sum_e.pdf> (visited= july= 8, 2022).

<https://www.wto.org/english/tratop_e/dispu_e/cases_e/1pagesum_e/60sum_e.pdf> (visited= july= 8, 2022).

Most importantly, in defining the contours of what it means to willfully infringe copyright for purposes of criminal liability, the courts should remember the ultimate aim of copyright. Copyright is not primarily about providing the strongest possible protection for copyright owners so that they have the highest possible incentive to create more works. The control given to copyright owners is only a means to an end: the promotion of knowledge and learning. Achieving that underlying goal of copyright law also requires access to copyrighted works and it requires permitting certain kinds of uses of copyrighted works without the permission of the copyright owner. While a particular defendant may appear to be deserving of criminal sanctions, the standard for determining willfulness should be set with reference to the larger goals of copyright embodied in the Constitution and the history of copyright in this country.

<https://www.wto.org/english/tratop_e/dispu_e/cases_e/1pagesum_e/60sum_e.pdf> (visited= july= 8, 2022).

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

on the owner of the copyright."

<https://www.wto.org/english/tratop_e/dispu_e/cases_e/1pagesum_e/60sum_e.pdf> (visited= july= 8, 2022).

<https://www.wto.org/english/tratop_e/dispu_e/cases_e/1pagesum_e/60sum_e.pdf> (visited= july= 8, 2022).

Intellectual property rights, such as copyright and the neighboring right against rebroadcasting, establish an artificial and limited monopoly to reward creativity. Without these legally enforceable rights, creators will have extreme difficulty recovering their costs and capturing the surplus or profit of their works as reflected in their markets. This, in turn, is based on the theory that the possibility of gain due to creative work creates an incentive which may improve efficiency or simply enhance consumer welfare or utility. More creativity redounds to the public good.[6] (Citations omitted)

<https://www.wto.org/english/tratop_e/dispu_e/cases_e/1pagesum_e/60sum_e.pdf> (visited= july= 8, 2022).

<https://www.wto.org/english/tratop_e/dispu_e/cases_e/1pagesum_e/60sum_e.pdf> (visited= july= 8, 2022).

Copyright regulation should not be reduced to economic exercises by individuals. Intellectual creations may be property under our laws, but our Constitution recognizes the social function of the use of property and its contribution to the common good. Article XII, Section 6 states:

SECTION 6. The use of property bears 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.

The "common good" in this provision applies equally to all property, including all intellectual property. The majority's assertions that, first, "[t]he simple nuances between the different kinds of intellectual creations show the inclination to afford protection to copyright, more than other forms"[7] and second, "copyright does not impact people's lives as much as patented inventions do[.]"[8] have no textual basis in our Constitution and our laws.

The Intellectual Property Code provides different kinds of protection depending on the intellectual property involved. The procedures, rights, and obligations are calibrated based on the characteristics of the specific intellectual property. For example, a patent's term is 20 years from filing date;^[9] a copyright holder's rights last during their lifetime and 50 years after death;^[10] and a trademark registration may be indefinitely renewable so long as certain conditions are met.^[11] Copyright vests upon the moment of creation;^[12] the acquisition of a letters patent or registered trademark involves application, publication, and approval with the Philippine Intellectual Property Office. These differences should not be interpreted to imply a hierarchy of protection, that the rights accorded to a copyright holder are superior to the rights of a patent or trademark holder, or vice versa, or that one may expect less equitable treatment when it comes to the enforcement of their respective rights.

The same holds true for works that fall within the ambit of copyright. Categories of works are protected differently due to their characteristics. Our copyright law recognizes that written works are exploited in ways different from visual, musical, audiovisual works, and works of applied art; hence, certain provisions clarify how parts of the law will operate for that particular kind of work.^[13] Nonetheless, all copyright holders can expect the same term of protection, exclusive economic rights, and access to remedies should there be an infringement of those rights.

Respectfully, it is reductive to assert that the common good is more easily comprehended in patents.^[14] Copyright is profoundly intertwined with culture. Many, if not all, copyrighted works can and do shape identities

of persons, groups, communities, and nations.[15] Copyright is not merely economic; it also embodies "discursive power—the right to create, and control, cultural meanings." [16] The State recognizes this not just with copyright law, but also with laws that promote and protect art,[17] literature,[18] culture workers,[19] and the preservation and development of national cultural heritage.[20] So-called "factual works" are part of the expression, speech, and the press explicitly protected in our Bill of Rights,[21] while artistic creations enjoy State patronage and constitute cultural treasures.[22] Neither our Constitution nor our laws intended to create discriminatory classifications of intellectual property based on some arbitrary metric of relative "value."

II

Petitioner has failed to prove that respondent had violated an economic right granted to a copyright holder.

Since copyright is a statutory right, the rights granted to copyright holders are limited by law.[23] No copyright holder has an unlimited monopoly over all forms of exploitation of their works.[24] In *Joaquin, Jr. v. Drilon*: [25]

Copyright, in the strict sense of the term, is purely a statutory right. It is a new or independent right granted by the statute, and not simply a pre-existing right regulated by the statute. Being a statutory grant, the rights are only such as the statute confers, and may be obtained and enjoyed only with respect to the subjects and by the persons, and on terms and conditions specified in the statute.[26] (Citation omitted)

In Section 177, the Intellectual Property Code enumerates the exclusive rights of a copyright holder:

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; (n)

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.

These rights are distinct from each other, as shown by the definitions of some of the acts in Section 171, including "communication to the public," "public performance," "rental," and "reproduction."

The exact right infringed is an essential determination in any copyright infringement case; otherwise, the defendant cannot raise the adequate defenses necessary to rebut the infringement claims. Moreover, plaintiffs and complainants should not be allowed to take a "shotgun" approach in their allegations; they must with certainty and specificity describe the alleged infringing act relative to one of the copyright holder's enumerated rights, appropriate to the type of copyrighted work allegedly infringed.

Here, petitioner alleges that the economic right violated by respondent is the right of "public performance of the work," as defined in Subsection 171.6:[27]

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[.]

To be clear, the works allegedly infringed in this case are not sound recordings, but musical compositions. The Intellectual Property Code separates the copyright over the composition and the sound recording in which a performance of the composition is fixated. The law provides for the concept of "fixation" of performances of musical compositions in sound recordings:

SECTION 202. Definitions. — For the purpose of this Act, the following terms shall have the following meanings:

....

202.2. "Sound recording" means the fixation of the sounds of a performance or of other sounds, or representation of sound, other than in the form of a fixation incorporated in a cinematographic or other audiovisual work;

....

202.4. "Fixation" means the embodiment of sounds, or of the representations thereof, from which they can be perceived, reproduced or communicated through a device.

Fixations of sounds in the form of sound recordings[28] are governed by Chapters XII and XIII of the Intellectual Property Code, which provide for performers' rights, the moral rights of performers, and the rights of producers of sound recordings. One exclusive right of performers is to authorize the broadcasting or communication of their performance to the public,[29] while producers have the exclusive right to authorize the communication of the sound recording in a like manner as Subsection 171.3.[30] When a sound recording is used directly for broadcasting or other communication to the public, then the performer and producer are entitled to compensation:

SECTION 209. Communication to the Public. — If a sound recording published for commercial purposes, or a reproduction of such sound recording, is used directly for broadcasting or for other communication to the public, or is publicly performed with the intention of making and enhancing profit, a single equitable remuneration for the performer or performers, and the producer of the sound recording shall be paid by the user to both the performers and the producer, who, in the absence of any agreement shall share equally.

By its own admission, petitioner represents "composers, lyricists, and music publishers." [31] Those composers, lyricists, and music publishers hold the copyright to the musical compositions only. Unless they are also the performers of the compositions, they do not hold the rights to the sound recordings where performances of their compositions are fixed.

The performance of a musical composition is typically executed using human artists, either directly with voices, or by means of instruments or other devices that represent or interpret the composition. One example of a "public performance" of a musical composition is *Filipino Society of Composers, Authors and Publishers, Inc. v. Tan*, [32] where the respondent hired a combo of professional singers to play and sing certain musical compositions inside his restaurant. Fixation of the performance may or may not take place. On the other hand, the public performance of a sound recording requires the fixation or embodiment of the sound to "[make] the recorded sounds audible" as stated in Subsection 171.6.

Thus, the clause in Subsection 171.6 pertaining to sound recordings does not apply when the alleged infringed work is a musical composition not embodied in a sound recording, unless the copyright holder can allege and prove that they also hold the copyright over the sound recordings. And even if, regardless of ownership of the two, the act of publicly performing a sound recording constitutes a public performance of the underlying musical composition, then the clause in Subsection 171.6 must be directed to the entity that actively made the recorded sounds audible to the public, as defined in the clause.

Even then, the entirety of this final clause must be considered. A sound recording and its underlying musical composition must be publicly performed in a manner that excludes the need for communication described in Subsection 171.3—that is, by wire or wireless means in such a way that members of the public may individually decide the time and place of their access.

The sound recording clause in Subsection 171.6 is a series of conditions, all of which must be met for the act to be considered a public performance. The absence of even one condition must mean that either a different right has been infringed, or no right has been infringed at all.

In this case, respondent's acts are not within the scope of a "public performance" of a musical composition. It and its employees did not perform the musical compositions either directly, using the human voice, or through devices such as musical instruments, or a combination of both. It was not in any way involved in the performances of the musical compositions, and a subsequent embodiment of the performances in sound recordings. It did not create the broadcast programming in which the sound recordings were included. It did not transmit the radio waves in which the programming was contained. Apart from the radio device itself and perhaps some rudimentary amplification, it did not introduce further processing into the radio waves that it received. At the very least, the use of wire or wireless means, as will be discussed below, precludes respondent's acts from coverage under Subsection 171.6.

Likewise, I disagree with the majority's findings that respondent committed "an unauthorized communication of [the] copyrighted music to the public[.]"[33] Subsection 171.3 of the Intellectual Property Code as amended, defines what "communication to the public" is:

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[.]

For there to be a communication to the public, the person must be the one that made the work available to the public by wire or wireless means. Moreover, it should be available in a way that members of the public may access the works from a place and time they individually chose.

In this case, the entity that made the musical compositions available to the public in the way described in Subsection 171.3 is not respondent, but the radio station or stations—the broadcaster—that transmitted the sound recordings in which the performances of the compositions were fixed. respondent was merely a "member of the public," able to access the work at a chosen place—the restaurant—and time.

Notably, petitioner has executed agreements with entities for the collection of royalty payments for the use of its members' works. One such entity is the Kapisanan ng mga Brodkaster ng Pilipinas,[34] a nongovernment, nonprofit organization for broadcast media of television and radio.[35] The license serves as a form of permission, where the broadcaster compensates the composer after being allowed to exercise the composer's rights to exclusively communicate their work to the public.[36] Compensation is determined by the number of compositions played within a certain period of time,[37] with the broadcaster reporting its usage[38] and petitioner doing its own monitoring.

If the broadcaster's use of the musical compositions is unlicensed, then the broadcaster should be made liable for infringing the composer's right to exclusively communicate their work to the public. Members of the public may also be liable under the Intellectual Property Code, as amended, if they benefited from the broadcaster's direct infringement, provided that they had notice of the infringing activity and the right and ability to control the direct infringer's activities,[39] and the secondary infringement was committed after the pertinent amendments to the Code.

If the broadcaster's use of the musical compositions is with a license, then the license's terms must be examined to determine the metes and bounds of the sanctioned use. If the use exceeds the stipulated bounds, then the broadcaster should be made liable for breach of contract, or in the case of a Kapisanan ng mga Brodcaster ng Pilipinas member, memorandum of agreement.

Meanwhile, the relationship between a broadcaster and its listener is one of medium and audience. The radio-listening public, as audience, can choose the time or place when they receive the broadcast, and on what device and at a volume of their preference. However, they generally have no input on what particular musical compositions or sound recordings are being played unless the station solicits requests—and even then, the request is only a suggestion that a station may accept or ignore. For commercial private stations, audiences are also recipients of advertising used to fund operations, while simultaneously being "products" sold to advertisers to entice them to place commercials as part of the stations' programming.[40]

But here, the crux of the matter is the legal tie between the copyright holder and the recipient of electromagnetic wavelengths—radio waves—transmitted by the broadcaster. Certainly, it cannot be based on the contract between the composer (or the composer's representative) and the broadcaster. In our civil law, only parties to a contract are bound to it, unless privity is proved.[41] Here, no privity is alleged, much less established. There is no claim that any broadcaster exceeded the terms of use of the musical compositions it included in its programming. The broadcaster that facilitated the transmission of the compositions to respondent is not even a party to this case.

In essence, petitioner alleges that, when respondent's employees used a radio receiver for its usual and intended purpose—to receive electromagnetic wavelengths—and amplified free-to-air programming from a broadcaster within respondent's establishments, and that programming happened to include musical compositions, respondent committed copyright infringement, regardless of the existence and terms of a valid license granted to that broadcaster. What the majority does here is frame the acts of lawfully receiving and amplifying transmitted radio waves as an exploitation of a work that the copyright holder can control.

Respondent's acts should be differentiated from infringing acts such as "interception without authority," which involves the unauthorized capture of satellite signals, or "free transmission," which is the exhibition of infringing materials.[42] Respondent was not alleged to have unlawfully intercepted the signals being transmitted by the broadcaster. The facts also do not show that the programming itself contained infringing materials such as unauthorized fixations of performances of the musical compositions.

The Intellectual Property Code takes great pains to create nuances in copyright law, with due regard for the complexities of the modes of creation and distribution of original intellectual creations in the literary and artistic domain, that should not be hastily collapsed.

Here, due to the characteristics of the copyrighted works relative to the rights that may be exercised, respondent's alleged infringing acts are not a public performance or a communication to the public, as contemplated in the Intellectual Property Code. Further, no other exclusive right enumerated in Section 171 was alleged to have been infringed. Therefore, this Court must find that no copyright infringement had taken place in this case. Copyright holders must not be allowed to extend the scope of protection to their works beyond the statutory rights granted to

them, and courts should be wary should they attempt to do so.

III

To arrive at its conclusions regarding the scope of public performance, the majority heavily relies[43] on United States copyright caselaw, namely, the cases of *Buck v. Jewell-LaSalle Realty, Co.*,[44] *Twentieth Century Music Corporation v. Aiken*,[45] and *Broadcast Music, Inc. v. Claire's Boutiques, Inc.*,[46] based on the rationalization that United States copyright law defines "public performance" similarly as Philippine law.[47] Hence, the majority essentially says that the Philippine Legislature's intent when it passed the Intellectual Property Code may be derived from foreign jurisprudence.[48]

This rationalization is unsupported by a textual reading of the Intellectual Property Code.

Those American cases were decided based on the United States' copyright laws: the Copyright Act of 1909, and Title 17 of the United States Code, as amended, pursuant to Article I, Section 8 of the United States Constitution.[49] These copyright laws include public performance rights; however, the definition of public performance is substantially different from the one in the Intellectual Property Code. Mechanical licensing over musical compositions in the Copyright Act of 1909 is extensive in ways not found in our Intellectual Property Code:

That any person entitled thereto, upon complying with the provisions of this Act, shall have the exclusive right:
...

e) To perform the copyrighted work publicly for profit if it be a musical composition; and for the purpose of public performance for profit; and for the purposes set forth in subsection (a) hereof, to make any arrangement or setting of it or of the melody of it in any system of notation or any form of record in which the thought of an author may be recorded and from which it may be read or reproduced: Provided, That the provisions of this Act, so far as they secure copyright controlling the parts of instruments serving to reproduce mechanically the musical work, shall include only compositions published and copyrighted after this Act goes into effect, ... And provided further, and as a condition of extending the copyright control to such mechanical reproductions, That whenever the owner of a musical copyright has used or permitted or knowingly acquiesced in the use of the copyrighted work upon the parts of instruments serving to reproduce mechanically the musical work, any other person may make similar use of the copyrighted work upon the payment to the copyright proprietor of a royalty of two cents on each such part manufactured, to be paid by the manufacturer thereof; and the copyright proprietor may require, and if so the manufacturer shall furnish, a report under oath on the twentieth day of each month on the number of parts of instruments manufactured during the previous month serving to reproduce mechanically said musical work, and royalties shall be due on the parts manufactured during any month upon the twentieth of the next succeeding month. The payment of the royalty provided for by this section shall free the articles or devices for which such royalty has been paid from further contribution to the copyright except in case of public performance for profit[.]

As early as 1976, public performance was defined in Title 17, Section 101 of the United States Code:

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.

While the definition above has superficial similarities with Subsection 171.6 of the Intellectual Property Code, the latter has clear clauses referring to specific types of works, which are relevant to this case, as I have earlier discussed. The United States caselaw relies heavily on the legislative history and intent of the United States Congress in the development of its domestic copyright law, especially Broadcast Music, which opinion devoted a significant portion of its discussion on legislative pushback to the ruling in *Twentieth Century Music*. Notably, United States copyright law also does not differentiate between public performance rights and the right to communicate the work to the public, as Philippine laws do.

To emphasize, copyright is a statutory right, the extent of which is defined in the relevant law. In the Philippines, the relevant law is the Intellectual Property Code and other existing Philippine laws. The Intellectual Property Code has provisions that are not in United States copyright law, and those provisions—being part of our legal system—requires our consideration. Our Legislature saw fit to distinguish between public performances and communications to the public, giving them specific definitions. We cannot merely say that the most relevant right is the right to public performance, when our copyright law defines other rights absent in American statute. Otherwise, our laws, and by extension, our courts, will be beholden to interpretations made of foreign laws, by foreign bodies, ignoring the real and material divergences in the legal, political, social, and cultural developments unique to each jurisdiction.

Even if the cases cited by the majority may serve as a basis to guide this Court's interpretation of Subsection 171.6 of the Intellectual Property Code, the factual antecedents of both *Buck* and *Broadcast Music* do not squarely align with the facts in this case. The use of the musical composition in *Buck* was unlicensed not just by the hotel proprietor, but also by the radio station from which the hotel obtained its performances:

Among the programs received are those transmitted by Wilson Duncan, who operates a duly licensed commercial broadcasting station in the same city. Duncan selects his own programs and broadcasts them for profit. There is no arrangement of any kind between him and the hotel. Both were notified by the plaintiff society of the existence of its copyrights, and were advised that, unless a license were obtained, performance of any copyrighted musical composition owned by its members was forbidden. Thereafter a copyrighted popular song, owned by the plaintiffs, was repeatedly broadcast by Duncan, and was received by the hotel company and made available to its guests.[50] (Emphasis supplied)

Here, it was not shown that the broadcasts that respondent allegedly performed in public similarly contained unlicensed performances of any musical compositions.

Moreover, both *Buck* and *Broadcast Music* did not involve the reception of transmitted radio waves using a single receiver and rudimentary amplification. In *Buck*, the "public performance" by the hotel proprietor involved "a master radio receiving set which is wired to each of the public and private rooms[,]" and "loudspeakers or headphones" were made available to guests so that they can listen to the performances "throughout the building." [51] Meanwhile, a network of "at least 669 receivers and 1,338 speakers" [52] across 749 stores [53] were the subject of *Broadcast Music*.

Comparisons [54] to the European Union case of *Phonographic Performance (Ireland), Ltd. v. Ireland* [55] and England and Wales Court of Appeal-Civil Division case of *TuneIn, Inc. v. Warner Music UK, Ltd. & Anor* [56] are also inapt. *Phonographic Performance*, similar to *Buck*, involved the transmission of sound recordings taken from a central receiver and distributed throughout the bedrooms of a hotel. [57] *TuneIn* concerned Internet radio, a medium that functions wholly differently from terrestrial radio—a fact made clear in the opinion [58]—and a different regulatory framework, with its own particularities too premature to be discussed at this juncture.

All of those cases are in stark contrast with methods by which respondent allegedly publicly performed the

musical compositions. The majority has not shown how the disparate facts could be reconciled to arrive at the same conclusions.

Similarly, the majority's use of the texts produced by the World Intellectual Property Organization to interpret provisions of the Intellectual Property Code^[59] is highly irregular. In our constitutional order, the task of interpreting Philippine laws is part of judicial power vested in this Court and other courts as may be provided by law.^[60]

There may be instances when the options of a body tasked to administer a treaty are relevant, but only insofar as that opinion is about that treaty. The World Intellectual Property Office's opinions on the Berne Convention may have persuasive effect in our understanding of the Berne Convention, but they cannot be said to have persuasive or moral effect on our interpretation of the Intellectual Property Code.

Article 11 of the Berne Convention does state that authors of musical works have the exclusive right to authorize the public performance and any communication to the public of the performance of their works.^[61] However, this must be read in conjunction with Article 11bis, which states that the contracting states determine in domestic law the conditions under which the rights of composers to authorize broadcasting rights may be exercised:

<<https://www.wto.org/english/whatis/treaties/berne/11bis.htm> (visited= july= 8, 2022).

Article 11bis

Broadcasting and Related Rights:

1. Broadcasting and other wireless communications, public

communication of broadcast by wire or rebroadcast, public

communication of broadcast by loudspeaker or analogous instruments;

2. Compulsory licenses; 3. Recording; ephemeral recordings

(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.

(2) It shall be a matter for legislation in the countries of the Union to determine the conditions under which the rights mentioned in the preceding paragraph may be exercised, but these conditions shall apply only in the countries where they have been prescribed. They shall not in any circumstances be prejudicial to the moral rights of the author, nor to his right to obtain equitable remuneration which, in the absence of agreement, shall be fixed by competent authority.

(3) In the absence of any contrary stipulation, permission granted in accordance with paragraph (1) of this Article shall not imply permission to record, by means of instruments recording sounds or images, the work broadcast. It shall, however, be a matter for legislation in the countries of the Union to determine the regulations for ephemeral recordings made by a broadcasting organization by means of its own facilities and used for its own broadcasts. The preservation of these recordings in official archives may, on the ground of their exceptional documentary

character, be authorized by such legislation. (Emphasis supplied)

The World Intellectual Property Office may opine whether our domestic laws are aligned with our treaty obligations. However, that is for our Legislature to heed when it sees fit to amend or repeal any provision in the Intellectual Property Code or any other law governing intellectual property rights. Courts can also consider the World Intellectual Property Office's opinions when they interpret our treaty obligations vis-à-vis domestic law. But their guidance, unanchored to specific treaty obligations, cannot bind this Court's interpretation of domestic law. Our accession to the Berne Convention did not bestow upon the World Intellectual Property Office any vestige of judicial power.

IV

Radio is a medium for mass communication, enjoyed both in private households and public parks. "Radio signals then and now do not respect political and cultural boundaries—radio signals may and do cross the imagined boundaries of nation and country." [62] The ubiquity of radio comes both from the low barriers to access radio frequencies, [63] and the historical use of Filipino languages in radio broadcasting. The flexible nature of the medium, as well as its distribution and scale, makes it a "democratic" medium that extends throughout the archipelago, [64] especially to demographics for whom mass media could be otherwise inaccessible. [65] Radio has been described as "part of Filipino culture": [66]

Perhaps no other media channel has touched the lives of ordinary Filipinos as much as the radio. From the traditional panawagans during personal tragedies or natural disasters, the tearjerkers of Tiya Dely Magpayo, knowledge power of Ernie Baron, eccentric health advises from Johnny Midnight and of course, the most requested songs in pop music radio stations.

But the power of radio is best dramatized during the 1986 People Power Revolution. This historic event, which led to the overthrow of the Marcos dictatorship, was given impetus with an appeal from Jaime Cardinal Sin Archbishop, of Manila, aired over Radio Veritas, a Catholic radio station, asking freedom loving Filipinos to support then Gen. Fidel V. Ramos and then Defense Minister Juan Ponce Enrile. In response, millions of Filipinos took over EDSA for four days. Millions of Filipinos all over the country followed the developments of the historic event from the clandestine Radyo Bandido anchored by women broadcaster June Keithley.

Radio is more than just a media channel to many Filipinos, it is a way of life. It is part of Filipino culture. Even today's so-called Generation X still finds radio "in" despite competition from the Internet and MTV. Consider these: The RX Concert Series features live performances by renowned bands and artists — broadcast live from the radio station's studio itself. Generation RX presents viewpoints on various issues from the pop generation who send their [opinions] via telephone, pager, and recently text messages. Both programs explain why radio listening is still a favorite past time of many young audiences.

The fact that radio uses the local language or dialect makes it the most accessible channel to the Filipino masa. [67]

During the height of the United States' physical, political, social, and cultural colonization of this country, [68] radio's role in popularizing Philippine music cannot be understated:

The American community generally regarded radio as an effective medium for the Americanization of the Philippines, which was an expressed colonial goal. However, American station managers sensed an appetite for Filipino elements in the programming when advertising for Tagalog programs began to increase, so the goal of Americanization came into conflict with the demands of making a profit. As businessmen, station owners and managers understood that satisfying the preferences of listeners created the critical mass of audiences that advertisers sought, which by the early 1930s had become the most important source of income of radio stations. Listeners mailed their requests for musical numbers not only in Tagalog but also in other

Philippine languages, and it became the job of the broadcasting manager to find individuals who could perform the requested numbers.

Local songs began to be heard on the air as early as 1929. The director of the National Library Teodoro M. Kalaw wrote that the frequent airplay of local songs increased their popularity to a point where the music sheets of kundiman outsold those of jazz. Kalaw praised radio for what it had done to revive the popularity of Philippine songs and the consequent flowering of local music such as kundiman, balitaw—an extemporaneous poetic debate between a man and a woman that is sung and danced simultaneously—and folk songs.... Some of the more memorable Tagalog compositions that gained wide acceptance through radio were "Dahil sa Iyo" (Because of You), "Ang Tangi Kong Pag-Ibig" (My Only Love), and "Maala-ala Mo Kaya?" (Do You Remember?).^[69] (Citations omitted)

Incidentally, that period in radio's history also illustrates the difference between public performance and communication to the public of musical compositions: Philippine songs during American colonial times were broadcast either as live in-studio performances or using recordings made with the burgeoning new technology of phonographic recordings.^[70]

When we characterize the usual use of radio as a vehicle for copyright infringement, we greatly diminish its role as a vital medium in the social life of this nation, one that has helped shape great movements in our history^[71] and is integral to the development of a common yet diverse national identity.^[72] We impose on radio a scheme of requirements for broadcasting musical works unsupported by law, and on its audience a listening experience fraught with paranoia and uncertainty. At worst, we punish radio for the qualities intrinsic to it as a medium. To avoid further pursuit by petitioner and other collecting societies, those living and working in public spaces may simply turn off their radios, to the detriment of the creator, the medium, and the public.

ACCORDINGLY, I vote to DENY the Petition for Review on Certiorari. The April 19, 2017 Decision and August 3, 2017 Resolution of the Court of Appeals in CA-G.R. CV No. 105430 are AFFIRMED. Respondent Anrey, Inc. committed no copyright infringement in this case.

[1]WENWEI GUAN, THE ORIGIN OF COPYRIGHT: EXPRESSION AS KNOWING IN BEING AND COPYRIGHT ONTO-EPISTEMOLOGY 9 (2021) citing LYMAN R. PATTERSON, COPYRIGHT IN HISTORICAL PERSPECTIVE 224-225 (1968).

[2]INTELLECTUAL PROP. CODE, sec. 24 states:

SECTION 24. Prior Art. — Prior art shall consist of:

24.1. Everything which has been made available to the public anywhere in the world, before the filing date or the priority date of the application claiming the invention; and

24.2.The whole contents of an application for a patent, utility model, or industrial design registration, published in accordance with this Act, filed or effective in the Philippines, with a filing or priority date that is earlier than the filing or priority date of the application: Provided, That the application which has validly claimed the filing date of an earlier application under Section 31 of this Act, shall be prior art with effect as of the filing date of such earlier application: Provided, further, That the applicant or the inventor identified in both applications are not one and the same.

[3]INTELLECTUAL PROP. CODE, sec. 173 states:

SECTION 173. Derivative Works. — 173.1. The following derivative works shall also be protected by copyright:

(a) Dramatizations, translations, adaptations, abridgments, arrangements, and other alterations of literary or artistic works; and

(b) Collections of literary, scholarly or artistic works, and compilations of data and other materials which are original by reason of the selection or coordination or arrangement of their contents.

173.2. The works referred to in paragraphs (a) and (b) of Subsection 173.1 shall be protected as new works: Provided, however, That such new work shall not affect the force of any subsisting copyright upon the original works employed or any part thereof, or be construed to imply any right to such use of the original works, or to secure or extend copyright in such original works.

[4]ABS-CBN Broadcasting Corporation v. Philippine Multi-Media System, Inc., 596 Phil. 283 (2009) [Per J. Ynares-Santiago, Third Division].

[5]755 Phil. 709 (2015) [Per J. Leonen, Second Division].

[6]Id. at 773-774.

[7]Ponencia, p. 14.

[8]Id. at 15.

[9]INTELLECTUAL PROP. CODE, as amended, sec. 54 states:

SECTION 54. Term of Patent. — The term of a patent shall be twenty (20) years from the filing date of the application.

[10]INTELLECTUAL PROP. CODE, as amended, sec. 213 states:

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

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

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

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

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

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

However, the moral rights of an author have a different term (see Intellectual Property Code, sec. 198).

[11]INTELLECTUAL PROP. CODE, secs. 145 and 146.

[12]INTELLECTUAL PROP. CODE, subsec. 172.2 states:

172.2. Works are protected by the sole fact of their creation, irrespective of their mode or form of expression, as well as of their content, quality and purpose.

[13]See, e.g., authorship in Subsection 178.5, reproductions in Section 187, and reproduction rights over computer programs in Section 189.

[14]Ponencia, pp. 14-15.

[15]See, e.g., CONST., art. XIV, secs. 16 and 17, which state:

SECTION 16. All the country's artistic and historic wealth constitutes the cultural treasure of the nation and shall be under the protection of the State which may regulate its disposition.

SECTION 17. The State shall recognize, respect, and protect the rights of indigenous cultural communities to preserve and develop their cultures, traditions, and institutions. It shall consider these rights in the formulation of national plans and policies.

In relation to Republic Act No. 8371 (1997), secs. 32 and 34, which state:

SECTION 32. Community Intellectual rights. ICCs/Ips have the right to practice and revitalize their own cultural traditions and cultures. The State shall preserve, protect and develop the past, present and future manifestations of their cultures as well as the right to the restitution of cultural, intellectual, religious, and spiritual property taken without their free and prior informed consent or in violation of their laws, traditions and customs.

SECTION 34. Rights to Indigenous Knowledge Systems and Practices and to Develop Own Sciences and Technology. ICCs/Ips are entitled to the recognition of the full ownership and control and protection of their cultural and intellectual rights. They shall have the right to special measures to control, develop and protect their sciences, technologies and cultural manifestations, including human and other genetic resources, seeds, including derivatives of these resources, traditional medicines and health practices, vital medicinal plants, animals and minerals, indigenous knowledge systems and practices, knowledge of the properties of flora and fauna, oral traditions, literature, designs, and visual and performing arts.

[16]Madhavi Sunder, Intellectual Property and Identity Politics: Playing with Fire, 4. J. GENDER RACE & JUST. 69, 70 (2000).

[17]Republic Act No. 9105 (2001), Art Forgery Act of 2001; Republic Act No. 8492 (1998), National Museum Act of 1998.

[18]Republic Act No. 8047 (1995). Book Publishing Industry Development Act.

[19]Presidential Decree No. 208 (1973) grants certain privileges and honors to National Artists; Republic Act No. 7355 (1992), Manlilikha ng Bayan Act.

[20]Republic Act No. 4165 (1964), An Act Creating the National Commission on Culture and Providing Funds Therefor.

[21]CONST., art. III, sec. 4 states:

SECTION 4. No law shall be passed abridging the freedom of speech, of expression, or of the press, or the right of the people peaceably to assemble and petition the government for redress of grievances.

[22]CONST., art. XIV, secs. 14-16 state:

SECTION 14. The State shall foster the preservation, enrichment, and dynamic evolution of a Filipino national culture based on the principle of unity in diversity in a climate of free artistic and intellectual expression.

SECTION 15. Arts and letters shall enjoy the patronage of the State. The State shall conserve, promote, and popularize the nation's historical and cultural heritage and resources, as well as artistic creations.

[23]See *Columbia Pictures, Inc. v. Court of Appeals*, 329 Phil. 875 (1996) [Per J. Regalado, En Banc].

[24]*Jane C. Ginsburg, Copyright and Control over New Technologies of Dissemination*, 101 COLUM. L. REV. 1613, 1616 (2001).

[25]361 Phil. 900 (1999) [Per J. Mendoza, Second Division].

[26]*Id.* at 914.

[27]Because the alleged infringing acts were committed in 2008, the governing law is Republic Act No. 8293 (1997), prior to the amendments introduced by Republic Act No. 10372 in 2013.

[28]Chapter XII also governs other audiovisual performances of literary and artistic works.

[29]INTELLECTUAL PROP. CODE, as amended, subsec. 203.1 states:

SECTION 203. Scope of Performers' Rights. – Subject to the provisions of Section 212, performers shall enjoy the following exclusive rights:

203.1. As regards their performances, the right of authorizing:

(a) The broadcasting and other communication to the public of their performance; ...

[30]INTELLECTUAL PROP. CODE, as amended, subsec. 208.4 states:

SECTION 208. Scope of Right. — Subject to the provisions of Section 212, producers of sound recordings shall enjoy the following exclusive rights:

....

208.4. The right to authorize the making to the public of their sound recordings in such a way that members of the public may access the sound recording from a place and at a time individually chosen or selected by them, as well as other transmissions of a sound recording with like effect.

[31]*Ponencia*, p. 8.

[32]232 Phil. 426 (1987) [Per J. Paras, Second Division].

[33]*Ponencia*, p. 19.

[34]ABS-CBN News, KBP, FILSCAP agree to boost the music industry, ABS-CBN NEWS, February 4, 2012, available at <<https://news.abs-cbn.com/lifestyle/02/03/12/kbp-filscap-agree-boost-local-music--industry>> (last accessed on August 7, 2022); Amy R. Remo, Filipino artists forge pacts to collect copyright dues, INQUIRER.NET, July 3, 2013, available at <<https://business.inquirer.net/130111/filipino-artists-forge-pacts-to-collect-copyright-dues>> (last accessed on August 7, 2022)

[35]*Kapisanan ng mga Brodkaster ng Pilipinas, About KBP*, KBP WEBSITE, available at <<https://www.kbp.org.ph/about-kbp>> (last accessed on August 7, 2022).

[36]See INTELLECTUAL PROP. CODE, as amended, subsec. 180.1, which states:

SECTION 180. Rights of Assignee of 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.

[37]See, e.g., Filipino Society for Composers, Authors, and Publishers, Rates for Radio Broadcast (KBP Member), [KBP WEBSITE](https://filscap.org/wp-content/uploads/2020/04/FILSCAP-Industry-Rate-for-KBP-2015-2019.pdf), available at <https://filscap.org/wp-content/uploads/2020/04/FILSCAP-Industry-Rate-for-KBP-2015-2019.pdf> (last accessed on August 7, 2022).

[38]INTELLECTUAL PROP. CODE, as amended, subsec. 180.5 states:

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.

See, e.g., Filipino Society for Composers, Author, and Publishers, Filscap License Application Form: Radio Broadcast, [FILSCAP WEBSITE](https://filscap.org/wp-content/uploads/2020/06/Application-Form-for-Radio-Broadcast.pdf), available at <https://filscap.org/wp-content/uploads/2020/06/Application-Form-for-Radio-Broadcast.pdf> (last accessed on August 7 2022).

[39]INTELLECTUAL PROP. CODE, as amended, sec. 216(b) states:

SECTION 216. Infringement. — Any person infringes a right protected under this Act when one:

....

(b) Benefits from the infringing activity of another person who commits an infringement if the person benefiting has been given notice of the infringing activity and has the right and ability to control the activities of the other person[.]

[40]Ernesto I. Songco, Broadcasting in the Philippines involvement in development, MEDIA ASIA 214, 216 (1978); Elizabeth L. Enriquez et al., Voices of a Nation: Radio in the Philippines, in THE PALGRAVE HANDBOOK OF GLOBAL RADIO 275, 284-285 (2012).

[41]CIVIL CODE, art. 1311 states:

ARTICLE 1311. Contracts take effect only between the parties, their assigns and heirs, except in case where the rights and obligations arising from the contract are not transmissible by their nature, or by stipulation or by provision of law. The heir is not liable beyond the value of the property he received from the decedent.

If a contract should contain some stipulation in favor of a third person, he may demand its fulfillment provided he communicated his acceptance to the obligor before its revocation. A mere incidental benefit or interest of a person is not sufficient. The contracting parties must have clearly and deliberately conferred a favor upon a third person.

[42]See Rico V. Domingo, Piracy and its Effects on the Film Industry, 13 WORLD BULL. 137, 139 (1997).

[43]Ponencia, pp. 16-18.

[44]283 U.S. 191 (1931).

[45]422 U.S. 151 (1975).

[46]949 F.2d 1482 (1991). It must also be pointed out that this case is not a case of the United States Supreme Court, but that of the United States Court of Appeals, Seventh Circuit.

[47]Ponencia, p. 18.

[48]Id.

[49]U.S. CONST., art. I, sec. 8 states:

Section 8. The Congress shall have Power ... To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries[.]

[50]Buck v. Jewell-LaSalle Realty, Co., 283 U.S. 191, 195 (1931).

[51]Id.

[52]949 F.2d 1482, 1485 (7th Cir. 1991).

[53]Id. at 1484-1485.

[54]Ponencia, pp. 25-26.

[55][2012] EUECJ C-162/10.

[56][2021] EWCA Civ 441.

[57]Phonographic Performance (Ireland), ltd. v. Ireland [2012] EU ECJ C-162/10, pars. 18-22.

[58]TuneIn Inc. v. Warner Music UK, Ltd. & Anor [2021]EWCA Civ 441, par. 6 states, "A traditional radio station (i.e. a radio station broadcasting by radio waves using FM, AM etc.) which wishes to play recorded music to its listeners needs a licence from the Claimants if the music is within the Claimants' repertoire. One source of these licences in the UK is the collecting society Phonographic Performance Ltd ("PPL"). Today radio stations are available on the internet. That includes "simulcasts" and "webcasts". The internet signal is received as a stream by the listener. A simulcaster is a traditional radio station which also simultaneously transmits its signal over the internet. A webcaster simply transmits its signal over the internet and does not also broadcast by radio waves. These can be referred to together as internet radio stations. They may also require a licence if they are going to play the relevant music recordings, depending on the applicable law."

[59]Ponencia, p. 20 states: "As one of the signatories to the convention establishing the WIPO, the WIPO guidance has a persuasive or moral effect in the interpretation of our intellectual property laws." The ponencia cites not the World Intellectual Property Office itself, but a committee under it with a mandate specific to genetic resources, traditional knowledge, and traditional cultural expressions. See Assembly of the Member States of WIPO, Report of the Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore, Sixty-Second Series of Meetings, October 4 to 8, 2021, available at <<https://www.wipo.int/export/sites/www/tk/en/documents/pdf/igc-mandate-2022-2023.pdf>> (last accessed on August 7, 2022).

[60]CONST., art. VIII, sec. 1 states:

SECTION 1. The judicial power shall be vested in one Supreme Court and in such lower courts as may be established by law.

Judicial power includes the duty of the courts of justice to settle actual controversies involving rights which are legally demandable and enforceable, and to determine whether or not there has been a grave abuse of discretion amounting to lack or excess of jurisdiction on the part of any branch or instrumentality of the Government.

[61]Berne Convention, art. 11 states:

<https://www.wto.org/english/whatis/treaties/berne/berne_e.htm (visited= july= 8, 2022).

<https://www.wto.org/english/whatis/treaties/berne/berne_e.htm (visited= july= 8, 2022).

Article 11

Certain Rights in Dramatic and Musical Works:

1. Right of public performance and of communication to the public of a performance
2. In respect of translations

(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.

(2) Authors of dramatic or dramatico-musical works shall enjoy, during the full term, of their rights in the original works, the same rights with respect to translations thereof.

[62]Elizabeth L. Enriquez, APPROPRIATION OF COLONIAL BROADCASTING: A HISTORY OF EARLY RADIO IN THE PHILIPPINES, 1922-1946 21 (2008).

[63]See John A. Lent, Philippine Radio – History and Problems, in ASIAN STUDIES (1968), which discussed how radio was accessible regardless of geography ("In a nation made up of 7,000 islands, a medium is needed that can reach anywhere. So far, radio is the only one capable of this." Id. at 52), wealth ("Barrio (small village) folk, traditionally isolated from the outside world, now absorb fresh ideas and keep abreast of national and international developments through transistor [radios].... Why the great emphasis placed on the transistor? What was wrong with the battery or electric radios? First of all, many barrios in the Philippines do not have electricity[,] and those having electricity still think of it as a luxury to be used sparingly. In addition, battery radios are prohibitively costly (because of the short life of the expensive batteries) and cumbersome." Id. at 37), and educational attainment ("Why do provincial cities have so many radio stations as compared to the number of newspapers? Reuben Canoy, Cagayan de Oro City pioneer in radio, explained that radio is easier to organize than newspapers. He added: 'You can get ads for radio and also there is not the need for as many staff members as newspapers. Of course, people who can't read can listen.'" Id. at 44-45).

[64]Resil B. Mojares, Taking Politics: The Komentaryo on Cebu Radio, 26 PHILIPPINE QUARTERLY OF CULTURE AND SOCIETY NO. 3/4 337, 338 (1998).

[65]See Carlos Arnaldo, The Electronic Information Media in the Second Decade of Development, 19 PHIL. STUD. No. 2 420, 420 (1971), which states, "The advent of the transistor in the Sixties proliferated the pocket-size radio throughout the country ten times faster than the nation's already high birth rate. Radio quickly became the poorman's newspaper, drama theatre, and jukebox."

[66]Ramon R. Tuazon, Radio as a way of life, NATIONAL COMMISSION ON CULTURE AND ARTS, available at

<<https://ncca.gov.ph/about-ncca-3/subcommissions/subcommission-on-cultural-dissemination/scd/communication/>

radio-as-a-way-of-life/> (last accessed on August 7, 2022).

[67]Id.

[68]Carrol Atkinson, Radio Used as an Educational Tool in the Philippine Islands, 25 MODERN LANGUAGE JOURNAL NO. 9 675, 675-676 (1941); Doreen G. Fernandez, Mass Culture and Cultural Policy: The Philippine Experience, 37 PHIL. STUD. NO. 4 488, 492 (1989).

[69]Elizabeth L. Enriquez, APPROPRIATION OF COLONIAL BROADCASTING: A HISTORY OF EARLY RADIO IN THE PHILIPPINES, 1922-1946 113-114 (2008).

[70]Id. at 114.

[71]See Elizabeth L. Enriquez, Media as Site of Social Struggle: The Role of Philippine Radio and Television in the EDSA Revolt of 1986, 3 PLARIDEL No. 2 123 (2006).

[72]Ernesto I. Songco, Broadcasting in the Philippines: involvement in development, MEDIA ASIA 218 (1978).

SEPARATE CONCURRING OPINION

CAGUIOA, J.:

I concur in the result.

At the outset, it is important to stress that this case presents an opportunity for the Court to balance the rights of music copyright owners with public interest, as well as to finally elucidate on the scope of the right of public performance and the right of communication to the public.

The Filipino Society of Composers, Authors and Publishers, Inc. (FILSCAP), the petitioner in this case, is "a non-stock, non-profit association of composers, lyricists, and music publishers"[1] accredited by the Intellectual Property of the Philippines (IPO) to perform the role of a Collective Management Organization (CMO), and is a member of the Paris-based International Confederation of Societies of Authors and Composers (Confédération Internationale des Sociétés d'Auteurs et Compositeurs or CISAC), the umbrella organization of all composer societies worldwide. Being the designated CMO of composers, lyricists, and music publishers, FILSCAP assists in "protecting the intellectual property rights of its members by licensing performances of their copyright music." [2] For this purpose, FILSCAP gets assigned the copyright by its members, [3] and, as assignee, then collects royalties which come in the form of license fees from end-users who intend to "publicly play, broadcast, stream, and to a certain extent (reproduce) any copyrighted local and international music of its members." [4]

This case deals with the use of copyrighted music by respondent Anrey, Inc., (Anrey), an operator of three Sizzling Plate restaurants (Anrey's restaurants) in Baguio City. [5]

After FILSCAP representatives monitored the restaurants operated by Anrey and found these establishments to have played various works included in FILSCAP's repertoire, FILSCAP sent demand letters informing Anrey's restaurants of their obligations under Republic Act No. (RA) 8293, otherwise known as the Intellectual Property Code (IP Code), and demanding that they pay the appropriate amount of license fees and/or that they obtain the necessary license from FILSCAP.

Anrey's restaurants, however, refused to heed the demand, prompting FILSCAP to file a complaint for copyright infringement against Anrey. In its Answer to the complaint, Anrey questioned FILSCAP's authority to enforce music copyright and — without explicitly raising as defenses any of the exceptions to copyright infringement under

the law — denied that its restaurants committed copyright infringement.

The ponencia of Associate Justice Rodil V. Zalameda correctly rules in favor of FILSCAP, finding that Anrey committed copyright infringement by playing, without a license from FILSCAP, copyrighted music through loud speakers in the dining areas of its restaurants.[6]

I concur with the finding of copyright infringement in the ponencia, and agree that the acts of Anrey are not analogous to fair use.[7] Yet, I write this separate opinion to offer a nuanced discussion on the different limitations on copyright and, more particularly, the concept of fair use. I also express reservations as to the manner in which the ponencia deals with the rights of "public performance" and "communication to the public." I submit that:<https://www.wto.org/english/whatis/treaties/dispu_e/cases_e/1pagesum_e_dsl_60sum_e.pdf> (visited= july= 8,= 2022).

I.

The Court is called upon not to simply discuss the provisions on copyright protection, but to extensively delve into its existing limitations, namely:

a.

Limitations on copyright

b.

Fair Use

i.

Fair Use Doctrine

ii.

Fair Use in the Philippines

iii.

The Four Fair Use Factors

1.

First Factor: The Purpose and Character of Use

2.

Second Factor: Nature of Copyrighted Work

3.

Third Factor: Amount and Substantiality of the Portion Used

4.

Fourth Factor: The Effect of the Use Upon the Potential Market for or Value of the Copyrighted Work

c.

The acts of Anrey do not fall under any of the exceptions to copyright infringement under the IP Code.

II.

The law itself distinguishes the right of "public performance" from the right of "communication to the public," either right being enforceable through FILSCAP.

a.

The right of public performance and the right to communicate to the public are two separate and distinct rights.

b.

As a general rule, a single radio reception of a copyrighted musical work cannot be both a public performance and a communication to the public.

c.

Any further communication to a "new public" beyond the original broadcast is an exercise of the right to communicate to the public under Section 177.7 in relation to 171.3 of the IP Code.

d.

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

III.

Anrey must pay FILSCAP actual damages.

DISCUSSION

<<https://www.wto.org/> english="" tratop_e="" dispu_e="" cases_e="" 1pagesum_e="" dsl="" 60sum_e.pdf="" (visited="" july="" 8,="" 2022).

I. THE COURT IS CALLED UPON NOT TO SIMPLY DISCUSS THE PROVISIONS ON COPYRIGHT PROTECTION, BUT TO EXTENSIVELY DELVE INTO ITS EXISTING LIMITATIONS

<<https://www.wto.org/> english="" tratop_e="" dispu_e="" cases_e="" 1pagesum_e="" dsl="" 60sum_e.pdf="" (visited="" july="" 8,="" 2022).

As mentioned, the primordial issue in this case is the existence of copyright infringement. As correctly held by the ponencia, in order to prove copyright infringement, the copyright owner must not only be able to demonstrate that the infringers violated at least one economic right under Section 177 of the IP Code, but must also show that "the act complained must not fall under any of the limitations on copyright under Section 184 of the [IP Code] or [amount] to fair use of copyrighted work." [8] Clearly, therefore, in resolving the main issue of copyright infringement, the Court is called upon to consider and delve into the exceptions to copyright infringement (i.e., the Limitations on Copyright under Section 184 of the IP Code and Fair Use of a Copyrighted Work under Section 185 of the IP Code) because they are crucial in determining whether copyright infringement exists.

Notably, even if Anrey has not explicitly raised as affirmative defenses the exceptions to copyright infringement, its defenses are akin to these exceptions, as will be discussed in more detail below. In any event, the fact that Anrey did not expressly raise these exceptions as issues in the present case is of no moment.

In the first place, *Spouses Campos v. Republic* [9] explains that the Court may consider issues not raised by the parties if these are necessary at arriving at a just decision, serve the interest of justice, and necessary to rule on the questions properly assigned as errors:

The general rule that an assignment of error is essential to appellate review and only those errors assigned will be considered applies in the absence of certain exceptional circumstances. As exceptions to the rule, the Court has considered grounds not raised or assigned as errors in instances where: (1) grounds not assigned as errors but affecting jurisdiction over the subject matter; (2) matters not assigned as errors on appeal but are evidently

plain or clerical errors within the contemplation of the law; (3) matters not assigned as errors on appeal, whose consideration is necessary in arriving at a just decision and complete resolution of the case or to serve the interest of justice or to avoid dispensing piecemeal justice; (4) matters not specifically assigned as errors on appeal but raised in the trial court and are matters of record having some bearing on the issue submitted which the parties failed to raise or which the lower court ignored; (5) matters not assigned as errors on appeal but are closely related to the assigned error/s; and (6) matters not assigned as errors on appeal, whose determination is necessary to rule on the question/s properly assigned as errors. The present case falls into the exceptions. We find no error by the CA in resolving the issues on the nature and duration of the petitioners' possession and on the alienable character of the subject land. These issues were apparently not raised by the Republic in its appeal before the CA, but are crucial in determining whether the petitioners have registrable title over the subject land. In *Mendoza v. Bautista*, the Court held that the appellate court reserves the right, resting on its public duty, to take cognizance of palpable error on the face of the record and proceedings, and to notice errors that are obvious upon inspection and are of a controlling character, in order to prevent a miscarriage of justice due to oversight.[10] (Emphasis and citations omitted)

Secondly, for the immediate protection of the general public against an overly expansive interpretation of the coverage of music copyright protection, the Court's verdict must also "thoroughly expound on and construe more definitively the guardrails already recognized under the law. This is part and parcel of the Court's function not only to adjudicate the rights of the parties but also, or more so, to interpret the law for the guidance of all. After all, even the ponencia acknowledges that an overly broad interpretation could cause even ordinary music listeners to live in fear, and is thus "a cause for concern." [11]

Music copyright is not a topic often discussed in our jurisprudence. Philippine jurisprudence has not yet caught up with the recent technological advances that have facilitated the access to, and multiplied the manner of use of, copyrighted musical works. Accordingly, even as the Court, by its decision in this case, shows respect for the copyright owners' rights, it also must prudently temper the wide-ranging effects of this decision in order to protect the public when using copyrighted music under the instances allowed by law. This the Court can do because in determining whether Anrey committed copyright infringement, it is also, necessary to explain why its acts do not fall under the exceptions to copyright infringement.

Lastly, the discussion of the exceptions to copyright infringement is necessary — especially for this landmark case — for the Court to balance the competing interests involved in copyright protection.

As stated in the ponencia, intellectual property has a social function under the Constitution.[12] Section 2 of the IP Code underscores that the ultimate objective of having an intellectual property system, which includes the means of protecting copyrights, is to benefit society, viz.:

SECTION 2. Declaration of Stale 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. (Emphasis supplied)

Indeed, the delicate balance involved in copyright protection will be maintained and strengthened if the Court

decides this case fully and wholly, considering its implications, and not simply deciding it in a vacuum. This delicate balancing is warranted because the expansive breadth of rights conferred upon copyright holders may be used to the detriment of everyone else. A plain reading of the copyright provisions in the IP Code readily conveys that the law may be "weaponized" by copyright owners because of its broad coverage and because of its penal provisions. In this light, it is imperative to elaborate on the exceptions to copyright infringement — to significantly shape the contours of music copyright jurisprudence moving forward.

Because of the dearth of jurisprudence discussing the nuances of music copyright, resolving the rights of the parties herein without amply emphasizing their reasonably defined edges may do more harm than good and tilt the balance in favor of copyright holders to the prejudice of the rest of society. Thus, notwithstanding the fact that Anrey may not have expressly raised as defenses any of the exceptions to copyright infringement, the Court is called upon to be proactive in reassuring the public that not all instances of using copyrighted music will be met with sanctions. Surely, this proactive stance in encouraging others to use protected material in a manner consistent with the copyright owners' rights is in line with the role of the State to "promote the diffusion of knowledge and information for the promotion of national development and progress and the common good."^[13]

Section 177 of the IP Code makes it clear that a copyright over protected works is a bundle of exclusive economic rights in favor of the author. Generally speaking, these comprehensively encompass the several means by which copyrighted material may be used, viz.:

CHAPTER V

Copyright or Economic Rights

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; x x x

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. (Sec. 5, P.D. No. 49a) (Emphasis supplied)

Section 217 of the IP Code, in turn, provides penal sanctions for copyright infringement:

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SECTION 217. Criminal Penalties. — 217.1. Any person infringing any right secured by provisions of Part IV of this Act or aiding or abetting such infringement shall be guilty of a crime punishable by:

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(a)

Imprisonment of one (1) year to three (3) years plus a fine ranging from Fifty thousand pesos (P50,000) to One hundred fifty thousand pesos (P150,000) for the first offense.

(b)

Imprisonment of three (3) years and one (1) day to six (6) years plus a fine ranging from One hundred fifty thousand pesos (P150,000) to Five hundred thousand pesos (P500,000) for the second offense.

(c)

Imprisonment of six (6) years and one (1) day to nine (9) years plus a fine ranging from Five hundred thousand pesos (P500,000) to One million five hundred thousand pesos (P1,500,000) for the third and subsequent offenses.

(d)

In all cases, subsidiary imprisonment in cases of insolvency. (Emphasis supplied)

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Based on the foregoing, it may be readily concluded that these penal sanctions pertain to wide-ranging conduct, including acts involving copyrighted material which are arguably commonplace in today's world. This, in effect, further narrows the already thin line dividing infringement and allowable use or reproduction. To illustrate, there is yet no categorical guidance on whether the following ordinary or day to day situations fall within the definition of copyright infringement and whether these people may be subjected to the penal provisions of the law:<<https://www.wto.org/> english="" tratop_e="" dispu_e="" cases_e="" 1pagesum_e="" dsl="" 60sum_e.pdf="" (visited="" july="" 8,="" 2022).

(1)

An organization established to promote awareness of the hardships endured by street children arranges an enclosed gallery in the high school cafeteria showcasing its members' photographs of street children. The organization charges a viewing fee of 10 pesos to visitors to raise funds to cover its administrative and operational expenses. To improve the atmosphere of the gallery, the organization plays the entire album of Smokey Mountain which includes the song "Paraiso."

(2)

A taxi driver listens to the radio inside his car for his own indulgence but regularly receives huge tips from his passengers for playing music through his radio.

(3)

A small carindaria owner sings the entirety of her favorite songs all day to entertain her customers who keep coming back.

(4)

A teenager plays the Eraserheads album in the background to improve the ambiance in a garage sale.

(5)

A customer sings all the hit songs of Queen onstage in a karaoke bar where more than 500 customers regularly go every night.

Even assuming that the copyright owners or their representatives do not, in reality, enforce their rights against ordinary individuals like those described in the examples above, this does not change the fact that their acts may fall under the definition of copyright infringement and potentially make them subject to penal sanctions. In fact, the lack of jurisprudence involving these ordinary people doing everyday activities precisely serves as the impetus for why the Court should take a proactive stance in elaborating on the limitations of copyright law.

In view of the unlikelihood that jurisprudence will categorically declare their acts as non-infringing — whether because cases have not historically been filed against them or whether because these disputes have always ended up in settlement — the Sword of Damocles would hover indefinitely over the heads of these ordinary people doing everyday activities. In this very real sense, therefore, it behooves the Court to take an active stance, and to not rely on the benevolence of copyright holders on the naïve belief that copyright holders enforcing their rights will never tyrannically bludgeon ordinary people using copyrighted material in common situations.

To be sure, the exceptions to copyright infringement are expressly provided under the IP Code. As well, the ponencia already addresses how none of these exceptions apply to the present case.^[14] However, since these exceptions are certainly difficult to understand, a more extensive yet nuanced rational interpretation of the Court would still be necessary — particularly in order to categorically give the assurance that ordinary people do not have to fear penal sanctions for using copyrighted musical works. To my mind, this is vital in this case, especially in light of the dangers an overly expansive interpretation of the coverage of music copyright protection could entail.

If the Court is to do its part in the delicate balancing of interests, copyright protection must, in the first place, not be seen as towering fortresses intended to define the metes and bounds of the owners' exclusive rights and to keep the trespassers out. While the Court is called upon to be steadfast in recognizing when the defensive ramparts have been breached, it must also reassure that these imposing edifices — while aiming to protect the interests of the owners — may also be used as platforms for the rest of society to reach loftier heights. Indeed, if the spirit of copyright protection as a catalyst for the progress or betterment of society is to be genuinely upheld, the Court must place due emphasis on how the law itself limits the coverage of copyright protection in a manner that already protects ordinary people in ordinary situations. At the risk of being repetitive, encouraging other people to

use copyrighted material in a manner consistent with copyright owners' rights is also important in order to "promote the diffusion of knowledge and information for the promotion of national development and progress and the common good."

The ponencia aptly discusses the four factors of the fair use doctrine,[15] and holds that Anrey failed to demonstrate that the use of FILSCAP's copyrighted works by its restaurants was either fair or covered by the limitations on copyright.[16] However, in view of the foregoing compelling considerations, for the guidance of the Bench, the Bar, and the public, I submit the following discussions on the exceptions to copyright infringement in Sections 184 and 185 of the IP Code.

A.

Limitations on Copyright

Section 184 of the IP Code reads:

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; (Sec. 10(1), P.D. 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; (Sec. 11, third par., P.D. 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; (Sec. 11, P.D. 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; (Sec. 12, P.D. 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 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.

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This Section expressly provides for specific situations involving the use of copyrighted material which do not

constitute infringement.

In this regard, particularly relevant to the aforementioned examples of day-to-day situations — and ultimately, the issue in this case — are paragraphs (a) and (i) of Section 184.1, which respectively involve (i) "the recitation or performance" of a work in private places, and (ii) the "public performance" and/or "communication to the public" of copyrighted works in public or publicly accessible places. Under these paragraphs, in order for a recitation, performance and/or the communication of a work to be exempt, the following requisites should be present:<https://www.wto.org/english/whatis/treaties/tratop_e.htm#dispu_e/cases_e/1pagesum_e.dsl/60sum_e.pdf (visited= july= 8,= 2022).

Under Section 184.1(a):

(i)

The recitation or performance is done (a) privately and free of charge or (b) made strictly for a charitable or religious institution or society; and

(ii)

The work has been lawfully made accessible to the public prior to the recitation or performance

Under Section 184.1 (i):

(i)

The place where the public performance and/or communication to the public is made does not charge any admission fee in respect of such performance or communication;

(ii)

The public performance and/or communication to the public is made by a club or institution: (a) for charitable or educational purpose only; and (b) whose aim is not profit making; and

(iii)

Such other requirements that may be prescribed under the implementing rules and regulations promulgated by the Director General of the IPO.[17]

Regarding the first requisite of Section 184.1 (a), for this exemption to apply, the recitation or performance should be done privately and completely free of charge — unless the same is made strictly for a charitable or religious institution or society. Corollarily, a person could avail of the exemption under Section 184.1(a) even if the recitation or performance were to be done publicly and/or for compensation, provided that the same is made strictly for a charitable or religious institution or society.

Notably, the IP Code does not specifically define the term "privately." Since Congress did not assign a statutory

definition to the term "privately," this term should thus be understood in its plain and ordinary sense,[18] i.e., "relating or belonging to an individual, opposed to the public or the government." [19] Considering, however, that the term "public," the commonly accepted antonym of "private," is given a technical meaning elsewhere in the IP Code, then resort could also be made to this definition in order to construe what "privately" as contemplated under Section 184.1(a) means. In this regard, Section 171.6 of the IP Code provides that a performance of a sound recording will be deemed as "public" if it would entail "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." [20]

In other words, construing "privately" in its ordinary sense (i.e., as the opposite of "publicly"), and coupled with the definition of "public" under Section 171.6, then this term should simply be understood to refer to situations where the work is not 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." After all, it is a settled principle of statutory construction that "words used in the Constitution or in the statute must be given their ordinary meaning except where technical terms are employed." [21] As well, the law must not be read in truncated parts, and "the whole and every part thereof must be considered in fixing the meaning of any of its parts in order to produce a harmonious whole." [22]

Meanwhile, regarding the first requisite of Section 184.1 (i), in contrast with the first requisite of Section 184.1(a), it should be clarified that based on the plain text of paragraph (i) of Section 184,[23] charging an admission fee, per se, does not take out an otherwise allowable "performance" or "communication" from this exemption. Rather, the admission fee must specifically be "charged in respect of such performance or communication." Thus, if an admission fee is charged for some other purpose not otherwise related to the performance or communication, then the latter could still be exempt under this paragraph.

Anent the second requisite of Section 184.1(i), it must be underscored that not only must the club or institution be for a "charitable or educational purpose," but it must also be "non-profit." Thus, to be exempt, the club or institution must not only first qualify as either a charitable institution, i.e., it "provide(s) for free goods and services to the public which would otherwise fall on the shoulders of government," [24] or an educational institution, i.e., it must be a school, seminary, college or similar educational establishment under the formal school system; [25] but also, said club or institution must likewise be "non-profit," such that "no net income or asset accrues to or benefits any member or specific person, with all [its] net income or asset[s] devoted to the institution's purposes and all its activities conducted not for profit." [26]

Going back to the examples of commonplace situations where copyrighted materials are used, even if the organization in the first example [27] plays the entirety of the copyrighted musical work (i.e., the entire album of Smokey Mountain which includes the song "Paraiso.") in a public place, this does not constitute copyright infringement because it falls under Section 184(i). [28] While the songs are publicly performed by the organization and an admission fee is being charged, the fee is not charged with respect to the public performance of the copyrighted music and the organization carrying out the public performance is for a charitable purpose and its aim is not profit-making.

In contrast to Section 184 which specifies the "Limitations on Copyright," Section 185 of the IP Code on Fair Use provides several factors that may encompass a multitude of situations not specifically contemplated under the law.

B.

Fair Use

i. Fair Use Doctrine

Aside from the specific exceptions and limitations contemplated under Section 184 of the IP Code, the law also provides a statutory framework that may be used as a guide in determining whether an unlicensed use of a copyrighted work falls within fair use and consequently, outside the scope of copyright infringement. Specifically, Section 185 provides as follows:

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 x x x. 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.

Copyright is defined as the right granted by a statute to the proprietor of an intellectual creation for its exclusive use and enjoyment.[29] Copyright protection is extended to creators of intellectual properties primarily to promote their personal and economic gain over their creations.[30] Although copyright protection inspired and encouraged a great deal of artistic and ingenious minds, it also effectively created a monopoly over the use of certain information, to the detriment of public availability and accessibility of literature, music, and other arts.[31] This quandary created the need to balance these two conflicting interests, and led to the development, and eventually the codification of the Doctrine of Fair Use.[32]

The Doctrine of Fair Use is "judge-made." [33] Its origin may be traced back to the fair abridgment cases litigated in English courts in the early 1700s,[34] including the leading case of *Gyles v. Wilcox, Barrow, and Nutt*. [35] This case involved a bookseller, Fletcher Gyles (Gyles), who sought to enjoin the printing of a book titled "Modern Crown Law," "it being suggested to be colourable only, and in fact borrowed verbatim from Sir Matthew Hale's Pleas of the Crown." [36] In ruling in favor of Gyles, the Court declared that an abridgment of a book that is fairly made may, "with great propriety be called a new book," [37] because "the invention, learning, and [judgment] of the author are also shown in it." [38] In this case however, the Court ruled that the "Modern Crown Law" is only a colorable reproduction, not a fair abridgment of the "Pleas of the Crown," and therefore, a mere evasion of the statute and should not be allowed. [39]

Through time, this Doctrine of Fair Abridgment evolved and shaped the modern idea and concept of fair use that is currently incorporated in copyright laws, including the Copyright Act of 1976 of the United States (US), and the IP Code of the Philippines.

The Doctrine of Fair Use was first launched in American jurisprudence in 1841 in the case of *Folsom v.*

Marsh.[40] In this case, the US Circuit Court for the District of Massachusetts ruled that the reproduction of 353 pages of President George Washington's papers in the two-volume work titled "The Life of Washington in the Form of an Autobiography," published by defendant, was not fair use and therefore, constituted "an act of piracy." [41] More importantly, in said case; Justice Joseph Story first proposed the four factors of fair use that would later be integrated into the US Copyright Act of 1976, to wit:

In short, we must often, in deciding questions of this sort, look to the nature and objects of the selections made, the quantity and value of the materials used, and the degree in which the use may prejudice the sale, or diminish the profits, or supersede the objects, of the original work.[42] (Emphasis and underscoring supplied)

Fair use has since been recognized as one of the acceptable affirmative defenses against allegations of copyright infringement.

In *Campbell v. Acuff-Rose Music, Inc.*[43] (Campbell), a case concerning a parody of the popular song "Pretty Woman," the Supreme Court of the United States (SCOTUS) definitively held that "fair use is an affirmative defense, so doubts about whether a given use is fair should not be resolved in favor of the self-proclaimed parodist." [44] In order to validly raise this defense, it is not enough to simply allege fair use. Statute and jurisprudence require the alleged infringer to prove that his or her use or reproduction is compatible with fair use, using as guide the four fair use factors enumerated in copyright laws.

At present, the Doctrine of Fair Use is not available in most European countries, which predominantly have civil law systems.[45] The copyright laws of European countries do not provide for a broad fair use exception, unlike the Copyright Act of 1976 of the US and the IP Code of the Philippines. On the other hand, they provide a list of specific uses of copyrighted works, akin to Section 184 of the IP Code, which are considered exceptions to infringement. Perhaps, the closest to the Doctrine of Fair Use would already be the Doctrine of Fair Dealing found in the copyright law of the United Kingdom (UK), also known as the Copyright, Design, and Patents Act of 1988. Unlike fair use, however, the defense of fair dealing is less subjective and may only be applied in the following cases: (1) non-commercial research; (2) criticism review and news reporting; and (3) caricature, parody and news reporting, to wit:

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Section 29. Research and private study: <<https://www.wto.org/> english="" tratop_e="" dispu_e="" cases_e="" 1pagesum_e="" dsl="" 60sum_e.pdf="" (visited="" july="" 8,="" 2022).

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(1)

Fair dealing with a work for the purposes of research for a non-commercial purpose does not infringe any copyright in the work provided that it is accompanied by a sufficient acknowledgement.

x x x x

Section 30. Criticism, review, and news reporting:

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(1)

Fair dealing with a work for the purpose of criticism or review, of that or another work or of a performance of a work, does not infringe any copyright in the work provided that it is accompanied by a sufficient acknowledgement (unless this would be impossible for reasons of practicality or otherwise) and provided that the work has been made available to the public.

x x x x

(2)

Fair dealing with a work (other than a photograph) for the purpose of reporting current events does not infringe any copyright in the work provided that (subject to subsection (3)) it is accompanied by a sufficient acknowledgement.

x x x x

Section 30A. Caricature, parody or pastiche<<https://www.wto.org/>"" english="" tr atop_e="" dispu_e="" cases_e="" 1pagesum_e="" dsl="" 60sum_e.pdf="" (visited="" july="" 8,="" 2022).

(1) Fair dealing with a work for the purposes of caricature, parody or pastiche does not infringe copyright in the work.[46]

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What is considered "fair dealing," according to the case of *Hubbard v. Vosper*,[47] is difficult to define, viz.:

It is impossible to define what is "fair dealing." It must be a question of degree. You must consider first the number and extent of the quotations and extracts. Are they altogether too many and too long to be fair? Then you must consider the use made of them. If they are used as a basis for comment, criticism or review, that may be fair dealing. If they are used to convey the same information as the author, for a rival purpose, that may be unfair. Next, you must consider the proportions. To take long extracts and attach short comments may be unfair. But, short extracts and long comments may be fair. Other considerations may come to mind also. But, after all is said and done, it must be a matter of impression. As with fair comment in the law of libel, so with fair dealing in the law of copyright. The tribunal of fact must decide.[48]

The UK courts have been stringent in appreciating the doctrine of fair dealing. For example, in the case of *The Controller of Her Majesty's Stationery Office, Ordnance Survey v. Green Amps*,[49] which involved the unauthorized use and download of the Ordnance Survey's[50] digital maps for research purposes by a company engaged in the business of providing wind turbines, the court in UK ruled that the defense of fair dealing should fail. The court noted that defendant used the maps to develop a commercial product. Thus, in view of the

commercial purpose of the research, the doctrine of fair dealing was not appreciated.

In another interesting case of *HRH Prince of Wales v. Associated Newspaper Ltd.*,^[51] involving the unauthorized use of the Prince of Wales's travel journals, the UK court ruled that the defense of doctrine of fair dealing should also fail considering that defendant obtained a copy of the journal as a result of breach of confidence. Moreover, the articles published by defendant in relation to the travel journals did not totally deal with current events. The defense of fair dealing for the purpose of criticism or review cannot also be appreciated considering that the journals have not been made available to the public for scrutiny.

In *Fraser-Woodward Limited v. British Broadcasting Corporation and Brighter Pictures Limited*,^[52] however, the UK court gave credence to the defense of fair dealing. In this case, defendants published photographs of the Beckham family, the copyright of which belongs to complainant therein. Ultimately, the court found that the subject photographs were used for the purpose of criticism or review of other works, namely the tabloid press and magazines.

ii. Fair Use in the Philippines

Although the term "fair use" was introduced in the legal system of the Philippines only when the IP Code took effect in 1998, its essence may already be culled from statutes dating back to the 1920s.

Act No. 3134,^[53] or the Copyright Law of the Philippine Islands, which became effective on March 6, 1924, specifically allowed citation or reproduction of copyrighted work for purposes of comment, dissertation and criticism. Further, it authorized reproduction of news and articles as long as proper citation is provided and parts of little extent of musical work. For reference, the relevant provision of Act No. 3134 is copied below:

SECTION 5. Lines, passages, or paragraphs in a book or other copyrighted works may be quoted or cited or reproduced for comment, dissertation, or criticism.

News items, editorial paragraphs, and articles in periodicals may also be reproduced unless they contain a notice that their publication is reserved or a notice of copyright, but the source of the reproduction or original reproduced shall be cited. In case of musical works parts of little extent may also be reproduced.^[54] (Emphasis and underscoring supplied.)

In the 1929 case of *Philippine Education Company, Inc. v. Vicente Sotto*,^[55] the Court had the opportunity to explain the legal construction that should be placed upon the second paragraph of Section 5 of Act No. 3134. The Court ruled that "where one periodical purchases, pays for and publishes an article with notice that 'all rights thereto were reserved,' another periodical has no legal right to again publish the article, without giving 'the source of reproduction' or citing the original from which it was reproduced."^[56]

Subsequently, Presidential Decree No. (PD) 49 or the Decree on the Protection of Intellectual Property^[57] was enacted in 1972 to update the provisions of Act No. 3134 in order to "give fuller protection to intellectual property and to encourage arts and letters, as well as stimulate scientific research and invention, at the same time safeguard the public's right to cultural information."^[58] In doing so, PD No. 49 expanded Section 5 of Act No. 3134 and enumerated the following limitations on copyright protection, the nature of which align with the spirit of fair use, as may be deduced from the ruling in the case of *Habana v. Robles*^[59] (Habana):

SECTION 10. When a work has been lawfully made accessible to the public, the author shall not be entitled to prohibit;

- Its recitation or performance (A) if done privately and free of charge; or (B) if made for strictly charitable or religious institution or society.

- Reproductions, translations and adaptations thereof destined exclusively for personal and private use;

SECTION 11. To an extent (sic) compatible with fair practice and justified by the scientific, critical, informatory or educational purpose, it shall be permissible to make quotations or excerpts from a work already lawfully made accessible to the public. Such quotations may be utilized in their original form or in translation.

News items, editorials, and articles on current political, social, economic, scientific or religious topic may be reproduced by the press or broadcast, unless they contain or are accompanied by a notice that their reproduction or publication is reserved. In case of musical works, parts of little extent may also be reproduced.

Quotations and excerpts as well as reproduction shall always be accompanied by an acknowledgment of the source and name of the author, if his name appears thereon.

SECTION 12. In reports of a current event by means of photography, cinematography or broadcasting, literary, scientific or artistic works which can be seen or heard in the course of said event may be reproduced and communicated to the public to the extent necessary for the purpose.

SECTION 13. Libraries, public archives and museums have the right, subject to the conditions specified in the succeeding paragraphs, to produce for purposes of their activities by photographic means, and without the consent of the caretaker or proprietor, copies of a literary or artistic work.[60] (Underscoring supplied)

PD 285,[61] which took effect on September 3, 1973, was also an indirect application of fair use in the Philippines. With affordability and availability of educational, scientific or cultural books and materials as end in mind, the law granted the government and private printers the right to reprint books, pamphlets, and other written materials, whether of domestic or foreign origin.[62]

Notwithstanding the foregoing and the subsequent institutionalization of the Doctrine of Fair Use in Section 185 of the IP Code of the Philippines, the Court has had only two notable cases that touched on the application of fair use. Specifically, these are *Habana* and *ABS-CBN Corporation v. Gozon, et al.*[63] (ABS-CBN).

In the case of *Habana*, the Court ruled that therein respondent's "act of lifting from the book of petitioners substantial portions of discussion and examples, and her failure to acknowledge the same in her book is an infringement of petitioner's copyrights." [64] In determining whether the act of reproduction constituted copyright infringement, the Court considered: (a) the amount of matter copied from the copyrighted work; and (b) the damages caused to the author of the book copied:

We believe that respondent Robles' act of lifting from the book of petitioners substantial portions of discussions and examples, and her failure to acknowledge the same in her book is an infringement of petitioners' copyrights.

x x x x

In determining the question of infringement, the amount of matter copied from the copyrighted work is an important consideration. To constitute infringement, it is not necessary that the whole or even a large portion of the work shall have been copied. If so much is taken that the value of the original is sensibly diminished, or the labors of the original author are substantially and to an injurious extent appropriated by another, that is sufficient in point of law to constitute piracy.

x x x x

The next question to resolve is to what extent can copying be injurious to the author of the book being copied. Is it enough that there are similarities in some sections of the books or large segments of the books are the same?

x x x x

In cases of infringement, copying alone is not what is prohibited. The copying must produce an "injurious effect." Here, the injury consists in that respondent Robles lifted from petitioners' book materials that were the result of the latter's research work and compilation and misrepresented them as her own. She circulated the book DEP for commercial use and did not acknowledge petitioners as her source.[65] (Emphasis and underscoring supplied)

For his part, Chief Justice Hilario Davide, Jr., in his dissenting opinion in *Habana*, 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." [66]

The case of *ABS-CBN* is a more pronounced application of the Doctrine of Fair Use. Consistent with US jurisprudence, the Court held that the determination of whether the subject five-second footage may be considered fair use is a matter of defense. The Court also had the opportunity to discuss, albeit briefly, the four factors listed in Section 185 of the IP Code that may be used as guide in determining whether there is fair use of a copyrighted work, viz.:

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.

Second, the nature of the copyrighted work is significant in deciding whether its use was fair. If the nature of the work is more factual than creative, then fair use will be weighed in favor of the user.

Third, the amount and substantiality of the portion used is important to determine whether usage falls under fair use. An exact reproduction of a copyrighted work, compared to a small portion of it, can result in the conclusion that its use is not fair. There may also be cases where, though the entirety of the copyrighted work is used without consent, its purpose determines that the usage is still fair. For example, a parody using a substantial amount of copyrighted work may be permissible as fair use as opposed to a copy of a work produced purely for economic gain.

Lastly, the effect of the use on the copyrighted work's market is also weighed for or against the user. If this court finds that the use had or will have a negative impact on the copyrighted work's market, then the use is deemed unfair.[67]

Unfortunately, in view of the insufficiency of available evidence, the determination of whether the five-second footage was subject to fair use, and consequently, the application of the four-factor test, was left to the trial court.

After the *ABS-CBN* case, there are no other fair use cases that reached the Supreme Court.

iii. The Four Fair Use Factors

Considering the broad descriptions of the four fair use factors and the tangential applications of the doctrine in the cases of *Habana* and *ABS-CBN*, I submit that reference should be had by the Court to US fair use cases in order to further elucidate the meaning and substance of each of the four factors. Although fair use cases should be

analyzed case-by-case,[68] the Court may nevertheless fashion a set of governing principles that the Bench, the Bar, and more importantly, the general public, can apply when confronted with fair use cases. This discussion would be crucial considering that, as emphasized earlier, copyright infringement may be penal in nature and that the Doctrine of Fair Use is recognized only as an affirmative defense.

Before delving into the relevant judicial interpretations made by the US Courts, it should first be emphasized that the four fair use factors set out in Section 185 of our IP Code are an exact reproduction of the factors listed in the counterpart provision of the US Copyright Act of 1976, to wit:

Section 107. Limitations on the exclusive rights: Fair use

Notwithstanding the provisions of sections 106 and 106A, the fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified by that section, for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright. In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include—

(1)

the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit 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.

The fact that a work is unpublished shall not itself bar a finding of fair use if such finding is made upon consideration of all the above factors. (Emphasis and underscoring supplied)

Accordingly, reference to US cases is not only proper, but also imperative.

Further, it should be pointed out that, as held in the case of Campbell, each of the four factors is not individually conclusive and should be weighed along with the other factors for purposes of establishing a case of fair use.

1. First Factor: The Purpose and Character of Use

The first factor to consider in determining whether an unlicensed use or reproduction of a copyrighted work is in accordance with fair use is the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes. In Campbell, the SCOTUS clarified the core value behind an enquiry as to the purpose and character of the new work:

x x x The central purpose of this investigation is to see, in Justice Story's words, whether the new work merely "supersede[s] the objects" of the original creation x x x, 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.' Although such transformative use is not absolutely necessary for a finding of fair use, the goal of copyright, to promote science and the arts, is generally furthered by the creation of transformative works. Such works thus lie at the heart of the fair use

doctrine's guarantee of breathing space within the confines of copyright, x x x and the more transformative the new work, the less will be the significance of other factors, like commercialism, that may weigh against a finding of fair use.[69] (Emphasis supplied)

Speaking of commercial purpose, the SCOTUS also clarified its ruling in *Sony Corp. of America v. Universal Studios, Inc.*, [70] and further elucidated that the commercial character of a work does not per se make it unfair. At the same time, "the mere fact that a use is educational and not for profit does not insulate it from a finding of infringement." [71] In shedding this light, the Court stated, as follows:

The language of the statute makes clear that the commercial or nonprofit educational purpose of a work is only one element of the first factor enquiry into its purpose and character. Section 107(1) uses the term "including" to begin the dependent clause referring to commercial use, and the main clause speaks of a broader investigation into "purpose and character." As we explained in *Harper & Row*, Congress resisted attempts to narrow the ambit of this traditional enquiry by adopting categories of presumptively fair use, and it urged courts to preserve the breadth of their traditionally ample view of the universe of relevant evidence x x x If indeed, commerciality carried presumptive force against a finding of fairness, the presumption would swallow nearly all of the illustrative uses listed in the preamble paragraph of § 107, including news reporting, comment, criticism, teaching, scholarship, and research, since these activities "are generally conducted for profit in this country." Congress could not have intended such a rule, which certainly is not inferable from the common-law cases, arising as they did from the world of letters in which Samuel Johnson could pronounce that "no man but a blockhead ever wrote, except for money." [72] (Emphasis and underscoring supplied)

In *Harper & Row, Publs. v. Nation Enters.* [73] (*Harper & Row*), the SCOTUS explained that "the crux of the profit/nonprofit distinction is not whether the sole motive of the use is monetary gain, but whether the user stands to profit from exploitation of the copyrighted material without paying the customary price." [74]

In other words, 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.

Applying the ruling of the SCOTUS in *Campbell*, we may use as illustrative, not limitative, examples of transformative use those listed in the preamble of Section 185 of the IP Code, i.e., for criticism, comment, news reporting, teaching, scholarship, research, and similar purposes.

In *Campbell*, the SCOTUS held that parodies which are "less ostensibly humorous forms of criticism[s]," [75] have transformative value [76] and served an entirely different function. [77] The US Court of Appeals for the Ninth Circuit, in *Hustler Magazine, Inc., v. Moral Majority, Inc.* [78] (*Hustler Magazine*), held that defendants reproduced and distributed copies of a single page from *Hustler Magazine, Inc.*'s magazine for a different purpose — "to defend himself (Jerry Falwell) against such derogatory personal attacks." [79] Similarly, the US Court of Appeals for the Second Circuit, in *The Author's Guild, Inc. v. Hathitrust* [80] (*The Author's Guild*), ruled that the creation of a full-text searchable database of books is "a quintessentially transformative use" and the same should not be considered as a substitute for the books searched. In the same line, the US Court of Appeals for the Ninth Circuit, in *Kelly v. Arriba-Soft* [81] (*Kelly*), ruled that the reproduction of plaintiffs photos as thumbnail images served an entirely different purpose — "as a tool to help index and improve access to images on the internet and their related web sites." [82] In the seminal case of *Field v. Google, Inc.* [83] (*Field*), the US District Court for the District of Nevada also ruled that Google's use of "cached" links has transformative use such as (1) it enables the users to temporarily access an inaccessible page; (2) it allows users to identify changes made to a particular website; and (3) it "allows users to understand why a page was responsive to their original query." [84]

On the other hand, in *Harper & Row*, the SCOTUS ruled that the respondent's intended purpose for the unauthorized use of the unpublished manuscripts was simply to "[supplant] the copyright holders' commercially valuable right of first publication," and thus, without any transformative use or value.[85] In *Twin Peaks Productions, Inc. v. Publications International Ltd.*[86] (*Twin Peaks*), the US Court of Appeals for the Second Circuit held that a book which simply summarizes the plots of plaintiff's teleplay has no transformative value.[87]

Taking into consideration the other fair use factors, US Courts sustained the user's claim of fair use in *Campbell*, *Hustler Magazine*, *The Author's Guild*, *Kelly*, and *Field*, but denied the same in *Harper & Row* and *Twin Peaks*.

2. Second Factor: Nature of Copyrighted Work

The second fair use factor involves the assessment of the nature of the copyrighted work. "This factor calls for recognition that some works are closer to the core of intended copyright protection than others, with the consequence that fair use is more difficult to establish when the former works are copied." [88]

In the case of *Stewart v. Abend*[89] (*Stewart*), the SCOTUS ruled that there is a higher probability for the fair use defense to fly in case of factual works than works of fiction and fantasy, since the law generally recognizes a greater need to disseminate the former than the latter. Considering that a motion picture based on a fictional short story is more creative than factual, the fair use defense was given less weight. This ruling is affirmed in *Twin Peaks*, which involved a televised work of fiction.

In addition, in *Harper & Row*, the SCOTUS stated that the fact that the copied work is unpublished is a significant element of its "nature," since "the scope of fair use is narrower with respect to unpublished works." [90]

While even substantial quotations might qualify as fair use in a review of a published work or a news account of a speech that had been delivered to the public or disseminated to the press, x x x the author's right to control the first public appearance of his expression weighs against such use of the work before its release. The right of first publication encompasses not only the choice whether to publish at all, but also the choices of when, where, and in what form first to publish a work.[91] (Emphasis supplied)

This ruling was affirmed by the US Courts in *Salinger v. Random House, Inc.*[92] and *Love v. Kwitny*,[93] where defendants' unauthorized reproduction of unpublished letters and manuscripts were weighed against fair use.

In the recent case of *Google LLC v. Oracle America, Inc.*[94] (*Google LLC*), the SCOTUS placed the copied "declaring code" farther from the core of copyright compared to other computer programs.[95] Given this, the application of fair use was held to "[unlikely undermine] the general copyright protection that Congress provided for computer programs." [96]

The foregoing judicial interpretations may be applied by analogy in similar cases or used as guide when this Court or the public is confronted with copyright infringement and fair use cases. As a rule, the closer the work is to the core of copyright protection — i.e., the more creative, imaginative, or original the copied work is, the more likely will fair use be rejected as a defense against infringement.

3. Third Factor: Amount and Substantiality of the Portion Used

The third fair use factor asks whether the amount and substantiality of the portion used in relation to the copyrighted work as a whole is reasonable. The SCOTUS, in *Google LLC*, ruled that the "substantiality" factor "will generally weigh in favor of fair use where x x x the amount of copying was tethered to a valid, and [transformative purpose]." [97] Thus,

this factor calls for thought not only about the quantity of the materials used, but about their quality and importance, too. In *Harper & Row*, for example, the Nation had taken only some 300 words out of President

Ford's memoirs, but we signaled the significance of the quotations in finding them to amount to "the heart of the book," the part most likely to be newsworthy and important in licensing serialization. We also agree with the Court of Appeals that whether "a substantial portion of the infringing work was copied verbatim" from the copyrighted work is a relevant question, for it may reveal a dearth of transformative character or purpose under the first factor, or a greater likelihood of market harm under the fourth; a work composed primarily of an original, particularly its heart, with little added or changed, is more likely to be a merely superseding use, fulfilling demand for the original.[98] (Emphasis and underscoring supplied)

In *Campbell*, the SCOTUS also clarified that the third fair use factor must be examined in relation to the first factor, which is the purpose and character of use. Thus, in this case, the Court held that a parody, which should necessarily "conjure up" at least enough of the original "to make the object of its critical wit recognizable," is fair use.[99] This is consistent with the US Court's statement in *Field* that "even copying of entire works should not weigh against a fair use finding where the new use serves a different function from the original." [100] Thus, the US District Court for the District of Nevada further stated:

x x x Google's use of entire Web pages in its Cached links serves multiple transformative and socially valuable purposes. These purposes could not be effectively accomplished by using only portions of the Web pages. Without allowing access to the whole of a Web page, the Google Cached link cannot assist Web users (and content owners) by offering access to pages that are otherwise unavailable. Nor could use of less than the whole page assist in the archival or comparative purposes of Google's "Cached" links. Finally, Google's offering of highlighted search terms in cached copies of Web pages would not allow users to understand why a Web page was deemed germane if less than the whole Web page were provided x x x. Because Google uses no more of the works than is necessary in allowing access to them through "Cached" links, the third fair use factor is neutral, despite the fact that Google allowed access to the entirety of *Field*'s works.[101] (Emphasis supplied)

4. Fourth Factor: The Effect of the Use Upon the Potential Market for or Value of the Copyrighted Work

The last factor, according to the case of *Harper & Row*, is "undoubtedly the single most important element of fair use." [102] "It requires courts to consider not only the extent of market harm caused by the particular actions of the alleged infringer, but also 'whether unrestricted and widespread conduct of the sort engaged in by the defendant x x x would result in a substantially adverse impact on the potential market' for the original" [103] and derivative works.[104]

The SCOTUS, in *Campbell*, stated that "when a commercial use amounts to mere duplication of the entirety of the original, it clearly supersedes the object of the original and serves as a market replacement for it, making it likely that cognizable market harm to the original will occur." [105]

In *Hustler Magazine*, the US Court of Appeals for the Ninth Circuit held that in order to determine the potential harm to a copyrighted work, the courts should focus on whether the infringing use: (1) "tends to diminish or prejudice the potential sale of the work; (2) tends to interfere with its marketability of the work; or (3) fulfill the demand for the original work." [106] In this case, the US Court considered the following factors in concluding that the impact of defendant's use of plaintiff's work was nil: (a) the plaintiff's work was first issued or released long before defendant's mailings went out; (b) "the effect on the marketability of back issues of the magazine is de minimis because it is only one page of a publication"; and (c) defendant's uses did not cause plaintiff any competitive injury since defendant was not selling or distributing copies of the ad parodies to plaintiff's followers.[107]

In *Google LLC*, the SCOTUS found that Google's new smartphone platform is not a market substitute for Java SE, and accordingly, weighed the fourth factor in favor of fair use.[108]

On the other hand, in the case of *Harper & Row*, the SCOTUS held that "if the defendant's work adversely affects the value of any of the rights in the copyrighted work (in this case the adaptation and serialization right) the use is not fair."^[109] Similarly, in *Stewart*, the SCOTUS ruled that the rerelease of a film based on a story impinged on respondent's ability to market new versions of the story, and consequently, caused market harm to respondent.^[110]

In *Twin Peaks*, the US Court of Appeals for the Second Circuit weighed the fourth factor against fair use and held that:

x x x It is a safe generalization that copyright holders, as a class, wish to continue to sell the copyrighted work and may also wish to prepare or license such derivative works as book versions or films. In this case, the Book may interfere with the primary market for the copyrighted works and almost certainly interferes with legitimate markets for derivative works. It is possible that a person who had missed an episode of "Twin Peaks" would find reading the Book an adequate substitute, and would not need to rent the videotape of that episode in order to enjoy the next one x x x. A copyright holder's protection of its market for derivative works of course cannot enable it to bar publication of works of comment, criticism, or news reporting whose commercial success is enhanced by the wide appeal of the copyrighted work. The author of "Twin Peaks" cannot preserve for itself the entire field of publishable works that wish to cash in on the "Twin Peaks" phenomenon. But it may rightfully claim a favorable weighting of the fourth fair use factor with respect to a book that reports the plot in such extraordinary detail as to risk impairment of the market for the copyrighted works themselves or derivative works that the author is entitled to license.^[111] (Emphasis supplied)

Applying the foregoing discussion, it may be strongly argued that all five examples earlier provided in the previous section fall under fair use.

In the first,^[112] second,^[113] and last^[114] examples, although the purpose for playing or singing the copyrighted songs is not transformative, considering the personal and noncommercial or nonprofit nature of the intended purpose for listening to and playing music in the gallery venue, inside a car, and in a karaoke bar, the first factor should be weighed in favor of fair use. In the first example, although the organization charges a viewing fee, the same is not for profit since the purpose is to cover the organization's administrative and operational expenses. Similarly, the money earned by the taxi driver from tips received from his music-loving passengers is merely incidental, and should not be weighed against a finding of fair use. As to the customer singing the hit songs of a popular band in a karaoke bar, his or her purpose in singing these songs is obviously noncommercial and nonprofit.

In all these examples, both the second and third fair use factors should be weighed against a finding of fair use. Following the rulings of the US Courts, the Fair Use Doctrine should find lesser application in case of reproduction of creative works such as songs or music.

Lastly, the fourth and most important element should favor a finding in favor of fair use for all of the examples. First, the playing of songs will unlikely affect the potential market for the original and derivative works since the use of copyrighted songs is only done for a limited period of time, i.e., during the duration of the gallery, the car ride, and the garage sale. In addition, public performance, i.e., the singing of copyrighted songs, is only done by small-scale users and should not cause considerable harm to the potential market of the original or derivative works.

Indeed, a reasonable interpretation of the law, as proposed above, does not lose sight of the primary objective of allowing and promoting the use of intellectual property for the common good and the progress of society. In this regard, despite the equivocal wording of the exceptions under the IP Code, small-scale users of copyrighted music can reasonably take comfort in the fact that the Court will never permit the balance to be tilted in favor of music

copyright owners to the detriment of the society in general.

C.

The acts of Anrey 's restaurants do not fall under any of the exceptions to copyright infringement under the IP Code

As mentioned above, to comprehensively discuss the existence of copyright infringement, there must be a showing that the acts in question relate to Section 177 and that they do not fall under the limitations on copyright (Section 184, IP Code) or the fair use doctrine (Section 185, IP Code).

Here, the core issue is whether the playing of a radio broadcast as background music in the dining areas of Anrey's restaurants amounts to copyright infringement.[115] As will be further explained below, Anrey committed copyright infringement because its acts relate to the author's exclusive rights under Section 177 and its acts do not fall under any of the exceptions to copyright infringement. FILSCAP alleges that Anrey's restaurants played, and for the benefit of its customers, radio receptions of sound recordings containing copyrighted music included in FILSCAP's repertoire without a license from FILSCAP.[116] Since Anrey's act of playing such radio broadcasts does not fall under any of the recognized exemptions under the IP Code, FILSCAP argues that Anrey should be found liable for copyright infringement.[117]

On the other hand, Anrey argues that it cannot be made to pay license fees or royalties as the radio stations should have already paid the same.[118] Moreover, Anrey alleges that the playing of such music cannot be deemed as "public," as the music was simply played for the benefit of its staff.[119] Notably, while Anrey does not invoke any of the exemptions found under Section 184 of the IP Code, it nevertheless argues that it should likewise be exempt from paying license fees based on US copyright law provisions exempting small business establishments from copyright infringement for television and radio receptions based on their size, number of devices used, and whether there is any cover charge.[120] In addition, Anrey alleges that the playing of the radio was for its staff to "hear hourly news." [121]

The ponencia concludes that the act of playing radio broadcasts containing copyright music through the use of loudspeakers, without a license from the copyright owner or the latter's duly authorized representative, would already constitute copyright infringement.[122] Thus, it grants FILSCAP's petition and awards damages.[123]

I concur with the foregoing disposition. The act of playing radio broadcasts containing copyright music in the dining areas of Anrey's restaurants does not fall under any of the recognized exceptions under Section 184 of the IP Code, nor is it justified by the fair use doctrine under Section 185 of the IP Code.

As correctly held by the ponencia, none of the exceptions in Section 184 of the IP Code applies in this case.[124] While the RTC found Anrey exempt, in particular, under paragraph (i) of Section 184,[125] the ponencia astutely finds this to have been a misapplication, considering that this exemption "only applies to institutions for charitable and educational purposes." [126] Here, while Anrey does not charge any admission fee in respect of such radio broadcasts, it is nonetheless undisputed that Anrey; being the owner and operator of three Sizzling Plate restaurants in Baguio City,[127] is not a charitable or educational institution, nor is its aim not profit making.

In this regard, Associate Justice Amy C. Lazaro-Javier (AJ Lazaro-Javier), nevertheless posits that there is no copyright infringement in this case as the act of playing copyrighted music in Anrey's restaurants was done "privately," and thus falls, instead, under Section 184.1(a) of the IP Code.[128] In support of this position, AJ Lazaro-Javier argues that the definition of "private" in this case should not be limited to the opposite of how "public" in relation to "public performance" is defined, and that instead, the Court should apply the "homestyle exemption" under the US Copyright Law.[129] Relying on the US case of *Edison Bros. Stores v. Broad. Music*,

Inc.,[130] AJ Lazaro-Javier posits, to wit:

Privately should be interpreted beyond how the right of public performance of the work pursuant to Section 171.6 of RA 8293 says of what public is — persons outside the normal circle of a family and that family's closest social acquaintances. Private does not refer to just being within the normal circle of family and its closest social acquaintances.

x x x x

Here, copyright should be limited where to do otherwise would be oppressive to the marginalized and underrepresented, those who cannot afford beyond what the ubiquitous radio could afford. The homestyle exemption in the United States could be adapted to help us define what private means in Section 184.(1)(a) of RA 8293.

This exemption has been explained thus:

The elements of Section 110(5) that Edison must satisfy are (1) that it uses a single receiving apparatus in its stores; (2) that the receiving apparatus is of a kind commonly used in private homes; and (3) that Edison does not further transmit or broadcast to the public the transmission it receives (the "second transmission" restriction). The Court finds that Edison has satisfied each of these elements through its Radio Policy.

The first element is satisfied in that each store that Edison owns and operates only uses one radio receiver at a time. The Court finds no merit in BMI's argument that the Court should focus on the number of stores, and thereby the total number of radios that Edison operates nationwide, rather than on the number of radios per store. The homestyle exception makes no sense unless it is applied on a store-by-store basis, to see whether each store is operating one set of simple radio equipment without extensive augmentation. It does not matter whether the owner repeats this compliance process for two or more stores.

x x x x

Edison also satisfies the second factor, in that its Radio Policy requires the use of simple, low grade radio-only receivers, only two speakers may be attached to a radio receiver, and only portable box speakers are allowed. x x x

x x x x

Lastly, the Court finds that Edison has complied with the "second transmission" restriction of the homestyle exception. What this restriction means is that the homestyle operator may not rebroadcast or secondarily broadcast a radio transmission to the public without liability. A simple example of conduct that would violate this restriction is where the operator tapes a radio broadcast in order to play it later, with or without editing or augmentation. Certain courts have declared that other, less well defined conduct violates the restriction, such as where the speakers are so far from the receiver, or are remotely placed in a room different from the receiver, that the playing of the broadcast through the remote speakers constitutes a second transmission to the public. x x x The Court doubts the validity of an analysis of the distancing of the speakers in various stores, but in any case finds that Edison's policy to place the two speakers no more than fifteen feet from the receiver is well within the range of any modest homestyle setup, and does not violate the second transmission of any modest homestyle setup, and does not violate the second transmission restriction.

In the context of this case, the above elements should define what the word private means in Section 184(1)(a) of RA 8293. The definition hews closely to how public is described in Section 171.6 of RA 8293 says of what public is — persons outside the normal circle of a family and that family's closest social acquaintances. There is close analogy between the family setting and the homestyle characterization as a copyright limitation. This familiarity between the concepts should not get lost.[131] (Emphasis supplied)

I respectfully disagree. The "homestyle exemption" materially differs from Section 184.1(a), and thus, there is no

compelling reason for this Court to adopt this foreign doctrine in our jurisdiction.

For one, the said "homestyle exemption" entails a very specific set of requirements which do not, at all, appear under Section 184.1(a) of the IP Code. The text of the US Copyright Act recognizing this exception, as now appearing as Section 110 (5) (A),^[132] provides:

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

Notwithstanding the provisions of section 106, the following are not infringements of copyright:

x x x x

(5)(A)

except as provided in subparagraph (B), communication of a transmission embodying a performance or display of a work by the public reception of the transmission on a single receiving apparatus of a kind commonly used in private homes, unless —

(i) a direct charge is made to see or hear the transmission; or

(ii) the transmission thus received is further transmitted to the public[.][133]

<<https://www.wto.org/> english="" tratop_e="" dispu_e="" cases_e="" 1pagesum_e="" dsl="" 60sum_e.pdf="" (visited="" july="" 8,="" 2022).

<<https://www.wto.org/> english="" tratop_e="" dispu_e="" cases_e="" 1pagesum_e="" dsl="" 60sum_e.pdf="" (visited="" july="" 8,="" 2022).

Notably, the "homestyle exemption" necessitates an inquiry into the type and number of receiving apparatus used in-store, whether the transmission is made free of charge,^[134] and the extent to which an audio system is augmented.^[135] On the other hand, Section 184.1(a) of the IP Code prescribes a totally different set of requirements for its application, namely that (i) the recitation or performance is done privately and free of charge, or made strictly for a charitable or religious institution or society, and (ii) the work has been lawfully made accessible to the public prior to the recitation or performance.^[136]

Certainly, these are two very different exceptions to copyright which, at most, share only one element, i.e., that the performance or recitation is made free of charge. In fact, Section 110 of the US Copyright Act recognizes other exceptions or limitations on copyright which are more similarly worded with, and thus more likely related to, Section 184.1(a) (and Section 184.1[i]) of the IP Code. Sections 110 (4) and 110 (10) of the US Copyright Act, for example, respectively provide:

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

Notwithstanding the provisions of section I 06, the following are not infringements of copyright:

x x x x

(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; or

(B)

the proceeds, after deducting the reasonable costs of producing the performance, are used exclusively for educational, religious, or charitable purposes and not for private financial gain, except where the copyright owner has served notice of objection to the performance under the following conditions:

(i)

the notice shall be in writing and signed by the copyright owner or such owner's duly authorized agent; and

(ii)

the notice shall be served on the person responsible for the performance at least seven days before the date of the performance, and shall state the reasons for the objection; and

(iii)

the notice shall comply, in form, content, and manner of service, with requirements that the Register of Copyrights shall prescribe by regulation;

x x x x

(10)

notwithstanding paragraph (4), the following is not an infringement of copyright: performance of a nondramatic literary or musical work in the course of a social function which is organized and promoted by a nonprofit veterans' organization or a nonprofit fraternal organization to which the general public is not invited, but not including the invitees of the organizations, if the proceeds from the performance, after deducting the reasonable costs of producing the performance, are used exclusively for charitable purposes and not for financial gain. For purposes of this section the social functions of any college or university fraternity or sorority shall not be included unless the social function is held solely to raise funds for a specific charitable purpose[.][137] (Emphasis and underscoring supplied)

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Notably, the foregoing exceptions, like that under Section 184.1(a) of the IP Code, require the "performance" to be: (i) private or otherwise "non-public" in nature (i.e., "otherwise than in a transmission to the public," or "social function x x x to which the general public is not invited"), (ii) free of charge, and (iii) of a charitable, non-profit or religious nature (i.e., "the proceeds x x x are used exclusively for educational, religious, or charitable purposes" or "performance x x x in the course of a social function which is organized and promoted by a nonprofit veterans' organization or a nonprofit fraternal organization"). Clearly, these provisions — and not Section 110(5)(A) of the US Copyright Act — more closely resemble Section 184.1(a) of the IP Code.

As such, as Section 110(5)(A) of the US Copyright Act differs from Section 184.1(a) of the IP Code in very material aspects, there is simply no reason for this Court to apply US law in order to aid in interpreting the meaning of "private" or "privately" within the context of Section 184.1(a) of the IP Code.[138] Rather, its meaning should simply 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." [139]

For another, as already discussed, while Congress did not assign a specific statutory definition for the term "privately," the latter's antonym, i.e., "public" or "publicly," is nevertheless given a technical meaning under Section 171.6 of the IP Code. [140] As such, it could either be understood in its plain or general meaning, or construed as the opposite of the IP Code's definition of "public," i.e., that the work is not 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." [141]

Furthermore, Sections 110(4) and 110(10) of the US Copyright Act — which, as earlier mentioned, more closely resemble Section 184.1(a) of the IP Code — likewise require a "performance" to be private or non-public in nature in order to be exempt. Yet, in both cases — like in Section 184.1(a) of the IP Code — being "non-public" or "private" in nature is not specifically defined, and is understood simply as the opposite of the state of being "public" (i.e., "otherwise than in a transmission to the public," or "social function x x x to which the general public is not invited"). Thus, the term "privately" in Section 184.1(a) should likewise be understood in a similar manner — that is, as the opposite of the technical meaning given by the IP Code to the term "public" or "publicly."

Moreover, even assuming *arguendo* that the "homestyle exemption," as posited by AJ Lazaro-Javier, can be applied by analogy in our jurisdiction, the application of this concept is nevertheless unwarranted based on the facts of this particular case. Here, the radio transmissions were played through two loudspeakers that were set up in the dining areas of Anrey's restaurants,[142] and not near their staff area. As well, Anrey failed to offer evidence — and expectedly so — showing that Anrey simply employed a "modest homestyle setup," i.e., whether the radio devices used were "a kind commonly used in private homes," as the said exception requires. Certainly, the foregoing shows that transmission of the broadcasts by Anrey's restaurants were made publicly — "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,"[143] such that members of the indiscriminate public who wish to dine at Anrey's restaurants would be able to access and enjoy such musical works.

Based on the foregoing, I submit that to apply Section 184.1(a) of the IP Code, and by analogy, the homestyle exemption under the US Copyright Act, would be unwarranted in this case. Like Section 184.1(i), Section

184.1(a) is also inapplicable to the present case.[144]

Too, as correctly held by the ponencia, the act of playing copyrighted music in Anrey's restaurants may not be excused under the fair use doctrine. In this regard, in finding Anrey guilty of copyright infringement, it is true that one must first assess whether a performance is made public or is merely incidental. As applied in the instant case, Anrey would likely have been exonerated, had its restaurants only played radio receptions solely for the benefit of its employees, and not for its customers.

To be sure, while Anrey does not expressly invoke fair use in this case, its allegations nevertheless seem to make out a case for fair use. Here, Anrey does not deny that it had used FILSCAP's musical compositions in its restaurants,[145] or that it did not obtain any license to play such music from FILSCAP.[146] However, it argues that such "use" is nevertheless justified under the circumstances. It alleges that: (i) it simply played the radio for the benefit of its staff, for "the primary purpose of monitoring the weather and not to play music for its customer[s;]"[147] (ii) it did not collect any cover charge in relation to the operation of its radios inside its establishments;[148] and (iii) the playing of such music was merely "incidental" to their operations.[149]

However, as stated, in order to validly raise fair use as defense, the alleged infringer must not simply allege fair use, but also prove that his or her use is indeed compatible with fair use, based on the four fair use factors. Here, contrary to Anrey's assertion, a "subjective assessment" would necessarily yield a conclusion that the acts of Anrey were by no means "fair."

First, the use of said musical works by Anrey's restaurants was primarily commercial in nature or clearly intended for a commercial purpose. For one, as discussed above, the musical works were played through two loudspeakers that were set up on the ceiling above the dining areas of Anrey's restaurants. For another, the radio devices of Anrey's restaurants were also tuned in to FM and not AM radio.[150] Simply put, had Anrey really intended said music to benefit its staff only, then it should have simply placed its speakers in the kitchen/pantry section or cash counter/counter areas, and tuned its radio devices to AM, which is more commonly used by news radio programs. Thus, what is palpably clear is that Anrey's restaurants played radio music not simply to allow their staff to monitor the news or weather, but rather, and more so, to improve the overall dining experience of Anrey's customers. Applying our discussion on the first fair use factor, that Anrey's use is non-transformative and primarily commercial in nature ultimately weighs heavily against fair use.

Second, Anrey's infringement involved musical compositions, which are creative and not factual works. Thus, as held in *Stewart*, that the work infringed is more creative than factual, works against the defense of fair use.

Third, the "use" performed by Anrey of FILSCAP's musical works were by no means unsubstantial. Based on the facts, FILSCAP's representative found Anrey's restaurants to have played, during her short visits on four separate dates,[151] a total of 12 whole songs included in FILSCAP's repertoire.[152] Neither was such use "tethered to a x x x transformative purpose." [153] More, Anrey also admitted that its stores were open for up to 10 hours per day.[154] Thus, it can reasonably be assumed that Anrey's restaurants played, for around 10 hours on a daily basis, many more songs than what Anrey's representative originally identified.

Lastly, said activity, if allowed by the Court unchecked, will indubitably have an adverse effect on the potential market for said musical compositions. At the core of this case is the playing by restaurant chains, without a proper license, during operational hours and for the benefit of their customers, of musical compositions by means of radio receptions.

As stated, the fourth fair use factor requires the Court to consider the deleterious effects of a particular conduct on the potential market of the work, if this were to be done not only by the defendant (Anrey, in this case), but also

by other potential users, "whether unrestricted and widespread." [155] Verily, to allow such an activity to be done widespread and unrestricted would allow restaurant chains to exploit for free, and benefit from, the labors of the authors of such works.

In sum, the acts of Anrey clearly cannot be classified as fair use because all four factors (i.e., The Purpose and Character of Use, Nature of Copyrighted Work, Amount and Substantiality of the Portion Used, The Effect of the Use Upon the Potential Market for or Value of the Copyrighted Work) weigh against this finding. As well, Anrey may not rely on any of the exemptions found under Section 184 of the IP Code. To hold otherwise would be to allow Anrey, as held in *Harper & Row*, "to profit from exploitation of the copyrighted material without paying the customary price." [156]

II.

THE LAW ITSELF DISTINGUISHES THE RIGHT OF "PUBLIC PERFORMANCE" FROM THE RIGHT OF "COMMUNICATION TO THE PUBLIC," EITHER RIGHT BEING ENFORCABLE THROUGH FILSCAP.

While I agree with the ponencia that the use of FILSCAP's copyrighted work by Anrey could neither be considered "fair" nor exempt under the IP Code, and that ultimately, Anrey is guilty of copyright infringement, I disagree with respect to how the ponencia deals with the rights of public performance and communication to the public.

As it stands, jurisprudence has not yet described the metes and bounds of "communication to the public" or the right to "communicate to the public," as defined in the IP Code, [157] before or after its amendment by RA 10372. [158] This case thus gives the Court an opportunity to finally clarify the scope of this right, particularly as distinguished from the right of public performance.

Here, the alleged infringing activity is the playing of radio broadcasts as background music in Anrey's restaurants. The ponencia holds that the playing of radio broadcasts through a loudspeaker amounts to a "public performance" as defined in the IP Code. [159] The ponencia also concludes that, based on US jurisprudence, a single radio reception also "creates a copyrightable performance separate from the broadcast[,] " [160] and that a radio reception of a sound recording, is, by itself, already a "performance" within the contemplation of the IP Code. [161] Further, the ponencia submits that Anrey did not violate FILSCAP's right to communicate to the public because the complained acts did not involve "interactive-on-demand systems" like the Internet. [162]

Notably, the ponencia observes that, based on the deeds of assignment entered into by FILSCAP with its members, as well as on its reciprocal agreements with foreign societies, FILSCAP is duly authorized to enforce both rights on behalf of its members. [163]

While I agree with the ponencia's ruling that FILSCAP is authorized to exercise, on behalf of its members, both economic rights, [164] 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.

My reasons for this conclusion are explained below.

A.

The right of public performance and the right to communicate to the public are two separate and distinct rights.

To recall, Section 5 of PD 49, the old copyright law enacted in 1972, enumerates the following rights vested exclusively in the copyright owner:

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Section 5. Copyright shall consist in the exclusive right;

(A)

To print, reprint, publish, copy, distribute, multiply, sell, and make photographs, photo-engravings, and pictorial illustrations of the works;

(B)

To make any translation or other version or extracts or arrangements or adaptations thereof; to dramatize it if it be a non-dramatic work; to convert it into a non-dramatic work if it be a drama; to complete or execute if it be a model or design;

(C)

To exhibit, perform, represent, produce, or reproduce, the work in any manner or by any method whatever for profit or otherwise; it not reproduced in copies for sale, to sell any manuscript or any record whatsoever thereof;

(D)

To make any other use or disposition of the work consistent with the laws of the land.[165]

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Thereafter, all laws dealing with the protection of intellectual property rights were consolidated into the present IP Code. In this regard, while the same overarching principles governing PD 49 have likewise been reiterated in the IP Code,[166] Section 177 thereof has expanded and further specified the bundle of exclusive economic rights accorded to a copyright owner. This section provides:

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, abridgement, 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 copy of the work;

177.6. Public performance of the work; and

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

At the onset, it bears noting that PD 49, under Section 5(c) thereof, already recognized the performance right of a copyright owner, i.e., to "perform x x x the work in any manner or by any method whatever for profit or otherwise." However, PD 49, unlike the IP Code, had not yet expressly recognized a separate right to carry out, authorize or prevent any "other communication to the public of the work." In fact, the World Intellectual Property Organization (WIPO) similarly remarked that while the public performance right has expressly been recognized under Section 5 of PD 49, the right to communicate one's work to the public^[167] "cannot be considered granted" under the said law, viz.:

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(iv) Performance right

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This is expressly granted under Section 5(c).

In *Filipino Society of Composers, Authors and Publishers, Inc. v. Tan*, the court cited with approval American jurisprudence that performance in a restaurant or hotel dining room, by persons employed by the proprietor, of a copyrighted musical composition, for the entertainment of patrons without charge for admission to hear it, infringes the exclusive right of the owner of the copyright.

Under the [Berne Convention], authors of dramatic, dramatico- musical or musical work have the exclusive right of authorizing the public presentation and public performance of their works. If the musical work is recorded by instruments capable of producing them mechanically, the author of the work has the exclusive right of authorizing the public performance by means of such instruments of the work thus recorded. The same right is enjoyed by authors with respect to the public presentation and performance of cinematographic adaptation and reproduction of their works.

x x x x

(vii) Broadcasting right

The broadcasting right as defined in the [Berne Convention] and the Rome Convention cannot be considered granted under Section 5(a).

Article 11bis of the [Berne Convention] provides for an express grant to the author of the exclusive right to authorize the communication of his work to the public by means of either radio-diffusion or wireless diffusion of signs, sounds or images; any communication to the public, whether over wire or not, of the radio-diffusion of the work (i.e., rebroadcasting of the broadcast of work by means of radio-diffusion), when this communication is made by a body other than the original one; and the communication to the public by

loudspeaker or any other similar instrument transmitting by signs, sounds or images the radio-diffusion work.[168] (Emphasis supplied)

In contrast, it can be gleaned from Section 177 of the IP Code that the law now recognizes a right to "communicate to the public" separate and distinct from the right of "public performance." In this regard, the right of "public performance" as contemplated under Section 177.6 has been defined under Section 171.6 as follows:

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 and underscoring supplied)

Meanwhile, the right to "communicate to the public" recognized under Section 177.7 has been defined under Section 171.3, prior to its 2013 amendment,[169] as follows:

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[.] (Emphasis and underscoring supplied)

In this connection, Subsection 202.7 of the IP Code identifies broadcasting as an example of how a work can be communicated to the public by "wireless" means:

202.7. "Broadcasting" means 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[.] (Emphasis and underscoring supplied)

The foregoing provisions suggest that the public performance right and right to communicate to the public are separate and distinct rights which are available to, and may separately be exploited by the author. This is clear from first, the separate designation of these rights under the "menu" of economic rights under Section 177 of the IP Code, and second, the "exclusionary" definition of "public performance" in Section 171.6, which expressly requires that "the performance x x x be perceived without the need for communication [to the public] within the meaning of Subsection 171.3 [of the IP Code]."

In this regard, that the public performance right and the right to communicate to the public are separate and distinct rights is likewise supported by the following provisions of the IP Code involving the rights of performers, producers of sound recordings, and broadcasting organizations. The relevant provisions thereof provide:

CHAPTER XII

Rights of Performers, Producers of Sounds Recordings and Broadcasting Organizations

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x x x x

SECTION 202.9. "Communication to the public of a performance or a sound recording" means 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. For purposes of Section 209, "communication to the public" includes making the sounds or representations of sounds fixed in a sound recording audible to the public.

x x x x

SECTION 209. Communication to the Public. — If a sound recording published for commercial purposes, or a reproduction of such sound recording, is used directly for broadcasting or for other communication to the public, or is publicly performed with the intention of making and enhancing profit, a single equitable remuneration for the performer or performers, and the producer of the sound recording shall be paid by the user to both the performers and the producer, who, in the absence of any agreement shall share equally. (Emphasis and underscoring supplied)

Notably, under Section 209 of the IP Code, performers and producers of sound recordings are entitled to remuneration whenever (i) a sound recording is published for commercial purposes, or (ii) when reproductions of such sound recordings are (a) "used directly for broadcasting or for other communication to the public" (i.e., right to communicate to the public), or (b) "publicly performed with the intention of making and enhancing profit" (i.e., right of public performance). In other words, performers and producers would be entitled to remuneration for three distinct activities, which is clear from the use of the conjunction "or." Otherwise stated, if the intention was to only entitle the performers and producers to one remuneration for all of these activities combined, then the conjunction "and" should have been used.[170] This further underscores that Sections 177.6 and 177.7 in relation to Sections 171.3 and 171.6 of the IP Code actually recognize two separate and distinct rights that may independently be exploited by an author or copyright owner.

B.

As a general rule, a single radio reception of a copyrighted musical work cannot be both a public performance and a communication to the public.

Proceeding from the foregoing discussion, it must further be underscored that the public performance right and right to communicate to the public are not only separate and distinct — they are also ingeniously delineated or segregated by the IP Code based on the means of transmission or making available of the work, i.e., whether the performance or communication is made by "wire or wireless means." In other words, a single radio reception of a sound recording, made by "wire or wireless means," would generally not constitute both a "public performance" and a "communication to the public."

I expound.

First, it should be stressed at the onset that the definition of public performance under Section 171.6 is exclusionary in relation to Section 171.3, i.e., in order to constitute "public performance," the performance must be "perceive[able] without the need for communication within the meaning of Subsection 171.3." Conversely, if an aspect of a performance can be perceived by the public by means of "communication" as defined under Section 171.3, i.e., "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,"[171] then this aspect of the performance would only be a "communication to the public" and would not therefore constitute a "public performance."

Second, the foregoing conclusion is also supported by the text of the The Berne Convention for the Protection of Literary and Artistic Works[172] (Berne Convention), to which the Philippines is a signatory.[173] Articles 11

and 11bis of the Berne Convention, which recognize the performance right and broadcasting right, respectively, provide:

Article 11

[Certain Rights in Dramatic and Musical Works: 1. Right of Public Performance and of communication to the public of a performance x x x] <https://www.wto.org/english/tratop_e/dispu_e/cases_e/1pagesum_e/dsl/60sum_e.pdf (visited= "" july= "" 8,="" 2022).

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(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. x x x

Article 11bis

[Broadcasting and Related Rights: 1. Broadcasting and other wireless communications, public communication of broadcast by wire or rebroadcast, public communication of broadcast by loudspeaker or analogous instruments x x x]

(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.

(2)

It shall be a matter for legislation in the countries of the Union to determine the conditions under which the rights mentioned in the preceding paragraph may be exercised, but these conditions shall apply only in the countries where they have been prescribed. They shall not in any circumstances be prejudicial to the moral rights of the author, nor to his right to obtain equitable remuneration which, in the absence of agreement, shall be fixed by competent authority. (Emphasis and underscoring supplied)

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Thus, under the Berne Convention, public performance and any communication of such performance is covered by Article 11 thereof. However, similar to how the IP Code is worded, if the public communication is via a specific mode or means of transmission, i.e., by means of broadcasting or other "wireless diffusion," by wire or rebroadcasting (if the communication is made by an organization other than the original one), or by loudspeaker or any other analogous instrument of the broadcast of the work, then the same will fall under Article 11bis.

In fact, the foregoing stance is made clear by the WIPO in its explanatory guide to the Berne Convention[174] (WIPO Guide). Anent the difference of Article 11 from Article 11bis of the Berne Convention, the WIPO remarked as follows:

11.4. However, [Article 11] goes on to speak of "including such public performance by any means or process", and this covers performance by means of recordings; there is no difference for this purpose between a dance hall with an orchestra playing the latest tune and the next-door discotheque where the customers use coins to choose their own music. In both, public performance takes place. The inclusion is general and covers all recordings (discs, cassettes, tapes, videograms, etc.) though public performance by means of cinematographic works is separately covered—see Article 14(1)(ii).

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. For example, a broadcasting organisation broadcasts a chamber concert. Article 11bis applies. But if it or some other body diffuses the music by landline to subscribers, this is a matter for Article 11.[175] (Emphasis and underscoring supplied)

Furthermore, the WIPO Guide also states that Article 11bis, which covers the author's right to communicate one's work by means of broadcasting, is "the fourth of the author's exclusive rights x x x, the other three being those of translation, reproduction and public performance." [176] Anent the "broadcasting right," the WIPO elucidates that this right includes one primary right to authorize the broadcast of one's work via wireless means,[177] and two other rights to authorize (i) the subsequent communication of said broadcast, by wire or rebroadcast, by an organization other than the one which originally made the broadcast, and (ii) the communication of the same broadcast via loudspeaker or a television screen to a "new public." [178] Thus:

11bis.1. This provision is of particular importance in view of the place now taken by broadcasting (which, it must be remembered, includes both radio and television) in the world of information and entertainment. It is the fourth of the author's exclusive rights to be recognised by the Convention, the other three being those of translation, reproduction and public performance. The Rome Revision (1928) was the first to recognise the right "of authorising the communication of x x x works to the public by radio and television". Slightly muddled in its terms, the text was like broadcasting itself — in its infancy. It was in Brussels (1948) that the subject was more fully considered and the right broken down into its various facets in order to take account of the various ways and techniques by which it might be exploited. Neither Stockholm nor Paris made any change, other than to provide a more suitable translation in the newly authentic English text.

x x x x

11bis.3. The primary right is to authorise the broadcasting of a work and the communication thereof to the public by any other means of wireless diffusion of signs, sounds or images. It applies to both sound and television broadcasts. What matters is the emission of signals; it is immaterial whether or not they are in fact received.

11bis.4. A secondary right is the subsequent use of this emission: the author has the exclusive right to authorise communication of the broadcast to the public, either by wire (a CATV system) or without, if the communication is made by an organisation other than the original one.

11bis.5. Finally the third exclusive right is to authorise the public communication of the broadcast by loudspeaker or on a television screen.

x x x x

11bis.9. In other words, this paragraph demands that the author shall enjoy the exclusive right to authorise the broadcasting of his work and, once broadcast, the communication to the public, whether by wire or not, if this is done by an organisation other than that which broadcast it. This act of wire diffusion differs from that covered in Article 11(1). The latter covers the case in which the wire diffusion company itself originates the programme, whereas Article 11bis deals with the diffusion of someone else's broadcast.

11bis.10. For example, a company in a given country, usually for profit, receives the signals sent through the ether by a television station in the same or another country and relays them by wire to its subscribers. This is covered by Article 11bis (1)(ii). But if this company sends out programmes which it has itself originated, it is Article 11 which applies. What matters is whether or not a second organisation takes part in the distribution of the broadcast programmes to the public. (A working party which met in Paris in June 1977 considered the copyright and neighbouring rights problems caused by the distribution of television programmes by cable.) The task of distinguishing between such a practice and the mere reception of programmes by a community aerial was left to national laws.

11bis.11. Finally, the third case dealt with in this paragraph is that which the work which has been broadcast is publicly communicated e.g., by loudspeaker or otherwise, to the public. This case is becoming more common. In places where people gather (cafés, restaurants, tea-rooms, hotels, large shops, trains, aircraft, etc.) the practice is growing of providing broadcast programmes. There is also an increasing use of copyright works for advertising purposes in public places. The question is whether the licence given by the author to the broadcasting station covers, in addition, all the use made of the broadcast, which may or may not be for commercial ends.

11bis.12. The Convention's answer is "no". Just as, in the case of relay of a broadcast by wire, an additional audience is created (paragraph (1) (ii)), so, in this case too, the work is made perceptible to listeners (and perhaps viewers) other than those contemplated by the author when his permission was given. Although, by definition, the number of people receiving a broadcast cannot be ascertained with any certainty, the author thinks of his licence to broadcast as covering only the direct audience receiving the signal within the family circle. Once this reception is done in order to entertain a wider circle, often for profit, an additional section of the public is enabled to enjoy the work and it ceases merely a matter of broadcasting. The author is given control over this new public performance of his work.

11bis.13. Music has already been used as an example, but the right clearly covers all other works as well — plays, operas, lectures and other oral works. Nor is it confined to entertainment; instruction is no less important. What matters is whether the work which has been broadcast is then publicly communicated by loudspeaker or by some analogous instrument e.g., a television screen.[179]

Parsed, while the communication of a "performance" may fall under Article 11 of the Berne Convention (governing public performance), this is only true if the performance can be perceived without the need for communication within the meaning of Article 11bis — very much like how Section 171.6 of the IP Code is worded. On the other hand, under the Berne Convention, if the communication to the public is made either (i) via broadcast or by any other means of wireless diffusion, (ii) whether by wire or not, by an organization other than the one who originally made the broadcast, or (iii) through a broadcast of the work through a loudspeaker,

television screen, or other analogous instrument, then Article 11bis applies. Put simply, one clear similarity between the structure of the Berne Convention and the IP Code is that both categorically separate the concept of "public performance" from "broadcasting," such that a work that is conveyed to the public solely via radio broadcast does not constitute an exercise of the author's right of "public performance," but rather of the author's right of "[b]roadcasting and other wireless communications, public communication of broadcast by wire or rebroadcast, public communication of broadcast by loudspeaker or analogous instruments[,] "[180] or, as referred to under the IP Code, the author's right to "communicate to the public."

Applying the foregoing principles to our jurisdiction, this means that under the IP Code, as under the Berne Convention, the single act of broadcasting of musical compositions contained in sound recordings, either by the original broadcaster or "by an organization other than the original one[.]" or by other business establishments solely "by loudspeaker or any other analogous instrument" (as worded in Article 11bis of the Berne Convention), is actually an exercise of the author's right to "communicate to the public" his or her work under Section 171.3 of the IP Code. This is clear from the wording of Section 171.3 of the IP Code which specifically defines "communication to the public" as the "making of a work available to the public by wire or wireless means x x x," and from the wording of Section 202.7 of the IP Code which defines "broadcasting" as a mode of "transmission by wireless means for the public reception of sounds[.]" As well, by the wording of Section 171.6 of the IP Code, this may also mean that such act does not constitute an exercise of an author's public performance right.

In other words, based on the IP Code's definition of these two rights, as further clarified by the Berne Convention, broadcasting a musical composition over the radio or communicating the same in some other "wire or wireless means x x x" would simply constitute an exercise of the right to "communicate to the public." On the other hand, playing a sound recording of a musical composition to an audience through other dissimilar or "non--broadcast" means, i.e., through a jukebox or CD player, even if the same is ultimately perceived by the audience through a loudspeaker or other analogous instrument, would only constitute "public performance." [181] After all, the sound recording in this situation can be perceived by the public without the need of communication 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."

It is noteworthy in this regard that the Philippines formally acceded to the Berne Convention in 1950, which became effective in respect of the Philippines on August 1, 1951. [182] The Senate of the Philippines, by its Resolution No. 21 dated May 16, 1950, likewise concurred in the accession thereto by the Philippines. [183] Thereafter, the President, by Proclamation No. 137 dated March 15, 1955, made public the Philippines' accession to the Berne Convention "to the end that the same, and every article and clause thereof may be observed and fulfilled in good faith by the Republic of the Philippines and the citizens thereof." [184]

Certainly, the legal recognition that the rights of public performance and communication to the public are two separate and distinct rights is not a foreign concept. This is well-recognized under Philippine law — under both the Berne Convention (Articles 11 and 11bis), to which the Philippines is a contracting party, and the IP Code (Sections 177.6 and 177.7 in relation to Sections 171.3 and 171.6). This clear distinction should not be lost — despite the ostensible similarity and overlap between the rights of public performance and communication to the public. [185]

To be sure, there are cases where a single performance could constitute both public performance and communication to the public. For instance, if a band performs a musical composition live before a studio audience, and the same performance is either simultaneously or subsequently broadcasted over the radio by a broadcasting station, then the band's performance results in both a public performance and communication to the public. In this example, the act of directly performing the musical composition before the audience is itself a

public performance, while the act of broadcasting the performance (not the actual performance itself) is a communication to the public. Thus, while there is only one performance, there are actually two acts which respectively result in the exercise of two separate economic rights.

In other words, unless there is a showing that the music being played via radio is not simply a sound recording but rather, being played live before a studio audience, then the playing of a radio broadcast as background music would only constitute a "communication to the public."

In this regard, it is worthy to note that Congress, when it amended the IP Code in 2012, saw it fit to expressly clarify in RA 10372 that "broadcasting" and "rebroadcasting" indeed fall within the right to communicate to the public. This further underscores that the broadcasting of musical compositions contained in sound recordings, by itself, is an exercise of the author's right to "communicate to the public," and not public performance. The table below compares the wording of Subsection 171.3 before and after said amendment:

RA 8293 or the IP Code, approved on June 6, 1997; took effect on January 1, 1998

[Applicable law in the instant case]

RA 8293 or the IP Code, as amended by RA 10372, approved on February 28, 2013; took effect on March 22, 2013

SEC. 171. Definitions.— x x x

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[.]

SEC. 171. Definitions.— x x x

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[.] (Emphasis and underscoring supplied)

The foregoing amended definition, reconciled with the definition of "public performance" under Section 171.6 of the IP Code, underscores that broadcasts of sound recordings by "wire or wireless means," i.e., by means of television or radio, indeed constitute only communication to the public, and not public performance.

C.

Any further communication to a "new public" beyond the original broadcast is an exercise of the right to communicate to the public under Section 177.7 in relation to 171.3 of the IP Code.

Proceeding from the foregoing discussion, I also submit that the communication of a radio broadcast via loudspeaker or a television screen, when done to a "new public," constitutes an exercise of the right of communication to the public separate from the original broadcast.

As discussed above, the broadcasting or communication to the public right, under the Berne Convention, includes one primary right to authorize the broadcast of one's work via wireless means,[186] and two other rights to authorize (i) the subsequent communication of said broadcast, by wire or rebroadcast, by an organization other than the one which originally made the broadcast, and (ii) the communication of the same broadcast via loudspeaker or a television screen to a "new public." [187] As remarked by the WIPO — which interpretation

indeed has "persuasive moral effect in the interpretation of our intellectual property laws"[188] — this concept of "new public" is a recognition that an author's license for a broadcast of his or her work, as a general rule, only covers a "license to broadcast as covering only the direct audience receiving the signal within the family circle," and not subsequent broadcasts.

In other words, the license given by the author to the broadcasting stations does not cover all other uses made of the broadcast, unless otherwise clearly stipulated. Thus, as a general rule, such a license will not authorize third parties other than the broadcasting station to make any further "communication to the public" of the author's work. After all, such third parties other than the author and the broadcasting station are not parties to a license agreement between the latter. It is a basic rule in contract law that contracts take effect only between the immediate parties to the same, unless the contract contains a stipulation which "clearly and deliberately" grants a favor upon a third person, or a stipulation pour autrui.[189] Hence, as a general rule, a stranger or third party cannot invoke the contract of another for his or her own interest.[190]

Thus, any further "communication to the public" made of a broadcast by a party other than the broadcasting station, which is not otherwise analogous to fair use, should be deemed as a separate exercise of an author's right under Section 177.7 in relation to Section 171.3 of the IP Code. This includes, among others, instances where an original broadcast is transmitted by a third party in favor of a "new public."

In this regard, I cannot agree with the implication made by Senior Associate Justice Marvic M.V.F. Leonen (SAJ Leonen) that FILSCAP's cause of action should be against the broadcaster, and not Anrey, since the contract is only between the "composer (or the composer's representative) and the broadcaster", and that "no privity [of contract] is alleged, much less established" between "the copyright holder and the recipient of electromagnetic wavelengths[.]"[191] SAJ Leonen opines that:

We note that FILSCAP has executed agreements with entities for the collection of royalty payments for the use of its members' works. One such entity is the Kapisanan ng mga Brodkaster ng Pilipinas x x x. The license serves as a form of permission, whereby the broadcaster compensates the composer after being allowed to exercise the composer's rights to exclusively communicate their work to the public. Compensation is determined by the number of compositions played within a certain period of time, with the broadcaster reporting its usage and FILSCAP doing its own monitoring.

If the broadcaster's use of the musical compositions is unlicensed, then the broadcaster should be made liable for infringing the composer's right to exclusively communicate their work to the public. Liability may perhaps attach to the members of the public under the Intellectual Property Code, as amended, if they benefited from the broadcaster's direct infringement, provided that they had notice of the infringing activity and the right and ability to control the direct infringer's activities and the secondary infringement was committed after the pertinent amendments to the Code.

If the broadcaster's use of the musical compositions is with a license, then the license's terms must be examined to determine the metes and bounds of the sanctioned use. If the use exceeds the stipulated bounds, the broadcaster should be made liable for breach of contract, or in the case of a Kapisanan ng mga Brodkaster ng Pilipinas member, memorandum of agreement.

x x x x

But here, the crux of the matter is the legal tie between the copyright holder and the recipient of electromagnetic wavelengths—radio waves—transmitted by the broadcaster. Certainly, it cannot be based on the contract between the composer (or the composer's representative) and the broadcaster. In our civil law, only parties to a contract are bound thereto, unless privity is proved. Here, no privity is alleged, much less established. There is no claim that any broadcaster exceeded the terms of use of the musical compositions it

included in its programming. The broadcaster that facilitated the transmission of the compositions to Anrey, Inc. is not even a party to this case.[192] (Emphasis supplied)

Precisely, however, the basic principle of relativity of contracts dictates that the license agreement between FILSCAP and the broadcasting organization is simply irrelevant in this case — unless Anrey is able to allege and prove that a stipulation pour atrui exists therein in the latter's favor. In other words, absent any stipulation pour atrui, the terms of the license agreement between FILSCAP and the broadcasting organization has nothing to do with the commercial use by a third party, i.e., a business establishment such as a restaurant of Anrey, of said musical compositions. After all, what is being alleged in this case — and rightly so — is the direct infringement, and not indirect or secondary infringement, committed by Anrey, which it did by directly communicating to the public, without a license from FILSCAP, works in FILSCAP's repertoire through loud speakers in its commercial establishments.

Verily, it would simply be fallacious to sweepingly conclude that a license granted by a composer (or the composer's representative) in favor of one (such as the broadcaster) precludes the former from requiring licenses from other third parties. To rule otherwise would be an unwarranted derogation of the Philippines' obligations under the Berne Convention, and an unmistakable abridgment of the composer's right under Section 177.7 of the IP Code — which, as SAJ Leonen himself describes, consists of the "right to exclusively communicate [the author's] work to the public." [193]

To illustrate, in *SGAE v. Rafael Hoteles*, [194] the Court of Justice of the European Union (CJEU) addressed how the right to communicate to the public may be exercised by the broadcasting of works in public places.

In this case, *Sociedad General de Autores y Editores de España (SGAE)* filed a copyright infringement action against *Rafael Hoteles SA (Rafael)* before the courts of Spain, taking the view that the use of television sets and the playing of ambient music within the hotel owned by Rafael involved "communication to the public" of works belonging to the repertoire which it manages. During the pendency of the case, the Spanish court referred the following questions, among others, to the CJEU for a ruling: (i) whether "the installation in hotel rooms of television sets to which a satellite or terrestrial television signal is sent by cable constitute an act of communication to the public;" [195] and (ii) whether "communication that is effected through a television set inside a hotel bedroom [can] be regarded as public because successive viewers have access to the work[.]" [196]

In response, the CJEU agreed with SGAE and held that Rafael's act of placing of television sets in its hotel rooms constituted an act of communication to the public, essentially since the communication did not take place in a "strictly domestic location." In so ruling, it took into account, among others, the "cumulative effects" of the successive clients occupying the rooms, and that as such, these clients could be considered overall as being a "new public." The CJEU held, to wit:

37 The Court has held that, in the context of this concept, the term 'public' refers to an indeterminate number of potential television viewers (Case C89/04 *Mediakabel* [2005] ECR I4891, paragraph 30, and Case C-192/04 *Lagardère Active Broadcast* [2005] ECR 17199, paragraph 31).

38 In a context such as that in the main proceedings, a general approach is required, making it necessary to take into account not only customers in hotel rooms, such customers alone being explicitly mentioned in the questions referred for a preliminary ruling, but also customers who are present in any other area of the hotel and able to make use of a television set installed there. It is also necessary to take into account the fact that, usually, hotel customers quickly succeed each other. As a general rule, a fairly large number of persons are involved, so that they may be considered to be a public, having regard to the principal objective of Directive 2001/29, as referred to in paragraph 36 of this judgment.

39 In view, moreover, of the cumulative effects of making the works available to such potential television viewers, the latter act could become very significant in such a context. It matters little, accordingly, that the only recipients are the occupants of rooms and that, taken separately, they are of limited economic interest for the hotel.

40 It should also be pointed out that a communication made in circumstances such as those in the main proceedings constitutes, according to Article 11bis(1)(ii) of the Berne Convention, a communication made by a broadcasting organisation other than the original one. Thus, such a transmission is made to a public different from the public at which the original act of communication of the work is directed, that is, to a new public.

41 As is explained in the Guide to the Berne Convention, an interpretative document drawn up by the WIPO which, without being legally binding, nevertheless assists in interpreting that Convention, when the author authorises the broadcast of his work, he considers only direct users, that is, the owners of reception equipment who, either personally or within their own private or family circles, receive the programme. According to the Guide, if reception is for a larger audience, possibly for profit, a new section of the receiving public hears or sees the work and the communication of the programme via a loudspeaker or analogous instrument no longer constitutes simple reception of the programme itself but is an independent act through which the broadcast work is communicated to a new public. As the Guide makes clear, such public reception falls within the scope of the author's exclusive authorisation right.

42 The clientele of a hotel forms such a new public. The transmission of the broadcast work to that clientele using television sets is not just a technical means to ensure or improve reception of the original broadcast in the catchment area. On the contrary, the hotel is the organisation which intervenes, in full knowledge of the consequences of its action, to give access to the protected work to its customers. In the absence of that intervention, its customers, although physically within that area, would not, in principle, be able to enjoy the broadcast work.

43 It follows from Article 3(1) of Directive 2001/29 and Article 8 of the WIPO Copyright Treaty that for there to be communication to the public it is sufficient that the work is made available to the public in such a way that the persons forming that public may access it. Therefore, it is not decisive, contrary to the submissions of Rafael and Ireland, that customers who have not switched on the television have not actually had access to the works.[197] (Emphasis and underscoring supplied)

In other words, the CJEU held that acts of retransmitting works — i.e., by way of a placing televisions in hotel rooms with satellite or terrestrial television signal — are restricted acts insofar as retransmissions reach a "new public," or a public which was not taken into account by the authors when they authorized their use by the communication to "original public." The "original public" contemplated by the authors in this case would "only [be the] direct users, that is, the owners of reception equipment who, either personally or within their own private or family circles, receive the progra[m]."[198]

Similarly, in a later case, the CJEU, in *Stichting Brein v. Ziggo BV*,[199] held that:

in order to be categori[z]ed as a 'communication to the public', a protected work must be communicated using specific technical means, different from those previously used or, failing that, to a "new public", that is to say, to a public that was not already taken into account by the copyright holders when they authori[z]ed the initial communication of their work to the public.[200]

To stress, the "new public" concept — unlike the doctrine of multiple performances under US jurisprudence[201] — is not a wholly foreign concept which the Court should simply "adopt" as "persuasive" in the interpretation of the IP Code.[202] Rather, it is explicitly recognized under Berne Convention, to which the Philippines is a State Party, and subsumed within the broad definition of "communication to the public" under the IP Code. For one, paragraph (3) of Article 11bis of the Berne Convention expressly considers as a separate broadcast "the public

communication by loudspeaker or any other analogous instrument transmitting, by signs, sounds or images, the broadcast of the work." For another, Section 171.3 of the IP Code broadly defines "communication to the public" as any act of making a copyrighted 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." [203]

Being a contracting party to the Berne Convention, the Philippines must recognize not only the distinction between the rights of public performance and communication to the public, as already discussed above, but also the scope and nature of the exclusive rights recognized under Article 11bis of the Berne Convention, namely — (i) the right to authorize the broadcast of one's work via wireless means, [204] (ii) the right to authorize the subsequent communication of said broadcast, by wire or rebroadcast, by an organization other than the one which originally made the broadcast, and (iii) the right to authorize the communication of the same broadcast via loudspeaker or a television screen to a "new public." [205] This recognition is vital "to the end that the [Berne Convention], and every article and clause thereof may be observed and fulfilled in good faith by the Republic of the Philippines and the citizens thereof." [206]

In other words, any act of making a work available to the public "by wire or wireless means x x x" — whether by the broadcasting station (to its original listeners, i.e., the "original" public) and a business establishment (to its customers, i.e., the "new public") — would fall within the IP Code's definition of "communication to the public." Such an interpretation would certainly not be an indiscriminate expansion of a right which is already recognized under Section 171.3 of the IP Code, and would also better harmonize the provisions of the IP Code and the State's obligations under the Berne Convention.

In this connection, the term "public," in this sense, should be understood in light of the technical meaning given to it under Part IV (The Law on Copyright) of the IP Code, which entails "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." [207] Thus, making a radio broadcast audible, via loudspeaker, "at places where persons outside the normal circle of a family and that family's closest social acquaintances are or can be present" should be considered as a separate exercise of the right to communicate to the public, pursuant to the IP Code in relation Article 11bis of the Berne Convention.

It is true, as intimated by SAJ Leonen, that paragraph (2) of Article 11bis of the Berne Convention provides that it is up to the signatory countries to legislate as to the conditions under which the broadcasting or communication to the public right shall be exercised within their respective jurisdictions. [208] However, it bears stressing that the leeway given by paragraph (2) of Article 11bis of the Berne Convention to contracting parties is simply with respect to the determination of the conditions as to how "the rights mentioned in the preceding paragraph (paragraph (1) of Article 11bis) may be exercised," but not the recognition of such rights. In this regard, Article 11bis even stresses that said conditions, if any, "shall apply only in the countries where they have been prescribed." [209] Needless to state, State Parties to the Berne Convention, such as the Philippines, are duty-bound to recognize the broadcasting or communication to the public right as described and recognized under Article 11bis of the Berne Convention.

In fact, it is apparent from the intent behind the enactment of the IP Code that the rights recognized under the Berne Convention, among others, consist of "minimum norms and standards" that the Philippines must adhere to. In his sponsorship speech, Senator Raul S. Roco notably remarked:

The Code and the TRIPS Agreement

A landmark agreement in the history of intellectual property, to which the Philippines adhered on December 15, 1994, the Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS) requires that

member-countries of the World Trade Organization (WTO) comply with existing international conventions, mainly the Paris and Berne Conventions, and adopt in their respective legislation certain minimum norms and standards of intellectual property right protection.

Senate Bill No. 1719 was crafted taking into consideration the country's adherence to the provisions of TRIPS.

Despite TRIPS, however, intellectual property protection is still largely left to domestic legislation, as long as consistent with these minimum standards, and always subject to the national treatment and most-favoured-nation clauses.[210]

It bears stressing that Section 177.7 in relation to Section 171.3 of the IP Code, expressly gives authors the "exclusive right to carry out, authorize or prevent x x x [the] communication to the public of the work" which, as defined, "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[.]" Other than said definition, the IP Code neither prescribes any other condition on how the right to communicate to the public may be exercised, nor imposes any restriction on the author's "exclusive right" under the Berne Convention, of authorizing "the public communication by loudspeaker or any other analogous instrument transmitting, by signs, sounds or images, the broadcast of the work." [211]

It is thus clear — under both the respective texts of the IP Code and the Berne Convention, as well as Congress' deliberations on the matter — that while the Philippines can, indeed, legislate as to the conditions by which said rights may be exercised, it must, at the very least, recognize and protect these rights, as a "minimum standard." This interpretation, to my mind, is undoubtedly more consistent with the general intent of the IP Code's enactment.[212]

On this score, I respectfully disagree with the common assertion of AJ Lazaro-Javier and SAJ Leonen that a business establishment which turns on the radio for its customers — as Anrey's restaurants did — does not exercise the right to communicate to the public.[213] In her view, AJ Lazaro-Javier opines that Anrey "did not exercise the right to communicate the work or the sound recordings to the public[.]" [214] simply based on the observation that "[i]t was not the one that transmitted [the sound recordings] to the public," [215] and that rather, it was the radio station, having "possessi[on] or control[] [of] the sound recordings[.]" [216] which "made [it] possible [for] the sound recordings to be within the hearing of the patrons." [217] Similarly, SAJ Leonen asserts that "[i]n this case, the entity that made the musical compositions available to the public in the way described in Subsection 171.3 is not x x x Anrey, Inc., but the radio station or stations — the broadcaster — that transmitted the sound recordings on which the performances were fixed." [218] Thus, for SAJ Leonen, Anrey "is more correctly identified as a 'member of the public'" instead.[219]

To the contrary, however, Article 11bis of the Berne Convention, as discussed above, clearly considers as an exercise of the right of communication to the public not only the "broadcasting of [a work] or the communication thereof to the public by any other means of wireless diffusion[.]" but also (i) "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[.]" or "the public communication by loudspeaker or any other analogous instrument transmitting, by signs, sounds or images, the broadcast of the work." This treatment of this exclusive economic right is likewise embraced by the broad definition of "communication to the public" under Section 171.3 of the IP Code, which covers any act of making 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 such, while the radio station is indeed, at the first instance, the "entity [in] possessi[on] or control[] [of] the sound recordings," [220] a person or entity which subsequently plays such broadcasted sound recordings to the

public "by loudspeaker or by some analogous instrument e.g., a television screen[.]"[221] — as Anrey's restaurants did — separately exercises the authors' exclusive right of communication to the public apart from the radio station.

Too, it simply cannot be concluded, as SAJ Leonen does, that Anrey is a "member of the public" in the context of this case. To be sure, if FILSCAP's music were simply played by Arney's restaurants for their own or their employees' non-commercial consumption — as Anrey alleged but failed to prove[222] — then its restaurants could have possibly qualified as part of the consuming public, and such act could have been justifiable to that extent based on the four "fair use" factors.[223] Here, however, the use of FILSCAP's musical works by Anrey was primarily commercial in nature or clearly intended for a commercial purpose, as the songs were played through two loudspeakers that were set up in the ceiling above the dining areas of these restaurants. Anrey, in the context of this case, is undoubtedly not a "member of the public," but a business establishment which, for a commercial purpose, communicated FILSCAP's works to a "new public."

Ultimately, I also disagree with SAJ Leonen's suggestion that the ponencia's recognition of the "new public" concept is "highly irregular," as it abdicates the Court's task and power to interpret Philippine laws to a foreign authority such as the WIPO.[224]

In the first place, the ponencia resorts to the WIPO's text simply as "persuasive"[225] — and not conclusive, contrary to what SAJ Leonen suggests — in the exercise of the Court's task of interpreting the IP Code and the Berne Convention. In the second place, this concept is embraced in the text itself of the Berne Convention — to which the Philippines is a contracting party - which expressly recognizes the author's exclusive right to authorize "the public communication by loudspeaker or any other analogous instrument transmitting, by signs, sounds or images, the broadcast of the work." [226] More importantly, the scope and definition of the right of "communication to the public" under Sections 177.7 in relation to Section 171.3[227] is broad enough to accommodate and include this right of authorizing "the public communication by loudspeaker or any other analogous instrument."

The foregoing, to my mind, will give effect to both the IP Code and the Philippines' treaty obligations under the Berne Convention. After all, it is one of the well-established rules of statutory construction that endeavor should be made to harmonize the provisions of a law or two laws so that each shall be effective.[228]

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"[229] 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.[230] Simply put, other than the communication to the public by "wire or wireless means x x x" of musical works in FILSCAP's repertoire,[231] 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." [232]

On this score, I submit that the ponencia's reliance on American authorities,[233] particularly on the decisions in

Broadcast Music, Inc. v. Claire's Boutiques, Inc.[234] (Claire's) and Buck v. Jewell-La Salle Realty Co.[235] (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,"[236] the ponencia quotes with approval the following discussion in Claire's, viz.:

Most relevant to the present case, the Supreme Court in *Twentieth Century Music Corp. v. Aiken*, dealt with a restaurant owner who played a radio with four speakers in his restaurant. Defendant Aiken owned a fast-food restaurant where customers usually stayed no more than ten or fifteen minutes. Following *Fortnightly*, the Court considered that a contrary ruling would result in practical problems because of the large number of small business establishments in the United States. As an economic matter, the Court felt that a copyright owner has adequately compensated for his work through his license fee with the radio station.

If Aiken's rationale were to apply in our case, the radio playing by Claire's store managers would not be performances and BMI would have no case. Congress, however, rejected Aiken's rationale, if not its result, in the Copyright Act of 1976. The drafters defined "perform[...]" and "perform publicly" broadly in 17 U.S.C. § 101:

To "perform" a work means to recite, render, play, dance, or act it, either directly or by means of any device or process x x x.

x x x x

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.

Under these particular definitions, the restaurant owner in *Aiken* "performed" the works in question by "playing" them on a "device" -- the radio receiver. Furthermore, the performances were "public" because they took place at a restaurant "open to the public." For the same reasons, Claire's, through the actions of its employees, engages in public performances of copyrighted works when it plays the radio during normal business hours.[237]

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,[238] the Court has time and again turned to US jurisprudence to aid in resolving issues involving copyright.[239] 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.[240]

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.[241] 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.[242] 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." [243]

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.[244] While the cited 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"[245] 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.[246] 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.[247] 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 RA 10372 in 2013. To recall, RA 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,"[248] but not "because the reception becomes a new public performance requiring separate protection,"[249] under the doctrine of multiple performances.[250] 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." [251] 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.

III.

ANREY MUST PAY FILSCAP ACTUAL DAMAGES.

Section 216 of the IP Code enumerates the remedies for infringement. Specifically, paragraph (b) provides how the award to be paid should be computed, viz.:

SECTION 216. Remedies for Infringement. — 216.1. Any person infringing a right protected under this law shall be liable:

x x x x

(b) Pay to the copyright proprietor or his assigns or heirs such actual damages, including legal costs and other expenses, as he may have incurred due to the infringement as well as the profits the infringer may have made due to such infringement, and in proving profits the plaintiff shall be required to prove sales only and the defendant shall be required to prove every element of cost which he claims, or, in lieu of actual damages and profits, such damages which to the court shall appear to be just and shall not be regarded as penalty.

As seen in the provision, there are two alternative awards that courts may order the infringer to pay to the copyright proprietor or his assigns, namely: <<https://www.wto.org/> english="" tratop_e="" dispu_e="" cases_e="" 1pagesum_e="" dsl="" 60sum_e.pdf="" (visited="" july="" 8,="" 2022).

(i)

actual damages, including legal costs and other expenses, as he may have incurred due to the infringement as well as the profits the infringer may have made due to such infringement, and on proving profits the plaintiff shall be required to prove 'sales only and the defendant shall be required to prove every element of cost which

he claims; or, in lieu of actual damages and profits,

(ii)

damages which to the court shall appear to be just and shall not be regarded as penalty.

Notably, Section 216 of the IP Code mirrors the rules on awarding actual damages prescribed under the Civil Code.[252] Thus, if the Court were to award a copyright owner actual damages, such damages "must not only be capable of proof, but must actually be proved with reasonable degree of certainty." Further, to be recoverable, the Court "cannot simply rely on speculation, conjecture or guesswork in determining the amount of damages[,]" such that there must be "competent proof" of the actual amount of loss incurred.[253] Otherwise, in the absence of such "competent proof", or if the amount of such loss "cannot be proved with certainty[,]" temperate damages which must be "reasonable under the circumstances" should instead be awarded.[254]

Here, the ponencia orders Anrey to pay FILSCAP: (1) P10,000.00, as "temperate damages; and (2) P50,000.00 as attorney's fees and litigation expenses.[255]

The ponencia recognizes that FILSCAP charges a fixed amount of license fees or royalties based on its rate cards.[256] However, the ponencia submits that the annual license fees demanded by FILSCAP appears to be inequitable considering that FILSCAP was only able to prove use by Anrey's restaurants of songs belonging to FILSCAP's repertoire on 12 occasions.[257] Accordingly, the ponencia deems it proper to award temperate damages of P10,000 considering that:

1) the license fees were charged annually and Anrey was only shown to have publicly performed FILSCAP's songs on two different days; and 2) the license fees [represent] the use of over 20 million songs of FILSCAP's repertoire and Anrey was only shown to have publicly performed FILSCAP's 12 songs in total.[258]

I do not agree. Anrey should pay FILSCAP P12,600.00, or P6,300.00 per store, as actual damages for unpaid public performance license fees for two of the three of Anrey's stores involved in the case.

For one, the annual license fee of P6,300.00 was based on FILSCAP's rate cards prevailing at the time for restaurants playing mechanical music only, whose seating capacity is less than a hundred.[259] This amount being claimed by FILSCAP corresponds to its annual license fee for the year 2009,[260] which should have been paid by Anrey to FILSCAP "[h]ad [Anrey] secured a public performance license" from the latter.[261] As well, as alleged by FILSCAP, [b]y not paying the said amount, [Anrey] was effectively able to 'save' on expenses and accordingly increase its profits at the expense of [FILSCAP]."[262]

For another, FILSCAP was also able to substantiate through monitoring reports that music from FILSCAP's repertoire were played in Anrey's Sizzling Plate restaurants at (i) 116 Session Road, Baguio City, on July 2 and September 3, 2008, and (ii) 136 Abanao Extension, Baguio City, on July 18 and September 17, 2008, respectively.[263] Thereafter, FILSCAP sent Anrey's restaurants six demand letters from July 24, 2008 to March 10, 2009,[264] but all such demands remained unheeded.[265]

Based on the foregoing, it is clear that FILSCAP's members lost out on license fees for one year when two of Anrey's restaurants played copyrighted work starting July 2008 until 2009. Notably, the license fee that FILSCAP regularly charges "restaurants playing mechanical music only" is computed not based on a daily rate, but is fixed on an annual basis.[266] Thus, it would be sufficient for FILSCAP to prove, as it did, that Anrey's restaurants publicly performed or communicated to the public copyrighted work in FILSCAP's repertoire at any time within a one year period (i.e., year 2009) in order to substantiate its claim for actual damages.

That FILSCAP was able to prove Anrey's use of songs included in its vast repertoire only on 12 occasions is of no moment, and should not render award of actual damages inequitable. Verily, the annual license fee charged by FILSCAP is a fixed fee and not a variable rate dependent on the number of songs that will be played or used by the establishment. Thus, if Anrey decides to play the songs protected by FILSCAP only on a single occasion, or even on multitude of occasions, FILSCAP would still charge the same fixed annual license fee of P6,300.00 per year for each establishment.

As well, I find the ponencia's award of P50,000.00 as attorney's fees as likewise proper pursuant to Section 216.1 (b) of the IP Code. Here, as observed by the ponencia, FILSCAP presented during trial vouchers for the legal expenses it had incurred, and the said amounts were stipulated upon by the parties during trial.[267]

In light of the foregoing, I vote to GRANT the petition.

[1]Ponencia, p. 8.

[2]Id.

[3]Id.

[4]Id.

[5]Id., p. 3.

[6]Id. at 33.

[7]Id. at 28-34.

[8]Id., p. 7.

[9]728 Phil. 450 (2014).

[10]Id. at 456-457.

[11]Ponencia, p. 38.

[12]Id. at 11-15.

[13]IP CODE, Sec. 2.

[14]Ponencia, pp. 26-28. The ponencia observes that none of the exceptions under Sec. 184 apply in this case, and clarifies that Section 184 (I) applies only to institutions for charitable and educational purposes. Id. at 28-34. The ponencia also applied the four-factors under Section 185 of the IP Code and concludes that Anrey's acts are not analogous with fair use.

[15]Id. at 28-34.

[16]Id. at 26-34.

[17]Currently, the IPO has not prescribed any additional requirements for the application of this exemption

[18]Commissioner of Internal Revenue v. Bank of the Philippine Islands, 525 Phil. 624, 632-633 (2006); Commissioner of Internal Revenue v. Bank of Commerce, 498 Phil. 673, 684 (2005); Romualdez v. Sandiganbayan, 479 Phil. 265, 287-288 (2004); Estrada v. Sandiganbayan, 421 Phil. 290, 348 (2001). See Commissioner of Internal Revenue v. Court of Appeals, 363 Phil. 130, 138 (1999), citing Mustang Lumber Inc. v. Court of Appeals, 327 Phil. 214 (1996), further citing RUBEN E. AGPALO, STATUTORY CONSTRUCTION,

(2[nd] Ed. 1990), p. 131.

[19]Private, Black's Law Dictionary (9[th] Edition) (2009), p. 1315.

[20]IP CODE, Sec. 171.6.

[21]Freuhauf Electronics v. Technology Electronics Assembly, 800 Phil. 721, 747 (2016).

[22]Philippine International Trading Corporation v. Commission on Audit, 635 Phil. 448, 454 (2010).

[23]The provision specifically exempts places "where no admission fee is charged in respect of such public performance or communication." (Emphasis supplied)

[24]Commissioner of Internal Revenue v. St. Luke's Medical Center, 805 Phil. 607, 618 (2017), citing Commissioner of Internal Revenue v. St. Luke's Medical Center, 695 Phil. 867, 895 (2012); lung Center of the Philippines v. Quezon City, 477 Phil. 141 (2004).

[25]See Commissioner of Internal Revenue v. Court of Appeals, 358 Phil. 562 (1998), citing 84 CJS 566).

[26]Commissioner of Internal Revenue v. St. Luke's Medical Center, *supra* note 24, at 617-618.

[27](1) An organization intended to promote awareness of the hardships endured by street children arranges an enclosed gallery in the high school cafeteria showcasing its members' photographs of street children. The organization charges a viewing fee of 10 pesos to visitors to cover its administrative and operational expenses. To improve the atmosphere of the gallery, the organization plays the entire album of Smokey Mountain which includes the song "Paraiso."

[28]IP CODE, Sec. 18 (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[.]"

[29]Dissenting Opinion of Chief Justice Hilario David , Jr. in Habana v. Robles, 369 Phil. 764, 787 (1999).

[30]Id. at 789.

[31]Pedro Jose Bernardo, TRANSFORMATIVE ADAPTATION, PERFORMANCE, AND FAIR USE OF LITERARY AND DRAMATIC WORKS: DELINEATING THE RIGHTS OF PLAYWRIGHTS AND ADAPTERS, pp. 619-620, citing Brad Sherman & Lionel Bentley, THE MAKING OF MODERN INTELLECTUAL PROPERTY LAW (2000), p. 302.

[32]Id.

[33]Natanel, Neil Weinstock, MAKING SENSE OF FAIR USE (2011), p. 719, available at <<https://escholarship.org/content/qt5mh7w8hc/qt5mh7w8hc.pdf>>, citing Matthew Sag, THE PRE--HISTORY OF FAIR USE, 76 BROOK. L. REV. (forthcoming 2011).

[34]Id.

[35][1741]2 Atk. 141, cited in PRIMARY SOURCES ON COPYRIGHT (1450-1900), eds L. Bently & M. Kretschmer, available at <https://web.archive.org/web/20110725200047/http://www.copyrighthistory.org/cgi-bin/kleioc/0010/exec/showScreen/%22uk_1741_im_001_0001.jpg%22>.

[36]Id.

[37]Id. at 143.

[38]Id.

[39]See id.

[40]Supra note 31, at 302.

[41]See Case Summary, Outcome, 9 F. Cas.'342, 344 (C.C.D. Mass. 1841).

[42]Id. at 348.

[43]510 US 569 (1994).

[44]Id. at 599.

[45]P. Bernt Hugenholtz, Law and Technology Fair Use in Europe, VIEWPOINTS: COMMUNICATIONS OF THE ACM (2013), Vol. 56, No. 5, p. 26, available at <https://www.ivir.nl/publicaties/download/Communications_ACM.pdt>; The Copyright Fair Use Debate: A European Perspective, MINITERELLISON, available at <<https://www.minterellison.com/articles/the-copyright-fair-use-debate-a-european-perspective>>.

[46]Copyright, Designs and Patents Act 1988, LEGISLATION.GOV.UK, available at <<https://www.legislation.gov.uk/ukpga/1988/48/contents>>.

[47]1971 C. No. 7360, available at <<https://uniset.ca/other/cs3/vosper.html>>.

[48]Id.

[49][2007]EWHC 2755, available at <<http://www2.bailii.org/ew/cases/EWHC/Ch/2007/2755.html>>.

[50]"Ordnance Survey" is the national mapping agency of Great Britain.

[51][2006]EWCA Civ 1776, available at <<https://www.5rb.com/wp-content/uploads/2013/10/HRH-Prince--of-Wales-v-Associated-Newspapers-CA-21-Dec-2006.pdf>>.

[52][2005]EWHC 472 (Ch), available at <<https://www.5rb.com/wp-content/uploads/2013/10/Fraser-v--BBC-final.pdf>>.

[53]AN ACT TO PROTECT INTELLECTUAL PROPERTY.

[54]Act. No. 3134, Sec. 5.

[55]52 Phil. 680 (1929).

[56]Id. See Syllabus.

[57]Dated November 14, 1972.

[58]PD 49, Whereas Clause.

[59]369 Phil. 764 (1999).

[60]PD 49, Secs. 11-13.

[61]AUTHORIZING THE COMPULSORY LICENSING OR REPRINTING OF EDUCATIONAL,

SCIENTIFIC OR CULTURAL BOOKS AND MATERIALS AS A TEMPORARY OR EMERGENCY MEASURE WHENEVER THE PRICES THEREOF BECOME SO EXORBITANT AS TO BE DETRIMENTAL TO THENATIONAL INTEREST.

[62]PD 285, Sec. 1.

[63]755 Phil. 709 (2015).

[64]Habana v. Robles, supra note 59, at 778.

[65]Id. at 778-780, citing Columbia Pictures Inc. v. Court of Appeals, 329 Phil. 875 (1996).

[66]Dissenting Opinion of Chief Justice Hilario Davide, Jr., in Habana v. Robles, supra note 29, at 797.

[67]ABS-CBN Corporation v. Gozon, et al., supra note 63, at 758-760, citing: (i) Matthew D. Bunker, Transforming The News: Copyright And Fair Use In News-Related Contexts, 52 J. COPYRIGHT SOC'Y U.S.A. 309, 311 (2004-2005); (ii) Campbell v. Acuff-Rose Music, Inc., 510 US 569, 579 (1994); (iii) Nunez v. Caribbean International News Corp., 235 F.3d 18 (1st Cir. 2000) and (iv) Psihoyos v. National Examiner, 49 U.S.P.Q.2d 1766 (S.D. N.Y. 1998) (See note 120: "Bunker proposes the term 'meta-use' for the kind of use that does not necessarily transform the original work by adding expression, meaning, or message, but only changes the purpose of the work. '[Psihoyos] distinguished between using the photograph to 'show what it depict[ed]' versus commenting upon the photograph in some way. Certainly the Nunez use was for purposes of commentary on the photos — the photos had engendered significant controversy, and the news article reported on that controversy. Thus, the Nunez use was what we might refer to as a 'meta-use' of the photos that went beyond simply using a photograph to illustrate a news story — as in Psihoyos — and instead consisted of a news story about the photographs themselves, or at least public reaction to them."); (v) John J. McGowan, Competition, Regulation, and Performance In Television Broadcasting, 1967 WASH. U. L. Q. 499 (1967), and (vi) William T. Kelley, How Television Stations Price Their Service, 11 J. BROAD. 313 (1966-1967).

[68]See Campbell v. Acuff-Rose Music, Inc., supra note 43.

[69]Id. at 578-579.

[70]464 US 417, 451, stating:

<https: www.wto.org="" english="" tratop_e="" dispu_e="" cases_e="" 1pagesum_e="" dsl="" 60sum_e.pdf="" (visited="" july="" 8,="" 2022).

<https: www.wto.org="" english="" tratop_e="" dispu_e="" cases_e="" 1pagesum_e="" dsl="" 60sum_e.pdf="" (visited="" july="" 8,="" 2022).

<https: www.wto.org="" english="" tratop_e="" dispu_e="" cases_e="" 1pagesum_e="" dsl="" 60sum_e.pdf="" (visited="" july="" 8,="" 2022).

[E]very [unauthorized] commercial use of copyrighted material is presumptively an unfair exploitation of the monopoly privilege that belongs to the owner of the copyright.

<https: www.wto.org="" english="" tratop_e="" dispu_e="" cases_e="" 1pagesum_e="" dsl="" 60sum_e.pdf="" (visited="" july="" 8,="" 2022).

<https: www.wto.org="" english="" tratop_e="" dispu_e="" cases_e="" 1pagesum_e="" dsl="" 60sum_e.pdf="" (visited="" july="" 8,="" 2022).

<https: www.wto.org="" english="" tratop_e="" dispu_e="" cases_e="" 1pagesum_e="" dsl="" 60sum_e.pdf="" (visited="" july="" 8,="" 2022).

<https: www.wto.org="" english="" tratop_e="" dispu_e="" cases_e="" 1pagesum_e="" dsl="" 60sum_e.pdf="" (visited="" july="" 8,="" 2022).

<https://www.wto.org/english/tratop_e/dispu_e/cases_e/1pagesum_e/dsl/60sum_e.pdf> (visited= "" july= "" 8,="" 2022).

<https://www.wto.org/english/tratop_e/dispu_e/cases_e/1pagesum_e/dsl/60sum_e.pdf> (visited= "" july= "" 8,="" 2022).

[71]Campbell v. Acuff-Rose Music, Inc., supra note 43, at 584.

[72]Id, citing Harper & Row Publs. v. Nation Enters., 471 US 539, 561 (1985); House Report, p. 66; 3 Boswell's Life of Johnson 19 (G. Hill ed. 1934).

[73]471 US 539 (1985).

[74]Id. at 562. Emphasis supplied.

[75]Campbell v. Acuff-Rose Music, Inc., supra note 43, at 579.

[76]Id.

[77]Id. at 591.

[78]796 F.2d 1148 (1986). Hustler Magazine, Inc., published an ad parody of Campari liquor featuring Reverend Jerry Falwell, "a nationally known fundamentalist minister, describing his 'first time' as being incest with his mother in an outhouse, and saying that he always gets 'sloshed' before giving his sermons." Defendants reproduced copies of the single page ad parody and distributed them to their members for solicitation in order to raise money to help Falwell "defend his mother's memory" in court.

[79]Id. at 1153.

[80]755F.3d 87 (2014).

[81]336 F.3d 811 (2003).

[82]Id. at 818.

[83]412 F. Supp. 2d 1106 (2006):

x x x Google maintains one of the world's largest and most popular Internet search engines, accessible, among other places, on the World Wide Web at www.google.com x x x.

x x x There are billions of Web pages accessible on the Internet. It would be impossible for Google to locate and index or catalog them manually. x x x Accordingly, Google, like other search engines, uses an automated program (called the 'Googlebot') to continuously crawl across the Internet, to locate and analyze available Web pages, and to catalog those Web pages into Google's searchable Web index. x x x

xx x As part of this process, Google makes and analyzes a copy of each Web page that it finds, and stores the HTML code from those pages in a temporary repository called a cache x x x

x x x When Google displays Web pages in its search results x x x in the smaller font, Google often displays another link labeled "Cached."

x x x When clicked, the "Cached" link directs an Internet user to the archival copy of a Web page stored in Google's system cache, rather than the original Web site for that page. By clicking on the 'Cached link' for a page, a user can view the 'snapshot' of that page, as it appeared the last time the site was visited and analyzed by the Googlebot." (pp. 1110- 1111)

Plaintiff Blake Field (Field), an author and attorney, filed an action against Google for directly infringing his

copyrights "when a Google user clicked on a 'cached' link to the Web pages containing Field's copyrighted works and downloaded a copy of those pages from Google's computers. (p. 1115)

[84]Id. at 1119.

[85]Harper & Row Publr v. Nation Enters., supra note 73, at 562.

[86]996 F.2d 1366 (1993). Petitioner Twin Peaks Productions, Inc. (TPP) is the producer of the show "Twin Peaks," which premiered on ABC in April 1990. In October 1990, defendant Publications International, Ltd. (PIL) published a book entitled "Welcome to Twin Peaks: A Complete Guide to Who's Who and What's What" based on the first eight episodes of TPP's Twin Peaks. "The 128-page book has seven chapters, dealing with, respectively, (1) the popularity of the show; (2) the characters and the actors who play them; (3) the plots of the eight episodes, some commentary on the plots, and 'unanswered questions'; (4) David Lynch, the creator of the show; (5) Mark Frost, the producer of the show, and Snoqualmie, Washington, the location of the show; (6) the music of the show; and (7) trivia questions and quotations constituting the 'wit and wisdom of Agent Cooper,' one of the characters." (p. 1370)

[87]See id.

[88]Campbell v. Acuff-Rose Music, Inc., supra note 43, at 586.

[89]495 US 207 (1990).

[90]Harper & Row Publr v. Nation Enters., supra note 73, at 564.

[91]Id.

[92]811 F.2d 90 (1987).

[93]772 F. Supp. 1367 (1989).

[94]141 S. Ct. 1183. "Oracle America, Inc., owns a copyright in Java SE, a computer platform that uses the popular Java computer programming language. In 2005, Google acquired Android and sought to build a new software platform for mobile devices. To allow the millions of programmers familiar with the Java programming language to work with its new Android platform, Google copied roughly 11,500 lines of code from the Java SE program. The copied lines are part of a tool called an Application Programming Interface (API). An API allows programmers to call upon prewritten computing tasks for use in their own programs." (p. 1187) "For each task, there is a computer code, known as 'implementing code' that in effect tells the computer how to execute the particular task you have asked it to perform," (p. 1191) and a declaring code which simply "locate[s] and invoke[s] the particular implementing code that it needs to instruct the computer how to carry out a particular task." (p.1192) "Google did not copy the task-implementing programs, or implementing code, from the Sun Java API. It wrote its own task- implementing programs, such as those that would determine which of two integers is the greater or carry out any other desired (normally far more complex) task. This implementing code constitutes the vast majority of both the Sun Java API and the API that Google created for Android. For most of the packages in its new API, Google also wrote its own declaring code. For 37 packages, however, Google copied the declaring code from the Sun Java API." (p.1193)

[95]Id.

[96]Id. at 1188.

[97]Id. at 1205.

[98]Campbell v. Acuff-Rose Music, Inc., supra note 43, at 587-588 citing Harper & Row Publrs v. Nation Enters., supra note 73.

[99]Id.

[100]Field v. Google, Inc., supra note 83, at 1120.

[101]Id.

[102]Harper & Row, Publrs. v. Nation Enters., supra note 73, at 566; Stewart v. Abend, supra note 89, at 238, citing 3 Nimmer § 13.05[A], pp. 13-81.

[103]Campbell v. Acuff-Rose Music, Inc., supra note 43, at 590, citing Nimmer § 13.05[A][4], p. 13-102.61; Harper & Row, Publrs. v. Nation Enters., supra note 73, at 569; Senate Report, p. 65; Folsom v. Marsh, 9 F. Cas. 341 (1841).

[104]Id. citing Harper & Row, Publrs. v. Nation Enter., supra note 73, at 568. Emphasis supplied.

[105]Campbell v. Acuff-Rose Music, Inc., supra note 43, at 591. Emphasis supplied.

[106]Hustler Magazine, Inc., v. Moral Majority, Inc., supra note 78, at 1155-1156.

[107]Id. at 1156.

[108]Google LLC v. Oracle America, Inc., supra note 94, at 1208.

[109]Harper & Row, Publrs. v. Nation Enters., supra note 73, 568, citing 3 Nimmer § 13.05[8], at 13-77-13-78.

[110]Stewart v. Abend, supra note 89, at 238.

[111]Twin Peaks Productions, Inc. v. Publications International Ltd., supra note 86, at 1377.

[112](1) An organization intended to promote awareness of the hardships endured by street children arranges an enclosed gallery in the high school cafeteria showcasing its members' photographs of street children. The organization charges a viewing fee of 10 pesos to visitors to cover its administrative and operational expenses. To improve the atmosphere of the gallery, the organization plays the entire album of Smokey Mountain which includes the song "Paraiso."

[113](2) A taxi driver listens to the radio inside his car for his own indulgence but regularly receives huge tips from his passengers for playing music.

[114](5) A customer sings all the hit songs of Queen onstage in a karaoke bar where more than 500 customers regularly go every night.

[115]Ponencia, p. 6; rollo, p. 63.

[116]Ponencia, pp. 3-4; rollo, p. 55.

[117]Rollo, pp. 65-70.

[118]Ponencia, p. 4.

[119]Id.

[120]Rollo, p. 95. Under said rules, a food service and drinking establishment that is 3,750 square feet or larger must secure a license for the public performance of musical works via radio and television. For establishments using television: (a) it has more than four (4) television sets; (b) it has more than one (1) television set in any

room; (c) if any of the television sets used has a diagonal screen with size that is greater than fifty-five (55) inches; (d) if any audio portion of the audiovisual performance is communicated by means of more than six (6) loudspeakers or four (4) loudspeaker in any one room or adjoining outdoor space; or (e) if there is any cover charge. As to the use of radio sets, it must secure a license if the following conditions apply: (a) if it has more than six (6) loudspeakers; (b) it has more than four (4) loudspeakers in any one room or adjoining outdoor it has more than four (4) loudspeakers in any one room or adjoining outdoor space; (c) if there is any cover charge; or (d) if there is music

[121]Id. at 185.

[122]Ponencia, pp. 21-24.

[123]Id. at 39-43.

[124]Id. at 26-28.

[125]Rollo, p. 443. This was not invoked by Anrey in its Answer, but the RTC, in its Decision dated April 15, 2015, nevertheless exempted Anrey under Section I 84(i) of the IP Code based on its observation that Anrey did not charge any additional costs to its customers in respect of the music played in its restaurants.

[126]Ponencia, p. 28.

[127]Rollo, p. 87.

[128]Dissent of AJ Lazaro-Javier, pp. 10-11. Section 184.1 (a) of the IP Code provides:

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; x x x

[129]Id.

[130]760 F. Supp. 767 (1991).

[131]Dissent of AJ Lazaro-Javier, pp. 8-11, citing Edison Bros. Stores v. Broad. Music, Inc., supra note 130.

[132]17 U.S.C. Sec. 110, as amended by the Fairness in Music Licensing Act of 1998 (FMLA) of the U.S.

[133]Id.

[134]Broadcast Music, Inc. v. Claire's Boutiques, Inc., 949 F.2d 1482, 1489 (1991). The court stated that "the exemption is available only if (1) a single receiving apparatus is used, (2) the receiving apparatus is of a kind commonly used in private homes, (3) the transmission is provided free of charge, and (4) the transmission is not 'further transmitted' to the public."

[135]Cass County Music Company v. Muedini, 55 F.3d 263, 268 (7th cir. 1995). Here, the court held that the extent to which an audio system is augmented should be a deciding factor in the outcome of each dispute.

[136]IP CODE, Sec. 184.1(a).

[137]17 U.S.C. Sec. 110.

[138]Ruben E. Agpalo, STATUTORY CONSTRUCTION (2009 ed.), p. 187 citing *People v. Yadao*, 94 Phil. 726 (1954).

[139]*Procter and Gamble Philippine Manufacturing Corp. v. Commissioner of Customs*, 132 Phil. 169, 175 (1968).

[140]Used in relation to "public performance" See IP CODE, Sec. 171.6.

[141]*Id.*

[142]*Ponencia*, p. 6.

[143]IP CODE, Sec. 171.6.

[144]*Ponencia*, p. 27.

[145]*Rollo*, pp. 63, 441-442.

[146]*Id.*

[147]*Id.* at 420, 578-579.

[148]*Id.* at 420, 443, 578-579.

[149]*Id.* at 88.

[150]*Id.* at 442, 533.

[151]*Rollo*, pp. 371-372; TSN dated February 21, 2011, pp. 15-16. The visits of FILSCAP's representative took around one (1) hour each.

[152]*Ponencia*, pp. 3-4.

[153]*Google LLC v. Oracle America, Inc.*, *supra* note 94.

[154]*Rollo*, p. 398.

[155]*Campbell v. Acuff-Rose Music, Inc.*, *supra* note 43, at 590, citing *Nimmer* § 13.05[A][4], p. 13-102.61; *Harper & Row, Publs. v. Nation Enters.*, *supra* note 73, at 569; Senate Report, p. 65; *Folsom v. Marsh*, 9 F. Cas. 341 (1841). Emphasis supplied.

[156]*Harper & Row, Publs. v. Nation Enters.*, *supra* note 73, at 562.

[157]In *ABS-CBN v. PMMSI*, 596 Phil. 283 (2009), the Court touched on Subsection 177.7 albeit in a limited way, as the issue in this case was whether a satellite television provider is infringing the broadcasting right of a television station by simply carrying or simultaneously retransmitting the signals transmitted by the television station in its unaltered form pursuant to the "must-carry rule" imposed by the National Telecommunications Commission (NTC). Under the said must-carry rule, the NTC requires satellite and cable television providers to carry all local stations.

[158]AN ACT AMENDING CERTAIN PROVISIONS OF REPUBLIC ACT NO. 8293, OTHERWISE KNOWN AS THE "INTELLECTUAL PROPERTY CODE OF THE PHILIPPINES," AND FOR OTHER PURPOSES, approved February 8, 2013.

[159]*Ponencia*, pp. 15-18.

[160]*Id.* at 18.

[161]Id. at 16.

[162]Id. at 26.

[163]Id. at 8-10.

[164]Id. at 9. Under FILSCAP's Deeds of Assignment with its members, the latter have assigned to FILSCAP their "Public Performing Rights" in all copyright works which, as defined in said Deeds of Assignment, cover both the "right of public performance" and "right of communication to the public" as defined in Sections 171.6 and 171.3 of the IP Code, respectively. The same holds true with respect to FILSCAP's authority to enforce the rights of foreign authors, as stated in FILSCAP's Reciprocal Agreements. See rollo pp. pp. 230, 234, 241, 244, 253, 257, 265, and 271-279. [Note: The Deeds of Assignment in rollo, pp. 248-249 and 261-262 are worded a bit differently but they also expressly grant the right to enforce the author's "right of communication to the public." Likewise, the Deeds of Assignment in rollo pp. 221 and 227, which appear to be based on an older template used by FILSCAP (prior to the effectivity of the IP Code), similarly grant the right to enforce the author's "performing rights", including broadcasting and televising.]

[165]NBI – Microsoft Corporation & Lotus Development Corp. v. Hwang, 499 Phil. 423, 438 (2005), citing PD 49, Sec. 5.

[166]See Habana v. Robles, supra note 59, at 775.

[167]Referred to by the WIPO as the "broadcasting right." Ignacio S. Sapalo, Background Reading Material on the Intellectual Property System of the Philippines [WIPO Background], WORLD INTELLECTUAL PROPERTY ORGANIZATION (1994), p. 141, available at <https://www.wipo.int/edocs/pubdocs/en/wipo_pub_686_ph.pdf>.

[168]Id. at 152-153, citing FILSCA P v. Tan, 232 Phil. 426 (1987)

[169]RA 10372, Sec. 4.

[170]See Neri v. NLRC, 296 Phil. 610, 616 (1993).

[171]IP CODE, Section 171.3.

[172]Also known as The Paris Act of July 24, 1971.

[173]WIPO-Administered Treaties, Contracting Parties to the Berne Convention, WORLD INTELLECTUAL PROPERTY ORGANIZATION, available at <https://wipolex.wipo.int/en/treaties/ShowResults?search_what=C&treaty_id=15> <available at="" ponencia, p. 19.

[174]Guide to the Berne Convention for the Protection of Literary and Artistic Works (Paris Act, 1971), WORLD INTELLECTUAL PROPERTY ORGANIZATION, Geneva (1978), available at <https://www.wipo.int/edocs/pubdocs/en/copyright/615/wipo_pub_615.pdf>.

[175]Id. at 64-65.

[176]Id. at 66.

[177]Id. at 66.

[178]Id. at 67.

[179]Id. at 66-69.

[180]BERNE CONVENTION, Art. 11bis.

[181]See WIPO Guide, pp. 64-65, where the WIPO remarks: "[Article 11] goes on to speak of 'including such public performance by any means or process,' and this covers performance by means of recordings; there is no difference for this purpose between a dance hall with an orchestra playing the latest tune and the next-door discotheque where the customers use coins to choose their own music. In both, public performance takes place. The inclusion is general and covers all recordings (discs, cassettes, tapes, videograms, etc.).]"

[182]Proclamation No. 137, MAKING PUBLIC THE ACCESSION OF THE REPUBLIC OF THE PHILIPPINES TO THE BERNE CONVENTION FOR THE PROTECTION OF LITERARY AND ARTISTIC WORKS, REVISED AT BRUSSELS ON JUNE 26, 1948, dated March 15, 1955; See WIPO-Administered Treaties, Contracting Parties to the Berne Convention, WORLD INTELLECTUAL PROPERTY ORGANIZATION available at <https://wipolex.wipo.int/en/treaties/ShowResults?search_what=C&treaty_id=15>.

[183]Proclamation No. 137, id.

[184]Id.

[185]It is noted that under the wording of Section 171.6 of the IP Code, it is implied that an act constituting a "communication to the public" could likewise constitute a performance, had it not been for the "need for communication within the meaning of Subsection 171.3."

[186]WIPO Guide, p. 66.

[187]Id. at 67.

[188]Ponencia, p. 20 (citing Intergovernmental Committee and Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore, 14[th] Session, Geneva, June 29 to July 2009).

[189]CIVIL CODE, Art. 1311; see *Sps. Narvaez v. Alciso*, 611 Phil. 452 (2009).

[190]*Integrated Packaging Corporation v. Court of Appeals*, 388 Phil. 835, 845 (2000).

[191]Dissenting Opinion of SAJ Leonen, pp. 10-11.

[192]Id.

[193]Id.

[194]Case C-306/05, December 7, 2006, available at <<https://curia.europa.eu/juris/showPdf.jsf?jsessionid=D80FA6C7FF9ED9C90DDA33A1933D2021?text=&docid=66355&pageIndex=0&doclang=EN&mode=1st&dir=&occ=first&part=1&cid=1744812>>.

[195]Id.

[196]Id.

[197]Id.

[198]Id.

[199]Case C-610/15, June 14, 2017, available at <<https://curia.europa.eu/juris/document/document.jsf?text=&docid=191707&pageIndex=0&doclang=en&mode=1st&dir=&occ=first&patt=1&cid=2630159>>.

[200]Id.

[201]This doctrine is applied in the ponencia. See ponencia, pp. 18-19.

[202]See *Cu v. Republic*, 89 Phil. 473, 478 (1951).

[203]IP CODE, Sec. 171.3.

[204]WIPO Guide, pp. 66-67.

[205]Id. at 67.

[206]Proclamation No. 137; See WIPO-Administered Treaties, Contracting Parties to the Berne Convention, WORLD INTELLECTUAL PROPERTY ORGANIZATION, available at <https://wipolex.wipo.int/en/treaties/ShowResults?search_what=C&treaty_id=15>.

[207]IP CODE, Sec. 171.6.

[208]Dissenting Opinion of SAJ Leonen, p. 17. BERNE CONVENTION, Article 11bis, paragraph 2 provides:<https://www.wto.org/english/whatis/treaties/tratop_e.htm#dispu_e> (visited= july= 8,= 2022). <available at=

(2)

It shall be a matter for legislation in the countries of the Union to determine the conditions under which the rights mentioned in the preceding paragraph may be exercised, but these conditions shall apply only in the countries where they have been prescribed. They shall not in any circumstances be prejudicial to the moral rights of the author, nor to his right to obtain equitable remuneration which, in the absence of agreement, shall be fixed by competent authority.

[209]BERNE CONVENTION, Article 11bis, paragraph 2.

[210]Full text of Sponsorship of Sen. Raul Roco, S. No. 1719, II RECORD, SENATE 10[TH] CONGRESS 2[ND] SESSION 132 (October 8, 1996); Article 9(1) of the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement) expressly refers to the Berne Convention, and requires that "Members shall comply with Articles 1 through 21 of the Berne Convention (1971) and the Appendix thereto."

[211]BERNE CONVENTION, Art. 11bis(1).

[212]See *Philippine International Trading Corporation v. Commission on Audit*, 635 Phil. 448, 454 (2010): "It is a rule in statutory construction that every part of the statute must be interpreted with reference to the context, i.e., that every part of the statute must be considered together with the other parts, and kept subservient to the general intent of the whole enactment."

[213]Dissent of AJ Lazaro-Javier, p. 8; Dissenting Opinion of SAJ Leonen, p. 10.

[214]Dissent of AJ Lazaro-Javier, p. 7.

[215]Id.

[216]Id.

[217] Id.

[218]Dissenting Opinion of SAJ Leonen, p. 10.

[219]Id.

[220]Dissent of AJ Lazaro-Javier, p. 7.

[221]See WIPO Guide, p. 69.

[222]Rollo, pp. 419-432, 578-579. Anrey alleged in its Answer that it simply played the radio for the benefit of its staff, for "the primary purpose of monitoring the weather and not to play music for its customer[s]."

[223]See discussions in Part I of this Opinion in relation to fair use and the limitations on copyright.

[224]Dissenting Opinion of SAJ Leonen, p. 16. SAJ Leonen opines that:

Similarly, the use of the texts produced by the World Intellectual Property Organization to interpret provisions of the Intellectual Property Code is highly irregular. In our Constitutional order, the task of interpreting Philippine laws is part of [the] judicial power vested in the Supreme Court and other courts as may be provided by law. (Id.)

[225]Ponencia, p. 20.

[226]BERNECONVENTION, Art 11bis(1).

[227]The IP Code defines this right as follows:

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[.]

[228]Valera v. Tuason, Jr., 80 Phil. 823, 827 (1948).

[229]Ponencia, pp. 15-18, 21-26.

[230]Id. at 4.

[231]Id. at 3.

[232]Id. at 16.

[233] Id. at 17-18.

[234]Supra note 134.

[235]283 US 191 (1931).

[236]Ponencia, p. 18.

[237]Id. at 17-18.

[238]WIPO Background, p. 141:

Act No. 3134 was patterned mainly on the American Copyright Law of 1909. Section 3 of the Act set forth the rights included in copyright. This was reproduced in its entirety in Section 5 of Presidential Decree No. 49, the current Copyright Law.

See also The Intellectual Property System: A Brief History, Intellectual Property Office of the Philippines, INTELLECTUAL PROPERTY OFFICE OF THE PHILIPPINES, available at <<https://www.ipophil.gov.ph/news/the-intellectual-property-system-a-brief-history/>>.

[239]See *ABS-CBN v. Gozon*, supra note 63; *Pearl & Dean (Phil.), Incorporated v. Shoemart, Incorporated*, 456 Phil. 474 (2003).

[240]Ruben E. Agpalo, *STATUTORY CONSTRUCTION* 185 (2009 ed.), citing *Wise & Co. v. Meer*, 78 Phil. 655 (1947) and *Carolina Industries, Inc. v. CMS Stock Brokerage, Inc.*, 97 SCRA 734 (1980).

[241]*Id.*, citing *Cu v. Republic*, 89 Phil. 473 (1951).

[242]*Id.* at 187, citing *People v. Yadao*, 94 Phil. 726 (1954).

[243]*Procter and Gamble Philippine Manufacturing Corp. v. Commissioner of Customs*, supra note 139, at 175.

[244]*Ponencia*, p. 25.

[245]Summary of the WIPO Copyright Treaty (WCT) (1996), WORLD INTELLECTUAL PROPERTY OFFICE, available at <https://www.wipo.int/treaties/en/ip/wct/summary_wct.html>.

[246]*Ponencia*, p. 25: "Apparently, the phrase 'the public may access these works from a place and time individually chosen by them' refers to interactive on-demand systems like the Internet. It does not refer to other traditional forms like broadcasting and transmitting of signals where a transmitter and a receiver are required as discussed in the WIPO Guide to the Berne Convention."

[241]*Id.*

[248]*Id.* at 19.

[249]*Id.*

[250]*Id.*

[251]*Id.* at 16.

[252]*CIVIL CODE*, Title XVIII.

[253]*Republic v. Looyuko*, 788 Phil. 1, 16 (2016). citing *Dueñas v. Guce-Africa*, 618 Phil. 10, 20-21 (2009); *CIVIL CODE*, Art. 2199.

[254]See *Yamauchi v. Suñiga*, 830 Phil. 122 (2018); *CIVIL CODE*, Arts. 2224-2225.

[255]*Ponencia*, p. 39.

[256]*Id.* at 41.

[257]*Id.*

[258]*Id.*

[259]*Id.* at 40. (citing *Records Vol. II*, p. 549).

[260]*Rollo*, pp. 71 and 74.

[261]*Id.* at 143.

[262]*Id.*

[263]*Id.* at 149-15 and 203-204.

[264]Dated July, 24, 2008, August 12, 2008, November 28, 2008, January 7, 2009, March 5, 2009 and March 10,

2009, respectively.

[265]Id. at 204.

[266]Ponencia, p. 40 (citing Records Vol. II, p. 549); rollo, pp. 71 and 74; see also FILSCAP Standard Rates Restaurant/Fast Food/Canteen/Cafe/Coffee Shop, available at <<https://filscap.org/wp-content/uploads/2018/02/FILSCAP-Standard-Rates-Restaurant-Fast-Food-Cafe-Coffee-Shop-Food-Chain.pdf>>.

[267]Ponencia, p. 42 (citing Records, pp. 443-520; TSN dated August 23, 2011, p. 8).

DISSENT

LAZARO-JAVIER, J:

I dissent.

The facts are undisputed.

Petitioner Filipino Society of Composers, Authors and Publishers Inc. (FILSCAP) is a non-profit society of composers, authors, and publishers which owns public performance rights over the copyrighted musical works of its members. It also owns the right to license public performance rights in the Philippines of copyrighted foreign musical works of its members and affiliate performing rights societies abroad. Such rights proceed from the contracts it has entered into with various composers, authors and publishers, and record labels, as well as the reciprocal agreements it has with affiliate foreign societies authorizing FILSCAP to license the public performance in the Philippines of musical works under their repertoire. These agreements deputized FILSCAP to enforce and protect the copyrighted works of its members or affiliates by issuing licenses and collecting royalties and/or license fees from anyone who publicly exhibits or performs music belonging to FILSCAP's worldwide repertoire.

These rights, however, are being challenged by respondent Anrey, Inc. (Anrey) when they were assessed by FILSCAP to pay annual license fees for the public exhibition of the copyrighted works of its members. The assessment came after a representative of FILSCAP, Ms. Ivy Labayne, conducted several days (between the months of July and September 2008) of monitoring over the chain of restaurants owned by Anrey in Baguio City.

FILSCAP sent several letters to the establishments concerned, informing them that an unauthorized public performance of copyright music amounts to infringement and urging them to secure licenses from FILSCAP and avoid prosecution. These demands fell on deaf ears, thus, FILSCAP filed a Complaint for Copyright Infringement against Anrey before the Regional Trial Court (RTC) in Baguio City, asking the court to award the following: a) P18,900.00 as compensatory damages; b) P300,000.00 as nominal damages; c) P100,000.00 as exemplary damages; and d) P50,000.00 as attorney's fees and litigation expenses.

In its Answer, Anrey denied playing any copyrighted music within its restaurants. It claimed that the restaurants it had been operating randomly and passively sounded off whatever was already being broadcasted on the radio their individual store was tuned in. In the alternative, Anrey argued that assuming it was sounding off copyrighted music inside its restaurants, the radio station had already paid the corresponding royalties, thus, FILSCAP would be recovering twice: from the station, and from it, simply because it tuned in on a broadcast intended to be heard by the public. Anrey maintained as well that even if the reception were to be considered a performance, this act would not qualify as a public performance since the broadcast was played for the benefit of its staff and not for its

customers.

The trial court dismissed FILSCAP's amended complaint for lack of merit. It cited Section 184 (i) of Republic Act No. (RA) 8293 in excepting Anrey from copyright infringement, such that a public performance by a club or institution for charitable or educational purposes, whose aim is not profit making and does not charge admission fees, is not liable for copyright infringement.

On appeal, the Court of Appeals affirmed. In denying the appeal, the appellate court relied on the copyright laws of the United States of America (U.S.) exempting small business establishments under the homestyle exemption clause.

The Majority finds merit in the petition and rules to reverse the aforesaid decisions. It holds, as follows:<https://www.wto.org/english/tratop_e/dispu_e/cases_e/1pagesum_e/dsl/60sum_e.pdf> (visited= july= 8,= 2022).<available at=

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Economic rights refer to the right of the owner to derive some sort of financial benefit from the use of his/her work. The economic rights of an owner are enumerated under Section 177 of RA 8293, one of which refers to the exclusive right of an owner to prevent the public performance of the work.

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In order for copyright holders to claim for infringement, two elements must be proven: 1) they must show ownership of a valid copyright; and 2) they must demonstrate that the alleged infringers violate at least one economic right granted to copyright holders under Section 177 of RA 8293. A third element may be added and that is the act complained of does not fall under any of the limitations on copyright under Section 184 or amounts to fair use of a copyrighted work under Section 185.

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FILSCAP has the right to sue for copyright infringement. The mechanics behind FILSCAP's role is plain and simple. FILSCAP gets assigned the copyright by its owners. It also enters into reciprocal agreements with foreign societies. Being the assignee of the copyright, it then collects royalties which come in the form of license fees 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.

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There should really be no question as to FILSCAP's authority to sue on behalf of its members. From the foregoing, it is evident that the first element of copyright infringement has been satisfied: that FILSCAP has the authority to collect royalties and/or license fees and sue for copyright infringement. As an assignee of copyright, it is entitled to all the rights and remedies which the assignor had with respect to the copyright.

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The genuine issue is one of law, i.e., whether the reception of a public radio station's broadcast of music and

the passive playing of this music via public radio broadcast and reception as background music in a restaurant owned by Anrey amounts to a violation of Section 177.6 of RA 8293, or the right of public performance of the work of the copyright owner or the latter's assignee FILSCAP.

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The answer is in the affirmative. 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 its patrons to hear. This act of playing radio broadcasts containing copyrighted music through the use of loudspeakers is in itself, a public performance.

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There is no merit to Anrey's claim for exemption from securing a license on the purported ground that the radio station which broadcasted the copyrighted music had already secured one from FILSCAP. A radio reception and playing of such reception to the public creates a performance separate from the broadcast – the doctrine of "multiple performances."

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This doctrine provides that a radio (or television) transmission or broadcast can create multiple performances at once. The doctrine was first determined in *Buck v. Jewell-LaSalle Realty Co.* (Jewell) wherein the U.S. Supreme Court 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 U.S. Supreme Court in *Jewell* concluded that the radio station owner and the hotel operator simultaneously performed the works in question. It cited that it is "the duty of the courts to give full protection to the monopoly of public performance for profit which Congress has secured to the composer."

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The act of playing radio broadcasts containing sound recordings through the use of loudspeakers amounts to an unauthorized communication of such copyrighted music to the public. This falls within the definition of Section 171.3 of RA 8293[1] and in relation to performances and sound recordings, Section 202.9 of the same law defines "communication to the public." [2]

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Applying the definitions, the reception of a radio broadcast of sound recordings within the hearing of Anrey's public through the use of speakers is both a public performance and a communication to the public.

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This ruling is supported by the guidance released by the World Intellectual Property Organization (WIPO) to the Berne Convention to which the Philippines is a signatory since 1951. The WIPO introduced the concept of

a "new public." Typically, radio stations already secured from the copyright owner (or the latter's assignee) the license to broadcast the sound recording. By the nature of broadcasting, it is necessarily implied that its reception by the public has been consented to by the copyright owners. But the author ordinarily thinks of the license to broadcast as to "cover only the direct audience receiving the signal within the family circle." Any further communication of the reception creates, by legal fiction, a "new public" which the author never contemplated when he or she authorized its use in the initial communication to the public.

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It is not true that the radio reception of the broadcasted sound recordings was intended to be within the hearing and enjoyment of its staff. It is a fact that the reception was made within auditory range by two (2) loudspeakers located at the ceiling above the dining areas of its restaurants. This proves that the intended audience of the reception was its dining clientele.

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None of the limitations applies to the present case. Section 184 (i) of RA 8293[3] applies only to institutions for charitable and educational purposes. The homestyle exemption pursuant to U.S. legislation cannot be applied here since there is no counterpart provision thereof in the Philippines. Anrey's reception of sound recordings from radio broadcast is not fair use. The purpose of the use was to enhance the ambience of Anrey's restaurant, the sound recordings are creative pieces and not factual reportage, the sound recordings are played in full, and this practice could result in a substantial adverse impact on the potential market of these sound recordings.

The Majority holds that Anrey is liable to FILSCAP for damages.

Text of the Relevant Provisions in RA 8293

FILSCAP's cause of action is viable only if it has rights that have been violated by Anrey's act of making the reception of the radio station's broadcast of sound recordings audible to its restaurant's clientele. The ponencia identifies the economic rights of public performance of the work (Section 177.6 of RA 8293), i.e., referring to the sound recordings broadcasted by the radio station, and of communication to the public of the work (Section 177.7 of RA 8293).

But these economic rights, as defined by RA 8293, are not adversely impacted by the alleged infringing act. The right of public performance of the work has been defined in Section 171.6, 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.

On the other hand, communication to the public of the work is spelled out in Section 171.3 thus –

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;

x x x x

202.9. "Communication to the public of a performance or a sound recording" means 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. For purposes of Section 209, "communication to the public" includes making the sounds or representations of sounds fixed in a sound recording audible to the public.

SECTION 209. Communication to the Public. — If a sound recording published for commercial purposes, or a reproduction of such sound recording, is used directly for broadcasting or for other communication to the public, or is publicly performed with the intention of making and enhancing profit, a single equitable remuneration for the performer or performers, and the producer of the sound recording shall be paid by the user to both the performers and the producer, who, in the absence of any agreement shall share equally.

For purposes of the present case, critical to these economic rights is sound recording, which has been defined as –

202.2. ... the fixation of the sounds of a performance or of other sounds, or representation of sound, other than in the form of a fixation incorporated in a cinematographic or other audiovisual work;

Meanwhile, fixation is understood under Section 202.4 to be "the embodiment of sounds, or of the representations thereof, from which they can be perceived, reproduced or communicated through a device...."

Here, the patrons of Anrey's restaurant were able to listen to and perhaps enjoy the radio broadcast of sound recordings. What Anrey did was to make the radio broadcast of the sound recordings audible to its restaurant's clientele, but not the sound recordings themselves. To repeat, Anrey did not render the sound recordings themselves within the hearing of the restaurant patrons. Anrey did not have possession, much less, control of the sound recordings. What it did was merely to turn on the radio and allow the broadcast to be heard within the premises of its restaurant.

On the other hand, as defined, the public performance of the work pertains to sound recordings, those objects in which sounds were fixed or recorded. Who made the sound recordings audible to the restaurant's patrons was the radio station. It was the radio station that made possible the sound recordings to be within the hearing of the patrons. The radio station was the entity which exercised the public performance of the work and the sound recordings; not Anrey.

Too, Anrey did not exercise the right to communicate the work or the sound recordings to the public. It was not the one that transmitted to the public, by any medium, the representations of sounds fixed in sound recordings. The radio station was the entity possessing or controlling the sound recordings and the one which transmitted them to the public. Anrey was also not responsible for making the sound recordings available to the public in such a way by which members of the public may access these works from a place and time individually chosen by them. The patrons of Anrey's restaurant could not have accessed the sound recordings when it turned on the radio and left it switched on for their listening pleasure. Hence, Anrey could not have communicated the sound recordings to the public.

Because there was no public performance or communication to the public of the sound recordings which Anrey's restaurant patrons heard, we cannot conclude that there was infringement of the rights assigned to FILSCAP or that the latter is entitled to damages. As very well explained in *Twentieth Century Music Corp. v. Aiken*:^[4]

If, by analogy to a live performance in a concert hall or cabaret, a radio station "performs" a musical composition when it broadcasts it, the same analogy would seem to require the conclusion that those who listen

to the broadcast through the use of radio receivers do not perform the composition. And that is exactly what the early federal cases held. "Certainly those who listen do not perform, and therefore do not infringe." *Jerome H. Remick & Co. v. General Electric Co.*, supra, at 829. "One who manually or by human agency merely actuates electrical instrumentalities, whereby inaudible elements that are omnipresent in the air are made audible to persons who are within hearing, does not "perform" within the meaning of the Copyright Law." *Buck v. Debaum*, 40 F. 2d 734, 735 (SD Cal. 1929).

Good Reason for Adopting a Contrary Rule

Assuming I was wrong in my understanding of the economic rights of public performance of the work and communication of the work to the public, I respectfully submit that Anrey's act of tuning into the radio and allowing its sound recordings to be heard and enjoyed by its restaurant patrons falls within the limitation to copyright recognized by Section 184(1)(a) of RA 8293 –

(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;

There is no question that Anrey did not charge its restaurant's patrons for the music that they heard coming from the radio station it tuned in. The issue is whether it was done privately. I submit it was.

Privately should be interpreted beyond how the right of public performance of the work pursuant to Section 171.6 of RA 8293 says of what public is – persons outside the normal circle of a family and that family's closest social acquaintances. Private does not refer to just being within the normal circle of family and its closest social acquaintances.

In *Twentieth Century Music Corp. v. Aiken*,^[5] the United States Supreme Court explained the prudential reasons for rejecting as public performance the radio broadcast of sound recordings for the listening pleasure of patrons of a small restaurant –

But such a holding would more than offend the principles of stare decisis; it would result in a regime of copyright law that would be both wholly unenforceable and highly inequitable.

The practical unenforceability of a ruling that all of those in Aiken's position are copyright infringers is self-evident. One has only to consider the countless business establishments in this country with radio or television sets on their premises -- bars, beauty shops, cafeterias, car washes, dentists' offices, and drive-ins -- to realize the total futility of any evenhanded effort on the part of copyright holders to license even a substantial percentage of them.

And a ruling that a radio listener "performs" every broadcast that he receives would be highly inequitable for two distinct reasons. First, a person in Aiken's position would have no sure way of protecting himself from liability for copyright infringement except by keeping his radio set turned off. For even if he secured a license from ASCAP, he would have no way of either foreseeing or controlling the broadcast of compositions whose copyright was held by someone else. Secondly, to hold that all in Aiken's position "performed" these musical compositions would be to authorize the sale of an untold number of licenses for what is basically a single public rendition of a copyrighted work. The exaction of such multiple tribute would go far beyond what is required for the economic protection of copyright owners, and would be wholly at odds with the balanced congressional purpose behind 17 U.S.C. § 1 (e): S

"The main object to be desired in expanding copyright protection accorded to music has been to give to the composer an adequate return for the value of his composition, and it has been a serious and a difficult task to combine the protection of the composer with the protection of the public, and to so frame an act that it would accomplish the double purpose of securing to the composer an adequate return for all use made of his composition and at the same time prevent the formation of oppressive monopolies, which might be founded

upon the very rights granted to the composer for the purpose of protecting his interests." H.R. Rep. No. 2222, 60th Cong., 2d Sess., 7 (1909).

This is truer in this country than in the United States. Radio is still the most accessible means of entertainment and information for most of our people. Internet may now be ubiquitous for those who have resources to spare but not to the many who have to live by the day. They are the ones who have small businesses to tender, with the radio as their only companion as source of entertainment and information. The ruling that the Majority forges will deny these penurious businesses the radio as their mode for connecting to the rest of the country and a means for relieving them of stress.

It is not uncommon for this Court to adopt from foreign jurisdictions concepts and doctrines that allowed a judge or court not to decline to render judgment by reason of the silence, obscurity, or insufficiency of the laws. We have often supplemented ambiguous terms in our statutes with thinking from elsewhere where it makes sense to do so.

Here, copyright should be limited where to do otherwise would be oppressive to the marginalized and underrepresented, those who cannot afford beyond what the ubiquitous radio could afford. The homestyle exemption in the United States could be adapted to help us define what private means in Section 184(1)(a) of RA 8293.

This exemption has been explained thus:

The elements of Section 110(5) that Edison must satisfy are (1) that it uses a single receiving apparatus in its stores; (2) that the receiving apparatus is of a kind commonly used in private homes; and (3) that Edison does not further transmit or broadcast to the public the transmission it receives (the "second transmission" restriction). The Court finds that Edison has satisfied each of these elements through its Radio Policy.

The first element is satisfied in that each store that Edison owns and operates only uses one radio receiver at a time. The Court finds no merit in BMI's argument that the Court should focus on the number of stores, and thereby the total number of radios that Edison operates nationwide, rather than on the number of radios per store. The homestyle exception makes no sense unless it is applied on a store-by-store basis, to see whether each store is operating one set of simple radio equipment without extensive augmentation. It does not matter whether the owner repeats this compliance process for two or more stores.

BMI's argument would mean that any chain of two or more stores owned and operated by the same person would be disqualified from the Section 110(5) exception. The Aiken case, which carved out this homestyle exception, involved a defendant, Mr. Aiken, who owned and operated more than one place of business, see *Twentieth Century Music Corp. v. Aiken*, 356 F. Supp. 271, 272 (W.D. Pa. 1973), and no court interpreting Section 110(5) has ever taken the position that operating two or more stores disqualifies a person from the exception. The Court finds that it is not appropriate to focus on the number of stores involved, but rather on whether each store duplicates the requirements of the homestyle exception. Accord, *Broadcast Music, Inc. v. Claire's Boutiques, Inc.*, 754 F. Supp. 1324 (N.D. Ill.1990).

Edison also satisfies the second factor, in that its Radio Policy requires the use of simple, low grade radio-only receivers, only two speakers may be attached to a radio receiver, and only portable box speakers are allowed. Edison's strict enforcement of its Radio Policy ensures that the abuses reported in other cases do not occur in its stores; abuses such as where high powered equipment, or equipment attached to large numbers of speakers, or equipment augmented by voice-over intercom systems and the like were passed off as "homestyle" radio systems. See, e.g., Plaintiffs Reply and Opposition Memorandum, Appendix A; *National Football League*, supra, 792 F.2d at 731 (citing cases).

The equipment Edison employs is of a type generally sold for private consumer use, and the equipment is

placed or installed in the stores in a manner duplicating its placement in a common household; i.e. the radio-only receiver unit is placed on or underneath a shelf, two normal box speakers are attached with ordinary speaker wire, and the wire is generally exposed to view, the speakers are placed on a shelf or hung on a wall near to the receiver, and speakers that are built into the walls or ceilings may not be used. In this day of digital-audio-computerized-noise reduced technology, most modern stereo buffs would no doubt be aghast at the low-tech, low-performance and low cost of Edison's store equipment, but it appears that Edison is attempting to focus on simplicity, and the spirit of the exception when it was first promulgated in 1976.

Lastly, the Court finds that Edison has complied with the "second transmission" restriction of the homestyle exception. What this restriction means is that the homestyle operator may not rebroadcast or secondarily broadcast a radio transmission to the public without liability. A simple example of conduct that would violate this restriction is where the operator tapes a radio broadcast in order to play it later, with or without editing or augmentation. Certain courts have declared that other, less well defined conduct violates the restriction, such as where the speakers are so far from the receiver, or are remotely placed in a room different from the receiver, that the playing of the broadcast through the remote speakers constitutes a second transmission to the public. See *Claire's Boutiques*, supra, 754 F. Supp 1332, fn. 17 (citing cases). The Court doubts the validity of an analysis of the distancing of the speakers in various stores, but in any case finds that Edison's policy to place the two speakers no more than fifteen feet from the receiver is well within the range of any modest homestyle setup, and does not violate the second transmission restriction.[6]

In the context of this case, the above elements should define what the word private means in Section 184(1)(a) of RA 8293. The definition hews closely to how public is described in Section 171.6 of RA 8293 says of what public is – persons outside the normal circle of a family and the family's closest social acquaintances. There is a close analogy between the family setting and the homestyle characterization as a copyright limitation. This familiarity between the concepts should not get lost.

ACCORDINGLY, I vote to dismiss the petition and affirm the respective Decisions of the trial court and the Court of Appeals.

[1]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.

[2]202.9. "Communication to the public of a performance or a sound recording" means 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. For purposes of Section 209, "communication to the public" includes making the sounds or representations of sounds fixed in a sound recording audible to the public.

[3]184.1. Notwithstanding the provisions of Chapter V, the following acts shall not constitute infringement of copyright: (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)

[4]422 US 151, 95 S Ct 2040, 1975 US LEXIS 156.

[5]422 US 151, 95 S Ct 2040, 1975 US LEXIS 156.

[6]Edison Bros. Stores v. Broad Music, Inc., 760 F. Supp. 767, 1991 U.S. Dist. LEXIS 4357, *7-11.

SEPARATE CONCURRING AND DISSENTING OPINION

SINGH, J.:

I concur with the ponencia's findings that Anrey, Inc. (Anrey) is guilty of copyright infringement. However, there are discussions in the ponencia that I see in a different light. As such, I respectfully submit this separate concurring and dissenting opinion.

As presented in the ponencia, the sole issue in this case is whether the unlicensed playing of radio broadcasts as background music in dining areas of a restaurant amount to copyright infringement.[1]

Copyright infringement is committed by any person who shall use original literary or artistic works, or derivative works, without the copyright owner's consent in such a manner as to violate the latter's copyright and economic rights.[2] Sec. 177 of Republic Act No. 8293 or the Intellectual Property Code (IP Code) enumerates such copyright and economic rights as follows:

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 irrespective of the ownership of the original or the copy which is the subject of the rental; (n)

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. (Sec. 5, P.D. No. 49a)

I submit that it is important to identify the specific economic right transgressed in this case, as to do so will allow us to properly narrow down the legal and jurisprudential bases for our findings.

Distinction between public
performance and communication to
the public

The ponencia of Associate Justice Rodil V. Zalameda seemed to have confused public performance with communication to the public.

The ponencia states that "the act of playing radio broadcasts containing copyrighted music through the use of loudspeakers is in itself, a performance." [3] It cites as basis the 1991 decision of the U.S. Court of Appeals, Seventh Circuit in *Broadcast Music, Inc. v. Claire's Boutiques, Inc.* [4] (*Claire's Boutiques*), which, according to the ponencia, "was decided based on how the present copyright law defines the term public performance, which is similarly worded to our own definition of the said term." [5] The ponencia also held that "public performance right includes broadcasting of the work [music] and specifically covers the use of loudspeakers. This is the very act

Anrey is complained of infringing. As to whether Anrey also infringed on FILSCAP's right to communicate to the public, given the factual scenario of the case, this should be answered in the negative." [6]

I respectfully beg to differ.

The confusion seems to be rooted in the ponencia's reliance on Claire's Boutiques, which was decided under the U.S. Copyright Act. Unlike our IP Code, the U.S. Copyright Act does not distinguish public performance from communication to the public:

To "perform" a work means to recite, render, play, dance, or act it, either directly or by means of any device or process or, in the case of a motion picture or other audiovisual work, to show its images in any sequence or to make the sounds accompanying it audible.

x x x x x x x x

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. [7]

By contrast, the definition of public performance under Section 171.6 of the IP Code excludes communication to the public under Section 171.3 of the same law. It may thus be said that the ponencia's reliance on Claire's Boutiques in characterizing the act of utilizing radio broadcast as background music in a restaurant is misplaced.

Section 171.6 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."

Under Section 171.3 of the IP Code, "communication to the public" or "communicate to the public" refers to "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."

The key distinction between the foregoing provisions lies in the method that the copyrighted work is made available to the public. In the case on hand, Anrey made the copyrighted music available to its customers by playing radio broadcasts through the use of loudspeakers in their restaurants. This act falls squarely within the definition of Section 171.3 of the IP Code on "communication to the public" because of the fact that the broadcast is made through the use of radio and loudspeakers. This constitutes "the making of a work available to the public by wire or wireless means." This method of making music audible to the public cannot constitute "public performance" since Section 171.6 specifies that the public performance of a sound recording must be perceived "without the need for communication within the meaning of Subsection 171.3." Thus, playing the radio broadcast via loudspeakers cannot be considered a "public performance."

As such, I agree with the position of Associate Justice Alfred Benjamin S. Caguioa that based on the foregoing

definitions, the playing of radio receptions of musical works via loud speaker amounted to communication to the public.[8] This is in accord with the Berne Convention for the Protection of Literary and Artistic Works, to which the Philippines is a party,[9] and its accompanying Guide which separates the concept of public performance and broadcasting, that is, communication to the public.

While we may find guidance from foreign courts in developing local jurisprudence, we must remember to apply any learnings to properly fit our domestic laws. In this case, by the fact that our IP Code specifically distinguishes the economic right of "public performance" and "other communication to the public," we must be careful to maintain these distinctions.

Nevertheless, on the matter at hand, I concur with the ponencia's findings that there is in fact copyright infringement by Anrey as against the Filipino Society of Composers, Authors and Publishers, Inc. (FILSCAP) as Anrey's use of the copyrighted songs do not constitute fair use pursuant to the discussion made in the ponencia.[10]

Having settled the key issue of infringement, I submit that there is a need to further discuss the concept of fair use as it is applied in this case, and as it could be applied in the future, as I fear that a strict application of the provisions on Fair Use in our IP Code alone may hinder or even defeat a core purpose to its institution. We cannot look merely at the potential injuries of the copyright owner, but we must also balance this with the inherent social purpose of our laws.

Fair use

Copyright has been defined as the right granted by statute to the proprietor of an intellectual production to its exclusive use and enjoyment.[11] However, the Supreme Court of the United States (U.S.), from whose laws our copyright laws were based, has held that copyright is "not an inevitable, divine, or natural right that confers on authors the absolute ownership of their creations." [12] Rather, it is intended to "stimulate activity and progress in the arts for the intellectual enrichment of the public." [13]

This finds support in our Constitution, laws, and jurisprudence. Article XIV, Section 13 of the Constitution enjoins the protection of the exclusive rights of intellectual property owners for the benefit of the public:

SECTION 13. The State 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 period as may be provided by law.

Article XII, Section 6 provides for the State's duty to regulate the use of property, in view of its inherent social function:

SECTION 6. The use of property bears 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.

Section 2 of the IP Code echoes the above constitutional pronouncements:

Section 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. (Emphasis supplied)

In *Republic v. Heirs of Tupaz IV*,^[14] the Court said that copyright has two rationales: economic benefit and social benefit.

The economic benefit is reaped by the author from his work while the social benefit manifests when it creates impetus for individuals to be creative. Copyright, like other intellectual property rights, grants legal protection by prohibiting the unauthorized reproduction of the author's work. It "create[s] a temporary monopoly on varying types of knowledge, allowing their owners to restrict and even prevent, other from using that knowledge." By eliminating fear of other's appropriation and exploitation of an author's work, intellectual creation is incentivized.

When the concept of copyright emerged, it was primarily concerned with the advancement of a common social good and not so much about the author's rights. Copyright statutes were initially crafted for the reading public and to encourage education through the production of books. (Emphasis supplied; citations omitted)

Because of its common good dimension, copyright protection is not absolute. The IP Code provides the limitations on copyright, which include the fair use doctrine embodied in Section 185 of the law, which pertinently states:

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. xxx 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.

In *ABS-CBN Corporation v. Gozon, et al. (Gozon)*,^[15] this Court 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." The Court further held that "[f]air use 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." Fair use was allowed because excessively broad copyright protection would impede, rather than advance, the law's objective of stimulating creativity and authorship.^[16]

The doctrine of fair use is widely said to have its origins in *Folsom v. Marsh*,^[17] a case decided by the U.S. Circuit Court for the District of Massachusetts in 1841.^[18] In the said case, it was held that in resolving questions of fair use, the court must "look to the nature and objects of the selections made, the quantity and value of the materials used, and the degree in which the use may prejudice the sale, or diminish the profits, or supersede the objects, of the original work."^[19] The U.S. Copyright Act and, in turn, our copyright law, largely adopted these considerations in how to recognize fair use.

In *Gozon*,^[20] the Court had the occasion to discuss the factors to be considered in determining fair use:

Determining fair use requires application of the four-factor test. Section 185 of the Intellectual Property Code lists four (4) factors to determine if there was fair use of a copyrighted work:

- 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.

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.

Second, the nature of the copyrighted work is significant in deciding whether its use was fair. If the nature of the work is more factual than creative, then fair use will be weighed in favor of the user.

Third, the amount and substantiality of the portion used is important to determine whether usage falls under fair use. An exact reproduction of a copyrighted work, compared to a small portion of it, can result in the conclusion that its use is not fair. x x x

Lastly, the effect of the use on the copyrighted work's market is also weighed for or against the user. If this court finds that the use had or will have a negative impact on the copyrighted work's market, then the use is deemed unfair." (Emphasis supplied; citations omitted)

As can be gleaned from the above, the presence of profit does not automatically foreclose fair use. There are other factors that must be weighed and considered in deciding whether the fair use doctrine applies. Nevertheless, a "for profit" use generally weighs against the user in a claim of fair use. This is because copyright was developed from the need to protect the moral and economic rights of creators.

In crafting the U.S. Copyright Act from which Act No. 3134 or the Philippine Copyright Law was based, the U.S. Congress tried to "shape the rights to ensure that actionable infringement only resulted from uses that interfered with a copyright owner's commercial exploitation of the work."^[21]

Related to this is the fourth factor in determining fair use, i.e., the effect of the use upon the potential market for or value of the copyrighted work. It considers the commercial benefits or disadvantage brought about by the alleged infringement to the original owner of the work. This concept was illustrated by the U.S. Court of Appeals in *Ty, Inc. v. Publications International*,^[22] in this manner: "we may say that copying that is complementary to the copyrighted work (in the sense that nails are complements of hammers) is fair use, but copying that is a substitute for the copyrighted work (in the sense that nails are substitutes for pegs or screws), or for derivative works from the copyrighted work x x x is not fair use."^[23] It was further held that "[complementary copying] does not impair the potential market or value of the copyrighted work except insofar as it criticizes the work,

which is the opposite of taking a free ride on its value." [24] Where the profit generated by the alleged infringement substitutes for what the owner or creator could make, there can be no fair use. But where the benefits are complementary or incidental, then fair use may be properly considered.

Based on the foregoing criteria, using copyrighted music through sound recording or via radio broadcast played through loudspeakers, as background music in restaurants for the entertainment of the customers and the enhancement of their dining experience falls outside the ambit of fair use. Verily, allowing these businesses to profit from the copyrighted works without compensating the owners or their assignee would be prejudicial and would significantly affect the market of the copyright holders.

This is the Decision that we are handing down in this case. However, the Court cannot stop here. There is a need to make a distinction between the big businesses, such as the restaurants involved here, and the small businesses such as small restaurants, school canteens, even carinderias, food carts, and the like. We cannot ignore the far-reaching consequences that the Court's ruling in this case may have on these small businesses if no such distinction is made. If the Court stops at ruling that all those in the position of Anrey are copyright infringers, the effect would be that all businesses, including small ones, where it could hardly be said that ambience is a consideration for customers, which play music, either through radios or otherwise, would also be subject to charges as copyright infringers.

These same consideration is led the U.S. Congress to adopt the following exemption to copyright in Section 110(5) of the U.S. Copyright Act, which pertinently states:

[T]he following are not infringements of copyright:

(5) communication of a transmission embodying a performance or display of a work by the public reception of the transmission on a single receiving apparatus of a kind commonly used in private homes, unless –

(A) a direct charge is made to see or hear the transmission; or

(B) the transmission thus received is further transmitted to the public.

Often referred to as the "small business exemption," [25] the above-quoted provision excludes from liability for infringement those transmissions received by a single apparatus of a kind commonly used in private homes, provided that there is no direct charge to see or hear the transmission, and that the transmission is not further transmitted to the public. It allows mom-and--pop establishments to play music without incurring liability for copyright infringement. [26]

The U.S. Congress explained the rationale for the small business exemption as follows:

Its purpose is to exempt from copyright liability anyone who merely turns on, in a public place, an ordinary radio or television receiving apparatus of a kind commonly sold to members of the public for private use.

The basic rationale of this clause is that the secondary use of the transmission by turning on an ordinary receiver in public is so remote and minimal that no further liability should be imposed. In the vast majority of these cases no royalties are collected today, and the exemption should be made explicit in the statute. [27]

In its responses to the Written Questions of the World Trade Organization (WTO) Panel in connection with the dispute between the European Communities and the U.S. as to the alleged inconsistency of the U.S. Copyright Act with the WTO Agreement on Trade-Related Aspects of Intellectual Property Rights, the U.S. expounded on the importance of protecting small businesses:

With respect to 110(5)(A), the record is clear that Congress was concerned with small 'mom and pop' businesses. Small businesses play a particularly important role in the American social fabric. They foster local

values and innovation and experimentation in the economy. Small businesses also create a disproportionately greater number of economic opportunities for women, minorities, immigrants, and those formerly on public assistance, and thus are an essential mechanism by which millions enter the economic and social mainstream.[28] (Citations omitted; emphasis supplied)

On 27 October 1998, the U.S. Congress enacted the Fairness in Music Licensing Act of 1998 (FMLA), amending the U.S. Copyright Act. The FMLA recodified the original exemption under Section 110(5) of the U.S. Copyright Act as Section 110(5)(A), often referred to as the "homestyle exemption," and introduced a second tier of exemption under Section 110(5)(B), often referred to as the "business exemption." [29] Section 110(5) of the U.S. Copyright Act as amended by the FMLA reads:

Limitations on exclusive rights: Exemption of certain performances and displays

Notwithstanding the provisions of section 106, the following are not infringements of copyright:

x x x

(5)

(A) except as provided in subparagraph (B), communication of a transmission embodying a performance or display of a work by the public reception of the transmission on a single receiving apparatus of a kind commonly used in private homes, unless—

(i) a direct charge is made to see or hear the transmission; or

(ii) the transmission thus received is further transmitted to the public;

(B) communication by an establishment of a transmission or retransmission embodying a performance or display of a nondramatic musical work intended to be received by the general public, originated by a radio or television broadcast station licensed as such by the Federal Communications Commission, or, if an audiovisual transmission, by a cable system or satellite carrier, if—

(i) in the case of an establishment other than a food service or drinking establishment, either the establishment in which the communication occurs has less than 2,000 gross square feet of space (excluding space used for customer parking and for no other purpose), or the establishment in which the communication occurs has 2,000 or more gross square feet of space (excluding space used for customer parking and for no other purpose) and—

(I) if the performance is by audio means only, the performance is communicated by means of a total of not more than 6 loudspeakers, of which not more than 4 loudspeakers are located in any 1 room or adjoining outdoor space; or

(II) if the performance or display is by audiovisual means, any visual portion of the performance or display is communicated by means of a total of not more than 4 audiovisual devices, of which not more than 1 audiovisual device is located in any 1 room, and no such audiovisual device has a diagonal screen size greater than 55 inches, and any audio portion of the performance or display is communicated by means of a total of not more than 6 loudspeakers, of which not more than 4 loudspeakers are located in any 1 room or adjoining outdoor space;

(ii) in the case of a food service or drinking establishment, either the establishment in which the communication occurs has less than 3,750 gross square feet of space (excluding space used for customer parking and for no other purpose), or the establishment in which the communication occurs has 3,750 gross square feet of space or more (excluding space used for customer parking and for no other purpose) and—

(I) if the performance is by audio means only, the performance is communicated by means of a total of not more than 6 loudspeakers, of which not more than 4 loudspeakers are located in any 1 room or adjoining outdoor space; or

(II) if the performance or display is by audiovisual means, any visual portion of the performance or display is communicated by means of a total of not more than 4 audiovisual devices, of which not more than one audiovisual device is located in any 1 room, and no such audiovisual device has a diagonal screen size greater than 55 inches, and any audio portion of the performance or display is communicated by means of a total of not more than 6 loudspeakers, of which not more than 4 loudspeakers are located in any 1 room or adjoining outdoor space;

(iii) no direct charge is made to see or hear the transmission or retransmission;

(iv) the transmission or retransmission is not further transmitted beyond the establishment where it is received; and

(v) the transmission or retransmission is licensed by the copyright owner of the work so publicly performed or displayed x x x

The business exemption shields from liability users based on the floor area of their business and the number of speakers or devices installed to transmit the broadcast subject to the following conditions: (a) no direct charge is made to see or hear the transmission; (b) no further transmission is made; and (c) the transmission itself is already licensed by the copyright owner.

Although no similar explicit exemption can be found in our IP Code, I respectfully submit that mom-and-pop businesses should be similarly protected from liability for copyright infringement under the fair use doctrine. To rule otherwise would amount to the expansion of the scope of copyright, which is beyond the constitutional powers of this Court. It must be emphasized that the primary motivation behind protection of intellectual property is the common good and thus the Court, in applying the law on intellectual property, is enjoined to strike a careful balance between the rights of the owners to be compensated for the use of their works and the right of the public to enjoy these creations. But this perhaps is for a more in-depth discussion in a future case under different circumstances.

As the case presents itself, the respondent does not fall within the concept of mom-and-pop business for which I advocate the fair use exemption to apply.

All things considered, I vote to GRANT the petition.

[1]Ponencia, p. 6.

[2]Olaño v. Lim Eng Co, G.R. No. 195835, 14 March 2016.

[3]Id. at 16.

[4]949 F.2d 1482 (7th Cir. 1991).

[5]Ponencia, p. 18.

[6]Id. at 23-24.

[7]U.S. Copyright Act, 17 U.S.C. § 101.

[8]Separate Concurring Opinion of Associate Justice Alfred Benjamin S. Caguioa, p. 72.

[9]See Treaties, <https://www.ipophil.gov.ph/reference/philippine-acceded-intellectual-property-treaties/>.

[10]Ponencia, p. 28-34.

- [11]Republic v. Heirs of Tupaz IV, G.R. No. 197335, 7 September 2020.
- [12]Leval, Pierre N. "Toward a Fair Use Standard." Harvard Law Review, Volume 103, No. 5 (1990): 1105-36. Available at: <https://doi.org/10.2307/1341457>.
- [13]Id.
- [14]Supra note 11.
- [15]G.R. No. 195956, 11 March 2015.
- [16]Supra note 12.
- [17]9 F. Cas. 342 (C.C.D. Mass. 184).
- [18]Netanel, Neil Weinstock. "Making Sense of Fair Use." Lewis & Clark Law Review 15, no. 3 (2011): 715-71. Available at: <https://law.lclark.edu/live/files/9132-lcb153netanelpdf>.
- [19]Supra note 17.
- [20]Supra note 15.
- [21]Loren, Lydia Pallas. "The Evolving Role of 'For Profit' Use in Copyright Law: Lessons from the 1909 Act." Santa Clara Computer and High Technology Law Journal, Vol. 26, No. 255, 2010, Lewis & Clark Law School Legal Studies Research Paper No. 2 10-17, <https://ssrn.com/abstract=161161>.
- [22]292 F.3d 512 (7th Cir. 2002).
- [23]Id.
- [24]Id.
- [25]Peggy H. Luh, "Pay or Don't Play: Background Music and the Small Business Exemption of Copyright Law," 16 Loy. L.A. Ent. L. Rev. 711, p. 715 (1996). Available at: <https://digitalcommons.lmu.edu/elr/vol16/iss3/4>.
- [26]Id.
- [27]H.R. Rep. No. 94-1476 (1976), p. 87.
- [28]Panel Report, United States — Section 110(5) of the U.S. Copyright Act, WT/DS160/R (15 June 2000), p. 87. Available at: https://docs.wto.org/dol2fe/Pages/FE_Search/MultiDDFDocuments/55222/Q:/WT/DS/160R00.pdf;Q:/WT/DS/160R-01.pdf/.
- 29 Charles Leininger, The Business Exemption of § 110(5) of the Copyright Act Violates International Treaty Obligations under Trips: Will Congress Honor its Commitments?, 25 J. Nat'l Ass'n Admin. L. Judges., p. 628 (2005). Available at <https://digitalcommons.pepperdine.edu/naalj/vol25/iss2/7>.

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