

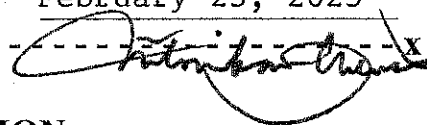
EN BANC

G.R. No. 184661 – FILIPINO SOCIETY OF COMPOSERS, AUTHORS  
AND PUBLISHERS, INC., Petitioner, v. WOLFPAC  
COMMUNICATIONS, INC., Respondent.

Promulgated:

February 25, 2025

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CONCURRING OPINION

CAGUIOA, J.:

The facts of the case relevant for the Court's resolution of the issues are as follows:

- (1) Several composers entered into Memoranda of Agreement (MOAs) with WOLFPAC COMMUNICATIONS, INC., (Wolfpac), where the former agreed to allow the latter to convert musical works into downloadable ringtones and sell the same to the public. Pertinently, the MOAs provide the composers' undertaking to: **"provide Content to [Wolfpac] and permit [the latter] to convert the Content into a form which can be downloaded through Caller Ring Tune Service, and to offer and sell the same to the general public via the Partner Operator[.]"**<sup>1</sup>
- (2) The MOAs also require Wolfpac to seek other licenses and consent before using the content in a manner not provided under the agreements, viz.: **"[T]he grant...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 the Content (musical works) not otherwise granted herein shall be obtained by [Wolfpac]."**<sup>2</sup>
- (3) In selling the ringtones, Wolfpac also allows the public to "Listen B4 U Download," i.e., Wolfpac allows prospective consumers to listen to a 20-second portion of a song by clicking the "pre-listening function" before downloading the ringback tone.<sup>3</sup>

<sup>1</sup> Ponencia, p. 18–19. (Emphasis supplied)

<sup>2</sup> Id. at 19. (Emphasis supplied)

<sup>3</sup> Id. at 2.



- (4) Complainant Filipino Society of Composers, Authors and Publishers, Inc. (FILSCAP) filed a complaint for copyright infringement against Wolfpac because the latter refused to secure licenses from FILSCAP and pay royalties.<sup>4</sup>

One of FILSCAP's main arguments is that the pre-listening function constitutes "public performance" for which Wolfpac is required to secure a license and pay royalties. On the other hand, Wolfpac argues mainly that the use of songs for the pre-listening function is not a "public performance" and argues that even assuming that this manner of use falls within the definition of "public performance," the same is allowed under Wolfpac's MOAs with the composers.<sup>5</sup>

The two issues for the Court's resolution are as follows:

- 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.<sup>6</sup>

I concur with the *ponencia*'s dismissal of FILSCAP's complaint for copyright infringement. I agree that the pre-listening function is considered as "communication to the public" and that Wolfpac's use of the samples in such pre-listening function is not considered as copyright infringement because it falls under fair use.

*One important difference between "communication to the public" and "public performance" is whether a performance can be perceived without the need for communication within the meaning of Subsection 171.3 of the Intellectual Property Code [IP Code]*

I agree with the *ponencia*'s main discussion relating to the nature of the rights of "public performance" and "communication to the public," especially its stance on the applicability of United States (US) copyright jurisprudence to Philippine jurisprudence relative to these concepts, viz.:

*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

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<sup>4</sup> *Id.* at 3.

<sup>5</sup> *Id.*

<sup>6</sup> *Id.* at 5.



Act 3134 was patterned on the US Copyright Law of 1909. 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.

**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 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.<sup>7</sup> (Emphasis supplied)**

However, I respectfully submit that, to avoid confusion, the Court should make it clear that radio-over-loudspeakers should no longer be considered as an example of public performance in light of recent jurisprudence.

While I fully recognize that the majority has ruled this to be so in the case of *FILSCAP v. Anrey*,<sup>8</sup> I maintain the stance previously stated in my Separate Concurring Opinion therein. More importantly, I respectfully submit that whether radio-over-loudspeakers can continue to qualify as "public performance" has already been clarified in a subsequent *En Banc* case, *Philippine Home Cable Holdings, Inc. v. Filipino Society of Composers, Authors & Publishers, Inc.*,<sup>9</sup> (*Philippine Home Cable*).

I expound on these points below.

*Separate Concurring Opinion in FILSCAP v. Anrey*

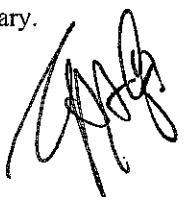
For ease of reference, I maintain the relevant points previously stated in my Separate Concurring Opinion for *FILSCAP v. Anrey*, viz.:

While I agree with the *ponencia*'s ruling that FILSCAP is authorized to exercise, on behalf of its members, both economic rights, I disagree with its conclusion that this case involves a violation of FILSCAP's right of public performance only. **On the contrary, it is my**

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

<sup>8</sup> G.R. No. 233918, August 9, 2022 [Per J. Zalameda, *En Banc*], available at <https://elibrary.judiciary.gov.ph/thebookshelf/showdocs/1/68646>.

<sup>9</sup> G.R. No. 188933, February 21, 2023 [Per SAJ Leonen, *En Banc*], available at <https://elibrary.judiciary.gov.ph/thebookshelf/showdocs/1/68958>.



view that Anrey exercised only the right of “communication to the public” as defined under Section 171.3 of the IP Code.

....

D.

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

In view of the foregoing discussion, while I agree with the *ponencia*’s application of the “new public” concept, I disagree with the *ponencia*’s categorization of Anrey’s radio reception of copyrighted work and use of loudspeakers as a “performance” under Section 177.6 of the IP Code. Corollarily, I disagree with the *ponencia*’s application of the doctrine of multiple performances under US jurisprudence, as this inaccurately assumes that a radio reception done via loudspeaker is a “public performance.”

In the present case, it is not disputed that Anrey’s restaurants played radio broadcasts of copyrighted music. Simply put, other than the communication to the public by “wire or wireless means x x x” of musical works in FILSCAP’s repertoire, Anrey did not commit any other act which could separately qualify as a public performance. Hence, I respectfully submit that it would be a grave mistake to sweepingly conclude that “the act of playing radio broadcasts containing copyrighted music through the use of loudspeakers (radio-over-loudspeakers) is in itself, a performance.”

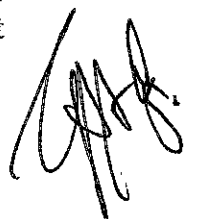
On this score, I submit that the *ponencia*’s reliance on American authorities, particularly on the decisions in *Broadcast Music, Inc. v. Claire’s Boutiques, Inc.* (*Claire’s*) and *Buck v. Jewell-La Salle Realty Co.* (*Jewell*), is misplaced.

Noting that the provision of the US Copyright Law defining “public performance,” on which *Claire’s* was based, is “similarly worded to our own definition thereof,” the *ponencia* quotes with approval the following discussion in *Claire’s*, viz.:

....

Proceeding from the foregoing, the *ponencia* also asserts, based on the “doctrine of multiple performances” — a doctrine which was first conceived in *Jewell* — that a radio (or television) transmission or broadcast can create multiple performances at once, such that a radio station owner and a hotel operator can simultaneously “perform” a copyrighted work.

However, contrary to the *ponencia*’s assertion, said provision of the US Copyright Law defining “public performance” (17 U.S.C. § 101) is *not* “similarly worded” to the provision defining the same under the IP Code. Notably, the said provision under the US Copyright Law lumps together under “public performance” the following: (i) the actual performance of a work to the public, and (ii) the “transmis[sion] or otherwise communicat[ion] [of] a performance x x x of the work x x x to the public, by means of any device or process[.]” Hence, under the US Copyright Law as cited in *Claire’s* and *Jewell*, “communication to the public” as contemplated under the IP Code is subsumed within the blanket definition of “public performance.”



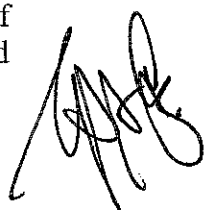
**In stark contrast however, the IP Code, as discussed above: (i) expressly recognizes a right to “communicate to the public” separate and distinct from “public performance” (IP Code, Sections 177.6 and 177.7); and (ii) explicitly carves out from the scope of “public performance” those performances which require “communication within the meaning of Section 171.3” in order to be perceived (IP Code, Section 171.6 in relation to Section 171.3).**

Indeed, with PD 49 and its predecessor, Act No. 3134 having been modeled after US copyright laws, the Court has time and again turned to US jurisprudence to aid in resolving issues involving copyright. After all, where local statutes are patterned after or copied from those of another country, the decisions of the courts in such country construing those laws are entitled to great weight in the interpretation of such local statutes.

However, the foregoing is true only if what is being adopted is reasonable and in harmony with justice, public policy and other local statutes on the subject. Thus, where the local law and the foreign statute from which the former was patterned differ in some material aspects, or where the adopting state has given the statute its own interpretation, the presumption that the foreign construction was adopted with the adoption of the statute no longer obtains. In the latter case, the local law must perforce be construed “in accordance with the intent of its own makers, as such intent may be deduced from the language of each law and the context of other local legislation related thereto.”

Here, as extensively discussed above, Congress expressly (i) carved out from the IP Code’s definition of “public performance” other “performances” which cannot be “perceived without the need for communication within the meaning of Section 171.3” and (ii) identified the public performance right and the right to communicate to the public as two separate and distinct economic rights. This distinction, however, is notably absent in the provision of the US Copyright Law cited in *Claire’s* and *Jewell*. Thus, I submit that the *ponencia’s* reliance on the same is misplaced.

Likewise, I submit that the *ponencia’s* reliance on the doctrine of multiple performances not only is improper, in light of the distinction under the IP Code between public performance and communication to the public, but is also unnecessary. For one, the playing of radio broadcasts via loudspeaker or otherwise by “wire or wireless means x x x” is not a “performance,” but a “communication” within the context of Section 177.7 in relation to 171.3 of the IP Code. Contrary to the statement in the *ponencia*, communication through “wire or wireless means” is not only limited to interactive on-demand systems like the internet. While the cited [World Intellectual Property Organization (WIPO)] Guide in the *ponencia* indeed explains that “the making available to the public of works in a way that the members of the public may access the work from a place and at a time individually chosen by them” covers, in particular, on-demand, interactive communication through the internet, this clarification is not intended to narrow down the scope of communication to the public to exclude broadcasting, as the *ponencia* states. This is clear from the same cited WIPO Guide which also states that the WIPO Copyright Treaty recognizes “a broader right of communication to the public” apart from the rights recognized by the Berne Convention. In other words, apart from the right of broadcasting — which, as discussed, is included in the right of “communication to the public” — the WIPO Copyright Treaty expanded



the coverage of the right by including, in particular, on-demand, interactive communication through the Internet. Verily, the right of communication to the public also covers other wire or wireless channels like the use of a loudspeaker.

To be sure, the interpretation proffered by the *ponencia* that the right of communication to the public is only limited to on-demand, interactive communication through the Internet is directly in conflict with the IP Code, as amended by [Republic Act No.] 10372 in 2013. To recall, [Republic Act No.] 10372 refined the definition of “communication to the public” to eliminate the misconception that broadcasting, rebroadcasting, retransmitting by cable, broadcasting and retransmitting by satellite are not included in the definition of “communication to the public.”

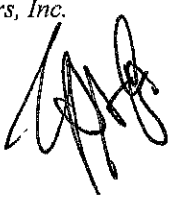
For another, reliance on this US law doctrine is unnecessary, as the act of transmitting said radio broadcasts by Anrey’s restaurants to a “new public,” *i.e.*, the customers dining at these restaurants, is already covered by the definition of “communication to the public” under Section 171.3 the IP Code in relation to Article 11*bis* of the Berne Convention.

To be sure, I agree with the *ponencia* that “it is immaterial if the broadcasting station has been licensed by the copyright owner,” but not “because the reception becomes a new public performance requiring separate protection,” under the doctrine of multiple performances. Rather, it is immaterial because any communication to a “new public” beyond the original broadcast is a separate exercise of the right to communicate to the public, pursuant to Section 177.7 in relation to 171.3 of the IP Code and Article 11*bis* of the Berne Convention.

In sum, I proffer that **absent any showing that the musical pieces played by Anrey on the radio were not simply sound recordings, but were likewise being played live before an audience (which could theoretically constitute, separately, as a “performance” in itself), as in this case, it would be improper to hold, as the *ponencia* does, that “the act of playing radio broadcasts containing copyrighted music through the use of loudspeakers (radio-over-loudspeakers) is in itself, a performance.”** I respectfully disagree that the playing of radio broadcasts as background music through a loudspeaker by Anrey’s restaurants is “public performance.” **On this score, contrary to the conclusion reached by the *ponencia*, I submit that such radio broadcasts constitute an infringement only of the right to communicate to the public, and not of the right of public performance.**

Lest I be misconstrued, however, I stress that I concur with the *ponencia* that Anrey, by playing radio broadcasts as background music in its restaurants despite not having obtained any license from FILSCAP, is guilty of copyright infringement.<sup>10</sup> (Emphasis supplied)

<sup>10</sup> J. Caguioa, Separate Concurring Opinion in *Filipino Society of Composers, Authors and Publishers, Inc. v. Anrey, Inc.*, *supra* note 8.



The subsequent case of *Philippine Home Cable Holdings, Inc. v. FILSCAP* emphasizes that the statutory definition of “public performance” cannot include the processes involved in the definition of “communication to the public” in Subsection 171.3 of the IP Code

After the promulgation of *FILSCAP v. Anrey* on August 9, 2022, the Court *En Banc* clarified on February 21, 2023 in *Philippine Home Cable* that **if a “performance” requires any process described in Subsection 171.3 of the IP Code, it is considered as “communication to the public.”**

For context, in *Philippine Home Cable*, the lower courts mistakenly ruled that the act of cablecasting karaoke channels is an exercise of both “public performance” and “communication to the public.” The relevant discussion on the difference between the two rights reads:

In respondent’s Complaint, it alleged that petitioner has been “playing or otherwise performing or communicating to the public” the subject musical compositions. Both the Regional Trial Court and the Court of Appeals determined that petitioner did both when it cablecast[ed] — engaged in program origination of — the two karaoke channels. But the application of Section 177 is inexact. Based on petitioner’s acts complained of, only an infringement of the “communication to the public” right has been committed.

....

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 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.” **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.**

It must be noted that 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:

....

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.<sup>11</sup> (Emphasis supplied)

To emphasize more clearly, in *Philippine Home Cable*, the Court correctly stated that:

[c]oncededly, 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 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.<sup>12</sup>

Thus, driving home the point that this act can technically fall under the broad statutory definition of public performance **IF NOT FOR THE FACT THAT** the “performance” of the musical composition requires the process described in Subsection 171.3 of the IP Code (which defines “communication to the public”). **Indeed, both the IP Code and *Philippine Home Cable* make it clear that—in case of confusion as to whether the act is considered as “public performance” or “communication to the public”—the litmus test is whether the performance can be perceived without the need for “communication to the public,” which includes 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 individually chosen by them.**

In sum, if the “performance” can be perceived without the use of the means specified in Subsection 171.3 of the IP Code, it is considered as an exercise of the right of “public performance.” On the other hand, if the possibility of perceiving the “performance” requires 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 individually chosen by them, then it is considered as an exercise of the right of “communication to the public.”

As can be gleaned from the foregoing clarification in *Philippine Home Cable*, the act of radio-over-loudspeakers can no longer be considered as “public performance” because it involves a radio broadcast, which is expressly specified as a process under Subsection 171.3 of the IP Code.

<sup>11</sup> *Philippine Home Cable Holdings, Inc. v. Filipino Society of Composers, Authors & Publishers, Inc.*, *supra* note 9.

<sup>12</sup> *Id.*





Notably, the definition of “public performance” under Subsection 171.6 of the IP Code **does not qualify whether the communication (e.g., the broadcast by a radio station) is being “performed” by another person or entity, viz.:**

171.6. “Public performance”, in the case of a work other than an audiovisual work, is the recitation, playing, dancing, acting or otherwise performing the work, either directly or by means of any device or process; in the case of an audiovisual work, the showing of its images in sequence and the making of the sounds accompanying it audible; and, in the case of a sound recording, making the recorded sounds audible at a place or at places where persons outside the normal circle of a family and that family’s closest social acquaintances are or can be present, irrespective of whether they are or can be present at the same place and at the same time, or at different places and/or at different times, and **where the performance can be perceived without the need for communication within the meaning of Subsection 171.3[.]** (Emphasis supplied)

At the risk of repetition, if the possibility of perceiving the “performance” requires the use of any of the means specified in Subsection 171.3 of the IP Code—regardless if the person carrying out the “performance” is the same person or entity primarily carrying out the specified means in Subsection 171.3 of the IP Code—then it is considered as an exercise of the right of “communication to the public.” Thus, **since the example of radio-over-loudspeakers involves a radio broadcast (regardless of the party carrying out the broadcast), it can no longer be considered as an exercise of “public performance” consistent with a plain reading of the provisions of the IP Code and the Court’s *En Banc* ruling in *Philippine Home Cable*.**

It must be underscored that treating radio-over-loudspeakers as a “communication to the public” is **not** the same as conflating and treating as singular (1) the act of the radio broadcaster doing its broadcast; and (2) the person playing the radio reception over loudspeakers. To be clear, both parties—the radio station and the person playing the broadcast over loudspeakers—are doing **separate acts** of “communication to the public.” Since the possibility of perceiving the performance or any communication requires the use of any of the means specified in Subsection 171.3 of the IP Code in **both** acts, they should **both** be treated as **separate** acts of “communication to the public.”

From the perspective of the radio station, there is no question that it is exercising the right of “communication to the public” because it broadcasts the musical works.

From the perspective of the person playing a song:

- a. If the person is simultaneously playing a radio broadcast over loudspeaker for the public, it is an act of “**communication to the public.**” The person playing the radio over loudspeaker



for the public could not have done it without a broadcast from another entity.

- b. However, if the consumer is not using any radio broadcast but is instead publicly playing a locally stored song from a device or a sound recording from a CD player, it is an act of “**public performance**” because the possibility of perceiving the performance or any communication does **not** require the use of any of the means specified in Subsection 171.3 of the IP Code in that instance of playing the locally stored audio file.

In sum, if the question is whether someone is exercising the right of “public performance” or “communication to the public,” the test is if the “performance” can be perceived without the use of the means specified in Subsection 171.3 of the IP Code. If the possibility of perceiving the “performance” requires the use of any of the means specified in Subsection 171.3 of the IP Code, it is an exercise of the right of “communication to the public.” As explained above, this interpretation is supported not only by recent jurisprudence but also the plain meaning of the law as it is written.

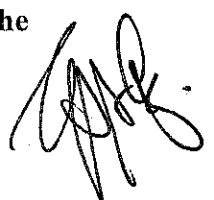
***Wolfpac’s violation of the composers’ right of “communication to the public” and fair use***

I agree with the *ponencia*’s discussion regarding Wolfpac’s violation of the composers’ right of “communication to the public” in offering the pre-listening function, which necessitates the discussion of whether Wolfpac’s acts constitute fair use.

The relevant discussion in the *ponencia* reads:

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. Wolfpac admitted the existence of the print advertisement in its answer. **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 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. 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.<sup>13</sup> (Emphasis supplied)

For easy reference, Wolfpac’s MOAs with composers pertinently contain:

- the composers’ undertaking to “provide Content to [Wolfpac] and permit [the latter] to convert the Content into a form which can be downloaded through Caller Ring Tune Service, and to offer and sell the same to the general public via the Partner Operator[.]”<sup>14</sup>
- Wolfpac’s obligation to seek other licenses and consent before using the content in a manner not provided under the agreements, viz.: “[t]he grant...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 the Content (musical works) not otherwise granted herein shall be obtained by [Wolfpac].”<sup>15</sup>

Associate Justice Amy C. Lazaro-Javier (Associate Justice Lazaro-Javier) submits that Wolfpac’s act of providing the pre-listening function is sanctioned in the MOAs. Thus, there is no violation of the composers’ rights and there is no further need to discuss whether Wolfpac’s act falls under fair use, viz.:

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<sup>13</sup> *Ponencia*, pp. 19–20.

<sup>14</sup> *Rollo*, p. 21

<sup>15</sup> *Id.* at 47–48.



Musical work is intangible. As audible work, it may only be perceived and recognized by the public once it is played, and it would be unreasonable to expect ordinary people to identify a specific song by title and author alone without hearing its tune, nor can they be expected to recognize a musical work by being presented with the written musical composition. It may also be possible that prospective consumers are not familiar with some of the songs offered and only encountered the song for the first time in Wolfpac's roster.

Realistically speaking, therefore, consumers obtain the necessary information to make an informed choice whether to purchase the ringback tone only upon hearing at least a portion of the musical work. This would then allow them to identify or confirm that the work being offered is indeed the work they wish to purchase. To be sure, even composers and singers perform first their new musical works publicly before offering their albums for sale for the very same reason.

Verily, in this context, I humbly submit that the agreement between the parties for Wolfpac "to offer" the musical works for sale necessarily includes reasonable means of advertising the same for purposes of enticing prospective consumers to make a purchase. As such, in my view, the pre-listening function utilized by Wolfpac falls within the purview of offering the musical works to the public, and by authorizing Wolfpac "to offer" their works for sale, FILSCAP and its member-composers gave their consent for Wolfpac to make a reasonable communication to the public of their musical work.

On this score, FILSCAP's claim of copyright infringement already fails. Consent having been effectively given by FILSCAP through this provision in its MOA with Wolfpac, it is no longer necessary to determine whether the 20-second pre-listening function constitutes fair use of the copyrighted work. For fair use has been defined as a privilege to use the copyrighted material in a reasonable manner without the consent of the copyright owner or as copying the theme or ideas rather than their expression.<sup>16</sup> (Emphasis supplied)

I respectfully disagree with Associate Justice Lazaro-Javier's position.

Firstly, as correctly discussed in the *ponencia*, under Article 1370 of the Civil Code, where "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." Further, Article 1372 provides that "[h]owever 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."<sup>17</sup>

Accordingly, a plain reading of the provisions of the MOAs indicates that the authority "does not include any right or authority **not expressly** authorized..."<sup>18</sup> Indeed, it is not the province of the Court to read its own commercial stipulations into a contract. As pointed out in the *ponencia*,

<sup>16</sup> J. Lazaro-Javier, Opinion, pp. 3-4.

<sup>17</sup> *Ponencia*, p. 19.

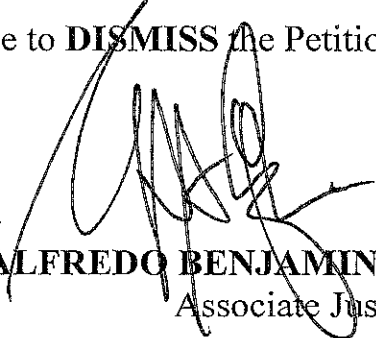
<sup>18</sup> *Rollo*, pp. 47-48.



Wolfpac can offer and sell the ringtones without exercising any additional rights of the composers by simply providing the list of songs and indicating the names of the singers. That said, **nothing prevented Wolfpac from seeking authorization from the composers to include a 20-second sample of the song as part of its marketing efforts.**

Secondly, the fact that songs or audible works may be recognized by the public once played is **not** a justification to expand the authority granted to Wolfpac. This line of reasoning would conceivably allow Wolfpac to automatically exercise any and all rights belonging to the composers—such as publicly performing the 20-second clips in physical kiosks, for example—as long as Wolfpac can shoehorn these acts as falling within the authority “to offer and sell” the songs to the general public. Such automatic expansion of the authority granted to Wolfpac goes against the plain meaning of the provisions of the MOAs and unjustifiably diminishes the rights of the copyright owners over the works involved.

In view of the foregoing, I vote to **DISMISS** the Petition.



**ALFREDO BENJAMIN S. CAGUIOA**  
Associate Justice