

ABS-CBN BROADCASTING  
CORPORATION,  
Complainant-Appellee,

APPEAL NO. 10-2004-00002

IPV No. 10-2004-00004

-versus-

For: Infringement of Copyright  
and Broadcasting Rights

PHILIPPINE MULTI-MEDIA  
SYSTEM, INC.  
Respondent-Appellant.

x-----x

## DECISION

This concerns the Decision No. 2003-01 dated 22 December 2003 rendered by the Director of Legal Affairs (Director), finding the Respondent-Appellant PHILIPPINEMULTI-MEDIA SYSTEM, INC. (Appellant) guilty of infringement of the broadcasting and copyright of Complainant-Appellee ABS-CBN BROADCASTING CORPORATION (Appellee). The Director ordered the Appellant to permanently cease and desist from rebroadcasting, publicly performing and communicating to the public the television programs of Complainant as said programs are shown in Channels 2 and 23, and to pay to the Complainant the following:

- (a) Temperate damages in the amount of P2,000,000.00
- (b) Exemplary damages in the amount of P1,000,000.00; and
- (c) Attorney's fees in the amount of P100,000.00

The resolution of this case involves the determination of:

1. Whether or not the intent to infringe is an indispensable element to hold somebody liable for infringement; and

Records show that on 13 May 2002, the Appellee, a corporation organized and existing under Philippine laws filed with the Bureau of Legal Affairs (BLA) a complaint against Appellant, also a corporation existing under the laws of the Philippines, praying that after due notice and hearing, a temporary restraining order and/or writ of preliminary injunction be issued enjoining Appellant from rebroadcasting the broadcasts of Appellee and from publicly performing and communicating to the public the television programs of Appellee. Appellee also asked that after trial on the merits, judgment be rendered declaring that Appellant has committed infringement and that Appellant has no rights to rebroadcast the broadcasts of Appellee and to publicly perform and communicate to the public the television programs of the Appellee. Appellee also sought the award of temperate, moral and exemplary damages, payment of attorney's fees and expenses of litigation and making permanent the writ of preliminary injunction.

In its complaint, Appellee alleged that it is duly licensed to engage in television and radio broadcasting and has the right and is authorized to originate and transmit or broadcast, including direct broadcasting via satellite, television and radio programs in and throughout the Philippines. Appellee said that it broadcasts its television programs in Metro Manila and nearby provinces through VHF Channel 2 and UHF Channel 23 and that television programs intended for viewers outside Metro Manila and nearby provinces are performed by duly authorized regional television stations. The programs shown by regional television stations, Appellee claimed are tailored in accordance with the perceived demands of particular area or province and thus, the television programs in Metro Manila are not necessarily shown in the provinces. Appellee maintained that without its authority, Appellant is rebroadcasting the broadcasts of Appellee over its Dream

Broadcasting System Service and is publicly performing and communicating to the public the television programs produced by the Appellee.

In its amended Answer dated 16 September 2002, Appellant argued that it would be premature for the Intellectual Property Office (IPO) to determine whether Appellee is entitled to the relief prayed for, unless the technical issue of whether the services Appellant provides can be classified as a cable television system and thus, subject to the mandatory carriage requirement provided for under the National Telecommunications Commission (NTC) Memorandum Circular No. 4-08-88, is first resolved. Appellant questioned the jurisdiction of the IPO over the said "operational" issues, which according to said party must be resolved by the NTC. Appellant stated that it has been carrying or transmitting VHF Channel 2 and UHF Channel 23 through its direct-to-home (DTH) satellite television service pursuant to and in compliance with the said NTC Memorandum Circular. Appellant maintained that as a provider of DTH satellite television service, which is similar to a cable television system, it is carrying Appellee's VHF Channel 2 and UHF Channel 23 because it is able to receive Appellee's broadcast signals via terrestrial antennae from its head-end facility located within the Clark Special Economic Zone and that because of the location of its head-end facility, it must carry Appellee's broadcast signals in order to comply with the said NTC Memorandum Circular. Appellant also raised the defense that some of the programs of the Appellee are news reporting, educational programs, informative programs on research and other similar purposes, and such as do not constitute infringement. Appellant claimed that Appellee has not shown that they were duly authorized by the producers of advertisement and foreign programs to prohibit, on their behalf, the retransmission of the said advertisement and foreign programs. Finally, Appellant asserted that the transmission which requires prior authority is transmission to the public and that Appellant makes the secondary transmission not to the general public but to limited private home subscribers.

After appropriate proceedings, the Director of the Bureau of Legal Affairs (Director) rendered Decision No. 2003-01. Obviously not satisfied, the Appellant filed this appeal on 06 February 2004 alleging that:

I  
THE BLA DIRECTOR GRAVELY ERRED IN RULING THAT THE  
INTELLECTUAL PROPERTY OFFICE HAS JURISDICTION OVER THE CASE.

II  
THE BLA DIRECTOR GRAVELY ERRED IN RULING THAT NTC  
MEMORANDUM CIRCULAR NO. 4-08-88 VIOLATED THE INTELLECTUAL  
PROPERTY CODE OF THE PHILIPPINES.

III  
THE BLA DIRECTOR GRAVELY ERRED IN DISREGARDING THE  
ADMINISTRATIVE INTERPRETATION OF THE NTC THAT APPELLANT PMSI IS  
SUBJECT TO THE MANDATORY CARRIAGE REQUIREMENT OF  
MEMORANDUM CIRCULAR NO. 4-08-88.

IV  
THE BLA DIRECTOR ERRED IN RULING THAT APPELLANT PMSI  
INFRINGED ON THE ALLEGED INTELLECTUAL PROPERTY RIGHTS OF THE  
APPELLEE ABS-CBN.

V  
THE BLA DIRECTOR GRAVELY ERRED IN AWARDING TEMPERATE  
AND EXEMPLARY DAMAGES AS WELL AS ATTORNEY'S FEES TO APPELLEE  
ABS-CBN.

In its comment to the appeal, Appellee argues that the instant appeal should be dismissed on ground of forum-shopping. Appellee maintains that Appellant has unequivocally confessed that at least the issue of supposed lack of jurisdiction of IPO is a common and identical issue in two cases it initiated before the Court of Appeals and the IPO. Appellee contends that the IP Code provides that the IPO shall administratively adjudicate contested proceedings affecting intellectual property rights and that the BLA of the IPO is vested with original jurisdiction in administrative complaints for violations of laws involving intellectual property rights. There is no deferring to the NTC to exercise any prior or primary jurisdiction. Appellee also argues that the BLA neither declare illegal or invalidate the NTC Memorandum Circular No. 4-08-88 nor failed to accord any evidentiary value to it including the 'contemporaneous construction" thereof. Moreover, Appellee says that Appellant is bound by its admission that it has been engaging in rebroadcasting, and that there is no irreconcilability between Memorandum Circular No. 4-08-88 and the IP Code and that the award of damages is warranted.

### I. Jurisdiction

Appellant argues that the complaint is mainly an action for infringement and damages and pursuant to the provisions of Republic Act No. 8293 (IP Code), the grant of remedies for infringement and the recovery of damages are vested in the "court" with appropriate jurisdiction. Appellant asserts that the function of the IPO is, among other things, to administratively adjudicate contested proceedings and that the jurisdiction of the BLA is limited to administrative complaint for violation of laws involving intellectual property rights. Appellant maintains that the complaint, subject of this appeal is not an administrative complaint for it seeks remedies against the Appellant, an entity not under the administrative control or supervision of the IPO. Appellant thus, contends that IPO has no jurisdiction to hear and decide the case and that the allegations of the complaint clearly show that it is the NTC that has jurisdiction.<sup>1</sup> This Office finds the arguments untenable.

The issue at hand is in connection with alleged violation of intellectual property rights. The jurisdiction of the NTC is on the supervision, adjudication and control of all telecommunication services throughout the country. It adopts and promulgates rules and regulations relative to the operation and maintenance of telecommunication facilities and services.<sup>2</sup> On the other hand, Sections 5, 5.1(f), 10 and 10.2 of the IP Code provide that:

“Sec. 5. Functions of the Intellectual Property Office (IPO) – 5.1. To administer and implement the State policies declared in this act, there is hereby created the Intellectual Property Office (IPO) which shall have the following functions:

xxx

f) Administratively adjudicate contested proceedings affecting intellectual property rights; xxx

Section 10. The Bureau of Legal Affairs – The Bureau of Legal Affairs shall have the following functions:

xxx

10.2(a) Exercise original jurisdiction in administrative complaints for violations of laws involving intellectual property rights: Provided, That its jurisdiction is limited to complaints where the total damages claimed are not less than Two Hundred Thousand Pesos (P200,000): Provided further, That availment of the provisional remedies may be granted it accordance with the Rules of Court. The Director of Legal Affairs shall have the power to hold and punish for contempt all those who disregard orders or writs issued in the course of the proceedings.”

As the damages claimed by the Appellee are not less than P200,000.00, the BLA and the IPO has jurisdiction over the complaint.

There is nothing in the law that says that IPO can only adjudicate cases involving entities under its administrative control or supervision. The term “administrative” complaint refers to the administrative remedy as distinguished from the complaint being filed in the regular courts. The jurisdiction of the IPO over such cases is conferred by law.

It is also basic that jurisdiction over the subject matter of an action is determined from the allegations of the complaint.<sup>3</sup> In the instant case, the Appellee alleged that the Appellant violates its exclusive right to carry out, authorize, or prevent the rebroadcasting of its broadcasts and it is the copyright owner of the television programs it produce and broadcasts over VHF Channel 2 and UHF Channel 23 and, thus, prays for a restraining order and/or injunction against the Appellant and claims temperate damages of P10,000,000, moral damages of P5,000,000, exemplary damages of P5,000,000 and attorney’s fees of P1,000,000. Section 4, and in particular, 4.1 of the IP Code provides in part that:

“Sec. 4 Definitions – 4.1. The term “intellectual property rights” consist of:

- a) Copyright and Related Rights;  
x x x”

Related Rights refer to the rights of performers, producers of sound recordings and broadcasting organizations. Broadcasting organizations enjoy the exclusive right to carry out, authorize or prevent any of the following acts:

- a) The rebroadcasting of their broadcasts;
- b) The recording in any manner, including the making of films or the use of video tape of their broadcasts for the purpose of communication to the public of television broadcasts of the same; and
- c) The use of such records for fresh transmissions or for fresh recording.<sup>4</sup>

Therefore, the allegations in the complaint of the Appellee involve violations of intellectual property rights, which is under the jurisdiction of the IPO.

This Office finds the Appellant’s arguments that notwithstanding the allegations of violation of intellectual property rights in the complaint, the actual issues of the case require the expertise of the National Telecommunications Commission and that the doctrine of primary jurisdiction should apply, without merit. Appellant’s claim that the Appellee effectively recognized that this Office has no jurisdiction over the case when it invoked the jurisdiction of the NTC through its letter-complained dated 14 April 2004<sup>5</sup> is not correct. The allegations in the complaint did not put in issue the interpretation of NTC Memorandum Circular No. 4-08-88. It is the Answer of the Appellant, which invoked the proper interpretation of the said circular as part of its defenses.<sup>6</sup> As correctly pointed out by the Director.

“The defenses raised by the Respondent, particularly its reliance on the rules and memoranda issued by the NTC, are not relevant in determining jurisdiction because the defenses asserted in the answer or motion to dismiss are not to be considered in resolving the issue of jurisdiction, otherwise, the question of jurisdiction could depend entirely upon the defendant.”<sup>7</sup>

Further, Appellant’s contention that it is only the NTC which has the expertise and which has primary jurisdiction to adjudicate the “operational” issues in this case deserves scant consideration. Suffice it to say that the central issue in this case is the Appellant’s alleged violation of the intellectual property rights of the Appellee.

The Appellee’s letter-complaint to the NTC dated 14 April 2004, which Appellant considers as Appellee’s recognition of the primary jurisdiction of the NTC, is of no moment. Precisely, such letter complains of an alleged violation of NTC Memorandum Circular No. 10-10-

2003 which is well within the jurisdiction of NTC to resolve. It is just proper that such issues involving circulars and licenses issued by the NTC be addressed by the said agency. It does not follow, however, that Appellee has recognized that the NTC has the primary jurisdiction over this case. The cause of action in the said letter-complaint is different from the causes of action raised by the Appellee in its complaint filed in the BLA. It cannot, therefore, be concluded that Appellee has recognized that this Office has no jurisdiction over the instant case.

## II. Forum Shopping

Appellee argues that the instant appeal should be dismissed on account of forum-shopping on the part of Appellant. Appellee maintains that Appellant disclosed in its Appeal Memorandum that it had filed a Petition for Certiorari with the Court of Appeals, which is still pending consideration in the said court. Appellee claims, that the ground raised in the said petition by the Appellant is the same first ground raised by the Appellant in this appeal. On the other hand, Appellant argues that there is no forum shopping in this case because there is no identity of parties, no identity of rights or causes of action, and different relief sought.

For forum shopping to exist, both actions must involve the same transactions, same essential facts and circumstances. The actions must also raised identical causes of action, subject matter and issues.<sup>8</sup> In the present case, the Appellant filed a Petition for Certiorari in the Court of Appeals (CA) on the ground that the Hearing Officer of the BLA acted without or in excess of his jurisdiction, or with grave abuse of discretion amounting to lack of excess of jurisdiction in issuing a temporary restraining order (TRO) in connection with the complaint filed by the Appellee against the Appellant for violation of intellectual property rights. In the instant appeal, the Appellant filed an Appeal Memorandum on the Decision of the Director ordering the Appellant to cease and desist from rebroadcasting the television programs of the Appellee and to pay temperate, moral and exemplary damages and attorney's fees to the Appellee.

This Office notes that while indeed the Appellant's ground in filing the Petition for Certiorari in the CA is "...excess or lack of jurisdiction" which is similar to Appellant's first ground in the instant appeal the IPO has no jurisdiction, the two cases still involve different causes of action, subject matter and issues. The petition in the CA arose from an Order issued by a Hearing Officer of the BLA granting the request for a TRO by the Appellee. On the other hand, the instant appeal involves the Decision rendered by the Director which orders the Appellant to cease and desist from rebroadcasting the television programs of the Appellee and to pay temperate, moral and exemplary damages and attorney's fees to the Appellee.

Forum shopping is the filing of repetitious suits in different courts. There is forum shopping whenever as a result of an adverse opinion in one forum, a party seeks a favorable opinion (other than by the appeal or certiorari) in another.<sup>9</sup> In the present case, what Appellant did, notwithstanding its position that this Office has no jurisdiction, is to appeal to this Office the Decision rendered by the Director as provided for in Section 7.1(b) of the IP Code.<sup>10</sup>

Appellant cannot, therefore, be guilty of forum shopping in filing this appeal as the law itself allows the Appellant to pursue this course of action.

## III. NTC Memorandum Circular No. 4-08-88

Appellant maintains that the Director gravely erred in ruling that NTC Memorandum Circular No. 4-08-88 violated the IP Code of the Philippines and in disregarding the administrative interpretation of the NTC that the Appellant is subject to the mandatory carriage requirement of Memorandum Circular No. 4-08-88.<sup>11</sup> Appellee, on the other hand, argued that the Director did not declare illegal or invalidate the said Memorandum Circular but was not accorded the "value" which Appellant deemed it should be.

This Office agrees with the Appellee that the Director did not declare illegal or invalidate NTC Memorandum Circular No. 4-08-88. The assailed Decision only points out that the said NTC

Memorandum Circular cannot prejudice intellectual property rights nor contravene the provisions of the IP Code. Nowhere in the assailed Decision can one find that the Director ruled that NTC Memorandum Circular NO. 4-08-88 violated the law on intellectual property. The Decision was categorical in stating that reliance on NTC Memorandum Circular No. 4-08-88 is misplaced.<sup>12</sup> A statement stating the wrong invocation of law does not mean that such law is being invalidated.

The Director did not also disregard the administrative interpretation of the NTC in the said Memorandum Circular, which this Office agrees is entitled to great weight and respect. However, it must be emphasized that the interpretation of the NTC on the said Memorandum Circular refers to the coverage of the mandatory carriage requirement mentioned in the Memorandum Circular and not to the central issue of this case, which is the determination of whether or not Appellant is guilty of infringement of Appellee's intellectual property rights. The only relevance of the said NTC Circular in this case is whether or not compliance therewith should be considered manifestation of lack of intent to commit infringement, and if it is, whether such lack of intent is a valid defense against the complaint of the Appellee.

#### IV. Infringement

The Director in her assailed decision, finds that the Appellant has infringed the broadcasting rights and copyright of the Appellee under Sections 211 and 177 of the IP Code. While the Director did not specify the particular provisions of Sections 211 and 177 that the Appellant allegedly violated, the Director ordered the Appellant to permanently cease and desist from rebroadcasting,<sup>13</sup> publicly performing<sup>14</sup> and communicating to the public<sup>15</sup> the television programs of Appellee shown in Channels 2 and 23.

Stripped of non-essentials, the Appellee's case, in sum, is anchored on its allegations that Appellant is rebroadcasting its programs in Channels 2 and a23 without its authority or consent through the latter's Dream Broadcasting System. Appellant's broadcast facility, according to the Appellee obtains signals from program providers, including the broadcasts of Appellee, which are allegedly rebroadcast directly to its subscribers. Appellant, counters that its carrying of Appellee's signals is not rebroadcasting but mere retransmission of Appellee's signals, and was done only to comply with Section 6.2 of NTC Circular No. 4-08-88, otherwise known as the "Must-Carry-Rule". Without compliance to the said circular, says the Appellant, NTC might cancel or revoke its license. Section 6.2 of said NTC Circular reads, as follows:

##### 6.2 Mandatory Coverage

6.2.1 A cable TV System operating in the 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.

There is no dispute that both Appellant and Appellee are broadcasting organizations under their respective franchises. The NTC, however, deems that the Appellant with respect to its DTH satellite television service is covered by NTC Circular No. 4-08-88 because the nature of such operations is similar to cable television.<sup>16</sup> Indeed, the facts and records show that:

1. Access to Appellant's DTH satellite television service is via subscription, hence, its limited viewer-ship; and
2. Appellant does not produce programs of its own but carries the signals of program providers, and under the "Must-Carry-Rule" of television broadcast stations the contents of which the Appellant does not alter, modify or change.

In effect, Appellant DTH satellite television service functions and operates in the same way as to that of a cable television. Cable television does not make or produce its own programs and send signals of its own but merely buys programs from providers. The only difference between the Appellant's DTH satellite television service and cable television is the technology

involved. In the Appellant's DTH satellite television service, the use of cable is replaced by satellite. Apparently, in treating the Appellant's DTH satellite television service as that of a cable television, the NTC looked into the service's nature and operations, the technology employed being only incidental.

The contentious issue therefore at hand, is whether or not the act of Appellant in carrying in its DTH satellite television service the television signals (Channels 2 and 23) of the Appellee, as it is required under the NTC Circular 4-08-88, falls within the term "rebroadcasting" and thus, in violation of Sections 211.1 and also of Section 177 of the IP Code. On this score, the terms "broadcasting" and "rebroadcasting" are to be considered not in their general, technical and engineering sense, but in their definition or description under the Intellectual Property Law. This issue is a legal one.

This Office notes that rebroadcasting is not defined nor described in the IP Code. The Philippines, however, is a signatory to the Rome Convention of 1961.<sup>17</sup> Paragraph (g) of Article 3 of the Rome Convention describes rebroadcasting, as the "*simultaneous broadcasting by one broadcasting organization of the broadcast of another broadcasting organization*". Based on said description, it can be inferred that when one is said to be rebroadcasting, it is actually broadcasting on its own, albeit, the same program or programs being broadcasted by another at the same time.

That the Appellant's subscribers are able to view Appellee's programs (Channels 2 and 23) at the same time that the latter is broadcasting the same is undisputed. The question however is, would the Appellant in doing so be considered engaged in broadcasting. Section 202.7 of the IP Code states that broadcasting means

"the transmission by wireless means for the public reception of sounds or 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 organizations or with its consent."

Section 202.7 of the IP Code, thus, provides two instances wherein there is broadcasting, to wit:

1. The transmission by wireless means for public reception of sounds or images or of representations thereof; and
2. The transmission by satellite for the public reception of sounds or images or of representations thereof where the means for decrypting are provided to the public by the broadcasting organization or with its consent.

It is under the second category that Appellant's DTH satellite television service must be examined since it is satellite-based. The elements of such category are as follows:

1. There is transmission of sounds or images or of representations thereof;
2. The transmission is through satellite;
3. The transmission is for public reception; and
4. The means for decrypting are provided to the public by the broadcasting organization or with its consent.

It is only the presence of all above elements can a determination that the DTH is broadcasting and consequently, rebroadcasting Appellee's signals in violation of Sections 211 and 177 of the IP Code, may be arrived at.

Accordingly, this Office is of the view that the transmission contemplated under Section 202.7 of the IP Code presupposes that the origin of the signals is the broadcaster. Hence, a program that is broadcasted is attributed to the broadcaster. In the same manner, the rebroadcasted program is attributed to the rebroadcaster.

In case at hand, Appellant is not origin nor does it claim to be the origin of programs broadcasted by the Appellee. Appellant did not make and transmit on its own but merely carried the existing signals of the Appellee. When Appellant's subscribers view the Appellee's programs in Channels 2 and 23, they know that the origin thereof was the Appellee.

Aptly, it is imperative to discern the nature of broadcasting. When a broadcaster transmits, the signals are scattered or dispersed in the air. Anybody may pick-up these signals. There is no restriction as to its number, type or class of recipients. To receive the signals, one is not required to subscribe or to pay any fee. One only has to have a receiver, and in case of television signals, a television set, and to tune-in to the right channel/frequency. The definition of broadcasting, wherein it is required that the transmission is wireless, all the more supports this discussion. Apparently, the indiscriminating dispersal of signals in the air is possible only through wireless means. The use of wire in transmitting signals, such as cable television limits the recipients to those who are connected. Unlike wireless transmissions, in wire-based transmissions, it is not enough that one wants to be connected and possesses the equipment. The service provider, such as cable television companies may choose its subscribers.

The only limitation to such dispersal of signals in the air is the technical capacity of the transmitters and other equipment employed by the broadcaster. While the broadcaster may use a less powerful transmitter to limit its coverage, this is merely a business strategy or decision and not an inherent limitation when transmission is through cable.

Accordingly, the nature of broadcasting is to scatter the signals in its widest area of coverage as possible. On this score, it may be said that making public means that accessibility is indiscriminating as long as it is within the range of the transmitter and equipment of the broadcaster. That the medium through which the Appellant carries the Appellee's signals, that is via satellite, does not diminish the fact that it operates and functions as a cable television. It remains that the Appellant's transmission of signals via its DTH satellite television service cannot be considered within the purview of broadcasting. The Director's reliance, therefore, on Section 171.6 of the IP Code, in determining of the word "public" as far as broadcasting is concerned is rather weak. The nature of making "public" through broadcasting is different from those contemplated under Section 171.6 of the IP Code. Sections 171.6 and 171.3 of the IP Code become relevant only when the violation is of Sections 211.2 and/or 177.6 and 177.7 of the IP Code.

The Director took note of the United States case *Fortnightly Corp. vs. United Artists*,<sup>18</sup> cited by the Appellant, wherein the United States Supreme Court held that a cable company had no copyright liability for retransmitting broadcast signals under the 1909 Copyright Act. The Director even cited another United States case, *Teleprompter Corp. vs. CBS, Inc.*<sup>19</sup> which applied the ruling in the former case. The discussions in the *Fortnightly* case is very significant, to wit:

"Television viewing results from combined activity by broadcasters and viewers. Both play active and indispensable roles in the process; neither is wholly passive. The broadcaster selects and procures the program to be viewed. He may produce it himself, whether "live" or with film or tape, or he may obtain it from a network or some other source. He then converts the visible image and audible sounds of the program into electronic signals and broadcasts the signals at radio frequency for public reception. Members of the public, by means of television sets and antennas that they themselves provide, receive the broadcaster's signals and reconvert them into visible images and audible sounds of the program. The effective range of the broadcast is determined by the combined contribution of the equipment employed by the broadcaster and that supplied by the viewer.

"The television broadcaster in one sense does less than the exhibitor of a motion picture or stage play: he supplies his audience not visible images but only with electronic



signals. The viewer conversely does more than a member of a theater audience; he provides the equipment to convert electronic signals into audible sound and visible images. Despite these deviations from the conventional situation contemplated by the framers of the Copyright Act, broadcasters have been judicially treated as exhibitors, and viewers as members of a theater audience. Broadcaster's perform. Viewers do not perform. Thus, while both broadcaster and viewer play crucial roles in the total television process, a line is drawn between them. One is treated as active performer; the other, as a passive beneficiary.

“When CATV is considered in this framework, we conclude that it falls on the viewer's side of the line. Essentially, a CATV system no more than enhances the viewer's capacity to receive the broadcaster's signals; it provides a well-located antenna with an efficient connection to the viewer's television set. It is true that a CATV plays an active role in making reception possible in a given area, but so ordinary television sets and antennas. CATV equipment is powerful and sophisticated, but the basic function the equipment serves is little different from that served by the equipment generally furnished by the television viewer. If an individual erected an antenna on a hill, strung a cable to his house, and installed the necessary amplifying equipment, he would not be performing the programs he received on his television set. The result would be no different if several people combined to erect a cooperative antenna for the same purpose. The only difference in the case of CATV is that the antenna system is erected and owned not by its users but by an entrepreneur.

The function of CATV systems has little in common with the function of broadcast or rebroadcast. Broadcasters select the programs to be viewed; CATV systems simply carry, without editing, whatever programs they received. Broadcasters procure programs and propagate them into public; CATV receives programs that have been released to the public and carry them by private channels to additional viewers. We hold that CATV operators, like viewers and unlike broadcasters, do not perform the programs that they receive and carry.”

Be that as it may, the Director finds that the Fortnightly case is unreliable because of the copyright law amendments in 1976 to include a provision that required cable companies to pay statutory royalty fees to program owners before being allowed to retransmit broadcast signals.<sup>20</sup> This Office finds such position erroneous. The cases were decided under the old United States Copyright Law. Hence, its weight, if any, in this instance depends whether or not our present copyright provisions in the IP Code are similar with those under the old United States Copyright Law. Citing the United States copyright law amendments of 1976 is misplaced because this time, specific legal provisions are already existing which imposes such obligation on the part of cable television companies.

This Office also finds no evidence on record showing that the Appellant has provided decrypting means to the public indiscriminately. Considering the nature of this case, which is punitive in fact, the burden of proving the existence of the elements constituting the acts punishable rests on the shoulders of the complainant.

Accordingly, this Office finds that there is no rebroadcasting on the part of the Appellant of the Appellee's programs on Channels 2 and 23, as defined under the Rome Convention.

Neither does this Office find the Appellant guilty of infringement under Section 177 of the IP Code. The applicable provision should have been Section 211.2 of the IP Code. The rights of the Appellee under Sections 177.6 and 177.7 are subsumed in Section 211.2 of the IP Code. There is no evidence on record that the Appellant is engaged in the recording in any manner, including the making of films or the use of video tape, of their broadcasts for the purpose of communication to the public of television broadcasts of the same. What it did was to carry the Appellee's signals in its DTH satellite television service, nothing more.

Granting en arguendo that Section 177 of the IP Code is applicable in this instance, Section 184(h) of the same code provides:

Section 184. Limitation on Copyright – 184.1. Notwithstanding the provisions of Chapter V, the following shall not constitute infringement of copyright:

(a) x x x

(h) The use made of work by or under the direction or control of the Government xxx.

Accordingly, the “Must-Carry-Rule” under NTC Circular NO. 4-08-88 falls under the foregoing category of limitations on copyright. This Office agrees with the Appellant that the “Must-Carry-Rule” is in consonance with the principles and objectives underlying the Executive Order No. 36, to wit:

“The Filipino people must be given wider access to more sources of news, information, education, sports event, and entertainment programs other than those provided for by mass media and afforded television programs to attain a well-informed, well-versed and culturally refined citizenry and enhance their socio-economic growth:

“WHEREAS, cable television (CATV) systems could support or supplement the services provided by the television broadcast facilities, local and overseas, as the national information highway to the countryside.

The “Must-Carry-Rule” favor both broadcasting organizations and the public. It prevents cable television companies from excluding broadcasting organizations especially in those places not reach by signals. Also, the rule prevents cable television companies from depriving viewers in far-flung areas the enjoyment of programs available to city viewers. In fact, this Office finds the rule more burdensome on the part of the cable television companies. The latter carries the television signals and shoulders the costs without any recourse or charging. On the other hand, the signals that are carried by cable television companies are dispersed and scattered by the television stations and anybody with a television set is free to pick them up.

With its enormous resources and vaunted technological capabilities, Appellee’s broadcast signals can reach almost every corner of the archipelago. That in spite of such capacity, it chooses to maintain regional stations, is a business decision. That the “Must-Carry-Rule” adversely affects the profitability of maintaining such regional stations since there will be no competition between them and its Metro Manila stations is speculative and an attempt to extrapolate the effects of the rule. As discussed above, Appellant’s DTH satellite television services is of limited subscription. There was not even a showing on part of the Appellee the number of Appellant’s subscribers in one region as compared to non-subscribing television owners. In any event, if this Office is to engage in conjecture, such competition between the regional stations and the Metro Manila station will benefit the public as such competition will most likely result in the production of better television programs.

WHEREFORE, premises considered, the instant appeal is hereby GRANTED. Accordingly, Decision No. 2003-01 dated 22 December 2003 of the Director of Bureau of Legal Affairs is hereby REVERSED and SET ASIDE.

Let a copy of this Decision be furnished the Director if the Bureau of Legal Affairs for appropriate action, and the records be returned to her for proper disposition. The Documentation, Information and Technology Transfer Bureau is also given a copy for library and reference purposes.

SO ORDERED.

December 20, 2004, Makati City.

EMMA C. FRANCISCO  
Director General

FOOTNOTES:

1 APPEAL MEMORANDUM, pp.21-22.

2 See Executive Order No. 546, 23 July 1979.

3 Isidro vs. Court of Appeals, G.R. No. 105586, 15 December 1993.

4 Republic Act No. 8293, Section 211.

5 See Appellant's MANIFESTATION AND MOTION, pp. 23-24.

6 Appeal Memorandum, p.22.

7 DECISION, p.7.

8 International Container Terminal Services, Inc. et al. vs. CA, et al., G.R. No. 116910, 18 October 1995.

9 First Philippine International Bank, et al, vs. CA, G.R. No. 115849, 24 January 1996.

10 Section 7 of the IP Code provides that:

“Sec. 7. The Director General and Deputies Director General – 7.1 Functions – The Director General shall exercise the following powers and functions:

X X X

b) Exercise exclusive appellate jurisdiction over all decisions rendered by the Director of Legal Affairs, the Director of Patents, the Director of Trademarks, and the Director of the Documentation, Information and Technology Transfer Bureau. x x x.”

11 APPEAL MEMORANDUM, pp. 34 and 39.

12 See Decision, p.8.

13 Section 211.1, IP Code.

14 Section 177.6, IP Code.

15 Section 177.7, IP Code.

16 See Exhibit “28” (Letter of NTC to Appellant dated 20 December 2002).

17 “International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations.”

18 U.S. Supreme Court 392 U.S. 390 (1968)

19 415 U.S. 394 (1974)

20 Decision No. 2003-01, page 16 citing 17 U.S.C. 111.