

THIRD DIVISION

ABS-CBN BROADCASTING CORPORATION,

Petitioner,

- versus -

PHILIPPINE MULTI-MEDIA SYSTEM, INC., CESAR G. REYES, FRANCIS CHUA (ANG BIAO), MANUEL F. ABELLADA, RAUL B. DE MESA, AND ALOYSIUS M. COLAYCO, Respondents.

G.R. Nos. 175769-70

Present:

Ynares-Santiago, J. (Chairperson), Austria-Martinez, Chico-Nazario, Nachura, and Leonardo-De Castro, * JJ.

Promulgated:

January 19, 2009

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DECISION

YNARES-SANTIAGO, J.:

This petition for review on certiorari^[1] assails the July 12, 2006 Decision^[2] of the Court of Appeals in CA-G.R. SP Nos. 88092 and 90762, which affirmed the December 20, 2004 Decision of the Director-General of the Intellectual Property Office (IPO) in Appeal No. 10-2004-0002. Also assailed is the December 11, 2006 Resolution^[3] denying the motion for reconsideration.

Petitioner ABS-CBN Broadcasting Corporation (ABS-CBN) is licensed under the laws of the Republic of the Philippines to engage in television and radio broadcasting.^[4] It broadcasts television programs by wireless means to Metro Manila and nearby provinces, and by satellite to provincial stations through Channel 2 on Very High Frequency (VHF) and Channel 23 on Ultra High Frequency (UHF). The programs aired over Channels 2 and 23 are either produced by ABS-CBN or purchased from or licensed by other producers.

ABS-CBN also owns regional television stations which pattern their programming in accordance with perceived demands of the region. Thus, television programs shown in Metro Manila and nearby provinces are not necessarily shown in other provinces.

Respondent Philippine Multi-Media System, Inc. (PMSI) is the operator of Dream Broadcasting System. It delivers digital direct-to-home (DTH) television *via* satellite to its subscribers all over the Philippines. Herein individual respondents, Cesar G. Reyes, Francis Chua, Manuel F. Abellada, Raul B. De Mesa, and Aloysius M. Colayco, are members of PMSI's Board of Directors.

PMSI was granted a legislative franchise under Republic Act No. 8630^[5] on May 7, 1998 and was given a Provisional Authority by the National Telecommunications Commission (NTC) on February 1, 2000 to install, operate and maintain a nationwide DTH satellite service. When it commenced operations, it offered as part of its program line-up ABS-CBN Channels 2 and 23, NBN, Channel 4, ABC Channel 5, GMA Channel 7, RPN Channel 9, and IBC Channel 13, together with other paid premium program channels.

However, on April 25, 2001,^[6] ABS-CBN demanded for PMSI to cease and desist from rebroadcasting Channels 2 and 23. On April 27, 2001,^[7] PMSI replied that the rebroadcasting was in accordance with the authority granted it by NTC and its obligation under NTC Memorandum Circular No. 4-08-88,^[8] Section 6.2 of which requires all cable television system

operators operating in a community within Grade “A” or “B” contours to carry the television signals of the authorized television broadcast stations.^[9]

Thereafter, negotiations ensued between the parties in an effort to reach a settlement; however, the negotiations were terminated on April 4, 2002 by ABS-CBN allegedly due to PMSI’s inability to ensure the prevention of illegal retransmission and further rebroadcast of its signals, as well as the adverse effect of the rebroadcasts on the business operations of its regional television stations.^[10]

On May 13, 2002, ABS-CBN filed with the IPO a complaint for “Violation of Laws Involving Property Rights, with Prayer for the Issuance of a Temporary Restraining Order and/or Writ of Preliminary Injunction,” which was docketed as IPV No. 10-2002-0004. It alleged that PMSI’s unauthorized rebroadcasting of Channels 2 and 23 infringed on its broadcasting rights and copyright.

On July 2, 2002, the Bureau of Legal Affairs (BLA) of the IPO granted ABS-CBN’s application for a temporary restraining order. On July 12, 2002, PMSI suspended its retransmission of Channels 2 and 23 and likewise filed a petition for *certiorari* with the Court of Appeals, which was docketed as CA-G.R. SP No. 71597.

Subsequently, PMSI filed with the BLA a Manifestation reiterating that it is subject to the must-carry rule under Memorandum Circular No. 04-08-88. It also submitted a letter dated December 20, 2002 of then NTC Commissioner Armi Jane R. Borje to PMSI stating as follows:

This refers to your letter dated December 16, 2002 requesting for regulatory guidance from this Commission in connection with the application and coverage of NTC Memorandum Circular No. 4-08-88, particularly Section 6 thereof, on mandatory carriage of television broadcast signals, to the direct-to-home (DTH) pay television services of Philippine Multi-Media System, Inc. (PMSI).

Preliminarily, both DTH pay television and cable television services are broadcast services, the only difference being the medium of delivering such services (i.e. the former by satellite and the latter by cable). Both can carry broadcast signals to the remote areas, thus enriching the lives of the residents thereof through the dissemination of social, economic, educational information and cultural programs.

The DTH pay television services of PMSI is equipped to provide nationwide DTH satellite services. Concededly, PMSI’s DTH pay television services covers very much wider areas in terms of carriage of broadcast signals, including areas not reachable by cable television services thereby providing a better medium of dissemination of information to the public.

In view of the foregoing and the spirit and intent of NTC memorandum Circular No. 4-08-88, particularly section 6 thereof, on mandatory carriage of television broadcast signals, DTH pay television services should be deemed covered by such NTC Memorandum Circular.

For your guidance. (Emphasis added)^[11]

On August 26, 2003, PMSI filed another Manifestation with the BLA that it received a letter dated July 24, 2003 from the NTC enjoining strict and immediate compliance with the must-carry rule under Memorandum Circular No. 04-08-88, to wit:

Dear Mr. Abellada:

Last July 22, 2003, the National Telecommunications Commission (NTC) received a letter dated July 17, 2003 from President/COO Rene Q. Bello of the International Broadcasting Corporation (IBC-Channel 13) complaining that your company, Dream Broadcasting System, Inc., has cut-off, without any notice or explanation whatsoever, to air the programs of IBC-13, a free-to-air television, to the detriment of the public.

We were told that, until now, this has been going on.

Please be advised that as a direct broadcast satellite operator, operating a direct-to-home (DTH) broadcasting system, with a provisional authority (PA) from the NTC, your company, along with cable television operators, are mandated to strictly comply with the existing policy of NTC on mandatory carriage of television broadcast signals as provided under Memorandum Circular No. 04-08-88, also known as the Revised Rules and Regulations Governing Cable Television System in the Philippines.

This mandatory coverage provision under Section 6.2 of said Memorandum Circular, requires all cable television system operators, operating in a community within the Grade "A" or "B" contours to "must-carry" the television signals of the authorized television broadcast stations, one of which is IBC-13. Said directive equally applies to your company as the circular was issued to give consumers and the public a wider access to more sources of news, information, entertainment and other programs/contents.

This Commission, as the governing agency vested by laws with the jurisdiction, supervision and control over all public services, which includes direct broadcast satellite operators, and taking into consideration the paramount interest of the public in general, hereby directs you to immediately restore the signal of IBC-13 in your network programs, pursuant to existing circulars and regulations of the Commission.

For strict compliance. (Emphasis added)^[12]

Meanwhile, on October 10, 2003, the NTC issued Memorandum Circular No. 10-10-2003, entitled "Implementing Rules and Regulations Governing Community Antenna/Cable Television (CATV) and Direct Broadcast Satellite (DBS) Services to Promote Competition in the Sector." Article 6, Section 8 thereof states:

As a general rule, the reception, distribution and/or transmission by any CATV/DBS operator of any television signals without any agreement with or authorization from program/content providers are prohibited.

On whether Memorandum Circular No. 10-10-2003 amended Memorandum Circular No. 04-08-88, the NTC explained to PMSI in a letter dated November 3, 2003 that:

To address your query on whether or not the provisions of MC 10-10-2003 would have the effect of amending the provisions of MC 4-08-88 on mandatory carriage of television signals, the answer is in the negative.

x x x x

The Commission maintains that, MC 4-08-88 remains valid, subsisting and enforceable.

Please be advised, therefore, that as duly licensed direct-to-home satellite television service provider authorized by this Commission, your company continues to be bound by the guidelines provided for under MC 04-08-88, specifically your obligation under its mandatory carriage provisions, in addition to your obligations under MC 10-10-2003. (Emphasis added)

Please be guided accordingly.^[13]

On December 22, 2003, the BLA rendered a decision^[14] finding that PMSI infringed the broadcasting rights and copyright of ABS-CBN and ordering it to permanently cease and desist from rebroadcasting Channels 2 and 23.

On February 6, 2004, PMSI filed an appeal with the Office of the Director-General of the IPO which was docketed as Appeal No. 10-2004-0002. On December 23, 2004, it also filed with the Court of Appeals a "Motion to Withdraw Petition; Alternatively, Memorandum of the Petition for Certiorari" in CA-G.R. SP No. 71597, which was granted in a resolution dated February 17, 2005.

On December 20, 2004, the Director-General of the IPO rendered a decision^[15] in favor of PMSI, the dispositive portion of which states:

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 of 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.^[16]

Thus, ABS-CBN filed a petition for review with prayer for issuance of a temporary restraining order and writ of preliminary injunction with the Court of Appeals, which was docketed as CA-G.R. SP No. 88092.

On July 18, 2005, the Court of Appeals issued a temporary restraining order. Thereafter, ABS-CBN filed a petition for contempt against PMSI for continuing to rebroadcast Channels 2 and 23 despite the restraining order. The case was docketed as CA- G.R. SP No. 90762.

On November 14, 2005, the Court of Appeals ordered the consolidation of CA-G.R. SP Nos. 88092 and 90762.

In the assailed Decision dated July 12, 2006, the Court of Appeals sustained the findings of the Director-General of the IPO and dismissed both petitions filed by ABS-CBN.^[17]

ABS-CBN's motion for reconsideration was denied, hence, this petition.

ABS-CBN contends that PMSI's unauthorized rebroadcasting of Channels 2 and 23 is an infringement of its broadcasting rights and copyright under the Intellectual Property Code (IP Code);^[18] that Memorandum Circular No. 04-08-88 excludes DTH satellite television operators; that the Court of Appeals' interpretation of the must-carry rule violates Section 9 of Article III^[19] of the Constitution because it allows the taking of property for public use without payment of just compensation; that the Court of Appeals erred in dismissing the petition for contempt docketed as CA-G.R. SP No. 90762 without requiring respondents to file comment.

Respondents, on the other hand, argue that PMSI's rebroadcasting of Channels 2 and 23 is sanctioned by Memorandum Circular No. 04-08-88; that the must-carry rule under the Memorandum Circular is a valid exercise of police power; and that the Court of Appeals correctly dismissed CA-G.R. SP No. 90762 since it found no need to exercise its power of contempt.

After a careful review of the facts and records of this case, we affirm the findings of the Director-General of the IPO and the Court of Appeals.

There is no merit in ABS-CBN's contention that PMSI violated its broadcaster's rights under Section 211 of the IP Code which provides in part:

Chapter XIV
BROADCASTING ORGANIZATIONS

Sec. 211. Scope of Right. - Subject to the provisions of Section 212, broadcasting organizations shall enjoy the exclusive right to carry out, authorize or prevent any of the following acts:

211.1. The rebroadcasting of their broadcasts;

x x x x

Neither is PMSI guilty of infringement of ABS-CBN's copyright under Section 177 of the IP Code which states that copyright or economic rights shall consist of the exclusive right to carry out, authorize or prevent the public performance of the work (Section 177.6), and other communication to the public of the work (Section 177.7).^[20]

Section 202.7 of the IP Code defines broadcasting 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."

On the other hand, rebroadcasting as defined in Article 3(g) of the International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations, otherwise known as the 1961 Rome Convention, of which the Republic of the Philippines is a signatory,^[21] is "the simultaneous broadcasting by one broadcasting organization of the broadcast of another broadcasting organization."

The Director-General of the IPO correctly found that PMSI is not engaged in rebroadcasting and thus cannot be considered to have infringed ABS-CBN's broadcasting rights and copyright, thus:

That the Appellant's [herein respondent PMSI] subscribers are able to view Appellee's [herein petitioner ABS-CBN] 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 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."

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

1. The transmission by wireless means for the public reception of sounds or of images or of representations thereof; and
2. The transmission by satellite for the public reception of sounds or of 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 the 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 the case at hand, Appellant is not the origin nor does it claim to be the origin of the 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 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 signal, 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. x x x

x x x x

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 shoulder 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.^[22]

Under the Rome Convention, rebroadcasting is "the simultaneous broadcasting by one broadcasting organization of the broadcast of another broadcasting organization." The Working Paper^[23] 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."^[24] 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 basis to its viewers. Clearly, PMSI does not perform the functions of a broadcasting organization; thus, it cannot be said that it is engaged in rebroadcasting Channels 2 and 23.

The Director-General of the IPO and the Court of Appeals also correctly found that PMSI's services are similar to a cable television system because the services it renders fall under cable "retransmission," as described in the Working Paper, to wit:

(G) Cable Retransmission

47. When a radio or television program is being broadcast, it can be retransmitted to new audiences by means of cable or wire. In the early days of cable television, it was mainly used to improve signal reception, particularly in so-called "shadow zones," or to distribute the signals in large buildings or building complexes. With improvements in technology, cable operators now often receive signals from satellites before retransmitting them in an unaltered form to their subscribers through cable.

48. In principle, cable retransmission can be either simultaneous with the broadcast over-the-air or delayed (deferred transmission) on the basis of a fixation or a reproduction of a fixation. Furthermore, they might be unaltered or

altered, for example through replacement of commercials, etc. In general, however, the term “retransmission” seems to be reserved for such transmissions which are both simultaneous and unaltered.

49. The Rome Convention does not grant rights against unauthorized cable retransmission. Without such a right, cable operators can retransmit both domestic and foreign over the air broadcasts simultaneously to their subscribers without permission from the broadcasting organizations or other right holders and without obligation to pay remuneration.^[25] (Emphasis added)

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 therefore constitute rebroadcasting in violation of the former’s intellectual property rights under the IP Code.

It must be emphasized that the law on copyright is not absolute. The IP Code provides that:

Sec. 184. Limitations on Copyright. -

184.1. Notwithstanding the provisions of Chapter V, the following acts shall not constitute infringement of copyright:

x x x x

(h) The use made of a work by or under the direction or control of the Government, by the National Library or by educational, scientific or professional institutions where such use is in the public interest and is compatible with fair use;

The carriage of ABS-CBN’s signals by virtue of the must-carry rule in Memorandum Circular No. 04-08-88 is under the direction and control of the government though the NTC which is vested with exclusive jurisdiction to supervise, regulate and control telecommunications and broadcast services/facilities in the Philippines.^[26] The imposition of the must-carry rule is within the NTC’s power to promulgate rules and regulations, as public safety and interest may require, to encourage a larger and more effective use of communications, radio and television broadcasting facilities, and to maintain effective competition among private entities in these activities whenever the Commission finds it reasonably feasible.^[27] As correctly observed by the Director-General of the IPO:

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 [herein respondent PMSI] that the “Must-Carry Rule” is in consonance with the principles and objectives underlying Executive Order No. 436,^[28] 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 television broadcast facilities, local and overseas, as the national information highway to the countryside.^[29]

The Court of Appeals likewise correctly observed that:

[T]he very intent and spirit of the NTC Circular will prevent a situation whereby station owners and a few networks would have unfettered power to make time available only to the highest bidders, to communicate only their own views on public issues, people, and to permit on the air only those with whom they agreed – contrary to the state policy that the (franchise) grantee like the petitioner, private respondent and other TV station owners, shall provide at all times sound and balanced programming and assist in the functions of public information and education.

This is for the first time that we have a structure that works to accomplish explicit state policy goals.^[30]

Indeed, intellectual property protection is merely a means towards the end of making society benefit from the creation of its men and women of talent and genius. This is the essence of intellectual property laws, and it explains why certain products of ingenuity that are concealed from the public are outside the pale of protection afforded by the law. It also explains why the author or the creator enjoys no more rights than are consistent with public welfare.^[31]

Further, as correctly observed by the Court of Appeals, the must-carry rule as well as the legislative franchises granted to both ABS-CBN and PMSI are in consonance with state policies enshrined in the Constitution, specifically Sections 9,^[32] 17,^[33] and 24^[34] of Article II on the Declaration of Principles and State Policies.^[35]

ABS-CBN was granted a legislative franchise under Republic Act No. 7966, Section 1 of which authorizes it “to construct, operate and maintain, for commercial purposes and in the public interest, television and radio broadcasting in and throughout the Philippines x x x.” Section 4 thereof mandates that it “shall provide adequate public service time to enable the government, through the said broadcasting stations, to reach the population on important public issues; provide at all times sound and balanced programming; promote public participation such as in community programming; assist in the functions of public information and education x x x.”

PMSI was likewise granted a legislative franchise under Republic Act No. 8630, Section 4 of which similarly states that it “shall provide adequate public service time to enable the government, through the said broadcasting stations, to reach the population on important public issues; provide at all times sound and balanced programming; promote public participation such as in community programming; assist in the functions of public information and education x x x.” Section 5, paragraph 2 of the same law provides that “the radio spectrum is a finite resource that is a part of the national patrimony and the use thereof is a privilege conferred upon the grantee by the State and may be withdrawn anytime, after due process.”

In *Telecom. & Broadcast Attys. of the Phils., Inc. v. COMELEC*,^[36] the Court held that a franchise is a mere privilege which may be reasonably burdened with some form of public service. Thus:

All broadcasting, whether by radio or by television stations, is licensed by the government. Airwave frequencies have to be allocated as there are more individuals who want to broadcast than there are frequencies to assign. A franchise is thus a privilege subject, among other things, to amendment by Congress in accordance with the constitutional provision that “any such franchise or right granted . . . shall be subject to amendment, alteration or repeal by the Congress when the common good so requires.”

x x x x

Indeed, provisions for COMELEC Time have been made by amendment of the franchises of radio and television broadcast stations and, until the present case was brought, such provisions had not been thought of as taking property without just compensation. Art. XII, §11 of the Constitution authorizes the amendment of franchises for “the common good.” What better measure can be conceived for the common good than one for free air time for the benefit not only of candidates but even more of the public, particularly the voters, so that they will be fully informed of the issues in an election? “[I]t is the right of the viewers and listeners, not the right of the broadcasters, which is paramount.”

Nor indeed can there be any constitutional objection to the requirement that broadcast stations give free air time. Even in the United States, there are responsible scholars who believe that government controls on broadcast media can constitutionally be instituted to ensure diversity of views and attention to public affairs to further the system of free expression. For this purpose, broadcast stations may be required to give free air time to candidates in an election. Thus, Professor Cass R. Sunstein of the University of Chicago Law School, in urging reforms in regulations affecting the broadcast industry, writes:

x x x x

In truth, radio and television broadcasting companies, which are given franchises, do not own the airwaves and frequencies through which they transmit broadcast signals and images. They are merely given the temporary privilege of using them. Since a franchise is a mere privilege, the exercise of the privilege may reasonably be burdened with the performance by the grantee of some form of public service. x x x^[37]

There is likewise no merit to ABS-CBN’s claim that PMSI’s carriage of its signals is for a commercial purpose; that its being the country’s top broadcasting company, the availability of its signals allegedly enhances PMSI’s attractiveness to potential customers;^[38] or that the unauthorized carriage of its signals by PMSI has created competition between its Metro Manila and regional stations.

ABS-CBN presented no substantial evidence to prove that PMSI carried its signals for profit; or that such carriage adversely affected the business operations of its regional stations. Except for the testimonies of its witnesses,^[39] no studies, statistical data or information have been submitted in evidence.

Administrative charges cannot be based on mere speculation or conjecture. The complainant has the burden of proving by substantial evidence the allegations in the complaint.^[40] Mere allegation is not evidence, and is not equivalent to proof.^[41]

Anyone in the country who owns a television set and antenna can receive ABS-CBN’s signals for free. Other broadcasting organizations with free-to-air signals such as GMA-7, RPN-9, ABC-5, and IBC-13 can likewise be accessed for free. No payment is required to view the said channels^[42] because these broadcasting networks do not generate revenue from subscription from their viewers but from airtime revenue from contracts with commercial advertisers and producers, as well as from direct sales.

In contrast, cable and DTH television earn revenues from viewer subscription. In the case of PMSI, it offers its customers premium paid channels from content providers like Star Movies, Star World, Jack TV, and AXN, among others, thus allowing its customers to go beyond the limits of “Free TV and Cable TV.”^[43] It does not advertise itself as a local channel carrier because these local channels can be viewed with or without DTH television.

Relevantly, PMSI's carriage of Channels 2 and 23 is material in arriving at the ratings and audience share of ABS-CBN and its programs. These ratings help commercial advertisers and producers decide whether to buy airtime from the network. Thus, the must-carry rule is actually advantageous to the broadcasting networks because it provides them with increased viewership which attracts commercial advertisers and producers.

On the other hand, the carriage of free-to-air signals imposes a burden to cable and DTH television providers such as PMSI. PMSI uses none of ABS-CBN's resources or equipment and carries the signals and shoulders the costs without any recourse of charging.^[44] Moreover, such carriage of signals takes up channel space which can otherwise be utilized for other premium paid channels.

There is no merit to ABS-CBN's argument that PMSI's carriage of Channels 2 and 23 resulted in competition between its Metro Manila and regional stations. ABS-CBN is free to decide to pattern its regional programming in accordance with perceived demands of the region; however, it cannot impose this kind of programming on the regional viewers who are also entitled to the free-to-air channels. It must be emphasized that, as a national broadcasting organization, one of ABS-CBN's responsibilities is to scatter its signals to the widest area of coverage as possible. That it should limit its signal reach for the sole purpose of gaining profit for its regional stations undermines public interest and deprives the viewers of their right to access to information.

Indeed, television is a business; however, the welfare of the people must not be sacrificed in the pursuit of profit. The right of the viewers and listeners to the most diverse choice of programs available is paramount.^[45] The Director-General correctly observed, thus:

The "Must-Carry Rule" favors both broadcasting organizations and the public. It prevents cable television companies from excluding broadcasting organization especially in those places not reached by signal. 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 of 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 [herein petitioner ABS-CBN] 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 competition between them and its Metro Manila station is speculative and an attempt to extrapolate the effects of the rule. As discussed above, Appellant's DTH satellite television services are 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."^[46]

All told, we find that the Court of Appeals correctly upheld the decision of the IPO Director-General that PMSI did not infringe on ABS-CBN's intellectual property rights under the IP Code. The findings of facts of administrative bodies charged with their specific field of expertise, are afforded great weight by the courts, and in the absence of substantial showing that such findings are made from an erroneous estimation of the evidence presented, they are

conclusive, and in the interest of stability of the governmental structure, should not be disturbed.^[47]

Moreover, the factual findings of the Court of Appeals are conclusive on the parties and are not reviewable by the Supreme Court. They carry even more weight when the Court of Appeals affirms the factual findings of a lower fact-finding body,^[48] as in the instant case.

There is likewise no merit to ABS-CBN's contention that the Memorandum Circular excludes from its coverage DTH television services such as those provided by PMSI. Section 6.2 of the Memorandum Circular requires all cable television system operators operating in a community within Grade "A" or "B" contours to carry the television signals of the authorized television broadcast stations.^[49] The rationale behind its issuance can be found in the whereas clauses which state:

Whereas, Cable Television Systems or Community Antenna Television (CATV) have shown their ability to offer additional programming and to carry much improved broadcast signals in the remote areas, thereby enriching the lives of the rest of the population through the dissemination of social, economic, educational information and cultural programs;

Whereas, the national government supports the promotes the orderly growth of the Cable Television industry within the framework of a regulated fee enterprise, which is a hallmark of a democratic society;

Whereas, public interest so requires that monopolies in commercial mass media shall be regulated or prohibited, hence, to achieve the same, the cable TV industry is made part of the broadcast media;

Whereas, pursuant to Act 3846 as amended and Executive Order 205 granting the National Telecommunications Commission the authority to set down rules and regulations in order to protect the public and promote the general welfare, the National Telecommunications Commission hereby promulgates the following rules and regulations on Cable Television Systems;

The policy of the Memorandum Circular is to carry improved signals in remote areas for the good of the general public and to promote dissemination of information. In line with this policy, it is clear that DTH television should be deemed covered by the Memorandum Circular. Notwithstanding the different technologies employed, both DTH and cable television have the ability to carry improved signals and promote dissemination of information because they operate and function in the same way.

In its December 20, 2002 letter,^[50] the NTC explained that both DTH and cable television services are of a similar nature, the only difference being the medium of delivering such services. They can carry broadcast signals to the remote areas and possess the capability to enrich the lives of the residents thereof through the dissemination of social, economic, educational information and cultural programs. Consequently, while the Memorandum Circular refers to cable television, it should be understood as to include DTH television which provides essentially the same services.

In *Eastern Telecommunications Philippines, Inc. v. International Communication Corporation*,^[51] we held:

The NTC, being the government agency entrusted with the regulation of activities coming under its special and technical forte, and possessing the necessary rule-making power to implement its objectives, is in the best position to interpret its own rules, regulations and guidelines. The Court has consistently yielded and accorded great respect to the interpretation by administrative

agencies of their own rules unless there is an error of law, abuse of power, lack of jurisdiction or grave abuse of discretion clearly conflicting with the letter and spirit of the law.^[52]

With regard to the issue of the constitutionality of the must-carry rule, the Court finds that its resolution is not necessary in the disposition of the instant case. One of the essential requisites for a successful judicial inquiry into constitutional questions is that the resolution of the constitutional question must be necessary in deciding the case.^[53] In *Spouses Mirasol v. Court of Appeals*,^[54] we held:

As a rule, the courts will not resolve the constitutionality of a law, if the controversy can be settled on other grounds. The policy of the courts is to avoid ruling on constitutional questions and to presume that the acts of the political departments are valid, absent a clear and unmistakable showing to the contrary. To doubt is to sustain. This presumption is based on the doctrine of separation of powers. This means that the measure had first been carefully studied by the legislative and executive departments and found to be in accord with the Constitution before it was finally enacted and approved.^[55]

The instant case was instituted for violation of the IP Code and infringement of ABS-CBN's broadcasting rights and copyright, which can be resolved without going into the constitutionality of Memorandum Circular No. 04-08-88. As held by the Court of Appeals, the only relevance of the 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 petitioner.^[56]

The records show that petitioner assailed the constitutionality of Memorandum Circular No. 04-08-88 by way of a collateral attack before the Court of Appeals. In *Philippine National Bank v. Palma*,^[57] we ruled that for reasons of public policy, the constitutionality of a law cannot be collaterally attacked. A law is deemed valid unless declared null and void by a competent court; more so when the issue has not been duly pleaded in the trial court.^[58]

As a general rule, the question of constitutionality must be raised at the earliest opportunity so that if not raised in the pleadings, ordinarily it may not be raised in the trial, and if not raised in the trial court, it will not be considered on appeal.^[59] In *Philippine Veterans Bank v. Court of Appeals*,^[60] we held:

We decline to rule on the issue of constitutionality as all the requisites for the exercise of judicial review are not present herein. Specifically, the question of constitutionality will not be passed upon by the Court unless, at the first opportunity, it is properly raised and presented in an appropriate case, adequately argued, and is necessary to a determination of the case, particularly where the issue of constitutionality is the very *lis mota* presented. x x x^[61]

Finally, we find that the dismissal of the petition for contempt filed by ABS-CBN is in order.

Indirect contempt may either be initiated (1) *motu proprio* by the court by issuing an order or any other formal charge requiring the respondent to show cause why he should not be punished for contempt or (2) by the filing of a verified petition, complying with the requirements for filing initiatory pleadings.^[62]

ABS-CBN filed a verified petition before the Court of Appeals, which was docketed CA G.R. SP No. 90762, for PMSI's alleged disobedience to the Resolution and Temporary Restraining Order, both dated July 18, 2005, issued in CA-G.R. SP No. 88092. However, after the cases were consolidated, the Court of Appeals did not require PMSI to comment on the

petition for contempt. It ruled on the merits of CA-G.R. SP No. 88092 and ordered the dismissal of both petitions.

ABS-CBN argues that the Court of Appeals erred in dismissing the petition for contempt without having ordered respondents to comment on the same. Consequently, it would have us reinstate CA-G.R. No. 90762 and order respondents to show cause why they should not be held in contempt.

It bears stressing that the proceedings for punishment of indirect contempt are criminal in nature. The modes of procedure and rules of evidence adopted in contempt proceedings are similar in nature to those used in criminal prosecutions.^[63] While it may be argued that the Court of Appeals should have ordered respondents to comment, the issue has been rendered moot in light of our ruling on the merits. To order respondents to comment and have the Court of Appeals conduct a hearing on the contempt charge when the main case has already been disposed of in favor of PMSI would be circuitous. Where the issues have become moot, there is no justiciable controversy, thereby rendering the resolution of the same of no practical use or value.^[64]

WHEREFORE, the petition is DENIED. The July 12, 2006 Decision of the Court of Appeals in CA-G.R. SP Nos. 88092 and 90762, sustaining the findings of the Director-General of the Intellectual Property Office and dismissing the petitions filed by ABS-CBN Broadcasting Corporation, and the December 11, 2006 Resolution denying the motion for reconsideration, are AFFIRMED.

SO ORDERED.

CONSUELO YNARES-SANTIAGO
Associate Justice

WE CONCUR:

MA. ALICIA AUSTRIA-MARTINEZ
Associate Justice

MINITA V. CHICO-NAZARIO
Associate Justice

ANTONIO EDUARDO B. NACHURA
Associate Justice

TERESITA J. LEONARDO-DE CASTRO
Associate Justice

ATTESTATION

I attest that the conclusions in the above decision were reached in consultation before the case was assigned to the writer of the opinion of the Court's Division.

CONSUELO YNARES-SANTIAGO
Associate Justice
Chairperson, Third Division

CERTIFICATION

Pursuant to Section 13, Article VIII of the Constitution and the Division Chairperson's Attestation, it is hereby certified that the conclusions in the above Decision were reached in consultation before the case was assigned to the writer of the opinion of the Court's Division.

REYNATO S. PUNO
Chief Justice

Footnotes:

* Designated as additional member of the Third Division in view of the retirement of Associate Justice Ruben T. Reyes, per Special Order No. 546 dated January 5, 2009.

[1] *Rollo*, pp. 65-178.

[2] *Id.* at 8-43.

[3] *Id.* at 54-57.

[4] ABS-CBN was granted a franchise under Republic Act No. 7966, entitled AN ACT GRANTING THE ABS-CBN BROADCASTING CORPORATION A FRANCHISE TO CONSTRUCT, INSTALL, OPERATE AND MAINTAIN TELEVISION AND RADIO BROADCASTING STATIONS IN THE PHILIPPINES, AND FOR OTHER PURPOSES.

[5] AN ACT GRANTING THE PHILIPPINE MULTI-MEDIA SYSTEM, INC., A FRANCHISE TO CONSTRUCT, INSTALL, ESTABLISH, OPERATE AND MAINTAIN RADIO AND TELEVISION STATIONS IN THE PHILIPPINES.

[6] *Rollo*, p. 316.

[7] *Id.* at 317.

[8] Revised Rules and Regulations Governing Cable Television Systems in the Philippines.

[9] 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.

[10] *Rollo*, p. 322.

[11] *Id.* at 852.

[12] *Id.* at 853-854.

[13] *Id.* at 857.

[14] *Id.* at 567-590. Penned by Estrellita Beltran-Abelardo, Director, Bureau of Legal Affairs.

[15] *Id.* at 793-811. Penned by Director-General Emma C. Francisco.

[16] *Id.* at 811.

[17] *Id.* at 43.

[18] Republic Act No. 8923, effective January 1, 1998.

[19] Article III, Section 9 provides: "Private property shall not be taken for public use without just compensation."

[20] Sec. 177. Copy 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:

x x x x

177.6. Public performance of the work; and

177.7. Other communication to the public of the work (Sec. 5, P. D. No. 49a)

[21] Entered into force on September 25, 1984. source: http://www.wipo.int/treaties/en/ShowResults.jsp?lang=en&treaty_id=17.

[22] *Rollo*, pp. 805-809.

[23] Eighth Session, Geneva, November 4-8, 2002.

[24] *Id.* at paragraph 58, page 12.

[25] *Id.* at paragraphs 47-49, page 10.

[26] E.O. No. 546, Sec. 15. Functions of the Commission. The Commission shall exercise the following functions:

a. Issue Certificate of Public Convenience for the operation of communications utilities and services, radio communications systems, wire or wireless telephone or telegraph systems, radio and television broadcasting system and other similar public utilities;

b. Establish, prescribe and regulate areas of operation of particular operators of public service communications; and determine and prescribe charges or rates pertinent to the operation of such public utility facilities and services except in cases where charges or rates are established by international bodies or associations of which the Philippines is a participating member or by bodies recognized by the Philippine Government as the proper arbiter of such charges or rates;

c. Grant permits for the use of radio frequencies for wireless telephone and telegraph systems and radio communication systems including amateur radio stations and radio and television broadcasting systems;

d. Sub-allocate series of frequencies of bands allocated by the International Telecommunications Union to the specific services;

e. Establish and prescribe rules, regulations, standards, specifications in all cases related to the issued Certificate of Public Convenience and administer and enforce the same;

f. Coordinate and cooperate with government agencies and other entities concerned with any aspect involving communications with a view to continuously improve the communications service in the country;

g. Promulgate such rules and regulations, as public safety and interest may require, to encourage a larger and more effective use of communications, radio and television broadcasting facilities, and to maintain effective competition among private entities in these activities whenever the Commission finds it reasonably feasible;

h. Supervise and inspect the operation of radio stations and telecommunications facilities;

i. Undertake the examination and licensing of radio operators;

j. Undertake, whenever necessary, the registration of radio transmitters and transceivers; and

k. Perform such other functions as may be prescribed by law.

[27] *Id.*, Section 15 (g).

[28] PRESCRIBING POLICY GUIDELINES TO GOVERN THE OPERATIONS OF CABLE TELEVISION IN THE PHILIPPINES.

[29] *Rollo*, p. 810.

[30] *Id.* at 42.

[31] Fr. Ranhill Callangan Aquino, Intellectual Property Law: Comments and Annotations, 2003, p. 5.

[32] SEC. 9. The State shall promote a just and dynamic social order that will ensure the prosperity and independence of the nation and free the people from poverty through policies that provide adequate social services, promote full employment, a rising standard of living, and an improved quality of life for all.

[33] SEC. 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.

[34] SEC. 24. The State recognizes the vital role of communication and information in nation-building.

[35] *Rollo*, p. 40.

[36] 352 Phil. 153 (1998).

- ^[37] *Id.* at 171-174.
- ^[38] *Rollo*, pp. 129-130.
- ^[39] *Id.* at 134.
- ^[40] *Artuz v. Court of Appeals*, 417 Phil. 588, 597 (2001).
- ^[41] *Navarro v. Clerk of Court*, A.M. No. P-05-1962, February 17, 2005, 451 SCRA 626, 629.
- ^[42] *Rollo*, Comment, p. 1249.
- ^[43] <http://www.dreamsatellite.com/about.htm>
- ^[44] *Rollo*, p. 810.
- ^[45] *Telecom. & Broadcast Attys. of the Phils., Inc v. COMELEC*, 352 Phil. 153, 173 (1998).
- ^[46] *Rollo*, pp. 810-811.
- ^[47] *Ocampo v. Salalila*, 382 Phil. 522, 532 (2000).
- ^[48] *Gala v. Ellice Agro-Industrial Corporation*, G.R. No. 156819, December 11, 2003, 418 SCRA 431, 444.
- ^[49] *Supra* note 9.
- ^[50] *Supra* note 11.
- ^[51] G.R. No. 135992, January 31, 2006, 481 SCRA 163.
- ^[52] *Id.* at 166-167.
- ^[53] *Meralco v. Secretary of Labor*, 361 Phil. 845, 867 (1999).
- ^[54] 403 Phil. 760 (2001).
- ^[55] *Id.* at 774.
- ^[56] *Rollo*, p. 41; citing the Decision of the Director-General of the IPO.
- ^[57] G.R. No. 157279, August 9, 2005, 466 SCRA 307.
- ^[58] *Id.* at 322-323.
- ^[59] Joaquin G. Bernas, *The 1987 Constitution of the Republic of the Philippines: A Commentary*, p. 858 (1996), citing *People v. Vera*, 65 Phil. 56 (1937).
- ^[60] G.R. No. 132561, June 30, 2005, 462 SCRA 336.
- ^[61] *Id.* at 349.
- ^[62] *Montenegro v. Montenegro*, G.R. No. 156829, June 8, 2004.
- ^[63] *Soriano v. Court of Appeals*, G.R. No. 128938, June 4, 2004, 431 SCRA 1, 7-8.
- ^[64] *Delgado v. Court of Appeals*, G.R. No. 137881, August 19, 2005, 467 SCRA 418, 428.