



Republic of the Philippines
Supreme Court
Manila

EN BANC

FILIPINO SOCIETY OF G.R. No. 233918
COMPOSERS, AUTHORS AND
PUBLISHERS, INC.,

Present:

Petitioner, GESMUNDO, CJ,
LEONEN,
CAGUIOA,
HERNANDO,
LAZARO-JAVIER,
INTING,*
ZALAMEDA,
LOPEZ, M.,**
GAERLAN,
ROSARIO,
LOPEZ, J.,
Respondent. DIMAAMPAO,
MARQUEZ,
KHO, JR., and
SINGH, JJ.

- versus -

ANREY, INC.,

Promulgated:

August 9, 2022

X-----X

DECISION

ZALAMEDA, J.:

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

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

** On Official Leave.

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 Petition¹ 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 Decision² dated April 19, 2017 and Resolution³ 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 Order⁴ 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.

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.



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	<i>Gitara</i> Don't Stop the Music Wherever You Will Go

⁵ Id. at 212.

⁶ Id.

⁷ Id. at 213.

⁸ Id.

⁹ Id. at 140.



2. September 3, 2008	Impossible <i>Mahal Pa Rin</i> 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 Infringement¹² against Anrey before the RTC, asking the court to award the following: (a) ₱18,900.00 as compensatory damages; (b) ₱300,000 as nominal damages; (c) ₱100,000 as exemplary damages; and (d) ₱50,000 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

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.

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. 8293¹⁷ 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 Reconsideration¹⁹ and a Manifestation/Supplement to the Motion for Reconsideration,²⁰ but these were denied by the RTC in its Order²¹ 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

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.

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 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 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 Resolution²⁵ 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.

²⁴ Id. at 95.

²⁵ Id. at 100-101.

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

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 holders²⁷ 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

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

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

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 Tonsättares 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

²⁹ *Rollo*, p. 140.

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

³¹ *Rollo*, p. 481.



entered into by FILSCAP with its members:

I. 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;

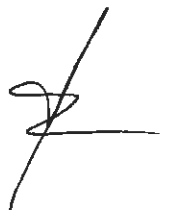
c) **“right of communication to the public”** shall mean the right in relation to the making of the work available to the public by wire or wireless means in such a way that members of the public may access these works from a place and time individually chosen by them, per Section 171.3 of [the IP Code];

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 x³²

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 x³³

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 x³⁴

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 authorisations 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.

³² Id. at 230-231.

³³ Id. at 231.

³⁴ Id. at 271.

x x x³⁵

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

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).

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:

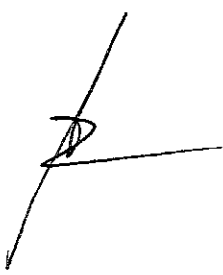
SECTION 13. The State shall protect and secure the exclusive rights of scientists, inventors, artists, and other gifted citizens to their intellectual property and creations, particularly when beneficial to the people, for such period as may be provided by law.

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.

⁴⁰ Id. at 707.



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

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

⁴² U.S. CONSTITUTION, Article I, 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.

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,

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 Benefits 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.

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 as 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

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).

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

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.

translation into audible sound was not a mere playing of the original program, but was a reproduction, since complicated electrical instrumentalities were necessary for its reception and distribution.

Then came the case of *Twentieth Century Music Corp. v. Aiken*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 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 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.

⁶³ 422 U.S. 151, 95 S. Ct. 2040.

⁶⁴ 949 F.2d 1482.

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

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

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

⁶⁶ Id. at 283 U.S. 196.

⁶⁷ Id. at 283 U.S. 198.

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



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 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 (I) (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, 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.

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

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

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)

⁷¹ C-351/12; ECLI:EU:C:2014:110.

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 11*bis*. For example, a broadcasting organisation broadcasts a chamber concert. Article 11*bis* 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 11*bis* 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:

11*bis*.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... 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

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

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 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."

x x x

11bis.11. Finally, the third case dealt with in this paragraph is that in 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 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 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 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:

⁷³ Id. at 68-69.

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), 11*bis*(1)(i) and (ii), 11*ter*(1)(ii), 14(1)(ii) and 14*bis*(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:

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



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 US⁷⁷ and even the Berne Convention⁷⁸ 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

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, 2022).

⁷⁷ *Supra* note 65.

⁷⁸ *Supra* note 70.

“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 11*bis* 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.

⁷⁹ *Rollo*, p. 443.

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

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

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).

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 of the use, including whether such use is of a commercial nature or is for non-profit educational purposes; (2) the nature of the copyrighted work; (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and (4) the effect of the use upon the potential market for or value of the copyrighted work.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

⁸⁹ *Id.* at Sec. 185.

⁹⁰ 755 Phil. 709 (2015).

⁹¹ *Id.* at 758.

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:

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.

(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

⁹⁷ *Supra* note 28.

⁹⁸ *Id.*

⁹⁹ *Id.*

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.

¹⁰⁰ Id.

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.

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

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.

¹⁰² EUECJ C-162/10 [2012].

¹⁰³ EWCA Civ 441 [2021].

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

¹⁰⁴ *Supra* note 71.

¹⁰⁵ <https://www.wto.org/english/tratop_c/t/ipr_e/intel3_e.htm> (visited July 11, 2022).

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. 11*bis*(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. 11*bis*(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%

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).

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.htm> (visited July 8, 2022).

(850,127) of total MSME establishments, followed by small enterprises at 10.25% (98,126) 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.

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

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

¹¹² Id. at 62.

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.*

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.

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) ₱18,900.00 as compensatory damages
- b) ₱300,000.00 as nominal damages
- c) ₱100,000.00 as exemplary damages
- d) ₱50,000.00 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 testimonies¹¹⁵ of its witnesses, FILSCAP demanded the amount of ₱18,900.00, which represent the fees that should have been paid had Anrey obtained the appropriate licenses for its three stores, or ₱6,300.00 *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

¹¹⁵ *Rollo*, pp. 212-216.

¹¹⁶ *Records*, Vol. II, p. 549.

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

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).

that normally authorizes 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 ₱10,000.00 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 ₱300,000.00, 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

¹²² *Rollo*, pp. 75-80.

¹²³ CIVIL CODE, Article 2224.

¹²⁴ *Id.*

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

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 ₱100,000.00-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.

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).

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. ₱10,000.00 as temperate damages for the unlicensed public performance of the copyrighted songs on FILSCAP's repertoire and ₱50,000.00 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.


RODIL V. ZALAMEDA
Associate Justice

WE CONCUR:

A. G. Gesmundo
ALEXANDER G. GESMUNDO
Chief Justice

See dissenting opinion
M. M. V. Leonen
MARVIC M.V.F. LEONEN
Associate Justice

See Concurring
Alfredo Benjamin S. Caguioa
ALFREDO BENJAMIN S. CAGUIOA
Associate Justice

Ramon Paul L. Hernando
RAMON PAUL L. HERNANDO
Associate Justice

With Dissent
Amy C. Lazaro-Javier
AMY C. LAZARO-JAVIER
Associate Justice

No part
HENRI JEAN PAUL B. INTING
Associate Justice

Mario V. Lopez
On Official Leave but left his vote
MARIO V. LOPEZ
Associate Justice

Samuel H. Gaerlan
SAMUEL H. GAERLAN
Associate Justice

Ricardo R. Rosario
RICARDO R. ROSARIO
Associate Justice

J. Lopez
JHOSEP N. LOPEZ
Associate Justice

Japar B. Dimaampao
JAPAR B. DIMAAMPAO
Associate Justice


Jose Midas P. Marquez
JOSE MIDAS P. MARQUEZ
Associate Justice

I join the separate concurring opinion of Justice Caguioa.
ANTONIO T. KHO, JR.
Associate Justice

See Concurring and Dissenting Opinions
MARIA FILOMENA D. SINGH
Associate Justice


CERTIFICATION

Pursuant to Section 13, Article VIII of the Constitution, I certify that the conclusions in the above Decision had been reached in consultation before the case was assigned to the writer of the opinion of the Court.


ALEXANDER G. GESMUNDO

Chief Justice

CERTIFIED TRUE COPY


MARIA LUISA M. SANTILLA
Deputy Clerk of Court and
Executive Officer
CCC-En Banc, Supreme Court

