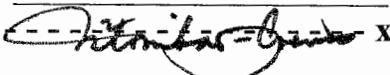


EN BANC

G.R. No. 222537 — COSAC, INC., *petitioner, versus* FILIPINO SOCIETY OF COMPOSERS, AUTHORS AND PUBLISHERS, INC., *respondent.*

Promulgated:

February 28, 2023

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SEPARATE CONCURRING OPINION

CAGUIOA, J.:

I concur.

This case involves a similar issue as *FILSCAP v. Anrey*<sup>1</sup> (*Anrey*), which likewise stemmed from a third party's unauthorized exercise of the authors' copyright. The role of respondent Filipino Society of Composers, Authors and Publishers, Inc. (FILSCAP) in relation to its members who own the music copyright involved in this case is summarized as follows:

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

<sup>1</sup> G.R. No. 233918, August 9, 2022. Penned by Associate Justice Rodil V. Zalameda, with Chief Justice Alexander G. Gesmundo and Associate Justices Ramon Paul L. Hernando, Samuel H. Gaerlan, Ricardo R. Rosario, Jhosep Y. Lopez, Japar B. Dimaampao, and Jose Midas P. Marquez concurring.

Associate Justice Caguioa submitted his Separate Concurring Opinion, joined in by Associate Justice Antonio T. Kho, Jr.

Senior Associate Justice Marvic M.V.F. Leonen and Associate Justice Amy C. Lazaro-Javier dissented, submitting their respective Dissenting Opinions.

Associate Justice Maria Filomena D. Singh expressed both concurrence and dissent.

Associate Justice Mario V. Lopez on official leave but left his vote to concur. Associate Justice Henri Jean Paul B. Inting took no part.



stream, and to a certain extent (reproduce) any copyrighted local and international music of its members.”<sup>2</sup>

The controversy in the instant case started when a representative from FILSCAP monitored Off the Grill Bar and Restaurant (Off the Grill), a commercial establishment in Quezon City owned and operated by petitioner COSAC, Inc. (COSAC). These monitoring activities led to the discovery that COSAC was playing copyrighted music in its establishment without obtaining from FILSCAP the necessary license or paying the corresponding fees.<sup>3</sup>

FILSCAP sent demand letters informing COSAC of its obligations under Republic Act No. (R.A.) 8293<sup>4</sup> otherwise known as the Intellectual Property Code (IP Code) and demanded the payment of the appropriate amount of license fees and/or that COSAC obtain the necessary license from FILSCAP.<sup>5</sup>

COSAC, however, refused to heed the demand, prompting FILSCAP to file a Complaint<sup>6</sup> for copyright infringement and damages. In its Answer,<sup>7</sup> COSAC questioned FILSCAP’s authority to enforce music copyright and — without explicitly raising as defenses any of the exceptions to copyright infringement under the law — denied that it had committed copyright infringement.<sup>8</sup>

I concur that COSAC should be held liable for copyright infringement. As stated in the *ponencia*, “**for an act to be considered as copyright infringement, it must not fall under Section 177 of the [IP Code (Copyright or Economic Rights)], and at the same time must not be covered by Sections 184 (Limitations on Copyright) and 185 (Fair Use [of a Copyrighted Work]).**”<sup>9</sup>

These two conditions are clearly present in this case. For ease of reference and to allow for the sufficient elaboration of the relevant issues, the succeeding discussion will be divided into the following topics:

- I. COSAC exercised without authority the authors’ exclusive rights under Section 177 (Copyright or Economic Rights).
  - a. The law itself distinguishes the right of “public performance” from the right of “communication to the public,” either right being enforceable through FILSCAP.

<sup>2</sup> J. Caguioa, Separate Concurring Opinion in *FILSCAP v. Anrey*, id. at 1.

<sup>3</sup> *Ponencia*, p. 2.

<sup>4</sup> AN ACT PRESCRIBING THE INTELLECTUAL PROPERTY CODE AND ESTABLISHING THE INTELLECTUAL PROPERTY OFFICE, PROVIDING FOR ITS POWERS AND FUNCTIONS, AND FOR OTHER PURPOSES, approved on June 6, 1997.

<sup>5</sup> *Rollo*, pp. 60-63 and 71.

<sup>6</sup> Id. at 37-43.

<sup>7</sup> Id. at 72-74.

<sup>8</sup> *Ponencia*, p. 3.

<sup>9</sup> Id. at 34. (Emphasis supplied)

- II. COSAC's acts are not covered by Sections 184 (Limitations on Copyright) and 185 (Fair Use of a Copyrighted Work).
  - a. The Court is called upon not to simply discuss the provisions on copyright protection, but to extensively delve into its existing limitations.
  - b. Limitations on copyright
  - c. Fair Use
    - i. Fair Use Doctrine
    - ii. Fair Use in the Philippines
    - iii. The Four Fair Use Factors
      - 1. First Factor: Purpose and Character of Use
      - 2. Second Factor: Nature of Copyrighted Work
      - 3. Third Factor: Amount and Substantiality of the Portion Used
      - 4. Fourth Factor: Effect of the Use Upon the Potential Market for or Value of the Copyrighted Work
  - d. Why COSAC is not exempted from liability for copyright infringement
- III. There must be reasonable considerations for quantifying the damages awarded in copyright infringement cases.

**DISCUSSION**

I. COSAC EXERCISED WITHOUT  
AUTHORITY THE AUTHORS'  
EXCLUSIVE RIGHTS UNDER SECTION  
177 (COPYRIGHT OR ECONOMIC  
RIGHTS)



In *Microsoft Corp. v. Manansala*,<sup>10</sup> the Court clarified that the “gravamen of copyright infringement” is not merely the unauthorized manufacturing of intellectual works[,] but rather the **unauthorized performance of any of the exclusive economic rights of the copyright owner**.<sup>11</sup> There is no question that COSAC had exercised the copyright owners’ exclusive rights under Section 177 by carrying out the following acts, as summarized and defined in the table below:

COSAC’s Acts	Infringed Right of the Authors
<p>Hiring a live band to perform copyrighted musical compositions</p> <p>(N.B.: The fact that COSAC had directly caused the musical compositions to be played — as opposed to being a mere passive party that happened to reap unexpected rewards due to having strangers/bands playing music in its establishment — is evidenced by COSAC’s witness’ own admission under oath that it <u>regularly hires and pays entertainers to play live music</u>.<sup>12</sup>)</p>	<p>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:</p> <p>x x x x</p> <p><b>177.6. Public performance of the work;</b> x x x</p> <p>-----</p> <p>Section 171.6 of the IP Code.</p> <p>“<b>Public Performance</b>” x x x is x x x otherwise performing the work x x x by means of any x x x process x x x 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 x x x.</p>
<p>Playing of copyrighted musical compositions contained in sound recordings</p> <p>(N.B.: As admitted under oath by COSAC’s witness, COSAC uses a projector to display “MTV.”<sup>13</sup> There is no indication whether this is</p>	<p>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:</p> <p>x x x x</p> <p><b>177.6. Public performance of the work; and</b></p>

<sup>10</sup> G.R. No. 166391, October 21, 2015, 773 SCRA 345.

<sup>11</sup> See *id.* at 352. Citations omitted.

<sup>12</sup> *Ponencia*, pp. 19-20.

<sup>13</sup> *Id.* at 20.

<p>a broadcast of the channel or whether COSAC is merely projecting a recorded footage thereof.)</p>	<p>177.7. Other <b>communication to the public</b> of the work. (Sec. 5, P.D. No. 49a)</p> <p style="text-align: center;">-----</p> <p>Section 171.6 of the IP Code. “<b>Public Performance</b>” x x x is x x x in the case of a sound recording, making the recorded sounds audible at a place or at places where persons outside the normal circle of a family and that family’s closest social acquaintances are or can be present, irrespective of whether they are or can be present at the same place and at the same time, or at different places and/or at different times x x x.</p> <p style="text-align: center;">AND/OR</p> <p>Section 171.3 of the IP Code. “<b>Communication to the public</b>” or “<b>communicate to the public</b>” 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[.]</p>
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A.

*The law itself distinguishes the right of “public performance” from the right of “communication to the public,” either right being enforceable through FILSCAP*

As will be elaborated below, I agree with the *ponencia* that “it would be more judicious to say, specifically for this case, that COSAC infringed the **[public] performing rights** of the copyright owners.”<sup>14</sup> Notably, this expression encompasses both “right of public performance” and “right of communication to the public,” as can be seen in FILSCAP’s deeds of assignment, *viz.*:

**1. DEFINITIONS**

a) “**Copyright work**” shall mean and include —

x x x x

b) “**right of public performance**” shall, as provided in Section 171.6 of [the IP Code] x x x

<sup>14</sup> Id. at 19.

- c) **“right of communication to the public”** shall mean the right x x x per Section 171.3 o[f] [the IP Code]
- d) The expression **“public performing rights”** shall mean **(b) [right of public performance] and (c) [right of communication to the public]** above.<sup>15</sup> (Emphasis and underscoring in the original)

Despite having a collective term to refer to both these rights, the Court must still take pains to proactively distinguish them lest these exclusive rights be conflated with one another. While not raised as an issue, it is important to dispel the misconception that only the right of public performance is generally involved when “[a] copyrighted musical work is ‘played or performed live through [the] performer or mechanically through any audio or audiovisual player or device such as a CD player, VCD player, DVD player, cassette player, **television set or radio player.**”<sup>16</sup>

The distinction between these two rights — the right of public performance and the right of communication to the public — I had earlier extensively discussed in my Separate Concurring Opinion in *Anrey*, viz.:

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

x x x [This] is likewise supported by the following provisions of the IP Code involving the rights of performers, producers of sound recordings, and broadcasting organizations. x x x

x x x x

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

<sup>15</sup> Id. at 38-39.

<sup>16</sup> Id. at 4; Testimony of FILSCAP’s witness, Ferdinand Gorospe. Emphasis supplied.

Code actually recognize **two separate and distinct rights** that may independently be exploited by an author or copyright owner.

x x x x

x x x [I]t must further be underscored that the public performance right and right to communicate to the public are not only separate and distinct — they are also ingeniously delineated or segregated by the IP Code based on the means of transmission or making available of the work, *i.e.*, whether the performance or communication is made by “wire or wireless means.” x x x

I expound.

First, it should be stressed at the onset that the definition of public performance under Section 171.6 is **exclusionary** in relation to Section 171.3, *i.e.*, in order to constitute “public performance,” the performance must be “perceive[able] without the need for communication within the meaning of Subsection 171.3.” Conversely, **if an aspect of a performance can be perceived by the public by means of “communication” as defined under Section 171.3, *i.e.*, “by wire or wireless means in such a way that members of the public may access these works from a place and time individually chosen by them,” then this aspect of the performance would only be a “communication to the public” and would not therefore constitute a “public performance.”**

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

x x x x

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

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

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



performance by means of cinematographic works is separately covered — see Article 14(1)(ii).

**11.5. The second leg of this right is the communication to the public of a performance of the work. It covers all public communication except broadcasting which is dealt with in Article 11bis.** For example, a broadcasting organisation broadcasts a chamber concert. Article 11bis applies. But if it or some other body diffuses the music by landline to subscribers, this is a matter for Article 11. x x x

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

x x x x

Parsed, while the communication of a "performance" may fall under Article 11 of the Berne Convention (governing public performance), this is only true if the performance can be perceived without the need for communication within the meaning of Article 11bis — very much like how Section 171.6 of the IP Code is worded. On the other hand, under the Berne Convention, if the communication to the public is made either (i) via broadcast or by any other means of wireless diffusion, (ii) whether by wire or not, by an organization other than the one who originally made the broadcast, or (iii) through a broadcast of the work through a loudspeaker, television screen, or other analogous instrument, then Article 11bis applies. **Put simply, one clear similarity between the structure of the Berne Convention and the IP Code is that both categorically separate the concept of "public performance" from "broadcasting," such that a work that is conveyed to the public solely via radio broadcast does not constitute an exercise of the author's right of "public performance," but rather of the author's right of "[b]roadcasting and other wireless communications, public communication of broadcast by wire or rebroadcast, public communication of broadcast by loudspeaker or analogous instruments[,]” or, as referred to under the IP Code, the author's right to "communicate to the public."**

Applying the foregoing principles to our jurisdiction, this means that under the IP Code, as under the Berne Convention, the single act of broadcasting of musical compositions contained in sound[/audiovisual] recordings, either by the original broadcaster or "by an organization other than the original one[.]" or by other business establishments solely "by loudspeaker[, television,] or any other analogous instrument" (as worded in Article 11bis of the Berne Convention), is actually an exercise of the author's right to "communicate to the public" his or her work under Section 171.3 of the IP Code. This is clear from the wording of Section 171.3 of the IP Code which specifically defines "communication to the public" as the



“making of a work available to the public by **wire or wireless means** x x x,” and from the wording of Section 202.7 of the IP Code which defines “broadcasting” as a mode of “**transmission by wireless means** for the public reception of sounds[.]” **As well, by the wording of Section 171.6 of the IP Code, this may also mean that such act does not constitute an exercise of an author’s public performance right.**

In other words, based on the IP Code’s definition of these two rights, as further clarified by the Berne Convention, broadcasting a musical composition over the [television or] radio or communicating the same in some other “wire or wireless means x x x” would simply constitute an **exercise of the right to “communicate to the public.”** On the other hand, playing a sound recording of a musical composition to an audience through other dissimilar or “non-broadcast” means, *i.e.*, through a jukebox or CD player, even if the same is ultimately perceived by the audience through a loudspeaker or other analogous instrument, would only constitute “public performance.” After all, the sound recording in this situation can be perceived by the public without the need of communication by “wire or wireless means in such a way that members of the public may access these works from a place and time individually chosen by them.”

x x x x

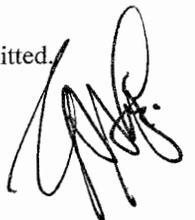
To be sure, there are cases where a single performance could constitute **both** public performance and communication to the public. For instance, if a band performs a musical composition live before a studio audience, and the same performance is either simultaneously or subsequently broadcasted over the radio by a broadcasting station, then the band’s performance results in **both** a public performance and communication to the public. In this example, the act of directly performing the musical composition before the audience is itself a public performance, while the act of broadcasting the performance (not the actual performance itself) is a communication to the public. Thus, while there is only one performance, there are actually two acts which respectively result in the exercise of two separate economic rights.

In other words, unless there is a showing that the music being played via radio[/television] is **not** simply a x x x recording [of a musical composition] but rather, being played live before a studio audience, then the playing of a radio[/television] broadcast as background music would **only** constitute a “communication to the public.”<sup>17</sup> (Emphasis and underscoring supplied)

Thus, in the case at bar, considering that COSAC had hired bands to play live music **and** played MTV in its establishment (but it is not sure whether this was a broadcast or a recorded footage), the *ponencia* is therefore correct in saying that COSAC had infringed the **public performing rights** of the copyright owners, *i.e.*, their right of public performance and/or their right of communication to the public.

## II. COSAC’S ACTS ARE NOT COVERED BY SECTIONS 184 (LIMITATIONS ON

<sup>17</sup> J. Caguioa, Separate Concurring Opinion in *FILSCAP v. Anrey*, supra note 1 at 44-51. Citations omitted.



COPYRIGHT) AND 185 (FAIR USE OF A  
COPYRIGHTED WORK)

A.

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

As mentioned, to determine whether copyright infringement has been committed, the acts in question “x x x must not be covered by Sections 184 (Limitations on Copyright) and 185 (Fair Use [of a Copyrighted Work]).”<sup>18</sup> Clearly, therefore, in resolving the main issue of copyright infringement, the Court is called upon to consider and delve into the exceptions to copyright infringement (*i.e.*, the Limitations on Copyright under Section 184 of the IP Code and Fair Use of a Copyrighted Work under Section 185 of the IP Code) because they are crucial in determining whether copyright infringement exists.

Notably, even if COSAC has not explicitly raised as affirmative defenses the exceptions to copyright infringement, its defense is akin to an exception under the law, as will be discussed in more detail below. In any event, the fact that COSAC did not expressly raise these exceptions as issues in the present case is of no moment, as explained in the following disquisition:

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

x x x x

*Secondly*, for the immediate protection of the general public against an overly expansive interpretation of the coverage of music copyright protection, the Court’s verdict must also x x x expound on and construe more definitively **the guardrails already recognized under the law**. This is part and parcel of the Court’s function not only to adjudicate the rights of the parties but also, or more so, to interpret the law for the guidance of all.

x x x

x x x x

*Lastly*, the discussion of the exceptions to copyright infringement is necessary — especially for this landmark case — for the Court to balance the competing interests involved in copyright protection. x x x Section 2 of the IP Code underscores that the ultimate objective of having an intellectual property system, which includes the means of protecting copyrights, is to benefit society[.] x x x

x x x x

<sup>18</sup> *Ponencia*, p. 34.

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

x x x x

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

x x x x

Based on the foregoing, it may be readily concluded that these penal sanctions pertain to wide-ranging conduct, including acts involving copyrighted material which are arguably commonplace in today's world. This, in effect, further narrows the already thin line dividing infringement **and** allowable use or reproduction.<sup>19</sup> x x x (Emphasis supplied)

To further make apparent this dividing line between infringement and allowable use or reproduction, therefore, it is imperative to emphasize why COSAC's acts neither fall under Section 184 (Limitations on Copyright) nor Section 185 (Fair use of a Copyrighted Work).

## B.

### *Limitations on Copyright*

The following discussion aptly highlights and explains the relevant portions of Section 184:

Section 184 of the IP Code reads:

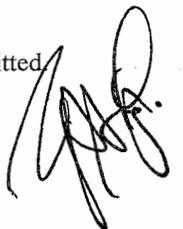
SECTION 184. Limitations on Copyright. — 184.1. Notwithstanding the provisions of Chapter V, the following acts shall not constitute infringement of copyright:

- (a) The recitation or performance of a work, once it has been lawfully made accessible to the public, if done privately and free of charge or if made strictly for a charitable or religious institution or society; (Sec. 10(I), P.D. No. 49)

x x x x

- (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

<sup>19</sup> J. Caguioa, Separate Concurring Opinion in *FILSCAP v. Anrey*, supra note 1 at 4-7. Citation omitted.



only, whose aim is not profit making, subject to such other limitations as may be provided in the Regulations[.]

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

In this regard, particularly relevant to x x x the issue in this case — are paragraphs (a) and (i) of Section 184.1, which respectively involve (i) “the recitation or performance” of a work in private places, and (ii) the “public performance” and/or “communication to the public” of copyrighted works in public or publicly accessible places. Under these paragraphs, in order for a recitation, performance and/or communication of a work to be exempt, the following requisites should be present:

Under Section 184.1 (a):

- (i) The recitation or performance is done (a) privately and free of charge or (b) made strictly for a charitable or religious institution or society; and
- (ii) The work has been lawfully made accessible to the public prior to the recitation or performance[.]

Under Section 184.1 (i):

- (i) The place where the public performance and/or communication to the public is made does not charge any admission fee in respect of such performance or communication;
- (ii) The public performance and/or communication to the public is made by a club or institution: (a) for charitable or educational purpose only; and (b) whose aim is not profit making; and
- (iii) Such other requirements that may be prescribed under the implementing rules and regulations promulgated by the Director General of the IPO[PHL].

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



Notably, the IP Code does not specifically define the term “privately.” Since Congress did not assign a statutory definition to the term “privately,” this term should thus be understood in its plain and ordinary sense, *i.e.*, “relating or belonging to an individual, as opposed to the public or the government”[.] Considering, however, that the term “public,” the commonly accepted antonym of “private,” is given a technical meaning elsewhere in the IP Code, then resort could also be made to this definition in order to construe what “privately” as contemplated under Section 184.1(a) means. In this regard, Section 171.6 of the IP Code provides that a performance of a sound recording will be deemed as “public” if it would entail “making the recorded sounds audible at a place or at places where persons outside the normal circle of a family and that family’s closest social acquaintances are or can be present, irrespective of whether they are or can be present at the same place and at the same time, or at different places and/or at different times.”

In other words, construing “privately” in its ordinary sense (*i.e.*, as the opposite of “publicly”), and coupled with the definition of “public” under Section 171.6, then this term should simply be understood to refer to situations where the work is **not** made “audible at a place or at places where persons outside the normal circle of a family and that family’s closest social acquaintances are or can be present.” After all, it is a settled principle of statutory construction that “words used in x x x [a] statute must be given their ordinary meaning except where technical terms are employed.” As well, the law must not be read in truncated parts, and “the whole and every part thereof must be considered in fixing the meaning of any of its parts in order to produce a harmonious whole.”

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

Anent the second requisite of Section 184.1(i), it must be underscored that not only must the club or institution be for a “charitable or educational purpose,” but it must also be “non-profit.” Thus, to be exempt, the club or institution must not only first qualify as either a charitable institution, *i.e.*, it “provide[s] for free goods and services to the public which would otherwise fall on the shoulders of government,” or an educational institution, *i.e.*, it must be a school, seminary, college or similar educational establishment under the formal school system; but also, said club or institution must likewise be “non-profit,” such that “no net income or asset accrues to or benefits any member or specific person, with all [its] net income or asset[s] devoted to the institution’s purposes and all its activities conducted not for profit.”<sup>20</sup> (Emphasis in the original)

C.

*Fair Use*

<sup>20</sup> Id. at 9-13. Citations omitted.

On the other hand, Section 185 of the IP Code has been explained as follows:

i. Fair Use Doctrine

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

**SECTION 185. Fair Use of a Copyrighted Work.** — 185.1.

The fair use of a copyrighted work for criticism, comment, news reporting, teaching including multiple copies for classroom use, scholarship, research, and similar purposes is not an infringement of copyright x x x. In determining whether the use made of a work in any particular case is fair use, the factors to be considered shall include:

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

x x x x

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

**Section 107. Limitations on the exclusive rights: Fair use**

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

- (1) the purpose and character of the use, including whether such use is of a**



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

The fact that a work is unpublished shall not itself bar a finding of fair use if such finding is made upon consideration of all the above factors. x x x

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

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

#### ***1. First Factor: The Purpose and Character of Use***

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

x x x The central purpose of this investigation is to see, in Justice Story's words, **whether the new work merely "supersede[s] the objects" of the original creation x x x, or instead adds something new, with a further purpose or different character, altering the first with new expression, meaning, or message;** it asks, in other words, whether and to what extent the new work is 'transformative.' Although such transformative use is not absolutely necessary for a finding of fair use, the goal of copyright, to promote science and the arts, is generally furthered by the creation of transformative works. Such works thus lie at the heart of the fair use doctrine's guarantee of breathing space within the confines of copyright, x x x and **the more transformative the new work, the less will be the significance of other factors, like commercialism, that may weigh against a finding of fair use.** x x x

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



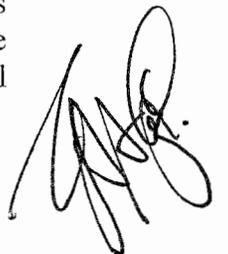
The language of the statute makes clear that **the commercial or nonprofit educational purpose of a work is only one element of the first factor enquiry into its purpose and character.** Section 107(1) uses the term “including” to begin the dependent clause referring to commercial use, and the main clause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

In *Harper & Row*, x x x the SCOTUS explained that “the crux of the profit/nonprofit distinction is not whether the sole motive of the use is monetary gain, but **whether the user stands to profit from exploitation of the copyrighted material without paying the customary price.**”

In other words, if the new work clearly has transformative use and value, a finding of fair use is more likely even if the user stands to profit from his or her new work. Conversely, if the new work merely supplants the object of the original work, *i.e.*, it has no transformative value, and is commercial in nature, the first factor will most likely be weighed against a finding of fair use. Needless to state, if the new work has transformative use and value, and was created for a noncommercial purpose or use, the scale will highly likely be swayed in favor of fair use.

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

In *Campbell*, the [US Court] held that parodies which are “less ostensibly humorous forms of criticism[s],” have transformative value and served an entirely different function. The x x x Court x x x in *Hustler Magazine, Inc., v. Moral Majority, Inc.* x x x held that defendants reproduced and distributed copies of a single page from Hustler Magazine, Inc.’s magazine for a different purpose — “to defend himself (Jerry Falwell) against such derogatory personal attacks.” Similarly, the x x x Court x x x in *The Author’s Guild, Inc. v. Hathitrust* x x x ruled that the creation of a full-text searchable database of books is “a quintessentially transformative use” and the same should not be considered as a substitute for the books searched. In the same line, the x x x Court x x x in *Kelly v. Arriba-Soft* x x x ruled that the reproduction of plaintiff’s photos as thumbnail images served an entirely different purpose — “as a tool to help index and improve access to images on the internet and their related web sites.” In the seminal



case of *Field v. Google, Inc.* x x x, the x x x Court x x x also ruled that Google's use of "cached" links has transformative use such as: (1) it enables the users to temporarily access an inaccessible page; (2) it allows users to identify changes made to a particular website; and (3) it "allows users to understand why a page was responsive to their original query."

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

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

## **2. Second Factor: Nature of Copyrighted Work**

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

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

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

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

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



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

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

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

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

this factor calls for thought **not only about the quantity of the materials used, but about their quality and importance, too.** In *Harper & Row*, for example, the Nation had taken only some 300 words out of President Ford’s memoirs, but we signaled the significance of the quotations in finding them to amount to “the heart of the book,” the part most likely to be newsworthy and important in licensing serialization. We also agree with the Court of Appeals that **whether “a substantial portion of the infringing work was copied verbatim”** from the copyrighted work is a relevant question, **for it may reveal a dearth of transformative character or purpose under the first factor, or a greater likelihood of market harm under the fourth;** a work composed primarily of an original, particularly its heart, with little added or changed, is more likely to be a merely superseding use, fulfilling demand for the original. x x x

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

**x x x Google’s use of entire Web pages in its Cached links serves multiple transformative and socially valuable purposes. These purposes could not be effectively accomplished by using only portions of the Web pages. Without allowing access to the whole of a Web page, the Google Cached link cannot assist Web users (and content owners) by offering access to pages**



**that are otherwise unavailable.** Nor could use of less than the whole page assist in the archival or comparative purposes of Google's "Cached" links. Finally, Google's offering of highlighted search terms in cached copies of Web pages would not allow users to understand why a Web page was deemed germane if less than the whole Web page were provided x x x. **Because Google uses no more of the works than is necessary in allowing access to them through "Cached" links, the third fair use factor is neutral, despite the fact that Google allowed access to the entirety of Field's works.** (Emphasis and underscoring in the original)

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

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

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

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

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

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

In *Twin Peaks*, the x x x Court x x x weighed the fourth factor against fair use and held that:



x x x It is a safe generalization that copyright holders, as a class, wish to continue to sell the copyrighted work and may also wish to prepare or license such derivative works as book versions or films. In this case, the Book may interfere with the primary market for the copyrighted works and almost certainly interferes with legitimate markets for derivative works. **It is possible that a person who had missed an episode of "Twin Peaks" would find reading the Book an adequate substitute, and would not need to rent the videotape of that episode in order to enjoy the next one x x x. A copyright holder's protection of its market for derivative works of course cannot enable it to bar publication of works of comment, criticism, or news reporting whose commercial success is enhanced by the wide appeal of the copyrighted work.** The author of "Twin Peaks" cannot preserve for itself the entire field of publishable works that wish to cash in on the "Twin Peaks" phenomenon. But it may rightfully claim a favorable weighting of the fourth fair use factor with respect to a book that reports the plot in such extraordinary detail as to risk impairment of the market for the copyrighted works themselves or derivative works that the author is entitled to license.<sup>21</sup> (Emphasis in the original)

D.

*Why COSAC is not exempted from liability for copyright infringement*

In its defense, COSAC claims that it did not commit infringement because "once the music is played in the airwaves, it becomes public property."<sup>22</sup> Clearly, this exception is **not** included in Section 184 of the IP Code. Even assuming that COSAC's defense may be generously construed as akin to Section 184(a)<sup>23</sup> because the copyrighted work being performed has been "lawfully made accessible to the public," it is readily apparent that COSAC cannot fall under this specific limitation on copyright because it is not done privately and COSAC is not a charitable or religious institution or society.

Neither can COSAC's acts be classified as falling under the fair use doctrine.

First, COSAC's use of said musical works was primarily commercial in nature, considering that it was made to improve the ambiance of the establishment and the experience of its customers. More importantly, COSAC's use of the copyrighted music has no transformative value since it

<sup>21</sup> Id. at 13-29. Citations omitted.

<sup>22</sup> *Ponencia*, p. 7.

<sup>23</sup> IP Code, Section 184(a) provides: "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)."

merely supplants the object of the original work. As discussed in the previous section, a commercial and non-transformative use of a copyrighted work will more likely be weighed against a finding of fair use.

Second, COSAC's infringement involved musical compositions, which are creative and not factual works. Since creative works like these are what copyright primarily intends to protect, the second factor on the nature of copyrighted work clearly does not weigh in favor of COSAC.

Third, it is undisputed that COSAC had used the entirety of at least 25<sup>24</sup> copyrighted musical compositions when it was monitored in two separate days.

Fourth, if allowed by the Court unchecked, COSAC's unauthorized acts of using musical compositions — whether by hiring live bands or by playing sound recordings (broadcasted or otherwise) — to enhance its establishment will indubitably have an adverse effect on the potential market for said musical compositions. If all bars and restaurants like COSAC may freely exploit copyrighted music in this manner, no other commercial establishment, big or small, will understand the need to secure licenses for using copyrighted music. Moreover, if unrestricted, COSAC's manner of use will significantly reduce the value of the copyrighted work. Unrestricted free use of copyrighted music means that there is zero value attached to the authors' works. This will ultimately work to the prejudice of the authors who — despite having exerted substantial effort, time, and resources — will not receive any economic benefits from sharing their works with the rest of the society. While exposure and fame in favor of the creators are arguably reasonable incentives, they do not pay the authors' bills.

Clearly, COSAC's acts cannot be classified as fair use because all four factors (*i.e.*, The Purpose and Character of Use, Nature of Copyrighted Work, Amount and Substantiality of the Portion Used, and The Effect of the Use Upon the Potential Market for or Value of the Copyrighted Work) weigh against this finding.

### III. THERE MUST BE REASONABLE CONSIDERATIONS FOR QUANTIFYING THE DAMAGES AWARDED IN COPYRIGHT INFRINGEMENT CASES

Proceeding from the discussions above, COSAC is clearly liable for copyright infringement because (1) COSAC exercised without authority the authors' exclusive "public performing rights," *i.e.*, their rights of "public performance" and/or "communication to the public" and (2) its acts are neither covered by the limitations on copyright nor the fair use doctrine.

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<sup>24</sup> Ponencia, pp. 6-7.



The nature of damages awarded by the Court in a similar copyright infringement case has been discussed as follows:

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

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

x x x x

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

As seen in the provision, there are two alternative awards that courts may order the infringer to pay to the copyright proprietor or his assigns, namely:

- (i) **actual damages**, including legal costs and other expenses, as he may have incurred due to the infringement as well as the **profits** the infringer may have made due to such infringement, and 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,
- (ii) **damages** which to the court shall appear to be **just** and shall not be regarded as penalty. x x x

Notably, Section 216 of the IP Code mirrors the rules on awarding actual damages prescribed under the Civil Code. Thus, if the Court were to award a copyright owner actual damages, such damages “must not only be capable of proof, but must actually be proved with reasonable degree of certainty.” Further, to be recoverable, the Court “cannot simply rely on speculation, conjecture or guesswork in determining the amount of damages[.]” such that there must be “competent proof” of the actual amount of loss incurred. Otherwise, in the absence of such “competent proof”, or if the amount of such loss “cannot be proved with certainty[.]” temperate damages which must be “reasonable under the circumstances” should instead be awarded.<sup>25</sup> (Emphasis in the original)

<sup>25</sup> J. Caguioa, Separate Concurring Opinion in *FILSCAP v. Anrey*, supra note 1 at 66-67.



Here, the decretal portion of the *ponencia* orders the award of the following amounts to FILSCAP, viz.:

WHEREFORE, the Petition for Review on *Certiorari* is hereby DENIED. The assailed May 28, 2015 Decision and January 14, 2016 Resolution of the Court of Appeals in CA-G.R. CV No. 101415 are AFFIRMED with MODIFICATIONS. The monetary award in the amount of ₱317,050.00 as damages for unpaid license fees/royalties in favor of the Filipino Society of Composers, Authors and Publishers, Inc. is DELETED. Instead, petitioner COSAC, Inc., is ORDERED to indemnify the Filipino Society of Composers, Authors and Publishers, Inc. temperate damages in the amount of ₱300,000.00. This amount shall be subject to interest at the rate of 12% per *annum* from February 13, 2006 until June 30, 2013, and at the rate of 6% per *annum* from July 1, 2013 until the date of finality of this judgment. Thereafter, all the monetary amounts shall be subject to interest at the rate of 6% per *annum* from the date of finality of this judgment until full satisfaction of the same.<sup>26</sup>

The *ponencia* justifies the amount of the award as follows:

Thence, the amount which should be awarded to FILSCAP should be based on the following considerations: (1) the 500-seating capacity of Off the Grill; (2) based on FILSCAP's matrix, the royalty fee of ₱170.00/day for lounges/bars/pubs which play copyrighted songs live and mechanically; (3) FILSCAP's assertion that it demanded from COSAC to pay license fees since October 2003, until the filing of the complaint on February 13, 2006 (although it is unclear when FILSCAP first discovered COSAC's acts of infringement); (4) FILSCAP's monitoring agent identified only 25 copyrighted songs which were played at Off the Grill without the requisite license and payment of fees; (5) to acknowledge FILSCAP's members who are copyright owners, and FILSCAP's authority to enforce their rights; and, (6) to balance the interests between copyright owners and the society, in that the award of just damages is "[a] not too excessive as to scare away other people from carrying out legitimate acts involving copyrighted music, BUT [b] not too minimal as to give the wrong impression that the State accords little value to copyrighted musical work and that creators do not deserve to be compensated with reasonable economic rewards for sharing their creations to the society."<sup>27</sup>

I fully concur with the amount awarded and the considerations enumerated by the *ponencia* for the following reasons:

- 1) It is proper to delete the award of ₱317,050.00 as **actual** damages for unpaid license fees/royalties. Apart from a lack of competent evidence, a closer look at the royalty fees being charged by FILSCAP hardly justifies awarding this amount. If FILSCAP's royalty fees for lounges/bars/pubs that play copyrighted songs live and mechanically for 500 persons or more is pegged at the daily rate of ₱170.00,<sup>28</sup> the award of ₱317,050.00 as "unpaid damages/royalties" amounts to

<sup>26</sup> *Ponencia*, p. 51.

<sup>27</sup> *Id.* at 50. Citations omitted.

<sup>28</sup> *Id.* at 4.



awarding 1,865 days' worth of royalty fees or more than five years' worth of royalties.

There is no indication in the complaint as to when FILSCAP first discovered COSAC's acts of infringement. There is only an allegation that as early as 2003,<sup>29</sup> FILSCAP had formally advised COSAC of its obligations under the IP Code. The complaint for copyright infringement was then filed on February 13, 2006. In effect, the filing of the complaint was made around three years (more or less 1,095 days) after COSAC was informed of its obligation to pay license fees. Assuming that there is clear proof that COSAC continuously played music in its establishment every day for three years, despite being informed of its obligation to pay license fees, it should have paid roughly around ₱186,150.00 maximum in royalties to FILSCAP.

As discussed, however, awarding unpaid license fees/royalties would be inappropriate due to the lack of competent proof to substantiate actual/compensatory damages. Thus, I agree with the *ponencia's* deletion of the award of ₱317,050.00 and its award of temperate damages instead.

- 2) As found by the Regional Trial Court, "FILSCAP is a [non-stock and] non-profit corporation because everything it collect[s] is distributed back to its members and affiliate performing rights societies abroad less only the administrative expenses which cannot exceed 30% of total collection, withholding tax and 5% deduction for the socio-cultural fund of its members."<sup>30</sup>

As it stands, FILSCAP is the only CMO accredited by the IPO to "collectively administer, license, and enforce the reproduction right (Sec. 177.1, IP Code), the transformation right (Sec. 177.2, IP Code), the first public distribution right (Sec. 177.3, IP Code), the public performance right (Sec. 177.6, IP Code), and the communication to the public right (Sec. 177.7, IP Code) of composers, lyricists, music publishers and other music copyright owners."<sup>31</sup> Put simply, its members who are music copyright owners — **including those who cannot afford to enforce their own copyrights and collect royalties** — rely on FILSCAP to secure royalties and enforce their rights.

<sup>29</sup> *Rollo*, p. 39.

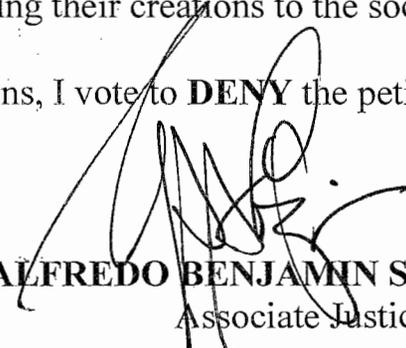
<sup>30</sup> *Id.* at 75.

<sup>31</sup> Certificate of Accreditation, Registration No. CMO-2-2020, available at <<https://www.ipophil.gov.ph/collective-management-organizations/>>.



- 3) In keeping with the goal of balancing competing interests between the copyright owners and the society at large, the Court should endeavor to ensure that the award of temperate damages is not too excessive as to scare away other people from carrying out legitimate acts involving copyrighted music **BUT** not too minimal as to give the wrong impression that the State accords little value to copyrighted musical work and that creators do not deserve to be compensated with reasonable economic rewards for sharing their creations to the society.

In view of the foregoing reasons, I vote to **DENY** the petition.



**ALFREDO BENJAMIN S. CAGUIOA**  
Associate Justice