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George S. S. WEI

Singapore Management University, georgewei@smu.edu.sg

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A LOOK BACK AT PUBLIC POLICY, THE LEGISLATURE, THE COURTS AND THE DEVELOPMENT OF COPYRIGHT LAW IN SINGAPORE

Twenty-Five Years On

The purpose of this article is to review the development of copyright law in Singapore over the past 25 years and to examine how public policy considerations have shaped legislative and judicial development of copyright law principles. The article begins with a review of legislative activity and includes a brief survey of the public consultation exercises that have taken place on reform proposals. Included is a discussion of statutory amendments in respect of exhaustion of rights and fair dealing. This is followed by a discussion of some copyright case law, with a view to identifying judicial copyright policy approaches and concerns that have been expressed in the development of copyright principles in Singapore.

George WEI*

Advocate and Solicitor, Supreme Court of Singapore;

Professor (Practice) of Law, Singapore Management University.

I. Introduction

1 The year 2012 marks the 25th anniversary of the coming into force of the Copyright Act 1987.¹ Coincidentally, it also marks the 100th anniversary of entry into force of the Imperial Copyright Act 1911 of the Westminster Parliament.² The year 1987 witnessed effectively

* This article includes some points discussed previously by the author in earlier works. The author is grateful to his colleagues and students for their contributions in ways too numerous to list out and would like to thank the Gerald Dworkin and Sam Ricketson for their very helpful comments on earlier drafts. The author apologises for all errors and omissions in the article and the Appendix entitled "Major Parliamentary, Statutory and Related Developments in Intellectual Property Law in Singapore, 1987–2012" included in this special issue.

1 Act 2 of 1987; subsequently Copyright Act (Cap 63, 2006 Rev Ed). The Copyright Act 1987 came into operation on 10 April 1987.

2 c 46 (UK). The Copyright Act 1911 received Royal assent in December 1911 and came into operation in the UK and Singapore on 1 July 1912. The Copyright Act 1911 remained in force in Singapore until its repeal in 1987. This was some 22 years after Singapore gained independence as the Republic of Singapore.

what became the “big bang” of modern copyright law in Singapore. The Copyright Act 1987 in turn quickly led to the modernisation of the entire intellectual property (“IP”) law system in Singapore.³ The trigger for the “big bang” was the economic transition that Singapore was undergoing in the 1980s and the need to change societal attitudes towards IP. The Ministry of Trade and Industry explained that, in 1987, Singapore was facing the challenges of a maturing economy, slower economic growth, increasing resource constraints, rising costs as well as increasing competition from developed and developing countries. Singapore’s use of technology at that time was relatively low, and there was a perceived need for the Government to catalyse the use and development of technology as part of Singapore’s strategy to develop her industry (especially in niche cluster areas such as electronics) and to diversify her economy.⁴

2 In 1987, it was estimated that there had been 3,361 research scientists in Singapore; ten years later, that figure rose to 11,302. Also in 1987, Singapore’s gross domestic product (“GDP”) had been \$61.316bn; by the end of the first decade of the new millennium, Singapore’s GDP grew to about \$265bn.⁵ Singapore’s new economic strategy, which dates back to the 1980s and tweaked from time to time, has clearly succeeded. That the modernisation of Singapore’s IP law has played an important role in the transformation of Singapore’s economy and industry cannot be doubted. Indeed, the development of Singapore’s IP law coincides with a period of rapid development of the Singapore legal system, leading to new-found confidence and assertiveness in the judicial development of the common law in Singapore. Singapore has removed

3 See the Appendix of this special issue for the timeline of major developments in Singapore’s intellectual property (“IP”) law since 1987. Prior to this, Singapore’s statutory IP law was mainly based on Imperial legislation from her colonial past, as well as local Acts importing the effect of English-registered designs and patents. See Registration of United Kingdom Patents Ordinance 1937 (SS Ord No 2 of 1937) and the United Kingdom Designs (Protection) Ordinance 1938 (SS Ord No 17 of 1938). In the case of registered trade marks, a registration system was established by the Trade Marks Ordinance 1938 (SS Ord No 38 of 1938) when Singapore was still a part of the Colony of the Straits Settlements. The Trade Marks Ordinance 1938 was based on the English Trade Marks Act 1938 (c 22) and it remained law in Singapore until its repeal in 1999.

4 Ministry of Trade and Industry, MTI Insights: 1986–1997 (18 July 2011) <<http://www.mti.gov.sg/MTIInsights/Pages/1986---1997.aspx>> (accessed 22 November 2012).

5 See The Economist, *Pocket World in Figures 2012* (Profile Books Ltd, 2011). However, see also Klaus Schwab ed, World Economic Forum, *The Global Competitiveness Report 2012–2013* (2012) estimating Singapore’s gross domestic product in 2011 as US\$259.8 billion. For a general account of the importance of intellectual property (“IP”) and the creation of invisible gold in Asia, see David Llewelyn, *Invisible Gold in Asia: Creating Wealth through Intellectual Property* (Marshall Cavendish, 2010). Llewelyn set out a helpful review of the importance of IP initiatives and Singapore’s economic growth at pp 156–167.

the system of acquisition of patent and design rights by registration in the UK and has taken full control of the development of the country's legal system by setting up her own national apex Court of Appeal and by legislative clarification of the effect English enactments have in Singapore under the Application of English Law Act.⁶

3 The purpose of this article is to review the development of copyright law in Singapore over the past 25 years and, in particular, to consider the extent to which public policy considerations have helped to shape legislative and judicial development of copyright law principles. The article begins with a review of legislative or statutory activity in the area of copyright since 1987 and a brief survey of the public consultation exercises that have taken place on reform proposals and lawmaking. Included will be a more detailed discussion of two areas that have generated some amount of public controversy and which have been subject to statutory amendments: the problem of exhaustion of rights and the scope of the fair dealing defences. The objective will be to draw out the general legislative and judicial approach towards copyright in Singapore, rather than to set out a detailed discussion of these two areas. This is followed by a discussion of copyright case law over the past 25 years, with a view to identifying some judicial copyright policy approaches and concerns that have been expressed in the development of copyright principles in Singapore. This is followed by a conclusion that will attempt to draw the strands together in the context of the development of Singapore law.

II. Legislative developments, 1987–2011 – Statute law, and intellectual property and copyright lawmaking

4 A glance at the Appendix will reveal the scale of legislative activity over the past 25 years in connection with IP. The Copyright Act 1987 alone has been the subject of some 15 amending Acts. Seven of these enactments have effected major changes to the law.⁷ Many of these were driven by the need for Singapore to implement her obligations under the Agreement on Trade-Related Aspects of Intellectual Property Rights (“TRIPS Agreement”), the World Intellectual Property Organization Copyright Treaties and the US–Singapore Free Trade Agreement (“USSFTA”). That many of the amendments were driven by the need to comply with international obligations does not, however,

6 Cap 7A, 1994 Rev Ed.

7 Copyright (Amendment) Act 1994 (Act 14 of 1994); Copyright (Amendment) Act 1998 (Act 6 of 1998); Copyright (Amendment) Act 1999 (Act 38 of 1999); Copyright (Amendment) Act 2004 (Act 52 of 2004); Copyright (Amendment) Act 2005 (Act 22 of 2005); Copyright (Amendment) Act 2009 (Act 23 of 2009); and the Registered Designs Act 2000 (Act 25 of 2000).

mean that Singapore is an unwilling convert to the cause of IP rights (“IPR”). In fact, the reverse is true. It might be said that an important factor behind the enactment of a new copyright law in 1987 and the application of that law to protect US works in Singapore on a national treatment basis was the need to protect Singapore’s trading privileges (Generalised System of Preferences benefits) with the US.⁸ Even so, there can be no doubt that Singapore had already determined that it was in her national interest to embrace IP and to develop her economic and industrial base through increased levels of research and development. Securing or protecting her trading position with the US was just one factor; securing and developing her relationship with the international trading and financial community and the need to encourage broad-based creative and entrepreneurial activity within Singapore had become, and remains, a national imperative.⁹ As is well known, Singapore is a founding signatory of the Anti-Counterfeiting Trade Agreement¹⁰ (“ACTA”), and remains committed to the need to provide effective protection for IP. The Government statement issued on the date of the ACTA signing proclaimed:¹¹

8 For an account of Singapore’s trading relationship with the US and privileges under the Generalised Scheme for Preferences, see George Wei, *Law of Copyright in Singapore* (Singapore National Printers, 2nd Ed, 2000) at para 6.11 ff. For Singapore Government statements on the link between the Generalised System of Preferences and copyright, see “Graduation from the US Generalised System of Preferences (GSP) Programme: Expression of Disappointment by the Singapore Government Issued by the Singapore Embassy in Washington DC on 29 January 1988” (Singapore Government Press Release No 41/JAN 09-0/88/01/30) (1988) 30 Mal LR 202. See also George Wei, *Some Thoughts on Intellectual Property Rights in Singapore: A Monograph for Gerald Dworkin* (George Wei, 2009) at para 1.32 ff for a survey of Singapore’s relationship with the US and Special 301.

9 See, for example, Ng-Loy Wee Loon, *Law of Intellectual Property of Singapore*, (Sweet & Maxwell, Rev Ed, 2009) at para 4.1.10 where it is said that the “change in Singapore’s attitude towards IP started in the mid-1980s corresponding to the shift in the country’s focus towards the higher technology industries”. See also Ng-Loy’s reference to the remarks of Dr Richard Hu (the then Minister for Trade and Industry) in 1985 regarding the importance of new copyright laws to foster creativity and to support the development of a software industry. See also the Appendix on the Copyright Act 1987 (Act 2 of 1987). The Explanatory Statement to the Copyright Bill 1986 (No 8/1986) states: “Apart from the fact that the UK Act does not fit in with the changed constitutional status of Singapore, it is necessary to enact an independent self-contained law on the subject of copyright in the light of growing public consciousness of the rights or obligations of the authors and owners of intellectual property. New developments in computer technology, lithophotography and video recording and new and advanced means of communication ... also call for changes in the existing law. Adequate provision has to be made for the fulfillment of international obligations in the field of copyright which Singapore might accept.” Note the reference to rights and “obligations” of the copyright owner.

10 Singapore signed the Anti-Counterfeiting Trade Agreement on 1 October 2011.

11 Ministry of Law, “Anti-Counterfeiting Trade Agreement Signing Ceremony”, press release (1 October 2011) <<http://app2.mlaw.gov.sg/News/tabid/204/Default.aspx?>
(cont’d on the next page)

ACTA is a significant achievement in the global fight against infringement of intellectual property rights (IPR) and in particular, the proliferation of counterfeiting and piracy. The key elements of ACTA go beyond the standards set by the World Trade Organisation Agreement on Trade-Related Aspects of Intellectual Property Rights and include more robust border measures for IPR, stronger civil and criminal liability regimes, and additional provisions for copyright protection in the digital environment. Singapore's IPR regime upholds the high standards established by ACTA ... With the importance of knowledge-based industries to the economy, Singapore places strong emphasis on supporting measures that encourage creativity and innovation. Singapore supports the establishment of mechanisms such as ACTA, as they promote greater international cooperation in the effective protection of IPR and adoption of higher standards in such protection.

5 The need for Singapore to provide strong and effective protection for IP does not mean that there are no counterbalancing concerns. The need to secure the interests of copyright owners is a "first among equals".¹² The history of the statutory copyright amendments over the past 25 years well demonstrates the concern that strong protection should be balanced in a way to secure other equally important national public interests such as access to information, education, public health and the need for competition. In the Appendix, reference is made to various Parliamentary statements in 2012 on copyright and IP protection. Even as the Minister for Law underscored in 2012 the importance of robust IP laws that are able to deal effectively with the challenges of the digital environment, the Minister also pointed to the need to preserve and protect legitimate uses of the Internet by the public at large. Where the balance lies is the tricky question, especially as technology expands the boundaries of the digital world. It comes as no surprise to find that the Government has on several occasions restated the necessity to review copyright law on a regular basis, given the rapid

ItemId=582> (accessed 22 November 2012). However, note that in Europe and some other countries, the Anti-Counterfeiting Trade Agreement ("ACTA") has met with considerable hostility. Indeed, ACTA was rejected by the European Parliament in July 2012.

- 12 See *Singapore Parliamentary Debates, Official Report* (17 February 2012) vol 88 at col 55 (Mr K Shanmugam, Minister for Foreign Affairs and Minister for Law), Mr K Shanmugam's written statement in response to a question on online piracy by Mr Chen Show Mao referred to the need for strong protection of intellectual property whilst recognising other legitimate uses of the Internet. The phrase "first among equals" is the comment of the author. The phrase usually refers to an individual in a group of the same rank, where that person possesses some special attribute or seniority. In the present context, it is used to underscore the point that even if strong protection of the interests of copyright owners is a first among equals, there are cogent and important counterbalancing interests that must also be taken account of in developing copyright law.

pace at which technology (and especially communication technologies) has been developing.

6 The rapid-fire amendments to Singapore's copyright legislation during the past 25 years were driven by Singapore's international commitments. These commitments are signed for largely because of the need to adapt the copyright system to the world of digital information and high-speed broadband communication technologies. It stands to reason that a copyright law developed to meet the challenges of analogue terrestrial television broadcasting, film-based photography, mimeograph technology, printing technology and paper books would struggle in the world of digital satellite broadcasting, the Internet, digitisation and virtual world classrooms.¹³ It should come as no surprise that the courts have, from time to time, returned to the policy rationale for copyright, for guidance in interpreting and applying copyright provisions and principles in the light of technological changes. The need to couple strong protection with appropriate checks and balances is an important theme underlining the discussion that follows.

7 Post-1987 statutory developments in copyright law concerned with safeguarding the interests of users and the public at large include the amendments made to the provisions dealing with parallel imports (exhaustion of rights) and the fair dealing defence.

A. *Parallel imports and exhaustion of rights*

8 The first area of copyright law to be re-examined by Parliament after 1987 concerns the amendment in 1994 to ensure that parallel imports were not caught by the importation provisions of the Copyright Act. This was especially problematic in those cases where the imported

13 The need to adapt the Copyright Act 1987 (Act 2 of 1987) to new communication technologies and the Internet (the digital agenda) lay behind the important amendments made by the Copyright (Amendment) Act 2004 (Act 52 of 2004). In some respects, these amendments came about relatively slowly, although the need for extensive consultation is well understandable. They were also driven by the need to ensure Singapore's compliance with her obligations under the US-Singapore Free Trade Agreement in 2003. The reader may be interested to know that Singapore did not actually become a member of the World Intellectual Property Organization ("WIPO") Internet Treaties (composed of the WIPO Copyright Treaty and the WIPO Performances and Phonograms Treaty, both adopted in 1996) until April 2005. The 2004 amendments included provisions on anti-circumvention measures; rights management information; a new unitary right of communication to the public; new rights for performers in respect of sound recordings; statutory damages; amendments to the provisions on border measures; special provisions on internet service providers; and new or enhanced defences and exceptions.

articles were made with the consent of the copyright owner at the place of manufacture. In moving the amendments, it was made clear that the Government's policy in favour of parallel imports of legitimate copies had not changed since discussions in the Select Committee in 1986. Parallel imports concern articles made and sold in one country (the country of manufacture) and which are imported into another country (Singapore) without the consent of the IPR owner in Singapore. These imported articles are sold in Singapore, in competition with articles originating from the IPR owner in Singapore.

9 Parallel imports raise the question of policy: to what extent should a country's IP law seal off the domestic market from "legitimate copies" made overseas? Parallel imports are broadly concerned with "genuine" articles, in that they are usually made and released into the market of the country of manufacture with the consent of the IPR owner in the place of manufacture. The arguments for and against parallel imports have spawned considerable debate within and outside Parliament, and also between nations. Within the international trading community, agreement on an international exhaustion principle proved to be impossible at the time when the terms of the Marrakesh Agreement Establishing the World Trade Organization¹⁴ ("WTO") were being negotiated in the early 1990s. Indeed, Article 6 of the TRIPS Agreement provides that nothing in the TRIPS Agreement shall be used to address the issue of exhaustion of rights. Members are therefore permitted to determine their own national position on parallel imports, subject to the requirements of national and most-favoured-nation treatments.¹⁵

10 In 1986 the original draft provisions in Singapore's Copyright Bill 1986¹⁶ on exhaustion of rights were modelled on the provisions found in the Australian Copyright Act 1968,¹⁷ under which liability

14 The Marrakesh Agreement Establishing the World Trade Organization was signed in 1994. This set up the World Trade Organization and replaced the General Agreement on Tariffs and Trade.

15 See Daniel Gervais, *The TRIPS Agreement: Drafting History and Analysis* (Sweet & Maxwell, 2003) at para 2.65; Carlos M Correa, *Trade Related Aspects of Intellectual Property Rights: A Commentary on the TRIPS Agreement* (Oxford University Press, 2007) at ch 3. See also *Global Copyright – Three Hundred Years Since the Statute of Anne, From 1709 to Cyberspace* (Lionel Bently, Uma Suthersanen & Paul Torremans eds) (Edward Elgar, 2010) at chs 22–27. For a general discussion of arguments for and against the control of parallel imports, see Warwick A Rothnie, *Parallel Imports* (Sweet & Maxwell, 1993); George Wei, *Parallel Imports and Intellectual Property in Singapore* (1990) 2 SAclJ 286; George Wei, "Competing with Yourself and International Businesses: Parallel Imports Re-Visited – Themes and Issues" in *Current Legal Issues in the Internationalization of Business Enterprises* (Lye Lin Heng ed) (Butterworths, 1996).

16 No 8/1986.

17 Act No 63 of 1968 (Cth).

would arise if the imported copies would infringe copyright in Singapore if they had been made in Singapore by the importer. Such a provision would have meant that most parallel imports would be caught under the Copyright Act. When the Copyright Bill 1986 was heard before the Select Committee, the provision on parallel imports had attracted a good deal of attention.¹⁸ The result was an amendment of the Bill so as to liberalise the position in favour of parallel imports, with the then Second Minister for Law stating in Parliament at the Third Reading of the Bill that the Select Committee had decided that the Bill should be amended to make it clear that parallel imports were to be allowed.¹⁹ The proposal was to allow the imports so long as the articles were non-infringing in the country of manufacture.

11 Elsewhere it has been argued that if this proposal had been enacted, Singapore's position on parallel imports and exhaustion of rights would be even more favourable than the law on exhaustion that existed under European Union Community law.²⁰ What was the policy justification for allowing parallel imports made in a country that did not provide copyright protection? When the provision was presented to Parliament at the Third Reading, a crucial amendment was made to the proposal of the Select Committee. Liability was made to depend on whether the imported article was made without the consent of the copyright owner. S Jayakumar in Parliament explained that the Select Committee proposal would prohibit the importation for trade purposes if the articles were actually made in breach of the copyright law in the country of manufacture. The problem, however, was that "if they are made in a country where there is no adequate protection given to

18 See representations by the Publishers Association, the Book Development Council, the Consumers Association of Singapore and the Singapore Booksellers Association. Papers 13B & 15 and oral testimony at B34 and B70 of the *Report of the Select Committee on the Copyright Bill 1986 (No 8/1986)* (Parl 9 of 1986, 22 December 1986).

19 *Singapore Parliamentary Debates, Official Report* (26 January 1987) vol 48 at cols 959–988. It is not immediately clear as to why Singapore chose to base its new copyright legislation on the Australian Copyright Act 1968 (Act No 63 of 1968) (Cth) (as amended) instead of the English Copyright Act 1956 (c 74) (as amended). A possible reason might be because of the perception that English intellectual property law as a whole was increasingly coming under the influence of European developments. Another possible reason is that the UK in 1986 and 1987 was itself undertaking a review of its copyright law, culminating in the Copyright, Designs and Patents Act 1988 (c 48) (UK). Whether Singapore used Australian or English copyright legislation as its template, it is fair to say that by 1987 copyright legislation in many leading common law jurisdictions was already complex. The complexity has increased over the past 25 years, leading many to call for a general review with the aim of simplification and clarity.

20 George Wei, "Competing with Yourself and International Businesses: Parallel Imports Re-Visited – Themes and Issues" in *Current Legal Issues in the Internationalization of Business Enterprises* (Lye Lin Heng ed) (Butterworths, 1996) at p 266.

intellectual property, they may be technically legitimate reproductions in the country of manufacture and therefore may be freely imported into Singapore. Imports from countries which offer little or no copyright protection will undermine the interests of copyright owners in Singapore”.²¹ It followed that, whilst the Government was supportive of a liberal policy on parallel imports, it was not prepared to open the door to all “legitimate” articles as this could undermine the legitimate interests of Singapore copyright owners.

12 Under sections 7(1), 32 and 104 of the Copyright Act 1987,²² liability depended on whether the imported article was made with the consent of the copyright owner. Unfortunately, what was unclear was whether the reference to copyright owner was to the copyright owner in Singapore, or in the country or place of manufacture. It has been argued elsewhere that Parliament must have intended this to be a reference to the Singapore copyright owner. After all, if the articles were made in a country or place that did not have copyright law, there would be no copyright owner in the place of making.²³ On the other hand, case law had initially taken the position that the test of non-consensual making was to be addressed from the perspective of the actual maker in relation to the actual making abroad.²⁴ If so, this could be interpreted as support for the view that the copyright owner whose consent was relevant was the owner of the copyright in the country of manufacture.

13 The matter finally came up for decision in 1993 in the well-known case of *Public Prosecutor v Teo Ai Nee*²⁵ (“*Teo Ai Nee*”), where Yong Pung How CJ (as he then was) held that owner of the copyright referred to the owner in Singapore. After all, as the Chief Justice pointed out: how was the test to be applied if there was no copyright owner in the country of manufacture or if the law at that place did not protect the material in question? In coming to this decision, Yong CJ noted the earlier decision of Chan Sek Keong J (as he then was) in *Television Broadcasts Ltd v Golden Line Video & Marketing Pte Ltd* (“*Television Broadcasts*”), where it was said that “in the area of copyright protection, our Legislature has adopted a mercantile policy of allowing in Singapore a free market where copyright articles, whether parallel imports or made under licence in Singapore, may be sold or dealt within competition

21 *Singapore Parliamentary Debates, Official Reports* (26 January 1987) vol 48 at col 959 (Mr Tan Soo Khoo, Mr Deputy Speaker).

22 Act 2 of 1987.

23 George Wei, *Law of Copyright in Singapore* (Singapore National Printers, 1989) at paras 6.60 and 10.8–10.9; and George Wei, “Parallel Imports and Intellectual Property in Singapore” (1990) 2 SAclJ 286 at 304.

24 *Television Broadcasts Ltd v Golden Line Video & Marketing Pte Ltd* [1989] 1 MLJ 201; [1988] 2 SLR(R) 388.

25 [1993] 3 SLR(R) 755.

with one another”.²⁶ The earlier case, *Television Broadcasts*, was distinguished and the court held that the copyright owner referred to must be taken to mean the copyright owner in Singapore. Looking at the legislative history behind the provisions and especially how the provisions had changed from the form originally proposed in the Bill to that proposed by the Select Committee and finally to what was actually enacted, Yong CJ held that “in order to prevent imports from countries which did not have adequate copyright laws, the Legislature intended that the definition of an ‘infringing copy’ made overseas and imported into Singapore was an article made without the consent of the Singapore copyright owner. This would also cover the situation in which articles are manufactured in a country in which there exists no copyright holder, and prevent, for example, a person from going to one of those countries, manufacturing such goods quite legally, and flooding the Singapore market with them”.²⁷

14 In coming to his decision, Yong CJ, whilst noting the competing policy arguments on parallel imports, stressed that he “did not have primary regard to the competing policy factors involved in the case. It is [his] opinion that the formulating of Singapore’s policy on parallel imports should rightly be the task of the Legislature and should not be entered into by the Judiciary. [He has] based [his] interpretation of the relevant portions of the Copyright Act on the ordinary and natural meaning of their wording, and on the practical consequences of preferring one interpretation over another. [He has] also had some regard for the fact that reference to the relevant preparatory materials would indicate that the Legislature had rejected the interpretation adopted by the district judge in the court below”.²⁸

15 The High Court decision in *Teo Ai Nee* had generated considerable interest, public discussion and disquiet over what was perceived to be a narrowing of the door to parallel imports.²⁹ The Consumers Association of Singapore commissioned a study on the economic impact of parallel imports. The 1994 study,³⁰ which was undertaken by the Asian Commerce and Economics Studies Centre of Nanyang Technological University, supported parallel imports, citing arguments such as lower prices for consumers, damage to the tourism industry through higher prices, and losses to local retailers as a result of

26 [1989] 1 MLJ 201; [1988] 2 SLR(R) 388 at [23].

27 *Public Prosecutor v Teo Ai Nee* [1989] 1 MLJ 201; [1988] 2 SLR(R) 388 at [28].

28 *Public Prosecutor v Teo Ai Nee* [1989] 1 MLJ 201; [1988] 2 SLR(R) 388 at [31].

29 Various reports in *The Straits Times* (3, 4, 9, 14, 21 February 1994; 5, 11, 19 March 1994; 21 April 1994; and 16 May 1994).

30 Consumers Association of Singapore, *Case Study of the Economic and Legal Impacts of Parallel Imports in Singapore* (Consumers Association of Singapore, 1994).

domestic consumers shopping overseas.³¹ In fact, the decision in *Teo Ai Nee* did not mean that the door to parallel imports had closed. Indeed, it is likely that many types of parallel imported articles would be regarded as legitimate even under the *Teo Ai Nee* approach, on the basis that they were made with the consent of the Singapore copyright owner (express or implied).³² In coming to his decision, Yong CJ was not making a policy-based decision or expressing any judicial view over the advantages or disadvantages of allowing parallel imports. This, as the court had made clear, was a matter for Parliament. Nevertheless, notwithstanding that the door to parallel imports was far from closed, there was a public perception that the decision had interpreted the provision in the Copyright Act in a manner that was “less than friendly” to parallel imports.³³ This was the backdrop to the 1994 statutory amendments to the Copyright Act 1987. The Copyright (Amendment) Act 1994³⁴ involved inserting a new definition to cover the identity of the copyright owner in cases where an issue had arisen as to whether an imported article was made with consent of the copyright owner. The amendment made clear that the copyright owner was the owner of the copyright in the country where the article was made. Nevertheless, in clear recognition of the problem highlighted by Yong CJ (no copyright owner in the country of making), the amended statutory provision also provides that if there is no copyright owner in the country of making, the owner is to be taken to refer to the owner entitled to make the article in Singapore. In this way, the concern highlighted by Yong CJ was taken into account by the legislature.

16 The way in which Singapore’s statutory provisions on parallel imports and copyright developed between 1987 and 1994 provides a good example of the legislative process and the approach taken by the Singapore judiciary in developing Singapore law. Extended inter-ministry consultation was undertaken prior to the framing of the Copyright Bill 1986. This was followed by a public consultation (written submissions, followed in some cases by oral examination), an engagement exercise and a detailed study by the Select Committee of the

31 See George Wei, “Competing with Yourself and International Businesses: Parallel Imports Re-Visited – Themes and Issues” in *Current Legal Issues in the Internationalization of Business Enterprises* (Lye Lin Heng ed) (Butterworths, 1996) at p 271, fn 71, for earlier comments on the study by the Consumers Association of Singapore.

32 This point has been argued before: see George Wei, “Competing with Yourself and International Businesses: Parallel Imports Re-Visited – Themes and Issues” in *Current Legal Issues in the Internationalization of Business Enterprises* (Lye Lin Heng ed) (Butterworths, 1996) at p 271; and George Wei, *Law of Copyright in Singapore* (Singapore National Printers, 2nd Ed, 2000) at para 8.205.

33 See the Appendix and the entry for the Copyright (Amendment) Act 1994 (Act 14 of 1994).

34 Act 14 of 1994.

House. Amendments were then proposed by the Select Committee, leading eventually to the enactment of a new copyright law. The Government was clearly concerned over the use of copyright to seal the Singapore market from competition by parallel imports. The fact that the Berne Convention for the Protection of Literary and Artistic Works³⁵ (“Berne Convention”) did not deal with exhaustion of rights provided Singapore with the latitude it needed to develop her own national policy on parallel imports.³⁶ The High Court in *Teo Ai Nee*, whilst sensitive to the public interest policy arguments, reached its decision on ambiguous wording largely as a matter of construction and statutory interpretation. The decision was not inconsistent with the general policy of a liberal approach to parallel imports. Indeed, it bears repeating that in enacting the Copyright (Amendment) Act 1994, the Government recognised the problem and mischief that would be caused if it did not take account of the fact that articles might be made in a place where there was no copyright owner. Even though Singapore wanted to develop a liberal pro-parallel imports regime, a balanced approach that took account of the interests of copyright owners in Singapore as well as the interests of consumers, competition and the marketplace was necessary.

B. Fair dealing exceptions

17 The second set of statutory developments that will be used to illustrate the legislature’s concern to safeguard the interests of the public

35 Adopted 9 September 1886; last revised 24 July 1971.

36 Many other countries have also tussled long and hard over what national parallel import copyright controls (if any) are best suited to meet their national interests. For example, see the position in Australia: Sam Ricketson & Chris Cresswell, *The Law of Intellectual Property: Copyright, Designs & Confidential Information* (Thomson Lawbook Co, Vol 1, 1999) at para 9.660 ff. NB, even though the Agreement on Trade-Related Aspects of Intellectual Property Rights (“TRIPS Agreement”) does not deal with exhaustion of rights and parallel imports, the US–Singapore Free Trade Agreement does contain enhanced standards of intellectual property protection, beyond the requirements set out in the TRIPS Agreement, in respect of parallel imports and pharmaceutical products. These obligations required amendments to Singapore’s patent legislation to ensure compliance. See the Patents (Amendment) Act 2004 (Act 19 of 2004). For discussion in this regard, see Ng-Loy Wee Loon, “The IP Chapter in the US–Singapore Free Trade Agreement” (2004) 16 SAclJ 42 and Ng-Loy Wee Loon, *Law of Intellectual Property of Singapore* (Sweet & Maxwell, Rev Ed, 2009) at para 34.3 ff. See also George Wei, *Some Thoughts on Intellectual Property Rights in Singapore: A Monograph for Gerald Dworkin* (George Wei, 2009) at para 3.179 ff. In moving the Patents (Amendment) Bill 2004 (No 19/2004) (Second Reading), the then Senior Minister of State for Law, Ho Peng Kee commented that, under the amendment, “[e]ssentially, the patent owner has a ‘first mover advantage’ in the Singapore market, but once he is in, will have to compete with parallel importers”. *Singapore Parliamentary Debates, Official Report* (15 June 2004) vol 78 at col 118 (Ho Peng Kee, Senior Minister of State for Law).

at large within a framework of strong effective protection for copyright subject matter is the evolution of the statutory fair dealing defences.³⁷

(1) *Between 1986 and 1999*

18 The Copyright Act 1987, being based on the English/Australian copyright model, did not set out a general fair dealing or fair use defence when it was enacted. Instead, fair dealing for certain specific and limited purposes was covered by three fair dealing defences: private study or research; criticism or review; and reporting current events or news. Of especial interest is the way in which the study and research defence was narrowed and then gradually opened up during the period under review. Under the former Imperial Copyright Act 1911, the equivalent defence was framed as fair dealing for private study or research. English case law had interpreted the defence as applying only where the copyist was taking the material for his own (private) study purposes. Copying so as to facilitate a third party's study needs was not covered. A fair dealing for private study and research was narrower than a defence resting on fair dealing for educational purposes.³⁸ Following the legislative structure, the judicial approach stresses that the provision operates by way of a defence: it authorises what would otherwise be an infringement where the dealing is by way of private study or research. Copyright, after all, was a property right and exceptions to the exclusive right conferred were to be narrowly construed. The defence was not construed on the basis that it was some form of user's right. Instead, it was construed as a defence that only became relevant because a *prima facie* case of infringement of the copyright owner's exclusive rights had taken place.

19 Would there be a change of approach in 1986 as Singapore debated a new copyright law? Significantly, the original Copyright Bill 1986, in fact, omitted the adjective "private" as the defence was recast as a fair dealing for study or research.³⁹ Unsurprisingly, when the Bill was considered by the Select Committee, numerous representations were

37 For a more detailed legislative history of the fair dealing provisions between 1987 and 1999, see George Wei, *Law of Copyright in Singapore* (Singapore National Printers, 2nd Ed, 2000) at para 9.23 ff.

38 *University of London Press Ltd v University Tutorial Press Ltd* [1916] 2 Ch 601; *Sillitoe v McGraw Hill Book Co* [1983] FSR 545.

39 This was in line with a similar amendment made in Australia in 1980 – the Copyright Amendment Act 1980 (Act No 154 of 1980) – following the recommendations of the Franki Committee, that limitation of study to private study was an unnecessary restriction. See Sam Ricketson & Chris Creswell, *The Law of Intellectual Property: Copyright, Designs & Confidential Information* (Thomson Lawbook Co, Vol 2, 1999) at para 11.30.

submitted to the effect that the defence was now too broad.⁴⁰ The result was a significant recrafting and narrowing of the defence. The adjective “private” was reinserted as a qualification to the study requirement. The factors that the court was directed to take account of in determining the fairness of the dealing was amended so as to include the issue of whether the dealing is of a commercial nature or for non-profit educational purposes.⁴¹ Finally, a new definition of research was crafted so as to exclude industrial research or research carried out by corporate bodies (with the exception of those owned or controlled by the Government), companies or associations or bodies of persons carrying on any business. The scope of the defence as enacted in 1987 was considered at length in *Aztech Systems Pte Ltd v Creative Technology Ltd*⁴² (“Aztech”), with the Court of Appeal eventually holding that commercial research, as well as private study for commercial purposes, was excluded from the scope of the defence. Further, the Court of Appeal, following earlier English authorities, held that private study only applied to copying undertaken personally by the student; it was not intended to cover copying by an instructor for classroom use.

20 Elsewhere it has been argued that the problem of interpreting the fair dealing defences in Singapore is compounded by the fact that the statutory provisions are drawn from different sources and jurisdictions: the UK, Australia and the US as well as home-grown provisions such as the restrictive definition of research.⁴³ The UK and

40 See the representations of the British Copyright Council, the International Confederation of Societies of Authors and Composers, the UK Government, the US Government and the International Intellectual Property Alliance, which are set out in George Wei, *Law of Copyright in Singapore* (Singapore National Printers, 2nd Ed, 2000) at para 9.25.

41 See s 35(2) of the Copyright Act 1987 (Act 2 of 1987). The factors set out in the Copyright Act 1987 as originally enacted are:

- (a) the purpose and character of the dealing, including whether such dealing is of a commercial nature or is for non-profit educational purposes;
- (b) the nature of the work or adaptation;
- (c) the amount and substantiality of the part copied taken in relation to the whole work or adaptation; and
- (d) the effect of the dealing upon the potential market for, or value of, the work or adaptation.

Note that the factors set out in the Copyright Bill 1986 (No 8/1986) were slightly different: see George Wei, *Law of Copyright in Singapore* (Singapore National Printers, 2nd Ed, 2000) at para 9.24.

42 [1996] 3 SLR(R) 697 (CA); [1995] 3 SLR(R) 568 (HC). See George Wei, *Law of Copyright in Singapore* (Singapore National Printers, 2nd Ed, 2000) at para 9.31 *ff* for a detailed discussion and references to articles on the fair dealing defence in Singapore.

43 George Wei, *Law of Copyright in Singapore* (Singapore National Printers, 2nd Ed, 2000) at paras 9.21–9.59, and especially at paras 9.26 and 9.37. See also Ng-Loy Wee Loon, *Law of Intellectual Property of Singapore* (Sweet & Maxwell, Rev Ed, 2009) at para 11.3.3.

Australia do not have a general open-ended fair use defence. Instead, what is provided is a set of three fair dealing defences that is limited to specific purposes such as (private) study or research. Under this approach, not only was it necessary to show that the dealing was fair but also that the dealing was for a covered purpose. Fairness of the dealing in abstract, however beneficial to the public, is irrelevant if the dealing is not for one of the limited recognised statutory objectives. The US Copyright Act of 1976, on the other hand, takes a rather different approach: rather than set out a list of limited specific fair dealing situations, the US Copyright Act of 1976 sets out a single, unitary and open-ended defence of fair use.⁴⁴ Guiding the US courts is a set of non-exhaustive factors to be taken into account in determining whether any particular use is fair. These factors are: the purpose and character of the use, including whether such use is of a commercial nature or for non-profit educational purposes; the nature of the copyrighted work; the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and the effect of the use upon the potential market for, or value of, the copyrighted work.⁴⁵

21 The difference in approach might be rationalised on the basis of a difference in the philosophy behind the rationale for copyright. Whilst generalisations should be used with care, there is a view that English copyright law has tended to underscore the importance of protecting the effort and labour of authorship from those who would reap what they have not sown. Even though utilitarianism lies at the heart of English copyright law, the emphasis has long been on the proprietary nature of the right. In civil law countries with their strong natural rights and moral rights approach, the author was placed even more firmly at the centre of the copyright universe.⁴⁶ Is it any surprise that Article 9(2) of the Berne Convention requires exceptions to the exclusive reproduction right to be confined to certain special cases that do not conflict with a normal exploitation of the work and which does not unreasonably prejudice the legitimate interests of the author?⁴⁷

44 Copyrights 17 USC (US) § 107; Copyright Act of 1976.

45 See generally Pamela Samuelson, "Unbundling Fair Uses" *Fordham L Rev* (forthcoming); UC Berkeley Public Law Research Paper No 1323834. Available at <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1323834> (accessed 22 November 2012).

46 See Sam Ricketson & Chris Creswell, *The Law of Intellectual Property: Copyright, Designs & Confidential Information* (Thomson Lawbook Co, Vol 2, 1999) at para 11.5 where it is said that under such an approach "the author is viewed as the subject or focus of such rights which should therefore be framed in a manner as absolute as possible. Exceptions or qualifications to rights, in consequence, can only be justified in unusual or extraordinary circumstances".

47 See also Art 13 of the Agreement on Trade-Related Aspects of Intellectual Property Rights.

22 The US, on the other hand, has taken a different approach to copyright. Even though copyright is a property right given by Congress to the author, the author does not find himself at the centre of the copyright universe. The centre is occupied by the public interest and the goal of advancement of the science and arts for the public good. Under such an approach, it stands to reason that it may be easier to justify broader exceptions to the exclusive rights in a way so as to cater for fair use and public interest exceptions.⁴⁸ Which policy, then, informs copyright law in Singapore?

23 Whatever was the immediate objective in 1986, it is reasonably clear that the policy for some time has centred or perhaps refocused on copyright's role in advancing and protecting utilitarian and communitarian interests in Singapore. In 1986, a significant factor behind Singapore's decision to cut back on the scope of the fair dealing defence for study and research were the strong representations made by the UK and US Governments as well as the International Intellectual Property Alliance. In particular, the concern was to ensure that the defence did not apply to corporations and companies "studying for profit".

24 By 1998, there was a discernible change in the legislative thinking. The TRIPS Agreement had been signed and was being implemented by WTO members. Even though Article 13 repeated the three-step test for validating copyright exceptions set out in the Berne Convention, it is not without significance that Article 7 proclaims that the objective of IP was to "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". Using the lens of Article 7 to construe

48 See *Feist Publications Inc v Rural Telephone Service Co Inc* 113 L Ed 2d 358 (1991) on copyright and compilations of facts, *per* Justice O'Connor, that copyright protection for factual compilations was thin and that the primary objective of copyright is not to reward the labour of authors, but "to promote the Progress of Science and useful Arts" (at 349), citing the US Constitution Art I § 8 cl 8. Copyright's aversion to protecting facts was said to be a result "that is neither unfair nor unfortunate. It is the means by which copyright advances the progress of science and art" (at 349). For discussion of copyright protection for databases, see George Wei, "Telephone Directories and Databases: The Policy at the Helm of Copyright Law and a Tale of Two Cities" [2004] 3 IPQ 316. Recently, the public policy objective of copyright played a significant role in the deliberations of the US Supreme Court in *Golan v Holder* 566 US (2012) on the power of Congress to amend the copyright law so that foreign works in the public domain after US accession to the Berne Convention for the Protection of Literary and Artistic Works were brought into copyright. See also William M Landes & Richard A Posner, *The Economic Structure of Intellectual Property Law* (Belknap Press of Harvard University Press, 2003).

Article 13, it would be hard to resist the inference that some forms of commercial use might fall within the scope of an allowable copyright exception. The Copyright (Amendment) Act 1998⁴⁹ removed the restrictive definition of research. The Explanatory Statement to the Copyright (Amendment) Bill 1998⁵⁰ asserts that the deletion was intended to make the defence available to persons undertaking research, whether or not commercial, so long as the dealing was fair. Even though the bulk of the amendments made in 1998 to Singapore's copyright law concerned the expansion and strengthening of rights, in line with her obligations under the TRIPS Agreement, it is significant that Singapore also took the opportunity to loosen the restrictions on the fair dealing defence for private study or research.⁵¹ Less than a year later, further amendments were enacted by the Copyright (Amendment) Act 1999.⁵² Even though the 1999 amendments did not touch on the fair dealing defences, it is noted that some of the changes were by way of clarification and expansion of other defensive provisions. For example, the defence set out in section 39 of the Copyright Act⁵³ for the making of copies of a computer program that is essential to the use of a computer program, with a machine, was widened to include compilations in an electronic form.⁵⁴

(2) *Copyright (Amendment) Act 2004*⁵⁵

25 The next set of major amendments to Singapore's copyright law took place in 2004. Introducing the Copyright (Amendment) Bill 2004⁵⁶ at its Second Reading in 2004, S Jayakumar, the then Deputy Prime Minister and Minister for Law, referred to the rapid pace of technological advancement between 1999 and 2004, and the huge increase in the percentage of Singapore homes with Internet access and broadband access.⁵⁷ The Minister made clear that the amendments were the result of a two-year review of technological and international developments, and were finalised only after extensive consultations with

49 Act 6 of 1998.

50 No 4/1998.

51 Other new defences introduced in 1998 that covered copying: to assist the intellectually handicapped; for examination purposes; carried out by educational institutions by non-reprographic materials; or for a course of instruction in the making of films and soundtracks.

52 Act 38 of 1999.

53 Cap 63, 1999 Rev Ed.

54 For a discussion of the Copyright (Amendment) Act 1999 (Act 38 of 1999), see George Wei, *Law of Copyright in Singapore* (Singapore National Printers, 2nd Ed, 2000) at para 16.1A *ff*.

55 Act 52 of 2004.

56 No 48/2004.

57 *Singapore Parliamentary Debates, Official Report* (16 November 2004) vol 78 at col 1041 (S Jayakumar, Deputy Prime Minister and Minister for Law).

stakeholders. The amendments were not simply intended to implement Singapore's obligations under the USSFTA. They were to address the needs of both copyright owners and users in the new digital environment: to achieve a good balance between the interests of owners and users. In this context, major changes were made to the structure of the fair dealing defences in Singapore. It will be recalled that the Copyright Act 1987 contained three specific fair dealing defences: (a) private study or research; (b) criticism or review; and (c) reporting current events or news. Any other dealing, for any other purpose, was not covered. For example, a fair dealing by way of a parody was not covered unless the parody was by way of criticism or review, reporting a current event or such. A parody for the sake of humour or self-expression would unlikely be covered. Similarly, the taping of broadcast programmes for the purpose of time-shifting would very likely fall outside of a fair defence that was limited to private study or research. The fact that the viewer intended to erase the recording after viewing would not be relevant if the court did not treat the recording as a dealing done for the purposes of study or research. Would the court interpret "study" as including "enjoyment" or "entertainment" on its own?⁵⁸ The recording of a broadcast documentary on the history of the game of tennis for viewing by the recorder at a more convenient time might just conceivably (on the right facts) be regarded as a form of study. What then about the recording of a broadcast of a Grand Slam tennis final for viewing at a more convenient time? Is this to be treated as the devotion of time to gathering knowledge?

26 The Copyright (Amendment) Act 2004, whilst retaining the three specific fair dealing defences, made a number of important changes. The first was the deletion of the requirement to show that the study is "private" to qualify for the defence. Any form of studying was now covered, provided that the actual dealing was found to be fair. This opened the door to a judicial reconsideration of whether the defence was still limited to cases where the copyist needed the copied material for his own study needs. The second and far more important change is the new section 35(1) of the Copyright Act,⁵⁹ which provides that fair dealing for any purpose other than criticism or review or reporting current events is also covered by fair dealing. The third change was the introduction of a fifth factor to be taken into account in deciding whether the dealing for study, research or any other purpose is fair: the "possibility of obtaining the work or adaptation within a reasonable

58 *Aztech Systems Pte Ltd v Creative Technology Ltd* [1995] 3 SLR(R) 568 (HC) at [50] defined study as "the devotion of time and attention to acquiring information or knowledge".

59 Cap 63, 2006 Rev Ed.

time at an ordinary commercial price”.⁶⁰ At the Second Reading of the Copyright (Amendment) Bill 2004, the then Deputy Prime Minister and Minister for Law explained that the former system of three specific fair dealing defences, whilst providing certainty, was also restrictive in that it did not cater for other new uses that could fall under the concept of fair dealing. The Minister also explained that the amendments on fair dealing were not driven by the need to comply with the terms of the USSFTA. Instead, the amendment creating the open-ended fair dealing defence was perceived to be needed to “preserve the unimpeded exchange of information and ideas to create an environment which is conducive to the development of creative works”.⁶¹

27 With a new statutory framework on fair dealing in place, it is apparent that the legislative policy in Singapore behind copyright is centred on promoting utilitarian and communitarian interests. That the public interest requires strong, effective and updated protection of works is clear. Equally clear is the conclusion that the strength of the protection and the range of available exceptions are not determined solely by the economic self-interests of authors and copyright owners. Indeed, it is worth bearing in mind that copyright can also be justified on non-economic grounds, which include the author’s natural interest to safeguard and protect his personality interests. The core of the matter is surely what is perceived to be in the best interests of society as a whole in Singapore: authors, owners and users. Users and readers doubtless need to find their authors and publishers. Though, in turn, how many will question the proposition that authors and publishers will also need to find their users and readers?⁶²

60 Section 35(2)(e) of the Copyright Act (Cap 63, 2006 Rev Ed). This new factor appears to be borrowed from the Copyright Act 1968 (Act No 63 of 1968) (Cth) (Aust). Singapore now has the following fair dealing defences: (a) fair dealing for study or research or any other purpose other than criticism or review and reporting current events; (b) fair dealing for criticism or review; and (c) fair dealing for reporting a current event. Five guiding factors to assist in determining fair dealing under limb (a) are set out in s 35(2) of the Copyright Act (Cap 63, 2006 Rev Ed). There are no specific guiding factors on what a fair dealing is, under limb (b) or (c). For an overview of the current statutory provisions, see Ng-Loy Wee Loon, *Law of Intellectual Property of Singapore* (Sweet & Maxwell, Rev Ed, 2009) at para 11.3 ff and *Halsbury’s Laws of Singapore* (LexisNexis, Vol 13(3), 2007) at para 160.079 ff. See also *Report of the Select Committee on the Copyright Bill 1986 (No 8/1986)* (Parl 9 of 1986, 22 December 1986).

61 *Singapore Parliamentary Debates, Official Report* (16 November 2004) vol 78 at col 1041 (S Jayakumar, Deputy Prime Minister and Minister for Law). This was also said to be in line with developments in Australia and the US. Note that representations submitted in 1986 included some that touched on the desirability of an open-ended fair dealing defence. See, for example, the *Report of the Select Committee on the Copyright Bill 1986 (No 8/1986)* (Parl 9 of 1986, 22 December 1986) at A 168.

62 See Jane C Ginsburg, “The Author’s Place in the Future of Copyright” (2009) 153 *Proceedings of the American Philosophical Society* 147. Ginsburg started her (cont’d on the next page)

(3) *Interpretation of fair dealing and policy*

28 What remains is the question as to the approach Singapore courts will take when interpreting and applying the fair dealing, and other, defences. As a defence of general application, the statutory provision is couched in broad terms. Given the flexibility inherent in common law rules of statutory interpretation, there are essentially two main approaches. The first is to interpret the wording strictly on the basis that, as a defence, the onus lies on the defendant to establish that the provision applies so as to excuse what would otherwise be an unlawful interference with a property right. After all, the provisions on exceptions to copyright in the Berne Convention and the TRIPS Agreement stress the importance of confining exceptions to special cases that do not conflict with normal exploitation. The alternative approach, whilst recognising that the onus lies on the defendant, tends to stress the purposive role of defensive provisions: to achieve a proper balancing of rights and obligations so as to secure the interests of society as a whole. Nevertheless, the TRIPS Agreement also makes clear that the commercial interests of the copyright owner are not sacrosanct. The TRIPS Agreement recognises the underlying public policy objectives of national systems for protecting IP, including developmental and technological objectives, as well as the importance of copyright law in supporting social and economic welfare.⁶³ The need to achieve a proper balance between owners and users and to secure the interests of Singapore society as a whole has also been referred to in various Second Reading speeches and other Parliamentary materials.

29 Of particular interest is how the courts will apply the new open-ended “US-style” fair dealing defence. In the US, two principles above all flag the central position occupied by public benefit in the copyright

essay with the quotations, “In the beginning was the Reader” and “No man but a blockhead ever wrote except for money” (Samuel Johnson in *Bartlett’s Familiar Quotations* (John Bartlett & Justin Kaplan eds) (Little, Brown & Co, 17th Ed, 2002) at p 328, quoting James Boswell, *Life of Johnson* [5 April 1776]), to which Ginsburg added: “And the Reader calculated the worth of a free supply of blockhead-written works against the value of recogni[s]ing the Author’s economic self-interest. She concluded that the Author’s interest is also her interest, that the ‘public interest’ encompasses *both* that of authors and of readers. So she looked upon copyright and saw that it was good.” [emphasis in original] One might add (with apologies) to that: “And the Author in turn looked kindly on the Reader for he realised that without the Reader there would be far fewer Authors.” Or as Ginsburg put it (at 154): “Maybe every reader is not truly an author, but every author can be a publisher.” This brings to mind Web 2.0 today.

63 As to the interpretation of statutory provisions by reference to international treaties, see s 9A(3)(e) of the Interpretation Act (Cap 1, 2002 Rev Ed), which provides that reference may be made to international treaties and agreements that are referred to in the written law. Section 9A(3) also permits referral to Explanatory Notes in Bills and Second Reading speeches, where relevant.

universe. These are the form of expression and ideas–facts dichotomy and the embrace of a general concept of fair use. It is hard to imagine any clearer signal that copyright is seen in the US as a means to an end: the progress of a society in science and arts and the encouragement of learning. The fair use defence in the US, first developed by the US courts and now statutorily enshrined, has proven flexible and responsive enough to deal with a huge variety of uses, of which the common denominator is public benefit. These include use by way of parody, the doctrine of transformative use, format-shifting, copying of broadcast films for time-shifting purposes and much more.⁶⁴

30 Indeed, even before the amendments in 2004 there had been signs that the courts in Singapore were receptive to a flexible purpose-driven approach to the fair dealing defences. For example, in *Bee Cheng Hiang Hup Chong Foodstuff Pte Ltd v Fragrance Foodstuff Pte Ltd*,⁶⁵ the Court of Appeal, in dismissing a claim for summary judgment, took the view that the question of what amounted to a “current event” involved factual enquiries that could not be decided on a summary basis. Chao Hick Tin JA, whilst expressly not deciding the scope of the defence of fair dealing for a current event, did refer in passing to earlier English case law where the view expressed was that the defence should be interpreted liberally and that the defence was wide and of indefinite scope.⁶⁶

31 Returning to the new open-ended fair dealing defence in Singapore, what approach will the courts take in deciding whether any dealing is fair on the facts? This is especially important, given that there is no other limit placed on the defence: no requirement that the “fair dealing” is to be limited to dealings for a particular purpose. The legislative intent is clear: to provide a defence that is more flexible and responsive to the needs of users, especially given the rapid developments in information and communication technology. That said, the

64 See Pamela Samuelson, “Unbundling Fair Uses” *Fordham L Rev* (forthcoming); UC Berkeley Public Law Research Paper No 1323834. Available at <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1323834> (accessed 22 November 2012). See also Ng-Loy Wee Loon, *Law of Intellectual Property of Singapore* (Sweet & Maxwell, Rev Ed, 2009) at para 11.3.19 ff.

65 [2003] 1 SLR(R) 305.

66 Whilst older English cases on the fair dealing defence for private study and research took a cautious approach in determining the ambit of the permitted purpose, more recent English cases on fair dealing for reporting current events and also for criticism or review have tended towards a more open interpretation, given the important role of these defences in protecting the public interest. See, for example, *Hubbard v Vosper* [1972] 2 QB 84; *Distillers Co (Biochemicals) Ltd v Times Newspapers Ltd* [1975] 1 QB 613; *Time-Warner Entertainments Co LP v Channel Four Television Corp plc* [1994] EMLR 1; and especially *Pro Sieben Media AG v Carlton UK Television Ltd* [1999] 1 WLR 605.

development of clear guidelines as to how Singapore courts will approach fair dealing is important so as to temper flexibility and discretion with a reasonable degree of predictability. In the days when fair dealing was confined to specified objectives, the remark of Lord Denning MR in *Hubbard v Vosper* – that “it is impossible to define what is ‘fair dealing’”, and that when all is said and done, “it must be a matter of impression” – is readily understandable.⁶⁷ Lord Denning’s remarks are, if anything, even more pertinent today. Space constraints do not permit a proper discussion of this question.⁶⁸ Nevertheless, it may be helpful if a few points are raised in the paragraphs that follow, in connection with the use of policy as an aid to interpreting and applying broad, open defences.

32 The first point is that the open-ended fair dealing defence needs to be interpreted, bearing in mind the provisions of the Copyright Act as a whole. As a defence, its application is only relevant after a case of infringement has been made out: that the subject matter does enjoy copyright in Singapore; that the claimant has the right to sue; that infringement has occurred, such as through the making of a copy (reproduction) of a substantial part of the work; and that the defendant is causally responsible for the infringement. Copyright is a property right by deliberate legislative choice. Property rights are not readily created or recognised. Property rights are inherently “selfish” rights, in that they create deliberate zones of exclusivity. Property rights are inherently stronger than personal rights. They are seen as the best way for society to provide an incentive to authors, publishers and so on, to produce works for the encouragement of learning. That is why the Berne Convention and the TRIPS Agreement set out a three-step test to validate copyright exceptions. In Singapore, it is clear that the legislature regards the effective protection of copyright as an essential component of her 21st-century economic and industrial strategy. The benefit is not simply to fend off hostile trade retaliation from countries whose copyright material is routinely “pirated”. It is also because of the benefits of encouraging home-grown creativity: because copyright is seen as one of the best ways to encourage creativity from within and for Singapore to become a major producer and exporter of copyright subject matter,

67 [1972] 2 QB 84 at 94.

68 There are already a number of published pieces on fair dealing in Singapore, and it is likely that there will be many more to come. Published works include: Daniel Seng Kiat Boon, “Reviewing the Defence of Fair Dealing for Research and Private Study” [1996] Sing JLS 136; Burton Ong, “Fissures in the Façade of Fair Dealing: Users’ Rights in Works Protected by Copyright” [2004] Sing JLS 150; Warren B Chik, “Paying It Forward: The Case for a Specific Statutory Limitation on Exclusive Rights for User-Generated Content Under Copyright Law” (2011) 11 J Marshall Rev Intell Prop L 240; and Warren B Chik & Saw Cheng Lim, “Opportunity Lost? Revisiting *RecordTV v MediaCorp TV*” (2012) 24 SAclJ 16.

and thereby to become an important participant in the international knowledge economy.

33 The second point is that copyright as a creature of statute has been subject to intensive legislative scrutiny over the past 25 years. This includes regular consultation and discussion by, and within, Government ministries and departments, the Intellectual Property Office of Singapore, the IP Academy, IP interest groups and the general public. In promoting the development and use of new information and communication technologies, including Web 2.0, the legislature and law reform bodies, whilst keen to promote the empowering nature of the new technologies, were also much concerned to ensure that traditional copyright interests were not ignored or sacrificed. Whilst few or less people may today subscribe to the mantra “if it is worth copying then it is worth protecting”, it does not follow that the new mantra for the information age is “less protection is more”.

34 The third point is that the extensive public consultations (past and present) over copyright law reform in Singapore, the existence of law reform bodies actively concerned with copyright, the pace at which amending legislation has been presented and the regular statements made by Government ministers inside and outside Parliament on copyright law and IP, deeply underscores the complex tangle of social and economic concerns behind copyright law reform. It should follow that where there is a perceived lacuna in the law or where the existing statutory provisions are no longer satisfactory, the courts are likely to defer to legislative action.

35 The fourth point is that the courts, in developing the fair dealing defence, will need to take account of other related provisions in the Copyright Act. Consider, for example, the act of reproducing materials for classroom use in an educational institution by students undertaking a course of instruction. The Copyright Act⁶⁹ has detailed provision in section 52, which touches on the reproduction (making of multiple copies) of works for use by students undertaking a course of instruction. The provision is founded on the concept of a statutory licence and is subject to terms and restrictions including forms and procedures, as well as the duty to pay equitable remuneration. Copying by an educational institution under section 52 is not “free of charge” copying. Could an educational institution bypass section 52 by asserting that the dealing is for educational purposes and is therefore, on the facts, to be regarded as a fair dealing? If it could, section 52 would be redundant. In such cases it is suggested that the court, in deciding whether the dealing is fair, should have regard to other exceptions that

69 Cap 63, 2006 Rev Ed.

are relevant, especially where these other exceptions take the form of a statutory licence that is made subject to statutory terms.⁷⁰ In other cases it may be that the user will be able to assert overlapping defences such as fair dealing and the special decompilation and related defences in respect of computer programs set out in sections 39A and 39B of the Copyright Act,⁷¹ as it is expressly provided that the latter defences are without prejudice to the fair dealing defence.

36 The final point is whether the court can take general public policy into account in deciding whether any dealing is fair on the facts. It is suggested that the starting point should always be the specific fair dealing defences: study and research; reporting current events; and criticism or review. If these defences are applicable and succeed on the facts, there is no need to consider whether any other defence might be asserted. However, what if, for example, the fair dealing defence for criticism or review is applicable but the defence fails on the facts – can the user then switch and assert the “general purpose” fair dealing defence? If the defence failed because of a finding that the dealing was not fair or because there was a failure to provide a sufficient acknowledgment, the user will not be able to assert the general fair dealing defence. After all, section 35 of the Copyright Act⁷² expressly states that it only applies to dealings for purposes other than criticism, review or the reporting of current events. Yet, what if the purpose falls just outside criticism or a current event – can the user resort to the “general purpose” fair dealing defence? There seems to be no reason why not: the then Minister for Law at the Second Reading of the Copyright (Amendment) Bill 2004 did stress that the change was intended to provide a more flexible defence. In approaching whether the dealing is fair, it is suggested that the court should consider how close or proximate the purpose is to traditional established categories of fair dealing (study, research, criticism, review, reporting current events or news). Purposes that fall within the shadow of established categories are likely to be more sympathetically treated than purposes that are far removed. This is not to say that the general fair dealing defence cannot apply where the purpose is far removed; it is merely to assert that the proximity of the purpose to traditional categories is a factor in favour of the user. If the purpose falls outside of the purposes covered by the specific fair dealing defences, there should be consideration as to whether any other specific statutory defence applies.⁷³ If not, then this

70 See also Ng-Loy Wee Loon, *Law of Intellectual Property of Singapore* (Sweet & Maxwell, Rev Ed, 2009) at para 11.3.25.

71 Cap 63, 2006 Rev Ed.

72 Cap 63, 2006 Rev Ed.

73 If there are other specific statutory provisions, care is needed to ensure that those provisions do not, in any case, exclude resort to s 35 of the Copyright Act (Cap 63, 2006 Rev Ed). See Ng-Loy Wee Loon, *Law of Intellectual Property of Singapore* (cont'd on the next page)

will be the context in which the court approaches the application of the general fair dealing defence in section 35.

37 Consider, for example, a user who argues that his dealing is fair because Singapore will benefit from increased competition, in circumstances where the copyright owner has acquired a position of dominance in the marketplace. To what extent can the court take account of competition policy concerns in determining the question of fair dealing in Singapore? This question was, in fact, raised as early as 1995 in *Aztech*.⁷⁴ This case involved the infringement of copyright in a computer program (a sound card) by copying and storage in a computer's random access memory. The objective was to examine the functioning of the program for the purposes of developing a competing and independent interoperable sound card. Assuming that the dealing was for the purpose of private study or research, the question would be whether the dealing was fair.⁷⁵ At that time, section 35(2) of the Copyright Act⁷⁶ had listed four factors to which the court was to pay regard in making the determination of fair dealing: the purpose of the dealing, including whether it is of a commercial nature or for non-profit educational purposes, the nature of the work, the amount taken and the effect of the dealing on the potential market for, or value of, the work.

38 Aside from these four factors, it is of note that the court, in the section of its judgment entitled "Public Interest", discussed at length the relevance of general public interest considerations in assessing fair dealing. The public interest considerations, put simply, proceeded along the following lines. Creative Technology Ltd ("Creative"), at that time, had enjoyed a dominant position in the market for sound cards. That being so, the public would benefit from the competition that an alternative compatible sound card would provide in the marketplace.

(Sweet & Maxwell, Rev Ed, 2009) at para 11.3.26. Ng-Loy argued that "where section 35 is intended to supplement another provision, this will be unequivocally provided for. Therefore absent its express preservation, section 35 cannot colonise what is already covered by another provision. This would frustrate the efforts of the draftsmen in prescribing conditions for the operation of the limitation in that other provision". The difficulty, however, is in deciding what is meant by "covered by another provision" in cases of near misses.

74 *Aztech Systems Pte Ltd v Creative Technology Ltd* [1995] 3 SLR(R) 568 (decision of Lim Teong Qwee JC, at first instance). Note that the competition policy issues did not feature in the decision of the Court of Appeal (*Creative Technology Ltd v Aztech Systems Pte Ltd* ([1996] 3 SLR(R) 673). The reader should bear in mind that, at the time, there was no open-ended fair dealing defence in Singapore.

75 On appeal, the Court of Appeal held that the defence did not apply because the dealing was not by way of private study or research. At the time, industrial research was excluded from the defence. The Court of Appeal did not consider the question of the proper approach to fair dealing: *Creative Technology Ltd v Aztech Systems Pte Ltd* [1996] 3 SLR(R) 673.

76 Cap 63, 1988 Rev Ed.

The copying into RAM was for this limited purpose, and the competing sound card that was eventually produced was not infringing. Lim Teong Qwee JC, noting that the list of statutory factors was not meant to be exhaustive, explained:⁷⁷

This may open the market to more than just Creative and those licensed by it. It may also place more sound cards on the market and to that extent Creative's immediate profitability may be affected but there is no evidence that the market is so limited that it cannot support the potential increase in the supply. Competition is not necessarily a bad thing and there may be longer term benefits even for Creative. The very popular game application X-Wing may be run on more than just a Sound Blaster sound card. There may be other such applications as well. Software developers will be freed from the restrictions inherent in the want of compatibility in sound cards. With compatible sound cards in the market an application written to run with a Sound Blaster sound card may be run with others which are compatible. This is likely to be good for the industry. The end user will have a choice of sound cards. There is a benefit to the industry in the development and marketing of sound cards and of applications software. There is a benefit to the large and growing number of end users. I think that on balance the public interest is served by the copying complained of.

39 On this basis, the court found that the defence of fair dealing for private study or research had been made out. Examining the public interest was said to be "in consonance with the purpose of the Act".⁷⁸ This is a viewpoint, which, if confirmed by the Court of Appeal, carries significant implications for the approach to be taken by the Singapore courts to the defence. The point has been raised before that there is strong support for the view that copyright is seen as serving the purpose of encouraging learning and art for the benefit of society as a whole. In *IceTV Pty Ltd v Nine Network Australia Pty Ltd*,⁷⁹ French CJ, Crennan and Kiefel JJ (High Court of Australia) robustly supported the view that the theoretical underpinning of copyright was to strike the balance between competing interests and policy considerations. Indeed, this was said to be the policy rationale for the principle that copyright does not protect facts or information. The principle was said to be rooted in considerations of social utility and that copyright was to be seen as an exception to the law's general abhorrence of monopolies. A limited copyright "monopoly" over expression was tolerated, as it was the best way to encourage the creation of new works.

77 *Aztech Systems Pte Ltd v Creative Technology Ltd* [1995] 3 SLR(R) 568 at 590.

78 *Aztech Systems Pte Ltd v Creative Technology Ltd* [1995] 3 SLR(R) 568 at 590.

79 [2009] HCA 14.

40 On this basis, it would follow that the fair dealing defences are also rooted in the general public interest of ensuring that copyright protection, whilst strong, is also balanced in respect of competing public interests. If so, what is needed is the development of coherent principles to guide the assessment of fair dealing in respect of various aspects of the public interest such as education, the creation of new original works, transformative use and so on. Parliament has started the process by listing out non-exhaustive statutory factors to assist the courts in making the determination. Beyond this, it appears that Parliament has left it to the courts to apply the defence as a matter of impression and to develop on a case-by-case basis other factors or guides that may be relevant where particular types of counterbalancing public interests are engaged. However, it is suggested that in seeking the proper balance it is essential to bear in mind that the very question of balancing only arises because society accepts that copyright, whatever its faults and problems, is still the best way of incentivising the creation of new works for the betterment of all. Once copyright is established, it will be for the user to bring out cogent specific and clear public interest arguments that support the claim to fair dealing, bearing in mind that, as a property right, copyright is intended to give the owner zones of exclusivity. Exclusivity always comes at the price of inconvenience to others. The closer the purpose is to one of the specified fair dealing objectives, the easier it may be to satisfy the court (on the basis of close analogy) that the general defence of fair dealing might be available. On the other hand, the further away the use or dealing is from the recognised statutory fair dealing categories, the slower the courts should be to find fair dealing. This is especially so if it is clear that Parliament is cognisant of the problems faced by users (the public) in that area of use.

41 On the facts of *Aztech*, there are, with respect, serious doubts as to whether the competition arguments raised would have been relevant if the Court of Appeal had found that the purpose of the copying fell within private study. The public interest concerned competition and market freedom. Fair dealing requires the court to examine whether the dealing is fair – fair as between the copyright owner and whom? It must be the user and the class of users (public) that he might be said to typify. On the facts of *Aztech*, this would mean between Creative and other manufacturers or developers of sound cards. Beyond this, there is the general public interest in increased competition, lower prices and so forth.

42 At the time when *Aztech* was litigated, Singapore had not yet established the Competition Commission. It did not have a specific legislative framework to deal with issues of abuse of dominant position and restrictive trade practices as such. At the interface of competition law and IP were to be found a handful of statutory provisions dealing with specific areas of “abuse” of rights such as the tie-in and tie-up

clauses in patent licence agreements,⁸⁰ compulsory licensing provisions in patent legislation⁸¹ and statutory or compulsory licensing provisions in the Copyright Act, in connection with certain types of licences largely in the area of public performance and broadcasting.⁸² Singapore did, of course, have a number of torts loosely grouped under the rubric of “economic torts”. Still, like so many other common law countries, Singapore did not and does not have a unitary action directly concerned with unfair competition. The tort of passing off might be able to expand incrementally as new forms of unfair trading emerged, which impacted a business’s investment in its goodwill. The development of a new tort or cause of action based on intentional or reckless infliction of pure economic loss would raise far trickier issues of economic policy and would require careful consideration by law reform bodies, business associations, consumer groups and the public at large. In these circumstances, even though the general comment by Lim Teong Qwee JC was that the public would enjoy the benefits of increased choice in the market for sound cards, it is hard to see how this could have much significance in deciding fair dealing. Copyright is a property right, and by its very nature, is intended by Parliament to confer market control.⁸³ Where Parliament is concerned over prices in the market, it

80 Sections 51 and 52 of the Patents Act 1994 (Act 21 of 1994); currently Cap 221, 2005 Rev Ed.

81 See generally Part XI of the Patents Act 1994 (Act 21 of 1994). Note that many of the original provisions on compulsory licences have been amended so as to comply with Singapore’s obligations under the Agreement on Trade-Related Intellectual Property Rights and the US–Singapore Free Trade Agreement.

82 See generally Part VII of the Copyright Act (Cap 63, 1988 Rev Ed), which set up the Singapore Copyright Tribunal. Note that the provisions have been amended since 1987. Indeed, it bears repeating that the Statute of Anne 1710 (c 19) (UK), which has just celebrated its tricentennial anniversary, contained provisions aimed at control over the setting of unreasonable prices for books. It is evident that the public interest in having access to reasonably priced books was recognised right at the start of “modern” English copyright law.

83 See *Canon Kabushiki Kaisha v Green Cartridge Co (Hong Kong) Ltd* [1997] 3 WLR 13 and the criticism by Lord Hoffmann (Privy Council) (at 20) of the House of Lords decision, where the ideal of an unrestricted market was employed to craft a cutback on copyright (perceived to have adversely affected the supply of spare parts for motor cars) in *British Leyland Motor Corp Ltd v Armstrong Patents Co Ltd* (“*British Leyland*”) [1986] AC 577: “It is of course a strong thing (not to say constitutionally questionable) for a judicially declared head of public policy to be treated as overriding or qualifying an express statutory right.” In any case, Lord Hoffmann observed that the question as to whether control by a manufacturer of the spare parts market is against the public interest was unclear, as there were different views that could be taken over the effect of the market power on spares. Lord Hoffmann concluded with the statement: “It is not necessary for the purposes of this appeal to form any view on whether the existence of copyright is capable of giving the plaintiff such economic power in the aftermarket as to be anticompetitive and contrary to the public interest. It is sufficient to recognise that the question is a complicated one which cannot be solved by broad generalisation. The courts are ill-equipped to pronounce upon such matters, which often involve
(cont’d on the next page)

generally sets out specific statutory provisions (often statutory licences) such as those over public performance and broadcast licences and those touching on certain types of copying by educational institutions for classroom use.⁸⁴

43 Since the *Aztech* decision in 1995, the competition law landscape in Singapore has changed dramatically. Singapore now has a Competition Commission.⁸⁵ The Guidelines issued by the Competition Commission well demonstrate the complex relationship between IP and competition policies. The Guidelines state:⁸⁶

Both intellectual property ('IP') and competition laws share the same basic objective of promoting economic efficiency and innovation. IP law does this through the provision of incentives for innovation and its dissemination and commercialisation, by establishing enforceable property rights for the creators of new and improved products and processes. Competition law does this by helping to promote competitive markets, thereby spurring firms to be more efficient and innovative.

The Guidelines accept that "the possession of an IPR does not necessarily create market power in itself"⁸⁷ and that "although the existence of an IPR may impede entry into the market in the short term,

questions of economic policy and are generally to be left to specialised bodies such as the Monopolies and Mergers Commission". For a detailed discussion of *British Leyland* and its possible relevance in Singapore, see George Wei, *Industrial Design Law in Singapore* (Academy Publishing, 2012) at para 3.121 ff.

84 In any case, even if the public interest in competition is a factor that might carry some weight, this must be on the basis of evidence that the assertion of copyright in the actual case is harmful in some specific sense of being anti-competitive. See Gerald Dworkin, "Judicial Control of Copyright on Public Policy Grounds" in *Intellectual Property and Information Law: Essays in Honour of Herman Cohen Jehoram* (Jan Kabel & Gerard Mon eds) (Kluwer Law International, 1998) at p 146: "[I]f a court has statutory jurisdiction to apply competition law to copyright, as is becoming increasingly common, this is both justifiable and appropriate. However, a more direct use of public policy whether by using an abuse of rights, misuse of copyright or similar concept is far more questionable."

85 See generally George 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* (Yeo Tiong Min, Hans Tjio & Tang Hang Wu eds) (Academy Publishing, 2011) at p 502. See also Burton Ong, "The Interface between Intellectual Property and Competition Policy in Singapore" in *The Interface between Intellectual Property and Competition Policy* (Steven D Anderman ed) (Cambridge University Press, 2007) at ch 7; and *Competition Law and Policy in Singapore* (Cavinder Bull SC & Lim Chong Kin gen eds) (Academy Publishing, 2009).

86 Competition Commission Singapore, *CCS Guidelines on the Treatment of Intellectual Property Rights* (June 2007) para 2.1.

87 Competition Commission Singapore, *CCS Guidelines on the Treatment of Intellectual Property Rights* (June 2007) para 2.5.

any other undertaking may in the long term be able to enter the market with its own innovation”.⁸⁸ It is perhaps worth stressing that competition law is not against market dominance that might come from success. It is the abuse of the dominance that is objectionable: abuse is not a matter that will be lightly found. Given that Singapore now has the Competition Commission with jurisdiction over IP, it is even more questionable as to when, if ever, competition policy arguments can be a factor in deciding fair dealing.⁸⁹ After all, it is noted that when Parliament intends the courts to take account of anti-competitive conduct, it usually makes this clear in statutory provisions such as those dealing with compulsory licences under the Patents Act and the Layout-Designs of Integrated Circuits Act.⁹⁰

44 In *Global Yellow Pages Ltd v Promedia Directories Pte Ltd*,⁹¹ interesting questions on copyright and compilations were raised in the context of a case alleging infringement of copyright in telephone subscriber information and related works. The defendant asserted that in order to produce their competing directory, they had no alternative but to extract information from the plaintiff’s directories because

88 Competition Commission Singapore, *CCS Guidelines on the Treatment of Intellectual Property Rights* (June 2007) para 4.3.

89 Note that in the case of patent legislation and control of tie-in and tie-up clauses, the Patents Act (Cap 221, 2005 Rev Ed) was amended in 2008 – with the Patents (Amendment) Act 2008 (Act 18 of 2008) – so as to provide that the provisions in ss 51 and 52 only apply to contracts entered into between 23 February 1995 and 1 December 2008, the commencement date of the Patents (Amendment) Act 2008. This means that issues over tie-in and tie-up terms in patent licences entered into after 1 December 2008 will no longer be dealt with under the Patents Act. Does this signal a general legislative intent to move competition-related intellectual property (“IP”) issues into the domain of the Competition Act (Cap 50B, 2006 Rev Ed) and the Competition Commission? It is hard to read too much into this because there are other provisions in Singapore’s IP statutes that expressly refer to anti-competitive practices and the grant of licences. See, for example, s 55 of the Patents Act (Cap 221, 2005 Rev Ed) and s 27(1) of the Layout-Designs of Integrated Circuits Act (Cap 159A, 2000 Rev Ed). See also George 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* (Yeo Tiong Min, Hans Tjio & Tang Hang Wu eds) (Academy Publishing, 2011) at p 504 where it is noted that there is no guidance in the Patents Act or Layout-Designs of Integrated Circuits Act as to what “anti-competitive” practice means: “Have the courts been ‘invited’ by Parliament to determine the scope of anti-competitive conduct? If so, the horse named ‘public policy’ will have to be ridden.” At least, this may be so where Parliament has specifically made anti-competitive practice a ground for the grant of a compulsory licence.

90 Cap 159A, 2000 Rev Ed.

91 [2010] SGHC 97. This case will not be discussed in detail as it has been reviewed before by the author; see George 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* (Yeo Tiong Min, Hans Tjio & Tang Hang Wu eds) (Academy Publishing, 2011) at p 443 ff and p 502 ff.

exclusive access agreements prevented them from obtaining the data via the original sources. The assistant registrar, referring to the *Aztech* decision, recognised the breadth of the inquiry, given that the list of factors was not exhaustive and because the inquiry involved a balancing of public interests. The defendant was allowed to amend his defence to plead fair dealing because he was not able to acquire the information from the service providers – not even for valuable consideration.⁹² Without prejudging the facts and arguments as they may appear at trial, several significant questions of law may arise for consideration. These include the following. First, assuming that there is a finding on the facts that the public will benefit from the defendant’s competition, does this mean that the court must find in favour of fair dealing?⁹³ Second, what is the relevance of decisions of the Competition Commission?

45 Leaving aside remedies under the Competition Act,⁹⁴ can the defendant seek to justify copyright infringement on the basis that the infringing dealing was necessary to avoid the anti-competitive conduct, even though at the time there was no finding of anti-competitive conduct by the Competition Commission? Can the defendant pray in aid copyright infringement as a form of self-help measure by means of the fair dealing defence?⁹⁵

46 The history behind the development of the fair dealing defences in Singapore illustrates how the legislature and courts have been sensitive to the need to provide strong but balanced protection that takes account of competing facets of the public interest in Singapore. There is hardly doubt that with the introduction of the new open-ended fair dealing defence that Singapore’s legislature has turned a page in the history of copyright in Singapore. The new chapter that is to be written by the courts concerns the scope of the new defence and the principles that are to be developed to guide and inform the exercise of judicial discretion. Some may be upset by the uncertainty that the new defence

92 At the date of writing, the case had not yet been reported as having gone to trial.

93 This seems unlikely. The court must weigh fairness as between the parties and consider the relative strengths of the benefits as compared to the disadvantages.

94 Cap 50B, 2006 Rev Ed.

95 At one time, it was thought in some common law jurisdictions that there may be a non-statutory defence to copyright infringement simply based on the public interest. It is unlikely that this is still the case in Singapore under the Copyright Act (Cap 63, 2006 Rev Ed). Copyright is a creature of statute and there are extensive statutory provisions on allowable exceptions and defences. The fair dealing defences are founded on public interest. With Singapore adopting the open-ended fair dealing concept, there is no room, no need and no place for a general non-statutory public interest defence. See generally Saw Cheng Lim, “Is There a Defence of Public Interest in the Law of Copyright in Singapore?” (2003) 2 Sing JLS 519. See also Gerald Dworkin, “Judicial Control of Copyright on Public Policy Grounds” in *Intellectual Property and Information Law: Essays in Honour of Herman Cohen Jehoram* (Jan Kabel & Gerard Mom eds) (Kluwer Law International, 1998).

brings to the copyright world; others will not, and may plead that it is always better to be roughly right than to be precisely wrong.⁹⁶

47 That the law (as enacted and interpreted) must take account of the benefits of certainty, as well as the advantages of flexibility, to achieve a balanced approach is something all can agree on. The balance may vary from nation to nation, depending as it does on a huge range of socioeconomic factors. Hopefully, the three-step Berne Convention test, now underwritten by the TRIPS Agreement, will prove malleable enough to allow nations to find their balance point.⁹⁷ Countries adopting, as a matter of policy, a strong rights-based approach that underscores the property nature of the rights and the need to protect

96 Indeed, the benefits of the more flexible US approach have not gone unnoticed in the UK. See, for example, Andrew Gowers, *Gowers Review of Intellectual Property* (“Gowers Review”) (The Stationery Office, 2006) at para 4.69: “[T]he broader approach has opened up a commercial space for others to create value.” The Gowers Review stated that fair uses of copyright “can create economic value without damaging the interests of copyright owners”. The 2006 review recommended a new private copying defence for format-shifting, a defence for private copying for all forms of content for research as well a defence for caricature, parody and pastiche. Significantly, the Gowers Review accepted that the doctrine of transformative use can be accommodated within the Berne Convention for the Protection of Literary and Artistic Works’ three-step test, and recommended that Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society (OJ L 167, 22 June 2001, pp 10–19) be amended to allow for transformative use within the three-step test. See also Ian Hargreaves, *Digital Opportunity: A Review of Intellectual Property and Growth* (“Hargreaves Report”) (May 2011) and the view that copyright exceptions “are designed to allow uses of content that offer benefits deemed either more important than those delivered by the core aims of copyright and/or benefits that do not significantly detract from those aims” (at para 5.5). The Hargreaves Report looked at the closed-list approach of the European Union (“EU”) and compared this with the more flexible approach in the US. The Hargreaves Report, whilst sympathetic to the US approach, noted the difficulties trying to transpose US-style fair use into EU law. The Hargreaves Report also noted that most of the responses to the Gowers Review were against fair use because it would cause too much uncertainty and result in more litigation. The former also highlighted that whilst fair use offers a zone for trial and error and bolder risk taking – thereby creating a positive environment in the US for innovation – “the economic benefits imputed to the availability of fair use in the US have sometimes been over stated” (at para 5.16). The Hargreaves Report, whilst not recommending a fair use defence for the UK, did recommend that the Government examine the need for specific defences covering the areas where economic growth is most likely to benefit from fair use. The UK Government has given a favourable response and is examining proposals to open up the UK’s copyright exceptions.

97 See generally the discussion set out in Hugh Hansen ed, *Intellectual Property Law and Policy* (Hart Publishing, Vol 11, 2010) at ch IV. This text sets out the proceedings of the Sixteenth Annual Fordham Intellectual Property Law and Policy Conference (Fordham University School of Law) (27–28 March 2008). Chapter IV is on copyright exceptions, limitations and the Berne Convention for the Protection of Literary and Artistic Works.

the effort and labour of authorship, may well place greater stress on the need for certainty and a more cautious case-by-case approach towards new statutory exceptions. Other countries that see copyright as more of a tool to achieve a utilitarian goal of benefit to the community may prefer a balance point that gives the judiciary greater flexibility in adapting a general defence to meet new opportunities and technologies. Indeed, it is not surprising that countries like the US also tend to place greater stress on limiting copyright protection to original expression and in requiring a “brighter” line approach towards application of the expression–fact dichotomy. European countries, on the other hand, tend towards natural law theories and view copyright works not simply as economic works, but as works that are part of the personality of the author, thereby opening the way not just to strong protection of the economic interests, but also protection for key (inalienable) moral rights, which include the moral right to object to derogatory treatment of a work. One wonders how many cases of successfully pleaded transformative use from the US will survive in a system that places stress on the moral rights of the author. It is fair comment that Singapore, whilst a member of the Berne Convention, does not presently subscribe to a strong moral rights approach. It may have less difficulty accommodating the US-style fair use defence than European countries.⁹⁸ The question as to whether Singapore should place greater emphasis on moral rights is, of course, a major issue requiring discussion in its own right.⁹⁹

98 For Australia, see Sam Ricketson & Chris Creswell, *The Law of Intellectual Property: Copyright, Designs & Confidential Information* (Thomson Lawbook Co, vol 2, 1999) at ch 11. Australia, after considering various proposals to reform the law on copyright exceptions, chose not to follow the US approach. Instead, in 2006, a number of specific amendments were made to deal with areas thought to be especially problematic: time-shift recordings, format-shift recordings, fair dealing for the purpose of parody or satire and certain types of non-commercial uses of copyright material for libraries, educational institutions and persons with visual or hearing disabilities. Singapore, on the other hand, has chosen to proceed down the path of providing a general fair dealing defence (alongside specific defences) that will enable the courts to adapt fair dealing to meet new cases as these develop. What is important is that clear principles evolve to guide the application of the judicial discretion.

99 See generally George Wei, *Law of Copyright in Singapore* (Singapore National Printers, 2nd Ed, 2000) at ch 11; and Burton Ong, “Why Moral Rights Matter: Recognizing the Intrinsic Value of Integrity Rights” (2003) 26 *Colum J.L. & Arts* 297. See also William R Cornish, *Intellectual Property: Omnipresent, Distracting, Irrelevant?* (Clarendon Law Lectures) (Oxford University Press, 2004) at p 49 where it is said that it is with copyright that the strains between simple protection of investment and recognition of the moral claims of individuals are of pervasive significance in intellectual property law.

III. Singapore's copyright case law from 1987 to 2011 – General themes and concerns

48 Between 1987 and 2012, nearly 100 cases on copyright (including some on interlocutory remedies) have been reported in the Singapore Law Reports or Lawnet. Leaving aside decisions on parallel imports and fair dealing defences touched on earlier in connection with legislative developments, this section will try to illustrate how policy considerations have influenced judicial views on copyright. Policy considerations can, of course, arise in different ways and can mean different things. These include: judicial assessment of legislative policy as an aid to the interpretation of ambiguous statutory provisions; use of policy to interpret and develop legal principles in areas not governed by statute, including areas left open by Parliament for judicial elucidation; reference to legislative policy as an aid in setting sentencing tariffs; and use of policy to craft new principles intended to overcome perceived shortcomings in the legislative framework. Use of policy in the last category is by far the most controversial as amounting to judicial legislation, as in the heavily criticised case of *British Leyland Motor Corp Ltd v Armstrong Patents Co Ltd*.¹⁰⁰

49 Gerald Dworkin has written that “laws, to a greater or lesser extent, are instruments of policy. Copyright legislation is no exception. Where there are significant changes of policy, legislative amendments may be necessary. Some copyright laws are precise, allowing little discretion for judges to do more than apply them; other copyright legislation leaves some scope for judicial discretion, indeed creativity, to implement and develop the law in accordance with perceived policy considerations”.¹⁰¹ Take, for example, the copyright requirement that a work must be “original”. The Copyright Act does not define “originality”, yet originality is there as a central controlling element that must be satisfied before protection can be claimed. Originality first became a statutory requirement in the UK when it was set out in the Imperial Copyright Act 1911. Before 1911, originality was tied into the concept of authorship. What did “originality” mean, and what was it about the work that had to be “original” – “originality” as in novelty, uniqueness, origination or ingenuity, and “work” as in expression, contents, facts or all of the above? Then again, did it follow that the test for originality was the same for all types of works? Could or should a distinction be drawn

100 [1986] AC 577.

101 Gerald Dworkin, “Judicial Control of Copyright on Public Policy Grounds” in *Intellectual Property and Information Law: Essays in Honour of Herman Cohen Jehoram* (Jan Kabel & Gerard Mom eds) (Kluwer Law International, 1998). See also Lord Hoffmann, “The Role of Policy in Intellectual Property Litigation” at the Sixth Annual Conference on International Intellectual Property Law and Policy (Fordham University School of Law) (16–17 April 1998).

between works that are a spontaneous creation of an author's mind and works that are based on, or derived from, existing works? Did originality mean the same thing for fictional works as well as factual works such as a telephone directory or some other database? In what sense could a telephone directory be original?

50 It has taken many cases over many years to refine and develop the legal meaning of "originality" and "works".¹⁰² Sometimes this was with the aid of statutory clarification – such as when the Copyright Act 1987 chose to define literary work as including a computer program, thereby sparing litigants and the courts from the huge controversy that had raged elsewhere in the late 1970s and early 1980s – as to whether these were a form of literary work protectable by copyright.¹⁰³ In many other areas, the matter was left to the courts to determine in the time-honoured case-by-case method of incremental development. Incremental and evolutionary the developments may have been, but would it have been possible to develop the law at all without casting a judicial eye at the perceived policy behind copyright and the provision

102 The writings in this area are voluminous. See, for example, Sam Ricketson, "Common Law Approaches to the Requirement of Originality" in *The Common Law of Intellectual Property: Essays in Honour of Professor David Vaver* (Catherine W Ng, Lionel Bently & Giuseppina D'Agostino eds) (Hart Publishing, 2010); Samantha Christie, "Expressive Form over Function? The Role of Intent in Copyright Protection: *IceTV* and Recent Cases" (2010) 21 AIPJ 186; Cameron Andrews, "Copyright in Computer-Generated Work in Australia post-*IceTV*: Time for the Commonwealth to Act" (2011) 22 AIPJ 29; Jani McCutcheon, "When Sweat Turns to Ice: The Originality Threshold for Compilations Following *IceTV* and *Phone Directories*" (2011) 22 AIPJ 87; Burton Ong, "Originality from Copying: Fitting Recreative Works into the Copyright Universe" [2010] IPQ 165 (UK). For other local writings, see George Wei, *Law of Copyright in Singapore* (Singapore National Printers, 2nd Ed, 2000) at chs 2 and 16; and Ng-Loy Wee Loon, *Law of Intellectual Property of Singapore* (Sweet & Maxwell, Rev Ed, 2009) at ch 6. For a discussion of originality and databases, see Lionel Bently & Brad Sherman, *Intellectual Property Law* (Oxford University Press, 3rd Ed, 2008) at p 93 ff; Justine Pila, "Compilation Copyright: A Matter Calling for a Certain Sobriety" (2008) 19 AIPJ 231; Peter Knight, "Copyright in Computer Programs and Databases: Why Is It so Hard to Understand?" (2010) 21 AIPJ 118; George Wei, "Telephone Directories: The Policy at the Helm of Copyright Law and a Tale of Two Cities" [2004] IPQ 316; and Ng-Loy Wee Loon, "Copyright Protection for Traditional Compilations of Facts and Computerised Databases – Is Sweat Copyrightable?" [1995] Sing JLS 96. See also Burton Ong, "Copyright and Cartography: Mapping the Boundaries of Infringement Liability" (2009) 31 EIPR 17 (UK); George Wei, "Certainty of Subject-Matter in the Development of Intellectual Property: Please Sir, I Want Some More" [2009] Sing JLS 474; and George Wei, "Of Copying, Reproduction, Substantiality and Copyright: A View from Singapore" [2011] EIPR 384.

103 See also the new definition of compilation and literary work introduced by the Copyright (Amendment) Act 1999 (Act 38 of 1999). This clarified that what was important about a compilation for copyright purposes was the selection or arrangement of the contents as opposed to the contents *per se*.

in question? How else does the court determine whether originality is the same for spontaneous works and works that are partly copied or based on or adapted from existing works?¹⁰⁴ How else can the court decide whether there is copyright in a report of speech?¹⁰⁵ In Singapore, section 9A(1) of the Interpretation Act¹⁰⁶ provides: “In the interpretation of a provision of a written law, an interpretation that would promote the purpose or object underlying the written law (whether that purpose or object is expressly stated in the written law or not) shall be preferred to an interpretation that would not promote that purpose or object.” A purposive interpretation is called for, and expanded upon, in section 9A.¹⁰⁷ Material not forming part of the written law can be referred to for a variety of interpretative purposes. These include: to confirm the ordinary meaning; to ascertain the meaning when the provision is obscure or ambiguous; and to ascertain the meaning when the ordinary meaning (taking account of the purpose or objective of the written law) leads to a result that is manifestly absurd or unreasonable.¹⁰⁸

104 For example, is a retouched photograph itself an original work? Is a restored piece of artwork original? See generally *Interlego AG v Tyco Industries Inc* [1988] 3 All ER 949 and Burton Ong, “Originality from Copying: Fitting Recreative Works into the Copyright Universe” [2010] IPQ 165.

105 *Walter v Lane* [1900] AC 329. George Wei, *Law of Copyright in Singapore* (Singapore National Printers, 2nd Ed, 2000) at ch 2, para 2.10 ff.

106 Cap 1, 2002 Rev Ed.

107 Interpretation Act (Cap 1, 2002 Rev Ed). There have been a number of recent English cases that closely examined the history and perceived policy behind statutory provisions as an aid to interpretation. For example, see *Lucasfilm Ltd v Ainsworth* (“*Lucasfilm*”) [2011] UKSC 39 (SC); [2009] EWCA Civ 1328 (CA); [2008] EWHC 1878 (Ch). The case concerned the meaning of sculpture and work of artistic craftsmanship under the Copyright, Designs and Patents Act 1988 (c 48) (UK). Even though the history was said to be “quite complicated” (at [14]), the Supreme Court felt it was possible to recognise “an emerging legislative purpose of protecting three-dimensional objects in a graduated way quite unlike the protection afforded by the indiscriminate protection of literary copyright” (at [48]). Full copyright protection was to be reserved for works of art. The Supreme Court’s conclusion was that there were good policy reasons for the differences in the terms of protection, and that the court should not encourage the boundaries of full copyright to creep outwards. For a detailed discussion of *Lucasfilm* and its possible relevance to Singapore, see George Wei, *Industrial Design Law in Singapore* (Academy Publishing, 2012) at para 3.17 ff.

108 See also s 9A(4) of the Interpretation Act (Cap 1, 2002 Rev Ed):

In determining whether consideration should be given to any material ... or in determining the weight to be given to any such material, regard shall be had, in addition to any other relevant matters, to —

- (a) the desirability of persons being able to rely on the ordinary meaning conveyed by the text of the provision taking into account its context in the written law and the purpose or object underlying the written law; and
- (b) the need to avoid prolonging legal or other proceedings without compensating advantage.

A. A Singapore example of policy and interpretation of intellectual property statutes to avoid absurdity – Ang Lay See v Solite Impex Pte Ltd¹⁰⁹

51 This case, *Ang Lay See v Solite Impex Pte Ltd* (“*Ang Lay See*”), concerned an action for infringement of a design registered for corner pieces and frames. The design had been registered in the UK under the Registered Designs Act 1949.¹¹⁰ Under section 4 of the United Kingdom Designs (Protection) Act¹¹¹ (now repealed), the owner of a design registered in the UK acquired the same rights and privileges in Singapore. A defendant could, however, ask the High Court to declare that the rights were not acquired in Singapore, upon any of the grounds on which the registration might be cancelled in the UK. One such ground was the lack of novelty. The Court of Appeal held that the prior publication of the corner pieces in Singapore was sufficient ground for the High Court to declare that exclusive privileges and rights in the registered design had not been acquired in Singapore. At that time, the UK Registered Designs Act 1949 limited the field of search to publications in the UK. A publication in Singapore would not prejudice novelty unless the design had also been published in the UK. The judge at first instance accordingly held that prior use in Singapore was not a ground upon which the registration might be cancelled in the UK.¹¹² In so holding, the judge felt constrained to reach this “unsatisfactory” conclusion since the words of the statutory provision were clear and unambiguous.

52 In allowing the appeal, Yong Pung How CJ preferred the view that the provisions were ambiguous from a Singapore perspective. The ambiguity concerned the point that the Singapore provision did not make clear whether the Singapore court should examine the grounds of cancellation from the perspective of a UK court or a Singapore court. The Court of Appeal, after reviewing the Parliamentary debates and the Explanatory Statement set out in the Singapore Copyright Act,¹¹³ was unable to discern whether Parliament intended to prevent commonplace Singapore designs from being protected. The debates showed that the immediate purpose was simply to accord automatic protection in Singapore of designs registered in the UK, without any need for re-registration. Nevertheless, the Court of Appeal agreed with the appellant that the judge’s interpretation would result in the bizarre consequence of a commonplace Singapore design being protected in Singapore because it happened to be novel in the UK. Not only was this

109 [1998] 1 SLR(R) 421 (CA).

110 c 88 (UK).

111 Cap 339, 1985 Rev Ed.

112 *Solite Impex Pte Ltd v Ang Lay See* [1997] SGHC 135 (HC).

113 Cap 63, 1988 Rev Ed.

bizarre, it was also said to be inconsistent with the treatment of other branches of IP law. Yong CJ's conclusion was that, "[i]n the circumstances, it would be extraordinary if run-of-the-mill local designs could secure a 25-year monopoly in Singapore through registration in the UK. In such a case, the monopoly would no longer be a just reward for inventiveness over and above that which is considered usual in the trade" and that "[s]uch a result would strike at the core object of design legislation and introduce undesirable counter-mischief".¹¹⁴

53 Leaving aside the specific question of interpretation raised in *Ang Lay See*, the general point is that the court regarded registered design protection as serving a utilitarian goal of encouraging innovation and nurturing inventiveness. Novelty was rightly regarded as central to registration, and (following the remarks in an earlier English case)¹¹⁵ it was said that it was the duty of a court of law to protect the honest tradesman. It was only if the article was new that protection should be awarded; otherwise, a registered design that was not new might be used *in terrorem* against other traders. Even though inventiveness is not, in fact, a requirement for registration under registered designs legislation, the basic point made is important: the courts in Singapore do not generally regard IPR as being awarded because of some strong natural rights theory; instead, the emphasis is very much on utilitarian benefit to the community at large.

B. Some other Singapore copyright case examples where policy has loomed large

54 In *RecordTV Pte Ltd v MediaCorp TV Singapore Pte Ltd*¹¹⁶ ("*RecordTV*"), the courts examined who was/were responsible for infringements alleged to have been committed in connection with an Internet-based service that facilitated public copying of free-to-air broadcasts, for home viewing by way of time-shifting. Given the highly interactive nature of the system, the task of determining who in law is initiating or responsible for storage (copying) and communication of copyright subject matter on the Internet was no easy task. In *RecordTV*, any member of the public who had a valid television licence in Singapore could sign up for the service of RecordTV Pte Ltd ("*RecordTV*"). As a registered user he could request the copying of programmes broadcast on certain free-to-air channels. The actual recording and storage equipment was located at RecordTV's premises. The registered user could access the stored material for 15 days. The system evolved through a number of versions, each of which was highly

114 *Ang Lay See v Solite Impex Pte Ltd* [1998] 1 SLR(R) 421 (CA) at [31] and [34].

115 *Gramophone Co Ltd v Magazine Holder Co* (1911) 28 RPC 221.

116 [2011] 1 SLR 830 (CA); [2010] 2 SLR 152 (HC).

automated. Leaving aside any defences that might have excused the copying and communication, who in law was the person doing the act of copying and communication, and who in law was responsible for those acts?

55 In brief, the copyright owner's claim was that RecordTV was the copyist and the person making the communication and was liable for the infringements that had occurred. The position of RecordTV was that even though they conceived and set up the service, their role was passive and that, at most, all they had done was to facilitate something equivalent to home taping by a home user for time-shifting purposes. Both Andrew Ang J (at first instance) and the Court of Appeal found that the act of copying was committed by the requesting home user and not RecordTV. Who, then, committed the act of transmission of the stored programme – the home user or RecordTV? In Andrew Ang J's view, RecordTV had sufficient control so as to be liable as the person making the communication. However, the Court of Appeal disagreed, holding that RecordTV was not the communicator, as they were not responsible for determining the content of the communication (the selection of the programme to be recorded); the requesting user was responsible. It followed that, in any event, the communication by the home user was to himself and not to the public.¹¹⁷

56 Whatever the views as to the correctness of the court's assessment of who had committed the acts in question, what is significant about the decision for the purposes of this article is the way in which public policy was used to support the interpretation as to who had committed the acts of storage and communication. The Court of

117 For a more detailed discussion, see George 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* (Yeo Tiong Min, Hans Tjio & Tang Hang Wu eds) (Academy Publishing, 2011). One of the points raised was that it might have been possible to treat RecordTV Pte Ltd as a joint-copyist. See also the criticism of *RecordTV Pte Ltd v MediaCorp TV Singapore Pte Ltd* [2011] 1 SLR 830 (CA); [2010] 2 SLR 152 (HC); Saw Cheng Lim & Warren B Chik, "Where Copyright Law and Technology Once Again Cross Paths: The Continuing Saga" (2011) 23 SAclJ 653. For a recent Australian decision that took a different view, see *National Rugby League Investments Pty Ltd v Singtel Optus Pte Ltd* ("Optus") [2012] FCAFC 59. Finn, Emmett and Bennett JJ holding on similar (but not identical) facts that Optus, the service provider, was either the maker of the copies or the joint-maker. See [64]: "[I]t is equally not apparent to us why a person who designs and operates a wholly automated copying system ought as of course not to be treated as a maker of an infringing copy where the system itself is configured designedly so as to respond to a third party command to make that copy." See also [75]–[76]: Without the concerted actions of both Optus and the subscriber, no copy of the broadcast programme would have been made. They had, on the facts before the court, acted in concert and pursuant to a common design, which was the production of the selected programme for transmission to the subscriber.

Appeal was very much taken by the point that the fundamental objective of time-shifting was to allow a show to be recorded on a storage medium so that it may be viewed later at the consumer's convenience. The Court of Appeal expressed the view that time-shifting "is a perfectly legitimate activity so long as it does not constitute copying copyright-protected material or communicating such material to the public contrary to copyright laws".¹¹⁸ Yet, why and in what sense is time-shifting legitimate? The Court of Appeal was not, at that point, considering the defence of fair dealing but whether an infringing act had taken place that would require the defendant to establish a defence – these are clearly distinct issues. In any case, the Court of Appeal hastened to explain that not only did RecordTV's service serve the same purpose as traditional time-shift copying on a DVR or VCR, "it is also a significant technological improvement over the latter with tangible benefits to users".¹¹⁹ This was the second reason for holding that RecordTV did not copy the programmes in question.

57 The decision of the Court of Appeal in *RecordTV* was influenced by the court's perception of the policy that underlay copyright protection. V K Rajah JA explained:¹²⁰

This appeal raises an important policy issue as to how the courts should interpret copyright legislation in the light of technological advances which have clear legitimate and beneficial uses for the public but which may be circumscribed or stymied by expansive claims of existing copyright owners. Bearing in mind that the law strives to encourage both creativity and innovation for the common good, ... how should the courts strike a just and fair balance between the interests of all the stakeholders, viz consumers, content providers as well as technology and service vendors? If the law is not clear as to whether the use of improved technology which is beneficial to society

118 *RecordTV Pte Ltd v MediaCorp TV Singapore Pte Ltd* [2011] 1 SLR 830 (CA) at [21].

119 *RecordTV Pte Ltd v MediaCorp TV Singapore Pte Ltd* [2011] 1 SLR 830 (CA) at [22].

120 *RecordTV Pte Ltd v MediaCorp TV Singapore Pte Ltd* [2011] 1 SLR 830 (CA) at [2]. See also [68] and [69] where, under the heading "Observations", V K Rajah JA reiterated that the task was to achieve a balance in a manner that would result in the most benefits to, and impose the least costs on, society as a whole, that there is a "public interest in not allowing copyright to hinder creativity and innovation" and that where the statutory provisions were unclear, "the courts should not be quick to interpret statutory words expansively if doing so may stifle technological advances which are in the public's interest". For a study of justification of copyright and the public interest, see Gillian Davies, *Copyright and the Public Interest* (Sweet & Maxwell, 2nd Ed, 2002). Davies concluded (at p 246) that economic and public interest rationales are the basic justifications for copyright in the Anglo/American system. This was to be contrasted with other systems placing greater emphasis on the moral and natural law justification for copyright and the idea of a just reward for labour.

constitutes a breach of copyright, should the court interpret legislative provisions to favour private rights of the copyright owner or the public's wider interests? ... In the normal course of events when enacting a statute, the Legislature balances the rights and interests of all affected stakeholders after considering the social costs and the economic implications. Where the statute is not clear, however, the courts have to perform this difficult task.

58 The general observation of the Court of Appeal on the policy supporting copyright in Singapore bears repeating. The legislative history behind Singapore's copyright legislation illustrates the lengths to which the Government and legislature have gone in consulting stakeholders on copyright law reform. Whilst there is no doubt that Singapore sees the benefits and need for a strong and effective copyright law, there is plenty of evidence from ministerial statements and so on that Singapore also seeks a balanced system, whereby the strong copyright protection works to the benefit of not just the copyright owner but the public at large. Where Parliament has left key provisions undefined (such as "originality"), the task is clearly for the court to interpret the provision, following the usual canons of statutory interpretation and taking account of the existing case law.¹²¹

59 In Singapore, as we have seen, a purposive construction is generally preferred. The court's assessment of policy should not, however, be used to read in ambiguity in those cases where the ordinary meaning is clear.¹²² The position may be different if it is felt that the ordinary meaning leads to an absurdity that Parliament could not have intended, as in the earlier case of *Ang Lay See*. Nonetheless, on the facts of *RecordTV*, even if the court had found that they were *prima facie* liable for the act of recording and communication, it did not follow that this result would have been absurd within the policy of copyright. After all, copyright is a property right that is intended to provide an incentive for the creation of new works.

121 For a summary of Singapore's approach to statutory interpretation, see Helena H M Chan, *The Legal System of Singapore* (Butterworths, 1995) at pp 107–112. See also Rupert Cross, John Bell & George Engle, *Cross: Statutory Interpretation* (LexisNexis, 1995); and Francis Bennion, *Understanding Common Law Legislation – Drafting and Interpretation* (Oxford University Press, 2001).

122 See also *National Rugby League Investments Pty Ltd v Singtel Optus Pte Ltd* [2012] FCAFC 59. The Full Court, whilst accepting that it should take a technologically neutral interpretation of general copyright provisions, added that no principle of technological neutrality could overcome the clear and limited legislative purpose of s 111 of the Copyright Act 1968 (Act No 63 of 1968) (Cth) (Aust). The Full Court also cited (at [96]–[98]) an earlier High Court decision that purposive interpretation does not allow a "judicially constructed policy at the expense of the requisite consideration of the statutory text and its relatively clear purpose. In construing a statute it is not for a court for construct its own idea of a desirable policy, impute it to legislature and then characteri[s]e it as a statutory purpose".

60 Indeed, the point may be made that, looking at the Copyright Act as a whole, Parliament had already taken account of the interests of the public in being able to access information and to use new technologies. For example, section 114 of the Copyright Act¹²³ already permitted the filming or recording of a broadcast (and related works and films) for the private and domestic use of the person by whom the recording is made. This defence formed part of the Copyright Act 1987, when it was first enacted at a time before the advent of Internet-based, high-speed broadband services that could be used to facilitate copying for time-shifting purposes. If the court had found that infringement was committed by RecordTV, interesting questions would have arisen as to whether they could pray in defence the aid of section 114, when the copying was not for the private and domestic use of RecordTV. Further, it is noted that section 114 does not apply to the exclusive right of communicating to the public. Nonetheless, it is also clear that Parliament was cognisant of the fact that defences limited to specific and tightly worded purposes suffered from the disadvantage of inflexibility and an inability to cope with new scenarios of “socially desirable” copying arising from technological advances. It will be recalled that the Minister had recognised this as a strong factor in favour of the new open-ended fair dealing defence introduced in 2004. At the same time the Minister, in 2004, also explained that the new unitary and technologically neutral right of communication to the public was needed precisely because the Internet was becoming an increasingly important platform, through which copyright owners promote and disseminate their copyrighted works. It was in this context that the Minister also remarked that the Government had been mindful that the introduction of new rights did not lead to undue restriction of fair uses of copyrighted material.¹²⁴

123 Cap 63, 2006 Rev Ed.

124 *Singapore Parliamentary Debates, Official Report* (16 November 2004) vol 78 at col 1041 (S Jayakumar, Deputy Prime Minister and Minister for Law). See also *National Rugby League Investments Pty Ltd v Singtel Optus Pte Ltd* (“Optus”) [2012] FCAFC 59. In this case, the Full Court (reversing the lower court) found that Optus was the maker of the recordings of free-to-air broadcasts under a time-shifting system offered to subscribers and that they were not entitled to rely on the time-shifting defence set out in s 111 of the Copyright Act 1968 (Act No 63 of 1968) (Cth) (Aust). That defence only applied when the copy was made for the private and domestic use of the person making the copy (for time-shifting purposes). Reference to Parliamentary material made it clear that the Australian Parliament was alive to the possibility that time-shift copying might be outsourced and that there was nothing to suggest that s 111 was intended to cover commercial copying on behalf of individuals. Note that the facts of *National Rugby League Investments Pty Ltd v Singtel Optus Pte Ltd* [2012] FCAFC 59, whilst similar, are not identical to those in *RecordTV Pte Ltd v MediaCorp TV Singapore Pte Ltd* [2011] 1 SLR 830 (CA); [2010] 2 SLR 152 (HC).

61 Testing the legitimacy of the recording service offered by RecordTV under the fair dealing defence would certainly have enabled the court to have regard to public benefit as a factor in deciding whether the dealing by RecordTV was fair. Whether the defence would have succeeded would, of course, depend on the court's assessment of all relevant factors: the amount taken; whether the dealing was commercial in nature (especially from the perspective of RecordTV); and certainly the impact the dealing had (or might have) on the market or value of the copyright material taken. It may well be that the court would, in any case, have found the dealing to be fair on the particular facts. Nonetheless, even though the end result might have been the same, the use of policy as a factor to assess the fairness of the dealing may have been preferable to its use as an argument to support a narrow construction of the scope of the exclusive rights.¹²⁵

62 *RecordTV* also raised a question as to the meaning of "authorise" in the context of liability under the Copyright Act for authorising infringement. This aspect of the case has been discussed in detail elsewhere and therefore will be lightly dealt with to illustrate the difficulties courts often have when interpreting ambiguous statutory provisions, especially in the light of new circumstances not envisaged at the time when the provision was enacted. Authorisation as a means of being held liable for copyright infringement has a long history, dating back to the Imperial Copyright Act 1911. This was way before the advent of computer-driven digital communication and copying technologies. The liability was statutory and distinct from the common law means of spreading liability such as the rules on joint tortfeasorship, vicarious liability and agency. The trouble was that there was, and still is, no statutory attempt to define "authorisation", by reference to either a governing principle or a list of relevant factors. There were essentially two lines of authority that might have been followed. The first was to interpret "authorise" narrowly (as in the UK) and to limit it to cases where the defendant has expressly or impliedly purported to grant authority to commit the act of infringement. The broader approach is to interpret "authorise" as synonymous with approval, sanctioning or

125 For a detailed exposition of fair dealing as an alternative way of analysing *RecordTV Pte Ltd v MediaCorp TV Singapore Pte Ltd* [2011] 1 SLR 830 (CA); [2010] 2 SLR 152 (HC), see Warren B Chik & Saw Cheng Lim, "Opportunity Lost? Revisiting *RecordTV v MediaCorpTV*" (2012) 24 SAcLJ 16. The reader should also be aware of the news report that an action has been commenced in Singapore by Singapore Press Holdings against Yahoo! for allegedly infringing copyright in various news articles. Yahoo! is reported as denying infringement, asserting that there was a public interest for the news reports to be widely disseminated. See Marc Lim, "Yahoo! Got Free Ride Plagiarising Works: SPH", *The Straits Times* (29 December 2011); Kenneth Lim, "SPH to fight Yahoo over Copyright Claims", *The Business Times* (29 December 2011); and Leonard Lim, "Yahoo! Denies Infringing Copyright, Counter-Sues", *The Straits Times* (14 December 2011).

permitting the infringing act to be done. Under this approach, liability can arise where the defendant has control over the means by which the infringement occurred. If the defendant has sufficient control and then fails to take any reasonable steps to exercise the control, liability for an implied authorisation might arise. Just how broad the second approach would prove to be, however, depended on what amounted to “sufficient control”.

63 In the Commonwealth, the narrower approach finds its champion in the House of Lords decision in *CBS Songs Ltd v Amstrad Consumer Electronics plc*.¹²⁶ The broader approach is best represented by the High Court of Australia in *Moorhouse v University of New South Wales*¹²⁷ (“*Moorhouse*”). In Singapore, the Court of Appeal in *Ong Seow Pheng v Lotus Development Corp*¹²⁸ (“*Lotus*”) had followed the narrower English approach. In *RecordTV*, the Court of Appeal reaffirmed the *Lotus* decision. Whilst the issue may now be academic, it has been argued that the structure of the Copyright Act and its various provisions, in fact, point towards the broader Australian approach. After all, the detailed provisions in the Singapore Copyright Act and the special statutory provision protecting libraries from a finding of authorisation were based on statutory provisions introduced in Australia, after the *Moorhouse* decision had put the fear of copyright liability into the “hearts” of many a library that provided photocopying services.¹²⁹ At the very least, it seems that the legislature must have been aware of the *Moorhouse* approach at the time when the Singapore Copyright Act was under consideration.¹³⁰

64 That said, the *Moorhouse* decision has always been controversial, raising the question of whether an appropriate balance was achieved

126 [1988] AC 1013. For more recent UK cases, see *Twentieth Century Fox Film Corp v Newzbin Ltd* [2010] FSR 21. “[T]hat authorise means the grant or purported grant of the right to do the act complained of. It does not extend to mere enablement, assistance or even encouragement”: at [90], *per* Kitchin J. See also Floyd J in *Football Dataco Ltd v Sportradar GmbH* [2010] EWHC 2911.

127 (1975) 133 CLR 1. The library was found to have authorised infringement committed by users of photocopying machines on library premises.

128 [1997] 2 SLR(R) 113; see also the extensive analysis in the judgment of L P Thean JA.

129 In any case, it is noted that the Minister had explained that the legislature decided not to set out a statutory definition and to leave this to the courts. George 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* (Yeo Tiong Min, Hans Tjio & Tang Hang Wu eds) (Academy Publishing, 2011) at pp 470–481 and especially at fn 125.

130 Indeed, *Moorhouse v University of New South Wales* (1975) 133 CLR 1 and the statutory provision protecting libraries were raised by the author in representations to the Select Committee on the Copyright Bill 1986 (No 8/1986). See *Report of the Select Committee on the Copyright Bill 1986 (No 8/1986)* (Parl 9 of 1986, 22 December 1986) at A 173.

between the interests of the copyright owner (convenience and practicality) and the alleged authoriser (culpability and fairness). The most recent Australian decision in the area is *Roadshow Films Pty Ltd v iiNet Ltd* (“iiNet”) (No 3).¹³¹ French CJ, Crennan and Kiefel JJ (High Court) explained that “no party doubted that the rationale for the separate tort of authorisation is economic – namely, cost efficient enforcement rights of the copyright owner”.¹³² In an important re-analysis of authorisation, the High Court highlighted the distinction between physical or technical control over the means of infringement and contractual control (for example, contractual power to withdraw services if infringement continued). Given that the power to prevent acts of primary infringement will vary from case to case, it must follow that the strength of any inference to be drawn on implied authorisation as well as what constitutes the taking of reasonable steps can vary quite considerably. French CJ, Crennan and Kiefel JJ were much taken by the fact that iiNet’s power was limited. It had no direct power to prevent primary infringements and could only ensure that result indirectly by terminating the contractual relationship it had with its customers.

65 Gummow and Hayne JJ agreed that the claim for authorisation failed. In reviewing the case law, their Honours made an important observation that the common law of torts seldom imposed liability for “pure omissions” in the absence of some special relationship that imposes a duty to act.¹³³ An overly liberal interpretation of *Moorhouse* might well be tantamount to the imposition of a duty of reasonable care in the guise of authorisation, when such a duty would not have been imposed by the tort of negligence.¹³⁴ The problem was where to draw the line between the interests of the copyright owner, and providers and suppliers of technology that facilitated acts of infringement. Underlying this question was the more fundamental question: Who should draw the line? Gummow and Hayne JJ explained that the complexity of the characteristics of modern copyright law meant that it was perhaps “inevitable that the legislation will give rise to difficult questions of

131 [2012] HCA 16 (HC, Aust); [2010] FCA 24 (Fed Ct, Aust).

132 *Roadshow Films Pty Ltd v iiNet Ltd* [2012] HCA 16 (HC, Aust) at [55].

133 Tort lawyers will be aware of the immense problems that have arisen over when the law will impose a duty to take reasonable care to avoid the causation of pure economic loss. Atkinian reasonable foreseeability is too broad. The search for appropriate guides – proximity, policy, justice and reasonableness, *etc* – has been long and difficult in the tort of negligence. In Singapore, see generally *Spandek Engineering (S) Pte Ltd v Defence Science & Technology Agency* [2004] SLR(R) 100. See Gary Chan Kok Yew, *The Law of Torts in Singapore* (Academy Publishing, 2011) at ch 3.

134 *Roadshow Films Pty Ltd v iiNet Ltd* [2012] HCA 16 at [115]. See also George Wei, *Law of Copyright in Singapore* (Singapore National Printers, 2nd Ed, 2000) at para 8.184.

construction”.¹³⁵ The courts had been tussling over the term “authorise” for 100 years, and that “the difficulties, which reflect both technological changes and changes in business methods, [were] unlikely to be resolved merely by recourse to a dictionary”.¹³⁶ The pace of technological change had, in the past, led the courts to adopt strained constructions “to meet a judicially perceived need to keep the statute law abreast of the times”.¹³⁷ Sounding a note of caution, Gummow and Hayne JJ noted that the history of the Australian Copyright Act, since its enactment in 1968, demonstrates that Parliament has been more responsive to pressures for change to accommodate new circumstances than in the past, and that “[t]hose pressures are best resolved by legislative processes rather than by any extreme exercise in statutory interpretation by judicial decisions”.¹³⁸ Similarly in Singapore, the summary of legislative developments over the past 25 years, as set out in the Appendix, reveals a legislature well aware of the need to keep copyright law up to date and be responsive to technological developments. With the Court of Appeal in *RecordTV* following L P Thean JA’s decision in *Lotus*, it is clear that the matter is now firmly at Parliament’s door to decide what reforms, if any, might be needed.

66 Leaving aside public interest and the defensive provisions in the Copyright Act, the question as to what the perceived and recognised purpose of copyright is, is at its most significant in deciding just what it is that copyright law seeks to protect from copying. To say that a textbook on copyright law in Singapore is protected against copying begs the question: Copying of what? Elsewhere it has been argued that if copyright is a property right carrying with it an armoury of exclusive rights – that, if trespassed, can result in both civil and criminal liability – the public are entitled to know with reasonable precision just what it is that is being protected. This is not to say that infringement can only arise where the defendant has copied more than a certain percentage of the work. The substantiality of the copying, which is rightly the benchmark of liability, must be assessed on a qualitative basis. Where less than the whole work has been taken, the fact that a qualitative assessment is called for does not, however, detract from the importance of being clear as to what copyright seeks to protect.¹³⁹ This is where the

135 *Roadshow Films Pty Ltd v iiNet Ltd* [2012] HCA 16 at [117].

136 *Roadshow Films Pty Ltd v iiNet Ltd* [2012] HCA 16 at [117].

137 *Roadshow Films Pty Ltd v iiNet Ltd* [2012] HCA 16 at [119].

138 *Roadshow Films Pty Ltd v iiNet Ltd* [2010] HCA 16 at [120].

139 This is a topic that has been extensively written on. See, for example, Burton Ong, “Copyright and Cartography: Mapping the Boundaries of Infringement Liability” [2009] EIPR 17; George 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* (Yeo Tiong Min, Hans Tjio & Tang Hang Wu eds) (Academy Publishing, 2011); George Wei, “Certainty of Subject-Matter in the Development of Intellectual Property: Please Sir, I Want Some More” [2009] (cont’d on the next page)

expression/idea–fact dichotomy serves a role in delineating the boundaries of what is protected.

67 All countries recognise the importance of the principle; what varies is the degree of precision with which different jurisdictions demand the boundary lines to be drawn. Some countries tend to stress the importance of protecting the skill, labour and effort expended by an author in the creation of the work. The greater the effort, the more there is to protect, because the policy of the law is that the defendant must not be allowed to reap what the copyright owner (or author) has planted. Indeed, this was the approach taken in Singapore by the District Court in a tightly reasoned judgment in *Virtual Map (Singapore) Pte Ltd v Singapore Land Authority*¹⁴⁰ (“*Virtual Map*”). Other countries tend to place more emphasis on asking whether the skill, effort and labour relate to the expression or the discovery and acquisition of facts and data. If raw facts and data are not to be protected by copyright, it makes sense that the law discounts the effort and labour expended to discover the facts. The distinction between the two approaches is at its sharpest in the case where highly factual works are “copied”. The usual examples concern computer programs and compilations such as databases, as in the case of telephone directories, television broadcast schedules and similar works. Computer programs are written for the function that they are supposed to enable the computer or hardware to perform for the user. A telephone directory is not written as a work of literature; it exists largely, or even solely, to do a job, which is to provide useful information to a reader. In the case of white pages, the information contained therein are mainly the subscribers’ addresses and telephone numbers.

68 The tussle between the different approaches and policies is well known and much written on. Countries such as the UK, which traditionally provided strong copyright protection, underscoring the need to protect all the effort and labour of authorship, including the preparatory work of fact-finding, were sufficiently concerned with the “weaker” protection offered by the other approach, that *sui generis* protection was introduced to help protect the investment expended in a database.¹⁴¹ If the *Virtual Map* decision (and, in particular, the decision by the District Court) provides strong support in Singapore for the English approach, there are indications that the matter is not quite

Sing JLS 474; and George Wei, “Of Copying, Reproduction, Substantiality and Copyright: A View from Singapore” [2011] EIPR 384.

140 [2007] SGDC 216.

141 See generally the position in the UK and Directive 96/9/EC of the European Parliament and of the Council of 11 March 1996 on the legal protection of databases (OJ L 77, 27 March 1996, pp 20–28).

settled.¹⁴² Strong protection (fuzzier application of the expression/idea–fact dichotomy) will mean that the second comer will have to independently reacquire the facts and knowledge, usually by going to the original public domain source. In the case of telephone directories, it will mean going to the telephone service provider or the individual subscribers. If they cannot do this for whatever reason, the second comer will find himself caught between the proverbial rock and a hard place. Is this something that should concern the courts and copyright law?

69 In the first place, it is not without significance that the Copyright Act was amended in 1999 so as to provide that copyright protection for compilations is limited to the selection or arrangement of contents, which constitutes an intellectual creation. This can be taken as a clear endorsement of the objective to limit protection to the author’s intellectual contribution, in terms of the expression over and above the raw or basic facts. Second, whilst Tan Lee Meng J, in upholding *Virtual Map*, referred to the need for the defendant to do his own work, *RecordTV* (albeit on a different area of copyright) has underscored the importance of developing copyright law in a manner so as to balance the competing interests of stakeholders and which results in the most benefits and impose the least cost on society as a whole.¹⁴³

70 An author’s expressive contributions to a literary work are not, of course, limited to literal or textual expression, in terms of the choice of words and phrases used to communicate the ideas or facts to the reader. It can include punctuation and the structure of the work, in respect of how the work is organised into chapters, sections and the effort expended on arrangement. In the case of fictional works, the intellectual choices as to the type and range of characters and the sequence of events and incidents can also form a very important part of the author’s contribution over and above the idea for the work. Likewise in the case of a factual work, such as a textbook on contract law, the effort and labour of deciding the “best” cases to include and the order in which they should be discussed are also contributions to the expression: the form in which the raw information is presented to the reader. If the litigation between Global Yellow Pages Ltd and Promedia Directories Pte

142 For a detailed discussion, see George 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* (Yeo Tiong Min, Hans Tjio & Tang Hang Wu eds) (Academy Publishing, 2011) at pp 422–452; and George Wei, *Some Thoughts on Intellectual Property Rights in Singapore: A Monograph for Gerald Dworkin* (George Wei, 2009) at p 165 ff.

143 *RecordTV Pte Ltd v MediaCorp TV Singapore Pte Ltd* [2011] 1 SLR 830 at [68]. See paras 54–58 above for discussion. This case did not, however, concern application of the fact–expression dichotomy.

Ltd (“Promedia”) is not settled, the Singapore High Court will have an excellent opportunity to address the issue head on.¹⁴⁴ After all, it appears from the interlocutory hearing that the dilemma was that it was “impossible” for Promedia to independently reacquire the facts (telephone subscriber information), since they were unable to obtain the information from the telephone service operators because of the existing licensing arrangements. The facts (names and telephone numbers) were, of course, in the public domain as they were readily accessible to the public, from the published directories. However, if the service providers were unable to provide access to the raw data from which the published directories had been compiled, was there any other reasonably practical method whereby the data could be independently recaptured?¹⁴⁵

71 Aside from the recent decision of the Court of Appeal in *RecordTV*, reference should also be made to the decision in *Asia Pacific Publishing Pte Ltd v Pioneers & Leaders (Publishers) Pte Ltd*¹⁴⁶ (“*Asia Pacific Publishing*”). This case concerned infringement of copyright in a horse-racing guide. Issues arose as to whether there was copyright in the guide, and if so, the identity of the author of the guide as an original literary work and the right of the publishing company to bring the claim for infringement. Issues also arose as to whether there was infringement:

144 *Global Yellow Pages Ltd v Promedia Directories Pte Ltd* [2010] SGHC 97. The competition law aspects of this case and fair dealing have been referred to in paras 44–47 above. For a detailed discussion, see George 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* (Yeo Tiong Min, Hans Tjio & Tang Hang Wu eds) (Academy Publishing, 2011) at pp 443–449 and 513–515.

145 To take an extreme and purely fanciful example: Suppose that on the recent dive to the bottom of the Mariana Trench (deepest part of the ocean depths in the Western Pacific Ocean), the explorer discovered a large pyramid-like structure that appears to be man-made. Photographs are taken and an article is written describing the appearance in terms of the shape, size, position, orientation and colour of the structure. Copyright would subsist in the photographs and in the article. To what extent would another person be able to use the information? He can read the article, mull and ponder the significance of the discovery; can he “copy” the information for use in his own article on the discovery, or would copyright require that he independently reacquire the facts, which are the existence of the structure, the size, its position and so forth? If he does not reacquire the facts and sets out the basic information in his article, is this a *prima facie* case of infringement? The question raised is separate from whether the reader is entitled to raise a defence to the infringement, such as fair dealing for purposes of criticism or review or reporting a current event, *etc.* See also the discussion of facts versus expression by William M Landes & Richard A Posner, *The Economic Structure of Intellectual Property Law* (Belknap Press of Harvard University Press, 2003) at pp 102–109.

146 [2011] 4 SLR 381.

copying of a substantial part of the racing guide.¹⁴⁷ In allowing the appeal and finding for the defendant, important statements on the court's perception as to the underlying purpose of copyright were set out.

72 Near the start of his judgment, V K Rajah JA commented that the Statute of Anne 1710¹⁴⁸ was the first copyright statute in the world and is “the basal foundation on which the modern concept of copyright has been built”.¹⁴⁹ The Statute of Anne 1710 recognised “the author as the fountainhead of protection” and that the Act “envisaged rights to be accorded to natural persons who created a work, balanced with the public interest of maintaining a robust public domain in which original literary, musical and artistic works are produced. The object of copyright protection was to encourage human progress through the sharing of learning and writings while safeguarding the potential economic benefits through the grant of monopoly rights of a limited duration. The social contract created protected original creativity without reference to literary merit”.¹⁵⁰ Commenting on the “robust debates” over the term of protection, V K Rajah JA continued that the debate “stem[med] from the difficulty of striking an appropriate balance between the competing tensions of public and private interests” and that, “on one hand, there is the interest of the public in securing both new and established works freely and as early as possible, and, on the other, the need to ensure that authors receive a just return for their creative efforts and are thereby encouraged to keep on creating”.¹⁵¹ Yet what does creation mean in this context? Does it include the effort and labour of making discoveries (fact-finding)? This is a hugely important question that has arisen in many jurisdictions and carries significant implications as to how copyright will be approached by the courts in Singapore. The Court of Appeal rightly notes that older cases (mainly English decisions) traditionally placed more emphasis on the time, effort and labour involved in creating the work. How is this to be applied when modern technology has taken so much of the “labour”

147 The High Court decision is discussed at length elsewhere; see George 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* (Yeo Tiong Min, Hans Tjio & Tang Hang Wu eds) (Academy Publishing, 2011) at pp 452–463. This article will not examine in detail the question of copyright protection for databases, as this is best dealt with in a separate article.

148 c 19 (UK).

149 *Asia Pacific Publishing Pte Ltd v Pioneers & Leaders (Publishers) Pte Ltd* [2011] 4 SLR 381 at [18].

150 *Asia Pacific Publishing Pte Ltd v Pioneers & Leaders (Publishers) Pte Ltd* [2011] 4 SLR 381 at [18]–[19].

151 *Asia Pacific Publishing Pte Ltd v Pioneers & Leaders (Publishers) Pte Ltd* [2011] 4 SLR 381 at [27].

and “drudge” out of fact-finding, as a computer is used to trawl for and compile data into tables and charts? This was the concern of the court leading to the observation that “older decisions that had focused on the gathering of information as the touchstone rather than the productive effort involved in expression may therefore require reconsideration one day”.¹⁵²

73 In raising this question, it appears that V K Rajah JA was concerned not just with whether copyright principles needed to be re-examined because of technological developments, but also with the cardinal principle that copyright does not protect ideas, facts or information. The principle, of course, is not new, and the question as to how it is to be applied to factual works has been problematic from very early times. Indeed, in the area of artistic works and photographs, new improved point-and-shoot digital cameras raised similar questions as regards the billions of photographs taken daily around the world over the past 20 years. In the age when a properly exposed and focused photograph can be taken simply by pressing a button, where is the author’s intellectual input such as to qualify the work as original, as a matter of copyright law? Does it matter that the composition was entirely fortuitous or serendipitous in nature?

74 Technology certainly makes life easier. Technological advances are rewarded primarily by means of the grant of patents. Nonetheless, this should not mean that as technology takes away the “drudge” of creation, that it becomes harder and harder to meet the copyright standard of originality. Elsewhere it has been suggested that when the law (the court) concludes that a work is “original”, it is really saying that, on the facts, there is sufficient public benefit such as to merit the award of a strong but limited copyright monopoly. The public benefit may be nothing more than the author’s attempt to express himself as best as he can by means of a poem, a drawing, a novel, an essay, a blog entry and so on. Even if the work is never published, as in the case of a private diary, it is (to argue the point) surely in the general interest of society to encourage individuals to express and record thoughts as a part of personal development. What, then, of the bystander who witnesses a natural event – a volcanic eruption, for instance – and who takes out a point-and-shoot camera and records the scene photographically? The photograph is an original artistic work. However, what does the originality reside in? The originality may be said to lie in the public benefit, that the photographer has recorded a scene, which otherwise would have been visually lost forever.¹⁵³ A picture, as has often been said,

152 *Asia Pacific Publishing Pte Ltd v Pioneers & Leaders (Publishers) Pte Ltd* [2011] 4 SLR 381 at [35].

153 *Bridgeman Art Library Ltd v Corel Corp* 25 F Supp 2d 421 (SDNY, 1998) and *Antiquesportfolio.com plc v Rodney Fitch and Co Ltd* [2001] FSR 345. See generally (cont’d on the next page)

is worth a thousand words. The fact that technology makes it much easier to create new works should not necessarily be an impediment to the reward, that is, copyright, so long as what is being protected is the new work as opposed to the raw information. Thus, whilst the District Court and High Court in *Virtual Map* had paid close attention to the preparatory effort and labour of fact-finding, it is significant that V K Rajah JA stated that “it is not the preparatory efforts of process of gathering facts that is protected. Rather it is the thought effort involved in creating the particular form of expression that is embraced by copyright. Not infrequently, the expression of data, say, through an alphabetical listing, will involve little ingenuity or skill beyond mechanical labour or routine programming. In such matters it may be difficult to argue that copyright protection is called for”.¹⁵⁴

Burton Ong, “Originality from Copying – Fitting Recreative Works into the Copyright Universe” (2010) 2 IPQ 165 and Simon Stokes, *Arts & Copyright* (Hart Publishing, 2001). See also the discussion of the case law in the standard copyright texts on copyright in the report of an extempore speech. Should it matter whether the report was taken down in longhand or shorthand, or if it was first recorded on tape and then transcribed at leisure? See Jane C Ginsburg, “Creation and Commercial Value: Copyright Protection of Works of Information” (1990) 90 Colum L Rev 1865 citing Justice Holmes’ statement that individuals are not free to copy the copy of an original object in nature because the copy is the personal reaction of an individual on nature. Copyright, it was argued, could be justified for such works (including compilations of facts) either on the basis that the copying “compromised the first author’s laboriously earned property or because the copying amounted to misappropriation of some aspect of the author’s personality” (at 1936–1947). The case referred to is *Bleistein v Donaldson Lithographing Co* 188 US 239 (1903). Ginsburg’s view was that US law should develop dual-track copyright protection: works of high authorship and those of low authorship. The level of protection would depend on the nature of the interest at stake. Works of low authorship (eg, a laboriously compiled street directory) could be offered protection tempered by compulsory licences for derivative uses. Such a bifurcation, whilst carrying many advantages, would require a substantial change to statutory copyright laws and, indeed, the international conventions. It might also shift the litigation away from expression or ideas and to the boundary between high, low or no authorship “works”. Ginsburg’s article was published shortly before the US Supreme Court decision in *Feist Publications Inc v Rural Telephone Service Co Inc* 113 L Ed 2d 358 (1991) (rejecting the “sweat of the brow” approach). For Ginsburg’s response, see Jane C Ginsburg, “No Sweat? Copyright and Other Protection of Works of Information after *Feist v Rural Telephone*” (1992) 92 Colum L Rev 338. It is submitted that countries wishing to protect laboriously compiled databases should seek to do so, if at all, by means of a *sui generis* database right, rather than by means of expansive interpretation of copyright. Query also the development of some form of unfair competition action.

154 *Asia Pacific Publishing Pte Ltd v Pioneers & Leaders (Publishers) Pte Ltd* [2011] 4 SLR 381 at [37]. In the case of compilations bear in mind that the Copyright Act has, in any case, been amended so as to require a sufficient input of selection (of facts) and arrangement, such as to make the compilation an intellectual creation. Where a database is an exhaustive compilation of facts (all subscribers’ names, addresses and numbers) organised alphabetically, is there enough arrangement so as to qualify the database as an intellectual (original) creation? See
(cont’d on the next page)

75 Some of the general comments in *Asia Pacific Publishing* on the policy of copyright, protection of facts and databases were not strictly necessary since the main finding was that the claim failed because the plaintiff had not established that it was entitled to bring the suit on the basis that it was, in law, the author. Nevertheless, whilst the meaning of originality in the context of databases and other factual works is still open, the comments provide much food for thought. This is especially so when taken together with the Court of Appeal's earlier comments in *RecordTV* on the need for balance and the public interest (as opposed to the interests of the IPR owner) in creativity and innovation.¹⁵⁵ The observation of Sam Ricketson on originality bears repeating:¹⁵⁶

Telstra Corp Ltd v Phone Directories Co Pty Ltd [2010] FCAFC 149, denying copyright to the white and yellow pages of a telephone directory, on the facts, before the court (directories largely produced through the running of a computer program, *ie*, minimal human input). In reaching its decision the Full Federal Court of Australia (Keane CJ) pointed out that the Statute of Anne 1710 (c 19) (UK) echoed specifically the emphasis on the practical or utilitarian importance that certain 17th-century philosophers attached to knowledge and its encouragement in the scheme of human progress. It is understood that there may be a further appeal to the High Court. See also Sam Ricketson & Jane C Ginsburg, *International Copyright and Neighbouring Rights: The Berne Convention and Beyond* (Oxford University Press, 2nd Ed, Vol 1, 2006) at para 8.87 where it is said that the choice of a chronological order may be too banal a method of organisation to qualify as original or as an intellectual creation.

155 For similar views expressed recently in Australia, see *IceTV Pty Ltd v Nine Network Australia Pty Ltd* ("IceTV") [2009] HCA 14, *per* French CJ, Crennan and Kiefel JJ. See also *Telstra Corp Ltd v Phone Directories Co Pty Ltd* [2010] FCAFC 149. Compare and contrast these cases with the earlier Australian decision in *Telstra Corp Ltd v Desktop Marketing Systems Pte Ltd* [2001] FCA 612. For a more detailed discussion of the policy of copyright, the *IceTV* decision and factual works, see George Wei, "Of Copying, Reproduction, Substantiality and Copyright: A View from Singapore" [2011] 33 EIPR 384. In the latter piece, it was said that Singapore cases at that time tended to follow the English approach towards protecting preparatory labour of fact-gathering. The matter is now very much a live issue, given the recent comments in *Asia Pacific Publishing Pte Ltd v Pioneers & Leaders (Publishers) Pte Ltd* [2011] 4 SLR 381 and the issues that were raised in *Global Yellow Pages Ltd v Promedia Directories Pte Ltd* [2010] SGHC 97. See also the news reports of the action that has been commenced by Singapore Press Holdings against Yahoo! in respect of alleged infringement of copyright in news articles. See Marc Lim, "Yahoo! Got Free Ride Plagiarising Works: SPH", *The Straits Times* (29 December 2011); Kenneth Lim, "SPH to fight Yahoo over Copyright Claims", *The Business Times* (29 December 2011); and Leonard Lim, "Yahoo! Denies Infringing Copyright, Counter-Sues", *The Straits Times* (14 December 2011).

156 Sam Ricketson, "Common Law Approaches to the Requirement of Originality" in *The Common Law of Intellectual Property: Essays in Honour of Professor David Vaver* (Catherine W Ng, Lionel Bently & Giuseppina D'Agostino eds) (Hart Publishing, 2010). The competing balance that Ricketson referred to is the balance between the need for a thriving public domain of ideas and information, and the desire to prevent egregious free riding on the backs of others. For a different take on the significance of the expression/idea-fact dichotomy, see Robert Burrell & Allison Coleman, *Copyright Exceptions – The Digital Impact* (Cambridge University Press, 2005) at p 20 *ff*.

[T]here is a constant, but always consistent, thread of authority ... that has favoured the confinement of originality to expressive acts of authorship that comprise some element of skill and judgment ... It has been suggested that conceptually, this has the advantages both of logic and coherence. It also provides a workable way of achieving a balance between the competing objectives of copyright protection. ...

76 Before drawing this article to a close, a brief overview of the decisions relating to the sentencing tariff for copyright infringement may be helpful in further shedding light on the attitude taken by the courts towards the importance of copyright. In the previous section, it has been shown how the legislature and judiciary have been concerned with providing strong protection that takes account of the needs and interests of society as a whole. The legislative developments and case law in the area of parallel imports, fair dealing defences and the scope of protection for factual works and databases are precisely concerned with finding a balance that avoids over-protection. This does not, for one moment, mean that Singapore is going soft on copyright infringement. In the vast majority of cases of commercial copyright infringement, there is no doubt that the acts complained of fall squarely within the heart of what copyright is seeking to protect. Where copyright does subsist in a work, it must be stressed that the private right of the copyright owner is granted because that is perceived to be in the public interest. When the law balances the competing interests of the copyright owner and other stakeholders and users, it is not comparing a private interest with a public interest; it is comparing and evaluating the importance of different aspects of the public interest. It comes as no surprise to find that the Minister has on occasions spoken in Parliament on the need for strong enforcement of the penal provisions and the importance of effective and up-to-date protection of copyright subject matter in Singapore. This is done in the interests of Singapore as a whole.

77 A glance at the various reported cases on sentences paints a clear picture of a judiciary that has responded to the call for strong protection.¹⁵⁷ The sentencing courts do, of course, take account of the

157 Space constraints do not permit a proper discussion of these cases: *Public Prosecutor v Ch'ng Kean Seng* [2012] SGDC 224; *Public Prosecutor v Lim Tiong Yee* [2012] SGDC 101; *Yu Peng Hsueh-Shu v Public Prosecutor* [2011] 4 SLR 1083; *Public Prosecutor v Yu Peng Hsueh-Shu* [2011] SGDC 67; *Public Prosecutor v Wang Yunqiu* [2011] SGDC 44; *Public Prosecutor v Guan Zhenbang* [2011] SGDC 47; *Public Prosecutor v Lin Jianqing* [2009] SGDC 363; *Public Prosecutor v Zheng Wenhai* [2009] SGDC 211; *Public Prosecutor v Too Yong Wei* [2008] SGDC 193; *Public Prosecutor v Koh Eng Kian* [2007] SGDC 166; *Kow Mui Huat v Public Prosecutor* [2007] SGDC 175; *Public Prosecutor v Chan Soon Fatt* [2007] SGDC 54; *Public Prosecutor v Md Hapiz bin Tabir* [2007] SGDC 40; *Public Prosecutor v Yeo Wei Kian* [2007] SGDC 55; *Public Prosecutor v PDM International Pte Ltd* [2006] (cont'd on the next page)

usual mitigating factors: whether the accused co-operated; whether there was a plea of guilty; the personal circumstances of the accused; the role of the accused person (whether he was the ring leader or merely a minor salesman and so on); and the scale of the infringements. Further, where the accused is being sentenced on multiple charges, the courts also strive to take account of the overall length of the sentences (the totality principle) – something that is important when multiple consecutive terms of imprisonment are imposed. That said, the sentencing decisions have made frequent reference to the importance of effective protection of copyright for the following reasons: to safeguard Singapore's trade interests; the need to encourage innovation and creativity from within Singapore; the fact that copyright is a form of property; and that copyright offences are often offences involving dishonesty. The need for deterrence in the name of the public interest features prominently in the sentencing decisions.

IV. Conclusion – Developing the Singapore legal system and intellectual property protection

78 For Singapore, the changes over the past 50 years or so have been enormous. From a colony to the merger with Malaya and then to independence; from a third-world to first-world country; from a convenient staging post to an *entrepôt* trade centre; from contract manufacturer to value-added research and development of information technology, life sciences¹⁵⁸ and nanotechnology; from business efficiency to the need for entrepreneurial creativity; from a manufacturer of goods to a provider of knowledge services; from a city-state of commerce to a city of leisure and arts; from market barriers to the globalised world; from a population base numbered in the hundreds of thousands to one

SGDC 91; *Public Prosecutor v Tan Wei Ling* [2006] SGDC 232; *Public Prosecutor v Poh Kim Video Pte Ltd* [2004] 1 SLR(R) 373; *Ong Ah Tiong v Public Prosecutor* [2004] 1 SLR(R) 587; *Jaya A/P Balakrishnan v Public Prosecutor* [2002] SGDC 252; *Public Prosecutor v Ng Chin Guan* [2002] SGMC 3; *How Meng Yan v Public Prosecutor* [2002] SGDC 207; *Highway Video Pte Ltd v Public Prosecutor* [2001] 3 SLR(R) 830; *Highway Video Pte Ltd v Lim Tai Wah* [2001] SGMC 32; *TS Video and Laser Pte Ltd v Lim Chee Yong* [2001] 3 SLR(R) 639; *Public Prosecutor v Tan Kee Guan Iskandar* [2001] SGDC 300; and *Public Prosecutor v IC Automation (S) Pte Ltd* [1996] 2 SLR(R) 673. See also the very recent case of *Public Prosecutor v Alterm Consortech Pte Ltd* [2012] SGDC 185. The latter is thought to be under appeal although it is noted that one of the accused persons has passed away and there is an issue pending as to whether the appeal (against conviction) can still proceed in his case; see Selina Lum, "Widow Wants Husband's Appeal Heard", *The Straits Times* (13 October 2012).

158 See Han Fook Kwang *et al*, *Lee Kuan Yew: Hard Truths to Keep Singapore Going* (Straits Times Press, 2011) at ch 4 entitled "Keeping the Economic Miracle Alive".

likely to approach six million or more;¹⁵⁹ from baby boomers to silver-haired adults; from the emergence of the Association of Southeast Asian Nations to the impact of China and India, and the fall of the Berlin Wall; from racial and social instability to harmony, and now the threats of a post-9/11 world; and so much more.

79 That Singapore must develop and adapt her law to meet changing conditions and challenges is obvious. In some areas of economic and industrial development, huge changes have been necessary, such as the legislative moves from the mid-1980s to completely overhaul, update and improve Singapore's standards of IP protection. The shape, form and colour of Singapore's IP laws are now very different from what they were in the 1970s. Singapore is no longer an IP sceptic or a simple follower of UK laws. The mid-1990s also marked a hugely important turning point in the development of the Singapore legal system as a whole. By then, Singapore's legal academics had long written of the need for adaptation of the English common law to address the fast-changing circumstances of independent Singapore. Writing in 1979, Philip Pillai referred to the desirability for a stocktaking of the state of the art of legal research in Singapore and the need to evaluate its "contributions to the development of an indigenous and self-sustaining Singaporean legal system which, while having a common law basis, is nevertheless not a mere pale shadow of its English parent system".¹⁶⁰ Pillai made the point that as a developing country, the demands made by society on its lawyers – academic, practising and judicial – were far greater than those made by contemporary developed societies where the pace of economic and social change was more gradual. Singapore, it was said, was telescoping its social and economic development process and attempting to achieve in 30 years what took the West the whole century of the industrial revolution.

159 It was reported in November 2012 that Singapore's population has hit 5.31 million at the end of June 2012: Singapore Department of Statistics, Statistics <<http://www.singstat.gov.sg/stats/latestdata.html#12>> (last updated 19 November 2012) (accessed 23 November 2012).

160 Phillip Pillai, "Legal Research in Singapore: A Conspectus and Development Proposal" (1979) 21 Mal LR 88. See also "In Conversation: Professor GW Bartholomew" (1985) 6 Sing LR 56 at 68 on the importance of developing a country's own legal literature to achieve an autochthonous legal system. See also Andrew Phang, "Of Generality and Specificity – A Suggested Approach Toward the Development of an Autochthonous Singapore Legal System" (1989) 1 SAclJ 68. Phang (then an academic at the National University of Singapore and now Judge of Appeal at the Supreme Court of Singapore) commented that "a constant as well as conscious desire and effort to develop an autochthonous legal system will ... automatically result in the seizing of any and every opportunity – whether by legal academic or lawyer or judge – not only to resolve the issue at hand, but to resolve it in a fashion that will aid in the development of a truly Singaporean system".

80 Divergent development of common law and equitable rules can only arise if the lens of local public policy is used to examine and develop rules and principles. Where there is no existing binding authority (and no relevant legislation), the choice is between leaving it to Parliament to legislate or for the courts to develop rules and principles, not simply by blindly following decisions from other common law jurisdictions but by reference to similar cases in analogous areas and close examination of local policy. Where there are prior binding case law precedents, divergent development (indeed, any development in the light of new or changing circumstances and conditions) will require a willingness by the highest courts to depart (where necessary) from judicial precedents of yesteryear. It goes without saying that divergent development and departure from hitherto established precedents is not a matter to be lightly undertaken. Divergent development should not become the goal, that is, divergence for the sake of divergence; the goal must be to develop legal rules and principles that are best suited to the interests of the independent State of Singapore. Doubtless, when confronted with a new issue (whether IP-based or otherwise) that has not been authoritatively decided, the Singapore courts will examine any established precedents from other leading common law jurisdictions that are relevant, and in appropriate cases, there is no reason why it should not follow those precedents.

81 In some areas (particularly those that affect commerce and trade), such as the basic rules of contract law, there may be much to be said in favour of “leaving well alone” or to adopt a position similar to that established in leading common law commercial jurisdictions such as the UK. After all, a selling point sometimes used to attract foreign trade and investment to Singapore has been the argument that Singapore’s contract and commercial law (as well as dispute resolution procedures) are similar (not only at the level of basic principles but also in terms of the detailing) to those of English law.¹⁶¹ In other areas such

161 The need for certainty and predictability, coupled with the need to encourage foreign investment in the new State of Singapore, resulted in a deliberate policy decision to retain appeals to the Privy Council until 1994. See John Koh, *The First Chief: Wee Chong Jin – A Judicial Portrait* (Academy Publishing, 2010) at pp 87–88, citing Lee Kuan Yew’s speech to Parliament in 1995 as the then Senior Minister in the debate on independence and integrity of Singapore’s judiciary. The need to attract and retain foreign investment and business interests was also an important factor behind the modernisation of Singapore’s intellectual property law over the past 25 years. Phang does, of course, accept that uniform laws (less divergent development) encourage certainty and that this has served Singapore well. By advocating the development of a system that is more attuned to the mores, needs and aspirations of its society, he expressly rejects an approach that leads to throwing away the baby with the bath water. In particular, he rightly stressed that “where received English law is not only viable but also eminently suitable to the needs of the country (particularly in the commercial sphere) there is no reason to throw out as it were the baby with the bathwater. One should ... be prepared to
(cont’d on the next page)

as intellectual and industrial property rights, a truly autochthonous system will be very difficult, if not impossible, given the requirements of membership of the WTO and the mandatory requirements of the TRIPS Agreement.¹⁶² Doubtless that there are quite a few aspects of IP law that are not dealt with by the TRIPS Agreement and the international IP conventions.¹⁶³ Nevertheless, the freedom for countries to develop their own IP standards in the gaps and spaces is diminishing, given the use of FTAs by the US to require US-style laws or standards to fill those gaps and spaces. Of course, it can and should be said that this is still by national choice, as Singapore must agree to those standards. If she does agree to certain enhanced standards, this must be because this is in her own national interests – there is no question of derogation of sovereignty. Development of some areas of IP law in tandem with US IP laws is a matter of sovereign choice to advance the economic interests of Singapore.¹⁶⁴

82 Singapore has embarked on a process of developing an autochthonous legal system.¹⁶⁵ The removal of appeals to the Privy Council, the setting up of a permanent Court of Appeal, the Practice Statement¹⁶⁶ that the Court of Appeal may depart from its own prior

adapt and innovate without detracting from the proper day to day functioning of the legal institution itself". See Andrew Phang, "The Singapore Legal System – History, Theory and Practice" (2001) 21 Sing LR 23 at 30.

162 Similar points were made by Andrew Phang in "The Singapore Legal System – History, Theory and Practice" (2001) 21 Sing LR 23 at 45. Phang pointed to the tension between the need to develop indigenous legal systems and the need to meet the challenges of globalisation as well as internationalisation. He, however, expressed confidence that the tension can be avoided by distinguishing the needs in the international arena, and the application and development of common law to resolve disputes between and amongst local residents. This point is well taken and merits mulling: in some areas, laws that distinguish between domestic and international dealings do make sense, possibly such as laws governing international sale of goods. In other areas, it may be very hard to draw distinctions between domestic and international issues. However, as Phang mentioned, there are, in any case, the rules of conflict of laws that may be resorted to.

163 See, for the example, the extensive discussion in *RecordTV Pte Ltd v MediaCorp TV Singapore Pte Ltd* [2011] 1 SLR 830 (CA) by V K Rajah JA, of the role of public policy in Singapore in helping to interpret tricky statutory copyright provisions such as "reproduction", "communicate" and "authorise".

164 The intellectual property provisions in the US–Singapore Free Trade Agreement should be seen in the context of the total package of benefits built into the agreement as well as Singapore's interests in globalisation.

165 For an invaluable recent empirical study, see Goh Yihan & Paul Tan, "An Empirical Study on the Development of Singapore Law" (2011) 23 SAclJ 176. The authors rightly referred (at 190) to the 2008 Practice Direction (No 1 of 2008) of Chan Sek Keong CJ (as he then was) that where there are existing relevant local judgments, these should be cited in precedence to foreign judgments so that the courts are not unnecessarily burdened with decisions from jurisdictions with different legal, social or economic contexts.

166 Practice Statement on Judicial Precedent (11 July 1994).

decisions in appropriate cases, the clarification and limitation of continuing reception of English legal developments, as well as the acceptance of the usefulness of examination of precedents from other common law jurisdictions, point the way forward. Policy considerations are unavoidable, and whilst the development of new overarching principles (as opposed to incremental development) should not be lightly undertaken, there must be a place for principled judicial lawmaking within the judicial process as described by Sir Anthony Mason in his extra-judicial writings.¹⁶⁷

83 The review of Singapore's development of her copyright law over the past 25 years illustrates the way in which public policy concerns (internal and international) have shaped the form and pace of developments. Even though most of the major developments have been statutory and driven by Parliament, this does not mean that judicial consideration of policy and the needs of modern Singapore have no role to play in the development of Singapore's IP law.

84 Even in the case of copyright, whilst the framework and principles are now statutory, this does not mean that public policy considerations are irrelevant in the judicial application of the law. The judicial perception of the policy behind the criminal offences created by the Copyright Act is clearly important as a general factor in deciding or laying down sentencing tariffs and guidelines. Beyond this, there is the point that many of the statutory principles have been left deliberately undefined in the Copyright Act and left to the courts to interpret by reference to the ordinary meaning of the words and the perceived purpose behind the provisions and prior case law. The hotly debated question as to the meaning of "authorise" is one example where reference to the dictionary leads only to more questions than answers.¹⁶⁸ Singapore's active participation and support for ACTA is clear evidence that Singapore subscribes to the view that strong and effective

167 See, for example, Sir Anthony Mason, "From Procedure to Substance and Refinement of Legal Principle" (1995) 7 SAclJ 253 at 264 and Sir Anthony Mason, "Legislative and Judicial Law Making: Can We Locate an Identifiable Boundary?" (2003) 24 Adel L Rev 15. See also Brice Dickson ed, *Judicial Activism in Common Law Supreme Courts* (Oxford University Press, 2007) and Fiona Wheeler & John Williams, "Restrained Activism in the High Court of Australia" in *Judicial Activism in Common Law Supreme Courts* (Brice Dickson ed) (Oxford University Press, 2007) at p 19.

168 Some may still query whether there is room for a general public interest defence that arises outside of the Copyright Act. This, as mentioned, is unlikely, especially because of the broad range of public interest-type defences already set out in the Copyright Act. Where the statutory provisions are clear and what is objected is the effect of the provision (because of changes in society or technology, etc) the matter is one that is best left to legislative law reform. The judicial crafting of a defence in such a case, however deserving the plight of the individual defendant, may be tantamount to judicial legislation.

protection of copyright is in the interests of Singapore and the international community. This is despite the fact that ACTA has since met with considerable resistance in some jurisdictions. The range of criminal offences in the Copyright Act and the sentences that have been imposed clearly underscore Singapore's recognition of the importance of protecting the commercial interests of copyright (and trade mark) owners. At the same time, it is now clear that the purpose is not just stronger protection of the interests of copyright owners. The ultimate objective is to encourage learning and to advance the interests of society as a whole by ensuring that what is achieved balances the interests of all stakeholders. In striving to attain this objective, the lead role rightly vests in the legislature. However, within the statutory framework set up by Parliament, there are many areas where the courts will play an important role in fleshing out the details and in developing copyright concepts by reference to general principles and the perceived policy of copyright.¹⁶⁹

169 Speaking in 2011, Lord Neuberger of Abbotsbury, the Master of the Rolls observed: Over the past forty years, the role of the Judges in this country has become more and more concerned with issues of public and even social policy. This is partly because of the welter of poorly drafted legislation, which the courts have had to interpret as best they can.

...

In our present complex fast-moving society, the judges have a vital role to play. First, we must not interpret the law enacted by Parliament in a blinkered unimaginative way. With the welter of legislation, much of it ill-drafted, we should interpret statutes in a practical way. ... Secondly, we must develop the common law so it reflects the changing needs and standards of society. That sometimes means moving the law on when Parliament has not got the legislative time or even sometimes when it has not got the political will to do so.

By this, Lord Neuberger did not mean that, on occasion, the courts should go against the expressed will of Parliament. Indeed, the Master of Rolls concluded thus: "[W]e should never overlook our primary duty in every case, which is to decide each case according to the law, and we should never forget that, however we develop or apply the law, we cannot go against Parliament's will when it is expressed through a statute." See Lord Neuberger, Second Lord Alexander of Weedon Lecture (6 April 2011) <<http://www.judiciary.gov.uk/media/speeches/2011/whos-the-master-now>> (accessed 23 November 2012). The lecture was not on intellectual property rights; the focus was on the impact of human rights law.