

EN BANC

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

Promulgated:

February 25, 2025

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SEPARATE CONCURRING OPINION

DIMAAMPAO, J.:

I concur in the dismissal of the complaint for copyright infringement filed by the Filipino Society of Composers and Publishers (FILSCAP) against Wolfpac Communications, Inc. (Wolfpac). As aptly elucidated in the *ponencia*, I submit that Wolfpac’s “pre-listening function” constitutes fair use.

Further to the discussion of the application of the four-factor test, specifically on the purpose and character of the use, an examination of American jurisprudence provides guidance in ascertaining whether Wolfpac’s use is, in fact, transformative. This, in turn, is determinative of whether the first factor favors Wolfpac. As aptly mentioned in the *ponencia*, “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”.¹

While one must be circumspect on whether the facts of American cases are on all fours with the case at hand, it is undeniable that foreign jurisprudence can provide insight on how to tackle novel and intricate copyright issues in the Philippine context. The U.S. courts’ elucidations on the concept of “transformative use” in the cases of *Kelly v. Arriba Soft Corp.*² and *Author’s Guild, Inc. v. HathiTrust*³ are particularly instructive to the case at bench.

In retrospect, the examination of the nature and character of the use aims to uncover whether there is a difference in the character and purpose of the use of the copyrighted work. Added value or utility is not the test: a

¹ *Ponencia*, p. 7.

² 336 F.3d 811 (9th Cir. 2002).

³ 755 F. 3d 87 (2d Cir. 2014).



transformative work is one that serves a **new and different function from the original work** and is not a substitute for it, thus:

The central purpose of this investigation is to see . . . whether the new work merely supersede[s] the objects of the original creation, or instead adds something new, with a further purpose or different character, altering the first with new expression, meaning, or message; it asks, in other words, whether and to what extent the new work is transformative.⁴

To illustrate, in *Kelly*, the U.S. Court of Appeals for the Ninth Circuit ruled that the reproduction of plaintiff's photos as thumbnail images served an entirely different purpose, i.e., as a tool to help index and improve access to images on the internet and their related web sites.⁵ Meanwhile, in *Author's Guild*, the U.S. Court of Appeals for the Second Circuit ruled that the creation of a full-text searchable database of books is a "quintessentially transformative use"⁶ and the same should not be considered as a substitute for the books searched.

Applying the foregoing precepts to the case at hand, the following conclusions may be reached:

First, it is irrefragable that Wolfpac's pre-listening function served a commercial function, as pointed out by the *ponencia*. However, as also correctly pronounced, "[a] finding that the use is commercial does not automatically bar the application of fair use."⁷ In this regard, as in *Kelly*, while the use was admittedly commercial, the use was "more incidental and less exploitative in nature"⁸ than other types of commercial use. Particularly, the use in this case was only in furtherance of and merely incidental to the pre-existing agreement between Wolfpac and the composers whom FILSCAP represents. To be sure, Wolfpac was using the 20-second preview of the songs to advertise the sale of the ringback tones. Nonetheless, it was not exploitative in the sense that, through the use of the pre-listening function, Wolfpac did not seek to profit in a way that exceeds the original contract agreed upon by the composers and Wolfpac. Thus, since the use of the songs was not highly exploitative, the commercial nature of the use weighs only slightly against a finding of fair use.

Second, it may reasonably be concluded that Wolfpac's use is indeed transformative. Even though the samples of the musical works were directly

⁴ See *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 579, 114 S.Ct. 1164, 127 L.Ed.2d 500 (1994).

⁵ See *Kelly v. Arriba Soft Corp.*, 336 F.3d 811, 818 (9th Cir. 2002).

⁶ *Author's Guild, Inc. v. HathiTrust*, 755 F.3d 87 (2d Cir. 2014).

⁷ *Ponencia*, p. 22.

⁸ *Kelly v. Arriba Soft Corp.*, 336 F.3d 811, 818 (9th Cir. 2002).



lifted from the songs, these were limited to 20-second segments which undeniably served a different function than the composers' songs. Verily, the use in this instance has now been twice removed from the original use of the songs. For one thing, the composers' songs intend to entertain. For another, the ringback tones which are based on said songs has the basic purpose of signaling that the phone of the party called is ringing. Meanwhile, the pre-listening function, which are based on the ringback tones, seek to provide potential consumers with means to make an informed choice before deciding to download the songs. The records are bereft of any evidence that the composers have composed their songs for the purpose of allowing the public to use them as ringback tones, nor to listen to them through the pre-listening function. It can also be surmised that users cannot make use of the pre-listening function other than for what it was intended since the same cannot be downloaded. The inherent brevity of the songs used in the pre-listening function perforce does not give it any entertainment value. Therefore, the pre-listening function does not merely repackage nor republish the original musical scores, but is laden with an entirely new function which may be safely regarded as transformative.

Finally, the Intellectual Property (IP) Code itself acknowledges that the effective intellectual and industrial property system is vital, among others, to the development of creative activity. To safeguard the future use of artistic works for educational, scholarly, critical, and journalistic purposes, Congress adopted the fair use exception. Proceeding from the above disquisitions, Wolfpac's use of segments of the composers' songs promotes the goals of the IP Code and the fair use exception. The pre-listening function does not stifle artistic creativity because they are not used for entertainment purposes and therefore do not do not supplant the need for the originals. In addition, it benefits the public, as explained by the *ponencia*, by enhancing consumer protection.

JAFAR B. DIMAAMPAO

Associate Justice