

Composers and Authors Society of Singapore Ltd

v

Fox Networks Group Singapore Pte Ltd

[2021] SGHC 241

General Division of the High Court — Suit No 927 of 2020 (Summonses Nos 5628 and 5684 of 2020)

Dedar Singh Gill J

8 February, 31 March 2021; 26 October 2021

Intellectual Property — Copyright — Infringement — Exclusive right to communicate work to the public in s 26(1)(a)(iv) Copyright Act (Cap 63, 2006 Rev Ed) — Test for determining whether work was communicated to the “public” — Whether persons outside of Singapore form part of the “public” — Section 26(1)(a)(iv) Copyright Act (Cap 63, 2006 Rev Ed)

Intellectual Property — Copyright — Infringement — Standing to sue — Distinction between exclusive right to authorise person to do act in relation to copyright work and exclusive right to do that act

Intellectual Property — Copyright — Subject matter — Broadcasts — Whether point-to-point transmissions fell within meaning of “broadcast” under Copyright Act (Cap 63, 2006 Rev Ed) — Copyright Act (Cap 63, 2006 Rev Ed)

Facts

The plaintiff pleaded that it was a collecting society which administered the rights of public performance, broadcast, diffusion and reproduction in “music and musical associated literary works” on behalf of its members. Under reciprocal agreements with affiliated societies in other countries, the plaintiff claimed to represent owners of musical works in both international and local repertoires. The defendant was a regional broadcasting company based and operating in Singapore. It programmed, operated and provided to its authorised, independent content distributors (“Distributors”) subscription pay television channels in an encrypted format (“the Encrypted Channels”), accessible only by the Distributors. There were only two Distributors located in Singapore – Singtel and Starhub. Only one Encrypted Channel was transmitted by the defendant via satellite to the Distributors in Singapore – Fox Sports 3. The remaining Distributors were located outside of Singapore. The Distributors owned, operated, and managed their own television platforms. Members of the public in the country the Distributor operated in were able to subscribe to these television platforms.

The plaintiff claimed that by uplinking programmes (“the Disputed Programmes”) which contained certain musical works (“the Disputed Musical Works”) to a satellite, the defendant had: (a) committed primary infringement by communicating the Disputed Musical Works to the public and performing the works in public; and (b) authorised infringement by third parties (*ie*, the defendant had authorised the Distributors to communicate the Disputed Musical Works to the public). The latter claim was referred to as a claim for

“authorisation liability”. According to the plaintiff, the Disputed Musical Works belonged to owners represented by the plaintiff.

The defendant applied to strike out the claim on several grounds in Summons No 5628 of 2020 (“SUM 5628”). One such ground was the “Standing Issue” – whether the plaintiff lacked standing to sue for primary infringement because it was not the exclusive licensee of the rights to do acts in relation to the Disputed Musical Works (“the Underlying Rights”). In response, the plaintiff argued that by virtue of reciprocal agreements (“the Disputed Reciprocal Agreements”) with two affiliated foreign collecting societies, it was the exclusive licensee of the Underlying Rights in relation to the Disputed Musical Works in Singapore.

Subsequently, the plaintiff applied to determine two questions of law under O 14 r 12 of the Rules of Court (2014 Rev Ed) (“ROC”) in Summons No 5684 of 2020 (“SUM 5684”). The first question presented for summary determination was the Standing Issue. The second question was whether the defendant’s uplinking of Encrypted Channels that contained or featured the Disputed Musical Works by way of satellite transmission from Singapore constituted communication of the works to the public under s 26(1)(a) of the Copyright Act (Cap 63, 2006 Rev Ed) (“the Communication Issue”).

Through the following chain of events, the Encrypted Channels (of which the Disputed Programmes were a part) were received by the Distributors’ subscribers: (a) the Encrypted Channels were uplinked to a satellite by the defendant from Singapore; (b) the signals were then downlinked (*ie*, returned to earth) to the Distributors in each country, including Singapore (each Distributor was provided with a decoder device to decrypt the defendant’s signals at the downlinking site); and (c) the Distributors then transmitted the Encrypted Channels, received from the defendant, to their own subscribers who were located in the same country the Distributor was based in. Each Distributor was only authorised to distribute the channel(s) it received to its subscribers within the territory it was based in.

A “communication” under the Copyright Act could take the form of a broadcast or making the work available for access by any person at his convenience (s 7(1) of the Copyright Act). The particular issues that arose for determination under the second question in SUM 5684 were: (a) what was the meaning of “broadcast” in s 7(1) of the Copyright Act; (b) what was the meaning of “the making available of a work” in s 7(1) of the Copyright Act; and (c) what was the meaning of the “public” in s 26(1)(a) of the Copyright Act.

Held, allowing SUM 5628 in part and dismissing the remainder of the claims in SUM 5684:

The claims for primary infringement

The Standing Issue

(1) The plaintiff was not the exclusive licensee of the right to communicate the Disputed Musical Works to the public or to perform these works in public. Thus, it lacked standing to bring the claims for primary infringement: at [40].

(2) Under the Disputed Reciprocal Agreements, the plaintiff was only the exclusive licensee of the right to authorise the doing of acts in relation to the Disputed Musical Works (“the Right of Authorisation”): at [36].

(3) As s 9(2) of the Copyright Act referred separately to “the exclusive right to do an act in relation to a work” and “the exclusive right to authorise a person to do that act”, this signalled that the two rights were distinct. Although all Underlying Rights were accompanied by a corresponding Right of Authorisation, the two could be severed such as by way of an assignment or exclusive licence: at [29] and [30].

(4) Further, being the owner or exclusive licensee of the Right of Authorisation did not necessarily imply the same over the Underlying Right. Section 25(1) of the Copyright Act made clear that a partial assignment of exclusive rights only transferred ownership of the exclusive rights which were the subject of the assignment. In keeping with the spirit of s 25(1) of the Copyright Act, rights obtained under an exclusive licence were confined to the exclusive rights which were the subject matter of the exclusive licence: at [38].

The Communication Issue

(5) The defendant’s satellite uplinking fell within the meaning of a point-to-point (“PTP”) transmission. In PTP transmissions, one broadcaster transmitted signals to a satellite, which were then transmitted to another broadcaster who included the signals in its own transmissions. Indeed, in this case, the Encrypted Channels uplinked by the defendant were only downlinked to the Distributors. The Distributors were then responsible for transmitting the defendant’s channel(s) to their own subscribers: at [42] and [43].

(6) The Disputed Musical Works had not been communicated to the public under s 26(1)(a)(iv) of the Copyright Act. There were three main planks to the court’s reasoning: at [108].

(7) First, uplinking signals to a satellite in the context of PTP transmissions did not constitute a broadcast. This was because a broadcast had to objectively involve direct transmission to the general public or a part thereof: at [54].

(8) Section 16(5)(b) of the Copyright Act stipulated the means for identifying who made a television or sound broadcast by “the technique known as direct broadcasting by satellite”, but not PTP transmissions. This suggested that Parliament did not consider PTP transmissions to be broadcasts under the Copyright Act. Further, Singapore had adopted s 16(5) from the Copyright Act 1956 (c 74) (UK) (“Copyright Act 1956 (UK)”), as amended by the Cable and Broadcasting Act 1984 (c 46) (UK). What was significant was that the UK Parliament had deliberately opted not to expand the definition of “broadcasting” in the Copyright Act 1956 (UK) to include PTP transmissions. Therefore, the UK’s intention to exclude PTP transmissions from the ambit of “broadcasting” was likely also imported into Singapore’s Copyright Act: at [58], [62] and [64].

(9) Because the pleaded claim only accused the defendant of uplinking PTP transmissions, the Disputed Musical Works were not being broadcast by the defendant: at [76].

(10) Second, the defendant had not made the Disputed Musical Works available for access by any person from a place and at a time chosen by that

person within the meaning of s 7(1) of the Copyright Act. This was because only the Distributors were provided with a device to decode the defendant's encrypted transmissions: at [82].

(11) Third, even if the works had been communicated, they were not communicated to the "public" within the meaning of s 26(1)(a)(iv) of the Copyright Act: at [99].

(12) The question of whether a communication had been made to the public was a multi-factorial inquiry. One factor was the number of persons to whom the work was communicated. Another factor was whether recipients of the communication were persons from whom the copyright owner was entitled to expect payment for the work's authorised communication. If so, it weighed in favour of the communication having been made to the public: at [85] and [86].

(13) The defendant performed its uplinking activities in a commercial setting. However, the commercial nature of the uplinked transmissions was outweighed by the fact that only two recipients in Singapore were able to decrypt them (*ie*, Singtel and Starhub). This number was too small to amount to a communication to the public: at [87], [95] and [98].

(14) Further, Distributors outside of Singapore who received the defendant's transmissions were irrelevant for the purpose of determining if a communication had been made to the public. In the absence of express language in s 26(1)(a), the word "public" did not have an extraterritorial reach: at [103] and [107].

Conclusion

(15) Both questions in the O 14 r 12 ROC application were resolved against the plaintiff. Therefore, the plaintiff's claims for primary infringement were dismissed: at [109].

The claim for authorisation liability

(16) Since the questions submitted for summary determination under O 14 r 12 of the ROC did not relate to authorisation liability, this portion of the claim was examined under O 18 r 19 of the ROC: at [111].

(17) The claim for authorisation liability was struck out under O 18 r 19(1)(b) for being legally unsustainable: at [113].

(18) To establish authorisation of an infringing act, there first had to be proof that an infringing act had taken place within Singapore. However, the plaintiff did not even plead that the Distributors, particularly Singtel and Starhub, committed primary infringement. Therefore, even if the plaintiff succeeded in proving all the pleaded facts, the defendant could not be liable for authorising an act of infringement when the latter did not exist in the pleadings: at [113] and [114].

Case(s) referred to

AG v Ting Choon Meng [2017] 1 SLR 373 (folld)

Australasian Performing Right Association Ltd v Telstra Corp Ltd
(1995) 31 IPR 289 (refd)

Bunga Melati 5, The [2012] 4 SLR 546 (folld)

- Chem Orchid, The* [2016] 2 SLR 50 (folld)
- ITV Broadcasting Ltd v TVCatchup Ltd* Case C-607/11, EU:C:2013:147 (refd)
- Lance Court Furnishings Pte Ltd v PP* [1993] 3 SLR(R) 103; [1993] 3 SLR 969 (folld)
- PCCW Media Ltd v M1 Ltd* [2018] 5 SLR 375 (folld)
- PP v Lam Leng Hung* [2018] 1 SLR 659 (folld)
- RecordTV Pte Ltd v MediaCorp TV Singapore Pte Ltd* [2011] 1 SLR 830 (refd)
- Reha Training Gesellschaft für Sport- und Unfallrehabilitation mbH v Gesellschaft für musikalische Aufführungs- und mechanische Vervielfältigungsrechte eV (GEMA)* Case C-117/15, EU:C:2016:379 (refd)
- Samsonite IP Holdings Sarl v An Sheng Trading Pte Ltd* [2017] 4 SLR 99 (refd)
- SBS Belgium NV v SABAM* Case C-325/14, ECLI:EU:C:2015:764 (refd)
- Sociedad General de Autores y Editores de Espana (SGAE) v Rafael Hoteles SL* Case C-306/05, EU:C:2006:764 (refd)
- Tan Cheng Bock v AG* [2017] 2 SLR 850 (folld)
- Telstra Corp Ltd v Australasian Performing Right Association Ltd* (1997) 146 ALR 649 (refd)
- TMT Asia Ltd v BHP Billiton Marketing AG (Singapore Branch)* [2015] 2 SLR 540 (folld)
- Total English Learning Global Pte Ltd v Kids Counsel Pte Ltd* [2013] SGHCR 22 (distd)
- Tsai Jean v Har Mee Lee* [2009] 2 SLR(R) 1; [2009] 2 SLR 1 (refd)
- TuneIn Inc v Warner Music UK Ltd* [2021] EWCA Civ 441 (refd)
- University of New South Wales v Moorhouse and Angus & Robertson (Publishers) Pty Ltd* (1975) 133 CLR 1 (refd)
- WEA International Inc v Hanimex Corp Ltd* (1987) 77 ALR 456 (refd)

Legislation referred to

- Broadcasting Act (Cap 28, 2012 Rev Ed) s 2(1)
- Copyright Act 1914 (SS Ord No 18 of 1914)
- Copyright Act 1987 (Act 2 of 1987) s 89
- Copyright Act (Cap 63, 1988 Rev Ed) s 74(2) (consd);
ss 16(5)(a), 74(2)(a), 74(2)(b), 74(3), 136(9)
- Copyright Act (Cap 63, 1999 Rev Ed) ss 16(5)(b), 26(1)(a)(iv)
- Copyright Act (Cap 63, 2006 Rev Ed) ss 7(1), 9(2), 16(5)(b), 25(1), 26(1)(a)(iv), 74(2) (consd);
ss 9, 16(5)(a), 16(5)(b), 26, 26(1), 26(1)(a), 26(1)(a)(iii), 31, 31(1), 114, 123
- Copyright (Amendment) Act 1994 (Act 14 of 1994) s 6
- Copyright (Amendment) Act 2004 (Act 52 of 2004) s 8
- Copyright (Gramophone Records and Government Broadcasting) Act (Cap 64, 1985 Rev Ed)
- Interpretation Act (Cap 1, 2002 Rev Ed) ss 9A(2)(a), 9A(2)(b)(i), 9A(2)(b)(ii)
- Rules of Court (2014 Rev Ed) O 14 r 12(1), O 14 r 12(2), O 18 r 19(1)(b) (consd);
O 14 r 12, O 18 r 19, O 18 r 19(1)(d)
- Trade Marks Act (Cap 332, 2005 Rev Ed) s 29(1)
- Cable and Broadcasting Act 1984 (c 46) (UK) Schedule 5 para 6(7) (consd)

Cable and Broadcasting Act (Commencement No 1) Order 1984 (SI 1984 No 1796) (UK) Schedule 2
Copyright Act 1911 (c 46) (UK)
Copyright Act 1956 (c 74) (UK) s 14(10) (consd);
ss 14, 16(5)
Copyright Act 1968 (Cth) ss 10, 13, 13(2), 31
Copyright, Designs and Patents Act 1988 (c 48) (UK) ss 6, 6(1), 6(1)(b)
Registered Designs Act 1949 (c 88) (UK) s 74(3)(a)

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26 October 2021

Judgment reserved.

Dedar Singh Gill J:

1 Summons No 5628 of 2020 (“SUM 5628”) and Summons No 5684 of 2020 (“SUM 5684”) raise the following interesting questions:

(a) can the owner or exclusive licensee of an act comprised in copyright sue for infringement of the doing of the act where his right under the assignment or licence is only to authorise the doing of the act; and

(b) whether point-to-point satellite transmissions (“PTP transmissions”) fall within the meaning of a communication to the public under the Copyright Act (Cap 63, 2006 Rev Ed).

2 SUM 5628, filed on 22 December 2020, is the defendant’s application to strike out the plaintiff’s claims for copyright infringement. SUM 5684 is the plaintiff’s application filed on 29 December 2020, under O 14 r 12 of the Rules of Court (2014 Rev Ed) (“ROC”), for the determination of two questions of law. More details on these summonses are provided at [11]–[17] below.

Introduction

3 The plaintiff is a company incorporated in Singapore. It is a collecting society which administers the rights of public performance, broadcast, diffusion and reproduction in “music and musical associated literary works” on behalf of its members. Under reciprocal agreements with affiliated societies in other countries, the plaintiff claims to represent owners of musical works comprised in both international and local repertoires.

4 The defendant is a regional broadcasting company based and operating in Singapore. It programmes, operates and provides to its

authorised, independent content distributors (“Distributors”) subscription pay television channels in an encrypted format (“the Encrypted Channels”), accessible only by the Distributors. There are only two Distributors located in Singapore – Singtel and Starhub. Only one Encrypted Channel is transmitted by the defendant via satellite to the Distributors in Singapore – Fox Sports 3.

5 The remaining Distributors are located outside of Singapore in South-East Asia, China (including Hong Kong and Macau), South Korea, Papua New Guinea and Mongolia. There are between one and seven such Distributors located in each country outside of Singapore. The defendant transmits various channels from Fox Sports (including Fox Sports 3) and Star Sports to the Distributors in these countries.

6 The Distributors own, operate, and manage their own television platforms. Members of the public in the country the Distributor operates in may subscribe to these television platforms. The Distributors also provide the necessary equipment to their subscribers to view the content on their television platforms, and the defendant’s channel(s) form(s) part of that content.

The copyright infringement claim

7 The plaintiff claims that on or around 18 May 2014, the defendant caused, allowed and/or authorised the uplinking of programmes (“the Disputed Programmes”) by satellite transmission to third parties (including the Distributors and the end-users). According to the plaintiff, the Disputed Programmes contained, comprised and/or featured musical works of owners represented by the plaintiff. In doing so, the defendant is alleged to have caused, allowed and/or authorised the communication to the public, performance in public, and exploitation of musical works of owners represented by the plaintiff, without obtaining a licence from the plaintiff.

8 The following is the chain of events by which the Encrypted Channels (of which the Disputed Programmes are a part) are received by the Distributors’ subscribers:

(a) First, the Encrypted Channels are uplinked to a satellite by the defendant from Singapore.

(b) Second, the signals are then downlinked (*ie*, returned to earth) to the Distributors in each country, including Singapore. Each Distributor is provided with a decoder device to decrypt the defendant’s signals at the downlinking site.

(c) The Distributors then transmit the Encrypted Channels, received from the defendant, to their own subscribers who are located in the same country the Distributor is based in. Each Distributor is

only authorised to distribute the channel(s) it receives to its subscribers within the territory it is based in.

9 The particular songs which the plaintiff alleges are contained in the Disputed Programmes (“the Disputed Musical Works”) are as follows:

| S/N | Musical work | Composer(s)/Author(s) | Copyright owner (alleged by the plaintiff) |
|-----|-----------------|---|--|
| 1. | “Home Brew” | Paul Christopher, Rawson, Wayne Anthony, Murray | Performing Right Society Ltd (“PRS”) |
| 2. | “Let It Happen” | Kevin Richard, Parker | Australasian Performing Right Association Ltd (“APRA”) |
| 3. | “Mash Em Up” | Peter Anthony Daniel, Parsons | PRS |
| 4. | “Good Feelings” | Julien, Bromley | PRS |
| 5. | “Cold Sweat” | Julien, Bromley | PRS |
| 6. | “Random Target” | Colin Francis, Bayley Murray William, Burns | APRA |

10 PRS and APRA are affiliated societies of the plaintiff. The plaintiff claims that members of those societies assigned all the performing rights in their musical works, including the right to broadcast and/or communicate the work to the public, to PRS and APRA respectively. Correspondingly, the plaintiff pleads that its reciprocal agreements with PRS and APRA (“the Disputed Reciprocal Agreements”) made it the exclusive licensee of the performing rights in Singapore. On this basis, the plaintiff claims to represent the owners of the Disputed Musical Works. The plaintiff now asserts that, as exclusive licensee, it has the same rights of action as the owners of the musical works under s 123 of the Copyright Act. That provision reads as follows:

123. Subject to this Division, the exclusive licensee shall, except against the owner of the copyright, have the same rights of action as the owner of the copyright would have, and be entitled to the same remedies as he would be entitled to, by virtue of sections 119, 120 and 120A if the licence had been an assignment, and those rights and remedies are concurrent with the rights and remedies of the owner of the copyright under those sections.

The plaintiff thus relies on the Disputed Reciprocal Agreements with PRS and APRA, and s 123 of the Copyright Act, to claim its standing to sue for copyright infringement.

The summonses

11 In SUM 5628, the defendant seeks to strike out the plaintiff's claim under O 18 r 19(1)(b) and/or O 18 r 19(1)(d) of the ROC for being frivolous and vexatious or otherwise an abuse of process. The defendant submits that:

(a) The plaintiff lacks standing to sue for infringement by way of communication of the musical works to the public. The Disputed Reciprocal Agreements only granted the plaintiff the exclusive right to *authorise* the doing of certain acts, and not to itself do those acts.

(b) Further, or alternatively, the claim is an abuse of process because the plaintiff failed to establish its standing despite having multiple opportunities to do so. The defendant argues that the plaintiff had notice, at least from 14 September 2020 when HC/OS 660/2020 was heard and converted into the present suit, that the defendant would challenge the plaintiff's *locus standi*. The plaintiff also failed to plead a proper basis for its standing in its Statement of Claim dated 2 October 2020 and before the hearing for these summonses on 8 February 2021. The defendant also accuses the plaintiff of failing to explain glaring inconsistencies in its affidavit evidence relating to whether PRS and APRA owned 100% of the copyright in the musical works of their respective members.

(c) In addition, the plaintiff failed to plead any particulars of any alleged acts of infringement, including the specific works allegedly infringed. However, in light of the Further and Better Particulars dated 28 July 2021 furnished by the plaintiff, this ground of striking out is moot.

12 Subsequently, the plaintiff filed SUM 5684 under O 14 r 12 of the ROC to submit two questions of law for summary determination:

(a) Whether the plaintiff has legal standing to commence proceedings for infringement under s 31 in the capacity of either an owner or an exclusive licensee under the Copyright Act, with respect to one or more of the Disputed Musical Works ("the First Question")?

(b) Whether the defendant's uplinking of programmes that contain or feature musical works by way of satellite transmission from Singapore (*ie*, transmission of broadcast signals from a local earth station to a satellite in space) constitutes communication of the works to the public under s 26(1)(a) of the Copyright Act ("the Second Question")?

13 It bears emphasising that the plaintiff's claim for infringement is premised on both primary infringement (*ie*, that the defendant communicates the Disputed Musical Works to the public and performs the works in public) and authorising infringement by third parties (*ie*, that the

defendant authorised the Distributors to communicate the Disputed Musical Works to the public).

14 With regard to the First Question, the plaintiff's standing to sue for primary infringement is an issue featuring in both summonses. I will analyse it under SUM 5684. If the defendant proves the plaintiff's lack of standing under O 14 r 12 of the ROC, its claims for primary infringement may be dismissed (O 14 r 12(2) of the ROC).

15 In contrast, for reasons which will subsequently become clear (see [30] below), the plaintiff's standing for its claim that the defendant authorised the Distributors' primary infringement ("authorisation liability") is *not* part of the questions submitted for determination under O 14 r 12 of the ROC. I therefore consider this aspect of the plaintiff's standing under O 18 r 19 of the ROC.

16 As for the Second Question in the O 14 r 12 application, I briefly outline the parties' submissions. The defendant argues that its activities do not constitute communication "to the public" for the purposes of s 26(1)(a) of the Copyright Act, mainly because:

(a) Broadcasting requires direct reaching out to the public or a part thereof. The defendant's signals are not transmitted directly to television viewers, but are transmitted in encrypted form to a small, specified group of its Distributors, which does not constitute the "public".

(b) Further or alternatively, for the purposes of determining whether there is communication "to the public", only recipients in Singapore are relevant. The defendant has only two Distributors in Singapore.

17 In contrast, the plaintiff argues that:

(a) Reading s 26(1)(a)(iv) together with the definitions of "broadcast" and "communication" under s 7(1) of the Copyright Act, a communication to the public by satellite transmission does not require *reception* of the satellite signal. In other words, uplinking Encrypted Channels containing or featuring the Disputed Musical Works falls within the meaning of a communication to the public in s 26(1)(a)(iv) of the Copyright Act.

(b) Communications to persons outside of Singapore are relevant infringing acts under s 26(1)(a).

(c) Under s 26(1)(a)(iv), the "public" should refer to any persons to whom the communication is made in circumstances where "the copyright owner/ licensee would expect to collect royalties / licence fees for communication of the work". The persons from whom the copyright owner or licensee would expect royalties or licence fees

shall be referred to as the “copyright holder’s public”. Accordingly, where a person exploits a copyright work for profit, as the plaintiff alleges is the case here, that person should be liable for copyright infringement.

Issues to be determined

18 In light of the foregoing, the issues for my determination in respect of the claims for primary infringement are:

(a) Whether the plaintiff is an exclusive licensee of the right to communicate the Disputed Musical Works to the public and of the right to publicly perform them, and therefore has standing to sue the defendant for primary infringement (considered under O 14 r 12 of the ROC)?

(b) Whether the defendant’s uplinking of the Encrypted Channels, containing or featuring the Disputed Musical Works, to a satellite from Singapore constitutes communication of the works to the public under s 26(1)(a)(iv) of the Copyright Act (considered under O 14 r 12 of the ROC)?

19 The issues arising in respect of the claim for authorisation liability are:

(a) Whether the plaintiff is an exclusive licensee of the right to authorise others to communicate the Disputed Musical Works to the public and/or of the right to perform the works publicly, and therefore has standing to sue the defendant for authorising the Distributors’ acts of primary infringement (considered under O 18 r 19 of the ROC)?

(b) Whether, by uplinking from Singapore the Encrypted Channels containing or featuring the Disputed Musical Works, the defendant authorised infringement where no act of primary infringement is alleged?

Claim for primary infringement

Law on summary determinations under Order 14 rule 12 of the ROC

20 Under O 14 r 12(1) ROC, the court may determine any question of law or construction of any document arising in any cause or matter where it appears that:

(a) such question is suitable for determination without a full trial of the action; and

(b) such determination will fully determine (subject only to any possible appeal) the entire cause or matter or any claim or issue therein.

Upon such determination, the court may dismiss the cause or matter or make such order or judgment as it thinks just (O 14 r 12(2) of the ROC).

21 However, novel questions of considerable public importance are not suitable for summary determination (*TMT Asia Ltd v BHP Billiton Marketing AG (Singapore Branch) and another* [2015] 2 SLR 540 at [35]–[37]). In the present case, neither party objected to the summary determination of either question of law. I also do not think the questions at hand are so novel or of such public importance as to preclude summary determination under O 14 r 12 of the ROC. By way of comparison, George Wei J in *Samsonite IP Holdings Sarl v An Sheng Trading Pte Ltd* [2017] 4 SLR 99 interpreted the phrase “put on the market” under s 29(1) of the Trade Marks Act (Cap 332, 2005 Rev Ed) for the purposes of the defence of parallel importation. He regarded such a question to be to be suitable for determination under O 14 r 12 of the ROC (at [43]). I see no reason preventing me from deciding the questions stated at [12] above under O 14 r 12.

Does the plaintiff have standing to claim for primary infringement?

22 The plaintiff’s basis for asserting standing in Suit No 927 of 2020 (“this Suit”) is detailed at [10] above. In gist, the plaintiff claims to be an exclusive licensee of the performing rights in the Disputed Musical Works by virtue of the Disputed Reciprocal Agreements with PRS and APRA. If this is true, it has *locus standi* under s 123 of the Copyright Act. At the hearing on 31 March 2021, the plaintiff added a further gloss to its submission. It argued that because it is the exclusive licensee of the right to *authorise* others to do certain acts, if a person does those acts without its authorisation, this is an infringement of *its rights* as exclusive licensee.

23 The defendant argues that the plaintiff is not an exclusive licensee of the performing rights of the Disputed Musical Works. It argues that the Disputed Reciprocal Agreements only confer on the plaintiff the exclusive right to *authorise* the doing of the performing rights of the works, but not the exclusive right (or any right) to itself do those acts. In support of this point, the defendant cites cl 2(1) of the plaintiff’s reciprocal agreement with PRS and Art 1(I) of the plaintiff’s reciprocal agreement with APRA. Clause 2(1) of the former agreement states:

With effect from the Commencement Date and subject to clause 2(2), PRS grants COMPASS, under the rights PRS owns in the Repertoire of PRS, an exclusive licence in the Territory of COMPASS to *authorise the public performance, broadcasting and inclusion in a cable programme* of any work in the Repertoire of PRS

[emphasis added in italics and bold italics]

Article 1(I) of the latter agreement reads as follows:

By virtue of the present contract, APRA confers on COMPASS the exclusive right, in the territories in which this latter Society operates ... to grant the *necessary authorisations for all public performances* (as defined in paragraph III of this Article) of musical works, with or without lyrics, which

are protected under the terms of national laws, bilateral treaties and multilateral international conventions relating to the author's right (copyright, intellectual property, etc.) now in existence or which may come into existence and enter into effect while the present contract is in force. ...

[emphasis added in italics and bold italics]

24 Therefore, the defendant submits that the plaintiff does not have the exclusive right to *do* the acts which it has only been licensed to authorise the doing of. The defendant relies on ss 9(2) and 25(1) of the Copyright Act to demonstrate that the latter right of authorisation is separate and distinct from the former bundle of rights. For ease of reference, I reproduce these provisions:

Acts comprised in copyright

9.—(1) ...

(2) For the purposes of this Act, the exclusive right to do an act in relation to a work, an adaptation of a work or any other subject-matter *includes the exclusive right to authorise a person to do that act* in relation to that work, adaptation or other subject-matter.

Ownership of copyright for particular purposes

25.—(1) In the case of a copyright of which (whether as a result of a partial assignment or otherwise) different persons are the owners in respect of its application to —

(a) the doing of *different acts or classes of acts*; or

(b) the doing of one or more acts or classes of acts in different countries or at different times,

the owner of the copyright, for any purpose of this Act, shall be deemed to be the person who is the owner of the copyright in respect of its application to the doing of the particular act or class of acts, or to the doing of the particular act or class of acts in the particular country or at the particular time, as the case may be, that is relevant to that purpose, and a reference in this Act to the prospective owner of a future copyright of which different persons are the prospective owners shall have a corresponding meaning.

[emphasis added in italics and bold italics]

25 According to the defendant, s 25(1) of the Copyright Act confines a copyright owner's exclusive rights to the particular act or class of acts that his ownership rights are in respect of. Further, it argues that s 9(2) of the Copyright Act recognises that the right to do an act and authorise the same are distinct, and there is nothing in the Copyright Act suggesting that the latter encompasses the former. Put another way, the defendant says that even if the Disputed Reciprocal Agreements confer on the plaintiff the exclusive right to *authorise* communication of the Disputed Musical Works to the public and to authorise the public performance of these works, the

plaintiff still is not the exclusive licensee of the underlying rights to do these acts.

26 There are two sub-issues which the defendant’s submissions raise:

(a) Whether the exclusive right to authorise the doing of an act in relation to a copyright work is separate and distinct from the doing of the act itself? For convenience, I will refer to these as the “Right of Authorisation” and “Underlying Right” respectively.

(b) Even if the first sub-issue is answered in the affirmative, whether being the owner or the exclusive licensee of the Right of Authorisation necessarily implies ownership of or an exclusive licence over the Underlying Right?

27 With regard to the first sub-issue, I find that the Right of Authorisation is indeed separate and distinct from the Underlying Right. I say this for the following reasons.

28 First, I agree with the defendant that s 9(2) of the Copyright Act indicates that the two rights are distinct. To appreciate the significance of s 9(2), it must be recalled that copyright comprises “a bundle of legally enforceable exclusive rights in respect of certain types of products of ‘intellectual’ activity” (*PCCW Media Ltd v M1 Ltd and others* [2018] 5 SLR 375 at [29], citing George Wei, *The Law of Copyright in Singapore* (SNP Editions, 2nd Ed, 2000) (“*The Law of Copyright in Singapore*”) at para 1.1). In a similar vein, s 26(1) of the Copyright Act expressly recognises that copyright in relation to different types of work consists of different bundles of exclusive rights:

Nature of copyright in original works

26.—(1) For the purposes of this Act, unless the contrary intention appears, copyright, in relation to a work, is the exclusive right —

(a) in the case of a literary, dramatic or musical work, to do all or any of the following acts:

(i) to reproduce the work in a material form;

(ii) to publish the work if the work is unpublished;

(iii) to perform the work in public;

(iv) to communicate the work to the public;

(v) to make an adaptation of the work;

(vi) to do, in relation to a work that is an adaptation of the first-mentioned work, any of the acts specified in relation to the first-mentioned work in sub-paragraphs (i) to (v);

- (b) in the case of an artistic work, to do all or any of the following acts:
- (i) to reproduce the work in a material form;
 - (ii) to publish the work in Singapore or any country in relation to which this Act applies, if the work is unpublished;
 - (iii) to communicate the work to the public; and
- (c) in the case of a computer program, to enter into a commercial rental arrangement in respect of the program unless the program is not the essential object of the rental.

29 Therefore, because s 9(2) of the Copyright Act refers *separately* to “the exclusive right to do an act in relation to a work ...” and “the exclusive right to authorise a person to do that act”, I do not think the Right of Authorisation and the Underlying Right are one and the same. It is trite that “Parliament shuns tautology and does not legislate in vain”. Courts should therefore “endeavour to give significance to every word in an enactment” (*Tan Cheng Bock v Attorney-General* [2017] 2 SLR 850 (“*Tan Cheng Bock*”) at [38]). Parliament’s express reference to an “exclusive right to authorise a person to do that act in relation to that work ...” signals that the Right of Authorisation is conceptually distinct from the Underlying Right.

30 In my view, s 9(2) simply describes a starting point: that all Underlying Rights are accompanied by a corresponding Right of Authorisation. This, however, does not mean that the Right of Authorisation cannot later be severed from the “parent” Underlying Right, such as by way of an assignment or exclusive licence. Nothing in the Copyright Act prohibits such severance. In fact, I agree with the defendant that s 25(1) of the Copyright Act (reproduced at [24] above) allows the copyright owner to divide the bundle of exclusive rights, such that each “copyright owner only has rights of action in relation to ... the particular act or class of acts that his ownership rights are in respect of”. Although s 25 deals with, among other issues, dividing the *ownership* of multiple exclusive rights comprised in the copyright in a work (see also *Halsbury’s Laws of Singapore* vol 13(3) (LexisNexis, 2021) at para 160.040, n 3), I see nothing preventing a copyright owner from granting an exclusive licence in respect of the Right of Authorisation only.

31 However, one may question why Parliament did not enumerate the Right of Authorisation when setting out the bundle of exclusive rights for each type of copyright work in s 26 of the Copyright Act. One answer is that there was no need to do so *because* of s 9(2). In fact, s 9(2) renders any such enumeration in s 26(1) tautologous.

32 Even further still, and turning now to my second point, cases commenting on or applying the Copyright Act 1968 (Cth) (“the Australian Act”) make clear that an Underlying Right and its corresponding Right of

Authorisation are separate and distinct. Section 9 of the Copyright Act is modelled on s 13 of the Australian Act. The annotation to s 9 of the Copyright Act reads: “[*Aust. 1968, s.13*]”. In fact, the language in s 13(2) of the Australian Act is identical to that in s 9(2) of the Copyright Act. More generally, at the Second Reading of the Copyright Bill (Bill No 8/1986) (“Copyright Bill 1986”), then Second Minister for Law, Prof S Jayakumar, confirmed that the Copyright Bill 1986 “is modelled largely on Australia’s copyright law” (*Singapore Parliamentary Debates, Official Report* (5 May 1986) vol 48 at col 12 (“Second Reading of the Copyright Bill 1986”). Thus, Australian authorities are persuasive for our purposes. I refer to two such authorities.

33 In *WEA International Inc and another v Hanimex Corporation Ltd* (1987) 77 ALR 456 (“*WEA International*”), Gummow J set out the distinction between an Underlying Right and its corresponding Right of Authorisation in these terms (at 466):

It was clear after *Ash v Hutchinson and Co (Publishers) Ltd* [1936] Ch 489, that the [Copyright Act 1911 (c 46) (UK)] gave, for example, the owner of copyright in a literary work both the sole right of reproducing it and the sole right of authorising such reproduction and that ***those rights were separate and distinct*** so that infringement of each was a distinct tort. That the same was true of ‘authorization’ in respect of the [Australian Act] was accepted by the High Court in *University of New South Wales v Moorhouse* (1975) 133 CLR 1 ; 6 ALR 193. [emphasis added in bold italics]

34 In *University of New South Wales v Moorhouse and Angus & Robertson (Publishers) Pty Ltd* (1975) 133 CLR 1 (“*Moorhouse*”), the High Court of Australia held that the appellant university had authorised the doing, by one Brennan, of the act of reproducing the literary work *The Americans, Baby* in a material form. The appellant thereby infringed the respondents’ copyright in the said work (at 210). Brennan was a graduate of the appellant university. Pertinently, the court confirmed that the appellant itself did *not* perform the act of photocopying, *ie*, the underlying act of reproducing the literary work (at 199). Therefore, the outcome in *Moorhouse* corroborates Gummow J’s analysis in *WEA International* that infringement of the Underlying Right and Right of Authorisation are separate causes of action rooted in breaches of distinct exclusive rights.

35 For these reasons, the first sub-issue is answered in the affirmative.

36 I now turn to the second sub-issue. To summarise thus far, because I have found that the Right of Authorisation is distinct and severable from its corresponding Underlying Right, the Disputed Reciprocal Agreements do not make the plaintiff an exclusive licensee of the Underlying Rights which are pleaded to be infringed. Clause 2(1) of the plaintiff’s reciprocal agreement with PRS only permits the plaintiff to “*authorise* the public performance, broadcasting and inclusion in a cable programme of any work in the Repertoire of PRS” [emphasis added]. Article 1(I) of the plaintiff’s

reciprocal agreement with APRA similarly only allows the plaintiff to “grant the necessary *authorisations* for all public performances ... of musical works” [emphasis added].

37 Thus, for the plaintiff to have standing in this Suit, I must go further to find that the owner or an exclusive licensee of the Right of Authorisation necessarily owns or is an exclusive licensee of the Underlying Right. With respect, I am unable to find that this is so for the following two reasons.

38 First, to say otherwise will contravene the spirit of s 25(1) of the Copyright Act. For assignments, s 25(1) makes clear that a partial assignment of exclusive rights will only transfer ownership of the exclusive rights which are the subject of the assignment, and nothing more. In my judgment, consistent with the spirit of s 25(1) of the Copyright Act, the rights obtained under an exclusive licence must similarly be confined to the exclusive rights which are the subject matter of the exclusive licence. Put another way, once the Right of Authorisation and its Underlying Right are severed, I fail to see why being the owner or exclusive licensee of the Right of Authorisation necessarily implies the same over the Underlying Right, or *vice versa*.

39 Second, there is little commercial sense in finding that being an owner or exclusive licensee of the Right of Authorisation necessarily implies ownership of or a licence over the Underlying Right. Conceivably, the holder of copyright in a particular work may wish to retain ownership of the Underlying Right, while at the same time appointing a separate person (“X”) to be his exclusive licensee of the corresponding Right of Authorisation, where X has no skill or expertise in performing the Underlying Right itself.

40 In these premises, the plaintiff is not the exclusive licensee of the right to communicate the Disputed Musical Works to the public or to perform these works in public. Thus, it lacks standing to bring claims for primary infringement.

Whether uplinking of the Encrypted Channels containing the Disputed Musical Works to a satellite constitutes communication to the public under section 26(1)(a) of the Copyright Act?

41 My finding on the plaintiff’s lack of standing for primary infringement is sufficient to dispose of the above claims (*ie*, that the defendant communicates the Disputed Musical Works to the public and performs the works in public). In case I am wrong, I go on to consider the Second Question in the O 14 r 12 application. For the avoidance of doubt, the Statement of Claim dated 5 April 2021 (Amendment No 2) (“ASOC2”) pleads that the defendant’s uplinking activities constitute public performance of the Disputed Musical Works. The Second Question, however, does not extend to whether uplinking programmes amounts to a

public performance under s 26(1)(a)(iii). The following analysis thus focuses on whether uplinking activities constitute communication to the public under s 26(1)(a)(iv) only.

42 For context, there are two main forms of satellite broadcasting (see Susanna H S Leong, *Intellectual Property Law of Singapore* (Academy Publishing, 2013) at para 08.158):

(a) First, direct broadcasting by satellite is where “the signal of the originating broadcaster is transmitted through the satellite direct to the receivers of the public. Special equipment, such as satellite dishes or signal boxes, is necessary for the receivers to receive the signals and to decode it for purposes of viewing”; and

(b) Second, in PTP transmissions, one broadcaster transmits signals to a satellite, which are then transmitted to another broadcaster who includes the signals in its own transmissions.

43 I agree with the defendant that its activities, pleaded in the ASOC2, fall within the meaning of PTP transmissions. This is because the Encrypted Channels uplinked by the defendant are only downlinked to the Distributors. The Distributors are then responsible for transmitting the defendant’s channel(s) to their own subscribers.

44 The plaintiff submits that uplinking in the context of PTP transmissions is a “communication” under s 7(1) of the Copyright Act because: (a) this falls within the definition of “broadcasting” under s 7(1), without the need to prove reception of these satellite signals; and (b) this makes the Disputed Musical Works available in such a way that the work may be accessed by any person from a place and at a time chosen by him under s 7(1). In support of this position, it relies on:

(a) the views of Tan Tee Jim in “Copyright Protection of Satellite and Cable Broadcasts in Singapore” (1995) 7 SAclJ 45 (“Tan Tee Jim’s 1995 Article”) at 50, and Susanna Leong and Chen Yuanyuan in “The Right of Communication in Singapore” (2010) 22 SAclJ 602 (“Leong and Chen’s Article”) at paras 20–22;

(b) *Total English Learning Global Pte Ltd and anor v Kids Counsel Pte Ltd* [2013] SGHCR 22 (“*Total English Learning Global*”), which the plaintiff cites for the proposition that it need only show electronic transmission of the Disputed Musical Works in order to prove their communication to the public;

(c) the definition of the term “broadcasting service” in the Broadcasting Act (Cap 28, 2012 Rev Ed); and

(d) the proposition in *RecordTV Pte Ltd v MediaCorp TV Singapore Pte Ltd and others* [2011] 1 SLR 830 (“*RecordTV*”) that making a work available for access by any person from a place and at a time chosen

by that person is a communication of the work to the public. The plaintiff argues that the act of satellite uplinking fulfils this test in *RecordTV*.

45 As for the definition of the “public”, the plaintiff submits that it includes persons outside of Singapore because:

(a) Section 10 of the Australian Act defines “to the public” to mean “the public within or outside Australia”. According to the plaintiff, although there is no similar provision in our Copyright Act, because s 26 is adopted from s 31 of the Australian Act, “there is value in looking towards [s 10 of the Australian Act]”.

(b) It is in line with the purposive interpretation of the Copyright Act to read it as such. If “the public” was limited to those within Singapore, there would be a loophole in the Copyright Act for communications such as broadcasts which originate from Singapore but are only received outside of Singapore.

46 Further on the meaning of the “public” in s 26(1)(a)(iv) of the Copyright Act, the plaintiff submits that it should refer to “any persons to whom communication is made in circumstances where the copyright owner / licensee would expect to collect royalties / licence fees for communication of the work”. In other words, the plaintiff urges me to follow *Telstra Corporation Ltd v Australasian Performing Right Association Ltd* (1997) 146 ALR 649 (“*Telstra (HC)*”), in which the High Court of Australia held that the “public” means the copyright owner’s public. This means that if the copyright owner would expect to receive a fee from the persons to whom the defendant communicated the work, communication to the public has occurred. It says that even though the alleged communication was only made to a number of Distributors, because the defendant has the autonomy to control the “public” and provides the communications for-profit to external parties (*ie*, the Distributors), its acts of uplinking are communications to the public.

47 Finally, the plaintiff argues that the intention of the Copyright (Amendment) Act 2004 (Act 52 of 2004) (“Copyright (Amendment) Act 2004”) was to enhance protection for copyright owners. The amendment to s 26(1)(a)(iv), which subsumed the right to broadcast under the right to communicate the work to the public, should thus not be read to curtail the rights of copyright owners in the area of broadcasting.

48 In response, the defendant submits that uplinking in the context of PTP transmissions is not a communication to the public. It relies on the following points in support of this submission:

(a) Even before the Copyright (Amendment) Act 2004, the broadcasting right involved some notion of direct reaching out to the public.

(b) Uplinking in the context of PTP transmissions does not satisfy the meaning of “broadcasting” because these signals are not directly received by the public. Such uplinking does not amount to “widespread dissemination” or something being “scattered widely abroad”.

(c) The defendant’s signals were not transmitted to a “substantial number of persons”. It cites *RecordTV* and *SBS Belgium NV v SABAM* Case C-325/14, ECLI:EU:C:2015:764, <<https://curia.europa.eu/juris/liste.jsf?language=en&td=ALL&num=C-325/14>> (accessed 19 October 2021) (“*SBS Belgium*”) as authority for the requirement of substantiality and argues that the latter should be followed in Singapore.

49 Further, or alternatively, to determine whether there is communication to the public, the defendant submits that only recipients *in Singapore* are relevant. And, the defendant has only two Distributors in Singapore. In particular, it highlights that a definition of the “public”, which included both persons inside and outside of Singapore, was deleted from the Copyright (Amendment) Bill (Bill No 48/2004) (“Copyright (Amendment) Bill 2004”) when it was presented for first reading in Parliament. The defendant argues that this deletion evinces Parliament’s intention not to give the right of communication to the public extraterritorial effect.

50 From the foregoing, I distil the following three issues: (a) what is the meaning of “broadcast” in s 7(1) of the Copyright Act; (b) what is the meaning of “the making available of a work” in s 7(1) of the Copyright Act; and (c) what is the meaning of the “public” in s 26(1)(a) of the Copyright Act.

Meaning of “broadcast” in section 7(1) of the Copyright Act

51 Part of the plaintiff’s claim is that the defendant caused the Disputed Musical Works to be communicated to the public. Section 7(1) defines “communicate” as follows:

7.—(1) ...

... to transmit by electronic means (whether over a path, or a combination of paths, provided by a material substance or by wireless means or otherwise) a work or other subject-matter, whether or not it is sent in response to a request, and includes —

- (a) the broadcasting of a work or other subject-matter;
- (b) the inclusion of a work or other subject-matter in a cable programme; and
- (c) the making available of a work or other subject-matter (on a network or otherwise) in such a way that the work or subject-matter

may be accessed by any person from a place and at a time chosen by him,

and ‘communication’ shall have a corresponding meaning;

52 As stated in s7(1), one way to prove that the defendant communicated the Disputed Musical Works is to show that its uplinking activities constitute “broadcasting”. Section 7(1) also provides that “broadcast” means “broadcast by wireless telegraphy, and [that] ‘broadcasting’ shall have a corresponding meaning”.

53 The following is a brief history of the right to broadcast copyright works. Prior to 1987, copyright protection in Singapore was provided for in the Copyright Act 1911 (c 46) (UK) (“Copyright Act 1911 (UK)”), a piece of imperial legislation, supplemented by the Copyright Act 1914 (SS Ord No 18 of 1914) and the Copyright (Gramophone Records and Government Broadcasting) Act (Cap 64, 1985 Rev Ed) (Ng-Loy Wee Loon, *Law of Intellectual Property of Singapore* (Sweet & Maxwell, 3rd Ed, 2021) (“Ng-Loy Wee Loon”) at para 4.1.4). Under the Copyright Act 1911 (UK), broadcasting was not a specific right conferred on copyright works. The approach was to try and treat broadcasting as a type of public performance (*The Law of Copyright in Singapore* at para 3.15). Subsequently, s 89 of the Copyright Act 1987 (Act 2 of 1987) (“Copyright Act 1987”) conferred copyright in Singapore for the first time on both television and sound broadcasts (*The Law of Copyright in Singapore* at para 3.13). Following that, the right to communicate copyright works to the public was introduced in the Copyright (Amendment) Act 2004, s 8. The right to communicate works to the public was enacted to bring Singapore’s copyright framework in line with international standards, such as that in Art 8 of the World Intellectual Property Organisation’s Copyright Treaty 1996 (20 December 1996) 2186 UNTS 121 (entered into force 17 April 2005) (“WIPO Copyright Treaty”) (Leong and Chen’s Article at paras 4–6; *Singapore Parliamentary Debates, Official Report* (16 November 2004) vol 78 (S Jayakumar, Minister for Law) (“Second Reading of Copyright (Amendment) Bill 2004”) at col 1044). Article 8 provides that:

... authors of literary and artistic works shall enjoy the exclusive right of authorizing any communication to the public of their works, by wire or wireless means, including the making available to the public of their works in such a way that members of the public may access these works from a place and at a time individually chosen by them.

At the Second Reading of Copyright (Amendment) Bill 2004, Deputy Prime Minister and Minister for Law, Prof S Jayakumar, said that the right to communicate works to the public “encompasses both the *existing* broadcasting and cable programme rights, and also the right to control the dissemination of works on the Internet” [emphasis added] (Second Reading of Copyright (Amendment) Bill 2004 at col 1043). As such, the former right

of broadcasting was subsumed within the right of communication to the public (Ng-Loy Wee Loon at para 9.5.2).

54 With this background in mind, and having regard to the parties' submissions, I agree with the defendant that uplinking signals to a satellite in the context of PTP transmissions does not constitute a broadcast and, therefore, a communication to the public under s 26(1)(a)(iv) of the Copyright Act. This is because a broadcast must objectively involve direct transmission to the general public or a part thereof. In reaching this conclusion, I am guided by the three-step approach to purposive statutory interpretation outlined in *Tan Cheng Bock* ([29] *supra*) at [37]:

- (a) First, ascertain the possible interpretations of the provision, having regard not just to the text of the provision but also to the context of that provision within the written law as a whole.
- (b) Second, ascertain the legislative purpose or object of the statute.
- (c) Third, compare the possible interpretations of the text against the purposes or objects of the statute.

55 Under the first step of the *Tan Cheng Bock* framework, the definition of "broadcast" under s 7(1) of the Copyright Act – "broadcast by wireless telegraphy" – does not address the issue at hand. Like Sheppard J in *Australasian Performing Right Association Ltd v Telstra Corporation Ltd* (1995) 31 IPR 289 at 305–306, I then turn to the ordinary meaning of the word "broadcast". According to the Oxford English Dictionary, "broadcast" means to "scatter widely abroad" or to "widely disseminate". Even further still, Sheppard J noted that for radio and television broadcasts, the Oxford English Dictionary states that broadcast means (at 306):

'to disseminate (a message, news, a musical or dramatic performance, or any audible or visible matter) from a radio or television transmitting station *to the receiving sets of listeners and viewers ...*' [emphasis added in italics and bold italics]

56 Based on the foregoing, one interpretation of "broadcast" is that the work must be transmitted directly to the general public or a part thereof ("the First Interpretation"). But, on another view, the plain meaning of "broadcast" does not shut out the conceptual possibility of the PTP transmissions being downlinked to numerous intermediate broadcasters which together form a *part of* the general public ("the Second Interpretation"). This is especially so if I am wrong about persons overseas not forming part of the "public" under s 26(1)(a)(iv) of the Copyright Act (see [107] below). Under this latter interpretation, uplinking in the context of PTP transmissions *may* amount to a broadcast.

57 However, when determining the ordinary meaning of a word or provision, courts should also have due regard to the context of that text within the written law as a whole (*Attorney-General v Ting Choon Meng and another appeal* [2017] 1 SLR 373 at [59(a)]). There is one contextual

clue which leads me to prefer the First Interpretation of the word “broadcast”. Namely, I agree with the defendant and the learned author of *The Law of Copyright in Singapore* at para 3.21 that s 16(5)(b) of the Copyright Act is significant:

Provisions relating to the making of a work or other subject-matter

...

(5) For the purposes of this Act, a television broadcast or sound broadcast shall be deemed to have been made by the person by whom, at the time when, and from the place from which —

(a) the visual images or sounds in question, or both, as the case may be, are broadcast; or

(b) in the case of a television broadcast or sound broadcast made by the *technique known as direct broadcasting* by satellite, the visual images or sounds in question, or both, as the case may be, are transmitted to the satellite transponder.

[emphasis added in bold italics]

58 Section 16(5)(b) of the Copyright Act stipulates the means for identifying *who* made a television or sound broadcast by “the technique known as direct broadcasting by satellite”, but not PTP transmissions. This suggests that Parliament did not consider PTP transmissions to be broadcasts under the Copyright Act. As George Wei observed, if it were otherwise, “statutory provisions as to where the point-to-point ‘broadcast’ was made from could have been expected” (*The Law of Copyright in Singapore* at para 3.21). I accept the learned author’s view for the following reasons.

59 Singapore appears to have adopted s 16(5) from the Copyright Act 1956 (c 74) (UK) (“Copyright Act 1956 (UK)”), as amended by the Cable and Broadcasting Act 1984 (c 46) (UK) (“Cable and Broadcasting Act 1984 (UK)”). I say this because the amendments to s 14 of the Copyright Act 1956 (UK) provided for in Schedule 5, para 6(7) of the Cable and Broadcasting Act 1984 (UK) are *in pari materia* to s 16(5) of our Copyright Act.

60 For reference, I set out the relevant provisions in the aforesaid UK statutes. Section 14(10) of the Copyright Act 1956 (UK) (before amendment by the Cable and Broadcasting Act 1984 (UK)) stated:

(10) In this Act ‘television broadcast’ means visual images broadcast by way of television, together with any sounds broadcast for reception along with those images, and ‘sound broadcast’ means sounds broadcast otherwise than as part of a television broadcast; and for the purposes of this Act a television broadcast or sound broadcast *shall be taken to be made by the body by*

whom, at the time when, and from the place from which, the visual images or sounds in question, or both, as the case may be, are broadcast.

[emphasis added in bold italics]

61 Schedule 5, para 6(7) of the Cable and Broadcasting Act 1984 (UK) provides that:

(7) In subsection (10) of section 14 of [the Copyright Act 1956 (UK)] (copyright in television broadcasts and sound broadcasts) for the words from ‘the visual images or sounds’ to the end there shall be substituted the following paragraphs—

‘(a) the visual images or sounds in question, or both, as the case may be, are broadcast; or

(b) in the case of a television broadcast or sound broadcast made by the technique known as direct broadcasting by satellite, the visual images or sounds in question, or both, as the case may be, are transmitted to the satellite transponder.’

This paragraph in Schedule 5 came into force on 1 January 1985: Cable and Broadcasting Act 1984 (Commencement No 1) Order 1984 (SI 1984 No 1796) (UK), Schedule 2.

62 What is significant is that the UK Parliament deliberately opted *not* to expand the definition of “broadcasting” in the Copyright Act 1956 (UK) to include PTP transmissions. I glean this from the debate, at the committee stage of the House of Lord’s consideration of the Cable and Broadcasting Bill (1984), in relation to the clause in the Cable and Broadcasting Bill (1984) which was later enacted as Schedule 5, para 6(7) (United Kingdom, House of Lords, *Parliamentary Debates* (2 February 1984), vol 447 at col 870–873, <<https://hansard.parliament.uk/Lords/1984-02-02/debates/f8f28cbb-17f3-42a4-a583-a7a0c357b873/CableAndBroadcastingBillHL>> (accessed 20 October 2021) (Lord Lovell-Davis, Lord Elton):

Lord Lovell-Davis

...

Sub-paragraph (8) of paragraph 6 of Schedule 3 amends Section 14(10) of the [Copyright Act 1956 (UK)], apparently to clarify the question whether the up-leg of a broadcast by satellite is to be treated as an act of broadcasting for the purpose of copyright. So far as the proposed change goes, I welcome it, but it appears to be *unsatisfactory* in three respects. ...

... Thirdly, and most important, the change relates only to direct satellite broadcasting, whereas the need for clarification is just as great, and perhaps greater, in the case where programme-carrying signals are *transmitted via a satellite to a receiving ground station and then are distributed to the public* either by cable or wireless for onward transmission. In this form of communication via satellite the owners of the rights in copyright works will

be *seriously prejudiced* if they have no right of control over the initial transmission to the satellite. ...

This is clearly an intolerable and unacceptable position for the copyright owner to be placed in. If his interest is to be properly protected by law, the clarification in the Bill relating to direct satellite broadcasting should be extended to cover point to point communication by satellite, as expressed and recommended in the Whitford report.

Having regard to all considerations it seems essential that a *comprehensive definition of ‘broadcasting’, covering both kinds of satellite communication, should be included* in the Bill for incorporation in the [Copyright Act 1956 (UK)]. That is what this amendment is designed to achieve. I beg to move.

Lord Elton

The noble Lord has proposed an extremely interesting solution to an extremely difficult problem. It is a fairly new problem and the Government accept that it is important that authors and other copyright owners should have copyright protection in respect of the communication to the public of their works by means of *point to point satellite transmissions* which are included in cable programmes. Unfortunately, there are a number of difficulties with this solution.

...

I hope I have said enough to persuade the noble Lord *not to go ahead with this amendment*. The Government will certainly look further into this to see whether the problem can be solved. If, in spite of the many difficulties we have already encountered, it proves possible to bring forward amendments during the course of the Bill’s passage, we will do so. But there are wide issues and we may have to wait until we come to the general reform of copyright legislation which we are hoping to introduce before long. ...

Lord Lovell-Davis

I am most grateful to the noble Lord the Minister for what he has said. ...

I raised the matter so that it could be looked into. As I understand the noble Lord’s reply, not only has he been looking into it in considerable detail but he intends to continue to try to resolve the matter. I must say I am very pleased to know that. I greet it with great satisfaction and I *beg leave to withdraw the amendment*.

[emphasis added in italics and bold italics]

63 In short, the House of Lords expressly declined to extend the meaning of “broadcasting” in the Copyright Act 1956 (UK) to include PTP transmissions. The eventual bill passed by both houses of the UK Parliament indeed did not do so. The following academic texts also confirm that, in the UK, PTP transmissions only began counting as broadcasts under s 6 of the Copyright, Designs and Patents Act 1988 (c 48) (UK) (“Copyright, Designs and Patents Act 1988 (UK)”): Adrian Speck *et al*, *Laddie, Prescott and Vitoria: The Modern Law of Copyright* vol 1

(LexisNexis, 5th Ed, 2018) (“*Laddie, Prescott and Vitoria*”) at paras 8.12 (Illustration 5), 8.21–8.24; Nicholas Caddick, Gwilym Harbottle & Uma Suthersanen, *Copinger and Skone James on Copyright* vol 1 (Sweet & Maxwell, 18th Ed, 2020) (“*Copinger and Skone James*”) at para 3-275; Gerald Dworkin & Richard D Taylor, *Blackstone’s Guide to the Copyright, Designs and Patents Act 1988: The Law of Copyright and Related Rights* (Blackstone Press Ltd, 1989) at p 195.

64 Singapore has not enacted the equivalent of s 6 of the Copyright, Designs and Patents Act 1988 (UK). Instead, having incorporated s 14(10) of the Copyright Act 1956 (UK), as amended by the Cable and Broadcasting Act 1984 (UK), into our statute books on 10 April 1987 when the Copyright Act 1987 came into force, the UK’s intention to *exclude* PTP transmissions from the ambit of “broadcasting” in the Copyright Act 1956 (UK) was likely also imported. Therefore, I prefer the ordinary meaning of “broadcast” which requires the copyright work to be disseminated *directly* to the general public or a part thereof. For completeness, I rely on s 9A(2)(a) of the Interpretation Act (Cap 1, 2002 Rev Ed) to justify reference to the debate in the House of Lords. The debate confirms that the meaning of “broadcast” is its ordinary meaning *when* read in its context within the Copyright Act.

65 I also reject the plaintiff’s submissions in relation to the second and third stages of the *Tan Cheng Bock* ([29] *supra*) framework. Namely, the plaintiff argues that the 2004 amendments, which subsumed the right to broadcast under the right to communicate the work to the public, were motivated by the policy of protecting the rights of copyright owners. According to the plaintiff, this means that by uplinking signals for the copyright holder’s public (*ie*, the Distributors), the defendant communicated the Disputed Musical Works to the public and infringed its copyright. It is the plaintiff’s case that the defendant ought to be separately licensed from the Distributors.

66 The plaintiff cites, among others, the following portions of the Second Reading of Copyright (Amendment) Bill 2004 at cols 1041 and 1053:

Sir, this Bill seeks to amend the Copyright Act to enhance and strengthen our copyright regime, particularly to ensure that our copyright laws remain relevant in an age of rapid technological development. ...

...

In conclusion, let me say that these amendments in the Bill, although fairly complicated and technical, are necessary to update Singapore’s copyright legislation to meet the needs of businesses, creators and users in the fast-evolving digital age. It provides enhanced enforcement measures to encourage stakeholders in the creative industries to further engage in high value-added activities in Singapore.

67 The problem is that the plaintiff is asking me to use the extraneous material above as a basis to depart from the ordinary meaning of the word

“broadcast”, when read in the context of s 16(5) of the Copyright Act. This is only permissible if the meaning of “broadcast” is ambiguous or obscure (s 9A(2)(b)(i) Interpretation Act) or if its ordinary meaning leads to a result that is manifestly absurd or unreasonable (s 9A(2)(b)(ii) Interpretation Act) (see *Tan Cheng Bock* at [48]). However, *Tan Cheng Bock* also clarified that statements in Parliament must be “clear and unequivocal to be of any real use” and that the statements “should be directed to the very point in question to be especially helpful” (at [52(a)], [52(c)]). Evidently, Parliament did not say that all satellite transmissions to the copyright holder’s public, including uplinking in the context of PTP transmissions, are infringing acts. Therefore, the extraneous material relied upon is no basis for interpreting “broadcast” in the manner advanced by the plaintiff.

68 Further, the plaintiff’s complaint that the First Interpretation of the word “broadcast” curtails the rights of copyright owners in the area of broadcasting has no leg to stand on. If my reasons at [54]–[67] are correct, this means that before the 2004 amendments, the right “to broadcast the work” in s 26(1)(a)(iv) of the Copyright Act (Cap 63, 1999 Rev Ed) (“Copyright Act (1999 Rev Ed)”) similarly did not encompass PTP transmissions. This is because the ordinary meaning of the word “broadcast” also applies to the Copyright Act (1999 Rev Ed) and s 16(5)(b) therein is identically worded to that in the latest revised edition of the Copyright Act.

69 I next deal briefly with other points raised by the plaintiff.

70 First, the plaintiff’s reliance on Tan Tee Jim’s 1995 Article does not assist it. Tan Tee Jim noted that unlike in many countries where transmissions are not treated as broadcasts unless they are intended for reception by the general public, the Copyright Act (Cap 63, 1988 Rev Ed) (“Copyright Act (1988 Rev Ed)”) did not contain such a requirement. The learned author raised the example of s 6(1) of the Copyright, Designs and Patents Act 1988 (UK). That provision, as originally enacted, provided that a transmission must fulfil either of the following conditions in order to constitute a broadcast:

- (a) is capable of being lawfully received by members of the public, or
- (b) is transmitted for presentation to members of the public; ...

He also stressed that the Copyright Act (1988 Rev Ed) merely defined “broadcast” as a broadcast by wireless telegraphy, and that the Act deemed broadcasts to be made by the persons by whom, at the time when, and from the place from which, the visual images or sounds constituting the broadcast, or both, are broadcast (s 16(5)(a) of the Copyright Act (1988 Rev Ed)). In this light, he opined that a defendant is liable for infringement as long as it transmits or authorises the transmission of copyright works to a satellite (*Tan Tee Jim’s* 1995 Article at p 50). In other words, PTP transmissions are infringing acts.

71 However, s 6(1)(b) of the Copyright, Designs and Patents Act 1988 (UK) extended the meaning of “broadcast” to PTP transmissions. That Singapore did not enact an equivalent of s 6(1)(b) points away from PTP transmissions being broadcasts under the Copyright Act. Although PTP transmissions are not directly receivable by members of the public, it is the public and not the intermediate broadcasters who are the ultimate audience. As such, PTP transmissions may be transmissions “for presentation to members of the public” within the meaning of s 6(1)(b) (*Laddie, Prescott and Vitoria* at paras 8.12 (Illustration 5), 8.24; *Copinger and Skone James* at para 3-275). Further, although s 16(5)(a) of the Copyright Act, on its face, is wide enough to apply to PTP transmissions, the deliberations in the House of Lords excerpted at [62] above make clear that s 16(5)’s predecessor in the UK was not intended to apply to PTP transmissions. Therefore, the absence of a provision similar to s 6(1)(b) of the Copyright, Designs and Patents Act 1988 (UK) in Singapore, the history behind s 16(5) of the Copyright Act and the ordinary meaning of the word “broadcast” (see [55] above) weigh strongly in favour of the First Interpretation of “broadcast” (*ie*, that there must be direct transmission to the general public or a part thereof).

72 Second, Leong and Chen’s Article hurts, rather than helps, the plaintiff’s case. The plaintiff cites paras 20–22 of this article for the proposition that a communication to the public by satellite transmission may be established without proving reception of the satellite signal. However, in those paragraphs, the learned authors were addressing the question of *when* a communication to the public occurs. They simply made the point that “for purposes of determining when a communication occurs through transmission of a work by electronic means”, one need only show that the work has been transmitted to potential recipients, without needing to prove actual receipt. This does not address the separate issue of what kind of transmissions are communications *to the public*. In fact, the learned authors at para 50, citing *The Law of Copyright* at pp 171–194, submitted that after the 2004 amendments and the reclassification of the right to broadcast under the broader umbrella provision of a right to communicate to the public, “the better view is that broadcasting does involve some notion of a direct transmission to the general public or a class thereof”.

73 Third, *Total English Learning Global* ([44(b)] *supra*) is not relevant to the interpretation of “broadcast”. The plaintiff in that case alleged that the defendant had infringed copyright in various artistic, literary and musical works by using them in the operation of its English literacy educational programmes (at [2], [4], [19]). The issue considered by the assistant registrar was whether communications by *non-electronic* means fall within the meaning of “communicate” in ss 26(1)(a)(iv) and 26(1)(b)(iii) of the Copyright Act (at [12(b)], [25]). Plainly, whether uplinking signals for PTP transmissions constitutes a “broadcast” was not a live issue.

74 Fourth, the definition of “broadcasting service” in the Broadcasting Act does not change my view on the proper interpretation of “broadcast” in the Copyright Act. A “broadcasting service” is defined as follows in the Broadcasting Act, s 2(1):

2.—(1) ...

... means a service whereby signs or signals transmitted, whether or not encrypted, comprise —

- (a) any programme capable of being received, or received and displayed, as visual images, whether moving or still;
- (b) any sound programme for reception; or
- (c) any programme, being a combination of both visual image (whether moving or still) and sound for reception or reception and display,

by persons having equipment appropriate for receiving, or receiving and displaying, as the case may be, that service, irrespective of the means of delivery of that service;

The plaintiff argues that in line with the Broadcasting Act, the defendant’s uplinking of programmes by way of satellite transmissions to a recipient constitutes the provision of a broadcasting service in or from Singapore.

75 However, I do not think that Parliament intended for the word “broadcast” in the Copyright Act to have the same meaning as “broadcasting service” in the Broadcasting Act. If Parliament did so intend, it would have said so. For instance, Parliament expressly provided, in s 7(1) of the Copyright Act, that other terms like “broadcasting licence” and “broadcasting licensee” have the same meanings as in s 2(1) of the Broadcasting Act. In addition, *per* Leong and Chen’s Article (see [72] above), the term “broadcast” in the Copyright Act must now be read in light of the right to communicate the work to the *public*. Rather, as explained above, I rely on the principles of statutory interpretation to determine the meaning of “broadcast” under the Copyright Act.

76 For all the foregoing reasons, because the pleaded claim only accuses the defendant of uplinking PTP transmissions, the Disputed Musical Works are not being broadcast by the defendant.

Meaning of “the making available of a work” in section 7(1) of the Copyright Act

77 As stated in s 7(1) of the Copyright Act (see [51] above), another way the plaintiff may prove the communication of the Disputed Musical Works is to show that the defendant’s uplinking activities made the works available for access by any person from a place and at a time chosen by that person.

78 The plaintiff submits that the defendant’s act of satellite uplinking made the Disputed Musical Works available, in the manner defined in

s 7(1), to the Distributors “and through the Distributors to the subscribers of the respective [D]istributors”.

79 I am unable to agree with the plaintiff.

80 It bears emphasising that the right to communicate works to the public is modelled after Art 8 of the WIPO Copyright Treaty. Specifically, that making works available constitutes a communication of the work is taken from the second part of Art 8 (see [53] above).

81 However, the phrase “making available” in Art 8 is targeted at the act of providing *access* to a work (Explanatory Note in the Basic Proposal for the Substantive Provisions of the Treaty on Certain Questions Concerning the Protection of Literary and Artistic Works to be Considered by the Diplomatic Conference (WIPO Doc CRNR/DC/4, 30 August 1996) (“Explanatory Note”) at para 10.10). In particular, the “main objective” of the second part of Art 8 is to include “interactive on-demand acts of communication” within the copyright owner’s bundle of rights (Explanatory Note at para 10.11). An example of an on-demand communication is providing a clickable internet link on a website that allows users of that website to link to a copyright work on another website (*Copinger and Skone James* at para 7-229). In other words, for a work to have been made available within the meaning of Art 8 (and hence s 7(1) of the Copyright Act), any person must be able to exercise their “individual choice” to access the work (Explanatory Note at paras 10.11–10.12). Therefore, uploading a work onto a password protected cloud storage system would not constitute a communication (*Copinger and Skone James* at para 7-231).

82 In this case, I am unable to find that by uplinking the Encrypted Channels, the defendants had allowed any person to access the Disputed Musical Works at their choosing. To the contrary, it is undisputed that the signals uplinked by the defendant were encrypted. Only the Distributors were provided with the decoder device to decrypt the signals at the downlinking site. Regardless of whether the defendant contemplated that the ultimate recipients of the Encrypted Channels were subscribers of the Distributors, the defendant’s actions did not enable anyone other than the Distributors to lawfully access the Disputed Musical Works. Therefore, the defendant’s actions are comparable to the uploading of works to a password protected cloud storage system. In both cases, the works are not made available under Art 8 of the WIPO Copyright Treaty or s 7(1) of the Copyright Act.

Meaning of “public” under section 26(1)(a)(iv) of the Copyright Act

83 Assuming the plaintiff has standing, my determinations of the meanings of “broadcast” and “the making available of a work” are sufficient to dispose of the claim for infringement of the right to communicate the

work to the public. However, if I am wrong in those regards, the question then is whether a communication to the *public* has taken place on the undisputed facts in this case.

84 I distil the following sub-issues from the parties’ submissions:

- (a) What is the test for determining if a work has been communicated to the “public”?
- (b) Are persons outside of Singapore part of the relevant “public”?

(1) Test for whether a communication is to the “public”

85 The word “public” is not defined in the Copyright Act. The Court of Appeal in *RecordTV* ([44(d)] *supra*) stated that the “public” ordinarily connotes “all members of the community or a section of the public. A substantial number of persons can sometimes be ‘the public’” (at [24]). The above proposition is uncontroversial and supported by the following authorities. *Copinger and Skone James* states that one of the principles relevant to determining if a work has been communicated to the public is that the “public” means an indeterminate number of recipients and implies, moreover, a fairly large number of persons (at para 7-237). The learned authors cite a line of European cases in support of this principle, including *Sociedad General de Autores y Editores de Espana (SGAE) v Rafael Hoteles SL* Case C-306/05, EU:C:2006:764, <<https://curia.europa.eu/juris/liste.jsf?num=C-306/05>> (accessed 19 October 2021) at [37]–[38] and *ITV Broadcasting Ltd and others v TVCatchup Ltd* Case C-607/11, EU:C:2013:147, <<https://curia.europa.eu/juris/liste.jsf?num=C-607/11&language=EN>> (accessed 19 October 2021) (“*ITV Broadcasting*”) at [32]. Both cases were cited for the same principle in *SBS Belgium* ([48(c)] *supra*) at [21]. This principle was also endorsed in the UK in *TuneIn Inc v Warner Music UK Ltd and another company* [2021] EWCA Civ 441 (“*TuneIn*”) at [70(11)] and [77].

86 However, in my view, the question of whether a communication has been made to the public is a multi-factorial inquiry. The number of persons to whom the work is communicated is only one of several factors to be considered. In addition, the court may consider factors such as whether the recipients of the communication are the copyright owner’s public. Under this factor, if the recipients of the communication are persons from whom the owner is entitled to expect payment for the work’s authorised communication, this would weigh in favour of the communication having been made to the public (*Telstra (HC)* ([46] *supra*) at 658). This multi-factorial approach is also advanced in *The Law of Copyright in Singapore* at para 8.97, *Copinger and Skone James* at para 7-237 and *TuneIn* at [70(4)], [70(11)] and [70(14)].

87 In this case, the principle described at [85] above weighs heavily against the defendant’s uplinking activities constituting communications to

the public. Only two entities in Singapore, Singtel and Starhub, received the communication directly from the defendant. This number is too small to amount to a communication to the public. It bears emphasising that Parliament shuns tautology (see [29] above). If communicating to two discrete entities is sufficient to amount to a communication to the public, this threatens to render the word “public” in s 26(1)(a)(iv) otiose.

88 *SBS Belgium* is highly instructive as the Court of Justice of the European Union (“CJEU”) decided an issue highly similar to that presented in the Second Question of the O 14 r 12 application. In that case, SBS Belgium NV (“SBS”) broadcasted its programmes in a two-step process. First, it transmitted its programme-carrying signals PTP via a private line to distributors. These signals could not be received by the general public. The distributors then sent the signals to their subscribers so that the latter could view the programmes on their television sets (*SBS Belgium* at [7]). Belgische Vereniging van Auteurs, Componisten en Uitgevers (“SABAM”), a copyright administration society, alleged that SBS made a communication to the public within the meaning of the Directive on the harmonisation of certain aspects of copyright and related rights in the information society, EU Parliament and EC Council Directive 2001/29/EC, [2001] OJ L 167 at p 10, <<https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32001L0029>> (accessed 19 October 2021) (“EU Copyright Directive”) by transmitting its programmes via the aforesaid method. It claimed that the authorisation of the copyright holders was required. Article 3 of the EU Copyright Directive provides as follows:

Article 3

Right of communication to the public of works and right of making available to the public other subject-matter

1. Member States shall provide authors with the exclusive right to authorise or prohibit any *communication to the public* of their works, by wire or wireless means, including the making available to the public of their works in such a way that members of the public may access them from a place and at a time individually chosen by them.

...

[emphasis added]

89 The Commercial Court of Brussels had allowed SABAM’s application and ordered SBS to pay close to €1m in copyright fees. SBS appealed, and the Court of Appeal of Brussels referred the following question to the European Court of Justice for a preliminary ruling (at [12]):

Does a broadcasting organisation which transmits its programmes exclusively via the technique of direct injection — that is to say, a two-step process in which it transmits its programme-carrying signals in an encrypted form via satellite, a fibre-optic connection or another means of transmission to distributors (satellite, cable or xDSLline), without the signals being

accessible to the public during, or as a result of, that transmission, and in which the distributors then send the signals to their subscribers so that the latter may view the programmes — make a communication to the public within the meaning of Article 3 of [the EU Copyright Directive]?

90 The CJEU reiterated that the concept of “communication to the public” in the EU Copyright Directive includes two cumulative criteria: an “act of communication” of a work and the communication of that work to a “public”: *SBS Belgium* at [15].

91 As regards the latter criterion, because the word “public” refers to an indeterminate number of recipients and implies a fairly large number of persons, the CJEU answered the question referred to it in the negative (*ie*, there is no communication to the public in the case of PTP transmissions):

22. However, in a situation such as that before the court in the main proceedings, as is clear from the question referred for a preliminary ruling, the broadcasting organisation in question transmits the programme-carrying signals to *specified individual distributors* without potential viewers being able to have *access* to those signals.

23. Consequently, the works transmitted by the broadcasting organisation, such as the organisation in the main proceedings, are communicated not to the ‘public’, within the meaning of Article 3(1) of [EU Copyright Directive], but to *specified individual professionals*.

...

34. ... the answer to the question referred for a preliminary ruling is that Article 3(1) of [EU Copyright Directive] must be interpreted as meaning that a broadcasting organisation *does not carry out an act of communication to the public*, within the meaning of that provision, when it transmits its programme-carrying signals exclusively to signal distributors without those signals being accessible to the public during, and as a result of that transmission, those distributors then sending those signals to their respective subscribers so that they may watch those programmes, unless the intervention of the distributors in question is just a technical means, which it is for the national court to ascertain.

[emphasis added in italics and bold italics]

I share the CJEU’s view that PTP transmissions sent to intermediate distributors, who later transmit the signals to their own subscribers, do not constitute a communication to the public.

92 In response, the plaintiff relies on *Telstra (HC)* and Prof Ng-Loy Wee Loon’s article, “The ‘Whom’s’ in Online Dissemination of Copyright Works: To Whom and By Whom is the Communication Made” [2011] SJLS 373 (“Prof Ng-Loy’s Article”) to argue that the commercial nature of the defendant’s communication qualifies it as a communication to the public. Briefly, Prof Ng-Loy’s Article argues that if *Telstra (HC)* was applied in *RecordTV* ([44(d)] *supra*), the respondents’ counterclaim for

infringement would not have failed. I now summarise the salient portions of *RecordTV* before addressing Prof Ng-Loy's argument.

93 RecordTV Pte Ltd ("RecordTV") owned an internet-based business that allowed its registered users ("Registered Users") to request the recording of free-to-air broadcasts in Singapore using its platform, the iDVR. Registered Users were able to play back and/or delete the recordings that they requested to be recorded. Registered Users operated the iDVR system remotely from home or elsewhere via a web browser. Usage of the iDVR was free-of-charge, and access to it was restricted to persons who were legally entitled to view and record the respondents' (collectively referred to as "MediaCorp") shows (at [5]). Persons who held valid television licences in Singapore were in effect licensed by MediaCorp to view its shows. By virtue of s 114 of the Copyright Act, persons in Singapore with valid television licences could also make copies of MediaCorp's shows for their own "private and domestic use" (at [5]). MediaCorp was the copyright owner of various free-to-air broadcasts and films whose copyright RecordTV was alleged to have infringed by means of the iDVR.

94 The Court of Appeal held that the shows which the Registered Users requested to be recorded were not communicated to the public. One of the court's reasons was that the recorded shows were only communicated to the relevant Registered Users privately and individually. Although any member of the public could register with RecordTV to become a Registered User, he had no immediate access to all (or any) of the MediaCorp shows already recorded by RecordTV. A Registered User was only allowed to access and view recordings which he had requested (at [26]). Even the aggregate of private communications to each Registered User was not, in that instance, a communication to the public (at [28]).

95 In Prof Ng-Loy's view, if the court in *RecordTV* had been referred to *Telstra (HC)* and European authorities taking a similar position, RecordTV's Registered Users would have qualified as the "copyright owner's public". This is because RecordTV provided, in a *commercial* setting, the service of recording free-to-air broadcasts in Singapore and allowing the Registered Users to play or delete the recordings they requested (see Prof Ng-Loy's Article at pp 383–385). Accordingly, RecordTV would have infringed MediaCorp's copyright. In the present case, the defendant pleads that it operates its business for profit. Therefore, it cannot be seriously disputed that the defendant uplinks the Encrypted Channels, which include the Disputed Musical Works, in a commercial setting.

96 However, that the communication was made in a commercial setting is not determinative. I agree with the defendant that whether the communication is of a commercial character, and the closely related question of whether the recipients form part of the copyright holder's public, are merely factors which the court may consider in the overall

analysis. For one, Dawson and Gaudron JJ, who jointly delivered the leading judgment in *Telstra (HC)* on this point, did not foreclose the possibility of communications made in commercial settings being private, rather than public, in nature (at 658). They held that:

Lying behind the concept of the copyright owner’s public is recognition of the fact that where a work is performed in a commercial setting, the occasion is *unlikely* to be private or domestic and the audience is *more appropriately* to be seen as a section of the public. [emphasis added]

In my view, this position espoused by Dawson and Gaudron JJ may be displaced by the particular circumstances of a case.

97 In fact, the European cases endorsed by the English Court of Appeal in *TuneIn* ([85] *supra*) expressly recognise that the commercial character of the communication is merely a factor to be considered. The CJEU stated in *Reha Training Gesellschaft für Sport- und Unfallrehabilitation mbH v Gesellschaft für musikalische Aufführungs- und mechanische Vervielfältigungsrechte eV (GEMA)* Case C-117/15, EU:C:2016:379, <<https://curia.europa.eu/juris/liste.jsf?num=C-117/15>> (accessed 19 October 2021) at [49] that the profit-making nature of the broadcast of a protective work “does not determine conclusively” whether a transmission is to be categorised as a communication to the public under Art 3(1) of the EU Copyright Directive. The same principle was expressed in *ITV Broadcasting* ([85] *supra*) at [43]. Both cases were affirmed in *TuneIn* at [70(14)] and [77] for this proposition.

98 In this case, I prefer the view that the initial factor discussed at [87] outweighs the import of the commercial nature of the uplinked transmissions. That only *two* recipients in Singapore were able to decrypt the defendant’s satellite transmissions puts the latter’s uplinking activities beyond the realm of public communications.

99 As the defendant’s satellite transmissions are not communicated to the public, even if the plaintiff has standing and I am wrong about the meanings of “broadcast” and “the making available of a work”, its claim for primary infringement of the right to communicate the Disputed Musical Works to the public fails.

100 For clarity, I accept that, in the abstract, the question of whether the defendant’s uplinking activities were communications to the public is a mixed question of law and fact. This issue, however, may be determined under O 14 r 12 of the ROC because all the relevant facts were undisputed. In this regard, the Court of Appeal in *The Chem Orchid and other appeals and another matter* [2016] 2 SLR 50 at [60] confirmed that summary determination under O 14 r 12 is suitable for points of law which can be determined on the basis of agreed or undisputed facts. Further, a useful illustration to distinguish questions of law and fact was set out by Andrew

Ang J (as he then was) in *Tsai Jean v Har Mee Lee and others* [2009] 2 SLR(R) 1 at [16]:

Whether a transaction is ‘not in good faith’ can be described as a question of mixed fact and law. It is a question of fact where one has to make relevant findings of fact (*vis-à-vis* good faith) and it is a question of law where one has to decide whether the findings of fact would constitute a lack of good faith in law.

Given the undisputed facts in this case, my analysis of whether the defendant’s uplinking activities constitute communications to the “public” falls into the latter category in Ang J’s illustration.

(2) Whether persons outside of Singapore form part of the “public” under section 26(1)(a) of the Copyright Act?

101 Finally, I address the plaintiff’s submission that persons outside of Singapore form part of the “public”. The plaintiff argues that because s 26 of the Copyright Act is adopted from s 31 of the Australian Act, the definition of “to the public” in s 10 of the Australian Act, which includes persons within and outside the territory, is instructive. Further, if the public is limited to persons within Singapore, there would be a loophole in the Copyright Act for communications originating from Singapore but which are only received outside of Singapore – the communicator may not be caught by the Copyright Act *or* the copyright law of the territory in which the communication is received.

102 In contrast, the defendant submits that the public should be confined to persons within Singapore. Primarily, it points to the fact that the Copyright (Amendment) Bill 2004 released for public consultation expressly defined “communicate” to include making the work available to members of the public, whether inside or outside of Singapore. However, this provision was deleted from the bill that was eventually passed by Parliament (Leong and Chen’s Article at para 53).

103 I agree with the defendant. That Singapore did not adopt Australia’s extraterritorial definition of “to the public” in our Copyright (Amendment) Bill 2004 evinces Parliament’s intention to limit the ambit of the “public” to persons in Singapore. Even further still, the discussion on s 74(2) of the Copyright Act at [105]–[107] below shows that Parliament has used express language to give specific provisions extraterritorial reach. Therefore, the plaintiff’s point that s 10 of the Australian Act defines the “public” extraterritorially does not advance its case.

104 I also agree with the defendant that the loophole identified by the plaintiff is neither here nor there. To read the word “public” in s 26(1)(a) with an extraterritorial gloss will exceed the boundaries of what is permissible in statutory interpretation. The court would be adding to the language of a statutory provision to plug a perceived gap in the law, which is

a legislative function (*Public Prosecutor v Lam Leng Hung and others* [2018] 1 SLR 659 at [276]).

105 Additionally, *Lance Court Furnishings Pte Ltd v Public Prosecutor* [1993] 3 SLR(R) 103 (“*Lance Court*”) underscores the impermissibility of giving a provision in the Copyright Act extraterritorial effect in the absence of express language. Anju/Woodridge Inc complained that Lance Court Furnishings Pte Ltd offered for sale fabric with designs infringing its copyrights (at [1]). Search warrants were issued under s 136(9) of the Copyright Act (1988 Rev Ed) in favour of Anju/Woodridge Inc. Lance Court Furnishings Pte Ltd then filed a criminal motion to set aside the search warrants. It referred to ss 74(2) and 74(3) of the Copyright Act (1988 Rev Ed) and submitted that if a design in which copyright subsists is applied industrially, and the design is not registered under the Registered Designs Act 1949 (c 88) (UK), then under s 74(3)(a) “it shall not be an infringement of the copyright in the work to do anything which, at the time when it is done, would have been within the scope of the copyright in the design if the design had, immediately before that time, been registered” (at [11]). For reference, s 74(2) Copyright Act (1988 Rev Ed) provides that:

(2) Where copyright subsists in an artistic work, and —

(a) a corresponding design is applied industrially by or with the licence of the owner of the copyright in the work;

(b) articles to which the design has been so applied are sold, let for hire, or offered for sale or hire *whether in Singapore or elsewhere*; and

(c) at the time when those articles are sold, let for hire or offered or exposed for sale or hire, they are not articles in respect of which the corresponding design has been registered under the Registered Designs Act 1949 of the United Kingdom [U.K. 1949 c. 88], or any Act amending or substituting for that Act,

subsections (3), (4) and (5) shall apply.

[emphasis added in bold italics]

106 *Lance Court Furnishings Pte Ltd* argued that the industrial application referred to in s 74(2)(a) is an industrial application *anywhere* (at [13]). Kan Ting Chiu J rejected this submission. He held that the inclusion of the words “whether in Singapore or elsewhere” in s 74(2)(b), which dealt with sales and hire, and their absence in s 74(2)(a) meant that industrial applications under the latter provision were limited to those in Singapore. Accordingly, Anju/Woodridge Inc did not, by applying the designs in the United States and Japan, forfeit copyright protection over them in Singapore (at [21]–[22]). Parliament then legislatively overruled this aspect of *Lance Court* by inserting the words “whether in Singapore or elsewhere” in s 74(2)(a) (see Copyright (Amendment) Act 1994 (Act 14 of 1994) s 6). The intent of this amendment was to rectify the anomaly pointed out in *Lance Court*, such that the design copyright owner who industrially

applies his work overseas is placed in no better position than his local counterpart who industrially applies his design in Singapore (*Singapore Parliamentary Debates, Official Report* (25 August 1994) vol 63 at col 415 (Ho Peng Kee, Parliamentary Secretary to the Minister for Law)).

107 In summary, *Lance Court* fortifies my unwillingness to read the “public” in s 26(1)(a) of the Copyright Act extraterritorially in the absence of express language to that effect. The Distributors located outside of Singapore, to which the defendant’s transmission were downlinked, are therefore irrelevant for the purpose of determining if a communication was made to the public.

Conclusion on whether the Disputed Musical Works were communicated to the public

108 Based on the foregoing, the Disputed Musical Works are not even communicated within the meaning of s 7(1) because the defendant’s uplinking activities do not constitute broadcasting and do not make the works available in the manner statutorily defined. Further, or in the alternative, the works are not communicated to the “public” within the meaning of s 26(1)(a)(iv) of the Copyright Act.

Conclusion for primary infringement

109 Both questions in the O 14 r 12 ROC application (see [12] above) are answered in the negative – the plaintiff’s claims for primary infringement are therefore dismissed. If I am wrong about the First Question, but right about the Second Question, only the claim for communicating the Disputed Musical Works to the public should be dismissed.

Claim for authorising primary infringement

110 As stated at [13] above, the plaintiff also pleads authorisation liability against the defendant. Authorisation liability is provided for in s 31(1) of the Copyright Act:

Infringement by doing acts comprised in copyright

31.—(1) Subject to the provisions of this Act, the copyright in a literary, dramatic, musical or artistic work is infringed by a person who, not being the owner of the copyright, and without the licence of the owner of the copyright, does in Singapore, or *authorises* the doing in Singapore of, any act comprised in the copyright.

[emphasis added]

111 Neither of the questions submitted for summary determination under O 14 r 12 of the ROC relate to authorisation liability. I therefore examine this portion of the claim under O 18 r 19 of the ROC. SUM 5628 filed by the defendant prays for striking out under O 18 r 19(1)(b) and O 18 r 19(1)(d).

112 Under O 18 r 19(1)(b) ROC, any pleading may be struck out if it is scandalous, frivolous or vexatious. An action is frivolous or vexatious if it is obviously unsustainable (*Singapore Civil Procedure 2021* vol 1 (Cavinder Bull gen ed) (Sweet & Maxwell, 2021) at para 18/19/12). An action is plainly or obviously unsustainable if it is either:

(a) *legally unsustainable*, in that it is “clear as a matter of law at the outset that even if a party were to succeed in proving all the facts that he offers to prove he will not be entitled to the remedy that he seeks”; or

(b) *factually unsustainable*, in that it is “possible to say with confidence before trial that the factual basis for the claim is fanciful because it is entirely without substance, [for example, if it is] clear beyond question that the statement of facts is contradicted by all the documents or other material on which it is based”.

(*The Bunga Melati 5* [2012] 4 SLR 546 at [39])

113 In my view, the claim for authorisation liability is legally unsustainable. To establish authorisation of an infringing act, there must first be proof that an infringing act took place within Singapore (*RecordTV* ([44(d)] *supra*) at [43]–[44]; *The Law of Copyright in Singapore* at para 8.176).

114 However, the plaintiff does not even plead that the Distributors, particularly Singtel and Starhub, committed primary infringement. In fact, in his affidavits, Mr Melvin Tan – the Senior Manager (Licensing) of the plaintiff – even produces correspondence with the defendant in which the defendant states that its Distributors are required to obtain licences from the plaintiff to broadcast the Disputed Musical Works to their subscribers. If the Distributors are licensed by the plaintiff, this precludes the existence of an infringing act in the first place. Therefore, even if the plaintiff succeeds in proving all the pleaded facts, the defendant cannot be liable for authorising an act of infringement when the latter does not exist in the pleadings.

115 For these reasons, the plaintiff’s claim for authorisation liability is legally unsustainable and struck out. This is sufficient to dispose of the striking out application and I need not go further to consider O 18 r 19(1)(d) of the ROC.

Conclusion

116 In summary, the plaintiff’s claims for primary infringement are dismissed under O 14 r 12 of the ROC because the plaintiff lacks standing. If I am wrong about the issue of standing, the plaintiff’s claim for communication of the Disputed Musical Works to the public should still fail because the defendant’s uplinking activities are not communications to

the public within the meaning of s 26(1)(a)(iv) of the Copyright Act. As regards the claim for authorisation liability, I strike this out under O 18 r 19(1)(b) of the ROC because there is no primary infringement by the Distributors in Singapore for authorisation liability to attach to.

117 I will hear parties on costs separately.

Reported by Jonathan Tan Ming En.
