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G.R. No. 184661 (FILIPINO SOCIETY OF COMPOSERS AND PUBLISHERS ("FILSCAP"), Petitioner, **v. WOLFPAC COMMUNICATIONS, INC.,** Respondent.)

Promulgated:

February 25, 2025

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CONCURRENCE AND DISSENT

LAZARO-JAVIER, *J.*:

The *ponencia* absolved respondent Wolfpac Communications, Inc. (Wolfpac) of copyright infringement and dismissed the complaint filed by petitioner Filipino Society of Composers, Authors, and Publishers, Inc. (FILSCAP), an aggrupation of copyright owners in the Philippines individually authorized by its member-composers to collect license fees or royalties on their behalf.[1]

To recall, Wolfpac entered into Memoranda of Agreement (MOA) with certain composers wherein the latter authorized Wolfpac to convert their works "into a form which can be downloaded through Caller Ring Tune Service" and "to offer and sell" the same to the public.[2] To facilitate the sale, Wolfpac advertised the musical works on a website, which allows prospective consumers to listen to a 20-second portion of a song by clicking the "pre-listening function" before downloading the ringback tone (20-second pre-listening function). FILSCAP sued Wolfpac, arguing that the latter did not secure the licenses and did not pay the appropriate royalties for the 20-second pre-listening function, hence, is liable for copyright infringement.[3]

The *ponencia* identified the 20-second pre-listening function as communication to the public instead of public performance allegedly because: (1) Wolfpac's act of placing the pre-listening function makes the musical work available to the public through the use of the internet; and (2) any member of the public can access the samples from a place and time individually chosen

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[1] *Ponencia,* p. 2.
[2] *Id.* at 16.
[3] *Id.* at 2.

by them,[4] so they have the option to choose what work to perceive, and when, where, and how they will perceive the work.

In any event, the *ponencia* found that FILSCAP or its member-composers did not authorize Wolfpac under the MOA to advertise the musical work via the 20-second pre-listening function, and the same does not fall under any of the limitations on copyright under the Intellectual Property Code (IPC). The *ponencia,* however, ordained that such communication constitutes fair use of a copyrighted work. [5]

I concur with the sound differentiation by the *ponencia* between the right of copyright owners to communicate to the public vis-à-vis the right to public performance. But I disagree that the 20-second pre-listening function is not sanctioned under the MOA.

I elucidate.

A copyright is the right granted by statute to the proprietor of an intellectual production to its exclusive use and enjoyment to the extent specified in the statute.[6] Under Section 177 of the IP Code, these rights include the following:

> 177.1. Reproduction of the work or substantial portion of the work;
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> 177.2. Dramatization, translation, adaptation, abridgment, arrangement or other transformation of the work;
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> 177.3. The first public distribution of the original and each copy of the work by sale or other forms of transfer of ownership;
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> 177.4. Rental of the original or a copy of an audiovisual or cinematographic work, a work embodied in a sound recording, a computed 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;
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> 177.5. Public display of the original or a copy of the work;
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> 177.6. Public performance of the work; and
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> **177.7. Other communication to the public of the work.** (Emphasis supplied)

It is the execution of any of the foregoing exclusive rights of the copyright owner *sans* his or her consent which constitutes copyright infringement. In essence, copyright infringement is a trespass into a domain

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4 *Id.* at 15.
5 *Id.* at 16.
6 *Habana v. Robles,* 369 Phil. 764 (1999) [Per J. Pardo, First Division].

owned and occupied by the copyright owner; it is a violation of a private right protected by law.[7]

As enumerated in the *ponencia*, for a claim of copyright infringement to prevail, the evidence on record must demonstrate: (1) ownership of a validly copyrighted material by the complainant; (2) infringement of the copyright by the respondent; and (3) the violation does not fall under any of the limitations on copyright under Section 184 of the IPC or amounts to fair use of copyrighted work.

There is no question on the presence of the first element. I thus focus on the **second** and **third elements**.

The *ponencia* ordained that Wolfpac was not authorized to advertise the copyrighted works because the relevant provision of the MOA simply 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 Service, and **to offer and sell the same to the general public** via the Partner Operator.[8] (Emphasis supplied)

Verily, a plain reading of the MOA purportedly reveals that the use of musical work is limited to converting it into ringtones that can be downloaded by the public for a fee, and presupposes that the public can only hear the musical work after purchasing the ringtones and not any time before.[9]

I humbly disagree. For to construe the plain meaning of the provision in such a way disregards the nature of the work subject of the agreement.

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 only 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

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7 *Id.*
8 *Ponencia*, p. 16.
9 *Id.* at 20.

first their new musical work 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 work 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 work to the public, and by authorizing Wolfpac "to offer" their work 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.[10]

Associate Justices Benjamin S. Caguioa and Henri Jean Paul B. Inting, in their erudite Separate Opinions, however, riposte:

First, the MOA clearly indicates that the authority granted to Wolfpac "does not include any grant or authority **not expressly** authorized..."[11] Such stipulation being clear and unambiguous, it must be construed in its literal meaning, i.e., Wolfpac was only authorized "to offer and sell" the musical works without exercising any additional rights of the composers by simply providing the list of songs and indicating the names of the singers and the Court must not read its own commercial stipulations into a contract.[12]

Second, the fact that songs or audible works are recognizable once played is not a justification to expand the authority granted to Wolfpac as it would consequently allow Wolfpac to exercise **any and all rights** belonging to the composers as long as the same is done within the authority "to offer and sell" the songs to the general public.[13]

The relevant stipulation of the MOA 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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10 *COSAC v. FILSCAP,* G.R. No. 222537, February 28, 2023 [Per J. Hernando, *En Banc*].
11 *JABSC's Reflection,* p. 14; *JHJPI's Reflection,* p. 3.
12 *Id.*
13 *Id.*

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

I focus on the sentence, "[t]he grant of herein does not include any right or authority not expressly authorized herein." Associate Justices Caguioa and Inting interpret this sentence to mean that Wolfpac's authority to offer the converted musical works to the general public is **limited** to means that do not involve the exercise of the copyright owners' economic rights other than what was "expressly authorized."

I respectfully submit, however, that this an erroneous construction of the stipulation. For it purports to limit the **means** or the **manner** in which Wolfpac may execute its obligation under the MOA. Yet, a holistic reading of the term shows that what this sentence qualifies is **not how** Wolfpac may offer the converted musical works to the public, but **what else** Wolfpac may be authorized to do pursuant to the MOA other than converting the musical works, offering them to the general public, and selling them. This is made obvious by the following sentence which clarifies, "[a]ll other rights of the Provider (composer) are deemed reserved."

Indeed, a quick reference to the first paragraph above shows that "[t]he grant of herein" pertains to the grant of authority by the composers to Wolfpac and the right and authority "expressly granted" by the MOA to Wolfpac is to "convert" the Content and "to offer and sell" the same. Therefore, what the proviso just really means is that Wolfpac is not allowed to exercise any other right or authority outside converting the musical works and offering and selling them to the public.

Had FILSCAP truly intend to narrowly construe the term "to offer," it could have specifically so indicated in the MOA, but it did not. To be sure, nothing hindered FILSCAP from specifying the manner in which it expected Wolfpac to advertise the composers' works. It would be highly unfair to place blame and find liability on Wolfpac who merely relied on the literal meaning of "to offer" as it was notably **generally indicated** in the MOA.

After all, construed in its literal meaning, "to offer" is a verb which means "to **present** or proffer something for someone to accept or reject as so desired."[14] I thus reiterate my submission that, by their nature, copyrighted works like songs, images, films, and other literary and artistic creations may

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[14] Oxford Dictionary.

be offered to the public by first **presenting** the same to them in some form of a sample, e.g., teasers of movies are released to encourage the public to consume the entire film while synopses of novels are publicly released to entice readers to purchase the entire book. Clearly, "to offer" in this case means, as well, **presenting** a sample of the converted musical works to the public—in this case through the 20-second pre-listening function—to lure the public to purchasing the ringback tones.

THUS, I express my concurrence in the dismissal of the complaint for copyright and damages filed by FILSCAP but on the ground that FILSCAP and its member-composers gave their consent for the advertisement of their musical works under its MOA with Wolfpac.

AMY C. LAZARO-JAVIER
Associate Justice