

THE ‘WHOM’S’ IN ONLINE DISSEMINATION OF COPYRIGHT WORKS: TO WHOM AND BY WHOM IS THE COMMUNICATION MADE?

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The right of ‘communication to the public’ was introduced into the Singapore *Copyright Act* in 2004, as part of its implementation of art. 8 of the *WIPO Copyright Treaty* (the “WCT”) 1996. The purpose of this right is clear enough: it is to allow right-holders to control, *inter alia*, the dissemination of their copyright works via the internet. There is a recent case in Singapore which involved an unauthorised transmission of copyright works via the internet. Yet the right-holder in this case lost in its claim for infringement of its right of ‘communication to the public’. This defeat brings into focus the two essential elements of this right: namely, the two ‘whom’s’. To whom is the communication made—is it to ‘the public’? By whom is the communication made—is it the defendant in the infringement action? This article suggests that the Singapore approach in answering these two questions is overly strict, and may be inconsistent with what the promulgators intended for the right of ‘communication to the public’. This assessment is made in the light of the *travaux préparatoires* of the WCT, as well as developments in Australia and the EU.

I. INTRODUCTION

When the Singapore *Copyright Act*¹ was enacted in 1987, the internet and the World Wide Web had not yet gained a public face. Naturally, the drafters of the original version of this legislation did not direct their mind to the dissemination of copyright works in the online and digital environment. By 1999, the internet had changed the way of life for many people, in particular by opening up another channel for the distribution of copyright works. However, even when the Singapore *Copyright Act* was amended in 1999 with the avowed aim of updating the law to address the “urgent needs of copyright owners and users of copyright materials in the on-line environment”,² the amendments did not address the question of whether the act of dissemination of copyright works on the internet is an act which falls within the control of right-holders. Rather, the 1999 amendments were mainly targeted at the *reproduction* of copyright works, which inevitably occurs when the works are disseminated online. Perhaps it

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¹ Cap. 63, 2006 Rev. Ed. Sing. [*Copyright Act*].

² Sing., *Parliamentary Debates*, vol. 70, col. 2069 at 2069 (17 August 1999). This Bill eventually became the *Copyright (Amendment) Act* (No. 38 of 1999).

was thought at the time that a refined concept of reproduction—one whose application is explicitly extended to the virtual world—would give right-holders sufficient control over online dissemination of their copyright works.³

Then in 2004, a new exclusive right called the right of ‘communication to the public’ was introduced into the Singapore *Copyright Act*.⁴ The term ‘communicate’ is defined to mean⁵:

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

- (a) the broadcasting of a work or other subject-matter;
- (b) the inclusion of a work or other subject-matter in a cable programme; and
- (c) the making available of a work or other subject-matter (on a network or otherwise) in such a way that the work or subject-matter may be accessed by any person from a place and at a time chosen by him.

Within this overarching definition of ‘communicate’ are three specific rights. The right of broadcasting in paragraph (a) and the right of inclusion in a cable programme (also known as ‘cable-casting’) in paragraph (b) are not new. It has already been mentioned that right-holders have had the broadcasting right and the cable-casting right since the inception of the Singapore *Copyright Act* in 1987. What is new is the ‘making available’ formula in paragraph (c). This formula has created a new right, which according to the Minister for Law, is “the right to control the dissemination of [copyright] works on the Internet”.⁶

³ There was possibly another reason. There was (and perhaps still is) a view that online disseminations could fall within the ambit of the right of inclusion in a cable programme (also known as the right of ‘cable programming’ or ‘cable-casting’). The cable-casting right, together with the broadcasting right, were available to right-holders from the inception of the *Copyright Act* in 1987. These concepts were defined in the legislation from day one. With the advent of the internet in the 1990s, some argued that the statutory definition of cable-casting already present in the *Copyright Act* was wide enough to encompass distributions via the internet. Supporters of this view would point to the by-now infamous case, *The Shetland Times Ltd v. Wills* [1997] E.M.L.R. 277 (more recently endorsed in *Sony Music Entertainment (UK) Ltd v. Easyinternetcafé Ltd* [2003] F.S.R. 48 at paras. 47, 48). Others argued that, for various reasons including the interactive nature of the internet, online transmissions cannot properly be described as cable transmissions: see in particular, the views expressed in Daniel Seng, “Copyright Norms and the Internet: The Problems of Works Convergence” [1998] S.J.I.C.L. 76 at 106, 107) and in George Wei, *The Law of Copyright in Singapore*, 2d ed. (Singapore: Singapore National Printers, 2000) at para. 8.126. Outside of Singapore, academics who support this opposing view include Professors Lionel Bently and Brad Sherman (authors of *Intellectual Property Law*, 1st ed. (Oxford: Oxford University Press, 2001) at 138) and Professors Sam Ricketson and Jane Ginsburg (authors of *International Copyright and Neighbouring Rights: The Berne Convention and Beyond*, 2d ed. (Oxford: Oxford University Press, 2006) vol. 1 at paras. 12.50, 12.51 [*International Copyright and Neighbouring Rights*]).

⁴ See the *Copyright (Amendment) Act*, No. 52 of 2004. This came into force on 1st January 2005. The new right of ‘communication to the public’ is found in s. 26(1)(a)(vi) for original literary, dramatic, musical and artistic works, s. 26(1)(b)(iii) for original artistic works, s. 83(c) for cinematographic films, s. 84(1)(d) for broadcasts and s. 85(1)(d) for cable programmes. For performances, see s. 252(1)(g). In the case of sound recordings, this new right is expressed as a right ‘to make available a sound recording to the public by means of, or as part of, a digital audio transmission’: see s. 82(1)(d). Note that this new right is not granted to right-holders of published editions of literary, dramatic, musical or artistic works.

⁵ *Copyright Act*, *supra* note 1, s. 7(1).

⁶ Sing., *Parliamentary Debates*, vol. 78, col. 1041 (16 November 2004) (Professor S. Jayakumar).

Besides this ministerial statement, there is another source we can turn to when searching for the purpose of the new right. The 'making available' formula is derived from art. 8 of the *WIPO Copyright Treaty* (the "WCT") 1996, a treaty ratified by Singapore in 2005.⁷ The WCT is an international agreement established under the *Berne Convention for the Protection of Literary and Artistic Works* (the "Berne Convention") to clarify the existing rules in the *Berne Convention*, and to introduce new rules for the protection of literary and artistic works in the digital environment. The latest revision of the *Berne Convention* was in 1971, and it was by no means clear that the provisions of the *Berne Convention* could adequately deal with the transmission of copyright works in the digital environment, such as transmission via the internet. It is well known that art. 8 of the WCT was devised by the international community as the 'umbrella solution'⁸ to this problem.⁹ Article 8 introduces the right of 'communication to the public' and defines it to include:

the making available to the public of their [literary and artistic] works in such a way that members of the public may access these works from a place and at a time individually chosen by them.

According to the *travaux préparatoires* of the WCT, this formula is aimed at the act of 'providing access' to the copyright work.¹⁰ For example, the act of connecting a server (containing a copy of an article) to the internet is an act of 'making available' the article to the public.¹¹ It should be noted that the 'making available' formula in art. 8 is not concerned with how the article came to reside in the server. That is, this formula is not concerned with the *reproduction* of the article in the server. In short, the WCT treats the act of connecting the server to the internet—thereby allowing the article to be disseminated via the internet—as distinct and separate from the act of reproducing the article in the server. Liability for the former act is governed by the new right of 'communication to the public', whereas liability for the latter act is governed by the age-old right of reproduction.

There can be no doubt that the right of 'communication to the public' is intended to give right-holders control over, *inter alia*, online transmissions of their copyright works, in particular via the internet. The first Singapore case to invoke the right of 'communication to the public' is *RecordTV Pte Ltd v. MediaCorp TV Singapore Pte Ltd*.¹² This case involved an unauthorised transmission of copyright works via

⁷ This ratification was part of the obligations undertaken by Singapore in various Free Trade Agreements (the "FTAs") it signed with the European Free Trade Association (in June 2002), Australia (in February 2003) and with the US (in May 2003).

⁸ This term was coined by Mr. Mihály Ficsor when he was the Assistant Director General of the WIPO. See Mihály Ficsor, *The Law of Copyright and the Internet: The 1996 WIPO Treaties, their Interpretation and Implementation* (Oxford: Oxford University Press, 2002) at para. 4.84.

⁹ *International Copyright and Neighbouring Rights*, *supra* note 3 at para. 12.17.

¹⁰ See WIPO, Committees of Experts, *Basic Proposal for the Substantive Provisions of the Treaty on Certain Questions Concerning the Protection of Literary and Artistic Works to be Considered by the Diplomatic Conference*, WIPO Doc. CRNR/DC/4, 30 August 1996, at Explanatory Note 10.10 [*Basic Proposal*]. See further at note 24 and the accompanying main text.

¹¹ This example is given by the Australian government during its review on whether and how to implement art. 8 of the WCT: see Austl., Commonwealth, Attorney-General's Department, *Copyright Reform and the Digital Agenda* (Discussion Paper) (Canberra: Australian Government Publishing Service, 1997), Part 4 at para. 3.20 [*Digital Agenda Discussion Paper*].

¹² [2011] 1 S.L.R. 830 (C.A.) [*RecordTV* (C.A.)].

the internet. Yet the right-holder in this case lost in its claim for infringement of its right of ‘communication to the public’. This defeat brings into focus the other two essential elements of this right: namely, the two ‘whom’s’. To whom is the communication made—is it to ‘the public’? And by whom is the communication made—by the defendant in the infringement action? According to the Court of Appeal, these two elements were not satisfied in this case. This author suggests that the appellate court may have adopted an overly strict approach when answering the two questions, and offers an alternative approach that can be traced back to the origins of the right: namely, art. 8 of the *WCT*. This article will also consider the developments in Australia and the EU, where the national right of ‘communication to the public’ is also derived from art. 8 of the *WCT*.

II. *RECORDTV V. MEDIACORP TV*

The battle was between a television broadcaster and a technology service provider. The television broadcaster, MediaCorp, was also a producer of movies and other television shows. The technology service provider was RecordTV, whose internet-based digital video recorder (“iDVR”) was in essence an online version of the video-cassette recorder and digital-video recorders which allow recording of free-to-air broadcasts for what is known as ‘time-shifting’—that is, recording a television broadcast for the purpose of watching it at a later and more convenient time. RecordTV offered its iDVR service to any member of the public in Singapore who signed up (for free) as a ‘registered user’. Every registered user was assigned a unique username and password. Using this username and password, the registered user could gain access to RecordTV’s online database, which listed the movies and other television programmes scheduled for broadcast on MediaCorp’s channels over the coming week. Only the programmes listed on this database were available for recording. The registered user would select from this database the show which he wanted to record, and issue a request for the recording to be made. He did not have to input the start and end times of the show or the channel on which this show would be broadcasted. All this information had been pre-programmed by RecordTV into its iDVR. At the scheduled date and time of the broadcast, the selected show would be recorded. The recorded show would be stored in RecordTV’s server, waiting to be retrieved by the registered user. When the registered user logged onto RecordTV’s website to call up this copy of the show, it would be streamed to the registered user. RecordTV’s service was a commercial venture. Although it did not charge members of the public a fee to become registered users, the primary purpose of providing this iDVR service was to earn revenue from selling advertising space on its website.

Invariably, there would be more than one registered user making a request to record the same show. These multiple requests were handled by RecordTV in two different ways or phases, which are relevant for the purposes of the infringement action brought by MediaCorp.¹³ In the first phase of its operations, RecordTV used

¹³ After the commencement of this action, RecordTV implemented a third phase. This was the ‘multiple’ mode of storage where, in every case that RecordTV received multiple requests to record a show, multiple copies of the show were made and stored in the server, the exact number of copies corresponding with the number of recording requests issued for the show. A registered user has access only to the copy

the 'Single Instance Storage' ("SIS") mode of storage, where only one copy of the broadcast was stored on its server, regardless of the number of requests issued by registered users to record the show. As and when these registered users log onto RecordTV's website to call up the recorded show, it was this single digital copy that was made available to them. In other words, in the SIS mode, one copy of the recording was 'shared' amongst the multiple registered users who requested the recording.¹⁴ In the second phase, RecordTV used the 'Mixed' mode of storage, where the number of copies of the show made and stored in the server corresponded with the number of requests issued by registered users for the recording of the show, so long as the system resources permitted it. Once there was insufficient storage capacity, the system shifted to the SIS mode. During the second phase when multiple copies were made and stored in the server, each of these copies was stored as individual and separate files in the recording computers. The registered users who issued the recording requests had access to only one of these files—namely, the one containing the copy of the show recorded at his request. When there was insufficient storage capacity and only one copy of the recorded show was stored, this single copy was shared amongst the registered users who requested the recording (just like in the SIS phase). However, even in the 'Mixed' mode, much of the playback to the registered users took the form of "non-unique copies",¹⁵ that is, from a single digital copy stored in the server.

The critical facts of the case can be summarised as follows. The recording of a broadcast was done by the registered user, who issued a command to the system provided by RecordTV. It was the registered user who selected—from a list prepared by RecordTV—which show to record. Only a single copy of the show was made and stored, regardless of the number of requests issued by registered users for that show. RecordTV connected its server to the internet, making it possible for the registered user (who issued the command) to record the show and have access to this single digital copy at a different time.

There were two primary acts with copyright implications.¹⁶ The first act was the recording of the broadcast and its storage in RecordTV's server. This act of recording and storing the broadcast in the server potentially engaged MediaCorp's right of reproduction. It was determined that the party responsible for this reproduction was the registered user himself, and not RecordTV.¹⁷ MediaCorp's claim was not against

of the show recorded pursuant to *his* request. The third phase is not the subject-matter of the dispute. As indicated by the High Court, for the purposes of the action, only RecordTV's services during the first and second phases were relevant: see *RecordTV v. MediaCorp TV Pte Ltd and Others* [2010] 2 S.L.R. 152 at para. 15 (H.C.) [*RecordTV* (H.C.)]. The Court of Appeal also noted that the third phase was implemented by RecordTV after the commencement of legal proceedings: *RecordTV* (C.A.), *supra* note 12 at para. 9.

¹⁴ This description of the SIS mode is found in the High Court's judgment of this case: *RecordTV* (H.C.), *supra* note 13 at para. 9.

¹⁵ This was a finding of fact made by the High Court: *RecordTV* (H.C.), *supra* note 13 at para. 79.

¹⁶ Apart from these two primary acts, MediaCorp had a third claim against RecordTV: namely, that RecordTV had authorised the commission of these two primary acts and was therefore liable under the concept of 'authorising infringement' in copyright law. MediaCorp also failed in this third claim.

¹⁷ This was a finding of fact made by the High Court: *RecordTV* (H.C.), *supra* note 13 at para. 33 and affirmed by the Court of Appeal: *RecordTV* (C.A.), *supra* note 12 at para. 20. Reliance was placed on a U.S. case, *The Cartoon Network LP, LLLP v. CSC Holdings Inc* 536 F. 3d 121 (2nd Cir. 2008). The defendant in that case offered a remote-storage digital video recording service similar to RecordTV's

the registered user. In any event, the registered user would not be liable for copyright infringement because reproduction of a broadcast for the purpose of time-shifting is permitted by a provision of the *Copyright Act*.¹⁸

The second act was the digital transmission of the recorded show to the registered users via the internet, as and when they logged onto RecordTV's website and gained access to the single copy of the show stored on RecordTV's server. MediaCorp claimed that this act infringed its right of 'communication to the public'. The Court of Appeal identified this online transmission as an act falling within the 'making available' formula in the statutory definition of 'communicate'.¹⁹ RecordTV's case for non-infringement was based on three grounds: first, there may have been an act of communication in this case, but this communication was not to 'the public'; secondly, this communication was made by the registered user and not by RecordTV; and thirdly, RecordTV's service was in any event permitted by the fair dealing exception in s. 35(1) of the *Copyright Act*. The Court of Appeal agreed with RecordTV on the first two grounds, and accordingly dismissed MediaCorp's claim without considering if the fair dealing exception applied in this case.

Part III assesses the reason why the recipients of the recorded shows (the registered users) did not constitute 'the public'. Part IV examines the reason why RecordTV was not the party who made available the recorded shows to the registered users.

III. TO WHOM IS THE COMMUNICATION MADE—TO 'THE PUBLIC'?

The recipients of MediaCorp's copyright works (the shows and broadcasts) were the registered users—who were members of the public who had registered (for free) with RecordTV. At the same time, each registered user was able to gain access only to the shows which were recorded at his request. The Court of Appeal took the view that the latter fact prevailed over the former. Two reasons were given for the court's conclusion that the registered users did not constitute 'the public'.

First, although the registered users were members of the public, they were also holders of valid television licences, and thus had an existing relationship with MediaCorp as they were licensed by MediaCorp to watch the latter's shows. To the extent that this licence created a contractual relationship between the registered users and MediaCorp, the registered users were "arguably" not members of 'the public' for the purposes of assessing if MediaCorp's right of 'communication to the

iDVR. The issue before the U.S. Court of Appeal was the identity of the party responsible for making the copy of the broadcast stored in the defendant's server—was it the defendant who designed the technology which made the copying possible, or was it the defendant's customer who issued the request to the defendant's technology to record the broadcast? The U.S. court held that it was the customer's volitional conduct (in issuing the recording request to the defendant's service) that was the direct and immediate cause of the reproduction of the broadcast. Therefore, it was the defendant's customer and not the defendant, who made the copy of the broadcast.

¹⁸ See s. 114 of the *Copyright Act 1987* (No. 2 of 1987, Sing.). This provision permits the making of a cinematographic film that is included in a broadcast 'for the private and domestic use of the person' making the cinematographic film.

¹⁹ *RecordTV* (C.A.), *supra* note 12 at paras. 33, 34. Interestingly, the High Court also treated this online transmission as an act of cable-casting falling within paragraph (b) of the statutory definition of 'communicate': see *RecordTV* (H.C.), *supra* note 13 at paras. 73-75. It has been noted that there are difficulties with this latter classification: see *supra* note 3.

public' had been infringed.²⁰ This author believes that the Court of Appeal, in using the word "arguably" in the first reason, had not come to a definitive position on this issue. It was the second reason that formed the true basis of its conclusion that the registered users in this case did not constitute 'the public'. Nonetheless, it is important to assess if the first reason—that is, existence of a relationship (contractual or otherwise) between the right-holder and the recipients of a communication—is the proper way of determining if the communication was made to 'the public'. This author respectfully submits that this factor is irrelevant in the inquiry. Parliament could not have intended the phrase 'the public' to be interpreted in this way. There is a provision which supports this submission. Section 199(3) of the *Copyright Act* provides that where a person receives and immediately retransmits an authorised television broadcast by including it in a cable programme service, this person shall be treated as if he had been a licensee of the right-holders of the copyright works embodied in the broadcast. The impact of s. 199(3) can be seen from the following scenario. StarHub TV provides a cable programme service in Singapore. The members of the public in Singapore who subscribe to StarHub TV's cable programme service can watch movies and other programmes on its cable channels, including MediaCorp's free-to-air broadcasts. Insofar as MediaCorp's broadcasts are concerned, StarHub TV's role is to receive the signals of MediaCorp's broadcasts and immediately retransmit these signals via its cable system to its subscribers. To put it in copyright terms, StarHub TV is *including* MediaCorp's shows *in a cable programme service*. Including a copyright work in a cable programme service—or cable-casting—falls within the scope of the term 'communicate'.²¹ The effect of s. 199(3) is to exempt StarHub TV from the need to get a copyright licence from MediaCorp for this act of communication. It is obvious that the enactment of this provision is made on the premise that in this scenario, StarHub TV is *prima facie* infringing MediaCorp's right of 'communication to the public'. In other words, Parliament considers that Starhub TV's subscribers constitute 'the public' in this communication. Yet StarHub TV's subscribers are holders of television licences and are authorised to watch MediaCorp's broadcasts, and to that extent, have an existing relationship with MediaCorp.

The other point to be made about the first reason is that, with effect from 1st January 2011, the Government abolished radio and television licence fees in Singapore.²² If an existing contractual relationship between MediaCorp and the registered users was the critical factor in the Court of Appeal's decision, the abolition of the need for television licences may throw into question the continued validity of this aspect of the decision.

The critical factor is really the second reason. The second reason is set out in this paragraph of the Court of Appeal's judgment²³:

Since Registered Users could only view those MediaCorp shows which they had requested to be recorded, those shows were communicated to the relevant

²⁰ *RecordTV (C.A.)*, *supra* note 12 at para. 25.

²¹ See *supra* note 5 and the accompanying main text.

²² Sing., *Annual Budget Statement*, vol. 87, col. 2634 at 2636 (18 February 2011) (Minister of Finance, Tharman Shanmugaratnam).

²³ *RecordTV (C.A.)*, *supra* note 12 at para. 28. See also para. 26: "We see no reason why the aggregate of the private and individual communications made to each of the Registered Users should transform the nature of such communications into 'public' communications."

Registered Users privately and individually. The aggregate of private communications to each of Registered User is not, in this instance, a communication to the public.

Although the words “privately” and “private” were used, these words are not particularly useful in this inquiry. A ‘private communication’ is a conclusion that the communication was not made to ‘the public’, and it does not inform on how this conclusion is reached. It was really the *individual* nature of the communication which formed the basis of the appellate court’s conclusion that the communications to the registered users in this case were not to ‘the public’. However, even this test is problematic. It is respectfully submitted that the *individual* nature of online communication is irrelevant to this inquiry. In fact, it is precisely this feature of the communication which fuelled the need to promulgate the ‘making available’ formula in art. 8 of the *WCT*.

A. *The Intended Scope of the Phrase ‘The Public’ under Art 8 of the WCT*

It was mentioned in Part I that until the conclusion of the *WCT*, there was uncertainty as to whether the exclusive rights provided in the *Berne Convention* (last revised in 1971) could be interpreted in a way to encompass online transmissions of copyright works. For example, the broadcasting right²⁴ might have been a suitable candidate, except that the notion of broadcasting implicitly involves a wireless transmission which is sent *simultaneously* to many recipients. Thus, the broadcasting right was not a good fit for online transmission, which is interactive and on-demand by nature, in that the transmission is sent at different times to various recipients in response to requests issued by them, at a time determined by them. Article 8 was intended to lay to rest this uncertainty by providing for the right of “making available to the public of [literary and artistic] works in such a way that members of the public may access [those] works from a place and at a time individually chosen by them”. This is evident from the discussions at international meetings on the provisions of the draft treaty (known as the “*Basic Proposal*”). Article 10 of the *Basic Proposal* sets out the proposed right of ‘communication to the public’. The *Basic Proposal* also contains explanatory notes, the purpose of which is to, *inter alia*, indicate the reasoning behind the proposals. Explanatory Note 10.11 to art. 10 of the *Basic Proposal* has this to say²⁵:

One of the main objectives of [the ‘making available’ formula] is to make it clear that interactive on-demand acts of communication are within the scope of the provision. This is done by confirming that the relevant acts of communication include cases where members of the public may have access to the works from different places and at different times. The element of *individual choice* implies the interactive nature of the access [emphasis added].

In other words, the ‘making available’ formula in art. 8 is intended to cater for the *individual* nature of online transmissions. Therefore, the fact that MediaCorp’s

²⁴ See art. 11*bis*(1)(i) (literary and artistic works) and art. 14*bis*(1) (cinematographic works) of the *Berne Convention*.

²⁵ For the full name of the *Basic Proposal*, see *supra* note 10.

copyright works were made available to the registered users *individually* in response to their requests issued at different times should not be an objection to these recipients constituting 'the public'.

The question whether the copyright work was communicated to 'the public' must be assessed by reference to some other guideline(s). This is where judicial decisions from Australia and the EU come in useful.

B. The Australian Experience

The right of 'communication to the public' was introduced into the *Australian Copyright Act 1968* via the *Copyright Amendment (Digital Agenda) Act 2000*. The term 'communicate' is statutorily defined to mean²⁶:

[to] make available online or electronically transmit (whether over a path, or a combination of paths, provided by a material substance or otherwise) a work or other subject-matter, including a performance or live performance within the meaning of this Act.

The *Copyright Amendment (Digital Agenda) Act 2000* also abolished the former broadcasting right and the 'diffusion' right (the term used for the cable-casting right in Australia). These two rights are now bundled into a new concept of 'broadcasting', where no distinction is made between wireless transmissions and wired transmissions.²⁷ This broadened concept of broadcasting is then subsumed within the new right of 'communication to the public'.

There are differences between the rights of 'communication to the public' in Singapore and Australia. In particular, the concept of broadcast in Australia includes cable-casting whereas broadcasting and cable-casting are maintained as separate concepts in Singapore. These differences are not critical or even relevant for the purposes of analysing the MediaCorp/RecordTV dispute. This dispute invokes the 'making available' formula, which is the same in both countries.

When Australia introduced the right of 'communication to the public' in 2000, it considered whether to adopt a statutory definition of the phrase 'the public'. It was decided that a statutory definition of the phrase 'the public' was not necessary.²⁸ This

²⁶ *Australian Copyright Act 1968* (Cth.), s. 10(1) [*Australian Copyright Act 1968*].

²⁷ For the new definition of 'broadcast', see *Australian Copyright Act 1968*, s. 10(1): 'broadcast' means "a communication to the public delivered by a broadcasting service within the meaning of the *Broadcasting Services Act 1992*." The abolition of the distinction between wireless broadcasting and wired cable transmissions is found in the definition of 'broadcasting service' in s. 6 of the *Broadcasting Services Act 1992* (Cth.). This definition makes it very clear that it is immaterial "whether the delivery [of the service] uses the radiofrequency spectrum, cable, optical fibre, satellite or any other means or a combination of those means". The other point to note about this definition is that certain services are excluded, in particular, services that provide no more than data or text (with or without associated still images) and services that make programs available on demand on a point-to-point basis. This means that online transmissions do not fall within the new concept of broadcasting.

²⁸ Note, however, that Australia has a statutory definition of the phrase 'to the public'. This is defined to mean "to the public within or outside Australia": see *Australian Copyright Act 1968*, s. 10(1). This definition serves to give control to the right-holder in Australia over transmissions that originate from Australia but are intended only for reception by the public outside Australia: see Austl., Commonwealth, *Exposure Draft and Commentary to the Copyright Amendment (Digital Agenda) Bill* (February 1999)

was because there was already ‘solid case law’ on the interpretation of this phrase to mean ‘the copyright owner’s public’, and the policy-makers were satisfied that this interpretation achieved the desired policy outcome.²⁹ This ‘solid case law’ is the 1997 decision by the High Court of Australia in *Telstra Corporation Ltd v. Australasian Performing Right Association Ltd*.³⁰ In other words, the legislative intent in Australia is to adopt the High Court’s interpretation of the phrase ‘to the public’ for the purposes of the new right. It is to this case we must now turn.

The defendant, a telecommunication service provider, participated in the provision of a ‘music-on-hold’ service to its telephone subscribers. Upon payment of a fee by the subscriber to the defendant, the defendant would arrange for a caller to the subscriber’s telephone line to listen to music when he was put on hold (for example, if the subscriber’s telephone line was busy). The right-holders of the musical works sought compensation from the defendant for such use of their songs. One of their claims was that the defendant’s transmission amounted to a ‘broadcast’. At the material time of this suit, the term ‘broadcast’ was defined in the *Australian Copyright Act 1968* to mean “transmit by wireless telegraphy to the public”.³¹ Where the callers were mobile phone users, the transmission of the songs to these callers who were put on hold involved a wireless transmission, and hence this transmission was undoubtedly a broadcast. The remaining issue on this claim was whether this broadcast was to ‘the public’. It was in this context that the High Court of Australia had to determine the ambit of the phrase ‘the public’. The court held that the phrase ‘the public’ meant ‘the copyright owner’s public’, that is, the group of people within the contemplation of the copyright owner in the sense that he would expect to receive a fee if there is a communication of his work to this group of people.³² A very important factor in this inquiry was whether the communication occurred in a “commercial setting”³³ or “as an adjunct to a commercial activity”.³⁴ If the setting or activity was commercial in nature, the copyright owner would ordinarily expect payment for the use of his work and hence, the audience of this communication would constitute ‘the public’. On the facts of the case, the defendant’s transmission was undoubtedly of a commercial nature. The High Court unanimously held that the defendant’s transmission of songs to mobile phone users was a broadcast to ‘the public’.

at 27, 28 [*Exposure Draft and Commentary*]; and Austl., Commonwealth, *Explanatory Memorandum to the Bill* at 23 [*Explanatory Memorandum*]. However, this definition of ‘to the public’ does not inform on what ‘the public’ means.

²⁹ *Digital Agenda Discussion Paper*, *supra* note 11 at para. 4.85. This is the discussion paper prepared by Australia’s Attorney-General’s Department for the purposes of seeking comments from the public on the government’s plan to implement the provisions of the WCT in the *Australian Copyright Act 1968*. References to the *Telstra* case are found in the *Digital Agenda Discussion Paper*, *supra* note 11 at paras. 1.15, 4.37-4.44, 4.85.

³⁰ (1997) 191 C.L.R. 140 (H.C.A.).

³¹ *Australian Copyright Act 1968*, s. 10(1). This definition was repealed when broadcasting was subsumed within the right of ‘communication to the public’ in 2000: see further *supra* note 27 and the accompanying main text.

³² *Supra* note 30 at 156, 157 (per Dawson and Gaudron JJ.) and 199, 200 (per Kirby J.). The remaining two judges, Toohey and McHugh JJ., adopted the judgment of Dawson and Gaudron JJ. on this issue.

³³ *Supra* note 30 at 157 (per Dawson and Gaudron JJ.).

³⁴ *Supra* note 30 at 198 (per Kirby J.).

C. The European Experience

The right of 'communication to the public' in the EU is found in art. 3 of the *Directive on Copyright in the Information Society* (the "*InfoSoc Directive*").³⁵ Article 3(1) of the *InfoSoc Directive* provides as follows:

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

Recital 25 of the preamble to the *InfoSoc Directive* makes it clear that the 'making available' formula in art. 3 gives right-holders the exclusive right to make available to the public copyright works by way of interactive on-demand transmissions. Recital 24 is instructive on the meaning of 'the public'. It provides as follows:

The right to make available to the public [copyright works] should be understood as covering all acts of making available such subject-matter to members of the public not present at the place where the communication originates.

The leading case in the EU on the right of 'communication to the public' is the ECJ decision in *Sociedad General de Autores y Editores de España (SGAE) v. Rafael Hoteles SA*.³⁶ The defendant, a hotel operator, had installed television sets in its hotel rooms. Broadcasts received on those television sets were not received directly from the broadcaster. Rather, the broadcasts were first received by a main aerial installed by the defendant on its premises and then transmitted to the individual hotel rooms via a cable system put in place by the defendant. The ECJ was asked to determine two questions relating to the scope of the right of 'communication to the public'.³⁷ The first question was whether the defendant's cable distribution of programme signals through its television sets to its clients in hotel rooms constituted a 'communication to the public'. The second question was whether the defendant's installation of the cable system and television sets in hotel rooms in itself constituted a 'communication to the public'. (This second question also has an impact on how to identify the communicator, and it will be considered more fully in Part IV.)

Both these questions had a common issue—namely, whether the private nature of the transmissions to the hotel rooms precluded the transmissions from constituting a communication to 'the public'. By these questions, the ECJ was in effect being asked to pronounce on the ambit of the phrase 'the public'. In particular, what was the relevance of the fact that the communication took place in a private setting (i.e., in the hotel room accessible only to the hotel guest assigned to that room)? The ECJ held that this was an immaterial factor when determining if the communication was to 'the public'. The court opined that this conclusion was mandated by the letter and spirit of art. 8 of the *WCT*. What was material was whether the defendant's act

³⁵ EC, *Commission Directive 2001/29/EC of 22 May 2001 on the harmonization of certain aspects of copyright and related rights in the information society*, [2001] O.J. L 167/10.

³⁶ C-306/05, [2007] E.C.R. I-11519 [SGAE].

³⁷ There were actually three questions referred to the ECJ. This author has distilled these three questions into two questions.

had reached out to a 'new public', that is, a public different from the public targeted by the original act of communication.³⁸ Applying this test to the facts of the case, the ECJ held that the defendant's hotel guests constituted a 'new public'. The court was influenced by the fact that the defendant was providing an "additional service performed with the aim of obtaining some benefit" in the form of an enhancement to the hotel's standing and hence, the price of its rooms.³⁹

D. Summary

This author has argued that the 'making available' formula in art. 8—and accordingly the Singapore equivalent—is intended to encompass communications which are *individual* by nature. The phrase 'the public' must be interpreted in a way to give effect to this intent. The Australian courts have interpreted this to mean 'the copyright owner's public', and that a communication that takes place in a commercial setting is likely to be a communication to the 'copyright owner's public'. The ECJ has interpreted this phrase to mean 'a new public', and when the defendant derives some benefit from the communication of the copyright work, he is likely to be communicating the work to 'a new public'. It is submitted that the Australian and the European interpretations are in substance the same.

The Australian and European interpretations of the phrase 'the public' were not presented to the Court of Appeal for its consideration. If the Australian interpretation had been applied to the facts of this case, the registered users would have qualified as 'the copyright owner's public'. The basis for this conclusion is *not* that these registered users paid for a television licence, and because of this contractual relationship, qualified as MediaCorp's public. It has been suggested earlier that this factor is immaterial. The critical factor should be whether the communication occurred in a commercial setting. In this case, the purpose and character of RecordTV's service was undeniably commercial in nature. RecordTV provided the iDVR service to the registered users with the ultimate aim of selling advertising space on its website. RecordTV's revenue need not come from the registered users who got to enjoy the broadcasts. An analogy can be drawn with the *Telstra* case. The defendant who provided the 'music-on-hold' service did not receive any payment from the mobile phone users who got to listen and enjoy the songs when they were put on hold. The defendant's income came from the telephone subscribers who were prepared to pay the defendant for its service so as to keep their callers distracted or entertained when their lines were busy. Just as the mobile phone users in *Telstra* qualified as 'the copyright owner's public', so should the registered users in this case.

³⁸ *Supra* note 36 at para. 40.

³⁹ *Supra* note 36 at para. 44. For a very recent U.K. case where the court found that the defendant's communication had been made to a 'new public', see *Twentieth Century Fox Film Corp v. Newzbin Ltd* [2010] F.S.R. 21 (H.C.) [*Newzbin*]. This is a judgment by Kitchin J. dated 29 March 2010. The defendant owned and operated a website called 'Newzbin' which catalogued and indexed millions of messages and content posted by Usenet users on movies, including infringing copies of movies. Subscribers to the defendant website who paid a subscription fee to become 'premium members' could use the defendant's catalogue and index to search for a particular movie and then to download the infringing copy of the movie. Kitchin J. held that the defendant was not merely providing a link to a movie made available by Usenet users. Rather, the defendant had intervened in a "highly material way to make the [movies] available to a new audience, that is to say, its premium members." (*Newzbin* at para. 125).

The same conclusion would have been reached if this case had been analysed by reference to the European interpretation. The European test is to determine if there is a 'new public'. At first glance, it might be argued that the registered users were not a 'new public', because they were the target audience of MediaCorp's broadcasts; RecordTV's service reached out to the *intended* audience. However, the counter-argument is that MediaCorp's broadcasts were aimed only at members of the public who were able to view the broadcast at the appointed time. Members of the public who cannot, for various reasons, view the broadcast at the appointed time, form a different audience in the eyes of the film and entertainment industries. This is why the business model of these industries provides for other modes of exploitation for their works to reach out to this different audience, for example, by licensing cable television providers to include their works in on-demand TV channels. Further, in the European test, the critical factor for determining whether there is a 'new public' is the matter of benefit to the communicator. RecordTV clearly derived a benefit (the ability to sell advertising space on its website) from providing this service to the registered users.

IV. BY WHOM IS THE COMMUNICATION MADE?

There are provisions in the *Copyright Act* which inform on this question: s. 16(5) for the act of broadcasting, and s. 16(6) for all the other acts of communication.⁴⁰ To recap, the allegedly infringing act in this case is the digital transmission of the recorded broadcast via the internet. This act is not broadcasting; rather, it falls within the 'making available' formula of the right of 'communication to the public'. Thus, the relevant provision for the purposes of identifying the communicator in this case is s. 16(6). This provision became the starting point of the Court of Appeal's analysis. Section 16(6) provides as follows:

For the purposes of this Act, a communication other than a broadcast is taken to have been made by the person responsible for determining the content of the communication at the time the communication is made.

The Court of Appeal noted that the inquiry in s. 16(6) required a determination of (a) the time of the communication; (b) the content of the communication at the time of communication; and (c) the identity of the person responsible for determining that content. As mentioned earlier, the relevant act of communication identified by the appellate court was the act of 'making available' the recorded show for viewing by the registered users who had requested the recording of the show. The time of this act of 'making available' for the purposes of (a) was the moment when the recorded show was available for viewing by these registered users. At this particular time, the content for the purposes of (b) was the specific show recorded pursuant to a request of the registered user. As for (c), the court held that it followed from its findings on (a) and (b) that the person responsible for determining the content of the communication was the registered user himself. The reasoning of the court appears to be this: if the registered user did not request the recording of the show, there would be no recording

⁴⁰ The other acts of communication include cable-casting and the 'making available' formula: see *supra* note 5 and the accompanying main text for the statutory definition of 'communicate'.

of the show and hence no copy of the show stored in RecordTV's server, and nothing to communicate.⁴¹

It is unfortunate that the Court of Appeal was not referred to the background to the enactment of s. 16(6). In this author's opinion, the conclusion reached in this case is inconsistent with the legislative intention underlying s. 16(6) and, more generally, the right of 'communication to the public'.

A. *The Background to Section 16(6): Its Link with the Agreed Statement to Art. 8 of the WCT*

Whilst it is well known that the 'making available' formula in art. 8 of the *WCT* is primarily targeted at the act of providing access to a copyright work in the digital environment, it is a less known fact that Singapore played an active part in the international meetings that led to the *WCT*, to seek clarification of the scope of the proposed right of 'communication to the public'.

At the time, this proposed right was set out in art. 10 of the *Basic Proposal*. Explanatory Note 10.10 of the *Basic Proposal* stipulated that the right of 'communication to the public' in art. 10 was targeted at the act of making available the copyright work by providing access to it, and not "the mere provision of server space, communication connections, or facilities for the carriage and routing of signals". The intent of this stipulation was to exempt—from the scope of the proposed right—parties such as Internet Service Providers (the "ISPs"), whose role in the digital transmission is merely to provide the physical facilities necessary for the transmission to take place. However, Singapore was not satisfied that such an important exemption should be dealt with in an explanatory note to the working documents of the proposed right. Therefore, at the fourth meeting of the Main Committee of Experts, Mr. Winston Chew (the then deputy director of Legal Policy in the Ministry of Law) made this intervention⁴²:

Mr CHEW (Singapore) ...said that his Delegation was especially concerned that a broad right of communication would ..., expose innocent carriers of information over [computer] networks to liability for the transmission of such information. To accommodate the needs of such on-line and other service providers, he noted that his Delegation had proposed an amendment to Article 10 [of the *Basic Proposal*] to include a new paragraph, which read "the mere provision of facilities for enabling or making any such communication shall not constitute an infringement."

Singapore's intervention was supported by the Philippines.⁴³ The delegation of African countries also presented a similar proposal.⁴⁴ Ultimately, the decision of

⁴¹ *RecordTV (C.A.)*, *supra* note 12 at para. 35.

⁴² "The Summary Minutes of the Main Committee I" in *The Records of the Diplomatic Conference on Certain Copyright and Neighbouring Rights Questions* (Geneva: World Intellectual Property Organisation, 1996) vol. 1 at 308. Singapore's proposal to amend Art 10 is also documented in WIPO Doc. CRNC/DC/12, 6 December 1996.

⁴³ *Ibid.* at 314.

⁴⁴ The African delegation proposed to amend art. 10 of the *Basic Proposal* as follows: "For the purposes of this Article, the phrase 'communication to the public', in respect of any communication, means the initial act of making the work available to the public and does not include merely providing facilities or

the committee was *not* to amend art. 10 of the *Basic Proposal* as proposed by the Singapore and African delegations. Instead, their concerns were accommodated by the adoption of the following Agreed Statement,⁴⁵ the first sentence of which provides as follows:

It is understood that the mere provision of physical facilities for enabling or making a communication does not in itself amount to communication within the meaning of this Treaty or the Berne Convention.

The role played by Singapore in the adoption of this Agreed Statement to art. 8 of the *WCT* is very significant, because when Singapore introduced the right of 'communication to the public' into the *Copyright Act* in 2004, it also added s. 16(6) at the same time. It is submitted that s. 16(6) is, in effect, Singapore's way of transposing the Agreed Statement into national law. Viewed from this perspective, s. 16(6) has a very specific purpose—namely, to ensure that 'innocent carriers of information' such as ISPs and telecommunication companies would not become targets of copyright suits. These carriers and providers are innocent in the sense that they merely provide the physical facilities used in the communication. Section 16(6) implements this 'innocence' concern by identifying the communicator as the party who is responsible for determining the content of the communication. ISPs and telecommunication companies are not responsible for determining the content of the online communications that take place on their facilities. The language used in s. 16(6) may be different from that of the Agreed Statement to art. 8 of the *WCT*, but the intent is the same.

It is submitted that s. 16(6) must be interpreted in the light of this background. The focal point of the inquiry in s. 16(6) is whether the party is 'innocent', in that his role was confined to mere provision of the physical facilities used in the communication. A party who has any role in the communication that goes beyond *mere* provision of the physical facilities, is not exempted. This is in fact the approach taken by the courts in Australia and the EU.

B. *The Australian Experience*

Australia has an equivalent of s. 16(6) of the Singapore *Copyright Act*. Section 22(6) of the *Australian Copyright Act 1968* provides as follows:

For the purposes of this Act, a communication other than a broadcast is taken to have been made by the person responsible for determining the content of the communication.

Like in Singapore, this provision was added to the *Australian Copyright Act 1968* at the same time as the enactment of the right of 'communication to the public'. Section 22(6) was added to give effect to the Agreed Statement to art. 8 of the *WCT*.⁴⁶ We have seen that this Agreed Statement was adopted to address the concern raised *inter alia* by Singapore that telecommunication companies and ISPs

the means for enabling or making such communication." See WIPO Doc. CRNC/DC/56, 12 December 1996.

⁴⁵ *Supra* note 42 at 994-1000.

⁴⁶ See *Digital Agenda Discussion Paper*, *supra* note 11 at paras. 4.69, 4.70.

might be held liable under the concept of ‘communication to the public’ in art. 8 of the *WCT*. This possibility was in fact very real in Australia, because in the *Telstra* case,⁴⁷ a telecommunication company was held liable for making a particular act of communication—namely, broadcast—to the public.⁴⁸ Australia decided that its new right of ‘communication to the public’ had to explicitly embody the spirit of the Agreed Statement. The result was s. 22(6).

The ambit of the Australian s. 22(6) has been considered in three cases. These cases did not involve ISPs and telecommunication carriers. Two important principles emerge from these cases. First, there can be more than one person responsible for determining the contents of the communication. One example lies in the file-sharing scenario using the Peer-to-Peer BitTorrent software. When an internet user (“XYZ”) installs this software in his computer and connects his computer to the internet, thereby allowing his computer to communicate with other computers which are also installed with this software (known as “peers”), XYZ makes the contents of his computer available to the peers to search and to download. If one of the peers is searching for a particular movie to download and there is a copy of this movie found amongst the contents of XYZ’s computer, XYZ’s computer will transmit bits of this movie to the requesting peer. In *Roadshow Films Pty Ltd v. iiNet Ltd*,⁴⁹ the court had to decide if the person responsible for the content of this transmission was XYZ or the requesting peer. It concluded that both parties were responsible. The requesting peer was responsible because he issued the search for the movie and for its download. XYZ was responsible because he had control and even involvement in the transmission of the movie—he continued to have the movie on his computer, continued to have active operation of the BitTorrent software, and continued to connect to the internet or take no steps to disconnect from the internet.⁵⁰ The court said that there was more than one “sole causative factor” in this transmission.⁵¹

Second, a person is responsible for determining the contents of the communication if he has prescribed the parameters within which another person makes a selection. In *IceTV v. Nine Network Australia*,⁵² the defendant provided a subscription-based online TV guide (called “IceGuide”) of free-to-air television channels, including the channels operated by the claimant broadcaster. This was how the defendant’s service worked. The subscriber connected his Personal Video Recorder (the “PVR”, a device used to record television programmes on the hard drive within the recorder) to the internet to gain access to the IceGuide that was stored in the defendant’s database, in order to retrieve and download the latest edition of the IceGuide. The subscriber could choose to retrieve different subsets of the data contained in the defendant’s

⁴⁷ *Supra* note 30.

⁴⁸ See *Digital Agenda Discussion Paper*, *supra* note 11 at 3.25, 4.87; *Exposure Draft and Commentary*, *supra* note 28 at 115, 116; *Explanatory Memorandum* at 40; and Austl., Commonwealth, House of Representatives Standing Committee on Legal and Constitutional Affairs, *Advisory Report on Copyright Amendment (Digital Agenda) Bill (November 1999)* by Chairperson Kevin Andrews MP (Canberra: Australian Government Publishing Service, 1999) at para. 6.13.

⁴⁹ [2011] F.C.A.F.C. 23 [*Roadshow Films*]. Another case where the court accepted that there can be more than one person responsible for determining the contents of the communication is *Universal Music Australia Pty Ltd v. Cooper* [2005] F.C.A. 972 at para. 73.

⁵⁰ *Roadshow Films*, *ibid.* at paras. 337, 338 (per Jagot J.).

⁵¹ *Roadshow Films*, *ibid.* at para. 166 (per Emmett J.).

⁵² [2007] F.C.A 1172 [*IceTV*].

database. For example, the subscriber might only want the IceGuide for Sydney channels, in which case the data relating to the Melbourne channels would not be downloaded onto his PVR. The IceGuide chosen by the subscriber was displayed on the television set connected to his PVR. The subscriber selected a particular television programme from this IceGuide for recording on his PVR. This recorded programme was stored on the hard disk of his PVR, awaiting the subscriber's retrieval for viewing at a later time. There was undoubtedly a communication of the IceGuide (an original literary work protected by copyright) to the public. Who was the party who made this communication—the defendant or the subscriber? The defendant argued that the party responsible for determining the contents of the communication was the subscriber, because it was the subscriber who chose the subsets of data in IceGuide to download and which television programme to record. The court disagreed, holding that the defendant was responsible for the contents of the transmission because the subscriber's choice was circumscribed by the choices pre-determined by the defendant.

C. The European Experience

The European right of 'communication to the public' is also limited by a statement equivalent to the Agreed Statement to art. 8 of the *WCT*. This statement is found in Recital 27 of the preamble to the *InfoSoc Directive*. It states as follows:

The mere provision of physical facilities for enabling or making a communication does not in itself amount to communication within the meaning of this Directive.

The role of Recital 27 was raised in *SGAE*,⁵³ which we looked at earlier. One question referred to the ECJ on the scope of the right of 'communication to the public' was whether the defendant's installation of television sets in the hotel rooms was in itself an act of 'communication to the public'. More specifically, the question was: could the defendant be said to have 'communicated' the broadcasts by providing television sets in the hotel rooms? Or was the defendant merely providing physical facilities for enabling or making the communication, and thus exempted from liability by virtue of Recital 27 of the preamble to the *InfoSoc Directive*?

The ECJ drew a parallel between Recital 27 and the Agreed Statement to art. 8 of the *WCT*. In interpreting the scope of Recital 27 (and hence the Agreed Statement), the ECJ made a distinction between 'mere provision' of the television sets and 'installation' of the television sets.⁵⁴ Only the former is exempted from the scope of the right of 'communication to the public'. The ECJ provided an example: a company selling or hiring television sets is merely providing the physical facilities for enabling or making the communication. The act of installing television sets, on the other hand, made public access to the broadcasts technically possible, and thus went beyond 'mere provision' of physical facilities. The ECJ concluded that the defendant's act of installation was not exempted from the right of 'communication to the public'.

⁵³ *Supra* note 36.

⁵⁴ *Supra* note 36 at para. 46.

D. Summary

This author has argued that the primary intent of s. 16(6) is to exempt ‘innocent’ parties such as telecommunication carriers and ISPs. These parties are ‘innocent’ because their role in the communication is *merely* to provide the physical facilities used in the communication. This being the case, the focus of the inquiry in s. 16(6) should be on whether the party’s role in the communication is entirely passive in that it *merely* provided the physical facilities used in the communication (like the role played by an ISP or a telecommunication company in online transmissions, or by the retailer who sells the television set used to receive cable transmissions), or whether the party’s role is something more.⁵⁵

This author will now analyse the facts of the MediaCorp/RecordTV dispute by applying the principle suggested above to s. 16(6). The Court of Appeal indicated that s. 16(6) required a determination of (a) the time of the communication; (b) the content of the communication at the time of communication; and (c) the identity of the person responsible for determining that content. To recap, the relevant act of communication in this case was the act of ‘making available’ the shows stored in RecordTV’s server to the registered users, as and when they logged onto RecordTV’s website and gained access to this server. For the purposes of (a), the Court of Appeal identified the time of the communication as the moment when the show was available for viewing by the registered users (that is, upon the completion of the recording process). For the purposes of (b), the Court of Appeal identified the content as the specific show recorded pursuant to the registered user’s request. The author respectfully agrees with the court’s reasoning up to this point. It is on (c) where a divergence appears. The Court of Appeal held that it followed from its findings in (a) and (b) that the registered user was the party responsible for determining the content of the communication, and not RecordTV. However, the fact that the registered user may be responsible for determining the contents of the communication does not necessarily mean that RecordTV could not *also* be responsible. The Australian courts have accepted that it is possible to pin responsibility on more than one party under the Australian equivalent of s. 16(6). Further, there is in principle no reason why there can only be one party liable under the right of ‘communication to the public’, in respect of the same act of communication. The U.K. copyright legislation even explicitly provides for this possibility where the act of communication is broadcasting. Section 6(3) of the U.K. *Copyright, Designs and Patents Act* provides as follows⁵⁶:

- (a) [...] the person transmitting the programme, if he has responsibility to any extent for its contents; *and*
- (b) [...] the person providing the programme who makes with the person transmitting it the arrangements necessary for its transmission.

⁵⁵ Professors Sam Ricketson and Jane Ginsburg have also emphasised the presence of the word ‘mere’ in the Agreed Statement to art. 8, taking the view that only *mere* provision of physical facilities is exempted from the right of ‘communication to the public’. The two professors conclude that “provision of physical facilities and something more, such as actual or constructive knowledge of the content of the communication, may amount to a ‘communication’”: *International Copyright and Neighbouring Rights*, *supra* note 3 at para. 12.55.

⁵⁶ *Copyright Designs and Patents Act 1988* (U.K.), 1988, c. 48, s. 6(3) (emphasis added).

Thus, the question of whether RecordTV was a party responsible for determining the contents of the communication should be assessed independently of the role played by the registered user in the communication. Instead, the inquiry should only look at RecordTV's role in the communication—was RecordTV's role entirely passive in that it *merely* provided the physical facilities used in the communication, or was it something more? It is submitted that RecordTV's role was not entirely passive. It was not *merely* providing the physical facilities (for instance, the iDVR or the server) used in the communication process. Whilst it was the registered user who decided which show to record and store in the server, the choices of shows available to the registered user were confined to the selection pre-determined by RecordTV. In this regard, the role played by RecordTV is similar to the role played by the defendant in the Australian case of *IceTV*.⁵⁷ Further, it was RecordTV who had control after the recording was made, in that it was RecordTV's decision to continue to store this recorded show on its server, and to connect this server to the internet (or not to disconnect it)—all of which were critical for the transmission of the recorded show to reach the registered users. This aspect of the case is similar to that in the Australian case of *Roadshow Films*.⁵⁸ An analogy can also be drawn to the facts of the European case of *SGAE*. In that case, a retailer who sold television sets which were used to receive broadcasts was considered as an example of a party who merely provided the physical facilities needed in the communication. The defendant hotelier in *SGAE* did something else which made the communication technically possible; namely, the act of connecting the television set in the hotel rooms in such a way that the guests could receive the broadcast signals. In this case, RecordTV was not merely selling or supplying the technology needed to record and transmit MediaCorp's shows to the registered users. RecordTV did something else which made the online transmission technically possible; namely, the act of connecting its service and server to the internet.

V. CONCLUSION

Would the Court of Appeal have decided these two issues differently if the relevant background information to the right of 'communication to the public' and the European and Australian experiences in applying this right had been brought to its attention? More importantly, should it? This author ventures to suggest that the answer should be 'yes', because what RecordTV provided via its internet-based service is precisely the type of activity that the promulgators of this right had in mind.

There may be an explanation as to why the Court of Appeal took a strict approach to the right of 'communication to the public'. The appellate court was very conscious that this battle between MediaCorp and RecordTV raised a bigger policy question in copyright law. This was how the court put it at the outset of its judgment⁵⁹:

Bearing in mind that the law strives to encourage both creativity and innovation for the common good, in a case such as the present, how should the courts strike

⁵⁷ *IceTV*, *supra* note 52.

⁵⁸ *Roadshow Films*, *supra* note 49.

⁵⁹ *Supra* note 12 at para. 2.

a just and fair balance between all the interests of all affected 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 constitutes a breach of copyright, should the courts interpret legislative provisions in favour of the private rights of the copyright owner or the public's wider interests? This is the problem that we face and have to resolve in the present case.

It seems that, in the mind of the appellate court, the "just and fair balance" must come down in favour of the public because of two factors. First, time-shifting is a legitimate activity in Singapore. RecordTV's technology allowed members of the public to do what they could legitimately do by using other recording devices, such as video-cassette recorders and digital-video recorders, and to this extent, RecordTV's technology has not caused any loss to MediaCorp.⁶⁰ Secondly, copyright law should not be applied in a way that hinders innovation and technological advancements. What RecordTV had given to the public was superior to the existing recording technology (video-cassette recorders and digital-video recorders). For example: the registered user need not be at home to watch the recorded broadcast, since he can access it from any place where he has access to the internet; the registered user does not need to know the start and end times of each MediaCorp broadcast and the channel that broadcast would be aired on because RecordTV's iDVR has already been pre-programmed with the relevant information. In the words of the Court of Appeal, RecordTV's service was "a significant technological improvement over existing recording methods" and "novel technology".⁶¹ What the Court of Appeal was attempting to achieve, by adopting a strict interpretation of the right of 'communication to the public' in order to arrive at the desired outcome (that is, a judgment in favour of RecordTV), was the promotion of a wider public interest.

However, it was possible to arrive at the desired outcome by other means. A finding that RecordTV's service fell within the ambit of the right of 'communication to the public' would simply have meant that there was a *prima facie* infringing act. The battle between MediaCorp and RecordTV would then have proceeded to the next stage, for a determination on whether this infringing act was permitted by any statutory defence in the *Copyright Act*. One of the defences raised by RecordTV was the general fair dealing defence in s. 35(1). This defence hinges on whether the defendant's activity is fair, and the court making this determination is required to take into account, *inter alia*, a list of statutory factors.⁶² In this inquiry, a tribunal would be concerned with precisely the policy question identified by the Court of Appeal; namely, striking a balance between the need to protect the private rights of the copyright owner and the need to serve the public's wider interest. At this stage the Court of Appeal could have held that after considering all factors, the scales were

⁶⁰ *Supra* note 12 at para. 71.

⁶¹ *Ibid.*

⁶² See *Copyright Act*, *supra* note 1, s. 35(2). These factors 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; (d) the effect of the dealing upon the potential market for, or value of, the work or adaptation; and (e) the possibility of obtaining the work or adaptation within a reasonable time at an ordinary commercial price.

tipped in favour of the public's wider interest, and in this way, exonerate RecordTV from liability.⁶³

The downside to the Court of Appeal's strict interpretation of the right of 'communication to the public' is the impact this may have in other cases involving online transmissions of copyright works. The copy of the recorded show that was communicated in this case was not an infringing copy because its making was permitted by the 'time-shifting' defence in the Singapore *Copyright Act*. But what if the copy of the recorded show in the next case is an infringing copy?⁶⁴ Some may answer that the right of reproduction can readily be invoked to deal with this situation. However, if right-holders have to continue to rely on the right of reproduction to stop unauthorised online transmissions of copyright works, does this not defeat the very purpose of Singapore enacting the right of 'communication to the public' in 2004?

⁶³ It should be noted that the High Court in *RecordTV* (H.C.) did consider the application of the fair dealing exception, and came to the conclusion that RecordTV's service was not permitted under this exception: *RecordTV* (H.C.), *supra* note 13 at paras. 104-109. The High Court's conclusion, however, was influenced by the fact that it was not particularly impressed with the technology offered by RecordTV, treating it as nothing more than a VCR or DVR. The High Court said so as much at para. 109: "The social benefit wrought by [RecordTV's service] had, to my mind, largely already been provided for by existing time-shifting technologies such as the VCR". The Court of Appeal, on the other hand, had a very different take on RecordTV's service, praising it as "a significant technological improvement over existing recording methods" and "novel technology": *RecordTV* (C.A.), *supra* note 12 at para. 71. If the Court of Appeal had engaged in the balancing act required in the fair dealing provision, it is possible that the court might have tilted this balance in favour of a conclusion that would allow the public to continue to enjoy this superior technology.

⁶⁴ If, for example, the registered user requesting for the recording of broadcasts is looking to build a library of recorded shows for rental purposes, this would not be permitted under s. 114 of the *Copyright Act*.