Republic of the Philippines
Supreme Court
Manila

EN BANC

FILIPINO SOCIETY OF COMPOSERS AND PUBLISHERS, Petitioner, -versus- **WOLFPAC COMMUNICATIONS, INC.,** Respondent.	**G.R. No. 184661** Present: GESMUNDO, *C.J.*, LEONEN, *S.A.J.*, CAGUIOA, HERNANDO,* LAZARO-JAVIER, INTING, ZALAMEDA, LOPEZ, M., GAERLAN, ROSARIO, LOPEZ, J., DIMAAMPAO, MARQUEZ, KHO, JR., and SINGH, *JJ.* Promulgated: February 25, 2025

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D E C I S I O N

LOPEZ, M., *J.*:

The advent of digital technology paved the way for the development of copyrights. In this age where the unauthorized utilization and exploitation of

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* No part and on Official Leave.

literary and artistic works can be done in a matter of seconds, different kinds of rights, such as communication to the public and public performance, emerged to protect copyright owners.[1] In some jurisdictions, communication to the public is a form of public performance. But since the Intellectual Property (IP) Code provides a dichotomy between public performance and communication to the public, the Court is duty bound to differentiate these two rights.

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

FACTS

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

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

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1 *See* II Record, Senate, 10th Congress, 2nd Session (October 8, 1996), p. 15.
2 *Rollo*, pp. 3–27.
3 *Id.* at 35–39. Penned by Presiding Judge Ramon Paul L. Hernando (now a member of this Court).
4 *Id.* at 32–34.
5 "Civil Case No. Q-05-54475" in some parts of the records.
6 *Rollo*, p. 35.
7 *Id.* at 5–6.
8 RTC Records, pp. 1858–1859.

royalties because the pre-listening function of their website does not constitute public performance.[9]

Consequently, FILSCAP filed a Complaint[10] for copyright infringement and damages against Wolfpac, and alleged that Wolfpac must secure a performance license and pay the royalties for the use of copyrighted musical works. In its Answer, Wolfpac argued that there is no public performance. First, the pre-listening service is free. Second, it is intended to be performed privately by potential consumers using their computers. Third, the samples have no independent commercial value. Fourth, Wolfpac neither performs the samples nor makes the samples audible to the public since the samples are only available to potential consumers. Even assuming that there is public performance, Wolfpac claimed that it has memoranda of agreements with the composers authorizing the public performance of the musical works.[11]

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

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

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9 *Rollo*, pp. 35–36.
10 *Id.* at 36.
11 *Id.*
12 *Id.* at 39. The dispositive portion of the Judgment reads:

> **ACCORDINGLY**, on the foregoing ratiocinations, the complaint subject of this suit is hereby **DISMISSED** for lack of merit. Defendants' counterclaims are, in like manner, **DISMISSED** for want of merit. No costs.
>
> **SO ORDERED**. (Emphasis in the original)

13 *Id.* at 38.
14 *Id.* at 39.
15 Dated July 1, 2008; *id.* at 40–52.
16 *Id.* at 32–34.
17 *Id.* at 3–27.

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

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

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

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

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18 *Id.* at 8–16.
19 *Id.* at 16–19.
20 *Id.* at 19–22.
21 *Id.* at 59–82.
22 *Id.* at 64–66.
23 *Id.* at 76–77.
24 *Id.* at 67–68.
25 *Id.* at 75–76.
26 *Id.* at 91–96.
27 *Id.* at 92–94.
28 *Id.* at 125–126.
29 *Id.* at 182–213, 217–258.

ISSUES

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

II. Whether Wolfpac's use of the samples constitutes copyright infringement.

THE COURT'S RULING

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

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

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

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

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30 *See Republic. v. Lacap*, 546 Phil. 87, 98 (2007) [Per J. Austria-Martinez, Third Division].
31 *Rollo*, p. 35.
32 *See De Lima v. Guerrero*, 819 Phil. 616, 690 (2017) [Per J. Velasco, Jr., *En Banc*].
33 *See Kumar v. People*, 874 Phil. 214, 229–230 (2020) [Per J. Leonen, Third Division].
34 *Rollo*, pp. 37–39.

of the parties, the resolution of the untold issues will greatly contribute to the pedagogical development of the country's intellectual property jurisprudence.

I.

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

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

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

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

> Article 8
> Right of Communication to the Public
>
> Without prejudice to the provisions of Articles 11(1)(ii), 11bis(1)(i) and (ii), 11*ter*(1)(ii), 14(1)(ii) and 14*bis*(1)(i) of the Berne Convention, authors of literary and artistic works shall enjoy the exclusive right of authorizing *any communication to the public of their works, by wire or wireless means, including the making available to the public of their works in such a way that members of the public may access these works from a place and at a time individually chosen by them.* (Emphasis supplied)

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

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35 *See* INTELL. PROP. CODE, sec. 177.

36 *See* INTELL. PROP. CODE, sec. 200.

37 Article 11
(1) Authors of dramatic, dramatico-musical and musical works shall enjoy the exclusive right of authorizing:
(i) the public performance of their works, including such public performance by any means or process;
(ii) any communication to the public of the performance of their works.

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

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

Foreign jurisprudence on public performance and communication to the public

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

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

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

> Section 171.3 'Communication to the public' or 'communicate to the public' means the making of a work available to the public by wire or wireless means in such a way that members of the public may access these works from a place and time individually chosen by them[.]

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

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

42 Section 101 – Definitions

. . . .

To *perform* or display *a work "publicly" means*—

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

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

. . . . (Emphasis supplied)

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

44 536 F. 3d 121 (2008).

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

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

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

Notably, Section 106[47] of the US Copyright Laws expressly grants the copyright owner's authority to allow the performance of sound recordings publicly through digital audio transmission. In Our jurisdiction, the IP Code does not provide that digital audio transmissions of sound recordings constitute public performance. Thus, the Court cannot apply *Bonneville* to determine whether a pre-listening function that uses music samples, and which may constitute digital audio transmission, is a form of public performance.

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

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46 *Rollo*, pp. 14–16.

47 Section 106. Exclusive rights in copyrighted works
Subject to sections 107 through 122, the owner of copyright under this title has the exclusive rights to do and to authorize any of the following:

. . . .

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

48 *Rollo*, pp. 11–14.

receiving an RS-DVR transmission is the single subscriber whose self-made copy is used to create the transmission.

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

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

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

Musical compositions are among the literary and artistic works that are subject of copyright under Section 172 of the IP Code. To be protected, the musical composition must be embodied in a sound recording or other forms of fixation.[51] The IP Code defines sound recording as the fixation of the sounds of a performance or other sounds, or representation of sound, other than in the form of a fixation incorporated in a cinematographic or other

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[49] *Id.* at 130–131.

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

> Section 110 – Limitations on exclusive rights: Exemption of certain performances and displays
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> (4) performance of a nondramatic literary or musical work otherwise than in a transmission to the public, without any purpose of direct or indirect commercial advantage and without payment of any fee or other compensation for the performance to any of its performers, promoters, or organizers, if—
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> (A) there is no direct or indirect admission charge[.]

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

audio-visual work.[52] In general, fixation is the embodiment of sounds, or its representations, from which they can be perceived, reproduced, or communicated through a device.[53]

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

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

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

> 171.3 'Communication to the public' or 'communicate to the public' means any communication to the public, including broadcasting, rebroadcasting, retransmitting by cable, broadcasting and retransmitting by cable, broadcasting and retransmitting by satellite, and includes the *making of a work available to the public by wire or wireless* means in such a way that *members of the public may access these works from a place and time individually chosen by them.* (Emphasis supplied)

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

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

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

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52 *See* INTELL. PROP. CODE, sec. 202.2.

53 *See* INTELL. PROP. CODE, sec. 202.4.

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

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

> *and/or at different times, and where the performance can be perceived without the need for communication within the meaning of Subsection 171.3[.]* (Emphasis supplied)

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

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

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

> Following a run-down of the above definitions, a *sound recording is publicly performed if it is made audible enough at a place or at places where persons outside the normal circle of a family, and that family's closest social acquaintance, are or can be present.* The sound recording in this case, is the *copyrighted music broadcasted over the radio which Anrey played through speakers loud enough for most of its patrons to hear.* But the big question is whether radio reception is, to begin with, a performance.
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> We believe that the act of *playing radio broadcasts containing copyrighted music through the use of loud speakers* (radio-over-loudspeakers) *is in itself, a performance.*
>
> In the American case of *Buck v. Jewell-LaSalle Realty Co.* (*Jewell*), the respondent, *a hotel proprietor, played copyrighted musical compositions received from a radio broadcast throughout the hotel by using public speakers for the entertainment of its guests.* ASCAP notified the hotel of its copyrights and advised that unless a license was obtained, performance of any of its copyrighted musical composition of its members is forbidden. Suits for injunction and damages were brought against the hotel. The hotel argued that radio receiving cannot be held to be performing. The federal court denied relief against ASCAP, but on appeal, the *SCOTUS ruled that the act of respondent in playing copyrighted musical compositions received from a radio broadcast throughout the hotel by means of a public speaker system was a "performance" within the meaning of the US Copyright Act of 1909.* The court reasoned that a reception of radio broadcast and its translation into audible sound was not a mere playing of the original program, but was a *reproduction, since complicated electrical instrumentalities were necessary for its reception and distribution.*
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> Then came the case of *Twentieth Century Music Corp. v. Aiken* (*Aiken*), which temporarily abandoned the concept that radio reception is a

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56 927 Phil. 577 (2022) [Per J. Zalameda, *En Banc*].
57 G.R. No. 222537, February 28, 2023 [Per J. Hernando, *En Banc*].
58 G.R. No. 188933, February 21, 2023 [Per J. Leonen, *En Banc*].

> performance. In *Aiken*, a restaurant received songs broadcasted in the radio and this was heard all throughout the area using four speakers. The station that broadcasted the songs is licensed by ASCAP but the restaurant did not hold such a license, thus it was sued for copyright infringement. On the sole question on whether radio reception constituted copyright infringement, the SCOTUS ruled in the negative. It stated that those who listen do not perform, therefore do not infringe. The said court used the analogy that if a radio station "performs" a musical composition when it broadcasts it, then it would require the conclusion that those who listen to the broadcast through the use of radio receivers do not perform the composition.
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> Finally, the case of *Broadcast Music, Inc. v. Claire's Boutiques, Inc.* (*Claire's*) *reverted back to the same rationale laid down in Jewell. As it stands now, an establishment that plays radio-over-loudspeakers is said to have publicly performed them. . .*
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> . . . .
>
> A *radio reception creates a performance separate from broadcast.* This is otherwise known as the doctrine of multiple performances which provides that a radio (or television) transmission or broadcast can create multiple performances at once. The doctrine was first conceived in *Jewell* wherein the SCOTUS noted that the playing of a record is "a performance under the Copyright Act of 1909," and that "the reproduction of the radio waves into audible sound waves is also a performance." *Ultimately, the SCOTUS in Jewell concluded that the radio station owner and the hotel operator simultaneously performed the works in question. . .*[59] (Emphasis supplied; citations omitted)

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

> The IPC, before its amendment in 2013, did not distinguish if the public performance was conducted or made possible by the owners of the establishment, the performers, or other individuals and entities. Undeniably, however, the *public performance of the copyrighted works, either directly or by means of any device or process, reached persons outside the normal circle of a family and that family's closest social acquaintances. This is how Off the Grill "performed" the copyrighted musical works under FILSCAP's repertoire[.]*
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> . . . .
>
> *[A]s owner of Off the Grill, it allowed the commission of infringing acts when it permitted musical artists or bands to perform copyrighted music* (secondary infringer), *and played sound recordings as background music* (primary infringer) without first procuring a license from the copyright owners (or assignees) of the songs and paying the fee.[60] (Emphasis supplied)

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

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

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

> Here, *petitioner's act of cablecasting the karaoke channels* cannot be considered an exercise of the public performance rights over the subject musical compositions. Concededly, the works were performed by means of certain processes, and because the musical compositions were fixed in sound recordings in a videoke format, they were made audible "at a place or places where persons outside the normal circle of a family and that family's closest social acquaintances are or can be present, irrespective of whether they are or can be present at the same place and at the same time, or at different places and/or at different times." However, the fact that "performance" of the musical composition requires the process described in Subsection 171.3 — *using wireless means to make the musical compositions available to the members of the public in such a way they may access these compositions from a place and time individually chosen by them — in order to be perceived places the act complained of outside Subsection 171.6.*
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> It must be noted a later amendment to the Intellectual Property Code, in Republic Act No. 10372, further expanded the scope of "communication to the public" to include broadcasting, rebroadcasting, retransmitting by cable, and retransmitting by satellite:
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> > 'Communication to the public' or 'communicate to the public' means any communication to the public, including broadcasting, rebroadcasting, retransmitting by cable, and retransmitting by satellite, and includes the making of a work available to the public by wire or wireless means in such a way that members of the public may access these works from a place and time individually chosen by them.
>
> Nonetheless, even prior to the amendment, *playing a musical composition, fixed in an audiovisual derivative work, over cable television to paying subscribers is making that work accessible to members of the public from a place or time individually chosen by them. This is the essence of the "communication to the public" right.*[61] (Emphasis supplied; citations omitted)

As pointed out by Associate Justice Alfredo Benjamin S. Caguioa, the Court clarified in *Home Cable* that if the possibility of perceiving the performance requires the means of communicating the works to the public, such as broadcasting, rebroadcasting, retransmitting by cable, broadcasting and retransmitting by cable, broadcasting and retransmitting by satellite, and making of a work available to the public by wire or wireless means in such a way that members of the public may access these works from a place and time

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

individually chosen by them, then it is considered as an exercise of the right of "communication to the public."[62]

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

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

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

Therefore, based on the above discussions, the public should have access to the copyrighted work at a time and place individually chosen by them to constitute communication to the public. Actual or possible public perception is unnecessary to show that communication to the public was made. As long as the communicator provides the public with the means to perceive the works, there is communication to the public. *In public performance, actual or possible public perception is necessary while the public's access to the copyrighted work at a time and place individually chosen by them is not.* As long as the performance is made at a place or at places where persons outside the normal circle of a family and that family's closest social acquaintances are or can be present, irrespective of whether they are or can be present at the same place and at the same time, or different places and/or at different times, and where the performance can be perceived, there is a public performance.

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

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62 J. Caguioa, Concurring Opinion, pp. 9–10.

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

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

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

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

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

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

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

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

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

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

68 *Rollo*, pp. 13–16.

the ringtones may listen to the samples from a place and time individually chosen by them.[69]

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

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

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

At the onset, the facts of this case show the characteristics of communication and performance of musical works. But then, only public communication is present when Wolfpac made the pre-listening function available to the public. There is no public performance on Wolfpac's part because the potential consumers were the ones who made the samples audible before deciding to purchase the ringback tone. Hence, the circumstances do

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69 *Id.* at 67–68.

not warrant the finding of public performance when Wolfpac's participation ends in providing the means for the public to access the sample ringtones.

II.

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

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

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

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

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

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

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

72 Section 177. *Copyright or Economic Rights.* - Subject to the provisions of Chapter VIII, copyright or economic rights shall consist of the exclusive right to carry out, authorize or prevent the following acts:
177.1. Reproduction of the work or substantial portion of the work;
177.2. Dramatization, translation, adaptation, abridgment, arrangement or other transformation of the work;
177.3. The first public distribution of the original and each copy of the work by sale or other forms of transfer of ownership;
177.4. Rental of the original or a copy of an audiovisual or cinematographic work, a work embodied in a sound recording, a computer program, a compilation of data and other materials or a musical work in graphic form, irrespective of the ownership of the original or the copy which is the subject of the rental;
177.5. Public display of the original or a copy of the work;
177.6. Public performance of the work; and
177.7. Other communication to the public of the work.

73 *FILSCAP v. Anrey*, 927 Phil. 577, 583-584 (2022) [Per J. Zalameda, *En Banc*]; and *Olaño v. Lim Eng Co*, 783 Phil. 234, 250 (2016) [Per J. Reyes, Third Division].

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

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

b. Violation of the composers' communication to the public right

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

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

> 2.1 to *provide Content to WOLFPAC and permit the same to convert the Content into a form which can be downloaded* through Caller Ring Tune

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

75 RTC Records, pp. 39–41.

76 *Id.* at 40.

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

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

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

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

> Service, and *to offer and sell the same to the general public* via the Partner Operator[.][81] (Emphasis supplied)

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

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

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

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

There are two communication to the public acts in this case. The first one is when Wolfpac made the ringtones available to the public for a fee. Wolfpac's exercise of communication to the public is necessary to convert the songs into a downloadable form. It is not the same with the second communication to the public act which pertains to Wolfpac's act of uploading the ringtones so that the public can listen to the ringtones for free. Communication to the public is not inherent in offering and marketing the ringtones to the public. Wolfpac can still offer and market the ringtones without providing a pre-listening function. This is supported by an advertisement in a newspaper showing the list of Ragnarok ringtones and their ID Nos.[85] Wolfpac admitted the existence of the print advertisement in its Answer.[86] Given these, Wolfpac can simply provide the list of songs and add the names of the singers. In releasing the print advertisement, Wolfpac exercised its right to offer the ringtones to the public. But in uploading the

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81 *Rollo*, p. 21.
82 *Id.* at 47–48.
83 *Norton Resources and Development Corporation v. All Asia Bank Corporation*, 620 Phil. 381, 391–392 (2009) [Per J. Nachura, Third Division].
84 *Rollo*, pp. 76–77.
85 RTC Records, pp. 1858–1859.
86 *Id.* at 249.

sample songs in the pre-listening function, Wolfpac exercised the composers' communication to the public right without their consent.

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

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

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

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

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

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

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[88] Section 184. *Limitations on Copyright.* —
184.1. Notwithstanding the provisions of Chapter V, the following acts shall not constitute infringement of copyright:
(a) The recitation or performance of a work, once it has been lawfully made accessible to the public, if done privately and free of charge or if made strictly for a charitable or religious institution or society;
(b) The making of quotations from a published work if they are compatible with fair use and only to the extent justified for the purpose, including quotations from newspaper articles and periodicals in the form of press summaries: *Provided*, That the source and the name of the author, if appearing on the work, are mentioned;
(c) The reproduction or communication to the public by mass media of articles on current political, social, economic, scientific or religious topic, lectures, addresses and other works of the same nature, which are delivered in public if such use is for information purposes and has not been expressly reserved: *Provided*, That the source is clearly indicated;
(d) The reproduction and communication to the public of literary, scientific or artistic works as part of reports of current events by means of photography, cinematography or broadcasting to the extent necessary for the purpose;
(e) The inclusion of a work in a publication, broadcast, or other communication to the public, sound recording or film, if such inclusion is made by way of illustration for teaching purposes and is compatible with fair use: *Provided*, That the source and the name of the author, if appearing in the work, are mentioned;
(f) The recording made in schools, universities, or educational institutions of a work included in a broadcast for the use of such schools, universities or educational institutions: *Provided*, That such recording must be deleted within a reasonable period after they were first broadcast: *Provided, further*, That such recording may not be made from audiovisual works which are part of the general cinema repertoire of feature films except for brief excerpts of the work;
(g) The making of ephemeral recordings by a broadcasting organization by means of its own facilities and for use in its own broadcast;
(h) The use made of a work by or under the direction or control of the Government, by the National Library or by educational, scientific or professional institutions where such use is in the public interest and is compatible with fair use;
(i) The public performance or the communication to the public of a work, in a place where no admission fee is charged in respect of such public performance or communication, by a club or institution for charitable or educational purpose only, whose aim is not profit making, subject to such other limitations as may be provided in the Regulations;
(j) Public display of the original or a copy of the work not made by means of a film, slide, television image or otherwise on screen or by means of any other device or process: *Provided*, That either the work has been published, or, that the original or the copy displayed has been sold, given away or otherwise transferred to another person by the author or his successor in title; and
(k) Any use made of a work for the purpose of any judicial proceedings or for the giving of professional advice by a legal practitioner.
184.2. The provisions of this section shall be interpreted in such a way as to allow the work to be used in a manner which does not conflict with the normal exploitation of the work and does not unreasonably prejudice the right holder's legitimate interests.

On the other hand, fair use is a privilege to use the copyrighted work in a reasonable manner without the copyright owner's consent. It is an exception to the copyright owner's monopoly of the use of work to avoid stifling the very creativity that the intellectual property law is designed to foster.[89] Specifically, Section 185 provides that the use of copyrighted works for criticism, comments, news reporting, teaching, scholarship, research, and similar purposes is fair use. The same section also enumerates the four factors to be considered in determining fair use of copyrighted work, thus:

> Section 185. *Fair Use of a Copyrighted Work.* —
>
> 185.1. *The fair use of a copyrighted work for criticism, comment, news reporting, teaching including multiple copies for classroom use, scholarship, research, and similar purposes is not an infringement of copyright.* Decompilation, which is understood here to be the reproduction of the code and translation of the forms of the computer program to achieve the inter-operability of an independently created computer program with other programs may also constitute fair use. In determining whether the use made of a work in any particular case is fair use, the factors to be considered *shall include*:
>
> (a) The purpose and character of the use, *including* whether such use is of a commercial nature or is for non-profit educational purposes;
>
> (b) The nature of the copyrighted work;
>
> (c) The amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
>
> (d) The effect of the use upon the potential market for or value of the copyrighted work. (Emphasis supplied)

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

As to the *first factor*, the IP Code's use of the term "including" suggests that the commercial nature of the use is but one of the many considerations in determining the purpose and character of the use. Together with the commercial nature of the use, the courts may also consider the purposes cited in the first paragraph of Section 185, namely: criticism, comment, news reporting, research, and similar purposes. Again, the IP Code gives the courts wider discretion in looking into other similar purposes to determine if the use of the copyrighted works constitutes fair use. In other words, the examination of the first factor should not end in determining whether the use is for

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

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

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

commercial purposes.[92] A finding that the use is commercial does not automatically bar the application of fair use. Conversely, the existence of non-profit educational purposes does not always indicate fair use.

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

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

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

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

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

Anent the *third factor*, the Court explained in *ABS-CBN* that the exact reproduction of the copyrighted work weighs against the finding of fair use. However, there are instances when the use of the entire copyrighted work is still considered fair use because of the purpose of the use. Therefore, this

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92 *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569 (1994).
93 755 Phil. 709 (2015) [Per J. Leonen, Second Division].
94 *Id.* at 759.
95 *See Andy Warhol Found. for the Visual Arts v. Goldsmith*, 143 S. Ct. 1258 (2023).
96 *Id.*
97 *See Google LLC v. Oracle America, Inc.*, 593 U.S. 1 (2021).

factor focuses on the reasonableness of the amount, as well as the quality and importance, of the portion used to accomplish the purpose of the use.[98]

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

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

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

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

The first factor requires the Court to examine whether Wolfpac's use serves a purpose different from the songs. The main purpose of the songs is to entertain, but Wolfpac used it to provide potential consumers with means to make an informed choice before deciding to download the songs. Although the songs are unaltered, Wolfpac's use of the song samples in a pre-listening function changed the purpose of the songs. As pointed out by Senior Associate Justice Marvic M.V.F. Leonen, the pre-listening function provides potential consumers with comprehensive information on the ringback tones. It can

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

confirm the title of the work, its artist or composer.[100] Therefore, the Court finds that the purpose of the pre-listening function is not purely commercial. It also allows the potential consumers to make an informed decision before downloading the ringback tones. As explained by Associate Justice Amy C. Lazaro-Javier, the pre-listening function allows potential consumers to identify or confirm if the ringback tones being offered are the songs that they wish to download.[101] This only shows that the pre-listening function also serves as a protection on the part of the potential consumers. Thusly, Wolfpac's use of copyrighted songs is transformative.

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

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

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

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

As to the fourth factor, the Court finds that Wolfpac's use of the sample songs in the pre-listening function would not cause substantial economic harm to the composers. As discussed, the purpose of Wolfpac's use is to encourage potential consumers to download the ringback tones by allowing them to listen to song samples. While the samples are significant, they cannot accomplish

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100 J. Leonen, Separate Concurring Opinion, p. 5.
101 J. Lazaro-Javier, Concurrence and Dissent, p. 3.
102 *See FILSCAP v. Anrey*, 927 Phil. 577, 610 (2022) [Per J. Zalameda, *En Banc*].
103 *Rollo*, p. 253.

the purpose of the copyrighted work, which is to provide entertainment. Neither does it serve as a substitute for the paid ringtones because the potential consumers cannot download the songs to their phones using the pre-listening function. Thus, the pre-listening function cannot serve as a market replacement for the copyrighted work.

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

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

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

SO ORDERED.

MARIO V. LOPEZ
Associate Justice

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104 J. Leonen, Separate Concurring Opinion, p. 11.
105 *Andy Warhol Found. for the Visual Arts v. Goldsmith* 143 S. Ct. 1258 (2023).
106 *See* INTELL. PROP. CODE, sec. 2.

WE CONCUR:

ALEXANDER G. GESMUNDO
Chief Justice

See concurring opinion

MARVIC M.V.F. LEONEN
Senior Associate Justice

See Concurring Opinion

ALFREDO BENJAMIN S. CAGUIOA
Associate Justice

No part and on Official Leave
RAMON PAUL L. HERNANDO
Associate Justice

See Concurrence & Dissent

AMY C. LAZARO-JAVIER
Associate Justice

HENRI JEAN PAUL B. INTING
Associate Justice

See Separate Concurring and Dissenting Opinion

RODIL V. ZALAMEDA
Associate Justice

SAMUEL H. GAERLAN
Associate Justice

RICARDO R. ROSARIO
Associate Justice

JHOSEP Y. LOPEZ
Associate Justice

See Separate Concurring Opinion

JAPAR B. DIMAAMPAO
Associate Justice

JOSE MIDAS P. MARQUEZ
Associate Justice

ANTONIO T. KHO, JR.
Associate Justice

See separate Concurring & Dissenting Opinion

MARIA FILOMENA D. SINGH
Associate Justice

CERTIFICATION

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

ALEXANDER G. GESMUNDO
Chief Justice