Case Note

WHERE COPYRIGHT LAW AND TECHNOLOGY ONCE AGAIN CROSS PATHS

The Continuing Saga

RecordTV Pte Ltd v MediaCorp TV Singapore Pte Ltd [2011] 1 SLR 830

This article critically analyses the issues and reasoning behind the recent Singapore Court of Appeal decision in *RecordTV Pte Ltd v Mediacorp TV Singapore Pte Ltd* on the legality of digital copying and communications technology under Singapore's copyright law and offers a different perspective (and some alternative arguments) on the three issues of copying, communication to the public and authorisation of copyright infringement. In particular, we will identify the relevant party to these acts and examine their definitions, based on the current statutory provisions and the history of the development of copyright law *vis-à-vis* modern technology.

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I. Introduction and facts

1 The High Court decision of Justice Andrew Ang in *RecordTV Pte Ltd v MediaCorp TV Singapore Pte Ltd*[1] has already been examined elsewhere.[2] Pursuant to RecordTV's appeal, this article sets out to

1 [2010] 2 SLR 152.

2 See C L Saw, "Where Copyright Law and Technology Once Again Cross Paths – *RecordTV Pte Ltd v MediaCorp TV Singapore Pte Ltd* [2010] 2 SLR 152" *Singapore Law Gazette* (December 2010) at pp 14–23.

critically analyse the recent judgment of the Court of Appeal, which was delivered on 1 December 2010 by V K Rajah JA.[3]

2 The facts, briefly, are as follows. RecordTV, the plaintiff, ran an internet business which provided complimentary recording services to members of the public who had pre-registered with them on their website. Subscribers of this online service were able to request for free-to-air television ("TV") programmes from, *inter alia*, Channel 5, Channel 8 and Channel NewsAsia (channels pre-determined by RecordTV) to be recorded for their later viewing. MediaCorp (the defendant) was the owner of copyright in these TV broadcasts and films (collectively, the "relevant MediaCorp shows").

3 This was how the RecordTV system worked. Once a request was received from a registered user ("RU"), RecordTV's internet-based digital video recorder ("iDVR") – at its remote location – would identify the relevant programme and make a copy of it at the time of its broadcast. The recorded programme would then be stored on RecordTV's online servers for a period of 15 days, during which time the RU can log on to the plaintiff's website, gain access to the requested recording and view it at his leisure. After 15 days, the recorded programme would be deleted.

4 MediaCorp subsequently sent RecordTV cease-and-desist letters for copyright infringement, whereupon the latter initiated proceedings against the former – pursuant to s 200(1) of the Copyright Act[4] – for groundless threats of copyright infringement. In defence, MediaCorp pleaded that RecordTV had indeed infringed their copyright in the relevant MediaCorp shows. Although Ang J had ruled in favour of MediaCorp at trial, the appeal by RecordTV succeeded before the Court of Appeal ("CA") and Ang J's decision was, accordingly, overturned. Three main issues arose for consideration before the CA:

> (a) whether RecordTV copied the relevant MediaCorp shows;
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> (b) whether RecordTV communicated the relevant MediaCorp shows to the public;
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> (c) whether RecordTV authorised its RUs to do in Singapore any act comprised in MediaCorp's copyright in the relevant MediaCorp shows.

We shall now examine these issues in turn.

3 *RecordTV Pte Ltd v MediaCorp TV Singapore Pte Ltd* [2011] 1 SLR 830.
4 Cap 63, 2006 Rev Ed.

II. The first issue: Did RecordTV copy the MediaCorp shows?

5 In relation to the first issue, the CA agreed with the decision of the trial judge and held that it was the RUs, and not RecordTV, who had copied the relevant MediaCorp shows through their request for the recording of these shows by the iDVR system.

6 Both Ang J and the CA relied heavily on the authority of *The Cartoon Network LP, LLLP v CSC Holdings, Inc*[5] ("*Cartoon Network*"), a decision of the US Court of Appeals for the Second Circuit. The Second Circuit decided, *inter alia*, that it was the customers of Cablevision (the defendant) – and not Cablevision itself – who had made the unauthorised copies in question using Cablevision's remote-storage digital video recording ("RS-DVR") service (which is, for our purposes, the equivalent of RecordTV's iDVR system). The US appellate court arrived at this conclusion by relying on the analogy between the users of Cablevision's RS-DVR system and those of the "ancient" video cassette recorder ("VCR"), *ie*, because the user/operator of the VCR (and not its manufacturer) supplies the necessary element of volition in the recording process (of making copies of TV programmes for later viewing), so it must be the case also for the user of the RS-DVR/iDVR system (which *automatically* makes copies upon the request/command of the user). In either case, the main volitional agent who engages in copying, so it was found, is the user himself and not the provider of the recording technology. Putting it another way, the Second Circuit concluded that the bulk of the relevant volitional conduct, "an important element of direct liability",[6] lay with the users of the RS-DVR service (*ie*, Cablevision's customers).

7 The authors are, respectfully, of the view that the CA (as well as Ang J at trial) should not have relied on the *Cartoon Network* decision. The analogy between the users of Cablevision's RS-DVR system and those of the "ancient" VCR – the lynchpin upon which the US decision was based – is incongruous and therefore ought to be rejected.[7]

8 As regards the extent of volition on the part of the provider of the recording technology (*viz*, the element of control over recordable content), it is the authors' view that, in comparison, the provider of a

5 536 F 3d 121 (2nd Cir, 2008). Notably, the Second Circuit had overturned the decision of Judge Denny Chin in the lower court (US District Court for the Southern District of New York), where his Honour had arrived at the opposite conclusion.

6 *The Cartoon Network LP, LLLP v CSC Holdings, Inc* 536 F 3d 121 at 131 (2nd Cir, 2008).

7 See also C L Saw, "Where Copyright Law and Technology Once Again Cross Paths – *RecordTV Pte Ltd v MediaCorp TV Singapore Pte Ltd* [2010] 2 SLR 152" *Singapore Law Gazette* (December 2010) at pp 16–18.

video-on-demand ("VOD") service exerts the most control, since such a provider actively selects and makes available beforehand the specific programmes available for viewing. This is followed by the provider of a RS-DVR/iDVR service who pre-determines and makes available to the user the specific channels of programming but not the specific programmes available for recording.[8] Only further down the line is the provider of a self-service photocopying facility or the manufacturer of the VCR, whose users can, practically speaking, choose to make copies of or record *any* sort of content whatsoever in their respective formats. There are, therefore, subtle (but extant) gradations in the extent of control that is exercised over recordable content insofar as each of these providers is concerned, and it seems inaccurate to assert that service providers like Cablevision and RecordTV "more closely resemble" the provider of a self-service photocopying facility or the manufacturer of the VCR.[9]

9 It is further submitted that there are palpable differences in the *modus operandi* of the VCR/photocopier on the one hand and the RS-DVR/iDVR system on the other which clearly serve to distinguish the extent of volition on the part of the end-users of the new technology.

10 Someone who uses the photocopying machine to make copies of copyright material has the power and ability to terminate the reproduction process at any time. Likewise, the user of the VCR can stop the recording of free-to-air TV programmes at any stage. It is unclear if a RU of the iDVR system is also able to terminate the process of making a digital copy of a MediaCorp programme once his instructions have been received by RecordTV, particularly so after the programme and, consequently, the digital recording process have begun.

11 Another difference is that a person using the VCR has to personally perform all the necessary steps for the recording of a particular MediaCorp programme – *ie*, all volitional conduct necessary for a VCR recording emanates *entirely* from the user himself.[10] The manufacturer of the VCR, on the other hand, engages in no volitional conduct at all, save for having merely made available the facility for

8 It is, however, suggested that in offering customers the specific channels of programming, service providers like Cablevision and RecordTV would already have defined the parameters of what their customers can choose to record specifically. Therein lies the argument that Cablevision and RecordTV indeed possess some element of control over the content that is available for recording – *contra* the provider of a self-service photocopying facility and the manufacturer of the video cassette recorder.

9 See generally *The Cartoon Network LP, LLLP v CSC Holdings, Inc* 536 F 3d 121 at 132 (2nd Cir, 2008).

10 This is also true, *mutatis mutandis*, insofar as a user of a photocopying machine is concerned.

recording. In this regard, the element of control is completely ceded from the manufacturer/vendor of the VCR to the consumer once the product is purchased by the latter. There is, therefore, no "continuing relationship" between the manufacturer/vendor and consumer post sale (save for the collateral contract of guarantee, if any). In contrast, where RecordTV's iDVR is concerned, a RU is merely empowered to make an online request – to indicate his choice of which MediaCorp show(s) he would like RecordTV to record on his behalf.[11] Beyond this initial *standalone* phase which no doubt triggers the follow-on recording mechanism, the RU does *not* participate in nor interfere with the online recording process in any way whatsoever. RecordTV will then execute, albeit automatically, all the remaining steps necessary for the recording and reproduction of the relevant MediaCorp programmes – from first displaying television scheduling information, to its software identifying the relevant programmes to be recorded, to the actual making of digital copies, to the storage of these copies on its servers, and to making these programmes available (for a period of 15 days and via streaming technology) to its customers for viewing.

12 Thus, it is apparent that RecordTV retains a considerable degree (indeed, the *bulk*) of control and volition – "an important element of direct liability"[12] – in the overall running of its iDVR service and that the viability of RecordTV's operations depends very much on a "continuing relationship" between RecordTV and all its RUs.[13] As such, RecordTV can hardly qualify as a mere "passive conduit" for the (so-called "automatic") delivery of copyrighted content to its RUs – quite the contrary, it was an *active participant* in the entire process of recording, hosting and delivery.

13 The Second Circuit's analogy between the VCR (a physical device whose manufacturer/vendor is *volitionally dissociated* and

11 Obviously, a request *per se* (or the mere making of a choice) does not, in itself, amount to infringing conduct under copyright law, since no copies have yet been made. Indeed, the online request made by the registered user ought to be divorced and treated separately from the ensuing reproduction process insofar as the assessment of copyright infringement liability is concerned. The authors therefore hold the view that *sans* the operation of the law of agency and the doctrines of vicarious liability and joint tortfeasorship (none of which was made out on these facts), a mere request from a registered user is, as a matter of law and without more, insufficiently proximate to the actual acts of infringement in the present case to attract copyright liability.

12 *The Cartoon Network LP, LLLP v CSC Holdings, Inc* 536 F 3d 121 at 131 (2nd Cir, 2008).

13 As V K Rajah JA himself acknowledged in *RecordTV Pte Ltd v MediaCorp TV Singapore Pte Ltd* [2011] 1 SLR 830 at [21]: "[T]he vendor of the traditional DVR/VCR is unable to control the use of the DVR/VCR as a recording machine once it has been sold to the user, whereas the iDVR provider may stop the recording service as and when it wishes."

completely cut off from the recording process post sale) and the RS-DVR/iDVR system (an online service whose provider is *constantly and actively engaged* in the recording process and, as will be explained later, who indeed determines the outcome of that process) is therefore flawed.[14] Even though the iDVR system, like the VCR, operates automatically at the behest of the end-user, it is apparent that significant operational differences do exist between these two forms of recording technology. Crucially, this article seeks to emphasise that the user of the iDVR service is, unlike the operator of the VCR (or the user of the photocopying machine), *many steps removed from the actual process of recording and reproduction*. Instead, it is the authors' opinion that RecordTV's conduct, when viewed *in toto* against the backdrop of the iDVR system, assumes a nexus that is sufficiently proximate and causal to the prohibited acts in question.

14 In the authors' view, therefore, the iDVR system is not "simply a digital version of the traditional DVR/VCR".[15] The main volitional agent in the recording process in relation to the VCR is clearly the end-user, but not so in the case of the iDVR system. It follows from the arguments above that the main volitional agent in the recording process (hence, the primary copyright infringer) for the iDVR system is RecordTV itself, and not its RUs.[16]

15 Notably, the CA, in affirming the trial judge's conclusion that RecordTV did not copy the relevant MediaCorp shows, went on to extol the virtues and legitimacy of time-shifting as well as the social benefits that accompanied the iDVR service (which was described as a "significant technological improvement").[17] In other words, the court's focus turned to an analysis of the end-result of the recording process. In RecordTV's case (as in the case of the traditional VCR), the user ultimately obtains and views a time-shifted recording. Therefore, according to Ang J, "[i]f the end-user is the maker of this time-shifted recording for the purposes of the VCR, it *must* remain that the end-user is the maker of the

14 The Second Circuit's unwillingness to impose primary/direct copyright liability on Cablevision was also influenced in part by the availability, under US copyright law, of the doctrine of "contributory liability" – see *The Cartoon Network LP, LLLP v CSC Holdings, Inc* 536 F 3d 121 at 132–133 (2nd Cir, 2008). However, the logic of this reasoning is open to serious question and debate.

15 *RecordTV Pte Ltd v MediaCorp TV Singapore Pte Ltd* [2011] 1 SLR 830 at [20].

16 For yet another perspective, see G Wei, "Copyright 2006–2010: A Return to Basic Principles and Issues" in *SAL Conference 2011: Developments in Singapore Law between 2006 and 2010 – Trends and Perspectives* (Academy Publishing, 2011) at p 468, para 61. In his very illuminating paper, Professor Wei has asked whether a case could have been made out "for a holding that both RecordTV and the home users [*ie*, registered users] were properly to be treated as *joint copyists*" [emphasis added].

17 *RecordTV Pte Ltd v MediaCorp TV Singapore Pte Ltd* [2011] 1 SLR 830 at [21] and [22].

recording in the context of the DVR, remote or local"[18] [emphasis in original]. However, as noted elsewhere,[19] "why should it follow – short of the operation of the doctrine of vicarious liability or the law of agency – that just because the end product in either case is the same (a time-shifted recording), the end-user, and not the technology provider, must be deemed the 'maker' of the recording?" Indeed, whilst the end-result may be the same in either case, the legal repercussions, as framed in the arguments above, are distinctly different.

16 The CA, as mentioned, was particularly persuaded by the "tangible benefits" of a "more convenient and user-friendly" online time-shifting service, which the court felt far outweighed the operational differences between the iDVR system and the traditional VCR (which the court found to be "immaterial").[20] However, for reasons which will be furnished and elaborated upon below, the CA's consideration of societal benefits at this stage of determining primary copyright liability – *viz*, whether RecordTV ought to be held liable for copying the relevant MediaCorp shows and therefore infringing MediaCorp's exclusive right of reproduction – is, with respect, misplaced. Public policy factors are not appropriate at this stage of the inquiry in determining who, on facts such as these, had volitionally copied the relevant MediaCorp shows.

17 For all the foregoing reasons, it would appear that RecordTV – and not its RUs – ought to assume primary copyright liability for having copied the relevant MediaCorp shows.

III. The second issue: Did RecordTV communicate the MediaCorp shows to the public?

18 In relation to the second issue, the CA disagreed with the trial judge and held that RecordTV did not "communicate" the relevant

18 *RecordTV Pte Ltd v MediaCorp TV Singapore Pte Ltd* [2010] 2 SLR 152 at [33]. Consider then this hypothetical example. Assume that a business provides a complimentary service to its customers, who choose which specific free-to-air TV shows to record and place their requests with the business accordingly. The business then makes physical video cassette recordings of the relevant television shows for its customers. The end result is the same in every case – a time-shifted recording of television shows requested by customers for their later viewing. But who precisely has "made" the recordings in question – the business or its respective customers? More importantly, does and should *automation* of the recording process make any difference?

19 See C L Saw, "Where Copyright Law and Technology Once Again Cross Paths – *RecordTV Pte Ltd v MediaCorp TV Singapore Pte Ltd* [2010] 2 SLR 152" *Singapore Law Gazette* (December 2010) at p 18.

20 *RecordTV Pte Ltd v MediaCorp TV Singapore Pte Ltd* [2011] 1 SLR 830 at [21] and [22].

MediaCorp shows to "the public" within the meaning of ss 83(*c*) and 84(1)(*d*) of the Copyright Act. The court was of the view that there was no communication made to "the public" and, in any event, that RecordTV was not the party responsible for making any such communication. With respect, the authors prefer the result reached by Ang J on this issue, but disagree with his Honour's analysis at trial that the relevant communication by RecordTV entailed the "inclusion" of the relevant MediaCorp shows "in a cable programme".[21]

19 Before we examine the two reasons furnished by the CA for ruling in favour of RecordTV, it is apposite to give a preliminary introduction and explanation of the exclusive right of the copyright owner to "communicate" his works to "the public".[22] The exclusive right of communication to the public was introduced in our copyright legislation to specifically implement Art 8 of the World Intellectual Property Organization ("WIPO") Copyright Treaty 1996 ("WCT") as well as Art 14 of the WIPO Performances and Phonograms Treaty 1996 ("WPPT").[23] Section 7(1) of the Copyright Act defines the word "communicate", which means:

> … 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 –
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> (a) the broadcasting of a work or other subject-matter;
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> (b) the inclusion of a work or other subject-matter in a cable programme; and

21 See C L Saw, "Where Copyright Law and Technology Once Again Cross Paths – *RecordTV Pte Ltd v MediaCorp TV Singapore Pte Ltd* [2010] 2 SLR 152" *Singapore Law Gazette* (December 2010) at pp 18–20. In this regard, V K Rajah JA quite rightly opined that "*on the basis of s 7(1) of the Copyright Act and Art 8 of the WIPO Copyright Treaty, it would seem that the recorded MediaCorp shows were communicated once they were made available for viewing by the Registered Users who had requested the recording of those shows*" [emphasis in original] (*RecordTV Pte Ltd v MediaCorp TV Singapore Pte Ltd* [2011] 1 SLR 830 at [34]).

22 See generally ss 26(1), 83(*c*), 84(1)(*d*) and 85(1)(*d*) of the Copyright Act (Cap 63, 2006 Rev Ed). See also C L Saw, "Where Copyright Law and Technology Once Again Cross Paths – *RecordTV Pte Ltd v MediaCorp TV Singapore Pte Ltd* [2010] 2 SLR 152" *Singapore Law Gazette* (December 2010) at p 14; C L Saw & S H S Leong, "Criminalising Primary Copyright Infringement in Singapore: Who are the Real Online Culprits?" [2007] European Intellectual Property Review 108; C L Saw & W T H Koh, "Does P2P have a Future? Perspectives from Singapore" (2005) 13 International Journal of Law and Information Technology 413.

23 See also Art 16.1.2(a) of the US-Singapore Free Trade Agreement, which obliged Singapore to ratify the World Intellectual Property Organization ("WIPO") Copyright Treaty 1996 ("WCT") and the WIPO Performances and Phonograms Treaty 1996 ("WPPT"). Both the WCT and WPPT came into force in Singapore on 17 April 2005.

> (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 …

20 It is apparent from this definition that our copyright legislation envisages, within the broad umbrella framework of a "communication to the public", the following *distinct* forms of communication:

> (a) a *general transmission* of a copyright work by *electronic means* – whether over a path, or a combination of paths, provided by a material substance or by wireless means or otherwise, and whether or not the said transmission is sent in response to a request;
>
> (b) a transmission of a copyright work by *broadcasting* the work;
>
> (c) a transmission of a copyright work by including the work in a *cable programme*; and
>
> (d) *making available* a copyright work in such a way that the work may be accessed by any person from a place and at a time chosen by him.

21 In short, the exclusive right of communication to the public encompasses, more specifically, the copyright owner's traditional rights of "broadcasting" and "cable-casting", as well as the distinct (and more contemporary) right of "making available" to the public.[24]

22 Parliament's rationale for introducing this exclusive right of communication (including the distinct right of "making available") is to help augment the level of protection accorded to copyright owners in the online environment – namely, by empowering copyright owners to prevent unauthorised *access to* and *distribution of* copyright material on

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24 See Prof S Jayakumar's speech during the second reading for the Copyright (Amendment) Bill on 16 November 2004 – *Singapore Parliamentary Debates, Official Reports* (16 November 2004) vol 78 at col 1043:

> First, new right of communication for works. Sir, the Internet is becoming an increasingly important platform through which copyright owners promote and disseminate their copyrighted works. Such digital dissemination of works has become the basis for businesses such as home-grown music distributor Soundbuzz. Clause 8 of the Bill introduces a new right to enable the copyright owner to control the communication of his work to the public. *This new communication right encompasses both the existing broadcasting and cable programme rights, and also the right to control the dissemination of works on the Internet.* This new right will enable copyright owners or other entrepreneurs to fully leverage on the Internet platform as a means to disseminate copyrighted material. [emphasis added]

the Internet.[25] Obviously, the need to control the active *transmission, distribution or dissemination* of copyright works on the Internet (as is the case where "push" technologies are concerned) also entails the concomitant need to regulate indiscriminate *access* to such works in the online environment (as is the case where "pull" technologies are concerned).

23 Where "pull" technologies are employed, all that the communicator need do is to "make available" the copyright work to the public, such that those members of the public who wish to avail themselves of this particular work will have to specifically "cause the system to make it actually available to them",[26] no doubt from any place and at any time chosen by them. Two principles are therefore at work in the concept of "making available" a copyright work – first, the notion of the communicator merely *providing access* to the copyright work in question, and second, that the actual transmission of the work (from communicator to recipient) is wholly or largely *initiated by the recipient himself*. It follows then that communicators who employ "pull" technologies (*eg*, website operators) are characteristically found to have breached the copyright owner's exclusive right of communication to the public – for "*making available*", without permission, the copyright work(s) in question in such a way that the work(s) "may be accessed by any person from a place and at a time chosen by him".

24 In contrast, communicators who employ "push" technologies (*eg*, unlicensed broadcasters and unlicensed operators of cable programme services) are characteristically found to have breached the copyright owner's exclusive right of communication to the public – for (actively) "*transmitting*",[27] without permission, the copyright work(s) in question to (passive) third party recipients. Whereas "pull" technologies generally involve a *passive communicator* with multiple *active recipients* (in which case, the transmission of the copyright work is generally regarded as recipient-initiated), the converse is true for "push" technologies – where there is an *active communicator* with multiple *passive recipients* (in which case, the transmission of the copyright work is generally taken to be initiated by the communicator himself).[28]

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25 See n 24 above.

26 See M Ficsor, *Guide to the Copyright and Related Rights Treaties Administered by WIPO* (WIPO Publication, 2003) at p 208. See also *RecordTV Pte Ltd v MediaCorp TV Singapore Pte Ltd* [2011] 1 SLR 830 at [34]: "[A] work is said to be 'made available' as soon as access to the work in question is provided."

27 Words/concepts which are synonymous with "transmission" include emission, transfer, distribution and dissemination.

28 Another indication that "push" technologies generally entail an *active communicator* and *passive recipients* can be gleaned from the Copyright Act (Cap 63, 2006 Rev Ed) s 7(1) definition of the word "communicate", which, as mentioned above, includes a general right of the copyright owner to "*transmit* by electronic means … a work …,

(*cont'd on the next page*)

25 In the authors' view, RecordTV's iDVR system – when properly analysed and especially in its first phase of operation (in the "SIS" mode)[29] – shares the same functionality and characteristics as "pull" technologies, which generally "make available" the copyright work in question.[30] Therefore, with respect, it is not semantically accurate for the CA to adopt the language of the "*transmission* of a MediaCorp show recorded using RecordTV's iDVR … *to* a single Registered User"[31] [emphasis added] and of "whether a particular MediaCorp show had been *transmitted* to the public"[32] [emphasis added]. The notion of a "transmission" ought to be kept distinct from that of "making available", in the same vein as a distinction that is generally drawn between "push" and "pull" technologies.

26 Be that as it may and putting aside for now the strict technicalities of how the iDVR system functioned, the internet-based recording facility provided by RecordTV is, at bottom, a time-shifting mechanism that gave all its RUs rights of *access* to a range of MediaCorp shows (which aired on particular TV channels pre-determined by RecordTV) for delayed viewing at a more convenient time.[33] Because the right of "making available" is premised on the notion of granting (active) third party recipients rights of *access* to the copyright work(s) in question, it may be argued, at the most general level, that RecordTV – the passive communicator[34] – had indeed "made available" the relevant MediaCorp shows to the internet public (or more accurately, to those of

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whether or not it is sent in response to a request" [emphasis added]. See also *RecordTV Pte Ltd v MediaCorp TV Singapore Pte Ltd* [2011] 1 SLR 830 at [34]: "Ordinarily, the word 'communicate' entails the communicator actively initiating an instance of communication."

29 As Ang J explained in *RecordTV Pte Ltd v MediaCorp TV Singapore Pte Ltd* [2010] 2 SLR 152 at [9]: "Since its inception, the RecordTV system has undergone three different phases of operation. When RecordTV launched in July 2007, only *one* recording was made despite multiple end-users' requests for a programme to be recorded (the 'First Phase'). This functionality was termed the Single Instance Storage Mode ('SIS Mode') and it eliminated the duplication of copies by allowing multiple end-users to share from one copy of a recording." [emphasis in original]

30 It is submitted that RecordTV's iDVR system ought to be classified as a form of "pull" technology because it involves a *passive communicator* (namely, RecordTV) and multiple *active recipients* (namely, the registered users) – where a registered user, in order to obtain access to the relevant MediaCorp show(s) recorded by RecordTV, has to *initiate the transmission process* by first logging-in to RecordTV's website, entering the relevant password, accessing his personal playlist and then viewing the recorded show(s) on his personal computer via streaming technology. This process is fairly similar to how an internet user normally gains access to unauthorised content files on websites hosted and operated by internet "pirates".

31 *RecordTV Pte Ltd v MediaCorp TV Singapore Pte Ltd* [2011] 1 SLR 830 at [27].

32 *RecordTV Pte Ltd v MediaCorp TV Singapore Pte Ltd* [2011] 1 SLR 830 at [28].

33 Here, within a period of 15 days from the time the recording was made by RecordTV.

34 See n 30 above.

its RUs who had made specific requests for the relevant MediaCorp shows) through the provision of the iDVR service. Accordingly, RecordTV ought to have been held liable for infringing MediaCorp's exclusive right of communication to the public, in respect of the latter's copyright in the relevant MediaCorp shows.

A. Communications to "the public"

27 As mentioned, the CA held that, on these facts, there was no communication made to "the public". In the absence of a statutory definition for the expression "the public", V K Rajah JA expressed the view – with which the authors entirely agree – that the word "public" ordinarily means "all members of the community or a section of the public", although a "substantial number of persons can sometimes be 'the public'".[35]

28 His Honour went on to cite an excerpt from *Copinger and Skone James on Copyright*, in which the learned authors submitted thus: "Where the work is only available to subscribers to an internet service, the subscribers will qualify as 'the public' for this purpose."[36] In other words, a work is arguably made available to "the public" even if only subscribers to an internet service (such as the iDVR service in the present case) – and not the public at large – can obtain access to that work. If this reasoning is correct, then, for reasons which will be elaborated upon below, it may be argued that RecordTV would have made available the relevant MediaCorp shows (the copyright in which belongs to MediaCorp)[37] to its online subscribers – who, it has been suggested, constitute "the public" – through the provision of the iDVR service.

29 Curiously though, V K Rajah JA then made the following observation:[38]

> In the present case, the Registered Users who held valid television licences had an existing relationship with MediaCorp as they were licensed by the latter to watch the MediaCorp shows …. To the extent that there was a contractual relationship between MediaCorp and those Registered Users arising from the former licensing the latter to view the MediaCorp shows, those Registered Users are arguably not members of "the public" for the purposes of ss 83(*c*) and 84(1)(*d*) of the Copyright Act.

35 *RecordTV Pte Ltd v MediaCorp TV Singapore Pte Ltd* [2011] 1 SLR 830 at [24].

36 See Kevin Garnett, Gillian Davies & Gwilym Harbottle, *Copinger and Skone James on Copyright* (Sweet & Maxwell, 15th Ed, 2005) at para 7-118.

37 For the precise list of particularised works, see *RecordTV Pte Ltd v MediaCorp TV Singapore Pte Ltd* [2011] 1 SLR 830 at [4].

38 *RecordTV Pte Ltd v MediaCorp TV Singapore Pte Ltd* [2011] 1 SLR 830 at [25].

30 With respect, it is difficult to follow his Honour's reasoning in these remarks. Why should it follow that the RUs of the iDVR service are debarred from being considered members of "the public" just because of an existing contractual (licensing) relationship between them and MediaCorp? Surely, a large proportion of members of the public (including those from lower-income households) in Singapore – and hence a large majority of RUs, if not all – hold valid TV licences. Furthermore, the notion of a contractual licence as a "private" agreement/arrangement between two parties does not detract from the view that RecordTV's RUs can, collectively, constitute members of "the public". It is therefore respectfully suggested that all RUs of the iDVR service collectively constitute a "section of the [online] public" and, although this information is not readily available from the facts of this case, it may also be postulated that RecordTV had accepted a "substantial number" of RUs for its service.[39] In any event, this issue is now moot as a result of the recent abolition of the radio and TV licensing scheme in Singapore from January 2011.[40]

31 V K Rajah JA was further of the view that "[a]lthough 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".[41] Whether a RU had "access to all (or any) of the MediaCorp shows already recorded by RecordTV" is, with respect, not entirely relevant to the question of determining whether RecordTV had "made available" to the public a *particular* copyright work belonging to MediaCorp. The right of "making available", which is one of many exclusive rights that reside with the copyright owner, only extends to a specific (here, requested) work of the copyright owner, and not to a "library of recorded works".[42] Indeed, the definition of "communicate" in s 7(1) of the Copyright Act makes this clear – "the making available of *a work* or other subject-matter". In other words, just because a RU had no access to "all (or any) of the MediaCorp shows already recorded by RecordTV" but only to the specific MediaCorp shows which he had requested to be recorded does not, *ipso facto*, lead to the conclusion that RecordTV had not "made available" those *specific* MediaCorp shows to "the public".

32 On the one hand, RecordTV cannot be said to have communicated the relevant MediaCorp shows to "the public" – at least

39 See *RecordTV Pte Ltd v MediaCorp TV Singapore Pte Ltd* [2011] 1 SLR 830 at [24], cited in para 27 of this article.

40 As reported in Chua Hian Hou's article ("It's the end for radio & TV licence fees") in *The Straits Times* (19 February 2011) at p A12. The Finance Minister made this announcement in the Government's 2011 Budget Statement.

41 *RecordTV Pte Ltd v MediaCorp TV Singapore Pte Ltd* [2011] 1 SLR 830 at [26].

42 *RecordTV Pte Ltd v MediaCorp TV Singapore Pte Ltd* [2011] 1 SLR 830 at [26].

in strict *form* and insofar as its third phase of operation is concerned.[43] As the CA observed,[44] each recorded MediaCorp show was only accessible by a *single* RU who had made the specific request for that particular show. Therefore, "any communications made by RecordTV to Registered Users who had requested the recording of a particular MediaCorp show were made privately and individually".[45]

33 On the other hand, the contrary view is equally compelling. It may be argued that RecordTV's iDVR service is, in *substance*, no different from a web-hosting service provided by an internet "pirate",[46] which service operates in like manner to "pull" technologies (as described above). Let us assume that the internet "pirate" creates a webpage on which numerous MediaCorp shows – hosted on the pirate's webpage as streaming, content files – are available for viewing by interested internet users. Arguably, in doing so, he has breached MediaCorp's exclusive right of communication to "the public" because he has made available, without permission, a collection of copyright works in such a way that *any member of the public* who is connected to the Internet can obtain access to any of these works from any place and at any time. Access to each MediaCorp show so made available by the internet "pirate" (as an individual, content file) is, of course, not restricted to just *one* internet user at any one time. Interested viewers

43 Namely, in the "Multiple Copy" mode of operation, where multiple copies of the recording of a MediaCorp show would be made based on the number of registered users requesting for that particular show.

44 See *RecordTV Pte Ltd v MediaCorp TV Singapore Pte Ltd* [2011] 1 SLR 830 at [27]. Incidentally, the US Court of Appeals for the Second Circuit also came to the same conclusion as regards Cablevision's RS-DVR system in the context of the "public performance" right under US copyright law (17 USC §106(4)) – see *The Cartoon Network LP, LLLP v CSC Holdings, Inc* 536 F 3d 121 at 137–138 (2nd Cir, 2008). However, the Second Circuit's approach to statutory interpretation in this regard was guided by the peculiar language/drafting of the "transmit" clause found in the §101 definition of a "public" performance of a work in the US Copyright Act 1976 (see 536 F 3d 121 at 134–138), which language/drafting differs *significantly* from the definition of "communicate" (and, in particular, "making available") found in s 7(1) of the Singapore Copyright Act (Cap 63, 2006 Rev Ed). Indeed, the interpretation adopted by the (lower) US District Court in *Cartoon Network* – which focused on the *potential audience of the "underlying work"* (*eg*, TV programme) rather than the potential audience of a "particular transmission" (see 536 F 3d 121 at 135) – better accords with the statutory language employed in Singapore and therefore ought to have been endorsed by the Court of Appeal on the facts of the present case instead.

45 *RecordTV Pte Ltd v MediaCorp TV Singapore Pte Ltd* [2011] 1 SLR 830 at [26]. See also *RecordTV Pte Ltd v MediaCorp TV Singapore Pte Ltd* [2011] 1 SLR 830 at [28]: "Since Registered Users could only view those MediaCorp shows which they had requested to be recorded, those shows were communicated to the relevant Registered Users privately and individually. The aggregate of private communications to each Registered User is not, in this instance, a communication to the public."

46 Affectionately labelled by the entertainment industry as such.

who wish to avail themselves of, say, "My Sassy Neighbour III" can all access the *same* content file hosted on the pirate's webpage.

34 RecordTV's online recording service, when operating in the "Multiple Copy" mode, mirrors this process in every respect save for one – that each RU who desires "My Sassy Neighbour III" has to individually and specifically request for this show through the iDVR system, which will then make available the show to each, respective RU. If there are 1,000 of such similar requests, then the iDVR system makes 1,000 copies of the *same show* (*ie*, the same copyright "subject-matter") and makes them accessible to each of the 1,000 requesting RUs – and not one copy/file for 1,000 requesting RUs (as in the example of the internet "pirate"). In *substance*, and notwithstanding this technical difference in *form*, it can be argued that RecordTV's iDVR service likewise makes available "My Sassy Neighbour III" in such a way that *any* member of the (internet) public – without exception, so long as he is a RU of the iDVR service – who has specifically requested for the *same show* (and there are 1,000 such people in this example) can nevertheless access it from any place and at any time within the stipulated period of 15 days. In substance, then, it is submitted that RecordTV, in making and hosting 1,000 copies of "My Sassy Neighbour III" for 1,000 requesting RUs, had likewise infringed MediaCorp's exclusive right of communication (making available) to "the public", insofar as MediaCorp's copyright in that show is concerned.

35 It is perhaps instructive to return to first principles. As we know, the scope of protection accorded by the statutory right of communication (making available) to the public extends to a particular copyright "work" or to other copyright "subject-matter" – *eg*, whether it be a cinematograph film or TV broadcast.[47] One should be careful not to delimit a "work" or other "subject-matter" (which of course forms the subject of protection under the Copyright Act) – and, by extension, the exclusive right of the copyright owner to make available the underlying "work" or other "subject-matter" to the public – simply by reference to the *form* in which it takes. Otherwise, it may become too easy for the alleged infringer to escape copyright liability merely by technicalities.

36 This, with respect, appears to have been the interpretation adopted by the CA in the present case. Insofar as RecordTV's "Multiple Copy" mode of operation is concerned, the CA held that there is no communication of the relevant MediaCorp show to "the public" because the relevant MediaCorp show, in its guise as a digital content file hosted on RecordTV's servers and only accessible through the personal playlist of the RU who had made a specific request for it, had only been made

47 See the s 7(1) definition of "communicate" as well as ss 26(1), 83(*c*) and 84(1)(*d*) of the Copyright Act (Cap 63, 2006 Rev Ed).

available to that particular RU "privately and individually". However, there is nothing in the language of the statute which prescribes such a technical or restrictive interpretation of a "work" or other "subject-matter". Hence, there is no reason why we should confine the relevant MediaCorp show (*ie*, the underlying copyright "subject-matter") to just a digital file recording of that show which is uniquely available to a particular RU.

37 Indeed, it appears that the controversy generated by this issue does not just entail whether the relevant communication had been made to "the public" or was only made "privately and individually", but also over the *precise nature and ambit of the copyright "subject-matter" in question*. In other words, is the underlying "subject-matter" in question in the present case – which has been allegedly communicated by RecordTV – the relevant MediaCorp show in its *original, pre-broadcast state* (*ie*, a "cinematograph film" recognised and protected under s 83(*c*) of the Copyright Act), or simply a highly individualised digital file recording of that show which, because of the iDVR system, is unique only to the RU who had requested for it? Flowing from the arguments above, it is submitted that the former interpretation is to be preferred and, accordingly, that the CA ought to have considered the *potential audience of the underlying MediaCorp show (in its original, pre-broadcast state)* when determining whether the relevant communication by RecordTV had been made to "the public".[48] Therefore, it is suggested that the alternative view proffered in the example above involving "My Sassy Neighbour III" (a cinematograph film) and RecordTV's iDVR service (in its "Multiple Copy" mode of operation) does not appear so untenable after all.

38 To summarise, the interpretation of the expression "the public" *vis-à-vis* the copyright owner's right of communication in the present case is informed to a large extent by the copyright owner's distinct right of "making available" a copyright work (which right, as explained above, has been subsumed within the broad umbrella right of "communication to the public" in the Copyright Act). This distinct right of "making available" is, in turn, defined in s 7(1) of the Copyright Act to mean making available a copyright work in such a way that the work may be "accessed by *any person* from a place and at a time chosen by him" [emphasis added]. Insofar as RecordTV is concerned, it is submitted that its iDVR service, in *substance*, makes available the relevant MediaCorp shows to "the public" because *any* member of the (internet) public – as long as he is a RU ("subscriber") of the iDVR service[49] – who

48 See also the arguments in n 44 above.

49 Apparently, it does not take very much to become a registered of the iDVR service – any member of the public with internet access and who holds a valid television licence in Singapore can register with RecordTV for free (see *RecordTV Pte Ltd v*

(*cont'd on the next page*)

has specifically requested for a particular MediaCorp show can gain access to it from any place and at any time within the given period of 15 days.

39 It must be further emphasised that beyond the requirements of being a RU and holding a valid TV licence in Singapore, RecordTV had not, in any other way, restricted or limited the public's access to its iDVR service, and hence access to the array of MediaCorp shows available for recording. Registration with RecordTV and use of the iDVR service was *neither limited nor private*, for example, as being confined only to the "family circle" or a select group of individuals.[50] Notably, all RUs of the iDVR service, who, it is submitted, collectively constitute a not insignificant segment of the public, comprised a sizeable group of *unrelated* persons.

40 The authors' views, expressed above, are fortified by the following survey of foreign case law, to which this article now turns.

41 When broadcaster "ITV" recently instituted copyright infringement proceedings against "TV Catch Up" (the defendant) in the English High Court,[51] Mr Justice Kitchin had the opportunity to consider the scope of the right of communication to the public, which is defined in s 20(2) of the UK Copyright, Designs and Patents Act 1988 ("CDPA").[52] Like RecordTV, the defendant in *ITV Broadcasting Ltd v TV*

MediaCorp TV Singapore Pte Ltd [2011] 1 SLR 830 at [5]). It is further submitted that all the registered users of the iDVR service, although by no means considered the public at large, collectively constitute a not insignificant section of the public.

50 See J Ginsburg, "The (New?) Right of Making Available to the Public" in *Intellectual Property in the New Millennium* (D Vaver & L Bently eds) (Cambridge University Press, 2004) ch 16 at pp 236, 244 and 245.

51 *ITV Broadcasting Ltd v TV Catch Up Ltd* [2010] EWHC 3063 (Ch). Interestingly, there is similar ongoing litigation in other parts of the world involving television broadcasters and internet upstarts which provide online streaming services of free-to-air television programmes. In the US, for example, several major television networks (*eg*, Fox, CBS, ABC and NBC) have, in succession, brought suit in New York against "ivi TV" (a paid, subscription-only service) and UK-based "FilmOn" (a complimentary service without restrictions), obtaining a preliminary injunction against the former (see the judgment of US District Judge Naomi Buchwald at <http://www.publicknowledge.org/files/docs/11-02-22iviruling.pdf> (accessed 29 July 2011)) and a temporary restraining order against the latter (see <http://docs.justia.com/cases/federal/district-courts/new-york/nysdce/1:2010cv07532/369116/8/> (accessed 29 July 2011)) in the process. There was also, some three years ago, a similar case in France between broadcaster "M6" and "Wizzgo" (an online provider of personal/digital video recording services), in which the broadcaster ultimately prevailed. For a short legal commentary on this case, see <http://www.internationallawoffice.com/newsletters/detail.aspx?g=a08cc455-b5ae-42d4-881d-fa85fc7c3a53&redir=1> (accessed 29 July 2011).

52 Section 20(2) of the Copyright, Designs and Patents Act 1988 (c 48) (UK) reads thus:

> References in this Part to communication to the public are to communication to the public by electronic transmission, and in relation to a work include –

(*cont'd on the next page*)

Catch Up Ltd ("*ITV*") provided an online streaming facility for the plaintiff's free-to-air TV broadcasts in the UK. Similarly, as in RecordTV's case, the TV programmes streamed via the defendant's service – unlike a traditional broadcast where the relevant TV programme is beamed or transmitted for simultaneous reception by members of the public (*ie*, one-to-many) – could only be accessed/viewed by its pre-registered customers "privately and individually" (*ie*, one-to-one). Notwithstanding this, Kitchin J had no hesitation in coming to the conclusion that the defendant's streaming facility nevertheless involved the communication of the plaintiff's TV broadcasts to "the public" within the meaning of s 20(2) of the UK CDPA.[53] In particular, his Lordship opined that the right of communication to the public ought to be "*interpreted broadly* so as to cover *all* communication to the public *not present where the communication originates*"[54] [emphasis added]. It was also pointed out that the s 20(2) definition was not intended to be exhaustive in nature and that it ought also to cover "*all other acts* which constitute communication to the public of the work by electronic transmission"[55] [emphasis added]. In the authors' view, RecordTV's iDVR service is – in

(a) the broadcasting of the work;

(b) the making available to the public of the work by electronic transmission in such a way that members of the public may access it from a place and at a time individually chosen by them.

Section 20 of the UK Copyright, Designs and Patents Act 1988 was amended in 2003 to specifically implement Art 3 of the EU "Information Society Directive" (2001/29/EC), which, in turn, was intended by the European Parliament to implement Art 8 of the WIPO Copyright Treaty 1996. Such legislative history also reflects the clear parliamentary intent behind Singapore's enactment of the right of communication to the public – see para 19 of this article. Thus, Kitchin J's interpretation of this exclusive right in *ITV Broadcasting Ltd v TV Catch Up Ltd* [2010] EWHC 3063 (Ch) ought to be of great persuasive value.

53 Contrast this one-to-one streaming scenario in *ITV Broadcasting Ltd v TV Catch Up Ltd* [2010] EWHC 3063 (Ch) with fax transmissions which emanate from a single point and which are received at a single point. As regards the latter scenario, the Supreme Court of Canada has confirmed – rightly in the authors' view – that the fax transmission of a single copy of a work to a single individual does not constitute a communication of the work "to the public by telecommunication" under s 3(1)(f) of the Canadian Copyright Act 1985: see *CCH Canadian Ltd v Law Society of Upper Canada* [2004] 1 SCR 339 at [77]–[79]. In any event, it is inconceivable that any legislature would have contemplated point-to-point fax transmissions as examples of infringing activity falling foul of the copyright owner's exclusive right of communication to the public. Note, however, that the Canadian Supreme Court in *CCH* did leave open the possibility that "a series of *repeated* fax transmissions of the *same* work to *numerous different* recipients might constitute communication to the public in infringement of copyright" [emphasis added] (see [2004] 1 SCR 339 at [78]). Consider then the implications of these remarks, *mutatis mutandis*, on the facts of *RecordTV Pte Ltd v MediaCorp TV Singapore Pte Ltd* [2011] 1 SLR 830.

54 *ITV Broadcasting Ltd v TV Catch Up Ltd* [2010] EWHC 3063 (Ch) at [15].

55 *ITV Broadcasting Ltd v TV Catch Up Ltd* [2010] EWHC 3063 (Ch) at [16].

substance, if not in form – largely similar to the defendant's online streaming facility in *ITV*.[56] Furthermore, because the language employed in s 20(2) is again largely similar to that employed in the definition of the word "communicate" (and, in particular, the right of "making available") in s 7(1) of the (Singapore) Copyright Act, it is submitted that Kitchin J's expansive interpretation of the right of communication to the public in *ITV* is not only to be welcomed, but should also have strong persuasive value on the decisions of our courts in Singapore.

42 The High Court of Australia also had the opportunity in *Telstra Corp Ltd v Australasian Performing Right Association Ltd*[57] ("*Telstra*") to consider the meaning of the expression "to the public" in the context of transmissions by wireless telegraphy (or broadcasting) under Australian copyright law (as it then was).[58] The Australasian Performing Right Association ("APRA") was the owner of copyright in the music and lyrics of various songs. APRA alleged that Telstra (a provider of telecommunications services in Australia) had infringed its copyright in these songs as a result of Telstra's playing of music-on-hold whenever a mobile phone user made a call on Telstra's network and was put on hold. For present purposes, the issue before the court was whether Telstra's provision of music-on-hold under such circumstances amounted to a transmission of the relevant copyright works "to the public".

43 The Australian High Court was unanimous in providing an affirmative answer to this question, notwithstanding Telstra's contention that such music-on-hold could only be received or heard by *one* mobile phone caller (who had been put on hold) at any one time – *ie*, that the music was transmitted to each caller "individually" by means of the mobile phone and the caller would have received it in "private or domestic" circumstances. In applying the concept of the "*copyright owner's public*" derived, *inter alia*, from judicial authorities interpreting the public performance right (*ie*, what matters in such cases is the *relationship of the "audience" to the "copyright owner"*, rather than that of the "audience" to the "performer"),[59] Dawson and Gaudron JJ (with

56 Indeed, RecordTV's iDVR (time-shifting) service goes one step further and actually makes available the relevant MediaCorp shows to its registered users "at a time individually chosen by them", so long as this occurs within 15 days from the time of broadcast/recording. In contrast, the defendant's streaming facility in *ITV Broadcasting Ltd v TV Catch Up Ltd* [2010] EWHC 3063 (Ch) appears to cater only to "live" (or real-time) television broadcasts by the plaintiff.

57 (1997) 191 CLR 140.

58 Broadcasting is, of course, a specific and distinct form of "communication" under Singapore's copyright laws – see the definition of "communicate" in s 7(1) of the Copyright Act (Cap 63, 2006 Rev Ed).

59 See, *eg*, *Rank Film Production Ltd v Dodds* (1983) 2 IPR 113. Therefore, by extrapolation, what ought to matter insofar as the right of communication to the public is concerned is the relationship of the "recipient" (*ie*, the registered users of

(*cont'd on the next page*)

whom Toohey and McHugh JJ agreed) were of the view that a communication made to individual members of the public in a private or domestic setting could nevertheless amount to a communication "to the public". What is crucial here is that the facility be made "available to those members of the public who choose to avail themselves of it".[60] In *Telstra*, the facility of providing music-on-hold was available to members of the public generally, even though those members of the public who so happened to dial an engaged number on their mobile phones and who were subsequently placed on hold might be relatively small in number. Indeed, it did not matter that those persons in a position to receive the music transmission formed only a segment of the public, however small.

44 By parity of reasoning, it may be argued that all RUs of RecordTV's iDVR service (or, at the very least, those RUs who had all requested for the *same* MediaCorp shows) must also be considered part of the *relevant* "public" which the owner of copyright in the relevant MediaCorp shows (*ie*, MediaCorp) would have contemplated to be part of its "audience". It matters not that the relationship between RecordTV and its RUs was somewhat private and individualistic in nature – *ie*, it matters not that the communications made by RecordTV to each of its RUs were made "privately and individually", because each recorded MediaCorp show was only accessible by a *single* RU who had made the specific request for that particular show. What matters in the overall scheme of things is that the iDVR service was made available, without undue restrictions or limitations, to those members of the public who chose to avail themselves of it by pre-registering with RecordTV. What is equally decisive in *RecordTV* is the *nature of the relationship* between MediaCorp (*ie*, the owner of copyright in the relevant MediaCorp shows) and those RUs of the iDVR service who had all requested for the same MediaCorp shows (*ie*, the recipients of the respective "private and individual" communications who were not in any way bound by domestic or family ties), such that there is much to be said for treating this latter group of individuals, collectively, as forming part of MediaCorp's "public" (*ie*, the "copyright owner's public"). It is therefore submitted that the expression "the public" in the statutory context of the right of communication in Singapore ought also to be construed *in relation to (or vis-à-vis) the copyright owner in question* and that RecordTV did, on the facts of the present case, communicate the relevant MediaCorp shows to "the public" through the provision of its iDVR service.

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the iDVR service) to the "copyright owner" (*ie*, MediaCorp), rather than that of the "recipient" to the "communicator" (*ie*, RecordTV).

60 *Telstra Corp Ltd v Australasian Performing Right Association Ltd* (1997) 191 CLR 140 at 156.

45 Finally, it would be remiss not to alert the reader to the fact that RecordTV's iDVR system actually underwent three different phases of operation. For the purposes of the present litigation, only the first two phases were relevant since the third phase was only implemented after RecordTV had commenced its action against MediaCorp. As explained by V K Rajah JA,[61] RecordTV operated its first phase in the "SIS" mode, which involved "the storage in RecordTV's recording computers of one copy of the time-shifted recording of a MediaCorp show, regardless of the number of recording requests made for that show". The second phase saw a combination of the "Mixed" mode for Channels 5 and 8 (where, in the first instance, multiple copies of the recording of a particular show would be made based on the number of individual requests received, but, if system resources were insufficient, the mode of storage would revert to the "SIS" mode), as well as the "Multiple Copy" mode for Channel NewsAsia (where multiple copies of the recording of the same show would be made based on the number of individual requests received). RecordTV's third phase operated solely in the "Multiple Copy" mode for all channels.

46 Notably, when RecordTV's iDVR system operated in the "SIS" mode (and arguably in the "Mixed" mode as well, at least on occasion), only *one* copy of the recording of a particular MediaCorp show was made and stored by RecordTV, which, according to Ang J at first instance, "eliminated the duplication of copies by allowing *multiple end-users to share from one copy* of a recording"[62] [emphasis added]. RecordTV's operations during the "SIS" phase, therefore, appear to mirror the web-hosting operations of the internet "pirate" in the example above.[63] In other words, it can be argued that the "SIS" phase of communication between RecordTV and all its RUs presents clear evidence of a communication by RecordTV of the relevant MediaCorp shows to "the public" (*ie*, "multiple end-users"),[64] contrary to the CA's view that "any communications made by RecordTV to Registered Users who had requested the recording of a particular MediaCorp show were made privately and individually".[65]

47 Crucially then, it is pertinent to ask why the CA had omitted to address this second issue – involving MediaCorp's exclusive right of communication to the public – from the perspective of RecordTV's iDVR operations *during the "SIS" phase*.[66] One is also tempted to ask

61 *RecordTV Pte Ltd v MediaCorp TV Singapore Pte Ltd* [2011] 1 SLR 830 at [9].
62 See *RecordTV Pte Ltd v MediaCorp TV Singapore Pte Ltd* [2010] 2 SLR 152 at [9].
63 See the discussion in para 33 of this article.
64 See the discussion in para 33 of this article.
65 *RecordTV Pte Ltd v MediaCorp TV Singapore Pte Ltd* [2011] 1 SLR 830 at [26].
66 With respect, it appears that the Court of Appeal's analysis of this issue (*RecordTV Pte Ltd v MediaCorp TV Singapore Pte Ltd* [2011] 1 SLR 830 at [26]–[28]) only took
(*cont'd on the next page*)

whether RecordTV, in engineering its iDVR system through three different phases over a period of 14 months or so, was trying very hard to align its *modus operandi* with what was legally permitted under the present copyright regime. Why else would RecordTV, "in going from the First Phase to the Third Phase", choose to embrace "increasingly inefficient technology"?[67] Even Ang J himself was convinced that "[t]he motivation for the apparent regression from the First Phase to the Third Phase was a desire on the part of the plaintiff to stay legally compliant …".[68] If so, an argument may well be made that RecordTV's "First Phase" (in "SIS" mode) had indeed fallen foul of being "legally compliant" insofar as MediaCorp's exclusive right of communication to the public is concerned, a matter which unfortunately escaped judicial consideration at the CA.

B. The communicator

48 The CA, in deciding that RecordTV had not communicated the relevant MediaCorp shows to "the public", was also of the view that RecordTV was not the "communicator" of these shows for the purposes of s 16(6) of the Copyright Act.[69] Instead, it was held that the RU himself was "the person responsible for determining the content of the communication at the time the communication [was] made".[70]

49 In the authors' view, there are a number of variables – which lie beyond the purview and control of the RU (but which indeed fall within the domain and expertise of RecordTV) – which are likely to impinge upon the ultimate determination of the precise "content" of any such

into account RecordTV's operations in the "Multiple Copy" mode – see para 32 of this article.

67 See *RecordTV Pte Ltd v MediaCorp TV Singapore Pte Ltd* [2010] 2 SLR 152 at [11]. As Ang J explains:

> 11 … Under the SIS Mode in the First Phase, only *one* recording had to be stored on the recording computers of the plaintiff. This placed very little strain on the overall storage capacity of the system. Additionally, the processing load on the recording computers was small, given that only *one* file was being encoded per programme requested.
>
> 12 Under the Multiple Copy Mode in the Third Phase, however, greater strains are placed on the storage capacity of the RecordTV system. This is because multiple copies of the same recording have to be stored, each unique to the specific party requesting. Additionally, there is a much higher processing load on the recording computers, given that multiple files all have to be encoded at the same time during the airing of the requested programme. [emphasis in original]

68 See *RecordTV Pte Ltd v MediaCorp TV Singapore Pte Ltd* [2010] 2 SLR 152 at [14].

69 Copyright Act (Cap 63, 2006 Rev Ed) s 16(6) provides as follows: "For the purposes of this Act, a communication other than a broadcast is taken to have been made by the person responsible for determining the content of the communication at the time the communication is made."

70 See *RecordTV Pte Ltd v MediaCorp TV Singapore Pte Ltd* [2011] 1 SLR 830 at [36].

communication. Much would depend on the degree of generality against which the word "content" is to be construed.

50 At the most general level, and as observed by the CA,[71] it must be the RU who determines the content of the communication, since it is the RU who makes the choice as to which particular MediaCorp show he wants recorded and puts in a request to RecordTV accordingly. However, the extent of the RU's responsibility "for determining the content of the communication" goes no further than this, *ie*, the mere making of a choice or request in identifying which specific show is to be recorded by the iDVR service. It may, in fact, be argued that the RU was merely granted the *privilege* of determining the precise content of what was to be *recorded* by the iDVR system (*ie*, the content of the "recording" *per se*), as opposed to the precise content of the *communication* that ensued. After all, the act of "recording" (or of making copies) and that of "communicating" are two separate and distinct acts which encroach, if at all, on two distinct exclusive rights of the copyright owner – *ie*, the right of reproduction and the right of communication to the public. Indeed, it is suggested that what is requested by the RU to be recorded, what is in actual fact recorded by the iDVR system, and what is eventually made available and communicated to the RU tend not to be always "on all fours".

51 At a more specific level, it is RecordTV which has undertaken the responsibility of providing the RU with the time-shifting capabilities of its iDVR system – from determining precisely how that particular MediaCorp show is to be recorded, to determining precisely how (and how long) that record/copy is to be hosted on its online server, to determining precisely how that record/copy is to be "communicated" (or made available) to the RU for subsequent viewing. Clearly, the *locus* of control shifts and the RU plays no part in, and certainly assumes no responsibility for, determining how that particular MediaCorp show is exactly to be "communicated" (or made available) to him. The technicalities of and mechanics behind the communication are left entirely to the expertise of RecordTV. Indeed, RecordTV itself had changed its technical operations from time to time (as noted above) and dictated the terms and nature of its service. Based on this view, "the person responsible for determining the content of the communication at the time the communication [was] made" must be the person who enabled and facilitated the communication in the first instance, *ie*, RecordTV. Obviously, how the particular MediaCorp show is precisely to be "communicated" to the RU will implicate the exact make-up or "content" of the said communication.

71 *RecordTV Pte Ltd v MediaCorp TV Singapore Pte Ltd* [2011] 1 SLR 830 at [35], [36] and [41].

52 It is submitted that the exact make-up or "content" of each communication is highly dependent on a number of (not implausible) variables which actually fall within the responsibility of RecordTV, not least in cases where a recording or transmission malfunction occurs.[72] For example, because of a technical fault or limitation in the iDVR system, the following may ensue: (a) the particular MediaCorp show is only recorded in part; (b) the show/part recorded is garbled or otherwise defective; (c) the wrong show is recorded and (wrongly) stored in the RU's personal playlist; (d) another show recorded for some other RU is wrongly stored in the RU's personal playlist; (e) the bandwidth for communication causes interruptions and other problems. Such technical glitches are not uncommon in reality and are certainly not far-fetched or beyond reasonable contemplation, particularly for more advanced and sophisticated forms of technology, such as the iDVR system.

53 To illustrate that the problem is real and that such forms of communications technology are not impervious to technical malfunction, let us briefly consider the familiar, day-to-day communications by e-mail and SMS. Even though e-mail and SMS technology have been in existence for quite some time now, we still hear of recipients receiving e-mails and text messages which are garbled or otherwise unintelligible. At other times, the e-mail or SMS – allegedly dispatched by the originator – does not even arrive at the recipient's end, or what actually does arrive is not meant or intended for the recipient.[73] The authors therefore respectfully disagree with the CA and adopt the view that such instances of technical malfunction do not at all smack of "extreme analogy".[74] They are in fact a reality of modern technology.

54 Furthermore, it is not inconceivable (although, admittedly, there is no evidence of this on these facts) that RecordTV may, if necessary, choose to "make available" the particular MediaCorp show (and thereby grant access rights to the RU) in two or more parts/files – rather than in its entirety in a single file – in view of operational constraints or other resource limitations. In such instances and those involving technical malfunction, the responsibility for determining the precise make-up or "content" of each particular communication must surely lie with RecordTV, and not the RU (who, obviously, has no understanding or control over such matters). On balance, therefore, it is submitted that RecordTV, as the provider of the iDVR service with the

72 As raised by Ang J in *RecordTV Pte Ltd v MediaCorp TV Singapore Pte Ltd* [2010] 2 SLR 152 at [84].

73 In this regard, one is reminded of the very lucid views expressed by V K Rajah JC (as he then was) in *Chwee Kin Keong v Digilandmall.com Pte Ltd* [2004] 2 SLR(R) 594 at [97] and [102], in relation to the various difficulties and uncertainties associated with e-mail transactions in the context of internet/electronic contracting.

74 *RecordTV Pte Ltd v MediaCorp TV Singapore Pte Ltd* [2011] 1 SLR 830 at [40].

power and ability to avoid/remedy such potential issues, is ultimately "responsible for determining the content of the communication at the time the communication is made" to each respective RU, and hence ought to be treated as the "communicator" (or the party making the communication) in the present case.

55 The CA, however, took a different view and instead found the RU to be the "communicator" of the relevant MediaCorp shows for the purposes of s 16(6) of the Copyright Act. In dealing with situations involving recording or transmission malfunction, V K Rajah JA made the following observations:[75]

> [W]e are of the opinion that the Registered User did intend the same predetermined content to be communicated to him, but his intention was frustrated by the malfunction. In such situations, the Registered User could not be said to have '"determined" the content of the unintelligent static that was recorded' … because he could not have intended such static to be recorded. However, it also cannot be said that RecordTV intended to transmit a garbled signal.

56 The authors are unable to accept the CA's reference to "intention" in the passage above as part of the overall inquiry for ascertaining the identity of the "communicator". What, it may be asked, is the relevance of "intention" (whether the intention of the RU or that of RecordTV) to the inquiry at hand as to who, precisely, is responsible for determining the content of the communication? Surely, it must (always) be the intention of all parties for the iDVR system to function normally, *ie*, without any technical glitches. Neither the RU nor RecordTV would, conceivably, intend otherwise. The crucial question, however, remains – which party should ultimately be held responsible for determining the content of the communication when, in the unlikely but plausible event, operational problems or technical glitches do arise?

57 In the CA's view and on the basis of the "intention" of the parties, the answer is that in such situations, the RU cannot be said to have "determined" the content of the defective communication, but neither can RecordTV. If so, then who should be deemed the "communicator" under such circumstances? The CA, unfortunately, did not provide a definite answer to this question, save to say that the technical malfunction "was not relevant to what a Registered User had determined to be the content of his request" and that this was simply "a case of RecordTV's iDVR failing to deliver to the Registered User what he had requested for".[76] But if this is indeed the "better analysis" of the situation,[77] then it can surely be argued that if RecordTV fails to

75 *RecordTV Pte Ltd v MediaCorp TV Singapore Pte Ltd* [2011] 1 SLR 830 at [41].
76 *RecordTV Pte Ltd v MediaCorp TV Singapore Pte Ltd* [2011] 1 SLR 830 at [41].
77 *RecordTV Pte Ltd v MediaCorp TV Singapore Pte Ltd* [2011] 1 SLR 830 at [41].

deliver to the RU (by way of "making available" the relevant MediaCorp show(s)) what he had requested for, RecordTV must, *ipso facto*, have been the party *responsible* for determining the content (or exact make-up) of that defective communication.

58 Further, even if the outcome (concerning the content of the communication in situations involving technical malfunction) was not "intended" by RecordTV, RecordTV must necessarily be the party who is *responsible* for that unintended outcome, and hence for determining (albeit unintentionally) the content of that defective communication. Who else would otherwise take responsibility for the (technical) failings of the iDVR system, an internet recording facility provided and developed by RecordTV itself? Therefore, on balance, "the person responsible for determining the content of the communication at the time the communication [was] made" in the present case ought to be RecordTV, and not the RU.

59 In summary, RecordTV's RUs merely had the privilege to decide on the content of what was to be *recorded* by the iDVR system (and only a mere request at that) whereas RecordTV was the party responsible for determining the content of what exactly was to be *communicated* to its RUs. Therefore, the overall conclusion here on this second issue, with respect, is that RecordTV did "communicate" the relevant MediaCorp shows to "the public" within the meaning of ss 83(*c*) and 84(1)(*d*) of the Copyright Act.

IV. The third issue: Authorising (primary) infringement

60 Given the submission above that RecordTV ought to have been imputed with primary copyright liability, it is not necessary to embark on a lengthy discussion of whether RecordTV had authorised its RUs to do in Singapore "any act comprised in [MediaCorp's] copyright" in the relevant MediaCorp shows.[78] However, two brief observations will be made here.

61 First, the authors generally agree with the reasoning and analysis offered by the CA on this third issue,[79] and with the CA's conclusion that RecordTV did not authorise any infringement by its RUs of MediaCorp's copyright in the relevant MediaCorp shows.

78 See Copyright Act (Cap 63, 2006 Rev Ed) s 103(1).

79 See *RecordTV Pte Ltd v MediaCorp TV Singapore Pte Ltd* [2011] 1 SLR 830 at [43]–[63].

62 Second, as noted elsewhere, there can be no liability for "authorisation" without proof of any base infringement of copyright.[80] In the present case, the CA rightly pointed out that only those RUs who were authorised by MediaCorp to view the relevant MediaCorp shows and record them for their own private viewing (*ie*, only those RUs based in Singapore who held valid TV licences) were entitled to use RecordTV's iDVR to record these shows.[81] Indeed, users who had registered to use RecordTV's iDVR service were, *in the main*, users who were based in Singapore and who held valid TV licences.[82] If so, in using the iDVR service *legitimately* to time-shift their viewing of MediaCorp shows,[83] these RUs were themselves *not* in breach of MediaCorp's copyright. Hence, there is an absence or no likelihood of any base infringement of copyright by any RU upon which authorisation liability (on the part of RecordTV) can hinge. In any event, no infringement claim was ever brought by MediaCorp against the RUs of the iDVR service.

63 Of course, there could well have been RUs who were located out of jurisdiction or Singapore-based RUs who did not hold valid TV licences, but the number of such RUs, realistically speaking, should be so infinitesimal as to be considered *de minimis*. As V K Rajah JA also observed:[84]

> [O]ne possible concern from MediaCorp's point of view could be that RecordTV's iDVR system might be hacked into by persons *who do not hold valid television licences*, thereby resulting in a loss of revenue for MediaCorp. Of course, the possibility of hacking exists, but no evidence of the likelihood of this possibility materialising was adduced before the court. In the circumstances, RecordTV cannot be held responsible for this possibility. [emphasis added]

64 In any event, this issue is now moot given the abolition of radio and TV licence fees in Singapore from January 2011.[85]

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80 See C L Saw, "Where Copyright Law and Technology Once Again Cross Paths – *RecordTV Pte Ltd v MediaCorp TV Singapore Pte Ltd* [2010] 2 SLR 152" *Singapore Law Gazette* (December 2010) at pp 20–21. See also *RecordTV Pte Ltd v MediaCorp TV Singapore Pte Ltd* [2010] 2 SLR 152 at [45] *per* Ang J; *ABKCO Music & Records Inc v Music Collection International Ltd* [1995] RPC 657 at 660 *per* Hoffmann LJ.

81 See *RecordTV Pte Ltd v MediaCorp TV Singapore Pte Ltd* [2011] 1 SLR 830 at [45].

82 See *RecordTV Pte Ltd v MediaCorp TV Singapore Pte Ltd* [2011] 1 SLR 830 at [5].

83 See also *RecordTV Pte Ltd v MediaCorp TV Singapore Pte Ltd* [2011] 1 SLR 830 at [38] as well as the "private and domestic use" defence found in s 114(1) of the Copyright Act (Cap 63, 2006 Rev Ed).

84 *RecordTV Pte Ltd v MediaCorp TV Singapore Pte Ltd* [2011] 1 SLR 830 at [64].

85 As reported in Chua Hian Hou's article ("It's the end for radio & TV licence fees") in *The Straits Times* (19 February 2011) at p A12. The Finance Minister made this announcement in the Government's 2011 Budget Statement.

V. Defence of fair dealing – Is RecordTV's iDVR service in the public interest?

65 Given the strict liability nature of primary copyright infringement, liability would have been made out once the alleged infringer is shown to have performed any act which falls within the scope of the copyright owner's exclusive rights (subject, of course, to further proof of a causal connection and a substantial taking, issues which are not in dispute in the present case). If, and as the CA had already found (by endorsing the *Cartoon Network* analogy discussed above),[86] RecordTV is not the party responsible for making copies of the relevant MediaCorp shows, then RecordTV cannot, *ipso facto*, be held liable for infringing MediaCorp's exclusive right of reproduction, regardless of (the propriety and force of) public policy or social benefit considerations.

66 Therefore, as alluded to earlier,[87] considerations of public interest – that RecordTV's provision of a "more convenient and user-friendly" online time-shifting facility is clearly in the public interest and that the court's decision should not ultimately stifle the advancement of technology – should not at all have been relevant in the CA's assessment of primary copyright liability, and particularly so in the court's subsequent affirmation of Ang J's conclusion that RecordTV did not copy the relevant MediaCorp shows.

67 On the other hand, if primary copyright liability (as regards both the first and second issue) were to attach to RecordTV in the present case in line with the submissions above, then such considerations of public interest might well be relevant in a court's assessment of possible *statutory defences* which RecordTV might rely on to exonerate its provision of the iDVR service, *eg*, the defence of fair dealing found in ss 35 and 109 of the Copyright Act.[88] An exploration of how relevant and applicable the fair dealing provisions are on the facts of the present case is, however, beyond the scope of this article.[89]

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86 See para 6 of this article.

87 See para 16 of this article. See also, generally, *RecordTV Pte Ltd v MediaCorp TV Singapore Pte Ltd* [2011] 1 SLR 830 at [68]–[71].

88 The question as to whether considerations of public interest have any role to play within the statutory framework of Singapore's copyright laws has been exhaustively examined elsewhere – see C L Saw, "Is There a Defence of Public Interest in the Law of Copyright in Singapore?" [2003] Sing JLS 519.

89 The reader may be interested to know that considerations of public interest and the applicability (or otherwise) of the fair dealing provisions in the Copyright Act (Cap 63, 2006 Rev Ed) will form the subject of discussion in a follow-up paper by the present authors.

VI. Conclusion

68 By arguing that RecordTV did infringe MediaCorp's exclusive right to copy and communicate to the public the relevant MediaCorp shows but that RecordTV may potentially avail itself of the fair dealing provisions in the Copyright Act to escape primary copyright liability, the authors are of the view that the thesis and reasoning put forth in this article accord with the overarching objectives of copyright law – *ie*, to strike the appropriate balance between the rights and interests of copyright owners on the one hand, and the rights and interests of the public on the other in gaining access to and benefiting from the copyright work(s) in question, whilst at the same time satisfying the larger public interest in the use and development of new technology.[90] Therefore, although the analysis of the first and second issues above differs markedly from that of the CA,[91] it is nevertheless possible to arrive at the same conclusion as the CA (*ie*, to allow RecordTV to continue providing the iDVR service to all its RUs) and to satisfy the same policy objectives of not stifling technological innovation which is otherwise in the public interest but through a different – and, in the authors' opinion, a more appropriate – route. This should form the subject of a separate inquiry and attract further doctrinal analysis on another occasion.[92]

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90 *Cf* Art 7 of the Agreement of Trade-Related Aspects of Intellectual Property Rights ("TRIPS Agreement") 1994:

> The protection and enforcement of intellectual property rights should contribute to the *promotion of technological innovation* and to the transfer and dissemination of technology, to the mutual advantage of producers and users of technological knowledge and in a manner *conducive to social and economic welfare*, and to a *balance* of rights and obligations. [emphasis added]

91 As argued above, RecordTV ought to have been held liable to MediaCorp for infringing the latter's exclusive right to copy and communicate to the public the relevant MediaCorp shows.

92 Considerations of public interest and the applicability (or otherwise) of the fair dealing provisions in the Copyright Act (Cap 63, 2006 Rev Ed) will form the subject of discussion in a follow-up paper by the present authors.