

[G.R. No. 188933. February 21, 2023.]

PHILIPPINE HOME CABLE HOLDINGS, INC., *petitioner*, **vs. FILIPINO SOCIETY OF COMPOSERS, AUTHORS & PUBLISHERS, INC.,** *respondent*.

DECISION

LEONEN, J p:

When a cable television system operator transmits a musical composition fixed in an audiovisual derivative work over a channel they control and operate, the operator 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 in the [Intellectual Property Code](#).

This resolves a Petition for Review **1** under Rule 45 of the [Rules of Court](#), assailing the February 27, 2009 Decision **2** and July 21, 2009 Resolution **3** of the Court of Appeals, Manila, in CA-G.R. CV No. 81083. The Court of Appeals affirmed, with modification, the October 20, 2003 Decision **4** of the Regional Trial Court of Quezon City, Branch 90, finding Philippine Home Cable Holdings, Inc. civilly liable for copyright infringement.

Philippine Home Cable Holdings, Inc. (Home Cable) is a domestic corporation engaged primarily in the business of installing, operating, and maintaining a community antennae television system, commonly known as "cable television." As part of its business as a cable television system operator, it enters into channel distribution agreements with international broadcasters or originators. The international broadcasters or originators' channels are thus shown to Home Cable's fee-paying subscribers. Particularly, Home Cable had a channel distribution agreement with Satellite Television Asian Region Limited (Star TV) for VIVA Cinema, a 24-hour Tagalog movie channel, **5** and a cable TV service affiliation agreement with Cable Box Office Shows and Systems (Cable Box) for "HBO service, WB television series/mini-series/animation, Hollywood Channel service, ESPN service, CNN International & TNT Cartoon Network services, CNBC & NBC services, MTV Asia service and MGM GOLD NETWORK." **6**

In 1995, Home Cable — then operating as Singing Makulay, Inc. — executed a Memorandum of Agreement with Precision Audio Video Service, Inc. (Precision Audio), a domestic corporation that produced and distributed videoke laser disc recordings. **7** Based on the agreement, Home Cable purchased 24 volumes of laser discs containing videoke materials from Precision Audio. **8** The contents of these laser discs would be made available on Home Cable's channel 38 for approximately five hours per day, excluding time allotted for advertising. Precision Audio was given 60 seconds of airtime for its own advertisements, while Home Cable reserved the right to air other paid advertisements on the channel. **9** Under the terms of this agreement, Home Cable was responsible for and in control of operating channel 38, including providing the equipment such as laser disc and VHS players. **10** In turn, Precision Audio guaranteed that it had full copyright over all the laser discs and that it had already acquired all necessary permits from relevant government agencies for the laser discs. **11**

A year later, Home Cable again executed a Memorandum of Agreement **12** with Precision Audio, this time for the operation of channels 22, 32, and 52. This agreement also provided for Home Cable's responsibility and control over the three channels, content for which were to be provided by Precision Audio's videoke laser discs. **13** As such, from 1997 to 1998, Home Cable carried Home Pinoy Karaoke on channel 22, playing Filipino songs, and Home English Karaoke on channel 32, which played English songs. **14**

The Filipino Society of Composers, Authors, and Publishers, Inc. (Filscap) is a non-stock and non-profit domestic association of Filipino composers, authors, and publishers. **15** As found by the Regional Trial Court:

. . . It had acquired by assignment, mandate, grant or by any other means, the representation and performance rights, mechanical reproduction and film synchronization rights into the musical compositions and/or literary works written and/or published by composers, authors and/or publishers affiliated to it as a society and/or to similar affiliated musical societies existing in foreign countries, like the American Society of Composers, Authors and Publishers, Inc. (ASCAP), Broadcast Music, Inc. (BMI), Performing Right Society Limited (PRSL), Australasian Performing Right Association Limited and Gessellschaft für Musikalische of Germany. . . . [Filscap] is representing or has represented practically [all] Filipino composers and has forty-five (45) foreign reciprocal agreements. It is granting or has granted licenses and is collecting or has collected royalties for the mechanical [production] of the above-mentioned compositions and works and is allotting and distributing or has allotted and distributed such royalties to their respective composers, authors and publishers. It has brought legal action for the protection of composers, authors and publishers of musical works against piracies of any kind, among other things[.] **16**

In July 1997, Filscap monitored Home Cable and found that its members' and foreign affiliates' musical compositions were being played on channels 22 and 32. **17** It sent letters to Home Cable advising that Home Cable obtain a license from Filscap and pay the license fees for the continued use of its musical compositions on Home Cable's channels, **18** but Home Cable did not respond. **19** Then, on January 12 and 13, 1998, Filscap monitored channels 22 and 32 and again found that Home Cable continued to play its members' musical compositions despite not securing a license from Filscap. **20**

Thus, on February 16, 1998, Filscap filed with the Regional Trial Court a Complaint for injunction and damages **21** against Home Cable. In its Complaint, it alleged that Home Cable "has been playing or otherwise performing or communicating to the public musical works included in the Filscap repertoire and despite full knowledge and nature of [Filscap's] existing right and ownership of the public performance right and the communication to the public right of said musical works in the Philippines[.]" **22** As a result of Home Cable's alleged infringement of Filscap's copyright over the musical works, Filscap demanded at least PHP1,000,000.00 in actual damages in the form of recovery of unpaid license fees from August 16, 1997 until the filing of the Complaint, **23** as well as exemplary damages and attorney's fees. **24**

In its Answer to the Complaint, Home Cable argued that Filscap was not the real party in interest; that its secondary transmission of channels 22 and 32 was not public performance under copyright law; that Filscap's rights did not include the right of communication of the work to the public; and that Filscap or its principals had already been paid for Home Cable's use of the copyrighted materials. **25**

Following a trial, the Regional Trial Court issued its Decision **26** finding Home Cable liable for copyright infringement. The dispositive portion of the Decision stated:

WHEREFORE, judgment is rendered ordering the defendant to pay to the plaintiff the following sums of money, to wit: a) PhP1,000,000.00 in the concept of damages that appear to be just, in lieu of actual damages; b) PhP1,000,00.00 [*sic*] as exemplary damages; c) PhP500,000.00 as reasonable attorney's fees and expenses of litigation, plus costs of suit.

Moreover, the defendant, its agents, representatives, assignees and persons acting in its behalf and under its authority is or are ordered to cease and desist from using, or causing to be used, any musical work included in the repertoire of the plaintiff.

All other claims, including all counterclaims, are dismissed for lack of legal and/or factual basis.

SO ORDERED. **27**

Upon appeal, the Court of Appeals modified the Regional Trial Court's Decision. While it affirmed the trial court's finding of copyright infringement, it reduced the damages awarded to Filscap. The Court of Appeals found that the award of actual damages did not have any basis; thus, Filscap was entitled only to PHP500,000.00 in moderate damages. **28** It also reduced the exemplary damages to PHP500,000.00 **29** and the attorney's fees to PHP100,000.00. **30** The dispositive portion of the Court of Appeals' Decision stated:

WHEREFORE, in view of the foregoing, the Decision, dated October 20, 2003, of Branch 90 of the Regional Trial Court of Quezon City in Civil Case No. Q-98-33511 is hereby MODIFIED so that the amount of P1,000,000.00 as actual damages is DELETED and in lieu thereof, temperate damages in the amount of P500,000.00 is awarded. Further, the amount of P1,000,000.00 as exemplary damages is also REDUCED to P500,000.00 and the award of attorney's fees is likewise REDUCED to P100,000.00. In all other respects, said judgment is hereby AFFIRMED.

SO ORDERED. **31**

Home Cable's Motion for Reconsideration was denied on July 21, 2009. **32**

On September 14, 2009, Home Cable filed before this Court a Petition for Review on *Certiorari* **33** under Rule 45 of the [Rules of Court](#), assailing the Decision and Resolution of the Court of Appeals.

In its Petition for Review, Home Cable argues the following: First, that this Court should apply its ruling in the January 19, 2009 case of [ABS-CBN Broadcasting Corp. v. Philippine Multi-Media System, Inc.](#); **34** second, that Home Cable's retransmission of channels 22 and 32 were retransmissions that did not constitute copyright infringement; third, that Filscap did not hold the communication to the public rights over its principals' musical compositions; and finally, that Home Cable, as a cable television systems operator, does not exercise financial or editorial responsibility over the content of programs it retransmits.

According to Home Cable, it was a cable television system operator which functions were limited by its mandate and the National Telecommunications Commission's rules and regulations for cable television services. **35** It points out that in [ABS-CBN Broadcasting Corp. v. Phil. Multi-Media System, Inc.](#), this Court had held that retransmission by a broadcast service did not constitute copyright infringement. **36** Home Cable argues that in light of the "must-carry" provision in [National Telecommunications Commission's Memorandum Circular No. 4-08-88](#), liability for copyright infringement lies with broadcasting organizations and other off-air television channels should they broadcast Filscap's materials without a license or sans compensation, not with entities like Home Cable. **37**

Further, Home Cable claims that Precision Audio should have been impleaded as an indispensable party. It points out that in their Memoranda of Agreement, Precision Audio guaranteed the full copyright of laser disc materials. **38** For the same reasons, Star TV and Cable Box must likewise be impleaded as indispensable parties. **39**

Moreover, it argues that Filscap did not have a cause of action against it, because 10 copyright owners **40** did not assign to Filscap the "right to communicate to the public" in their Deeds of Assignment. **41** To Home Cable, Filscap's authority was limited only to enforcing these copyright owners' "performing rights," namely the right to perform the work in public, to broadcast the work, and to cause the work to be transmitted to subscribers to a diffusion service. **42** Similarly, the reciprocal agreements with foreign societies did not expressly mention the enforcement of rights against cable services. **43** Hence, Filscap did not have the capacity to enforce the present action against Home Cable.

Finally, Home Cable claims that Precision Audio was the broadcasting party that provided materials to Home Cable's videoke channels 38, 22, 32, and 52, and that it only provided the medium for the transmission. **44** It claims that its control only extended to operating the equipment used for transmitting the broadcast signals, such as the music camp karaoke and laser disc materials. **45** According to Home Cable:

Petitioner has no control over the contents of materials which it may transmit through the videoke channels because the laser disc materials from Precision already contain a compilation of songs per volume. Petitioner received videoke laser disc materials consisting of volumes of songs and never represented itself as the origin or author of these volumes of copyrighted works. Only Precision has control and selection of the songs which appear in all the volumes subject of the agreement. In fact, the very same MOAs grant videoke programming exclusivity to Precision to the exclusion of any other person or entity engaged in the same programming concept as Precision. **46**

Filscap filed its Comment **47** on January 6, 2010. First, it argues that *ABS-CBN Broadcasting Corp. v. Philippine Multi-Media System, Inc.* could not be applied retroactively; second, Home Cable's retransmission was a broadcast or rebroadcast that was a public performance or a communication to the public under the *Intellectual Property Code*; third, Home Cable was liable for copyright infringement because it had control over the content of the programs it broadcast, notwithstanding the "must carry" rule; and fourth, Filscap was the real party in interest as it represented the copyright owners and foreign societies.

According to Filscap, while Section 177 of *Republic Act No. 8293* does not use the term "broadcasting right," its equivalent is either or both the "public performance" and "communication to the public" rights. **48** Home Cable's retransmission of works through the simultaneous relay of broadcast signals exercised both these exclusive rights, without the consent or authority granted by the copyright holder over those works. **49**

Filscap also points out that Home Cable's witnesses all admit that Home Cable's retransmission "(a) gives [it] the power to choose which program provider to deal with and thus, control the broadcast content being shown through its cable facilities; (b) makes works available to the general public by wire and in effect, transmits sounds and images or programs broadcast; (c) allows the public to access said works from a place and time individually chosen by them; (d) creates additional audience and (e) earns it profit." **50**

Further, Filscap argues that it has proved that it may represent Filipino composers and music publishers based on the provisions of the deeds of assignments executed with them. **51** To Filscap, the "do all acts" clause in these deeds grants it the power to license the composers' and music publishers' works, and to do other acts to administer and enforce their performing rights, including filing complaints such as the one in this case. **52** These deeds of assignment all define "performing rights" as "the right to perform a work in public, to broadcast such a work or to include such a work in a cable programme service." **53** Filscap claims that the reason why "communication to the public" was not a right included in the definition in the deeds of assignment is because this right was not included in *Presidential Decree No. 49*, the copyright law in force at the time these deeds

were executed. Nonetheless, it argues that the assignment of the right to "cause the work to be transmitted to subscriber[s] to a diffusion service" in the deeds is analogous to the "communication to the public" right. **54**

Home Cable filed its Reply **55** on February 15, 2010, arguing that its retransmission did not constitute control and management over program content. Because it had acted in compliance with the National Telecommunications Commission's "must carry" rule, its actions were a statutory limitation on copyright and did not constitute copyright infringement. **56**

Home Cable also argues that only performing rights under Section 203 of the [Intellectual Property Code](#) were assigned by composers and music publishers to Filscap; hence, it cannot sue on their behalf over alleged infringement of the economic rights under Section 177. **57**

The issue to be resolved in this case is whether or not Philippine Home Cable Holdings, Inc. committed copyright infringement.

Article II, Section 17 of the [Constitution](#) mandates that the State give priority to education, science and technology, arts, culture, and sports:

SECTION 17. The State shall give priority to education, science and technology, arts, culture, and sports to foster patriotism and nationalism, accelerate social progress, and promote total human liberation and development.

In relation to this, Article XIV, Section 13 provides for the protection and security of intellectual property and creations:

SECTION 13. The State shall protect and secure the exclusive rights of scientists, inventors, artists, and other gifted citizens to their intellectual property and creations, particularly when beneficial to the people, for such period as may be provided by law.

An important aspect of intellectual property rights is that their protection subsists only "for such period as may be provided by law." **58** As with other intellectual property rights, the metes and bounds of protection for works covered by copyright are defined and governed by existing law. In *Joaquin v. Drilon*: **59**

Copyright, in the strict sense of the term, is purely a statutory right. It is a new or independent right granted by the statute, and not simply a pre-existing right regulated by the statute. Being a statutory grant, the rights are only such as the statute confers, and may be obtained and enjoyed only with respect to the subjects and by the persons, and on terms and conditions specified in the statute. **60**

An early system for the protection of creative works through copyright was established in [Act No. 3134](#), the [Copyright Law of the Philippine Islands](#). This law was superseded by [Presidential Decree No. 49](#), the [Decree on Intellectual Property](#). Later, in 1996, Congress passed [Republic Act No. 8293](#), otherwise known as the [Intellectual Property Code](#), which consolidated the then-disparate laws and decrees on various intellectual property rights, including copyright. Amendments were made to the [Intellectual Property Code](#) in succeeding years to be responsive to technological developments and public policies. **61**

Under the [Intellectual Property Code](#), "original intellectual creations in the literary and artistic domain" or literary and artistic works are protected from the moment of their creation:

SECTION 172. *Literary and Artistic Works*. — 172.1. Literary and artistic works, hereinafter referred to as "works," are original intellectual

creations in the literary and artistic domain protected from the moment of their creation and shall include in particular:

- (a) Books, pamphlets, articles and other writings;
- (b) Periodicals and newspapers;
- (c) Lectures, sermons, addresses, dissertations prepared for oral delivery, whether or not reduced in writing or other material form;
- (d) Letters;
- (e) Dramatic or dramatico-musical compositions; choreographic works or entertainment in dumb shows;
- (f) Musical compositions, with or without words;
- (g) Works of drawing, painting, architecture, sculpture, engraving, lithography or other works of art; models or designs for works of art;
- (h) Original ornamental designs or models for articles of manufacture, whether or not registrable as an industrial design, and other works of applied art;
- (i) Illustrations, maps, plans, sketches, charts and three-dimensional works relative to geography, topography, architecture or science;
- (j) Drawings or plastic works of a scientific or technical character;
- (k) Photographic works including works produced by a process analogous to photography; lantern slides;
- (l) Audiovisual works and cinematographic works and works produced by a process analogous to cinematography or any process for making audio-visual recordings;
- (m) Pictorial illustrations and advertisements;
- (n) Computer programs; and
- (o) Other literary, scholarly, scientific and artistic works. **62**

The type of work subject of the case must be identified. This Court has previously denied the protections of copyright law to works which fall outside the exclusive enumeration in Subsection 172.1, such as dating game show formats, **63** light boxes, **64** and utility models, all of which were not works of applied art. **65** The [Intellectual Property Code](#) also has provisions which apply only to certain types of works, such as writings, **66** audiovisual works, **67** works of architecture, **68** or computer programs. **69**

In this case, videoke may appear to be an audiovisual work under Subsection 172.1 (l), in line with the word being a portmanteau of "video" and "karaoke." Yet a typical videoke of a song is not one single object, having discrete components: a set of moving images, the song's lyrics superimposed over the moving images, and a musical composition in instrumental format synchronized to the superimposed lyrics. Each of these components may be separately protected by copyright: the moving images as a cinematographic work in Subsection 172.1 (l), the lyrics as writing in Subsection 172.1 (a), and the musical composition in Subsection 172.1 (f). The videoke itself is a form of

audiovisual derivative work, also protected by copyright by virtue of Subsection 173.1 (a). **70** Additionally, if a laser disc contains a collection of videoke, the collection may be a derivative work if the originality requirements of Subsection 173.1 (b) are met. **71** Yet, it must be noted that derivative works do not affect the force of or extend any subsisting copyright on the original works used in the derivative work, and the copyright protection over the derivative works does not imply by itself the right to use the original works. **72** Moreover, the videoke itself is distinct from the laser disc in which it is fixed. **73**

Here, respondent claims that the subject works were musical works, **74** or musical compositions under Subsection 172.1 (f). Consequently, this Court confines its discussion to the subject musical compositions, the identification and copyright subsistence of which are uncontested.

The [Intellectual Property Code](#) enumerates in Section 177 the economic rights that comprise copyright:

SECTION 177. *Copyright or Economic Rights.* — Subject to the provisions of Chapter VIII, copyright or economic rights shall consist of the exclusive right to carry out, authorize or prevent the following acts:

177.1. Reproduction of the work or substantial portion of the work;

177.2. Dramatization, translation, adaptation, abridgment, arrangement or other transformation of the work;

177.3. The first public distribution of the original and each copy of the work by sale or other forms of transfer of ownership;

177.4. Rental of the original or a copy of an audiovisual or cinematographic work, a work embodied in a sound recording, a computer program, a compilation of data and other materials or a musical work in graphic form, irrespective of the ownership of the original or the copy which is the subject of the rental; (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[.]

Should any person, without the consent or authority of the copyright holder, exercise any of these economic rights, they may be liable for copyright infringement. This expands the scope of copyright infringement from merely the unauthorized duplication of a literary, artistic, or scientific work to the unauthorized performance of the acts in Section 177. **75** In [Habana v. Robles](#): **76**

. . . Infringement of a copyright is a trespass on a private domain owned and occupied by the owner of the copyright, and, therefore, protected by law, and infringement of copyright, or piracy, which is a synonymous term in this connection, consists in the doing by any person, without the consent of the owner of the copyright, of anything the sole right to do which is conferred by statute on the owner of the copyright. **77**

To uphold a copyright infringement claim, the following must be proved: first, the complainant or plaintiff's ownership of a validly copyrighted material, and second, the defendant or respondent's exercise of any the enumerated economic rights without the consent of the copyright owner or holder. **78** For the second element, it must further be shown that the exercise of the economic right was inconsistent with any of the limitations on copyright **79** and permissible unauthorized reproductions and importations. **80** Alternatively, the defendant or respondent may prove that its exercise of the economic right falls within fair use. **81**

As to the first element, petitioner does not make any claim as to the invalidity of copyright subsisting in the subject musical compositions. Instead, what petitioner challenges is respondent's right to sue it for alleged unauthorized "public performance" or "communication to the public" of works which "performing rights" **82** were assigned to respondent.

Section 180 of the [Intellectual Property Code](#) states that copyright may be assigned, in whole or in part, and within the assignment's scope, the assignee is entitled to all the assignor's rights and remedies. **83** Moreover, copyright owners may designate a society to enforce on their behalf their copyright and moral rights. **84**

This Court has recognized respondent's legal standing to sue for copyright infringement, noting that the Intellectual Property Office of the Philippines has accredited it as a collective management organization: **85**

Being the government-accredited CMO for music creators/copyright owners, FILSCAP assists music users in getting the necessary authorization to publicly play, broadcast and stream copyrighted local and foreign songs in the Philippines. It is created exactly for the purpose of protecting the intellectual property rights of its members by licensing performances of their copyright music." With [Filscap], the individual composer would have a difficult time enforcing their rights against an infringer, not to mention the expenses and time involved in pursuing such cases. But [Filscap] eases this burden away by handling these concerns. In addition, [Filscap], acts as an agency for the composers ho deal with any party who desires to obtain public performance rights and privileges.

The mechanics behind [Filscap's] role is plain and simple. Copyright holders assign their rights to [Filscap]. Filscap enters into reciprocal agreements with foreign societies such as the American society of Composers, Authors and Publishers (ASCAP), BMI, Australian Performing Right Association (APRA), Performing Right Society Limited (PRS) of the United Kingdom and Föreningen Svenska Tonsättares Internationella Muskiörå (STIM) of Sweden, whose roles are similar to [Filscap], Being the assignee of the copyright, it then collects royalties through 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. In return, [Filscap] does an accounting of all license fees collected and then distributes them to its members and the members of its affiliate foreign societies. **86**

Petitioner's contention that what the composers and music publishers assigned to respondent were "neighboring rights" in Section 203 is erroneous. Considering the type of works involved, their authors, and the phrasing of the deeds of assignment, it is evident that economic rights under Section 177 were assigned to respondent.

Section 203 of the [Intellectual Property Code](#) enumerates the rights of performers:

SECTION 203. Scope of Performers' Rights. — Subject to the provisions of Section 212, performers shall enjoy the following exclusive rights:

203.1. As regards their performances, the right of authorizing:

- (a) The broadcasting and other communication to the public of their performance; and
- (b) The fixation of their unfixed performance.

203.2. The right of authorizing the direct or indirect reproduction of their performances fixed in sound recordings, in any manner or form;

203.3. Subject to the provisions of Section 206, the right of authorizing the first public distribution of the original and copies of their performance fixed in the sound recording through sale or rental or other forms of transfer of ownership;

203.4. The right of authorizing the commercial rental to the public of the original and copies of their performances fixed in sound recordings, even after distribution of them by, or pursuant to the authorization by the performer; and

203.5. The right of authorizing the making available to the public of their performances fixed in sound recordings, by wire or wireless means, in such a way that members of the public may access them from a place and time individually chosen by them.

Performers are defined in Subsection 202.1 as "actors, singers, musicians, dancers, and other persons who act, sing, declaim, play in, interpret, or otherwise perform literary and artistic work." For purposes of Chapter XII on the rights of performers, producers of sound recordings and broadcasting organizations, these performers have rights over their performances separate from the right to perform or publicly communicate the literary or artistic work, which is vested in the author of the work. Hence:

Developments in technology, including the process of preserving once ephemeral works and disseminating them, resulted in the need to provide a new kind of protection as distinguished from copyright. The designation "neighboring rights" was abbreviated from the phrase "rights neighboring to copyright." Neighboring or related rights are of equal importance with copyright as established in the different conventions covering both kinds of rights. **87**

Here, respondent does not represent performers of the subject musical compositions. Consistent with its mandate, it is a collective management organization for composers, authors, and publishers in the field of musical compositions. This is clear based on the definition of "copyright work" in the deed of assignment it enters into with its affiliates or members:

a) the expression "copyright work" shall mean any musical work whether now or existing hereafter composed and such words as are associated with any musical works and shall include the vocal and instrumental music in any cinematographic film, the words and/or music of any monologue having a musical introduction and/or accompaniment, the musical accompaniment of any non-musical play, and any part of any such work, words, music, or accompaniment as aforesaid. **88**

That respondent pertains to rights under Section 177 of the [Intellectual Property Code](#) and not the neighboring rights in Section 203 is also apparent in the scope of "performance" that respondent's affiliates and members have assigned respondent to administer or enforce:

c) the expression "performance" includes, unless otherwise stated, any mode of acoustic presentation, including any such presentation by means [of] broadcasting or cause of a work to be transmitted to subscribers to a diffusion service, or by the exhibition of a cinematographic film, or by the use of a sound recording, or by any other means, and references to "perform" and "performing" shall be construed accordingly. **89**

Respondent claims that the lack of explicit reference to the right to communicate the work to the public is because, at the time when the deeds were written, the prevailing copyright law was [Presidential Decree No. 49](#), which enumeration of economic rights predated many technological developments that may have an effect on literary, artistic, and scientific works:

SECTION 5. Copyright shall consist in the exclusive right:

(A) To print, reprint, publish, copy, distribute, multiply, sell, and make photographs, photo-engravings, and pictorial illustrations of the works;

(B) To make any translation or other version or extracts or arrangements or adaptations thereof; to dramatize it if it be a non-dramatic work; to convert it into a non-dramatic work if it be a drama; to complete or execute if it be a model or design;

(C) To exhibit, perform, represent, produce, or reproduce, the work in any manner or by any method whatever for profit or otherwise; if not reproduced in copies for sale, to sell any manuscript or any record whatsoever thereof,

(D) To make any other use or disposition of the work consistent with the laws of the land. **90**

In this regard, Section 239.3 of the [Intellectual Property Code](#) extended its provisions to works in which copyright protection was obtained prior to its effectivity and which copyright is still subsisting:

SECTION 239. Repeals. — . . .

239.3. The provisions of this Act shall apply to works in which copyright protection obtained prior to the effectivity of this Act is subsisting: *Provided*, That the application of this Act shall not result in the diminution of such protection.

Moreover, the wording of the deeds of assignments indicates that among the rights assigned to respondent by the copyright holders was the right to broadcast or cause a work to be transmitted to subscribers to a diffusion service. Even without the use of the specific phrase "communication to the public," respondent is plainly the assignee who may authorize others who wish to do these acts with respect to the copyright holders' musical compositions, or demand compensation in case these acts were done without their consent or authority.

The second element of copyright infringement is similarly present in this case.

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 Regional Trial Court **91** and the Court of Appeals **92** determined that petitioner did both when it cablecast — engaged in program origination of — the two karaoke channels. But the application of Section 177 is inexact. Based on petitioner's acts complained of, only an infringement of the "communication to the public" right has been committed.

Our country's early law on copyright, [Act No. 3134](#), granted to copyright holders a broad exclusive performance right, without limitation as to manner, method, or intent to or actual profit. Thus, Section 3 (c) stated:

SECTION 3. The proprietor of a copyright or his heirs or assigns shall have the exclusive right:

(c) To exhibit, *perform*, represent, produce, or reproduce the copyrighted work in any manner or by any method whatever for profit or otherwise; if not reproduced in copies for sale, to sell any manuscripts or any record whatsoever thereof; . . . (Emphasis supplied)

Then, on August 1, 1951, the Philippines' accession to the 1948 revision to the [Berne Convention for the Protection of Literary and Artistic Works](#) became effective. **93** Known as the [Brussels Act](#), the 1948 revision included a provision on the exclusive right of an author of a dramatic, dramatico-musical, or musical work to its public presentation and public performance, and the public distribution thereof:

Article 11

(1) The authors of dramatic, dramatico-musical or musical works shall enjoy the exclusive right of authorizing: i. the public presentation and public performance of their works; ii. the public distribution by any means of the presentation and performance of their works. The application of the provisions of Articles 11*bis* and 12 is, however, reserved.

(2) Authors of dramatic or dramatico-musical works, during the full term of their rights over the original works, shall enjoy the same rights with respect to translations thereof.

(3) In order to enjoy the protection of this Article, authors shall not be bound, when publishing their works, to forbid the public presentation or performance thereof. **94**

Article 11*bis* of the [Brussels Act](#), meanwhile, provided for the parameters of the exclusive right to the communication to the public by wire or wireless means of a literary or artistic work:

Article 11*bis*

(1) Authors of literary and artistic works shall have the exclusive right of authorizing: i. the radio-diffusion 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, whether over wires or not, of the radio-diffusion of the work, when the communication is made by a body other than the original one; iii. The communication to the public by loudspeaker or any other similar instrument transmitting, by signs, sounds or images, the radio-diffusion of a 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 right of the author, nor to his right to obtain just remuneration which, in the absence of agreement, shall be fixed by competence authority. **95**

xxx xxx xxx

Later, the [Berne Convention](#) was revised in the [Paris Act of 1971](#). Article 11 of the [Paris Act](#) separated the public performance and communication to the public of the performance rights:

Article 11

(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.

(2) Authors of dramatic or dramatico-musical works shall enjoy, during the full term of their rights in the original works, the same rights with respect to translations thereof.

Further, Article 11 *bis* of the [Paris Act](#) refined the communication to the public right introduced in the [Brussels Act](#):

Article 11 *bis*

(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.

(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.

(3) In the absence of any contrary stipulation, permission granted in accordance with paragraph (1) of this Article shall not imply permission to record, by means of instruments recording sounds or images, the work broadcast. It shall, however, be a matter for legislation in the countries of the Union to determine the regulations for ephemeral recordings made by a broadcasting organization by means of its own facilities and used for its own broadcasts. The preservation of these recordings in official archives may, on the ground of their exceptional documentary character, be authorized by such legislation.

In 1972, at a time when the Philippines' accession to the [Berne Convention](#) was still only to the [Brussels Act](#), the Philippines again modified its law on copyright through [Presidential Decree No. 49](#). Section 5 thereof substantially retained Section 3 of [Act No. 3134](#):

SECTION 5. Copyright shall consist in the exclusive right:

(A) To print, reprint, publish, copy, distribute, multiply, sell, and make photographs, photo-engravings, and pictorial illustrations of the works;

(B) To make any translation or other version or extracts or arrangements or adaptations thereof; to

dramatize it if it be a non-dramatic work; to convert it into a non-dramatic work if it be a drama; to complete or execute if it be a model or design;

(C) To exhibit, *perform*, represent, produce, or reproduce, the work *in any manner or by any method whatever for profit or otherwise*; it not reproduced in copies for sale, to sell any manuscript or any record whatsoever thereof;

(D) To make any other use or disposition of the work consistent with the laws of the land. (Emphasis supplied)

On April 14, 1980, the Philippines acceded to the [Paris Act](#). The treaty entered into force on July 16, 1980, with the declaration that the accession would not apply to Articles 1 to 21 and the Appendix of the [Paris Act](#). **96**

Following a 1993 bilateral agreement with the United States of America in order to remove the Philippines from the "Special 301" priority watch list, **97** the Philippines agreed to submit amendments to its copyright law in the areas of sound recordings and computer programs, among others, and to begin the process of accession to the substantive portions of the [Paris Act](#). **98** On March 18, 1997, the Philippines finally extended its accession to Articles 1 to 21 and the Appendix of the [Paris Act](#), with those articles entering into force on June 18, 1997. **99**

Consequently, [Republic Act No. 8293](#) in 1997 for the first time statutorily recognized the Philippines' obligations in accordance with international conventions, treaties, and other agreements **100** involving intellectual property, transforming **101** relevant provisions of the [Paris Act](#) and including amendments to strengthen copyright protection in the Philippines according to the United States' recommendations.

Notably, the modern formulation of the "communication to the public" right — including the distinct "making available" right — in international intellectual property law **102** was formalized in the [World Intellectual Property Organization \(WIPO\) Copyright Treaty](#), which sought to make copyright protections responsive to the advent of new technologies, **103** and the [WIPO Performances and Phonograms Treaty](#), which sought to protect the rights of performers and producers of phonograms. **104** In particular, Article 8 of the [WIPO Copyright Treaty](#) stated:

Article 8
Right of Communication to the Public

Without prejudice to the provisions of Articles 11(1)(ii), 11*bis*(1)(i) and (ii), 11*ter*(1)(ii), 14(1)(ii) and 14*bis*(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.

Both treaties were concluded in 1996. Although the Philippines acceded to the [WIPO Copyright Treaty](#) **105** and the [WIPO Performances and Phonograms Treaty](#) **106** only on July 4, 2002, it had already, in a sense, unilaterally integrated these treaties' contemplation of a "communication to the public" in domestic legislation via Section 171.3 of the [Intellectual Property Code](#).

As a result, in a divergence from both [Act No. 3134](#) and [Presidential Decree No. 49](#), [Republic Act No. 8293](#) not only modified the scope of the performance right into the

"public performance" right, but also granted the "communication to the public" among the Code's new economic rights, by way of the distinct "making available" formulation.

Here, petitioner's act of cablecasting the karaoke 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 "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 that 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:

'Communication to the public' or 'communicate to the public' means any communication to the public, including broadcasting, rebroadcasting, retransmitting by cable, 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. **107**

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.

To evade liability, petitioner argues that its transmission of the subject musical compositions is not an infringing act. It anchors its theory on [ABS-CBN Broadcasting Corp. v. Phil. Multi-Media System, Inc.](#), **108** decided after the promulgation of the Court of Appeals' Decision, in which this Court held that the carriage by cable television systems of other broadcasters' free-to-air signals was not copyright infringement. **109**

Petitioner's contention has no merit. The dissimilarity between the facts in this case and [ABS-CBN Broadcasting Corp. v. Phil. Multi-Media System, Inc.](#) must lead this Court to different conclusions.

Section 6 of the [National Telecommunications Commission Memorandum Circular No. 4-08-88](#) **110** states the "must carry" rule:

Section 6. Carriage of Television Broadcast Signals. —

xxx xxx xxx

6.2. Mandatory Coverage

6.2.1. A Cable TV system operating in a community which is within the Grade A or Grade B contours of an authorized TV broadcast station or stations must carry the TV signals of these stations.

Section 2.3 of [Memorandum Circular No. 4-08-88](#) defines a television broadcast station as "any television broadcast station authorized to operate on a channel regularly allocated to a community."

In *ABS-CBN Broadcasting Corp. v. Phil. Multi-Media System, Inc.*, this Court stated that, when cable television systems comply with the "must carry" rule, they do not rebroadcast the free-to-air signals and do not act as broadcasting organizations:

Under the Rome Convention, rebroadcasting is "the simultaneous broadcasting by one broadcasting organization of the broadcast of another broadcasting organization." The Working Paper prepared by the Secretariat of the Standing Committee on Copyright and Related Rights defines broadcasting organizations as "entities that take the financial and editorial responsibility for the selection and arrangement of, and investment in, the transmitted content." Evidently, PMSI would not qualify as a broadcasting organization because it does not have the aforementioned responsibilities imposed upon broadcasting organizations, such as ABS-CBN.

ABS-CBN creates and transmits its own signals; PMSI merely carries such signals which the viewers receive in its unaltered form. PMSI does not produce, select, or determine the programs to be shown in Channels 2 and 23. Likewise, it does not pass itself off as the origin or author of such programs. Insofar as Channels 2 and 23 are concerned, PMSI merely retransmits the same in accordance with Memorandum Circular 04-08-88. With regard to its premium channels, it buys the channels from content providers and transmits on an as-is bases to its viewers. Clearly, PMSI does not perform the functions of a broadcasting organization; this, it cannot be said that it is engaged in rebroadcasting Channels 2 and 23.

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Thus, while the Rome Convention gives broadcasting organizations the right to authorize or prohibit the rebroadcasting of its broadcast, however, this protection does not extend to cable retransmission. The retransmission of ABS-CBN's signals by PMSI — which functions essentially as a cable television — does not therefor constitute rebroadcasting in violation of the former's intellectual property rights under the [IP Code](#). **111**

At the outset, petitioner is not acting in compliance with the National Telecommunication Commission's "must carry" rule when it distributes channels from entities such as Star TV and Cable Boss. Petitioner's obligation to carry these channels is not pursuant to the requirements of [Memorandum Circular No. 4-08-88](#), but because of contracts it entered into where it pays to transmit Star TV and Cable Boss' channels on its system. Those channels are not the "television broadcast stations" contemplated in Section 6.2.1 of [Memorandum Circular No. 4-08-88](#), especially because they are not free-to-air TV signals like the ones subject of the case in *ABS-CBN Broadcasting Corp. v. Phil. Multi-Media, Inc.*

More accurately, the Star TV and Cable Boss channels are akin to "premium channels" that are bought from channel providers and transmitted on an as-is basis to its viewers. **112** Notwithstanding the lack of regulatory obligation such as the "must carry" rule, it is evident from petitioner's distribution agreements with Star TV and Cable Boss that petitioner merely retransmits signals that these entities provide and is prohibited from modifying those programs. **113** In that regard, *ABS-CBN Broadcasting Corp. v. Phil. Multi-Media, Inc.*'s concept of "retransmission" applies to the situation with the Star TV and Cable Boss channels that petitioner carries.

However, this reasoning does not apply to channels 22 and 32, the videoke channels on Home Cable's lineup. An examination of the agreements with Precision Audio

shows that Precision Audio was only obliged to sell videoke laser discs to petitioner, and petitioner has responsibility and control over the channels:

1. The FIRST PARTY agrees to sell, and the SECOND PARTY agrees to purchase on cash basis the new releases of videoke laser disc materials of TWO THOUSAND PESOS (P2,000.00), Philippine Currency. Further, the SECOND PARTY shall make available to FIRST PARTY the Channels mentioned below free of program fee charges the promotion solely of the FIRST PARTY's products.

2. The SECOND PARTY shall be responsible for and in control of the operation of Channels 22 [PINOY KTV], 32 [ENGLISH KTV], and 52 [CHINESE KTV]. It shall be responsible for providing the equipment (music camp karaoke and laser disc materials) necessary for the satisfactory operation of the above mentioned Channels. **114**

As observed by the Court of Appeals:

Thus, unlike other channels which it merely retransmits to its subscribers such as CNN (Cable News Network), BBC (British Broadcasting Corporation), HBO (Home Box Office), Cinemax, Discovery, and National Geographic and the like, the [petitioner] operated and controlled the karaoke channels from which it played or "cablecasted" the videoke laser disc materials which it had brought. In effects, the [petitioner] was acting as a broadcaster in the case at bar. Hence its argument that it is merely retransmitting programs and is, thus, not liable for copyright infringement does not apply to the particular circumstances of the case at bar. **115**

Consistent with Section 181 of the [Intellectual Property Code](#), petitioner's purchase of the laser discs from Precision Audio as part of their agreements **116** did not by itself transfer or assign the copyright of the fixed musical compositions in those laser discs. Assuming that Precision Audio's production and distribution of the videoke laser discs was with the copyright holders' consent, only the economic rights to adapt the musical compositions to videoke format, reproduce the fixation in laser disc, and sell the laser discs were granted to Precision Audio, unless the terms of the license state that additional rights were included.

Moreover, if the licenses for the musical compositions did include any public performance or communication to the public rights, those rights were not for Precision Audio to sublicense to a third party such as petitioner unless expressly allowed by the copyright holder or licensor. If these were the case with the laser discs here, then petitioner failed to allege and prove it.

To emphasize, copyright over an original work is unaffected even when that work is used in a derivative work. And the grant of copyright protection to the derivative work does not by itself make the use of the original work, or any part of it, lawful absent the copyright holder's consent. Precision Audio may warrant that it holds the copyrights to the videoke works fixed in the laser discs purchased by petitioner, and it may license or assign any of the videoke's economic rights to petitioner as part of the sale, but that does not affect the copyright over the underlying musical composition which is a component of the videoke. At most, Precision Audio validly granted to petitioner the right to publicly perform or communicate to the public the videoke, but not the composite original works which economic rights were held by others, such as the composers, authors, or publishers that respondent represents.

Precision Audio is not an indispensable party to this case. The [Rules of Court](#) provide:

Rule 3, SEC. 7. *Compulsory Joinder of Indispensable Parties*. — Parties-in-interest without whom no final determination can be had of an action shall be joined either as plaintiffs or defendants.

In *Boston Equity Resources, Inc. v. Court of Appeals*: **117**

An indispensable party is one who has such an interest in the controversy or subject matter of a case that a final adjudication cannot be made in his or her absence, without injuring or affecting that interest. He or she is a party who has not only an interest in the subject matter of the controversy, but "an interest of such nature that a final decree cannot be made without affecting [that] interest or leaving the controversy in such a condition that its final determination may be wholly inconsistent with equity and good conscience. It has also been considered that an indispensable party is a person in whose absence there cannot be a determination between the parties already before the court which is effective, complete or equitable." Further, an indispensable party is one who must be included in an action before it may properly proceed.

On the other hand, a "person is not an indispensable party if his interest in the controversy or subject matter is separable from the interest of the other parties, so that it will not necessarily be directly or injuriously affected by a decree which does complete justice between them. Also, a person is not an indispensable party if his presence would merely permit complete relief between him or her and those already parties to the action, or if he or she has no interest in the subject matter of the action." It is not a sufficient reason to declare a person to be an indispensable party simply because his or her presence will avoid multiple litigations.

Applying the foregoing pronouncements to the case at bar, it is clear that the estate of Manuel is not an indispensable party to the collection case, for the simple reason that the obligation of Manuel and his wife, respondent herein, is solidary. **118**

Petitioner's liability for copyright infringement is separate and distinct from Precision Audio's, if there is any. As stated above, the economic right that petitioner infringed is the right to communicate the subject musical compositions to the public, and this finding is in no way affected or altered by any act or omission of Precision Audio. Petitioner's liability can be determined without need to implead Precision Audio. With regard to the warranties made by Precision Audio in the Memoranda of Agreement, the Court of Appeals correctly held that "[i]f any, the said guarantee merely gives the defendant-appellant the right to go after Precision Audio Video Services, Inc., for possible reimbursement." **119**

No other limitation to copyright exists in this case. Petitioner has also not raised the defense of fair use. Therefore, its unauthorized exercise of the copyright holders' communication to the public rights as a result of cablecasting the two karaoke channels is copyright infringement.

Whenever copyright infringement is proved, damages shall be awarded:

SECTION 2.16. *Remedies for Infringement*. — 216.1. Any person infringing a right protected under this law shall be liable:

xxx xxx xxx

(b) Pay to the copyright proprietor or his assigns or heirs such actual damages, including legal costs and other expenses, as he may have incurred due to the infringement as well as the profits the infringer may have made due to such infringement, and in proving profits the plaintiff shall be

required to prove sales only and the defendant shall be required to prove every element of cost which he claims, or, in lieu of actual damages and profits, such damages which to the court shall appear to be just and shall not be regarded as penalty.

We affirm the Court of Appeals' modification of the award of damages, though it must be noted that the trial court did not award "actual damages" but "just damages in lieu of actual damages" **120** as stated in Section 216.1 (b). Just damages may pertain to temperate or moderate damages, when actual or compensatory damages are not sufficiently proven. Under Section 216.1 (b), a court is given the discretion as to the amount and kind of damages it can impose. Nonetheless, there is no reason to disturb the Court of Appeals' modified award of temperate damages. Article 2224 of the [Civil Code](#) provides:

Article 2224. Temperate or moderate damages, which are more than nominal but less than compensatory damages, may be recovered when the court finds that some pecuniary loss has been suffered but its amount can not, from the nature of the case, be proved with certainty.

In [Sambar vs. Levi Strauss & Co.](#): **121**

For although the exact amount of damage or loss can not be determined with reasonable certainty, the fact that there was infringement means they suffered losses for which they are entitled to moderate damages. **122**

The award of exemplary damages and attorney's fees are also proper and reasonable under the circumstances.

However, the interest to be imposed on the monetary award in favor of respondent must be adjusted in view of this Court's Resolution in [Lara's Gifts & Decors, Inc. v. Midtown Industrial Sales, Inc.](#), **123** the relevant portions of which state:

With regard to an award of interest in the concept of actual and compensatory damages, the rate of interest, as well as the accrual thereof, is imposed, as follows:

xxx xxx xxx

B. In obligations not consisting of loans or forbearances of money, goods or credit:

xxx xxx xxx

2. For unliquidated claims:

Compensatory interest on the amount of damages awarded may be imposed in the discretion of the court at the rate of 6% per annum. No compensatory interest, however, shall be adjudged on unliquidated claims or damages until the demand can be established with reasonable certainty. Thus, when such certainty cannot be so reasonably established at the time the demand is made, the interest shall begin to run only from the date of the judgment of the trial court (at which time the quantification of damages may be deemed to have been reasonably ascertained) until full payment. The actual base for the computation of the interest shall, in any case, be on the principal amount finally adjudged. **124**

All intellectual property rights are not mere economic exercises. Our [Constitution](#) and laws recognize their social function and benefit to the common good. Copyright, in particular, is linked with culture:

. . . Copyright is profoundly intertwined with culture. Many, if not all, copyrighted works can and do shape identities of persons, groups, communities, and nations. Copyright is not merely economic; it also embodies "discursive power — the right to create, and control, cultural meanings." The State recognizes this not just with copyright law, but also with laws that promote and protect art, literature, culture workers, and the preservation and development of national cultural heritage. So-called "factual works" are part of the expression, speech, and the press explicitly protected in our Bill of Rights, while artistic creations enjoy State patronage and constitute cultural treasures. **125**

To encourage the creation, proliferation, and innovation of literary, artistic, and scientific works, our laws have designed a regime of protection that balances the incentives to an individual for disclosing their works and the eventual benefit to the public once the protections lapse and these works become freely available. **126** An essential component of this balance is certainty of enforcing creators' rights against unauthorized trespass:

Intellectual property rights, such as copyright and the neighboring right against rebroadcasting, establish an artificial and limited monopoly to reward creativity. Without these legally enforceable rights, creators will have extreme difficulty recovering their costs and capturing the surplus or profit of their works as reflected in their markets. This, in turn, is based on the theory that the possibility of gain due to creative work creates an incentive which may improve efficiency or simply enhance consumer welfare or utility . . .

These, however, depend on the certainty of enforcement. Creativity, by its very nature, is vulnerable to the free rider problem. It is easily replicated despite the costs to and efforts of the original creator. The more useful the creation is in the market, the greater the propensity that it will be copied. The most creative and inventive individuals are usually those who are unable to recover on their creations. **127**

Awareness of, and compliance with, intellectual property laws is the obligation of all persons, natural or juridical. To attain the advantages provided by society's scientists, inventors, artists, and other gifted citizens, there must first be respect for and enforcement of their rights.

ACCORDINGLY, the Petition for Review on *Certiorari* is **DENIED**. The Decision and Resolution of the Court of Appeals, Manila, in CA-G.R. CV No. 81083 are **AFFIRMED WITH MODIFICATION**. Philippine Home Cable Holdings, Inc. is ordered to pay Filipino Society of Composers, Authors & Publishers, Inc. PHP500,000.00 as temperate damages, PHP500,000.00 as exemplary damages, and PHP100,000.00 in attorney's fees. Interest at the rate of six percent (6%) *per annum* shall be imposed on the sum of the monetary awards from October 20, 2003, the date of the Regional Trial Court Decision, until full payment.

SO ORDERED.

Gesundo, C.J., Hernando, Inting, M.V. Lopez, Gaerlan, Rosario, J.Y. Lopez, Dimaampao, Marquez and Kho, Jr., JJ., concur.

Caguioa, J., see concurring opinion.

Lazaro-Javier, J., please see concurrence.

Zalameda, and Singh, JJ., pls. see separate concurring opinion.

Separate Opinions

CAGUIOA, J., concurring:

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 (IPOPIL) 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 [IPOPIL] 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 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 P1,000,000.00 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.**

xxx xxx xxx

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.

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:

xxx xxx xxx

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 those key points below.

I. The right of "public performance" and the right of "communication to

the public" are two separate and distinct rights.

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**

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

xxx xxx xxx

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.

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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. 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)

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 11bis

[*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:
- (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 11bis.

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 11bis 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 11bis.** For example, a broadcasting organisation broadcasts a chamber concert. Article 11bis 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 11bis, 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:

11bis.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.

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11bis.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.

11bis.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.**

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

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11bis.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 11bis deals with the diffusion of someone else's broadcast.**

11bis.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 11bis(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.

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11bis.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.

11bis.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 (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 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 not 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

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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:

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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)

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

<p style="text-align: center;">R.A. No. 8293 or the IP Code, approved on June 6, 1997; took effect on January 1, 1998</p>	<p style="text-align: center;">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</p>
<p>SEC. 171. Definitions. — x x x</p> <p style="text-align: center;">xxx xxx xxx</p> <p>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[.]</p>	<p>"SEC. 171. Definitions. — x x x</p> <p>"171.3. 'Communication to the public' or 'communicate to the public' means <u>any communication to the public, including broadcasting, rebroadcasting, retransmitting by cable, broadcasting and retransmitting by satellite, and includes</u> 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)</p>

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 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.

LAZARO-JAVIER, J., concurrence:

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. **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.

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.

ZALAMEDA, J., concurring:

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)

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.

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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:

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 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), 11*ter*(1)(ii), 14(1)(ii) and 14*bis*(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.)

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** 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 *Tuneln, 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 Tuneln is a company that operates Tuneln 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 Tuneln 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 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.

(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.

(26) With regard to the making available in on-demand services by broadcasters or 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 (IPOPIL) recognizes such distinction. In an official publication issued by the IPOPIL for the WIPO, the IPOPIL 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 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 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.

SINGH, J., concurring:

I concur with the *ponencia's* findings that Philippine Home Cable Holdings, Inc. (**Home Cable**) is guilty of copyright infringement. In arriving at this conclusion, the Senior Associate Justice, Hon. Marvic Mario Victor F. Leonen, aptly distinguished the provisions of [Republic Act No. 8293](#) or the [Intellectual Property Code \(IP Code\)](#) on "public performance" and "communication to the public" to determine the existence of infringement. Nonetheless, I wish to add to the discussions of these issues, in defining the economic right transgressed by Home Cable.

Copyright infringement is committed by any person who shall use original literary or artistic works, or derivative works, without the copyright owner's consent in such a manner as to violate the latter's copyright or economic rights. **1** Sec. 177 of the [IP Code](#) enumerates these as follows:

SECTION 177. Copyright or Economic Rights. — Subject to the provisions of Chapter VIII, copyright or economic rights shall consist of the exclusive right to carry out, authorize or prevent the following acts:

177.1. Reproduction of the work or substantial portion of the work;

177.2. Dramatization, translation, adaptation, abridgment, arrangement or other transformation of the work;

177.3. The first public distribution of the original and each copy of the work by sale or other forms of transfer of ownership;

177.4. Rental of the original or a copy of an audiovisual or cinematographic work, a work embodied in a sound recording, a computer program, a compilation of data and other materials or a musical work in graphic form, irrespective of the ownership of the original or the copy which is the subject of the rental; (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)

I submit that it is important to identify the specific economic right violated in this case, to properly narrow down the legal and jurisprudential bases for our findings.

Distinction between public performance and communication to the public

In my separate and concurring opinion in *Filipino Society of Composers, Authors and Publishers, Inc. v. Anrey, Inc.*, [2](#) I explained that the key distinction between "public performance" and "communication to the public" lies in the method that the copyrighted work is made available to the public.

Section 171.6 of the [IP Code](#) defines "public performance," "in the case of a sound recording," as "**making the recorded sounds audible at a place or at places where persons outside the normal circle of a family and that family's closest social acquaintances are or can be present**, irrespective of whether they are or can be present at the same place and at the same time, or at different places and/or at different times, and **where the performance can be perceived without the need for communication within the meaning of Subsection 171.3.**"

Under Section 171.3 of the [IP Code](#), "communication to the public" or "communicate to the public" refers to "the making of a work available to the public **by wire or wireless means** in such a way that members of the public may access these works from a place and time individually chosen by them." Section 202.9 of the [IP Code](#) further defines "communication to the public of a performance or a sound recording" as "the transmission to the public, **by any medium, otherwise than by broadcasting**, of sounds of a performance or the representations of sounds fixed in a sound recording."

The *ponencia* explained that pursuant to Section 177 of the [IP Code](#), Home Cable is liable for copyright infringement under Section 171.3 having cablecasted the copyrighted materials of Filipino Society of Composers, Authors and Publishers, Inc. (**Filscap**) via "communication to the public." Home Cable's act of "allegedly cablecasting the karaoke channels cannot be considered an exercise of the public performance right 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." [3](#) The *ponencia* reasons that these "performances" fall within the scope of Subsection 171.3, and not under Subsection 171.6.

I agree.

Here, Home Cable broadcasted the copyrighted musical compositions to its customers through its two cable channels, or through wire or wireless means. Clearly, this act falls squarely within the definition of Section 171.3 of the [IP Code](#) on "communication to the public." This method of making music available to the public cannot constitute "public performance" since Section 171.6 specifies that the public performance of a sound recording must be perceived "without the need for communication within the meaning of Subsection 171.3." This is because the definition of public performance under Section 171.6 excludes communication to the public under Section 171.3. Cablecasting through its karaoke channels, considered as premium channels and not mere free-to-air TV signals, is not the "public performance" contemplated by the [IP Code](#).

This is in accord with the [Berne Convention for the Protection of Literary and Artistic Works](#), to which the Philippines is a party, [4](#) and its accompanying Guide which separates the concept of public performance and broadcasting, that is, communication to the public.

Let me underscore that while the Court may take guidance from foreign courts in developing local jurisprudence, it is always vigilant in applying any such learnings to

properly fit our domestic laws. In this case, by the fact that our [IP Code](#) specifically distinguishes the economic right of "public performance" and "other communication to the public," we must be careful to maintain these distinctions.

Thus, I concur with the *ponencia's* finding that Philippine Home Cable Holdings, Inc. is liable for copyright infringement against the Filipino Society of Composers, Authors and Publishers, Inc., and I vote to **DENY** the Petition.

Footnotes

1. *Rollo*, pp. 9-49.
2. *Id.* at 51-75. The Decision was penned by Associate Justice Romeo F. Barza, and concurred in by Associate Justices Josefina Guevara-Salonga and Arcangelita M. Romilla-Lontok of the Ninth Division, Court of Appeals, Manila.
3. *Id.* at 77-78. The Resolution was penned by Associate Justice Romeo F. Barza, and concurred in by Associate Justices Josefina Guevara-Salonga and Arcangelita M. Romilla-Lontok of the Former Ninth Division, Court of Appeals, Manila.
4. *Id.* at 301-311. The Decision was penned by Judge Reynaldo B. Daway.
5. *Id.* at 79-92.
6. *Id.* at 100.
7. *Id.* at 112-113.
8. *Id.* at 112.
9. *Id.* at 113.
10. *Id.* at 112.
11. *Id.* at 113.
12. *Id.* at 115-116.
13. *Id.* at 115.
14. *Id.* at 52.
15. *Id.*
16. *Id.* at 301.
17. *Id.* at 52.
18. *Id.* at 53.
19. *Id.* at 302.
20. *Id.*
21. *Id.* at 121-124.
22. *Id.* at 123.
23. *Id.*
24. *Id.* at 124.
25. *Id.* at 302.
26. *Id.* at 301-311.

27. *Id.* at 311.
28. *Id.* at 72-73.
29. *Id.* at 73.
30. *Id.* at 73-74.
31. *Id.* at 74.
32. *Id.* at 77-78.
33. *Id.* at 9-43.
34. 596 Phil. 283-314 (2009) [Per J. Ynares-Santiago, Third Division].
35. *Rollo*, p. 22.
36. *Id.* at 24.
37. *Id.* at 26.
38. *Id.* at 26-27.
39. *Id.* at 27.
40. *Id.* at 30; Freddie Aguilar, Rachel Alejandro, George Canseco, Jose Mari Chan, Wenceslao T. Cornejo, Danny Javier, Jungee Marcelo, Jim Paredes, Freddie Saturno, and Venancio "Vehnee" A. Saturno.
41. *Id.* at 29-30.
42. *Id.*
43. *Id.* at 31-33.
44. *Id.* at 33-34.
45. *Id.* at 34.
46. *Id.*
47. *Id.* at 614-643.
48. *Id.* at 617.
49. *Id.* at 618-619.
50. *Id.* at 620.
51. *Id.* at 628.
52. *Id.* at 629.
53. *Id.* at 630.
54. *Id.* at 635-636.
55. *Id.* at 650-669.
56. *Id.* at 659.
57. *Id.* at 662-664.
58. **CONST.**, Art. XIV, Sec. 13.
59. 361 Phil. 900 (1999) [Per J. Mendoza, Second Division].

60. *Id.* at 914.
61. *E.g.*, Republic Act No. 9150, Republic Act No. 9502, and Republic Act No. 10372.
62. Republic Act No. 8293 (1996), Sec. 172.
63. *Joaquin v. Driilon*, 361 Phil. 900 (1999) [Per J. Mendoza, Second Division].
64. *Pearl & Dean (Phil.) v. Shoemart*, 456 Phil. 474 (2003) [Per J. Corona, Third Division].
65. *Ching v. Salinas*, 500 Phil. 628 (2005) [Per J. Callejo, Sr., Second Division].
66. *E.g.*, INTELLECTUAL PROPERTY CODE, subsection 188.2.
67. *E.g.*, INTELLECTUAL PROPERTY CODE, subsections 178.5 and 213.6.
68. *E.g.*, INTELLECTUAL PROPERTY CODE, Sec. 186, subsection 187.2 (a).
69. *E.g.*, INTELLECTUAL PROPERTY CODE, Sec. 189.
70. INTELLECTUAL PROPERTY CODE, subsection 173.1 (a) states:
- Sec. 173. *Derivative Works*. — 173.1. The following derivative works shall also be protected by copyright:
- (a) Dramatizations, translations, adaptations, abridgements, arrangements, and other alterations of literary or artistic works; and . . .
71. INTELLECTUAL PROPERTY CODE, subsection 173.1 (b), which states:
- Sec. 173. *Derivative Works*. — 173.1. The following derivative works shall also be protected by copyright: . . .
- (b) Collections of literary, scholarly or artistic works, and compilations of data and other materials which are original by reason of the selection or coordination or arrangement of their contents.
72. INTELLECTUAL PROPERTY CODE, subsection 173.2, which states:
- 173.2. The works referred to in paragraphs (a) and (b) of Subsection 173.1 shall be protected as new works: *Provided, however*, That such new work shall not affect the force of any subsisting copyright upon the original works employed or any part thereof, or be construed to imply any right to such use of the original works, or to secure or extend copyright in such original works.
73. INTELLECTUAL PROPERTY CODE, Sec. 181, which states:
- Sec. 181. *Copyright and Material Object*. — The copyright is distinct from the property in the material object subject to it. Consequently, the transfer or assignment of the copyright shall not itself constitute a transfer of the material object. Nor shall a transfer or assignment of the sole copy or of one or several copies of the work imply transfer or assignment of the copyright.
74. *Rollo*, p. 302.
75. *NBI-Microsoft Corp. v. Hwang*, 499 Phil. 423, 438 (2005) [Per J. Carpio, First Division], *Microsoft Corp. v. Manansala*, 772 Phil. 14, 21 (2015) [Per J. Bersamin, First Division].
76. 369 Phil. 764 (1999) [Per J. Pardo, First Division].
77. *Id.* at 779.
78. *Olaño v. Lim Eng Co*, 783 Phil. 234, 250 [Per J. Reyes, Third Division].

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

80. **INTELLECTUAL PROPERTY CODE**, Secs. 187-190, which state:

Sec. 187. *Reproduction of Published Work*. — 187.1. Notwithstanding the provision of Section 177, and subject to the provisions of Subsection 187.2, the private reproduction of a published work in a single copy, where the reproduction is made by a natural person exclusively for research and private study, shall be permitted, without the authorization of the owner of copyright in the work.

187.2. The permission granted under Subsection 187.1 shall not extend to the reproduction of:

- (a) A work of architecture in the form of building or other construction;
- (b) An entire book, or a substantial part thereof, or of a musical work in graphic form by reprographic means;
- (c) A compilation of data and other materials;
- (d) A computer program except as provided in Section 189; and
- (e) Any work in cases where reproduction would unreasonably conflict with a normal exploitation of the work or would otherwise unreasonably prejudice the legitimate interests of the author.

Sec. 188. *Reprographic Reproduction by Libraries*. — 188.1. Notwithstanding the provisions of Subsection 177.6, any library or archive whose activities are not for profit may, without the authorization of the author of copyright owner, make a single copy of the work by reprographic reproduction:

- (a) Where the work by reason of its fragile character or rarity cannot be lent to user in its original form;
- (b) Where the works are isolated articles contained in composite works or brief portions of other published works and the reproduction is necessary to supply them, when this is considered expedient, to persons requesting their loan for purposes of research or study instead of lending the volumes or booklets which contain them; and
- (c) Where the making of such a copy is in order to preserve and, if necessary in the event that it is lost, destroyed or rendered unusable, replace a copy, or to replace, in the permanent collection of another similar library or archive, a copy which has been lost, destroyed or rendered unusable and copies are not available with the publisher.

188.2. Notwithstanding the above provisions, it shall not be permissible to produce a volume of a work published in several volumes or to produce missing tomes or pages of magazines or similar works, unless the volume, tome or part is out of stock: *Provided*, That every library which, by law, is entitled to receive copies of a printed work, shall be entitled, when special reasons so require, to reproduce a copy of a published work which is considered necessary for the collection of the library but which is out of stock.

SECTION 189. *Reproduction of Computer Program*. — 189.1. Notwithstanding the provisions of Section 177, the reproduction in one (1) back-up copy or adaptation of a computer program shall be permitted, without the authorization of the author of, or other owner of copyright in, a computer program, by the lawful owner of that computer program: *Provided*, That the copy or adaptation is necessary for:

(a) The use of the computer program in conjunction with a computer for the purpose, and to the extent, for which the computer program has been obtained; and

(b) Archival purposes, and, for the replacement of the lawfully owned copy of the computer program in the event that the lawfully obtained copy of the computer program is lost, destroyed or rendered unusable.

189.2. No copy or adaptation mentioned in this Section shall be used for any purpose other than the ones determined in this Section, and any such copy or adaptation shall be destroyed in the event that continued possession of the copy of the computer program ceases to be lawful.

189.3. This provision shall be without prejudice to the application of Section 185 whenever appropriate.

Sec. 190. *Importation for Personal Purposes.* — 190.1. Notwithstanding the provision of Subsection 177.6, but subject to the limitation under the Subsection 185.2, the importation of a copy of a work by an individual for his personal purposes shall be permitted without the authorization of the author of, or other owner of copyright in, the work under the following circumstances:

(a) When copies of the work are not available in the Philippines and:

(i) Not more than one (1) copy at one time is imported for strictly individual use only; or

(ii) The importation is by authority of and for the use of the Philippine Government; or

(iii) The importation, consisting of not more than three (3) such copies or likenesses in any one invoice, is not for sale but for the use only of any religious, charitable, or educational society or institution duly incorporated or registered, or is for the encouragement of the fine arts, or for any state school, college, university, or free public library in the Philippines.

(b) When such copies form parts of libraries and personal baggage belonging to persons or families arriving from foreign countries and are not intended for sale: *Provided*, That such copies do not exceed three (3).

190.2. Copies imported as allowed by this Section may not lawfully be used in any way to violate the rights of owner the copyright or annul or limit the protection secured by this Act, and such unlawful use shall be deemed an infringement and shall be punishable as such without prejudice to the proprietor's right of action.

190.3. Subject to the approval of the Secretary of Finance, the Commissioner of Customs is hereby empowered to make rules and regulations for preventing the importation of articles the importation of which is prohibited under this Section and under treaties and conventions to which the Philippines may be a party and for seizing and condemning and disposing of the same in case they are discovered after they have been imported.

81. INTELLECTUAL PROPERTY CODE, Sec. 185, which states:

Sec. 185. *Fair Use of a Copyrighted Work.* — 185.1. The fair use of a copyrighted work for criticism, comment, news reporting, teaching including multiple copies for classroom use, scholarship, research, and similar purposes is not an infringement of copyright. Decompilation, which is understood here to be the reproduction of the [code](#) and translation of the forms of the computer program to achieve the interoperability of an independently created computer program with other programs may

also constitute fair use. In determining whether the use made of a work in any particular case is fair use, the factors to be considered shall include:

- (a) The purpose and character of the use, including whether such use is of a commercial nature or is for non-profit educational purposes;
- (b) The nature of the copyrighted work;
- (c) The amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
- (d) The effect of the use upon the potential market for or value of the copyrighted work.

185.2. The fact that a work is unpublished shall not by itself bar a finding of fair use if such finding is made upon consideration of all the above factors.

82. *Rollo*, p. 499.

83. **INTELLECTUAL PROPERTY CODE**, Sec. 180, which states:

Sec. 180. *Rights of Assignee*. — 180.1. The copyright may be assigned in whole or in part. Within the scope of the assignment, the assignee is entitled to all the rights and remedies which the assignor had with respect to the copyright.

180.2. The copyright is not deemed assigned inter vivos in whole or in part unless there is a written indication of such intention.

180.3. The submission of a literary, photographic or artistic work to a newspaper, magazine or periodical for publication shall constitute only a license to make a single publication unless a greater right is expressly granted. If two (2) or more persons jointly own a copyright or any part thereof, neither of the owners shall be entitled to grant licenses without the prior written consent of the other owner or owners.

84. **INTELLECTUAL PROPERTY CODE**, Sec. 183, which states:

Sec. 183. *Designation of Society*. — The copyright owners or their heirs may designate a society of artists, writers or composers to enforce their economic rights and moral rights on their behalf.

85. *Filscap v. Anrey, Inc.*, G.R. No. 233918, August 11, 2022, p. 8 [Per J. Zalameda, *En Banc*].

86. *Id.*

87. *ABS-CBN Corporation v. Gozon*, 755 Phil. 709, 751 (2015) [Per J. Leonen, Second Division].

88. *Rollo*, p. 498.

89. *Id.*

90. **Presidential Decree No. 49** (1972), Sec. 5.

91. *Rollo*, pp. 309-310.

92. *Id.* at 68.

93. Proclamation No. 137 (1955).

94. **Brussels Act** (1948), art. 11.

95. **Brussels Act** (1948), art. 11 *bis*.

96. Berne Notification No. 98, Accession by the Republic of the Philippines to the [Paris Act](#) (1971) (with the exception of Articles 1 to 21 and the Appendix), April 16, 1980, available at https://www.wipo.int/treaties/en/notifications/berne/treaty_berne_98.html (last accessed on February 28, 2023).
97. The "Special 301" priority watch list is part of the "Special 301" Report, "an annual review of the global state of [intellectual property] protection and enforcement" issued by the Office of the United States Trade Representative, and names countries deemed by the United States to have insufficient intellectual property protections or enforcement of intellectual property rights. See USTR Releases 2022 Special 301 Report on Intellectual Property Protection and Enforcement, April 27, 2022, available at <https://ustr.gov/about-us/policy-offices/press-office/press-releases/2022/april/ustr-releases-2022-special-301-report-intellectual-property-protection-and-enforcement> (last accessed on February 28, 2023).
98. Agreement Between the United States of America and the Philippines, Effected by Exchange of Letters at Manila and Washington, April 6, 1993, pp. 2-3, available at <https://www.state.gov/wp-content/uploads/2019/12/93-406-Philippines-Intellectual-Property-Notes.pdf> (last accessed on February 28, 2023).
99. Berne Notification No. 179, Declaration by the Republic of the Philippines Extending the Effects of its Accession of the [Paris Act](#) (1971) to Articles 1 to 21 and the Appendix, March 18, 1997, available at https://www.wipo.int/treaties/en/notifications/berne/treaty_berne_179.html (last accessed on February 28, 2023).
100. [Republic Act No. 8293](#), Secs. 2 and 3, which state:
- Sec. 2. Declaration of State Policy.* — The State recognizes that an effective intellectual and industrial property system is vital to the development of domestic and creative activity, facilitates transfer of technology, attracts foreign investments, and ensures market access for our products. It shall protect and secure the exclusive rights of scientists, inventors, artists and other gifted citizens to their intellectual property and creations, particularly when beneficial to the people, for such periods as provided in this Act.
- The use of intellectual property bears a social function. To this end, the State shall promote the diffusion of knowledge and information for the promotion of national development and progress and the common good.
- It is also the policy of the State to streamline administrative procedures of registering patents, trademarks and copyright, to liberalize the registration on the transfer of technology, and to enhance the enforcement of intellectual property rights in the Philippines.
- Sec. 3. International Conventions and Reciprocity.* — Any person who is a national or who is domiciled or has a real and effective industrial establishment in a country which is a party to any convention, treaty or agreement relating to intellectual property rights or the repression of unfair competition, to which the Philippines is also a party, or extends reciprocal rights to nationals of the Philippines by law, shall be entitled to benefits to the extent necessary to give effect to any provision of such convention, treaty or reciprocal law, in addition to the rights to which any owner of an intellectual property right is otherwise entitled by this Act.
101. See, e.g., [Pangilinan v. Cayetano](#), G.R. Nos. 238875, 239483 & 240954, March 16, 2021 [Per J. Leonen, *En Banc*].

102. The "communication to the public" right, separate and distinct from the "public performance" right, likewise exists in other jurisdictions. Among the Association of Southeast Asian Nations (ASEAN), the copyright laws of Cambodia (Law on Copyright and Related Rights, articles 2 (c) and 2 (i)), Indonesia (Law of the Republic of Indonesia No. 28 (2014), article 9.), Laos (Law on Intellectual Property (amended), article 102)), Myanmar (Pyidaungsu Hluttaw Law No. 15/2019, chapter 10 (18)), Malaysia (Act 332 (Copyright Act 1987), article 3), Singapore (Copyright Act, s 7 (1)), and Vietnam (Law No. 50/2005/QH11, article 20) all recognize a "communication to the public" economic right separate from a "public performance" right. See The ASEAN Secretariat, ASEAN Intellectual Property Rights Enforcement Handbook (2020), available at https://www.aseanip.org/Portals/0/ASEAN%20IPR%20Enforcement%20Handbook_with%20ISBN%20and%20Logo%20Final.pdf (last accessed on February 28, 2023). The European Union Directive 2001/29/EC, known as the InfoSoc Directive, provides in Article 3 the "right of communication to the public of works and right of making available to the public other subject-matter," while Australia implemented the "communication to the public" right in its Copyright Amendment (Digital Agenda) Act 2000. Conversely, the United States has not carved out a "communication to the public" or "making available to the public" right separate from the extant "public performance" right in its federal copyright law, Title 17 of the U.S. Code; instead, the United States Supreme Court in *ABC, Inc. v. Aereo, Inc.* (573 U.S. 431 (2014)) has held that the statutory scope of "public performance" encompassed the activities of a broadcaster, a viewer of the broadcast, and a cable system operator. Indeed, in 2016, the United States Copyright Office, through the Register of Copyrights, submitted a report to the United States Congress that concluded that the scope of Section 106, as written and then interpreted by United States courts, "collectively meet and adequately provide the substance of the making available right." (United States Copyright Office, "The Making Available Right in the United States, A Report of the Register of Copyrights," p. 4 available at https://www.copyright.gov/docs/making_available/making-available-right.pdf (2016)) The Copyright Office report used the phrase "making available right" because, in international intellectual property law, the essence of the communication to the public right is "the making available to the public of 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." (*Id.* at 1)

103. [WIPO Copyright Treaty](#), Preamble, which states, in part:

The Contracting Parties,

Desiring to develop and maintain the protection of the rights of authors in their literary and artistic works in a manner as effective and uniform as possible,

Recognizing the need to introduce new international rules and clarify the interpretation of certain existing rules in order to provide adequate solutions to the questions raised by new economic, social, cultural and technological developments,

Recognizing the profound impact of the development and convergence of information and communication technologies on the creation and use of literary and artistic works,

104. [WIPO Performances and Phonograms Treaty](#), Preamble, which states in part:

The Contracting Parties,

Desiring to develop and maintain the protection of the rights of performers and producers of phonograms in a manner as effective and uniform as possible,

Recognizing the need to introduce new international rules in order to provide adequate solutions to the questions raised by economic, social, cultural and technological developments,

Recognizing the profound impact of the development and convergence of information and communication technologies on the production and use of performances and phonograms,

105. WCT Notification No. 38, Accession by the Republic of the Philippines, July 4, 2002, available at https://www.wipo.int/treaties/en/notifications/wct/treaty_wct_38.html (last accessed on February 28, 2023).
106. WPPT Notification No. 37, Accession by the Republic of the Philippines, July 4, 2002, available at https://www.wipo.int/treaties/en/notifications/wppt/treaty_wppt_37.html (last accessed on February 28, 2023).
107. [Republic Act No. 10372](#), Sec. 4.
108. 596 Phil. 283 (2009) [Per J. Ynares-Santiago, Third Division].
109. *Id.* at 296-297.
110. Otherwise known as the [Revised Rules and Regulations Governing Cable Television Systems in the Philippines](#).
111. [ABS-CBN Broadcasting Corp. v. Phil. Multi-Media System, Inc.](#), 596 Phil. 283, 300-301 (2009) [Per J. Ynares-Santiago, Third Division].
112. *Id.* at 300.
113. *Rollo*, p. 89.
114. *Id.* at 115.
115. *Id.* at 70.
116. *Id.* at 112, 115.
117. 711 Phil. 451 (2013) [Per J. Perez, Second Division].
118. *Id.* at 469-470.
119. *Rollo*, p. 71.
120. *Id.* at 311.
121. 428 Phil. 425 (2002) [Per J. Quisumbing, Second Division].
122. *Id.* at 437.
123. G.R. No. 225433, September 20, 2022 [Per J. Leonen, *En Banc*].
124. *Id.* at 20-21.
125. J. Leonen, Dissenting Opinion in [Filscap v. Anrey, Inc.](#), G.R. No. 233918, August 11, 2022, pp. 5-6 [Per J. Zalameda, *En Banc*].
126. *Id.* at 2-3.
127. [ABS-CBN Corporation v. Gozon](#), 755 Phil. 709, 774-775 (2015) [Per J. Leonen, Second Division].

CAGUIOA, J., concurring:

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.
4. See *ponencia*, p. 2.
5. *Id.*
6. *Id.* at 3.
7. *Id.*
8. *Id.*
9. *Id.* at 3-4.
10. *Id.* at 4.
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.
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.
19. *Id.* at 44.
20. *Supra* note 2.
21. *Id.* at 44-45. Citation omitted.
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.*
25. *Id.* at 46-50 and 57. Citations omitted.

26. *Ponencia*, pp. 17-18.

27. See *id.* at 18.

28. *Id.* at 23-24.

29. *Id.* at 6.

LAZARO-JAVIER, J., concurring:

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

ZALAMEDA, J., concurring:

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

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

3. *Id.*

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).

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.

9. [2021] EWCA Civ 441.

10. *Ponencia*, p. 2.

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.

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.

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).
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 Concepts," 8th session, Geneva, 04 to 08 November 2022.
25. See Article 11*bis*, Berne Convention.

SINGH, J., concurring:

1. *Olaño v. Lim Eng Co*, G.R. No. 195835, 14 March 2016.
2. G.R. No. 233918, August 9, 2022.
3. *Decision*, p. 23.
4. See Treaties, <https://www.ipophil.gov.ph/reference/philippine-acceded-intellectual-property-treaties/>.