EN BANC

G.R. No. 188933 – Philippine Home Cable Holdings Inc. *Petitioner,* **v. Filipino Society of Composers, Authors and Publishers (FILSCAP), Inc.,** *Respondent.*

Promulgated:

February 21, 2023

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SEPARATE CONCURRING OPINION

ZALAMEDA, *J.*:

I concur.

The case presents an opportunity to make further distinctions between two related but still distinct economic rights of an author: 1) public performance and 2) right to communicate the work to the public.[1]

The case of *FILSCAP v. Anrey, Inc.(Anrey case)*[2] was the very first case to make a distinction between these two rights.

In *Anrey*, what was complained as infringing is the act of playing radio broadcasts by a commercial establishment using loudspeakers (radio-over-loudspeakers). The Court *En Banc* applied the accumulation of legislative history, treaties, international conventions, and other secondary sources in determining that the specific right infringed is FILSCAP's right to public performance, and not the right to "communication to the public."

We made an exhaustive discussion on this score but to sum it all up, 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. In fact, the Berne Convention considered the right to communicate the protected work publicly, as part of the public performance rights of an author, thus:

ARTICLE 11

Right of Public Performance

Article 11, paragraph (1)

[1] See Dissenting Opinion of Justice Leonen, p. 14.

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

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.

Originally, the Berne Convention did not recognize public communication as a right separate and independent from the author's right to public performance. This is clear from the World Intellectual Property Organization (WIPO) Guide to the Berne Convention 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.

> 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.
>
> x x x x
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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 11*bis*.

In fact the Berne Convention only recognizes four (4) exclusive rights of an author: 1) translation; 2) reproduction; 3) public performance; and 4) broadcasting.[3] The Berne Convention does not mention the right to public communication as a separate and independent economic right of an author. Not that such right does not exist. What it means is, generally, the right to public communication would, depending on its use, fall under the author's right to public performance OR the right to broadcasting. This is the exact reason why both provisions of the Berne Convention on public performance and broadcasting contain references to public communication:

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[3] Id.

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(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 confusion lies on the import of Subsection 177.7 of the Intellectual Property Code (IPC), which mentions the "other communication to the public of the work" as one of the economic rights of an author. Specifically, if such right is supposed to be subsumed under either the right to public performance or broadcasting. In order to understand this better, it is necessary to look into the historical details of the provision's origin.

In 2002, the Philippines became a member of WIPO. As a member, the State had to adhere to the WIPO Copyright Treaty (WCT). The Treaty led to changes in our copyright law. In particular, Section 171.3 of Republic Act No. (RA) 8293[4] was lifted directly from Article 8 of the WCT.[5] Article 8 reads:

Article 8
Right of Communication to the Public

Without prejudice to the provisions of Articles 11(1)(ii), 11*bis*(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,

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[4] 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.

[5] Available at https://wipolex.wipo.int/en/text/295166, (last accessed on July 20, 2022).

> 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.)

But even without such amendment, the right to communicate to the public has been recognized, as part of the public performance right. So what exactly is the purpose of Article 8 of the WCT. Apparently, it was introduced as a band-aid solution to cover situations in the ever-growing and fast-paced digital environment. The explanatory note to the WCT strengthens this point:

> 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.
>
> "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.[6] (Underscoring supplied.)

As a result of the accumulation of treaties, international conventions, legislative history and other secondary sources, We made the following distinctions: if "public communication" was done using traditional forms such as radio-over-loudspeakers, then the right involved is the public performance right under Sec. 177.6. On the other hand, if the communication was done in the digital landscape such as the Internet, then the right violated is the separate economic right to publicly communicate the work under Sec. 177.7.

To illustrate, a streaming service in the United Kingdom (UK) named TVCatchup offers live streams of free-to-air UK television broadcasts over the Internet. The UK High Court referred to the Court of Justice of the European Union (CJEU) whether TVCatchup's streaming activities were a communication to the public. The CJEU held that the retransmission of protected works and broadcasts over the Internet was a new communication to the public and therefore must be authorised by the authors concerned.[7]

Another illustrative case is *Nils Svensson v. Retriever Sverige AB.*[8]

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[6] Available at https://www.wipo.int/treaties/en/ip/wct/summary_wct.html, (last accessed 21 February 2023).

[7] ITV v. TVCatchup, CJEU 7.3.2013, C-607/11.

[8] CJEU 2.13.2014, C-466/12.

The applicants, all journalists, wrote press articles that were published in the *Göteborgs-Posten* newspaper and on the *Göteborgs-Posten* website. Retriever Sverige operates a website that provides its clients, according to their needs, with lists of clickable Internet links (hyperlinks) to articles published by other websites. Those articles were freely accessible on the *Göteborgs-Posten* newspaper site. And when you click those links, you get redirected to another site in order to access the work in which he is interested. The CJEU held that the activity of linking to third party works on the internet is described as an act of public communication, irrespective of the type of link (the judgment makes no distinctions) users may have before them.

Unauthorized links to radio streams also violates the right to communication to the public. In *TuneIn Inc. v. Warner Music UK Ltd. & Anor*[9] the claimants either represent, own, or hold exclusive licenses to copyrights in sound recordings of music. On the other hand, defendant TuneIn is a company that operates TuneIn Radio, which enables users in UK to access radio stations from around the world by broadcasting the same on the internet. The England and Wales Court of Appeals (CA) clarified that every transmission or retransmission of the work by a specific technical means must be individually authorized by the copyright holder. Further, for purposes of determining whether there is "communication," the appellate court explained that the work must be made available to the public in such a way that they may access it, whether or not they actually access the work. It confirmed that there is communication to the public in the "transmission of television and radio broadcasts, and sound recordings included therein, to the customers of hotels, public houses, spas, café-restaurants and rehabilitation centres by means of television and radio sets". As TuneIn is a different kind of communication targeted at a different public in a different territory, the court concluded that the rights of the copyright holders in this case were violated.

What is complained as infringing in this case is the cablecasting of videoke laser disc recordings[10] done by Philippine Home Cable Holdings, Inc. (Home Cable), pursuant to an agreement with Precision Audio Videoke Service. These videoke recordings were played by Home Cable in three of its cable channels (the *Home Cable Case*).

The IPC does not specifically define cablecasting but secondary sources define the act as:

> "[C]ablecasting" means the transmission by wire for public reception of sounds, images or sounds and images or of the

[9] [2021] EWCA Civ 441.
[10] *Ponencia*, p. 2.

> representations thereof. Transmission by wire of encrypted signals is "cablecasting" where the means for decrypting are provided to the public by the cablecasting organization or with its consent. "Cablecasting" shall not be understood as including transmissions over computer networks or any transmission where the time and place of reception may be individually chosen by members of the public; x x x.[11]

In *Anrey,* what was involved is a secondary transmission of a radio broadcast and We perceived such secondary transmission as a public performance. On the other hand, the present *Home Cable case* involves an original transmission made by Home Cable. For the *ponente,* cablecasting falls under the right to public communication for this amounts to making that work accessible to members of the public from a place or time individually chosen by them, which is the very essence of the "communication to the public" right in the IPC. [12]

Perhaps this statement is taken from the 1997 version of Sec. 171.3 of the IPC which states:

> "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.

Due to its very restricted application, Member States has regarded this as the restricted right of "making available to the public" the copyrighted material. In the U.S., this right is reserved to control interactive, on-demand dissemination of copyrighted works over the Internet, including provision of access to streams or downloads.[13] 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 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

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[11] Article 2, Proposed Draft WIPO Treaty on the Protection of Broadcasting Organizations and Cablecasting Organizations.

[12] *Ponencia*, p. 1.

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

> public may access them from a place and at a time individually chosen by them.
>
> (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.
>
> (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.

However, We noticed that the *ponencia* used the disjunctive word "OR" when the law used the conjunctive word "AND" in the phrase "from a place and time individually chosen by them." This has the tendency to significantly change the meaning of the provision.

The provision uses the word "AND" which implies that the transmission of the protected work should be accessible by the public with discretion not just to the place, but also discretion to the time. This for me is the exact essence of the "communication to the public" right under RA 8293, which should be limited to On-Demand platforms (such as Netflix, Spotify, or Youtube) since these platforms offer discretion to access communication of the work at a place AND time of their own choosing. It is only the Internet that makes such discretion possible.

Even the Intellectual Property Office of the Philippines (IPOPHIL) recognizes such distinction. In an official publication issued by the IPOPHIL for the WIPO, the IPOPHIL enumerates public performance and public communication right, on the one hand; and the making of the works available on the Internet for on-demand access by the public, on the other; as among the economic rights of the copyright owner.[14]

Finally, the *ponencia* made reference to the definition under RA 10372 of "communication to the public" which includes "broadcasting, rebroadcasting, retransmitting by cable, broadcasting and retransmitting by satellite."[15]

Following the above disquisitions, I agree with the *ponente* that the right infringed is the "communication to the public" right. If we are to harmonize the definition of "communication to the public" under RA 8293

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[14] See p. 18, *Creative Expression, An Introduction to Copyright and Related Rights for Small and Medium-sized Enterprises,* Intellectual Property for Business Series Number 4, IPOPHIL (2010). Available at https://www.wipo.int/export/sites/www/sme/en/documents/guides/customization/creative_expression_phil.pdf, (last accessed 15 February 2023).

[15] *Ponencia*, p. 18.

with the present definition of the term under RA 10372,[16] then it may very well be argued that the modern day formulation of the term should prevail.

The definition of the term "communication to the public" under RA 10372 is the result of the State's joint accession to the WCT[17] and the WIPO Performances and Phonograms Treaty (WPPT)[18] in 04 July 2002. Although RA 10372 took effect as an amendment to the IPC only in 22 March 2013,[19] both the WCT and the WPPT were concluded in 1996. As the *ponencia* states, in a sense both treaties were integrated in our domestic legislation even before the amendment to the IPC was made by RA 10372.[20]

In fine, the acts constituting "communication to the public" under RA 10372 reflects the true scope of the "communication to the public" right. Having said this, I would like to tread on this very carefully so as not to undesirably overexpand the coverage of this right.

There are only five variations in which the expanded "communication to the public" covers: 1) broadcasting; 2) rebroadcasting; 3) retransmitting by cable; 4) broadcasting and retransmitting by satellite; and 5) 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. The fifth is known as the limited right of "making the work available" to the public the coverage of which have been sufficiently discussed above.

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.[21] 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

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[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] WCT Notification No. 38, Accession by the Republic of the Philippines", 04 July 2002, available at https://www.wipo.int/treaties/en/notifications/wct/treaty_wct_38.html, (last accessed 21 February 2023).

[18] WCT Notification No. 37, Accession by the Republic of the Philippines", 04 July 2002, available at https://www.wipo.int/treaties/en/notifications/wct/treaty_wct_37.html, (last accessed 21 February 2023).

[19] Sec. 32, RA 10372.

[20] See *Ponencia*, p. 23

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

one broadcasting organization of the broadcast of another broadcasting organization." We acceded to the Rome Convention on 25 June 1984.[22] Likewise, the Rome Convention is integrated in the WPPT. Rebroadcasting under the Rome Convention is limited to over-the-air transmissions.

Retransmitting by cable or cable retransmission is the communication to the public by wire of a broadcast by an organization other than the original one.[23] Cable-originated transmissions or cablecasting is not specifically enumerated but some states accord them protection the same way as broadcasting.[24]

Following a rundown of these definitions, how this impacts the Court's ruling in the *Anrey case* is completely negligible. Radio-over-loudspeakers, for obvious reasons, does not amount to broadcasting, rebroadcasting, retransmission by satellite. Neither does it amount to retransmission by cable. Although it uses cable wires, it does not amount to cable retransmission. Besides, the Berne Convention sees this as a separate and distinct act, apart from broadcasting, and rebroadcasting.[25]

From the foregoing disquisitions, I humbly submit my vote to **DENY** the Petition.

RODIL V. ZALAMEDA
Associate Justice

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[22] 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 21 February 2023).

[23] Article 11*bis* (1)(ii) of the Berne Convention.

[24] See note 12, WIPO Standing Committee on Copyright and Related Rights, "Protection of Broadcasting Organizations: Terms and Concenpts,". 8th session, Geneva, 04 to 08 November 2022.

[25] See Article 11*bis*, Berne Convention.