EN BANC

G.R. No. 222537 – COSAC, Inc., *Petitioner,* **v. Filipino Society of Composers, Authors and Publishers (FILSCAP),** *Respondent.*

Promulgated:

February 28, 2023

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SEPARATE CONCURRING OPINION

ZALAMEDA, *J.*:

PREFATORY STATEMENT

A basic principle of international law requires a State party to an international treaty must ensure that its own domestic law and practice are consistent with what is required by the treaty.[1]

The Berne Convention for the Protection of Literary and Artistic Works (the Berne Convention) provides a milestone in acknowledging the rights of authors and providing a framework that would ensure their protection. But times have changed and today's technological advancement have paved the way for new types of works, new markets and new methods of use and dissemination.[2]

In response to these changes, new treaties were adopted to update and supplement to the Berne Convention. References to these treaties are essential in determining the extent of copyright and related rights to today's environment, especially in the context of digital technologies.[3] Doing so would effectuate and achieve the fundamental rule of *pacta sunt servanda* or performance of international agreements in good faith.

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1 United Nations Handbook for Parliamentarians on the Convention on the Rights of Persons with Disabilities.

2 See *The Advantages of Adherence to the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT)*; the International Bureau of WIPO, p. 2.

3 Id.

DISCUSSION

I would like to express my concurrence with the *ponencia*, except for a few matters which I have a different perspective on, particularly, the difference between public performance and communication to the public. It is very rare for the Court to encounter cases involving intellectual property, especially copyright infringement. It was only recently that the case of *FILSCAP v. Anrey, Inc.*[4] (*Anrey)* was promulgated by the Court *en banc*. The *Anrey* case gave way for an opportunity for the Court to elaborate on the public performance rights of a copyright owner and balance it against the interest of the common good.

To recall, in *Anrey*, the Court was faced with the issue of whether the **unlicensed playing of radio broadcasts as background music** in dining areas of a restaurant amounts to copyright infringement.[5] The Court answered this in the affirmative. It explained that there was a violation of the owner's public performance right, which includes the broadcasting of music and specifically covers the use of loudspeakers.[6] Nonetheless, the Court concluded that there is no violation of the owner's right to communicate to the public, as the latter more particularly covers advanced methods of communication such as interactive on-demand systems like the internet.[7]

Meanwhile, the present case involves allegedly infringing activities committed through performance by a live band and **playing of sound recordings**.[8] In contrast, while the *ponencia* acknowledged that the methods of playing the sound recordings were not differentiated by FILSCAP nor delved into by the lower courts, it held that COSAC infringed on FILSCAP's copyright without distinction as to specific economic right infringed.[9]

I agree with the *ponente* in his determination that COSAC certainly is liable for copyright infringement. And while the *ponencia* did not specify the specific economic right infringed, I would like to take this opportunity to discuss and attempt to create fine distinctions between the public performance right versus the right to communicate the copyrighted material to the public.

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4 G.R. No. 233918, 09 August 2022.
5 Id.
6 Id.
7 Id.
8 *Ponencia*, p. 17
9 Id. at 17-18.

Distinction between public performance and other communication to the public

Section 177 of Republic Act No. (RA) 8293,[10] otherwise known as the "Intellectual Property Code (IPC)," provides for the following economic rights on copyright:

> 177.6. Public performance of the work; and
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> 177.7. **Other** communication to the public of the work (Emphasis supplied.)

A "public performance" means:

> 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 acquaintance are or can be present**, (e.g. radio broadcast as background music in dining areas) 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)

On the other hand, the term "communication to the public" or "communicate to the public bear the following meaning:

> 171.3. "Communication to the public" or "communicate to the public" means **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.** (Emphasis supplied.)

In *Anrey,* We made an exhaustive discussion on the subject but to summarize, there is an overlap between the right to public performance and the right to communicate to the public, with the right to **public performance being the broader of these rights.** This conclusion was made on a collective and harmonized approach: by reviewing treaties,

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[10] Entitled: "AN ACT PRESCRIBING THE INTELLECTUAL PROPERTY CODE AND ESTABLISHING THE INTELLECTUAL PROPERTY OFFICE, PROVIDING FOR ITS POWERS AND FUNCTIONS, AND FOR OTHER PURPOSES." Approved: 06 June 1997.

jurisprudence of foreign countries, legislative history, and other secondary sources.

The Berne Convention and the Paris Act

In 1886, an international assembly was held by European countries on a uniform approach to protect the literary and artistic works of authors against infringement. Initially, there were only ten European countries that acceded to the Berne Convention but the list grew enormously throughout the years. This caucus became known as the Berne Convention. The provisions under the Berne Convention underwent several revision, the most notable one was in 1971 in Paris. It became known as the Guide to the Substantive Provisions of the Berne Convention for the Protection of Literary and Artistic Works (Paris Act of 1971). The Paris Act of 1971 entitled authors certain economic rights including the right to public performance and broadcasting, thus:

ARTICLE 11
Right of Public Performance
Article 11, paragraph (1)
Scope of the Right

(I) Authors of dramatic, dramatico-musical and musical works shall enjoy the exclusive right of authorizing:

(i) the public performance of their works, including such public performance by any means or process;
(ii) any communication to the public of the performance of their works.

ARTICLE 11*bis*
Right of Broadcasting
Article 11*bis*, paragraph (1)
Scope of the Right

(1) Authors of literary and artistic works shall enjoy the exclusive right of authorizing:
(i) the broadcasting of their works or the communication thereof to the public by any other means of wireless diffusion of signs, sounds or images;
(ii) any communication to the public by wire or by rebroadcasting of the broadcast of the work, when this communication is made by an organization other than the original one;
(iii) the public communication by loudspeaker or any other analogous instrument transmitting, by signs, sounds or images,

the broadcast of the work.

The Berne Convention did not mention public communication as an independent economic right. Instead, it is enumerated as part of the right to public performance. This logic was confirmed when in 1978, the World Intellectual Property Organization (WIPO) commissioned a subject matter expert to draft a written guide to the provisions of the Berne Convention. The result was the 1978 WIPO Guide to the Berne Convention (WIPO Guide) which states that the author's **right to public performance is split into two: 1) the right to authorize the public performance of his work; and 2) the right to communication to the public of a performance of the work,** thus:

> 11.3. The paragraph splits the right into two. The author has the exclusive right to authorise public performance of his work. x x x
> 11.4. However, it goes on to speak of "including such public performance by any means or process", and this covers performance by means of recordings; there is no difference for this purpose between a dance hall with an orchestra playing the latest tune and the next-door discotheque where the customers use coins to choose their own music. In both, public performance takes place. The inclusion is general and covers all recordings (discs, cassettes, tapes, videograms, etc.) though public performance by means of cinematographic works is separately covered—see Article 14(1)(ii)." (Underscoring supplied.)
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> 11.5. The second leg of this right is the communication to the public of a performance of the work. It covers all public communication except broadcasting which is dealt with in Article 116/5. For example, a broadcasting organisation broadcasts a chamber concert. Article 116/5 applies. But if it or some other body diffuses the music by landline to subscribers this is a matter for Article 11.[11]

The WIPO Guide also contained a discussion about radio-over-loudspeakers and considered it as a new and separate public performance from the original transmission of the copyrighted work, thus:

> 11*bis*.11. Finally, the third case dealt with in this paragraph is that in which the work which has been broadcast is publicly communicated e.g., by loudspeaker or otherwise, to the public. This case is becoming more common. In places where people gather (cafés, restaurants, tea-rooms, hotels, large shops, trains, aircraft, etc.) the practice is growing of providing broadcast programmes. There is also an increasing use of copyright works for advertising purposes in public places. The question is whether the licence given by the author to the broadcasting station covers, in addition, all the use made of the broadcast, which may or may not be for commercial ends.

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[11] WIPO – 1978 Guide to the Berne Convention, pp. 64-65.

> 11*bis*.12. The Convention's answer is "no". Just as, in the case of a relay of a broadcast by wire, an additional audience is created (paragraph (1) (ii)), so, in this case too, the work is made perceptible to listeners (and perhaps viewers) other than those contemplated by the author when his permission was given. Although, by definition, the number of people receiving a broadcast cannot be ascertained with any certainty, the author thinks of his licence to broadcast as covering only the direct audience receiving the signal within the family circle. Once this reception is done in order to entertain a wider circle, often for profit, an additional section of the public is enabled to enjoy the work and it ceases to be merely a matter of broadcasting. **The author is given control over this new public performance of his work.**[12] (Emphasis supplied.)

This is the basis why the Court in *Anrey* held that the license given to the radio station to broadcast the copyrighted works does not extend to establishments that tune in and play the radio broadcasts using loudspeakers in their establishments. The radio reception creates a *new public performance* that is separate and distinct from the broadcast. **The act of playing radio broadcasts containing copyrighted music through the use of loudspeakers is in itself another performance.**

Indeed, public performance includes performance by means of a recording. A musical work is considered publicly performed when a sound recording of that work or phonogram, is played over amplification equipment, for example in a discotheque, airplane, or shopping mall.[13]

Despite the explanation provided under the WIPO Guide, a confusion arose on the true meaning of "communication to the public." This is because Section 171.3 of the IPC which contained the definition of the term "communication to the public" underwent changes in a relatively short amount of time. **So to understand the term better, it is necessary to look into the historical details of the provision's origin.**

The distinct "Making-Available to the Public Right" and the so-called Internet Treaties

The original text under the IPC (RA 8293) defines communication to the public as:

> Sec. 171. Definitions. - For the purpose of this Act, the following terms

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[12] Id. at 68-69.

[13] Understanding Copyright and Related Rights; World Intellectual Property Organization (WIPO), 2016, p. 12.

have the following meaning:

x x x x

171.3. "Communication to the public" or "communicate to the public" means 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;

This definition, however, was lifted directly from the [WIPO] Copyright Treaty (Copyright Treaty) of 1996. Article 8 of the Copyright Treaty[14] reads:

Article 8
Right of Communication to the Public

Without prejudice to the provisions of Articles 11(1)(ii), 11bis(1)(i) and (ii), 11ter(1)(ii), 14(1)(ii) and 14bis(1) of the Berne Convention, authors of literary and artistic works shall enjoy the exclusive right of authorizing any communication to the public of their works, by wire or wireless means, including the making available to the public of their works in such a way that members of the public may access these works from a place and at a time individually chosen by them. (Underscoring supplied.)

The Internet was a game-changer and authorities may not have anticipated Internet as a medium to broadcast copyrighted works. Thus the WCT introduced the right to "communication to the public." But as explained in the quoted text, this right finds particular application to advanced forms or medium of communication such as the Internet.

This provision has been regarded by Member States as the restricted right of "making the work available to the public" (for brevity, the "making available right") and **the WIPO explained that the "making available right" refers to interactive on-demand systems like the Internet. It does not refer to other traditional forms like broadcasting and transmitting of signals where a transmitter and a receiver are required as discussed in the WIPO Guide to the Berne Convention.** Here is an excerpt of WIPO's explanatory note to the Copyright Treaty:

The WIPO Copyright Treaty (WCT) is a special agreement under the Berne Convention that deals with the protection of works and the rights of their authors in the digital environment."

"As to the rights granted to authors, apart from the rights recognized by the Berne Convention, the Treaty also grants: (i) the right of distribution; (ii) the right of rental; and (iii) a broader right of communication to the public.

[14] https://wipolex.wipo.int/en/text/295166; last accessed on 20 July 2022.

> "The right of communication to the public is the right to authorize any communication to the public, by wire or wireless means, including "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". The quoted expression covers, in particular, on-demand, interactive communication through the Internet.[15] (Underscoring supplied.)

In 2013, Sec. 171.3 of the IPC (RA 8293) was amended by RA 10372[16] (An Act Amending Certain Provisions of the IPC) to expand its scope and coverage, 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.

The amendment led to two formulations of the "communication to the public" right. The first is the formulation under the IPC (RA 8293) which exclusively contains the "making available right". On the other hand, the modern formulation created by the amendment in RA 10372 has a broader scope and now consists of five variations in which the expanded "communication to the public" may be infringed: 1) broadcasting; 2) rebroadcasting; 3) retransmitting by cable; 4) broadcasting and retransmitting by satellite; and 5) the making available right.

In this case, considering that the infringing acts took place on scattered dates in 2005 and 2006, then We are supposed to be bound by the original definition under Sec. 171.3 of the RA 8293. And the original definition exclusively refers to one particular right, which is the "making available right." It has been explained by the WIPO that the said right only covers on-demand and interactive communication through the Internet.

U.S. authorities also reserve its applicability to copyright owners on the right to control interactive, on-demand dissemination of copyrighted works over the Internet, including provision of access to streams or downloads.[17] Also, the European Union, under Recitals 24-27 of Article 3, Directive 2001/29/EC provide a background on this right:

> (24) The right to make available to the public subject-matter referred to in Article 3(2) should be understood as covering all acts of making available

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[15] Available at https://www.wipo.int/treaties/en/ip/wct/summary_wct.html, last accessed 20 July 2022.

[16] Entitled: "AN ACT AMENDING CERTAIN PROVISIONS OF REPUBLIC ACT NO. 8293, OTHERWISE KNOWN AS THE INTELLECTUAL PROPERTY CODE OF THE PHILIPPINES, AND FOR OTHER PURPOSES." Approved: 28 February 2013.

[17] The Making Available Right in the United States, U.S. Copyright Office (2016), p. 15.

> such subject-matter to members of the public not present at the place where the act of making available originates, and as not covering any other acts.
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> (25) The legal uncertainty regarding the nature and the level of protection of acts of on-demand transmission of copyright works and subject-matter protected by related rights over networks should be overcome by providing for harmonised protection at Community level. It should be made clear that all rightholders recognised by this Directive should have an exclusive right to make available to the public copyright works or any other subject-matter by way of interactive on-demand transmissions. Such interactive on-demand transmissions are characterised by the fact that members of the public may access them from a place and at a time individually chosen by them.
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> (26) With regard to the making available in on-demand services by broadcasters of their radio or television productions incorporating music from commercial phonograms as an integral part thereof, collective licensing arrangements are to be encouraged in order to facilitate the clearance of the rights concerned.
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> **(27) The mere provision of physical facilities for enabling or making a communication does not in itself amount to communication within the meaning of this Directive.** (Emphasis supplied.)

Even if We disregard the explanations provided by secondary sources, it is still my firm point of view that the making available right is an umbrella clause, not for any type of public communication, but only to those situations which may not have been contemplated with the advent of Internet.

If We look at Sec. 177.7 (regardless if under the Original or Amended IPC), the specific economic right enumerated is the right to **"other** communication to the public." **The word "other" qualifies the phrase "communication to the public" which indicates that there are certain acts of communication to the public that are subsumed by the definition of public performance.** We cannot simply disregard the word **"other"** and treat it as a worthless qualifier of the clause "communication to the public."

Also, my interpretation of the communication to the public right has a lot to do with the phraseology of its definition. Although the definition says that **making of a work available to the public by wire or wireless means amounts to communication to the public, this definition is qualified by the phrase "in such a way that members of the public may access these works from a place AND time individually chosen by them."** The phrase used the conjunctive word "AND" which means that in order for it to qualify as a "communication to the public" within the definition, the transmission must not only be made available to the public, but the public must also have discretion to access the copyrighted material at the place AND at a time individually chosen by them.

So the essence of the making available right is to give the public liberty to access a particular protected work, not just to the place of their own choosing, but also the time. This is exactly the reason why the making available right is limited to On-Demand platforms (such as Netflix, Disney Plus, Amazon Prime, HBO Go, Spotify, iTunes, or Youtube) since these platforms offer discretion to access particular protected work at a place AND time of their own choosing. The Internet has provided accessibility to copyrighted materials in ways traditional media can never achieve.

To illustrate (and for purely illustrative purposes only), the series the Walking Dead used to run on the local channel TV5 every Saturday at 7:00 P.M. But the entire series is also available on Disney Plus. Here the act of making the Walking Dead series available in the Disney Plus streaming platform amounts to "making it available to the public" since a subscriber can access the series without any regard as to the place and to the time so long as he has his phone or laptop. He can even watch it at work on his computer or at home by chromecasting on his Internet-capable Sony Bravia TV. So if it turns out that Disney Plus does not have the rights to stream the Walking Dead series, then Disney Plus is liable for infringement under the making-available formulation. The particular economic right violated is the public communication right.

On the contrary, if TV5 does not have the license to broadcast the series the Walking Dead, then the right infringed cannot be the "making available right" because the audience is prevented access the series at a time of his own preference, since TV5 only broadcasts the work every Saturday at 7:00 p.m. The audience is only deprived preference to access the series at his preferred place since he can only view the series where there is television, which is normally at home.

Clearly, not every communication of the protected work should be categorized as "communication to the public." Especially since a public performance of a work would always, to a certain extent, involve an element of public communication. Sometimes, the demarcation between these two rights become obscure and fragmented. But most of the time the particular acts that fall under each right becomes defined by referring to treaties, foreign jurisdiction and knowing the history behind the introduction of the law. This is the very same approach the Court adopted in *Anrey*, when We ruled that Sec. 171.3 of the IPC (RA 8293) on communication to the public is the exact embodiment of the restricted "making available right".

Justice Caguiao, in his separate Concurring Opinion remarked that in order to constitute public performance, the performance must be "perceive[able] without the need for communication within the meaning of

Subsection 171.3.[18] I also agree to this exclusionary approach; that if the performance was publicly communicated through the process mentioned under Sec.171.3, then the copyright infringed is the communication to the public copyright, and not public performance.[19]

I agree for this may very well be the reason why in *Anrey*, the Court treated radio-over-loudspeakers to involve the public performance copyright, and not "communication to the public" simply because radio-over-loudspeakers does not provide the listener access to the protected work at a place AND time of his own choosing.

Even if We assume that the modern formulation of the communication to the public right introduced by the amendments in RA 10372 retroactively applies, still the acts involved in this case can neither qualify.

To reiterate, under the present and modern definition, there are only five variations in which the expanded "communication to the public" right covers: 1) broadcasting; 2) rebroadcasting; 3) retransmitting by cable; 4) broadcasting and retransmitting by satellite; and the 5) making available right which has been thoroughly discussed above. If there is anything that defines copyright laws, almost every word bears a technical meaning.

Broadcasting has been defined by RA 10372 (which was lifted from the WPPT) as the transmission by wireless means for the public reception of sounds or of images or of representations thereof; such transmission by satellite is also "broadcasting" where the means for decrypting are provided to the public by the broadcasting organization or with its consent.[20] The last phrase should be interpreted as retransmitting by satellite under the fourth enumeration.

Our law does not define rebroadcasting but Article 3(g) of the Rome Convention defines "rebroadcasting" as the "simultaneous broadcasting by one broadcasting organization of the broadcast of another broadcasting organization." We acceded to the Rome Convention on 25 June 1984.[21] Likewise, the Rome Convention is integrated in the WPPT. Rebroadcasting under the Rome Convention is limited to over-the-air transmissions.

The European Parliament and the Council of the European Union defines retransmitting by cable or cable retransmission as the unaltered and unabridged retransmission by a cable or microwave system for reception by

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[18] *J.* Caguioa Separate Concurring Opinion dated 03 October 2022, p.10.

[19] Id. p. 12.

[20] Sec. 202.7 of the IPC (as amended).

[21] WIPO-Administered Treaties, "Contracting Parties > Rome Convention", available at https://www.wipo.int/wipolex/en/treaties/ShowResults?search_what=C&treaty_id=17 (last accessed 24 February 2023).

the public of an initial transmission from another Member State, by wire or over the air including that by satellite, of television or radio programmes intended for reception by the public, regardless of how the operator of a cable retransmission service obtains the programme-carrying signals from the broadcasting organization for the purpose of retransmission.[22]

The infringing acts involved in the present case do not fit in any of the foregoing definitions. Here COSAC was allegedly involved in hosting live-band performances and in the unauthorized playing of radio broadcasts. Had FILSCAP laid down the necessary distinctions; and had the lower courts delved on to these distinctions, then the acts should have been classified as public performances of the protected work, not communication to the public.

I urge prudence by referring to the history that led to the introduction of the new definition of "communication to the public" under the amendments of RA 10372. We introduced the amendment as an affirmative action in acceding to the terms of the WIPO Performances and Phonograms Treaty (WPPT) of 1996. It incorporated the obligations created by the Rome Convention for the Protection of Performers, Producers of Phonograms, and Broadcasting Organizations (1961 Rome Convention). The Rome Convention expanded and dealt with broadcasting rights. On the other hand, the WPPT is regarded as an "Internet Treaty."[23] I mentioned this because We may be ascribing acts beyond the contemplation of the Treaties that introduced them.

Finally, I would like to inject that if there is any gap or void in the IPC, the Court should recommend to Congress proposed changes in the IPC rather than making pronouncements that would in effect judicially legislate on matters which are not properly at issue.

Based on the above disquisitions, I vote to **DENY** the Petition and hold COSAC liable for copyright infringement.

RODIL V. ZALAMEDA
Associate Justice

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[22] Art. 1 of Directive 93/83/EEC, par. 3.

[23] WIPO Internet Treaties, available at https://www.wipo.int/copyright/en/activities/internet_treaties.html, last accessed 24 February 2023.