EN BANC

G.R. No. 188933 – PHILIPPINE HOME CABLE HOLDINGS, INC., *petitioner, versus* **FILIPINO SOCIETY OF COMPOSERS, AUTHORS AND PUBLISHERS, INC.,** *respondent.*

Promulgated:

February 21, 2023

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CONCURRING OPINION

CAGUIOA, *J.*:

I concur.

This case involves petitioner Philippine Home Cable Holdings, Inc. (Home Cable), a domestic company operating cable television,[1] and respondent Filipino Society of Composers, Authors and Publishers, Inc. (FILSCAP), a non-stock, non-profit domestic association of Filipino composers, authors, and publishers duly accredited by the Intellectual Property Office of the Philippines (IPOPHIL) as a Collective Management Organization (CMO),[2] which assists in protecting the intellectual property rights of its members. FILSCAP's role in enforcing the copyright of its members is as follows:

> [FILSCAP] x x x is a "non-stock, non-profit association of composers, lyricists, and music publishers" accredited by the [IPOPHIL] to perform the role of a [CMO], and is a member of the Paris-based International Confederation of Societies of Authors and Composers (*Confédération Internationale des Sociétés d'Auteurs et Compositeurs* or CISAC), the umbrella organization of all composer societies worldwide. Being the designated CMO of composers, lyricists, and music publishers, FILSCAP assists in "protecting the intellectual property rights of its members by licensing performances of their copyright music." For this purpose, FILSCAP gets assigned the copyright by its members, and, as assignee, then collects royalties which come in the form of license fees from end-users who intend to "publicly play, broadcast, stream, and to a certain extent (reproduce) any copyrighted local and international music of its members."[3]

In 1995, Home Cable executed a Memorandum of Agreement with Precision Audio Video Service, Inc. (Precision Audio), a domestic corporation that produced and distributed videoke laser disc recordings, to

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1 See *ponencia*, p. 2.

2 See id. at 3 and 14; see also *J.* Caguioa, Separate Concurring Opinion in *FILSCAP v. Anrey, Inc.*, G.R. No. 233918, August 9, 2022, p. 1.

3 *J.* Caguioa, Separate Concurring Opinion in *FILSCAP v. Anrey, Inc.*, id. Citations omitted.

purchase laser discs containing videoke materials to be made available on Channel 38 for five (5) hours per day.[4] Pertinently, as stated in their agreement, Home Cable was responsible for and in control of operating Channel 38.[5] A year later, Home Cable executed a similar Memorandum of Agreement with Precision Audio for the operation of Channels 22, 32, and 52, which also provided for Home Cable's responsibility and control over the three (3) channels, the contents of which were to be provided by Precision Audio's videoke laser discs.[6]

In July 1997, FILSCAP monitored Home Cable and found that the musical compositions of its members and foreign affiliates were being played on Channels 22 and 32.[7] It sent letters to Home Cable requesting the latter to obtain a license for the continued use of the musical compositions, but these were unheeded.[8] A year later, on January 12 and 13, 1998, FILSCAP again monitored the same channels and discovered that Home Cable continued to play musical compositions without having secured licenses from FILSCAP.[9]

On February 16, 1998, FILSCAP filed with the Regional Trial Court (RTC) a complaint for injunction and damages against Home Cable, demanding at least ₱1,000,000.00 in actual damages for unpaid license fees from August 16, 1997 until the filing of the complaint in February 1998, as well as exemplary damages and attorney's fees.[10]

The RTC, the Court of Appeals (CA), and the *ponencia* uniformly find Home Cable liable for copyright infringement, to which I concur. However, unlike the lower courts, the *ponencia* correctly highlights important points regarding the economic rights of the copyright owner, *viz.*:

> In respondent's Complaint, it alleged that petitioner has been "playing or otherwise performing or communicating to the public" the subject musical compositions. **Both the [RTC] and the [CA] determined that petitioner did both** when it cablecast[ed]—engaged in program origination of—the two karaoke[/videoke] channels. But the application of Section 177 is inexact. x x x **[O]nly an infringement of the "communication to the public" right has been committed.**
>
> x x x x
>
> As a result, x x x Republic Act No. 8293 not only modified the scope of the performance right into the **"public performance" right**, but also grants the **"communication to the public"** among the Code's new economic rights, by way of the distinct "making available" formulation.

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4 See *ponencia*, p. 2.
5 Id.
6 Id. at 3.
7 Id.
8 Id.
9 Id. at 3-4.
10 Id. at 4.

> Here, petitioner's act of cablecasting the karaoke[/videoke] channels cannot be considered an exercise of the public performance rights over the subject musical compositions. Concededly, the works were performed by means of certain processes, and because the musical compositions were fixed in sound recordings in a videoke format, they were made 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." **However, the fact that [the] "performance" of the musical composition requires the process described in Subsection 171.3—using wireless means to make the musical compositions available to the members of the public in such a way they may access these compositions from a place and time individually chosen by them—in order to be perceived places the act complained of outside Subsection 171.6.**
>
> It must be noted a later amendment to the Intellectual Property Code, in Republic Act No. 10372, further expanded the scope of "communication to the public" to include broadcasting, rebroadcasting, retransmitting by cable, and retransmitting by satellite:
>
> x x x x
>
> Nonetheless, **even prior to the amendment, playing a musical composition, fixed in an audiovisual derivative work, over cable television to paying subscribers is making that work accessible to members of the public from a place or time individually chosen by them. This is the essence of the "communication to the public" right.**[11] (Emphasis supplied)

Two important points are highlighted by the *ponencia* above: (1) the exclusive rights of "public performance" and "communication to the public" are separate and distinct from each other; and (2) even prior to the amendment of the Intellectual Property (IP) Code[12] by Republic Act (R.A.) No. 10372,[13] broadcasting musical compositions was already considered an exercise of the author's right of "communication to the public."

I expound on these key points below.

I. The right of "public performance" and the right of "communication to the public" are two separate and distinct rights.

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11 Id. at 17-18 and 23-24.

12 R.A. No. 8293, AN ACT PRESCRIBING THE INTELLECTUAL PROPERTY CODE AND ESTABLISHING THE INTELLECTUAL PROPERTY OFFICE, PROVIDING FOR ITS POWERS AND FUNCTIONS, AND FOR OTHER PURPOSES, otherwise known as the "INTELLECTUAL PROPERTY CODE OF THE PHILIPPINES," approved on June 6, 1997.

13 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 on February 28, 2013.

As correctly shown in the *ponencia*, the IP Code differentiates the rights of "public performance" and "communication to the public."[14] That the public performance right and right to communicate to the public are separate and distinct rights which are available to, and may separately be exploited by, the author is made clear by several provisions in the IP Code.[15]

First, Section 177 of the IP Code separately designates these rights under the "menu" of economic rights pertaining to the copyright holder,[16] *viz.*:

> **Chapter V.**
>
> **COPYRIGHT OR ECONOMIC RIGHTS**
>
> **SEC. 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; (n)
>
> 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. (Sec. 5, P.D. No. 49a)** (Emphasis supplied)

Second, a scrutiny of the quoted definitions of "public performance" and "communication to the public" in the IP Code makes it apparent that the definition of "public performance" in Section 171.6 is exclusionary in the sense that it "expressly requires that 'the performance x x x be perceived without the need for communication [to the public] within the meaning of Subsection 171.3 [of the IP Code].'"[17] Thus, "if an aspect of a performance can be perceived by the public by means of 'communication' as defined under Section 171.3, *i.e.*, '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,' then this aspect of the performance would only be a 'communication to the public' and would not therefore constitute a 'public performance.'"[18]

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[14] See *ponencia*, pp. 18-23.

[15] *J.* Caguioa, Separate Concurring Opinion in *FILSCAP v. Anrey*, supra note 2, at 44.

[16] Id.

[17] Id.

[18] Id. at 45. Citation omitted.

Third, the provisions of the IP Code on the rights of performers, producers of sound recordings, and broadcasting organizations also make it clear that the rights of "public performance" and "communication to the public" are separate and distinct from each other.[19] As discussed in my Separate Concurring Opinion in *FILSCAP v. Anrey, Inc.*[20]:

> CHAPTER XII
>
> Rights of Performers, Producers of Sounds Recordings and Broadcasting Organizations
>
> x x x x
>
> SECTION 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.
>
> x x x x
>
> 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. x x x
>
> Notably, under Section 209 of the IP Code, performers and producers of sound recordings are entitled to remuneration whenever (i) a sound recording is published for commercial purposes, or (ii) when reproductions of such sound recordings are (a) "used directly for broadcasting or for other communication to the public" (*i.e.*, right to communicate to the public), or (b) "publicly performed with the intention of making and enhancing profit" (*i.e.*, right of public performance). In other words, performers and producers would be entitled to remuneration for three distinct activities, which is clear from the use of the conjunction "or". Otherwise stated, if the intention was to only entitle the performers and producers to one remuneration for all of these activities combined, then the conjunction "and" should have been used. This further underscores that Sections 177.6 and 177.7 in relation to Sections 171.3 and 171.6 of the IP Code actually recognize two separate and distinct rights that may independently be exploited by an author or copyright owner.[21] (Emphasis omitted)

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19 Id. at 44.

20 Supra note 2.

21 Id. at 44-45. Citation omitted.

This distinction between the rights of "public performance" and "communication to the public" is further highlighted in the Berne Convention, which the Philippines formally acceded to in 1950 and which became effective in respect of the Philippines on August 1, 1951.[22] The Senate of the Philippines, by its Resolution No. 21 dated May 16, 1950, likewise concurred in the accession thereto by the Philippines.[23] Thereafter, the President, by Proclamation No. 137 dated March 15, 1955, made public the Philippines' accession to the Berne Convention "to the end that the same and every article and clause thereof may be observed and fulfilled with good faith by the Republic of the Philippines and the citizens thereof."[24] The following disquisition explains how the IP Code's separation of "public performance" and "communication to the public" mirrors how the Berne Convention likewise separates the two rights:

> x x x Articles 11 and 11*bis* of the Berne Convention, which recognize the performance right and broadcasting right, respectively, provide:
>
> **Article 11**
> [*Certain Rights in Dramatic and Musical Works:* 1. Right of Public Performance and of communication to the public of a performance x x x]
>
> (1) 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**. x x x
>
> **Article 11*bis***
> [*Broadcasting and Related Rights:* 1. Broadcasting and other wireless communications, public communication of broadcast by wire or rebroadcast, public communication of broadcast by loudspeaker or analogous instruments x x x]
>
> (1) Authors of literary and artistic works shall enjoy the exclusive right of authorizing:

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22 Proclamation No. 137, MAKING PUBLIC THE ACCESSION OF THE REPUBLIC OF THE PHILIPPINES TO THE BERNE CONVENTION FOR THE PROTECTION OF LITERARY AND ARTISTIC WORKS, REVISED AT BRUSSELS ON JUNE 26, 1948, dated March 15, 1955, available at <https://www.officialgazette.gov.ph/downloads/1955/03mar/19550315-PROC-0137-RM.pdf>; see also WIPO-Administered Treaties, Contracting Parties to the Berne Convention, WORLD INTELLECTUAL PROPERTY ORGANIZATION, available at <https://wipolex.wipo.int/en/treaties/ShowResults?search_what=C&treaty_id=15>

23 Proclamation No. 137, id.

24 Id.

> (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**.
>
> (2) It shall be a matter for legislation in the countries of the Union to determine the conditions under which the rights mentioned in the preceding paragraph may be exercised, but these conditions shall apply only in the countries where they have been prescribed. They shall not in any circumstances be prejudicial to the moral rights of the author, nor to his right to obtain equitable remuneration which, in the absence of agreement, shall be fixed by competent authority. x x x

Thus, under the Berne Convention, public performance and any communication of such performance is covered by Article 11 thereof. However, similar to how the IP Code is worded, if the public communication is via a specific mode or means of transmission, *i.e.*, by means of broadcasting or other "wireless diffusion," by wire or rebroadcasting (if the communication is made by an organization other than the original one), or by loudspeaker or any other analogous instrument of the broadcast of the work, then the same will fall under Article 11*bis*.

In fact, the foregoing stance is made clear by the WIPO in its explanatory guide to the Berne Convention (WIPO Guide). Anent the difference of Article 11 from Article 11*bis* of the Berne Convention, the WIPO remarked as follows:

> 11.4. However, [Article 11] 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).

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 11*bis*.** For example, a broadcasting organisation broadcasts a chamber concert. Article 11*bis* applies. But if it or some other body diffuses the music by landline to subscribers, this is a matter for Article 11. x x x

Furthermore, the WIPO Guide also states that Article 11*bis*, which covers the author's right to communicate one's work by means of broadcasting, is "the fourth of the author's exclusive rights x x x, the other three being those of translation, reproduction and public performance." Anent the "broadcasting right," the WIPO elucidates that this right includes one primary right to authorize the broadcast of one's work via wireless means, and two other rights to authorize (i) the subsequent communication of said broadcast, by wire or rebroadcast, by an organization other than the one which originally made the broadcast, and (ii) the communication of the same broadcast via loudspeaker or a television screen to a "new public." Thus:

11*bis*.1. This provision is of particular importance in view of the place now taken by broadcasting (which, it must be remembered, includes both radio and television) in the world of information and entertainment. **It is the fourth of the author's exclusive rights to be recognised by the Convention, the other three being those of translation, reproduction and public performance.** The Rome Revision (1928) was the first to recognise the right "of authorising the communication of x x x works to the public by radio and television". Slightly muddled in its terms, the text was like broadcasting itself — in its infancy. It was in Brussels (1948) that the subject was more fully considered and the right broken down into its various facets in order to take account of the **various ways and techniques by which it might be exploited**. Neither Stockholm nor Paris made any change, other than to provide a more suitable translation in the newly authentic English text.

x x x x

11*bis*.3. The primary right is to authorise the broadcasting of a work and the communication thereof to the public by any other means of wireless diffusion of signs, sounds or images. It applies to both sound and television broadcasts. What matters is the emission of signals; it is immaterial whether or not they are in fact received.

11*bis*.4. A secondary right is the subsequent use of this emission: the author has the exclusive right to authorise communication of the broadcast to the public, either by wire (a CATV system) or without, **if the communication is made by an organisation other than the original one**.

11*bis*.5. Finally the third exclusive right is to authorise the public communication of the broadcast by loudspeaker or on a television screen.

x x x x

11*bis*.9. In other words, this paragraph demands that the author shall enjoy the exclusive right to authorise the broadcasting of his work and, **once broadcast, the communication to the public, whether by wire or not, if this is done by an organisation other than that which broadcast it. This act of wire diffusion differs from that covered in Article 11(1). The latter covers the case in which the wire diffusion company itself originates the programme, whereas Article 11*bis* deals with the diffusion of someone else's broadcast.**

11*bis*.10. For example, a company in a given country, usually for profit, receives the signals sent through the ether by a television station in the same or another country and relays them by wire to its subscribers. This is covered by Article 11*bis* (1)(ii). But if this company sends out programmes which it has itself originated, it is Article 11 which applies. What matters is whether or not a second organisation takes part in the distribution of the broadcast programmes to the public. (A working party which met in Paris in June 1977 considered the copyright and neighbouring rights problems caused by the distribution of television programmes by cable.) The task of distinguishing between such a practice and the mere reception of programmes by a community aerial was left to national laws.

11*bis*.11. Finally, the third case dealt with in this paragraph is that 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.

11*bis*.12. The Convention's answer is "no". Just as, in the case of relay of a broadcast by wire, an additional audience is created (paragraph (l) (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

> merely a matter of broadcasting. The author is given control over this new public performance of his work.
>
> 11*bis*.13. Music has already been used as an example, but the right clearly covers all other works as well — plays, operas, lectures and other oral works. Nor is it confined to entertainment; instruction is no less important. What matters is whether the work which has been broadcast is then publicly communicated by loudspeaker or by some analogous instrument *e.g.*, a television screen.

Parsed, while the communication of a "performance" may fall under Article 11 of the Berne Convention (governing public performance), this is only true if the performance can be perceived without the need for communication within the meaning of Article 11*bis* — very much like how Section 171.6 of the IP Code is worded. On the other hand, under the Berne Convention, if the communication to the public is made either (i) via broadcast or by any other means of wireless diffusion, (ii) whether by wire or not, by an organization other than the one who originally made the broadcast, or (iii) through a broadcast of the work through a loudspeaker, television screen, or other analogous instrument, then Article 11*bis* applies. **Put simply, one clear similarity between the structure of the Berne Convention and the IP Code is that both categorically separate the concept of "public performance" from "broadcasting," such that a work that is conveyed to the public solely via radio [or television] broadcast does <u>not</u> constitute an exercise of the author's right of "public performance," but rather of the author's right of "[b]roadcasting and other wireless communications, public communication of broadcast by wire or rebroadcast, public communication of broadcast by loudspeaker or analogous instruments[,]" or, as referred to under the IP Code, the author's right to "communicate to the public."**

Applying the foregoing principles to our jurisdiction, this means that under the IP Code, as under the Berne Convention, the single act of broadcasting of musical compositions contained in sound [or audiovisual] recordings, either by the original broadcaster or "by an organization other than the original one[,]" or by other business establishments solely "by loudspeaker or any other analogous instrument" (as worded in Article 11*bis* of the Berne Convention), is actually an exercise of the author's right to "communicate to the public" his or her work under Section 171.3 of the IP Code. This is clear from the wording of Section 171.3 of the IP Code which specifically defines "communication to the public" as the "making of a work available to the public by **wire or wireless means** x x x," and from the wording of Section 202.7 of the IP Code which defines "broadcasting" as a mode of "**transmission by wireless means** for the public reception of sounds[.]" **As well, by the wording of Section 171.6 of the IP Code, this may also mean that such act does not constitute an exercise of an author's public performance right.**

In other words, based on the IP Code's definition of these two rights, as further clarified by the Berne Convention, broadcasting a musical composition over the radio [or television] or communicating the same in some other "wire or wireless means x x x" would simply constitute an exercise of the right to "communicate to the public." x x x

x x x x

> Being a contracting party to the Berne Convention, the Philippines must recognize not only the distinction between the rights of public performance and communication to the public, as already discussed above, but also the scope and nature of the exclusive rights recognized under Article 11*bis* of the Berne Convention, namely — (i) the right to authorize the broadcast of one's work via wireless means, (ii) the right to authorize the subsequent communication of said broadcast, by wire or rebroadcast, by an organization other than the one which originally made the broadcast, and (iii) the right to authorize the communication of the same broadcast via loudspeaker or a television screen to a "new public." This recognition is vital "to the end that the [Berne Convention], and every article and clause thereof may be observed and fulfilled in good faith by the Republic of the Philippines and the citizens thereof."[25] (Emphasis and underscoring in the original)

In sum, the *ponencia* is correct in holding that the lower courts' application of Section 177 — *i.e.*, ruling that Home Cable had exercised both "public performance" right and "communication to the public" right — is inexact.[26] Home Cable did **not** exercise both rights when it "cablecasted," or engaged in the program origination of, the two videoke channels. Instead, Home Cable only committed copyright infringement by exercising without authority the authors' exclusive economic right of "communication to the public."[27]

II. Even prior to the amendment of the IP Code by R.A. No. 10372, broadcasting musical compositions was already considered an exercise of the right of "communication to the public."

The *ponencia*'s statement regarding this amendment bears repeating not only for easy reference but also for well-deserved emphasis:

> It must be noted a later amendment to the [IP] Code, in [R.A.] No. 10372, further expanded the scope of "communication to the public" to include broadcasting, rebroadcasting, retransmitting by cable, [broadcasting] and retransmitting by satellite:
>
> x x x x
>
> Nonetheless, **even prior to the amendment, playing a musical composition, fixed in an audiovisual derivative work, over cable television to paying subscribers is making that work accessible to members of the public from a place or time individually chosen by them. This is the essence of the "communication to the public" right.**[28] (Emphasis supplied)

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25 Id. at 46-50 and 57. Citations omitted.

26 *Ponencia*, pp. 17-18.

27 See id. at 18.

28 Id. at 23-24.

A table comparing the definition of "communication to the public" before and after the amendment introduced by R.A. No. 10372 is included below:

R.A. No. 8293 or the IP Code, approved on June 6, 1997; took effect on January 1, 1998	**R.A. No. 8293 or the IP Code, as amended by R.A. No. 10372**, approved on February 28, 2013; took effect on March 22, 2013
SEC. 171. *Definitions.*— x x x 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[.]	"SEC. 171. *Definitions.*— x x x "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[.]" (Emphasis and underscoring supplied)

To be sure, the amendment introduced by R.A. No. 10372, **insofar as Section 171.3 is concerned**, was not meant to substantially alter the nature of the authors' right of "communication to the public." It merely explicitly codified for further clarification what was already contained in the law: broadcasting videoke songs, among other acts, is making the 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. Put simply, even before the amendment, "broadcasting," among other acts, was already recognized by the IP Code as an exercise of the right of "communication to the public." The phrase "the public may access these works from a place and time individually chosen by them" in the definition of "communication to the public" only means that it allows the members of the public to access copyrighted works — regardless of whether the works were specifically chosen by the members of the public — in **places and times** chosen by such members.

Here, in Home Cable's act of broadcasting the videoke songs, the end-users and audiences appear to have no ultimate control or choice over what videoke songs are played. End-users and viewers cannot request Home Cable to play certain chosen songs because, logically, Home Cable can only play the songs in the order compiled by Precision Audio. This is clear from Home Cable's own allegation that it "has no control over the contents of materials x x x because the laser disc materials from Precision [Audio] already contain a compilation of songs per volume."[29] This element of end-user control or

[29] Id. at 6.

choice of musical works to be played, however — such as in services that offer on-demand, interactive communication through the internet — was never an integral element of "communication to the public," even prior to the amendment introduced by R.A. No. 10372. Prior to the amendment, members of the public were still able to access musical compositions fixed in audiovisual works or videoke songs, including those not selected by them, in **places and times** chosen by such members (*e.g.*, in the comfort of their own homes at 7:00 p.m. every weekday night) because of Home Cable's act of exercising the authors' right of "communication to the public."

In view of the foregoing, I concur with the *ponencia*, and vote to **DENY** the Petition.

ALFREDO BENJAMIN S. CAGUIOA
Associate Justice

EN BANC

G.R. No. 188933 – (PHILIPPINE HOME CABLE HOLDINGS, INC., Petitioner, **v. FILIPINO SOCIETY OF COMPOSERS, AUTHORS, & PUBLISHERS, INC.,** Respondent)

Promulgated: February 21, 2023

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CONCURRENCE

LAZARO-JAVIER, *J.*:

I concur in the *ponencia*. My *Opinion* in *Filipino Society of Composers, Authors and Publishers, Inc. v. Anrey, Inc.*[1] is not controlling. In *Anrey*, my *Opinion* is that respondent did not appropriate the rights of public performance and communication to the public when they turned on the radio within the hearing distance of their customers. In contrast, herein petitioner was clearly involved in the communication to the public of copyrighted songs as defined in the *Intellectual Property Code* –

> 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;
>
> 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.
>
> SECTION 209. **Communicatiou 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.

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[1] G.R. No. 233918, August 09, 2022.

Petitioner's act of transmitting the *videokes* by cable or broadcast is expressly covered by the definitions quoted above.

My only misgiving about this case, which is not the *ponente*'s fault, is the absence of a ruling on how to measure the amount of damages for infringements of this kind. None of the parties raised any issue about damages apart from their arguments on liability. I myself have no suggestion to offer since I do not wish to appear as lawyering for either of them. This state of affairs of our jurisprudence, however, must not stand for long as we strive to break out of this inertia.

Thus, I vote to deny the petition and affirm the decision of the Court of Appeals.

AMY C. LAZARO-JAVIER