EN BANC

G.R. No. 233918 – FILIPINO SOCIETY OF COMPOSERS, AUTHORS AND PUBLISHERS, INC., *Petitioner,* **v. ANREY, INC.,** *Respondent.*

Promulgated:

August 9, 2022

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SEPARATE CONCURRING AND DISSENTING OPINION

SINGH, *J.*:

I concur with the *ponencia's* findings that Anrey, Inc. (**Anrey**) is guilty of copyright infringement. However, there are discussions in the *ponencia* that I see in a different light. As such, I respectfully submit this separate concurring and dissenting opinion.

As presented in the *ponencia*, the sole issue in this case is whether the unlicensed playing of radio broadcasts as background music in dining areas of a restaurant amount to copyright infringement.[1]

Copyright infringement is committed by any person who shall use original literary or artistic works, or derivative works, without the copyright owner's consent in such a manner as to violate the latter's copyright and economic rights.[2] Sec. 177 of Republic Act No. 8293 or the Intellectual Property Code (**IP Code**) enumerates such copyright and economic rights as follows:

> SECTION 177. Copyright or Economic Rights. - Subject to the provisions of Chapter VIII, copyright or economic rights shall consist of the exclusive right to carry out, authorize or prevent the following acts:
>
> 177.1. Reproduction of the work or substantial portion of the work;
>
> 177.2. Dramatization, translation, adaptation, abridgment, arrangement or other transformation of the work;
>
> 177.3. The first public distribution of the original and each copy of the work by sale or other forms of transfer of ownership;
>
> 177.4. Rental of the original or a copy of an audiovisual or cinematographic work, a work embodied in a sound recording, a computer program, a

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1 *Ponencia*, p. 6.

2 *Olaño v. Lim Eng Co*, G.R. No. 195835, 14 March 2016.

> irrespective of the ownership of the original or the copy which is the subject of the rental; (n)
>
> 177.5. Public display of the original or a copy of the work;
>
> 177.6. Public performance of the work; and
>
> 177.7. Other communication to the public of the work. (Sec. 5, P.D. No. 49a)

I submit that it is important to identify the specific economic right transgressed in this case, as to do so will allow us to properly narrow down the legal and jurisprudential bases for our findings.

Distinction between public performance and communication to the public

The *ponencia* of Associate Justice Rodil V. Zalameda seemed to have confused public performance with communication to the public.

The *ponencia* states that "the act of playing radio broadcasts containing copyrighted music through the use of loudspeakers is in itself, a performance."[3] It cites as basis the 1991 decision of the U.S. Court of Appeals, Seventh Circuit in *Broadcast Music, Inc. v. Claire's Boutiques, Inc.*[4] ***(Claire's Boutiques)***, which, according to the *ponencia,* "was decided based on how the present copyright law defines the term public performance, which is similarly worded to our own definition of the said term."[5] The *ponencia* also held that "public performance right includes broadcasting of the work [music] and specifically covers the use of loudspeakers. This is the very act Anrey is complained of infringing. As to whether Anrey also infringed on FILSCAP's right to communicate to the public, given the factual scenario of the case, this should be answered in the negative."[6]

I respectfully beg to differ.

The confusion seems to be rooted in the *ponencia's* reliance on *Claire's Boutiques,* which was decided under the U.S. Copyright Act. Unlike our IP Code, the U.S. Copyright Act does not distinguish public performance from communication to the public:

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3 Id. at 16.
4 949 F.2d 1482 (7th Cir. 1991).
5 *Ponencia,* p. 18.
6 Id. at 23-24.

> To "perform" a work means to recite, render, play, dance, or act it, either directly or by means of any device or process or, in the case of a motion picture or other audiovisual work, to show its images in any sequence or to make the sounds accompanying it audible.
>
> x x x x x x x x x
>
> To perform or display a work "publicly" means—
>
> (1) to perform or display it at a place open to the public or at any place where a substantial number of persons outside of a normal circle of a family and its social acquaintances is gathered; or
>
> (2) to transmit or otherwise communicate a performance or display of the work to a place specified by clause (1) or to the public, by means of any device or process, whether the members of the public capable of receiving the performance or display receive it in the same place or in separate places and at the same time or at different times.[7]

By contrast, the definition of public performance under Section 171.6 of the IP Code excludes communication to the public under Section 171.3 of the same law. It may thus be said that the *ponencia's* reliance on *Claire's Boutiques* in characterizing the act of utilizing radio broadcast as background music in a restaurant is misplaced.

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

Under Section 171.3 of the IP Code, "communication to the public" or "communicate to the public" refers to "the making of a work available to the public **by wire or wireless means** in such a way that members of the public may access these works from a place and time individually chosen by them." Section 202.9 of the IP Code further defines "communication to the public of a performance or a sound recording" as "the transmission to the public, **by any medium, otherwise than by broadcasting**, of sounds of a performance or the representations of sounds fixed in a sound recording."

The key distinction between the foregoing provisions lies in the method that the copyrighted work is made available to the public. In the case on hand, Anrey made the copyrighted music available to its customers by playing radio

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7 U.S. Copyright Act, 17 U.S.C. §101.

broadcasts through the use of loudspeakers in their restaurants. This act falls squarely within the definition of Section 171.3 of the IP Code on "communication to the public" because of the fact that the broadcast is made through the use of radio and loudspeakers. This constitutes "the making of a work available to the public by wire or wireless means." This method of making music audible to the public cannot constitute "public performance" since Section 171.6 specifies that the public performance of a sound recording must be perceived "without the need for communication within the meaning of Subsection 171.3." Thus, playing the radio broadcast via loudspeakers cannot be considered a "public performance."

As such, I agree with the position of Associate Justice Alfred Benjamin S. Caguioa that based on the foregoing definitions, the playing of radio receptions of musical works via loud speaker amounted to communication to the public.[8] This is in accord with the Berne Convention for the Protection of Literary and Artistic Works, to which the Philippines is a party,[9] and its accompanying Guide which separates the concept of public performance and broadcasting, that is, communication to the public.

While we may find guidance from foreign courts in developing local jurisprudence, we must remember to apply any learnings to properly fit our domestic laws. In this case, by the fact that our IP Code specifically distinguishes the economic right of "public performance" and "other communication to the public," we must be careful to maintain these distinctions.

Nevertheless, on the matter at hand, I concur with the *ponencia*'s findings that there is in fact copyright infringement by Anrey as against the Filipino Society of Composers, Authors and Publishers, Inc. (**FILSCAP**) as Anrey's use of the copyrighted songs do not constitute fair use pursuant to the discussion made in the *ponencia*.[10]

Having settled the key issue of infringement, I submit that there is a need to further discuss the concept of fair use as it is applied in this case, and as it could be applied in the future, as I fear that a strict application of the provisions on Fair Use in our IP Code alone may hinder or even defeat a core purpose to its institution. We cannot look merely at the potential injuries of the copyright owner, but we must also balance this with the inherent social purpose of our laws.

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8 *Separate Concurring Opinion* of Associate Justice Alfred Benjamin S. Caguioa, p. 72.

9 *See* Treaties, https://www.ipophil.gov.ph/reference/philippine-acceded-intellectual-property-treaties/.

10 *Ponencia*, p. 28-34.

Fair use

Copyright has been defined as the right granted by statute to the proprietor of an intellectual production to its exclusive use and enjoyment.[11] However, the Supreme Court of the United States (**U.S.**), from whose laws our copyright laws were based, has held that copyright is "not an inevitable, divine, or natural right that confers on authors the absolute ownership of their creations."[12] Rather, it is intended to "stimulate activity and progress in the arts for the intellectual enrichment of the public."[13]

This finds support in our Constitution, laws, and jurisprudence. Article XIV, Section 13 of the Constitution enjoins the protection of the exclusive rights of intellectual property owners for the benefit of the public:

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

Article XII, Section 6 provides for the State's duty to regulate the use of property, in view of its inherent social function:

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

Section 2 of the IP Code echoes the above constitutional pronouncements:

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

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11 *Republic v. Heirs of Tupaz IV*, G.R. No. 197335, 7 September 2020.

12 Leval, Pierre N. "Toward a Fair Use Standard." *Harvard Law Review*, Volume 103, No. 5 (1990): 1105–36. Available at: https://doi.org/10.2307/1341457.

13 Id.

> **The use of intellectual property bears a social function. To this end, the State shall promote the diffusion of knowledge and information for the promotion of national development and progress and the common good.**
>
> It is also the policy of the State to streamline administrative procedures of registering patents, trademarks and copyright, to liberalize the registration on the transfer of technology, and to enhance the enforcement of intellectual property rights in the Philippines. (Emphasis supplied)

In *Republic v. Heirs of Tupaz IV,*[14] the Court said that copyright has two rationales: economic benefit and social benefit.

> **The economic benefit is reaped by the author from his work while the social benefit manifests when it creates impetus for individuals to be creative.** Copyright, like other intellectual property rights, grants legal protection by prohibiting the unauthorized reproduction of the author's work. It "create[s] a temporary monopoly on varying types of knowledge, allowing their owners to restrict and even prevent, other from using that knowledge." By eliminating fear of other's appropriation and exploitation of an author's work, intellectual creation is incentivized.
>
> When the concept of copyright emerged, it was primarily concerned with the advancement of a common social good and not so much about the author's rights. Copyright statutes were initially crafted for the reading public and to encourage education through the production of books. (Emphasis supplied; citations omitted)

Because of its common good dimension, copyright protection is not absolute. The IP Code provides the limitations on copyright, which include the fair use doctrine embodied in Section 185 of the law, which pertinently states:

> SEC. 185. *Fair Use of a Copyrighted Work.* – 185.1. The fair use of a copyrighted work for criticism, comment, news reporting, teaching including limited number of copies for classroom use, scholarship, research, and similar purposes is not an infringement of copyright. xxx In determining whether the use made of a work in any particular case is fair use, the factors to be considered shall include:
>
> (a) The purpose and character of the use, including whether such use is of a commercial nature or is for non-profit educational purposes;
>
> (b) The nature of the copyrighted work;
>
> (c) The amount and substantiality of the portion used in relation to the copyrighted work as a whole; and

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14 Supra note 11.

(d) The effect of the use upon the potential market for or value of the copyrighted work.

In *ABS-CBN Corporation v. Gozon, et al. (**Gozon**),*[15] this Court defined fair use as "a privilege to use the copyrighted material in a reasonable manner without the consent of the copyright owner or as copying the theme or ideas rather than their expression." The Court further held that "[f]air use is an exception to the copyright owner's monopoly of the use of the work to avoid stifling "the very creativity which that law is designed to foster." Fair use was allowed because excessively broad copyright protection would impede, rather than advance, the law's objective of stimulating creativity and authorship.[16]

The doctrine of fair use is widely said to have its origins in *Folsom v. Marsh,*[17] a case decided by the U.S. Circuit Court for the District of Massachusetts in 1841.[18] In the said case, it was held that in resolving questions of fair use, the court must "look to the nature and objects of the selections made, the quantity and value of the materials used, and the degree in which the use may prejudice the sale, or diminish the profits, or supersede the objects, of the original work."[19] The U.S. Copyright Act and, in turn, our copyright law, largely adopted these considerations in how to recognize fair use.

In *Gozon*,[20] the Court had the occasion to discuss the factors to be considered in determining fair use:

Determining fair use requires application of the four-factor test. Section 185 of the Intellectual Property Code lists four (4) factors to determine if there was fair use of a copyrighted work:

a. The purpose and character of the use, including whether such use is of a commercial nature or is for non-profit educational purposes;

b. The nature of the copyrighted work;

c. The amount and substantiality of the portion used in relation to the copyrighted work as a whole; and

d. The effect of the use upon the potential market for or value of the copyrighted work.

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15 G.R. No. 195956, 11 March 2015.
16 Supra note 12.
17 9 F. Cas. 342 (C.C.D. Mass. 184).
18 Netanel, Neil Weinstock. "Making Sense of Fair Use." *Lewis & Clark Law Review 15*, no. 3 (2011): 715–71. Available at: https://law.lclark.edu/live/files/9132-lcb153netanelpdf.
19 Supra note 17.
20 Supra note 15.

> First, the purpose and character of the use of the copyrighted material must fall under those listed in Section 185, thus: "criticism, comment, news reporting, teaching including multiple copies for classroom use, scholarship, research, and similar purposes." The purpose and character requirement is important in view of copyright's goal to promote creativity and encourage creation of works. Hence, **commercial use of the copyrighted work can be weighed against fair use.**
>
> The "transformative test" is generally used in reviewing the purpose and character of the usage of the copyrighted work. This court must look into whether the copy of the work adds "new expression, meaning or message" to transform it into something else. "Meta-use" can also occur without necessarily transforming the copyrighted work used.
>
> Second, the nature of the copyrighted work is significant in deciding whether its use was fair. **If the nature of the work is more factual than creative, then fair use will be weighed in favor of the user.**
>
> Third, the amount and substantiality of the portion used is important to determine whether usage falls under fair use. **An exact reproduction of a copyrighted work, compared to a small portion of it, can result in the conclusion that its use is not fair.** x x x
>
> Lastly, **the effect of the use on the copyrighted work's market is also weighed for or against the user.** If this court finds that the use had or will have a negative impact on the copyrighted work's market, then the use is deemed unfair." (Emphasis supplied; citations omitted)

As can be gleaned from the above, the presence of profit does not automatically foreclose fair use. There are other factors that must be weighed and considered in deciding whether the fair use doctrine applies. Nevertheless, a "for profit" use generally weighs against the user in a claim of fair use. This is because copyright was developed from the need to protect the moral and economic rights of creators.

In crafting the U.S. Copyright Act from which Act No. 3134 or the Philippine Copyright Law was based, the U.S. Congress tried to "shape the rights to ensure that actionable infringement only resulted from uses that interfered with a copyright owner's commercial exploitation of the work."[21]

Related to this is the fourth factor in determining fair use, *i.e.,* the effect of the use upon the potential market for or value of the copyrighted work. It considers the commercial benefits or disadvantage brought about by the alleged infringement to the original owner of the work. This concept was illustrated by the U.S. Court of Appeals in *Ty, Inc. v. Publications*

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21 Loren, Lydia Pallas. "The Evolving Role of 'For Profit' Use in Copyright Law: Lessons from the 1909 Act." *Santa Clara Computer and High Technology Law Journal*, Vol. 26, No. 255, 2010, Lewis & Clark Law School Legal Studies Research Paper No. 2010-17, https://ssrn.com/abstract=1611261.

International,[22] in this manner: "we may say that copying that is complementary to the copyrighted work (in the sense that nails are complements of hammers) is fair use, but copying that is a substitute for the copyrighted work (in the sense that nails are substitutes for pegs or screws), or for derivative works from the copyrighted work x x x is not fair use."[23] It was further held that "[complementary copying] does not impair the potential market or value of the copyrighted work except insofar as it criticizes the work, which is the opposite of taking a free ride on its value."[24] Where the profit generated by the alleged infringement substitutes for what the owner or creator could make, there can be no fair use. But where the benefits are complementary or incidental, then fair use may be properly considered.

Based on the foregoing criteria, using copyrighted music through sound recording or via radio broadcast played through loudspeakers, as background music in restaurants for the entertainment of the customers and the enhancement of their dining experience falls outside the ambit of fair use. Verily, allowing these businesses to profit from the copyrighted works without compensating the owners or their assignee would be prejudicial and would significantly affect the market of the copyright holders.

This is the Decision that we are handing down in this case. However, the Court cannot stop here. There is a need to make a distinction between the big businesses, such as the restaurants involved here, and the small businesses such as small restaurants, school canteens, even *carinderias,* food carts, and the like. We cannot ignore the far-reaching consequences that the Court's ruling in this case may have on these small businesses if no such distinction is made. If the Court stops at ruling that all those in the position of Anrey are copyright infringers, the effect would be that all businesses, including small ones, where it could hardly be said that ambience is a consideration for customers, which play music, either through radios or otherwise, would also be subject to charges as copyright infringers.

These same considerations led the U.S. Congress to adopt the following exemption to copyright in Section 110(5) of the U.S. Copyright Act, which pertinently states:

> [T]he following are not infringements of copyright:
>
> (5) communication of a transmission embodying a performance or display of a work by the public reception of the transmission on a single receiving apparatus of a kind commonly used in private homes, unless –
>
> (A) a direct charge is made to see or hear the transmission; or

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22 292 F.3d 512 (7th Cir. 2002).
23 Id.
24 Id.

(B) the transmission thus received is further transmitted to the public.

Often referred to as the "small business exemption,"[25] the above-quoted provision excludes from liability for infringement those transmissions received by a single apparatus of a kind commonly used in private homes, provided that there is no direct charge to see or hear the transmission, and that the transmission is not further transmitted to the public. It allows mom-and-pop establishments to play music without incurring liability for copyright infringement.[26]

The U.S. Congress explained the rationale for the small business exemption as follows:

> Its purpose is to exempt from copyright liability anyone who merely turns on, in a public place, an ordinary radio or television receiving apparatus of a kind commonly sold to members of the public for private use.
>
> **The basic rationale of this clause is that the secondary use of the transmission by turning on an ordinary receiver in public is so remote and minimal that no further liability should be imposed**. In the vast majority of these cases no royalties are collected today, and the exemption should be made explicit in the statute. [27]

In its responses to the Written Questions of the World Trade Organization (**WTO**) Panel in connection with the dispute between the European Communities and the U.S. as to the alleged inconsistency of the U.S. Copyright Act with the WTO Agreement on Trade-Related Aspects of Intellectual Property Rights, the U.S. expounded on the importance of protecting small businesses:

> With respect to 110(5)(A), the record is clear that Congress was concerned with small 'mom and pop' businesses. **Small businesses play a particularly important role in the American social fabric. They foster local values and innovation and experimentation in the economy. Small businesses also create a disproportionately greater number of economic opportunities for women, minorities, immigrants, and those formerly on public assistance, and thus are an essential mechanism by which millions enter the economic and social mainstream.**[28] (Citations omitted; emphasis supplied)

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25 Peggy H. Luh, "Pay or Don't Play: Background Music and the Small Business Exemption of Copyright Law," 16 Loy. L.A. Ent. L. Rev. 711, p. 715 (1996). Available at: https://digitalcommons.lmu.edu/elr/vol16/iss3/4.

26 Id.

27 H.R. Rep. No. 94-1476 (1976), p. 87.

28 Panel Report, United States – Section 110(5) of the U.S. Copyright Act, WT/DS160/R (15 June 2000), p. 87. Available at: https://docs.wto.org/dol2fe/Pages/FE_Search/MultiDDFDocuments/55222/Q:/WT/DS/160R00.pdf;Q:/ WT/DS/160R-01.pdf/.

On 27 October 1998, the U.S. Congress enacted the Fairness in Music Licensing Act of 1998 (**FMLA**), amending the U.S. Copyright Act. The FMLA recodified the original exemption under Section 110(5) of the U.S. Copyright Act as Section 110(5)(A), often referred to as the "homestyle exemption," and introduced a second tier of exemption under Section 110(5)(B), often referred to as the "business exemption."[29] Section 110(5) of the U.S. Copyright Act as amended by the FMLA reads:

> Limitations on exclusive rights: Exemption of certain performances and displays
>
> Notwithstanding the provisions of section 106, the following are not infringements of copyright:
>
> x x x
>
> (5)
>
> (A) except as provided in subparagraph (B), communication of a transmission embodying a performance or display of a work by the public reception of the transmission on a single receiving apparatus of a kind commonly used in private homes, unless—
>
> > (i) a direct charge is made to see or hear the transmission; or
> > (ii) the transmission thus received is further transmitted to the public;
>
> (B) communication by an establishment of a transmission or retransmission embodying a performance or display of a nondramatic musical work intended to be received by the general public, originated by a radio or television broadcast station licensed as such by the Federal Communications Commission, or, if an audiovisual transmission, by a cable system or satellite carrier, if—
>
> > (i) in the case of an establishment other than a food service or drinking establishment, either the establishment in which the communication occurs has less than 2,000 gross square feet of space (excluding space used for customer parking and for no other purpose), or the establishment in which the communication occurs has 2,000 or more gross square feet of space (excluding space used for customer parking and for no other purpose) and—
> >
> > > (I) if the performance is by audio means only, the performance is communicated by means of a total of not more than 6 loudspeakers, of which not more than 4 loudspeakers are located in any 1 room or adjoining outdoor space; or
> > >
> > > (II) if the performance or display is by audiovisual means, any visual portion of the performance or display is

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29 Charles Leininger, *The Business Exemption of § 110(5) of the Copyright Act Violates International Treaty Obligations under Trips: Will Congress Honor its Commitments?*, 25 J. Nat'l Ass'n Admin. L. Judges., p. 628 (2005). Available at https://digitalcommons.pepperdine.edu/naalj/vol25/iss2/7.

> communicated by means of a total of not more than 4 audiovisual devices, of which not more than 1 audiovisual device is located in any 1 room, and no such audiovisual device has a diagonal screen size greater than 55 inches, and any audio portion of the performance or display is communicated by means of a total of not more than 6 loudspeakers, of which not more than 4 loudspeakers are located in any 1 room or adjoining outdoor space;
>
> (ii) in the case of a food service or drinking establishment, either the establishment in which the communication occurs has less than 3,750 gross square feet of space (excluding space used for customer parking and for no other purpose), or the establishment in which the communication occurs has 3,750 gross square feet of space or more (excluding space used for customer parking and for no other purpose) and—
>
> (I) if the performance is by audio means only, the performance is communicated by means of a total of not more than 6 loudspeakers, of which not more than 4 loudspeakers are located in any 1 room or adjoining outdoor space; or
>
> (II) if the performance or display is by audiovisual means, any visual portion of the performance or display is communicated by means of a total of not more than 4 audiovisual devices, of which not more than one audiovisual device is located in any 1 room, and no such audiovisual device has a diagonal screen size greater than 55 inches, and any audio portion of the performance or display is communicated by means of a total of not more than 6 loudspeakers, of which not more than 4 loudspeakers are located in any 1 room or adjoining outdoor space;
>
> (iii) no direct charge is made to see or hear the transmission or retransmission;
>
> (iv) the transmission or retransmission is not further transmitted beyond the establishment where it is received; and
>
> (v) the transmission or retransmission is licensed by the copyright owner of the work so publicly performed or displayed x x x

The business exemption shields from liability users based on the floor area of their business and the number of speakers or devices installed to transmit the broadcast subject to the following conditions: (a) no direct charge is made to see or hear the transmission; (b) no further transmission is made; and (c) the transmission itself is already licensed by the copyright owner.

Although no similar explicit exemption can be found in our IP Code, I respectfully submit that mom-and-pop businesses should be similarly protected from liability for copyright infringement under the fair use doctrine.

To rule otherwise would amount to the expansion of the scope of copyright, which is beyond the constitutional powers of this Court. It must be emphasized that the primary motivation behind protection of intellectual property is the common good and thus the Court, in applying the law on intellectual property, is enjoined to strike a careful balance between the rights of the owners to be compensated for the use of their works and the right of the public to enjoy these creations. But this perhaps is for a more in-depth discussion in a future case under different circumstances.

As the case presents itself, the respondent does not fall within the concept of mom-and-pop business for which I advocate the fair use exemption to apply.

All things considered, I vote to **GRANT** the petition.

MARIA FILOMENA D. SINGH
Associate Justice

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