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G.R. No. 233918 (*Filipino Society of Composers, Authors and Publishers, Inc., v. Anrey, Inc.*)

Promulgated:

August 9, 2022

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DISSENT

LAZARO-JAVIER, *J*:

I dissent.

The facts are undisputed.

Petitioner Filipino Society of Composers, Authors and Publishers Inc. (FILSCAP) is a non-profit society of composers, authors, and publishers which owns public performance rights over the copyrighted musical works of its members. It also owns the right to license public performance rights in the Philippines of copyrighted foreign musical works of its members and affiliate performing rights societies abroad. Such rights proceed from the contracts it has entered into with various composers, authors and publishers, and record labels, as well as the reciprocal agreements it has with affiliate foreign societies authorizing FILSCAP to license the public performance in the Philippines of musical works under their repertoire. These agreements deputized FILSCAP to enforce and protect the copyrighted works of its members or affiliates by issuing licenses and collecting royalties and/or license fees from anyone who publicly exhibits or performs music belonging to FILSCAP's worldwide repertoire.

These rights, however, are being challenged by respondent Anrey, Inc. (Anrey) when they were assessed by FILSCAP to pay annual license fees for the public exhibition of the copyrighted works of its members. The assessment came after a representative of FILSCAP, Ms. Ivy Labayne, conducted several days (between the months of July and September 2008) of monitoring over the chain of restaurants owned by Anrey in Baguio City.

FILSCAP sent several letters to the establishments concerned, informing them that an unauthorized public performance of copyright music amounts to infringement and urging them to secure licenses from FILSCAP and avoid prosecution. These demands fell on deaf ears, thus, FILSCAP filed a Complaint for Copyright Infringement against Anrey before the Regional Trial Court (RTC) in Baguio City, asking the court to award the following: a)

₱18,900.00 as compensatory damages; b) ₱300,000.00 as nominal damages; c) ₱100,000.00 as exemplary damages; and d) ₱50,000.00 as attorney's fees and litigation expenses.

In its Answer, Anrey denied playing any copyrighted music within its restaurants. It claimed that the restaurants it had been operating **randomly and passively sounded off whatever was already being broadcasted on the radio** their individual store was tuned in. In the alternative, Anrey argued that assuming it was sounding off copyrighted music inside its restaurants, the radio station had already paid the corresponding royalties, thus, FILSCAP would be recovering twice: from the station, and from it, simply because it tuned in on a broadcast intended to be heard by the public. Anrey maintained as well that even if the reception were to be considered a performance, this act would not qualify as a **public** performance since the broadcast was played for the benefit of its staff and not for its customers.

The trial court dismissed FILSCAP's amended complaint for lack of merit. It cited Section 184 (i) of Republic Act No. (RA) 8293 in excepting Anrey from copyright infringement, such that a public performance by a club or institution for charitable or educational purposes, whose aim is not profit making and does not charge admission fees, is not liable for copyright infringement.

On appeal, the Court of Appeals affirmed. In denying the appeal, the appellate court relied on the copyright laws of the United States of America (U.S.) exempting small business establishments under the *homestyle exemption* clause.

The *Majority* finds merit in the petition and rules to reverse the aforesaid decisions. It holds, as follows:

- Economic rights refer to the right of the owner to derive some sort of financial benefit from the use of his/her work. The economic rights of an owner are enumerated under Section 177 of RA 8293, one of which refers to the exclusive right of an owner to prevent the **public performance** of the work.

- In order for copyright holders to claim for infringement, two elements must be proven: 1) they must show ownership of a valid copyright; and 2) they must demonstrate that the alleged infringers violate at least one economic right granted to copyright holders under Section 177 of RA 8293. A third element may be added and that is the act complained of does not fall under any of the limitations on copyright under Section 184 or amounts to fair use of a copyrighted work under Section 185.

- FILSCAP has the right to sue for copyright infringement. The mechanics behind FILSCAP's role is plain and simple. FILSCAP gets assigned the copyright by its owners. It also enters into reciprocal agreements with foreign societies. Being the assignee of the copyright, it then collects royalties which come in the form of license fees 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.

- There should really be no question as to FILSCAP's authority to sue on behalf of its members. From the foregoing, it is evident that the first element of copyright infringement has been satisfied: that FILSCAP has the authority to collect royalties and/or license fees and sue for copyright infringement. As an assignee of copyright, it is entitled to all the rights and remedies which the assignor had with respect to the copyright.

- The genuine issue is one of law, i.e., whether the reception of a public radio station's broadcast of music *and* the passive playing of this music via public radio broadcast and reception as background music in a restaurant owned by Anrey amounts to a violation of Section 177.6 of RA 8293, or the right of public performance of the work of the copyright owner or the latter's assignee FILSCAP.

- The answer is in the affirmative. 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 its patrons to hear. This act of playing radio broadcasts containing copyrighted music through the use of loudspeakers is in itself, a **public** performance.

- There is no merit to Anrey's claim for exemption from securing a license on the purported ground that the radio station which broadcasted the copyrighted music had already secured one from FILSCAP. A radio reception *and* playing of such reception to the public creates a performance separate from the broadcast – the doctrine of "multiple performances."

- This doctrine provides that a radio (or television) transmission or broadcast can create multiple performances at once. The doctrine was first determined in *Buck v. Jewell-LaSalle Realty Co.*

(Jewell) wherein the U.S. Supreme Court 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 U.S. Supreme Court in *Jewell* concluded that the radio station owner and the hotel operator simultaneously performed the works in question. It cited that it is "the duty of the courts to give full protection to the monopoly of public performance for profit which Congress has secured to the composer."

- The act of playing radio broadcasts containing sound recordings through the use of loudspeakers amounts to an unauthorized communication of such copyrighted music to the public. This falls within the definition of Section 171.3 of RA 8293[1] and in relation to performances and sound recordings, Section 202.9 of the same law defines "communication to the public."[2]

- Applying the definitions, the **reception** of a radio broadcast of sound recordings **within the hearing** of Anrey's public through the use of speakers is both a **public performance** and a **communication to the public**.

- This ruling is supported by the guidance released by the World Intellectual Property Organization (WIPO) to the Berne Convention to which the Philippines is a signatory since 1951. The WIPO introduced the concept of a "new public." Typically, radio stations already secured from the copyright owner (or the latter's assignee) the license to broadcast the sound recording. By the nature of broadcasting, it is necessarily implied that its reception by the public has been consented to by the copyright owners. But the author ordinarily thinks of the license to broadcast as to "cover only the direct audience receiving the signal within the family circle." Any further communication of the reception creates, by legal fiction, a "new public" which the author never contemplated when he or she authorized its use in the initial communication to the public.

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1 171.3. "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 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.

2 202.9. "Communication to the public of a performance or a sound recording" means 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. For purposes of Section 209, "communication to the public" includes making the sounds or representations of sounds fixed in a sound recording audible to the public.

- It is not true that the radio reception of the broadcasted sound recordings was intended to be within the hearing and enjoyment of its staff. It is a fact that the reception was made within auditory range by two (2) loudspeakers located at the ceiling above the dining areas of its restaurants. This proves that the intended audience of the reception was its dining clientele.

- None of the limitations applies to the present case. Section 184 (i) of RA 8293[3] applies only to institutions for charitable and educational purposes. The *homestyle exemption* pursuant to U.S. legislation cannot be applied here since there is no counterpart provision thereof in the Philippines. Anrey's reception of sound recordings from radio broadcast is not fair use. The purpose of the use was to enhance the ambience of Anrey's restaurant, the sound recordings are creative pieces and not factual reportage, the sound recordings are played in full, and this practice could result in a substantial adverse impact on the potential market of these sound recordings.

The *Majority* holds that Anrey is liable to FILSCAP for damages.

Text of the Relevant Provisions in RA 8293

FILSCAP's cause of action is viable only if it has rights that have been violated by Anrey's act of making the reception of the radio station's broadcast of sound recordings audible to its restaurant's clientele. The *ponencia* identifies the economic rights of *public performance of the work* (Section 177.6 of RA 8293), i.e., referring to the sound recordings broadcasted by the radio station, and of *communication to the public of the work* (Section 177.7 of RA 8293).

But these economic rights, as defined by RA 8293, are not adversely impacted by the alleged infringing act. The right of *public performance of the work* has been defined in Section 171.6, *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**

[3] 184.1. Notwithstanding the provisions of Chapter V, the following acts shall not constitute infringement of copyright: (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; (n)

> **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.

On the other hand, *communication to the public of the work* is spelled out in Section 171.3 thus –

> 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 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;
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> 202.9. **"Communication to the public of a performance or a sound recording"** means 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.** For purposes of Section 209, "communication to the public" includes **making the sounds or representations of sounds fixed in a sound recording audible** to the public.
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> SECTION 209. **Communication to the Public.** — If a **sound recording** published for commercial purposes, or a **reproduction of such sound recording**, is used directly for broadcasting or **for other communication to the public**, or is **publicly performed with the intention of making and enhancing profit**, a single equitable remuneration for the performer or performers, and the producer of the sound recording shall be paid by the user to both the performers and the producer, who, in the absence of any agreement shall share equally.

For purposes of the present case, critical to these economic rights is *sound recording*, which has been defined as –

> 202.2. ... the **fixation of the sounds** of a performance or of other sounds, or representation of sound, other than in the form of a fixation incorporated in a cinematographic or other audiovisual work;

Meanwhile, *fixation* is understood under Section 202.4 to be "the **embodiment** of sounds, or of the representations thereof, **from which they can be perceived, reproduced** or **communicated through** a **device**...."

Here, the patrons of Anrey's restaurant were able to listen to and perhaps enjoy the **radio broadcast** of sound recordings. What Anrey did was to make the **radio broadcast** of the sound recordings **audible** to its

restaurant's clientele, but **not** the sound recordings themselves. **To repeat**, Anrey did **not** render the **sound recordings** themselves **within the hearing** of the restaurant patrons. Anrey **did not have possession, much less, control** of the **sound recordings**. What it did was merely **to turn on the radio** and **allow the broadcast to be heard** within the premises of its restaurant.

On the other hand, as defined, the *public performance of the work* pertains to **sound recordings**, those **objects** in which sounds were **fixed** or recorded. Who made the **sound recordings** audible to the restaurant's patrons was the **radio station**. It was the **radio station** that **made** possible the **sound recordings** to be within the hearing of the patrons. The **radio station** was the entity which exercised the *public performance of the work* and the sound recordings; **not Anrey**.

Too, Anrey did **not** exercise the right to *communicate the work* or the **sound recordings** *to the public*. It was **not** the one that **transmitted to the public**, by any medium, the representations of sounds fixed in **sound recordings**. The **radio station** was the **entity possessing** or **controlling** the sound recordings and the **one which transmitted them** to the public. Anrey was also **not responsible** for making the sound recordings available to the public **in such a way by which members of the public may access these works** from a place and time individually chosen by them. The patrons of Anrey's restaurant could **not** have accessed the sound recordings when it turned on the radio and left it switched on for their listening pleasure. Hence, Anrey **could not have communicated** the sound recordings to the public.

Because there was **no** *public performance* or *communication to the public* of the **sound recordings** which Anrey's restaurant patrons heard, we **cannot conclude** that there was infringement of the rights assigned to FILSCAP or that the latter is entitled to damages. As very well explained in *Twentieth Century Music Corp. v. Aiken*:[4]

> If, by analogy to a live performance in a concert hall or cabaret, a radio station "performs" a musical composition when it broadcasts it, **the same analogy would seem to require the conclusion that those who listen to the broadcast through the use of radio receivers do not perform the composition**. And that is exactly what the early federal cases held. **"Certainly those who listen do not perform, and therefore do not infringe."** Jerome H. Remick & Co. v. General Electric Co., supra, at 829. **"One who manually or by human agency merely actuates electrical instrumentalities, whereby inaudible elements that are omnipresent in the air are made audible to persons who are within hearing, does not "perform"** within the meaning of the Copyright Law." Buck v. Debaum, 40 F. 2d 734, 735 (SD Cal. 1929).

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[4] 422 US 151, 95 S Ct 2040, 1975 US LEXIS 156.

Good Reason for Adopting a Contrary Rule

Assuming I was wrong in my understanding of the economic rights of *public performance of the work* and *communication of the work to the public*, I respectfully submit that Anrey's act of tuning into the radio and allowing its sound recordings to be heard and enjoyed by its restaurant patrons falls within the limitation to copyright recognized by Section 184(1)(a) of RA 8293 –

> (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;

There is no question that Anrey did not charge its restaurant's patrons for the music that they heard coming from the radio station it tuned in. The issue is whether it was done **privately**. I submit **it was.**

Privately should be interpreted beyond how the right of *public performance of the work* pursuant to Section 171.6 of RA 8293 says of what *public* is – persons **outside the normal circle** of a family and that family's closest social acquaintances. **Private** does **not** refer to just being within the normal circle of family and its closest social acquaintances.

In *Twentieth Century Music Corp. v. Aiken*,[5] the United States Supreme Court explained the prudential reasons for rejecting as public performance the radio broadcast of sound recordings for the listening pleasure of patrons of a small restaurant –

> But such a holding would more than offend the principles of *stare decisis*; **it would result in a regime of copyright law that would be both wholly unenforceable and highly inequitable**.
>
> The **practical unenforceability** of a ruling that all of those in Aiken's position are copyright infringers is self-evident. One has only to **consider the countless business establishments** in this country **with radio** or television sets **on their premises** -- bars, beauty shops, cafeterias, car washes, dentists' offices, and drive-ins -- to realize the **total futility of any evenhanded effort** on the part of copyright holders to license even a substantial percentage of them.
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> And a ruling that a **radio listener "performs" every broadcast that he receives** would be **highly inequitable** for **two distinct reasons. First**, a person in Aiken's position would have **no sure way of protecting himself from liability for copyright infringement except by keeping his radio set turned off**. For even if he secured a license from ASCAP, he would have **no way of either foreseeing or controlling the broadcast of compositions whose copyright was held by someone else. Secondly**, to hold that **all in Aiken's position "performed"** these musical compositions

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5 422 US 151, 95 S Ct 2040, 1975 US LEXIS 156.

> would be **to authorize the sale of an untold number of licenses for what is basically a single public rendition** of a copyrighted work. The exaction of such multiple tribute **would go far beyond what is required for the economic protection of copyright owners**, and would be **wholly at odds with the balanced congressional purpose** behind 17 U.S.C. § 1 (e): S
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> "The **main object** to be desired in expanding copyright protection accorded to music has been **to give to the composer an adequate return for the value of his composition**, and it has been a serious and a difficult task **to combine the protection of the composer with the protection of the public**, and to so frame an act that it would accomplish **the double purpose of securing to the composer an adequate return for all use made of his composition** and at the same time **prevent the formation of oppressive monopolies**, which might be founded upon the very rights granted to the composer for the purpose of protecting his interests." H.R. Rep. No. 2222, 60th Cong., 2d Sess., 7 (1909).

This is truer in this country than in the United States. Radio is still the most accessible means of entertainment and information for most of our people. Internet may now be ubiquitous for those who have resources to spare but not to the many who have to live by the day. They are the ones who have small businesses to tender, with the radio as their only companion as source of entertainment and information. The ruling that the *Majority* forges will deny these penurious businesses the radio as their mode for connecting to the rest of the country and a means for relieving them of stress.

It is not uncommon for this Court to adopt from foreign jurisdictions concepts and doctrines that allowed a judge or court not to decline to render judgment by reason of the silence, obscurity, or insufficiency of the laws. We have often supplemented ambiguous terms in our statutes with thinking from elsewhere where it makes sense to do so.

Here, copyright should be limited where to do otherwise would be oppressive to the marginalized and underrepresented, those who cannot afford beyond what the ubiquitous radio could afford. The **homestyle exemption** in the United States could be adapted to help us define what **private** means in Section 184(1)(a) of RA 8293.

This exemption has been explained thus:

> The **elements** of Section 110(5) that Edison must satisfy are **(1)** that it **uses a single receiving apparatus** in its stores; **(2)** that the **receiving apparatus is of a kind commonly used in private homes**; and **(3)** that Edison does **not further transmit or broadcast to the public** the transmission it receives (the "second transmission" restriction). The Court finds that Edison has satisfied each of these elements through its Radio Policy.

The **first element** is satisfied in that each store that Edison owns and operates **only uses one radio receiver at a time**. The Court finds no merit in BMI's argument that the Court should focus on the number of stores, and thereby the total number of radios that Edison operates nationwide, rather than on the number of radios per store. The homestyle exception makes no sense unless **it is applied on a store-by-store basis**, to see whether **each store is operating one set of simple radio equipment without extensive augmentation**. It does not matter whether the owner repeats this compliance process for two or more stores.

BMI's argument would mean that any chain of two or more stores owned and operated by the same person would be disqualified from the Section 110(5) exception. The Aiken case, which carved out this homestyle exception, involved a defendant, Mr. Aiken, who owned and operated more than one place of business, see Twentieth Century Music Corp. v. Aiken, 356 F. Supp. 271, 272 (W.D. Pa. 1973), and no court interpreting Section 110(5) has ever taken the position that operating two or more stores disqualifies a person from the exception. The Court finds that it is not appropriate to focus on the number of stores involved, but rather on whether each store duplicates the requirements of the homestyle exception. Accord, Broadcast Music, Inc. v. Claire's Boutiques, Inc., 754 F. Supp. 1324 (N.D. Ill.1990).

Edison also satisfies the second factor, in that its Radio Policy requires the use of simple, low grade radio-only receivers, **only two speakers may be attached to a radio receiver**, and **only portable box speakers are allowed**. Edison's strict enforcement of its Radio Policy ensures that **the abuses** reported in other cases **do not occur in its stores; abuses such as where high powered equipment**, or **equipment attached to large numbers of speakers**, or **equipment augmented by voice-over intercom systems** and the like were passed off as "homestyle" radio systems. See, e.g., Plaintiff's Reply and Opposition Memorandum, Appendix A; National Football League, supra, 792 F.2d at 731 (citing cases).

The equipment Edison employs is of **a type generally sold for private consumer use**, and the **equipment is placed or installed in the stores in a manner duplicating its placement in a common household**; i.e. the **radio-only receiver unit is placed on or underneath a shelf, two normal box speakers** are attached with ordinary speaker wire, and the wire is generally exposed to view, the **speakers are placed on a shelf or hung on a wall** near to the receiver, and speakers that are built into the walls or ceilings may not be used. In this day of digital-audio-computerized-noise reduced technology, most modern stereo buffs would no doubt be aghast at the low-tech, low-performance and low cost of Edison's store equipment, but it appears that Edison is attempting to **focus on simplicity**, and the spirit of the exception when it was first promulgated in 1976.

Lastly, the Court finds that Edison has complied with the **"second transmission" restriction of the homestyle exception**. What this restriction means is that **the homestyle operator may not rebroadcast or secondarily broadcast a radio transmission to the public without liability**. A **simple example** of conduct that would violate this restriction is **where the operator tapes a radio broadcast in order to play it later**, with or without editing or augmentation. Certain courts have declared that other,

> less well defined conduct violates the restriction, such as **where the speakers are so far from the receiver**, or are **remotely placed in a room different from the receiver**, that **the playing of the broadcast through the remote speakers constitutes a second transmission** to the public. See Claire's Boutiques, supra, 754 F. Supp 1332, fn. 17 (citing cases). **The Court doubts the validity of an analysis of the distancing of the speakers in various stores**, but in any case finds that Edison's policy to place the two speakers no more than fifteen feet from the receiver is well within the range of any modest homestyle setup, and does not violate the second transmission restriction.[6]

In the context of this case, the above elements should define what the word **private** means in Section 184(1)(a) of RA 8293. The definition hews closely to how **public** is described in Section 171.6 of RA 8293 says of what *public* is – persons **outside the normal circle** of a family and the family's closest social acquaintances. There is a close analogy between the **family** setting and the **homestyle** characterization as a copyright limitation. This familiarity between the concepts should not get lost.

ACCORDINGLY, I vote to dismiss the petition and affirm the respective Decisions of the trial court *and* the Court of Appeals.

AMY C. LAZARO-JAVIER
Associate Justice

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MARIA LUISA M. SANTILLA
Deputy Clerk of Court and
Executive Officer
[illegible], Supreme Court

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6 *Edison Bros. Stores v. Broad. Music, Inc.*, 760 F. Supp. 767, 1991 U.S. Dist. LEXIS 4357, *7-11.