SECOND DIVISION

[G.R. No. L-36402. March 16, 1987.]

FILIPINO SOCIETY OF COMPOSERS, AUTHORS AND PUBLISHERS, INC., plaintiff-appellant, vs. BENJAMIN TAN, defendant-appellee.
Lichauco, Picazo & Agcaoili Law Office for plaintiff-appellant.
Ramon A. Nieves for defendant-appellee.

R E S O L U T I O N

PARAS, J p:

An appeal was made to the Court of Appeals docketed as CA-G.R. No. 46373-R * entitled Filipino Society of Composers, Authors, Publishers, Inc., Plaintiff-Appellant v. Benjamin Tan, Defendant-Appellee, from the decision of the Court of First Instance of Manila, Branch VII in Civil Case No. 71222 ** "Filipino Society of Composers, Authors and Publishers, Inc., Plaintiff v. Benjamin Tan, Defendant," which had dismissed plaintiffs' complaint without special pronouncement as to costs.

The Court of Appeals, finding that the case involves pure questions of law, certified the same to the Supreme Court for final determination (Resolution, CA-G.R. No. 46373-R, Rollo, p. 36; Resolution of the Supreme Court of February 16, 1973 in L-36402, Rollo, p. 38).

The undisputed facts of this case are as follows:

Plaintiff-appellant is a non-profit association of authors, composers and publishers duly organized under the Corporation Law of the Philippines and registered with the Securities and Exchange Commission. Said association is the owner of certain musical compositions among which are the songs entitled: "Dahil Sa Iyo," "Sapagkat Ikaw Ay Akin," "Sapagkat Kami Ay Tao Lamang" and "The Nearness Of You."

On the other hand, defendant-appellee is the operator of a restaurant known as "Alex Soda Foundation and Restaurant" where a combo with professional singers, hired to play and sing musical compositions to entertain and amuse customers therein, were playing and singing the above-mentioned compositions without any license or permission from the appellant to play or sing the same.

Accordingly, appellant demanded from the appellee payment of the necessary license fee for the playing and singing of aforesaid compositions but the demand was ignored.

Hence, on November 7, 1967, appellant filed a complaint with the lower court for infringement of copyright against defendant-appellee for allowing the playing in defendant-appellee's restaurant of said songs copyrighted in the name of the former.

Defendant-appellee, in his answer, countered that the complaint states no cause of action. While not denying the playing of said copyrighted compositions in his establishment, appellee maintains that the mere singing and playing of songs and popular tunes even if

they are copyrighted do not constitute an infringement (Record on Appeal, p. 11; Resolution, CA-G.R. NO. 46373-R, Rollo, pp. 32-36) under the provisions of Section 3 of the Copyright Law (Act 3134 of the Philippine Legislature).

The lower court, finding for the defendant, dismissed the complaint (Record on Appeal, p. 25).

Plaintiff appealed to the Court of Appeals which as already stated certified the case to the Supreme Court for adjudication on the legal question involved. (Resolution, Court of Appeals, Rollo, p. 36; Resolution of the Supreme Court of February 18, 1973, Rollo, p. 38).

In its brief in the Court of Appeals, appellant raised the following Assignment of Errors:

I
THE LOWER COURT ERRED IN HOLDING THAT THE MUSICAL COMPOSITIONS OF THE APPELLANT WERE IN THE NATURE OF PUBLIC PROPERTY WHEN THEY WERE COPYRIGHTED OR REGISTERED.

II
THE LOWER COURT ERRED IN HOLDING THAT THE MUSICAL COMPOSITIONS OF THE APPELLANT WERE PLAYED AND SUNG IN THE SODA FOUNTAIN AND RESTAURANT OF THE APPELLEE BY INDEPENDENT CONTRACTORS AND ONLY UPON THE REQUEST OF CUSTOMERS.

III
THE LOWER COURT ERRED IN HOLDING THAT THE PLAYING AND SINGING OF COPYRIGHTED MUSICAL COMPOSITIONS IN THE SODA FOUNTAIN AND RESTAURANT OF THE APPELLEE ARE NOT PUBLIC PERFORMANCES FOR PROFIT OF THE SAID COMPOSITIONS WITHIN THE MEANING AND CONTEMPLATION OF THE COPYRIGHT LAW.

IV
THE LOWER COURT ERRED IN NOT HOLDING THAT THE APPELLEE IS LIABLE TO THE APPELLANT FOR FOUR (4) SEPARATE INFRINGEMENTS. (Brief for Appellant, pp. A and B).

The petition is devoid of merit.

The principal issues in this case are whether or not the playing and signing of musical compositions which have been copyrighted under the provisions of the Copyright Law (Act 3134) inside the establishment of the defendant-appellee constitute a public performance for profit within the meaning and contemplation of the Copyright Law of the Philippines; and assuming that there were indeed public performances for profit, whether or not appellee can be held liable therefor.

Appellant anchors its claim on Section 3(c) of the Copyright Law which provides:

"SEC. 3. The proprietor of a copyright or his heirs or assigns shall have the

exclusive right:
xxx xxx xxx

(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;
xxx xxx xxx"

It maintains that playing or singing a musical composition is universally accepted as performing the musical composition and that playing and singing of copyrighted music in the soda fountain and restaurant of the appellee for the entertainment of the customers although the latter do not pay for the music but only for the food and drink constitute performance for profit under the Copyright Law (Brief for the Appellant, pp. 1925).

We concede that indeed there were "public performances for profit."

The word 'perform' as used in the Act has been applied to "One who plays a musical composition on a piano, thereby producing in the air sound waves which are heard as music . . . and if the instrument he plays on is a piano plus a broadcasting apparatus, so that waves are thrown out, not only upon the air, but upon the other, then also he is performing the musical composition." (Buck, et al. v. Duncan, et al.; Same v. Jewell-La Salle Realty Co., 32F. 2d. Series 367).

In relation thereto, it has been held that "The playing of music in dine and dance establishment which was paid for by the public in purchases of food and drink constituted 'performance for profit' within a Copyright Law," (Buck, et al. v. Russon, No. 4489 25 F. Supp. 317). Thus, it has been explained that while it is possible in such establishments for the patrons to purchase their food and drinks and at the same time dance to the music of the orchestra, the music is furnished and used by the orchestra for the purpose of inducing the public to patronize the establishment and pay for the entertainment in the purchase of food and drinks. The defendant conducts his place of business for profit, and it is public; and the music is performed for profit (Ibid., p. 319). In a similar case, the Court ruled that "The Performance in a restaurant or hotel dining room, by persons employed by the proprietor, of a copyrighted musical composition, for the entertainment of patrons, without charge for admission to hear it, infringes the exclusive right of the owner of the copyright." (Herbert v. Shanley Co.; John Church Co. v. Hillard Hotel Co., et al., 242 U.S. 590-591). In delivering the opinion of the Court in said two cases, Justice Holmes elaborated thus:

"If the rights under the copyright are infringed only by a performance where money is taken at the door, they are very imperfectly protected. Performances not different in kind from those of the defendants could be given that might compete with and even destroy the success of the monopoly that the law intends the plaintiffs to have. It is enough to say that there is no need to construe the statute so narrowly. The defendants' performances are not eleemosynary. They are part of a total for which the public pays, and the fact that the price of the whole is attributed to a particular item which those present are expected to order is not important. It is true that the music is not the sole object, but neither is the food, which probably could be got cheaper elsewhere. The object is a repast in surroundings that to people having limited power of conversation or disliking the rival

noise, give a luxurious pleasure not to be had from eating a silent meal. If music did not pay, it would be given up. If it pays, it pays out of the public's pocket. Whether it pays or not, the purpose of employing it is profit, and that is enough." (Ibid., p. 594).

In the case at bar, it is admitted that the patrons of the restaurant in question pay only for the food and drinks and apparently not for listening to the music. As found by the trial court, the music provided is for the purpose of entertaining and amusing the customers in order to make the establishment more attractive and desirable (Record on Appeal, p. 21). It will be noted that for the playing and singing the musical compositions involved, the combo was paid as independent contractors by the appellant (Record on Appeal, p. 24). It is therefore obvious that the expenses entailed thereby are added to the overhead of the restaurant which are either eventually charged in the price of the food and drinks or to the overall total of additional income produced by the bigger volume of business which the entertainment was programmed to attract. Consequently, it is beyond question that the playing and singing of the combo in defendant-appellee's restaurant constituted performance for profit contemplated by the Copyright Law. (Act 3134 as amended by P.D. No. 49, as amended).

Nevertheless, appellee cannot be said to have infringed upon the Copyright Law. Appellee's allegation that the composers of the contested musical compositions waived their right in favor of the general public when they allowed their intellectual creations to become property of the public domain before applying for the corresponding copyrights for the same (Brief for Defendant-Appellee, pp. 14-15) is correct.

The Supreme Court has ruled that "Paragraph 33 of Patent Office Administrative Order No. 3 (as amended, dated September 18, 1947) entitled 'Rules of Practice in the Philippines Patent Office relating to the Registration of Copyright Claims' promulgated pursuant to Republic Act 165, provides among other things that an intellectual creation should be copyrighted thirty (30) days after its publication, if made in Manila, or within sixty (60) days if made elsewhere, failure of which renders such creation public property." (Santos v. McCullough Printing Company, 12 SCRA 324-325 [1964]. Indeed, if the general public has made use of the object sought to be copyrighted for thirty (30) days prior to the copyright application the law deems the object to have been donated to the public domain and the same can no longer be copyrighted.

A careful study of the records reveals that the song "Dahil Sa Iyo" which was registered on April 20, 1956 (Brief for Appellant, p. 10) became popular in radios, juke boxes, etc. long before registration (TSN, May 28, 1968, pp. 3-5; 25) while the song "The Nearness Of You" registered on January 14, 1955 (Brief for Appellant, p. 10) had become popular twenty five (25) years prior to 1968, (the year of the hearing) or from 1943 (TSN, May 28, 1968, p. 27) and the songs "Sapagkat Ikaw Ay Akin" and "Sapagkat Kami Ay Tao Lamang" both registered on July 10, 1966, appear to have been known and sang by the witnesses as early as 1965 or three years before the hearing in 1968. The testimonies of the witnesses at the hearing of this case on this subject were unrebutted by the appellant. (Ibid., pp. 28; 29 and 30).

Under the circumstances, it is clear that the musical compositions in question had long become public property, and are therefore beyond the protection of the Copyright Law.

PREMISES CONSIDERED, the appealed decision of the Court of First Instance of Manila in Civil Case No. 71222 is hereby AFFIRMED.

SO ORDERED.

Fernan, Gutierrez, Jr., Padilla, Bidin and Cortes, JJ., concur.
Alampay, J., took no part. On leave at time of deliberation.

Footnotes

* Penned by Justice Ruperto G. Martin concurred in by Justices Andres Reyes and Mateo Canonoy.

** Penned by Judge Gregorio T. Lantin.