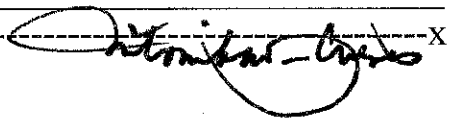


EN BANC

G.R. Nos. 184661 – FILIPINO SOCIETY OF COMPOSERS, AUTHORS AND PUBLISHERS, INC., Petitioner v. WOLFPAC COMMUNICATIONS, INC., Respondent.

Promulgated:

February 25, 2025

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CONCURRING AND DISSENTING OPINION

SINGH, J.:

In this case, the Filipino Society of Composers, Authors and Publishers, Inc. (**FILSCAP**) entered into Memoranda of Agreement (**MOAs**) with Wolfpac Communications, Inc. (**Wolfpac**), allowing the conversion of FILSCAP's musical works into downloadable ringtones for sale to the public.¹ Later, FILSCAP came across an advertisement in the Lifestyle Section of the May 28, 2004 issue of the Philippine Daily Inquirer, which promoted the downloading of ringback tones for mobile phones from a website. 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, it filed a complaint for copyright infringement.² FILSCAP alleged that the pre-listening function constitutes "public performance," for which Wolfpac is required to secure a license and pay royalties.³

In its defense, Wolfpac claimed that when the composers assigned their musical works for conversion into ringtones, along with the associated right to distribute and sell them, the assignment inherently included the right to market the ringtones through the pre-listening feature. Wolfpac also argued that the pre-listening service is not "public performance" but "communication to the public." Finally, the fair use doctrine applies because the samples have no independent commercial value, thus precluding FILSCAP from claiming remuneration.⁴

¹ Draft *ponencia*, p. 18.

² *Id.* at 2.

³ *Id.* at 3.

⁴ *Id.* at 4.



The Court is thus faced with these questions: (1) Was the use of sample ringtones in the pre-listening feature of Wolfpac's website public performance or communication to the public? and (2) Was it fair use of FILSCAP's work?⁵

In dismissing FILSCAP's claim, the *ponencia* held that: (1) the pre-listening function should be considered as communication to the public; and (2) Wolfpac's use of the samples constitutes fair use.⁶ Thus, while the MOAs between FILSCAP and Wolfpac exclude the assignment of the songs for use in a pre-listening device, the Court cannot hold Wolfpac liable for copyright infringement in using the sample ringtones under the fair use doctrine.

I concur with the finding that the pre-listening feature constitutes communication to the public rather than public performance. However, I respectfully disagree that the use of the ringtone samples on Wolfpac's pre-listening page qualifies as fair use.

Public performance v.
Communication to the public

In my concurring and dissenting opinion in *FILSCAP v. Anrey, Inc.*⁷ and concurring opinion in *Home Cable Holdings, Inc. v. FILSCAP*,⁸ I explained that the key distinction between "public performance" and "communication to the public" lies in the method that the copyrighted work is made available to the public.⁹

Section 171.6¹⁰ of the IP Code defines "public performance," in the case of a sound recording, as "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."

⁵ *Id.* at 4–5.

⁶ *Id.* at 18.

⁷ G.R. No. 233918, August 9, 2022 [Per J. Zalameda, *En Banc*].

⁸ *Home Cable Holdings, Inc. v. FILSCAP*, G.R. No. 188933, February 21, 2023 [Per J. Leonen, *En Banc*].

⁹ Concurring Opinion, *Home Cable Holdings, Inc. v. FILSCAP*, G.R. No. 188933, February 21, 2023 [Per J. Leonen, *En Banc*].

¹⁰ Section 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[.]



Meanwhile, Section 171.3¹¹ of the IP Code defines “communication to the public” as “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.” Section 202.9 of the IP Code further defines “communication to the public of a performance or a sound recording” as “the transmission to the public, by any medium, otherwise than by broadcasting, of sounds of a performance or the representations of sounds fixed in a sound recording.”

Based on the foregoing definitions, the *ponencia* correctly set out the two aspects of “communication to the public” as (1) the act of making the work available to the public by wire or wireless means; and (2) the option on the part of the members of the public to access the work from a place and time individually chosen by them.¹² The elements of “public performance,” on the other hand, are (1) actual performance of the work, showing the work, or making the work audible, depending on the type of work; and (2) actual or possible public perception without the need for communication to the public.¹³

Based on the facts of the case, the *ponencia* correctly concluded that the pre-listening function constitutes “communication to the public.”¹⁴ The first aspect of “communication to the public” is evident. Wolfpac’s implementation of the pre-listening function makes the musical work available to the public through the internet. At this stage, the musical works are not yet audible, meaning the first element of “public performance” is not present. The works only become audible when a potential consumer clicks the play button to listen to the sample song. This is where the second element of “communication to the public” becomes apparent. Since the samples are accessible on Wolfpac’s website, any member of the public can access them from a location and time of their choosing. Thus, “communication to the public” by wireless means occurs, as members of the public can access the samples from Wolfpac’s website at a place and time individually chosen by them.

Therefore, I concur with the *ponencia* that the pre-listening function on Wolfpac’s website constitutes “communication to the public.”

Fair use

¹¹ Section 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*[.]

¹² Draft Decision, p. 10.

¹³ *Id.* at 11.

¹⁴ *Id.* at 16.



Under the IP Code, copyright or economic rights consist of the exclusive right to perform the following:

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. (Emphasis supplied)

These economic rights are exclusive in nature.¹⁵ Thus, the use of any copyrighted material without the consent of the copyright owner or its assignee, and which violates these economic rights, shall amount to copyright infringement.¹⁶ Section 177 has expanded the scope of copyright infringement from merely the unauthorized duplication of a literary, artistic or scientific work to the unauthorized performance of the acts enumerated in said Section.¹⁷ In *Habana v. Robles*,¹⁸ as quoted in *Home Cable v. FILSCAP*,¹⁹ the Court stated:

Infringement of a copyright is a trespass on a private domain owned and occupied by the owner of the copyright, and, therefore, protected by law, and infringement of copyright, or piracy, which is a synonymous term in this connection, consists in the doing by any person, without the consent of the owner of the copyright, of anything the sole right to do which is conferred by statute on the owner of the copyright.²⁰

¹⁵ *FILSCAP v. COSAC*, G.R. No. 222537, February 28, 2023 [Per J. Hernando, En Banc].


¹⁶ *Id.*

¹⁷ *Home Cable Holdings, Inc. v. FISLCAP*, G.R. No. 188933, February 21, 2023 [Per J. Leonen, En Banc].

¹⁸ 369 Phil. 764 (1999) [Per J. Pardo, First Division].

¹⁹ *Home Cable Holdings, Inc. v. FISLCAP*, G.R. No. 188933, February 21, 2023 [Per J. Leonen, En Banc].

²⁰ *Id.* at 779.



Two elements must be proved to uphold a claim of copyright infringement. One, the plaintiff's ownership of a validly copyrighted material, and two, the respondent's exercise of any the enumerated economic rights without the consent of the copyright owner or holder.²¹ As to the second element, the Court has held that it must further be shown that the exercise of the economic right was inconsistent with any of the limitations on copyright²² and permissible unauthorized reproductions and importations under Sections 187-190 of the IP Code. Alternatively, the respondent could demonstrate that its use of the economic right qualifies as fair use.²³

Here, Wolfpac did not dispute the composers' ownership of the copyrighted material. FILSCAP's authority to represent said composers was also established through the standard Deed of Assignment presented by FILSCAP, which 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."²⁴ The assignment of copyright, in whole or in part, is sanctioned under Section 180 of the IP Code. Thus, the first element of copyright infringement is satisfied.

As to the second element, the *ponencia* correctly established that Wolfpac's use of the subject ringtones in the pre-listening function constitutes "communication to the public" that is unauthorized under the parties' contract. Wolfpac did not claim that the pre-listening function falls under the permissible unauthorized reproductions and importations under Sections 187-190 of the IP Code. However, it claimed that the authority to market the ringtones through the pre-listening function is corollary to the right to offer and sell said ringtones provided under the MOA.²⁵ Nonetheless, the *ponencia* correctly held that 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.²⁶ Thus, Wolfpac's act of using portions of the ringtones in the pre-listening function falls under neither of the first two limitations to copyright.

The other limitation to copyright under the IP Code is fair use.²⁷

The Court has defined fair use 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."²⁸ It is an

²¹ *Olaño v. Lim Eng Co*, 783 Phil. 234, 250 [Per J. Reyes, Third Division].

²² *ABS-CBN Corporation v. Gozon*, 755 Phil. 709, 723 (2015) [Per J. Leonen, Second Division].

²³ *Home Cable Holdings, Inc. v. FISLCAP*, G.R. No. 188933, February 21, 2023 [Per J. Leonen, *En Banc*].

²⁴ Main Decision, pp. 17-18.

²⁵ *Id.* at 19.

²⁶ *Id.* at 19.

²⁷ Section 184.

²⁸ *Habana v. Robles*, 369 Phil. 764 (1999) [Per J. Pardo, First Division].



exception to the copyright owner's monopoly of the use of the work to avoid "stifling the very creativity which that law is designed to foster."²⁹ Determining fair use requires the application of the four-factor test.³⁰

SECTION 185. *Fair Use of Copyrighted Work*. – [. . .]

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)

Applying these factors,³¹ the *ponencia* concluded that Wolfpac's use of the sample songs in the pre-listening function constitutes fair use. The *ponencia* provides the following rationale:

- (1) The purpose of the pre-listening function is not purely commercial. It also serves a public purpose, *i.e.*, consumer protection, as it allows potential consumers to make an informed decision before downloading the ringback tones; and
- (2) The effect on the work's potential market goes both ways, such that it can either encourage or discourage the public from downloading the ringtones. Thus, it does not always result in increased sales and profit for Wolfpac.

However, in my view, the argument that the pre-listening function serves a consumer protection purpose, and thus constitutes fair use, is for the consumer or public to invoke as a defense to a copyright infringement charge. In this case, the parties involved entered into a contract that expressly excludes the act in question—the use of FILSCAP's songs in Wolfpac's pre-listening function—from the authority granted by the copyright holder.

To recall, the authority of Wolfpac under the MOA is to "offer and sell" the ringtone versions of the songs. The excerpt of the agreement in Wolfpac's favor reads:

²⁹ *ABS-CBN Corporation v. Gozon*, 755 Phil. 709, 782 (2015) [Per J. Leonen, Second Division]

³⁰ 755 Phil. 709, 782 (2015) [Per J. Leonen, Second Division].

³¹ Section 185 of the IP Code, as cited and discussed in *ABS-CBN Corporation v. Gozon*, 755 Phil. 709, 782 (2015) [Per J. Leonen, Second Division].



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[.]

The MOA expressly excludes other licenses not specified in the agreement:

[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.³²

I also disagree that the use of FILSCAP's ringtones in Wolfpac's pre-listening function constitutes fair use for serving a public purpose. As Wolfpac highlighted in its Petition, the objective of the pre-listening function is *to market* the ringtones:

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.*³³ (Emphasis supplied)

Moreover, Wolfpac's MOAs with the composers precisely provide that the conversion of their songs into ringtones is toward the end of *selling* them to the public:

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[.]³⁴ (Emphasis supplied)

Even if the pre-listening function provides some degree of public benefit, the primary goal of the pre-listening feature is commercial – to promote or advertise the ringtones, and generate more sales. As with other widely-used music platforms and services, the provision of song previews to users is a form of advertising aimed toward the promotion of the platform's offerings. They are designed to attract potential buyers by showcasing the works available for purchase. Spotify, for instance, offers Audio Preview Clips or snippets of songs to allow listeners to preview music before deciding to listen to the full track or add it to their playlists.³⁵ The previews are in place to encourage subscriptions, which allow users to save, download or share the

³² Main Decision, p. 18.

³³ Draft *ponencia*, p. 4.

³⁴ *Id.* at 18.

³⁵ PREVIEW MUSIC, PODCASTS, AND AUDIOBOOKS ON SPOTIFY HOME (March 8, 2023) <https://newsroom.spotify.com/2023-03-08/spotify-previews-clips-music-podcasts-audiobooks-home-feed/>



sampled work.³⁶ YouTube or Netflix likewise post samples or trailers to encourage paid downloads of their movie and TV show offerings.

Although the pre-listening or sampling feature could be seen as having a consumer protection aspect, its main objective remains largely commercial. The ultimate aim is profit-making.

A review of the acts listed as limitations to copyright or fair use under Sections 184 and 185 of the IP Code shows that they qualify as exceptions to the general rule – that unauthorized exercise of economic rights is copyright infringement – because of a **clear** and **predominantly** public purpose attached to said acts:

SECTION 184. Limitations on Copyright. –

184.1. Notwithstanding the provisions of Chapter V (Economic Rights), 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; [. .]*

(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;

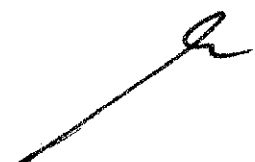
(d) The reproduction and *communication to the public of literary, scientific or artistic works as part of reports of current events* by means of photography, cinematography or broadcasting to the extent necessary for the purpose;

(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; [. .]

(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;

³⁶ *Id.*



(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 Regulations; [. . .]

(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*.

...

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)

Additionally, Section 185 outlines specific examples of acts which the law considers fair use, *i.e.*, criticism, comment, news reporting, teaching including multiple copies for classroom use, scholarship and research. While it does not restrict fair use to these acts, the provision states that any act sought to be included within the concept of fair use will have to serve “similar purposes.” The advertisement of the ringtones for sale through the pre-listening feature does not align with these purposes under Section 185, which are evidently intended for educational, public service or similar objectives.

In *ABS-CBN Corporation v. Gozon*,³⁷ the Court stressed the importance of the purpose and character requirement. It further stressed that the purpose and character of the use of the copyrighted material must fall under those listed in Section 185:

First, *the purpose and character of the use of the copyrighted material must fall under those listed in Section 185*, thus: ‘criticism, comment, news reporting, teaching including multiple copies for classroom

³⁷ *ABS-CBN Corporation v. Gozon*, 755 Phil. 709 (2015) [Per J. Leonen, Second Division].



use, scholarship, research, and similar purposes.' *The purpose and character requirement is important in view of copyright's goal to promote creativity and encourage creation of works. Hence, commercial use of the copyrighted work can be weighed against fair use.*

The 'transformative test' is generally used in reviewing the purpose and character of the usage of the copyrighted work. This court must look into whether the copy of the work adds 'new expression, meaning or message' to transform it into something else. 'Meta-use' can also occur without necessarily transforming the copyrighted work used.³⁸ (Emphasis supplied)

Moreover, in enumerating the factors that determine fair use, Section 185 states the first factor in this wise:

(1) The purpose and character of the use, including *whether such use is of a commercial nature or is for non-profit educational purposes.* (Emphasis supplied)


"Commercial use or purpose" is contrasted with "non-profit educational purposes." A reasonable interpretation of this provision is that the use of a particular work may either be commercial (not fair use), or for non-profit educational purposes (fair use). Again, in this case, Wolfpac's pre-listening function falls under commercial use, as it clearly does not serve a non-profit educational, or at least similar, purpose.

In *Gozon*, the Court stated that in the case of new work, profiting from the same, or the absence of the non-profit aspect, may be excused if the new work "clearly has a transformative use and value." Conversely, if the new work has no transformative value, and is commercial in nature, the first factor will most likely be weighed against a finding of fair use. Given that fair use restricts the exercise of exclusive economic rights, a similar justifying function should reasonably be expected in cases involving abridgement or sampling.

First Factor of Fair Use: The Purpose and Character of the Use

The purpose and character of the use of the copyrighted work, whether it is for commercial or nonprofit educational purposes, should be determined. *Thus, "if the new work clearly has transformative use and value, a finding of fair use is more likely even if the user stands to profit from his or her new work. Conversely, if the new work merely supplants the object of the original work, i.e., it has no transformative value, and is commercial in nature, the first factor will most likely be weighed against a finding of fair use. Needless to state, if the new work has transformative use and value, and was created for a noncommercial purpose or use, the scale will highly likely be swayed in favor of fair use." To illustrate, examples of transformative use are those listed in Section 185 of the IPC, i.e., for*

³⁸ *Id.* at 758-759.



criticism, comment, news reporting, teaching, scholarship, research, and similar purposes. (Emphasis supplied)

Lastly, Section 185 on fair use should be read together with Section 184.2, which provides that the unlicensed use of a work, under the premise that it is fair use, must not go beyond the normal exploitation of the work or unreasonably prejudice the right holder's rights:

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.* (Emphasis supplied)

In my view, the unauthorized use of portions of FILSCAP ringtones in Wolfpac's advertisement, espousing the slogan "Listen B4 U Download," goes beyond the normal exploitation of FILSCAP's copyright. More than encouraging the download of FILSCAP's ringtones, the advertisement also serves to promote Wolfpac as a platform which offers such mobile phone services. Again, this particular use of FILSCAP's copyright in the advertisement of the pre-listening feature, and Wolfpac itself, is not covered by the MOAs, nor was FILSCAP informed of such use. Therefore, in my view, the same unreasonably prejudices FILSCAP's copyright, which takes it out of fair use, as provided under Section 184.2 of the IP Code.

Thus, I respectfully submit that Wolfpac is liable for copyright infringement against FILSCAP in this case, and vote to **GRANT** the Petition.



MARIA FILOMENA D. SINGH
Associate Justice

