

1-2012

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Citation

CHIK, Warren B. and SAW, Cheng Lim. Opportunity Lost? Revisiting RecordTV v MediaCorp TV. (2012). *Singapore Academy of Law Journal*. 24, (1), 16-59. Research Collection School Of Law.

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OPPORTUNITY LOST?

Revisiting *RecordTV v MediaCorpTV**

Taking the Singapore Court of Appeal's Decision in *RecordTV Pte Ltd v MediaCorp TV Singapore Pte Ltd* [2011] 1 SLR 830, this article seeks to argue that the copyright fair dealing defence would have been the more appropriate basis to exempt RecordTV, a digital recording service for recording television programmes, from primary copyright liability. This judicial approach towards legalising digital video recorder ("DVR") services is more suitable taking into consideration the following: The role and objectives of copyright law in Singapore; the history and development of the fair dealing defence (including the latest amendments pursuant to the US-Singapore Free Trade Agreement); the global trends relating to user rights and information technology through a comparative study of similar cases in other jurisdictions; and a policy assessment of Singapore's interests in promoting innovation and development against the backdrop of proprietary copyright protection.

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* This study was funded through a research grant (Project Fund No 11-C234-SMU-001) from the Office of Research, Singapore Management University. The study includes an earlier analysis of the case by the joint authors: Saw Cheng Lim & Warren Chik, "Where Copyright Law and Technology Once Again Cross Paths – The Continuing Saga: *RecordTV Pte Ltd v MediaCorp TV Singapore Pte Ltd* [2011] 1 SLR 830" (2011) 23 SAclJ 653.

I. Introduction

A. *The parties, dispute and outcome*

1 In *RecordTV Pte Ltd v MediaCorp TV Singapore Pte Ltd*¹ (“*RecordTV*”), the first decision of its kind and with significant repercussions for the development of information and communications technology in Singapore, the highest court in Singapore, the Court of Appeal (“CA”) made a statement in its decision delivered on 1 December 2010 in favour of fledgling RecordTV in its dispute with Mediacorp over the treatment of the latter’s free-to-air content by RecordTV’s online digital video recorder (“iDVR”). The main service of the iDVR was to allow its registered users (“RUs”) to view Mediacorp programmes at any time beyond its broadcast timeslots. There was no charge for the service.

2 The CA determined that RecordTV did not infringe Mediacorp’s rights to duplicate or publicly communicate its programmes, and that furthermore it did not authorise its RUs to do so. It overturned the High Court’s (“HC”) decision favouring Mediacorp.² First, on the issue of copying, both the HC and CA rejected a technical approach to the matter, preferring the view that it was the RU who for all intents and purposes was the relevant primary copyright infringer and did the copying based on their assessment of the RU’s control of the activity. Second, on the matter of communication to the public, the CA diverged from the HC and decided that the RU had the power to determine the time and content of the communication and that the transmission of the programmes was not made to the “public”. Third, the CA also concluded that RecordTV did not authorise any copyright infringement by its RUs of MediaCorp’s programmes against whom the latter did not bring any action and who were highly unlikely to attract copyright liability in the first place.

B. *The global development of the digital video recorder*

3 A “digital video recorder” (“DVR”) is often used to refer to an enabled electronic hardware (eg, TiVo and Freeview) or online digital software, that allows the recording of videos in digital format to a storage device. When such a device or service is used to deliver television shows through the World Wide Web (“WWW”) using the internet protocol suite, it is known as internet protocol television (“IPTV”). The service can consist of “live” broadcasts and automatic or on-demand “time-shifted” shows. There is no legal issue when it is

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

2 *RecordTV Pte Ltd v MediaCorp TV Singapore Pte Ltd* [2010] 2 SLR 152 (HC).

offered by a television company in relation to its own programmes (eg, XinMSN, which is operated in collaboration with Microsoft). However, legal issues arise when it is offered by third parties, commercially or otherwise, even if the shows are offered to the same audience.

4 DVR technology has rapidly evolved from the physical personal consumer electronic device such as the traditional set-top boxes and portable recorders to remote application software services that are the subject of this article.³ Recording devices are now remotely offered and more portable, which is made possible by modern wireless technology and larger internet bandwidths. With this evolution subtle changes have emerged in the manner of their usage and in the relationship between the service provider and the user, which can potentially lead to a shift in control, depending on one's perspective. The difficulty in determining what constitutes *relevant* control depending on the form of technology and technical operation is particularly an issue in the legal context.

5 Internet digital video recording and hosting services that offer the retransmission of television programmes that have emerged in recent years include Cablevision, Filmon and iviTV in the US, Wizzgo in France and RecordTV in Singapore, all of which have faced legal challenges in court in the respective jurisdictions of operation.

II. Objectives of this article

6 Although the CA reached the right outcome based on policy interest and overarching considerations that take into account the socio-economic utility of technological innovations like DVRs, the authors have some difficulties with the issue of liability being determined on the basis that the RU was the primary infringer and as such RecordTV did not infringe Mediacorp's copyright in its television programmes.⁴

3 Bundled hardware and software devices include the VHS/VCR, DVD and VCD recording devices, while remote web-based hosting and recording services include Cablevision, Filmon, iviTV, Wizzgo and RecordTV.

4 These issues have been taken up in an earlier article, Saw Cheng Lim & Warren Chik, "Where Copyright Law and Technology Once Again Cross Paths – The Continuing Saga: *RecordTV Pte Ltd v MediaCorp TV Singapore Pte Ltd* [2011] 1 SLR 830" (2011) 23 SAclJ 653. In the earlier article, the authors have already set out their arguments for the proposition that it was RecordTV that was the primary infringer. See also C L Saw, "Where Copyright Law and Technology Once Again Cross Paths – *RecordTV Pte Ltd v MediaCorp TV Singapore Pte Ltd* [2010] 2 SLR 152" *Singapore Law Gazette* (December 2010) at p 14. See further, Justice Floyd's observations in *ITV Broadcasting Ltd v TV Catchup Ltd* [2011] EWHC 1874 at [101] and [102] (Pat) (18 July 2011) on the *RecordTV Pte Ltd v MediaCorp TV Singapore Pte Ltd* [2011] 1 SLR 830 (CA) decision.

7 In the authors' view, the CA actually had an alternative route to take on the matter that would have led to the same conclusion, even if the court had made a finding of copyright infringement against RecordTV. On the assumption that primary copyright liability should attach to RecordTV rather than to its RUs, as it was determined by the CA, the analysis in this article will focus on the relevance, applicability and suitability of the fair dealing defence to the facts of this case in order to protect RecordTV and similar types of technology from copyright liability and hence meet the ultimate objective, which is to accommodate such technological innovations within the copyright framework. In the course of this analysis, the policy arguments made by the CA in favour of modern technology (and DVRs in particular) will be revisited as more relevant considerations under the fair dealing defence. In brief, this article will proceed to examine the potential for a similar outcome through the defence of fair dealing.

8 The HC had held that RecordTV could not rely on any safe harbour or the fair dealing provision under Pt IXA and s 109 of the Copyright Act⁵ respectively to avoid liability for copyright infringement.⁶ Unfortunately, as the CA decided that there was no infringement by RecordTV to begin with, there was no necessity for them to determine the issue of reliance on those exemption provisions.⁷ However, based on their approach to the issue and the outcome of the CA's decision, it would have been possible for the court to reverse the HC judge's holding with regard to the fair dealing assessment in favour of RecordTV as well.

9 In order to show how fair dealing in its inception and evolution is most suitable as a vehicle of change and an instrument of balancing interests as well as to understand its role and function within the context of the copyright regime, we will begin by tracing its history, objective and amendments in the Singapore context as well as briefly examine its birth and development in other countries, in particular, its relationship with the US fair use doctrine.

10 A comparative analysis of the copyright statutory and case law developments – in relation to the doctrine and the advocacy for stronger user rights in its application to cases – in the US and Canada will then be made. The expansive fair use defence has been used in relation to similar forms of digital recording technology and services in the US. In Canada, the landmark Canadian Supreme Court case of *CCH v Law*

5 Cap 63, 2006 Rev Ed.

6 *RecordTV Pte Ltd v MediaCorp TV Singapore Pte Ltd* [2010] 2 SLR 152 at [104] and [109] (HC).

7 *RecordTV Pte Ltd v MediaCorp TV Singapore Pte Ltd* [2011] 1 SLR 830 at [65] (CA).

*Society of Upper Canada*⁸ will be considered for its user-centric approach, which appears to be the trend in the context of narrower fair dealing provisions that are available in other common law jurisdictions. The approaches taken in the courts in those countries will be relevant and persuasive in our courts for several reasons, including the shared legal systems and legislative history and due to the fact that Singapore's fair dealing provision has evolved from a narrow purpose specific defence to a general one modelled after the US fair use provision.

11 Finally, a transposition of the law and reasoning of the relevant cases as well as the more liberal user and techno-centric approach to the local context will be proposed, which would have led to the same outcome in *RecordTV* but through what will be argued as a different but more appropriate process given the history and development of copyright law as a whole and the objectives and expansion of the fair dealing defence in particular (with its relevance for the future development of new technology in Singapore). Some peripheral issues such as the possible impediment that the Berne three-step test may pose will also be dealt with to explain and justify the appropriateness of the defence in this context. In the course of this analysis, useful comparisons between DVR technology and subsisting physical analogues will be made to support this position wherever applicable.

III. Applying fair dealing to *RecordTV v MediaCorpTV*

A. *History, development and expansion*

(1) *The history of copyright and the statutory fair dealing and fair use exceptions*

12 The modern copyright regime developed from the laws of England about 270 years ago,⁹ and has been transposed into the laws of other countries through cases and statutes and harmonised to some extent through international and regional conventions.¹⁰

8 [2004] 1 SCR 339; 2004 SCC 13.

9 Copyright itself emerged in the English Statute of Anne of 1709. Copyright Act 1709 (8 Anne, c 19) (UK.). See further Melville B Nimmer & David Nimmer, *Nimmer on Copyright* (Matthew Bender, looseleaf) at para 13.05 and William F Patry, *The Fair Use Privilege in Copyright Law* (BNA Books, 1985) at pp 6–17.

10 *Ie*, the Berne Convention for the Protection of Literary and Artistic Works (9 September 1886) (as amended 28 September 1979) <http://www.wipo.int/treaties/en/ip/berne/trtdocs_wo001.html> (accessed 5 March 2012); the Agreement on Trade-Related Aspects of Intellectual Property Rights (“TRIPS”) (15 April, 1994), Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, 108 Stat 4809, 1869 UNTS. 299 <http://www.wto.org/english/tratop_e/trips_e/t_agm0_e.htm> (accessed 5 March 2012); the World Intellectual Property Organization (“WIPO”) Copyright Treaty (“WCT”) and the WIPO Performances
(cont'd on the next page)

13 “Fair dealing” is a section of copyright law of many Commonwealth jurisdictions that provides exclusions to copyright infringement so that others are allowed to use copyrighted works without first seeking permission, but only in certain purpose specific ways. It was created by case law and subsequently codified in statute.¹¹ Each common law country has its own version of fair dealing and the courts may interpret this concept differently. Generally, under this exception, users have defences to a complaint of, or an action for, copyright infringement if they can show that they used the work for a specifically authorised purpose such as for research, study, criticism, review, parody, satire and reporting, provided that the work is attributed in appropriate instances.¹²

14 In the US, judges applied the concept of “fair use” long before it became codified in law since 1976 as an exception to what would otherwise constitute an infringement of copyright.¹³ It has been described as an “equitable rule of reason” to serve as a salve to what would otherwise be a harsh and restrictive copyright regime.¹⁴ The original intent had both social utility and private interests in mind, which was to allow third parties to develop and further enhance earlier copyrighted works without otherwise having to seek permission from the copyright owner to do so.¹⁵ Despite its important function, or because of it, the doctrine is an amorphous and organic thing.

and Phonograms Treaty (“WPPT”) WIPO/CR/KRT/05/7 (20 December 1996) <http://www.wipo.int/treaties/en/ip/wct/trtdocs_wo033.html & http://www.wipo.int/treaties/en/ip/wppt/trtdocs_wo034.html> (accessed 5 March 2012); and the Report to the Council, the European Parliament and the Economic and Social Committee on the Application of Directive 2001/29/EC on the Harmonisation of Certain Aspects of Copyright and Related Rights in the Information Society (“EU Copyright Directive”) <<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32001L0029:EN:HTML>> (accessed 5 March 2012).

- 11 *Eg*, in the UK, when the Imperial Copyright Act was consolidated in 1911 (as s 2(1)(i) of the Copyright Act 1911 (c 46) (UK)) and in Canada under its Copyright Act in 1921 (under s 16(1)(i) of the Copyright Act (SC 1921, c 24) (Canada)).
- 12 *Eg*, for criticism, review and reporting, the source of the work must be credited; whereas such acknowledgement is not necessary under fair use, although it can be a relevant factor in determining fairness.
- 13 17 USC §107. See *Gyles v Wilcox* (1740) 26 ER 489 at 490, an earlier case that dealt with “fair abridgement” that subsequently evolved into “fair use”. See also Jay Dratler Jr, “Distilling the Witches’ Brew of Fair Use in Copyright Law” (1988) 43 U Miami L Rev 233.
- 14 HR Rep No 94-1476 at 65 (1976). Because of this, there is no clear or generally applicable definition. See also *Sony Corp of Am v Universal City Studios, Inc* 464 US 417 at 448 (1984).
- 15 *Campbell v Acuff-Rose Music, Inc* 510 US 569 at 577–578 (1994). The US Supreme Court recognised the importance of relaxing exclusive rights to allow works that build upon, reinterpret and reconceive existing works to avoid “stifling the very creativity which the law is designed to foster” (at 575–577). The fair use doctrine “creates a limited privilege in those other than the owner of a copyright to use the
- (cont’d on the next page)

15 Built into the statutory version of the doctrine in many jurisdictions' written law are some guidelines that include four or more core "fair use factors" that emerged from the US case of *Folsom v Marsh*.¹⁶ To determine whether a work constitutes fair use (or fair dealing, as the case may be), courts engage in a case-by-case analysis and a flexible balancing of the relevant factors (giving due weight to each factor).¹⁷ An important distinction with the narrower version of fair dealing is that fair use and its functional equivalent is not purpose specific and hence is conceptually wider and allows for a more flexible and expansionist interpretation.¹⁸ In that sense, it is also a more forward-looking and adaptive instrument.

(2) *The shape-shifting nature of fair use and its development*

16 Fair use is an amorphous concept and it is even less easy to pin down its parameters.¹⁹ The doctrine has been described as "the most troublesome in the whole law of copyright".²⁰ But therein in its

copyrighted material in a reasonable manner without the owner's consent" (*Fisher v Dees* 794 F 2d 432 at 435 (9th Cir, 1986).

16 9 F Cas 342 at 348 (CCD Mass, 1841): "[W]e must ... look to the nature and objects of the selections made, the quantity and value of the materials used, and the degree in which the use may prejudice the sale, or diminish the profits, or supersede the objects, of the original work."

17 Hence, "no generally applicable definition is possible": *Campbell v Acuff-Rose Music, Inc* 510 US 569 at 577 (1994). "[It] permits Courts to avoid rigid application of the copyright statute when, on occasion, it would stifle the very creativity which that law is designed to foster": *Dr Suess Enters, LP v Penguin Books USA, Inc* 109 F 3d 1394 at 1399 (9th Cir, 1997), *cert dismissed* 521 US 1146 (1997).

18 The purposes set out in 17 USC §107 on fair use are illustrated by common objectives "such as criticism, comment, news reporting, teaching (including multiple copying for classroom use), scholarship, or research" [emphasis added] and as such the "use" list is open-ended just as the "fairness" factors list is non-exhaustive, which in a sense compounds the difficulty in clearly identifying the parameters of the doctrine. The US Constitution s 8, cl 8, specifically authorises the US Congress "[t]o promote the Progress of Science and useful Arts, by securing for limited times to Authors and Inventors the exclusive right to their respective writings and discoveries", which informs the interpretation of copyright and fair use that allows for other purposes that are also consistent with the promotion of the progress of Science and useful Arts.

19 "What is most curious about this doctrine is that neither the decisions that have applied it for nearly 300 years, nor its eventual statutory formulation, undertook to define or explain its contours or objectives": Pierre N Leval, "Toward a Fair Use Standard" (1994) 103 Harv L Rev 1105. "The factors are broadly stated, overlapping, and vague, and the legislative history provides little insight as to their meanings, what weights to give them, or how they interrelate": Marshall Leaffer, *Understanding Copyright Law* (New York: Matthew Bender & Co, Inc, 1989) at p 299. This flexibility was intended by the US Congress.

20 *Dellar v Samuel Goldwyn, Inc* 104 F 2d 661 at 662 (2nd Cir, 1939). See also D Nimmer, "Fairest of Them All and Other Fairy Tales of Fair Use, Law and Contemporary Problems" (2003) 66 *Law and Contemporary Problems* 263. The amount of academic literature on fair use also attests to this fact.

elusiveness also lies its virtue and continued significance. It is not unnecessarily fickle and it is often misunderstood as *ad hoc* when, in actual fact, it is malleable and finds continued relevance in its flexibility. Even in the face of the development of other forms of protection or exemptions, it remains the most important counterweight to the power of the (often monopolistic) statutory rights.

17 The dichotomy between its strengths and weaknesses lies in the ambivalent nature of its definition, which leads to the role of the courts in defining its application in the light of new developments, contexts and interests. This may appear *ad hoc*,²¹ but it is still rooted in copyright objectives. However, the very objectives and the role of fair use can also change subtly to incorporate and accommodate other interests besides the copyright owner's rights (that may be a "regulatory rather than proprietary concept"²²), with an overarching utilitarian objective, and social utility and public interest concerns in mind. That was in fact how the original conceptualisation of fair use evolved and was adapted to modern technologies as will be illustrated by the US Supreme Court cases, which will be considered below.

(3) *The transposition of the fair use concept into the Singapore fair dealing provision*

18 The US agenda to export its version of the copyright regime produced results particularly through the trade deals it made with other countries. There is now a closer legal convergence with the US copyright law in Singapore's own legislation since the coming into effect of the US-Singapore Free Trade Agreement in 2004,²³ and with regard to the traditionally closed-listed fair dealing provision in Singapore, an amendment to the Copyright Act that took effect from 1 January 2005 has produced, amongst other changes, a hybrid model of fair dealing.²⁴

21 Leon Seltzer, *Exemptions and Fair Use in Copyright* (Harvard University Press, 1978) at pp 16–17 and Pierre Leval, "Towards a Fair Use Standard" (1994) 103 Harv L Rev 1105 (judges do not perform "*ad hoc* perceptions of justice without a permanent framework" but remain guided by the "governing principles [that] exists and is soundly rooted in the objectives of the copyright law").

22 L Ray Patterson, "Free Speech, Copyright and Fair Use" (1987) 40 Vand L Rev 1 (also referring to the "[making] use of the work and not of the copyright" in appropriate cases or situations for an exception to apply (at 65)).

23 See Kenneth Chiu, "Harmonizing Intellectual Property Law Between the United States and Singapore: The United States-Singapore Free Trade Agreement's Impact on Singapore's Intellectual Property Law" (2005) 18 Transnat'l Law 489 at 502–504; Ng-Loy Wee Loon, "The IP Chapter in the US-Singapore Free Trade Agreement" (2004) 16 SAclJ 42; and Sherrilyn S Lim, "The U.S.-Singapore Free Trade Agreement: Fostering Confidence and Commitment in Asia" (2004) 34 Cal W Int'l LJ 301.

24 This amendment is meant to offer some balance to the concessions that provide stronger copyright protections made in the United States-Singapore Free Trade

This hybrid model combines the purpose specific statutory exemptions that were already in place in other parts of the Act with the amended ss 35 and 109, which effectively removed research or (private) study as a *condition* for invoking the fair dealing defence. This move towards an open-ended model is a clear signal from the Singapore Parliament that the courts are now given a much wider discretion on the application of the doctrine, especially to new or other forms of uses, taking into consideration the circumstances and parties, social interests and policy factors. For example, previously excluded practices such as parodies and satires may now be permitted provided that the factors test favours an exemption over a finding of infringement.

19 With this convergence and in the light of the objectives and purpose behind it, the flexibility of the current fair dealing provision in Singapore can give rise to the same or similar application of the test to protect new forms of information technology. Analogy can be made to US case law (particularly the US Supreme Court cases) on fair use that deals with the same or similar forms of technology and their reasoning for newer exemptions to be applied (and also for the expansion of the factors test beyond those listed), which can be persuasive authority before our courts.

B. *The US Supreme Court cases and subsequent developments in DVRs*

(1) The Sony Betamax case and its progeny

20 Within the spectrum of digital recording and distribution technology, where the RecordTV iDVR model of operation and its business practices *vis-à-vis* users fall along the DVR scale can provide

Agreement. During the parliamentary readings of the Intellectual Property (Miscellaneous Amendments) Bill, the then Minister for Law, Professor S Jayakumar stated that “[c]opyright fair dealing provisions present in the Copyright Act will continue to operate to ensure a balance between creators, industry and consumers ... [and that the Government] will continue to monitor international and domestic trends to ensure that the right balance is struck” (*Singapore Parliamentary Debates, Official Report* (15 June 2004) vol 78 at col 125). On the expansion of the fair dealing provision, he stated at the second reading of the Copyright (Amendment) Bill that “[while the closed-list] system provides certainty, it is also restrictive in that it does not cater for other new uses which could fall under the concept of fair dealing. While the current permitted activities have been retained, [the amendment] refines our fair dealing system by allowing other acts to be assessed according to a set of factors in determining whether these acts could constitute fair dealing ... I believe they will create an environment conducive to the development of creative works, and also facilitate greater investment, research and development in the copyright industries in Singapore” (*Singapore Parliamentary Debates, Official Report* (16 November 2004) vol 78 at col 1041).

some guidance on the likelihood of a finding of fair use in the US courts. On the one hand, there is the *Sony Betamax* set-top model of DVR technology;²⁵ and on the other, the peer-to-peer (“P2P”) and subsequent remotely driven DVR technologies such as Napster, Grokster and other similar models and practices.²⁶ There are many similarities as well as differences in the function and use of the more “ancient” forms of DVRs such as the VHS/VCR and the set-top box model of operation as compared to the “newer” forms of DVRs which rely on the remote services of its operators.

21 For example, the subtle distinctions in the relationship between the DVR developer and the user *vis-à-vis* the technology can have different legal consequences. The older forms of DVRs involve the contractual sale of a product that gives ownership to the buyer-user and that allows him the full control to operate the machine, whereas the newer forms of DVRs are more of a service-type industry that may or may not constitute a contractual arrangement and that may give rise to a different outcome on the control issue.²⁷ This distinction can make a difference as to the issue of the type of infringement that the creator-manufacturer may face – that is, whether there is primary or indirect copyright infringement. However, since *Sony Corp of Am v Universal City Studios, Inc*²⁸ (“*Sony Betamax*”), the US Supreme Court has clearly extended the fair use doctrine and made it similarly applicable as a defence to secondary liability as it is to direct infringement. Thus, this distinction is less significant here and is relevant only insofar as the facts and circumstances have a bearing on the fair use factors analysis.

22 While their purpose or final objective is similar, the technology also incidentally determines the predominant nature of the use and the user’s attitude and behavioural patterns. For example, the VHS/VCR was for home or personal use whereas P2P technology since Napster was widely available and used more for sharing purposes.²⁹ These distinctions will also be pertinent to the inquiry in the later part of this article on the relevance and weight of each fair dealing factor to the iDVR eligibility inquiry.

25 *Sony Corp of Am v Universal City Studios, Inc* 464 US 417 at 448 (1984).

26 *A&M Records, Inc v Napster, Inc* 239 F 3d 1004 (9th Cir, 2001). The behaviour and relationship between the service provider and the user was also crucial in *MGM Studios, Inc v Grokster, Ltd* 545 US 913 (2005) (*ie*, whether there was *inducement* by Grokster of primary infringement by its users).

27 For the analysis on this issue, see Saw Cheng Lim & Warren Chik, “Where Copyright Law and Technology Once Again Cross Paths – The Continuing Saga: *RecordTV Pte Ltd v MediaCorp TV Singapore Pte Ltd* [2011] 1 SLR 830” (2011) 23 SAclJ 653. The issue of control is central to a finding of infringement, which can be influenced by the nature and form of the technology itself and how it may determine the role of the parties.

28 464 US 417 at 448 (1984).

29 *A&M Records, Inc v Napster, Inc* 239 F 3d 1004 at 1019 (9th Cir, 2001).

23 Judging from the case law trend on P2P technology, generally speaking, where the iDVR resembles the VHS/VCR more than other online software designed to facilitate the infringement of copyrighted materials by users (despite the superficial differences in form (analogue or digital) and location (on-site or remote) and particularly in relation to the nature and forms of use), there are more arguments against, and hence less likelihood of, a finding of any type of infringement liability. However, if the iDVR is found to be more similar to Grokster or Kazaa,³⁰ especially in relation to the manner of operation and the relationship between the parties, then it is foreseeable that an argument based on the fair use defence would fail.

24 The US fair use doctrine and our current permutation of it in our revamped and augmented fair dealing provision should be made relevant for, and up to the task of, dealing with these technological developments locally. Additional guidance can come from jurisdictions such as the US with its matured body of case law on the subject that can form persuasive authority from which jurisprudence can be drawn.³¹ Thus, it will be most useful to evaluate and distill the essence of the US fair use factors in relation to DVRs that will also be relevant to the analysis of the Singapore fair dealing test for the iDVR.

25 The mandatory four fair use factors and how they have been developed by the US Supreme Court and utilised in similar cases are as follows.

- (a) The purpose and character of the use, including whether such use is of a commercial nature or is for non-profit educational purposes³²

26 The purpose and character of the use considers whether the use is commercial or should be deemed transformative.³³ Commercial use is but one factor and, against a flurry of case law, is clearly not definitive. In *Sony Betamax*, a case concerning the use of the VHS videotape recorder that allowed for the private “time-shifting” of television programmes on VCRs, the US Supreme Court considered whether the user actually stood to gain from the use of the copyrighted works, not the user’s actual motive. It also focused on the user’s dealing rather than on the obviously profit-driven dealing of Sony Corp. In this case, time

30 *Universal Music Australia Pty Ltd v Sharman License Holdings Ltd* [2005] FCA 1242.

31 See Daniel E Abrams, “Personal Video Recorders, Emerging Technology and the Threat to Antiquate the Fair Use Doctrine” (2004) 15 Alb LJ Sci & Tech 127.

32 17 USC §107(1). This factor focuses on the justification for the use of the copyrighted work and examines whether the use fulfils the objectives of copyright law to stimulate creativity for public illumination and education.

33 Since *Campbell v Acuff-Rose Music, Inc* 510 US 569 (1994), which crafted the “transformative use” doctrine.

shifting was found to be a non-commercial and largely private use.³⁴ The court then determined the case on the basis that the substantial use of the VHS machine was for that purpose rather than for otherwise infringing purposes (eg, modifying the show and selling or sharing of recorded material).³⁵

27 Even if we assume that RecordTV is the primary infringer, we can still consider the motive for or ultimate purpose of its services, which is for the benefit of users in a manner that is the same as or largely similar to the above case. The linkage of RecordTV to the user's use, which is arguably lawful, can legitimise its own use. That is, the purpose and character of the use or the factually relevant use for fair dealing analysis in RecordTV's case is in fact the users' use.

28 To summarise, the use of RecordTV's services is analogous to the use of the VHS machine in *Sony Betamax* where the use of the video recording device was found to be personal and non-commercial.³⁶ RecordTV's iDVR is used by individual home users for the purpose of "time-shifting" shows for viewing at a later time. This factor will favour RecordTV.

29 Contrast the *Sony Betamax* VHS machine and RecordTV's iDVR with the provision of P2P technological services and the difference is clear. Statistically, the latter forms of services directly enable predominantly infringing user behaviour in the form of the adaptation and sharing of copyrighted content.³⁷ It should be noted that more recently, good faith has been treated as a sub-factor and as an increasingly important consideration. This will also be an important fair dealing consideration later in this article.³⁸

34 The US Supreme Court determined that the commercial nature of a work should not be dispositive (*Campbell v Acuff-Rose Music, Inc* 510 US 569 at 581 (1994)).

35 It is to be noted that the court focused on the collective dealings of the users (as the potential *direct* infringer) to determine the substantiality of non-infringing *primary* uses in order to then determine the defence in favour of the alleged *indirect* infringer, which was Sony Corp (which was the purveyor of the facilitative technology *device* as opposed to a provider of an equivalent *service*) in the action against the latter for *secondary* liability. The fact that the user's dealing is the significant form of use, which our Court of Appeal itself has acknowledged and used to justify its finding of non-infringement, works in the context of fair dealing analysis even if it may not comfortably sit within the strictures of the strict liability rights and infringement provisions.

36 "[The] time-shifting for private home use must be characterized as non-commercial, nonprofit activity": *Sony Corp of Am v Universal City Studios, Inc* 464 US 417 at 449 (1984).

37 Empirical studies and statistical evidence have shown that peer-to-peer services are, quantitatively speaking, predominantly used for infringing purposes.

38 See, the *Grokster* opinion (*MGM Studios, Inc v Grokster, Ltd* 545 US 913 (2005)) relating to the "inducement of infringement", "inducement liability" and "inducement theory" and the *Kazaa* opinion (*Universal Music Australia Pty Ltd v* (cont'd on the next page)

(b) The nature of the copyrighted work³⁹

30 For the nature of the copyrighted work factor, courts will consider whether the work is factual or fictional and whether it is published or unpublished.⁴⁰ If there is substantial creativity, this tends to favour the copyright owner.

(c) The amount and substantiality of the portion used in relation to the copyrighted work as a whole⁴¹

31 The amount and substantiality of the portion used in relation to the copyrighted work as a whole factor operates on a sliding scale. The larger the usage, the less likely that there is fair use. Courts still focus on *what* and not *how much* is used, that is, the quality over quantity of the taking is important.⁴² However, when courts find the character of the use to be appropriate, the utilisation of entire works can still constitute fair use. On the whole, as compared to Canada and the UK, this factor appears to be the least significant in the US where it has resulted in differing outcomes in the US Supreme Court. In *Sony Betamax*, the court allowed the time-shifting of an entire video programme for personal use, but in *A&M Records, Inc v Napster, Inc*⁴³ (“*Napster*”), it found that wholesale copying of a creative work “militates” against a finding of fair use. But it is to be noted that the medium and objective of the iDVR is closer to the former than the

Sharman License Holdings Ltd [2005] FCA 1242) and settlement where the institution and incorporation of filtering technology was an important part of the decision and component of the agreement respectively. There is an element of good faith in the efforts to develop such counter-technology. Increasingly, internet service providers and other intermediaries are putting into place similar forms of technology and practices to meet the eligibility requirements of statutory safe harbour protections. Statutory prerequisites such as the statutory notice-and-take-down processes that require a streamlined procedure to be developed by such intermediaries are an example.

39 17 USC §107(2). This factor focuses on incentives of authorship. The more creative the work, the more protection it is accorded from copying, while the more informational or functional the work, the broader the scope of the fair use defence.

40 Currently, non-publication is not dispositive of fair use. See *Fair Use of Unpublished Works* (Pub L No 102-492, 106 Stat 3145 (1992)) (codified as amended at 17 USC §107 (1994)), overriding *Harper & Row Publishers v Nation Enterprises* 471 US 539 (1985).

41 17 USC §107(3). This factor assesses the portion of the original work used. It focuses both on the quantitative analysis of the amount taken and the qualitative substantiality of whether that taking is “essentially the heart” of the original. In general, the larger the volume or the greater the importance of what is taken, the less likely the taking will be found to be fair use. See *Harper & Row Publishers v Nation Enterprises* 471 US 539 at 563 (1985).

42 Eg, in *Basic Books v Kinko's Graphics Corp* F Supp 1522 at 1538 (SDNY, 1991), entire chapters were copied, which negated both quantitative and qualitative considerations.

43 239 F 3d 1004 (9th Cir, 2001).

latter. Also, copying the entire programme is necessary to achieve the purpose of the iDVR. This factor arguably favours RecordTV.

- (d) The effect of the use upon the potential market for or value of the copyrighted work⁴⁴

32 *Harper & Row Publishers v Nation Enterprises*⁴⁵ (“*Harper & Row*”) signalled this last factor as the single most important one, especially if the use of the copyrighted work becomes widespread and undermines the author’s potential market, given that the main purpose of the copyright regime is to incentivise authors and creativity. Market substitution is an important factor in the US and the UK, but it is somewhat less important in Canada after *CCH Canadian Ltd v Law Society of Upper Canada*⁴⁶ where the plaintiff bears the onus of proving market substitution.⁴⁷

33 But which market should we consider here? The market for the programme as a whole, the market for digital download separate from the market for broadcast television, the market for rebroadcast, the sale of DVDs/CDs of the shows, or all of the above? Presumably the effect of the use on the market for or value of the shows relates to the potential advertising and sales revenue that can be generated (and regenerated) from their use in relation to the relevant market concerned. Arguably, the potential market in MediaCorp’s case should be that relating to the digital download platform (*ie*, the online advertising market) as well as any potential *subsequent* forms of revenue that can be proven (as the revenue from the original broadcast would arguably not be greatly affected, if at all). This will be difficult for Mediagroup to calculate or prove. Moreover, the potential impact on the market is even less when we factor in the jurisdictional and user restrictions built into the RecordTV model and written into its terms of service.⁴⁸ Mediagroup will also have to show that it is affected in that medium concerned, namely, that at the relevant period of time it operated a DVR online service competitively, offering the same programmes and one that was meant to

44 17 USC §107(4). This factor focuses on the effect of the use upon the potential market for or value of the copyrighted work. This factor measures whether the market for the original is impaired because the use or dealing serves the consumer as a substitute for the original. See *Harper & Row Publishers v Nation Enterprises* 471 US 539 at 565 (1985).

45 471 US 539 (1985).

46 [2004] 1 SCR 339; [2004] SCC 13.

47 See paras 39–53 of this article.

48 Provided that the programmes are recorded in their entirety, including the advertisements, and the registered user cannot skip or fast forward the shows, the further dissemination of such advertisements through the iDVR will arguably benefit the original advertisers even more. Consequentially, it could translate to greater sales and more competitive pricing for Mediagroup, although this is based on conjecture.

generate a separate account of advertising revenue based upon that business model (*ie*, XinMSN). Here again, arguably the relative impact remained low and as such this factor arguably favours RecordTV.

- (2) *The convergence and relevance of the US fair use considerations and Singapore's public interest arguments for non-infringement in favour of RecordTV*

34 It is to be noted that many of the points and policy arguments that were validly made by the HC and the CA in favour of a finding of non-infringement in this case were in fact based on arguments that originated from and were used by the US courts to justify a finding of fair use in the context of earlier forms of DVR technology as well as the same or similar forms of modern DVRs.

- (a) Time-shifting

35 The current open-ended s 109 of the Singapore Copyright Act can now embrace new technology such as RecordTV's iDVR that enables the copying of a work for the purpose of "time-shifting", where a broadcast programme can be viewed at a later and more convenient date and time by a viewer. "Time-shifting" is already a valid statutory defence, provided the programme was recorded for "private and domestic use" under s 114.⁴⁹ However, the concept when applied to fair use need not be so strictly confined,⁵⁰ especially if the same considerations are applied as those that were made in *Sony Betamax* where the potential for minor infringing uses of the VCR by the body of users as primary infringers did not prevent a finding of fair use in favour of Sony Corp as secondary infringer.⁵¹ "Time-shifting", which is "the practice of recording a program to view it once at a later time, and thereafter erasing it",⁵² can be contrasted to "librarying" which is the practice of recording programmes "in order to keep [them] for repeated viewing over a longer term".⁵³ Arguably, the RecordTV service and its

49 Sections 114(1) and 114(2) of the Singapore Copyright Act (Cap 63, 2006 Rev Ed) provides that the filming or recording of broadcasts or programmes "for the private and domestic use" of the person by whom it is made does not constitute an infringement in the various copyright contained therein. This is not applicable as a defence for RecordTV even if it arguably does not fall under any of the explicit exclusions under subsection (3).

50 This was alluded to by Ang J in *RecordTV Pte Ltd v MediaCorp TV Singapore Pte Ltd* [2010] 2 SLR 152 at [53] (HC).

51 The court held that the sale of VCRs that allowed the recording of television shows for later viewing by the purchaser-user of the product did not amount to indirect copyright infringement.

52 *Sony Corp of Am v Universal City Studios, Inc* 464 US 417 at 423 (1984).

53 *Sony Corp of Am v Universal City Studios, Inc* 464 US 417 at 459 (1984). See also, Matthew W Bower, "Replaying the Betamax Case for the New Digital VCRs:

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corporate practices fall in between because it allows for repeat viewing, but programmes are only temporarily stored (deleting programmes after 15 days from recording). Since in practice it is highly unlikely that RUs will watch a programme more than once before the 15 days is up, what in fact occurs is arguably time-shifting.⁵⁴ The HC and CA also appear to agree with this conclusion.

(b) Format-shifting

36 Moreover, the RecordTV service also allows for “format-shifting” or “space shifting” by allowing the television shows to be watched on a personal computer or other mobile devices supporting the application rather than on television sets. This is likewise a valuable tool with social benefits that should be a factor in favour of protecting the development of such technology,⁵⁵ particularly when there is a legitimate right of user access to the programmes in question.⁵⁶

(c) “New” factors

37 Although not binding, additional guidance can be taken from earlier US decisions on the same or similar forms of technology, particularly the “unlisted” factors that have emerged from common law. In *Sony Betamax*, the “substantial non-infringing uses” test was developed and crucial in shielding the defendant, Sony Corp, from *indirect* infringement liability for the development and sale of the VCR

Introducing TIVO to Fair Use” (2002) 20 *Cardozo Arts & Entertainment Law Journal* 417 at 432–435.

54 The adverse effects were merely speculative and television viewing did not appear to have been greatly affected by alternative mediums. Matthew W Bower, “Replaying the Betamax Case for the New Digital VCRs: Introducing TIVO to Fair Use” (2002) 20 *Cardozo Arts & Entertainment Law Journal* 417 at 443–444.

55 This argument was rejected in *A&M Records, Inc v Napster, Inc* 239 F 3d 1004 (9th Cir, 2001) but only in the peer-to-peer context of converting media files to the electronic format and the hosting of such files in a server in such a way as to render it widely available for copying. See also *UMG Recordings, Inc v MP3.com, Inc* 92 F Supp 2d 349 (SDNY, 2000) (the service of duplicating music CDs by MP3.com for users to access their private music collections online), but contrast with *Recording Indus Ass’n of Am v Diamond Multimedia Sys, Inc* 180 F 3d 1072 at 1079 (9th Cir, 1999) (the sale of the Rio portable MP3 player device to users to copy their music for greater portability). The justification for duplication is the proof of existing ownership of or licence to listen to the music; and the distinction between the two cases can be said to stem from the ability to prove the user’s right to access the music from the device or service in question (rather than the manner of the recording processes, whether via an on-site recording device operated by the user or a remote service operated by the operator). See *In re Aimster Copyright Litigation* 334 F 3d 643 at 652–653 (7th Cir, 2003) (*obiter dicta*).

56 As Mediacorp television shows are free-to-air broadcast programmes formerly based on compulsory television and radio licences (which, as of 1 January 2011, have been abolished), the legitimacy of the actual user is not in question.

machines. Since then, it has largely been proven to have been the wise decision to make, as that exemption paved the way for significant subsequent developments in recording technology, and even the Cablevision and RecordTV remote models of recording can trace their primogeniture from the roots of the *Sony Betamax* decision.⁵⁷ The test may be applicable to the facts and circumstances of *RecordTV*. *Sony Betamax* must be considered in its context – the intention was clearly to protect useful technologies that provide value-added services to society at large (*ie*, users) and that allow for predominantly private or personal uses.⁵⁸ The other legacy of the *Sony Betamax* decision is how the exception transcends the strict formulation of rights and liability (*eg*, to protect against primary or secondary infringement, to protect the user or facilitator and to protect the use or the facilitative *device, method or format*). *Sony Betamax* itself focused on the *capabilities* of the *device* and all the benefits that it entails. This should likewise extend to *services* that offer the same benefits and safeguards without significant detriment to the copyright owner. The larger public interest should prevail.

(3) *The arguments raised on behalf of DVRs similar to the iDVR and the state of play in those cases*

38 Many of the arguments raised by DVR proponents and advocates in relation to the DVR cases to date, particularly in the US and some decisions in other countries like France, have focused on the above fair use and policy grounds. Some of the important distinctions that were drawn between different DVR models, and that were used by some DVR producers to distinguish and distance themselves from more dubious business models, have been on good practices. For example, the Filmon and iviTV disputes have appeared before the same trial judge in the New York Federal Court, but the former (which operates on the open internet, does not protect content against piracy and does not pay royalties) is under a restraining order while the latter (which is a “closed

57 Thus, it has been rightly observed in Pamela Samuelson, *The Generativity of Sony v Universal: The Intellectual Property Legacy of Justice Stevens* (2006) 74 *Fordham Law Review* 101 at 102 that:

[T]he *Sony* decision is the most significant legacy of Justice Stevens in the field of intellectual property law and its significance is likely to continue in mediating disputes between copyright industries and creative information technology developers and Users of information technology.

It was further observed that “[t]he most obvious and most commercially significant legacy of *Sony* is the safe harbour it established for technologies having or capable of having substantial non-infringing uses. *Sony* has been characterized as the ‘Magna Carta’ of the information technology industry”: at 120, citing Jessica Litman, “The *Sony* Paradox” (2005) 55 *Case W Res L Rev* 917 at 951.

58 “[There must be] a balance between a copyright holder’s legitimate demand for effective – not merely symbolic – protection of the statutory monopoly, and the rights of others freely to engage in substantially unrelated areas of commerce”: *Sony Corp of Am v Universal City Studios, Inc* 464 US 417 at 442, [39] (1984).

loop” system operating only in the US, provides encryption technology and pays royalties) is allowed to continue its operations in the interim. RecordTV’s own practices are arguably closer and more similar to that of the iviTV and certainly the Cablevision model, which bodes well for its prospects in a fair dealing analysis. RecordTV’s terms of service and practices, which gave deference to and by-and-large appeared to abide by copyright laws, could only help its case as well (and in the determination of fairness and good faith).

C. *The Canadian Supreme Court case of CCH Canadian Ltd v Law Society of Upper Canada and the user-centric approach*

39 *CCH Canadian Ltd v Law Society of Upper Canada*⁵⁹ (“CCH”) is a significant milestone for the fair dealing defence in Canadian copyright law as it established and expanded the parameters of the exception and gave the fair dealing provision under the Canadian copyright legislation a novel and progressive reading. Although there was no legislative amendment similar to the one exercised by the Singapore Parliament to expand fair dealing by freeing it from purpose specific constraints, the Canadian Supreme Court seemed to have taken the lead in doing so within the confines of s 29 of their Copyright Act in this case. The interpretative approach of the court is instructive as it is consistent with the objective and purpose behind a more robust fair dealing doctrine that the Singapore Parliament must have intended by instituting the amendments to its copyright regime in 2005.⁶⁰

59 [2004] 1 SCR 339; [2004] SCC 13 available at <<http://www.canlii.org/en/ca/scc/doc/2004/2004scc13/2004scc13.html>> (accessed 1 February 2012). See also Parveen Esmail, “*CCH Canadian Ltd v Law Society of Upper Canada*: Case Comment on a Landmark Copyright Case” (2005) 10 Appeal 13.

60 See, eg, *Singapore Parliamentary Debates, Official Report* (16 November 2004) vol 78 at col 1041, where the then Minister for Law (Professor S Jayakumar) stated with regard to the amendment to the fair dealing provision in the Copyright (Amendment) Bill that:

Like all our IP laws, copyright laws are intended to be an incentive to create original works through the granting of exclusive rights. This objective can only be achieved if the exchange of information and ideas is not unduly impeded ... Presently, Singapore has a fair dealing system that permits the use of copyrighted material for specified activities, namely, research and private study, review and criticism, and news reporting. While this system provides certainty, it is also restrictive in that it does not cater for other new uses which could fall under the concept of fair dealing ... While the current permitted activities have been retained, [the amendment] refines our fair dealing system by allowing other acts to be assessed according to a set of factors in determining whether these acts could constitute fair dealing ... As mentioned earlier, currently, the fair dealing provisions are somewhat restrictive. They deal with specified activities and those specified activities have been retained, but we have also refined the fair dealing regime to allow for other activities to be considered, such as fair dealing based on a set of factors. And I think that is better because they are also in tune with developments in other countries, like

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40 Until *CCH*, the Canadian courts had adopted a narrow interpretation of fair dealing. However, the Canadian Supreme Court changed that when it released its decision in *CCH* wherein it interpreted fair dealing against the facts of the case in a broader manner than ever before in relation to the practice of photocopying legal materials. The court modified copyright law by applying new interpretations and redefining the status of users. The court stated that: “The fair dealing exception, like other exceptions in the *Copyright Act*, is a User’s right. In order to maintain the proper balance between the rights of a copyright owner and Users’ interests, it must not be interpreted restrictively.”⁶¹ In explicitly taking this position, the court had moved towards a more balanced approach, even a relatively more pro-user position, from a traditionally pro-author stance. This shift is legally and philosophically significant. Thus, exceptions are now recognised as an integral part of the Copyright Act and may be entitled to a broad and purposive interpretation (being elevated to the status of “rights” in and of themselves), and if they are made out, then there is no copyright infringement at all.⁶² This would apply directly to the fair dealing defence, which requires proof of “fairness” and a statutorily permitted type of “use”, “dealing” or “purpose”.

(1) *The CCH liberalisation of the Canadian fair dealing provision*

41 The copyright infringement action in *CCH* was brought by three publishers of legal materials against the Law Society of Upper Canada, which operates the Great Library at Osgoode Hall in Toronto, Ontario and provides a non-profit “custom photocopying service” to its patrons. There were two causes of action: primary infringement by the photocopying and distribution of legal materials by the librarians; and authorising infringement by the provision of on-site self-service photocopiers. The court held in favour of the defendant.

42 In relation to the first cause of action, on the issue of “fairness”,⁶³ the court held that the Law Society only had to establish that its general

the US and Australia. I think it is an amendment which we need because they seek to preserve the unimpeded exchange of information and ideas to create an environment which is conducive to the development of creative works.

See also the observation of Mr Zainal Abidin in the same proceedings that: “For the copyright users, the amendments put into effect enhanced fair use provisions and specific exceptions.”

61 *CCH Canadian Ltd v Law Society of Upper Canada* [2004] 1 SCR 339; [2004] SCC 13 at [48].

62 See Warren B Chik, “Better a Sword than a Shield: The Case for Statutory Fair Dealing/Use Right as Opposed to a Defence in the Light of the Disenfranchising Effect of Digital Rights Management and Anti-Circumvention Laws” (2008) 1(1/2) *International Journal of Private Law* 157.

63 On the issue of “use”, “dealing” or “purpose”, the court in *CCH Canadian Ltd v Law Society of Upper Canada* [2004] 1 SCR 339; [2004] SCC 13 at [51] determined
(cont’d on the next page)

dealings were fair in nature. And that it did not have to prove that each patron used the legal material provided in a manner that constituted fair dealing. There is a certain similarity here with the *Sony Betamax* “substantial non-infringing uses” test, albeit in this case it is in the context of its *own* dealings and of *primary* infringement. The court affirmed and applied a non-exhaustive and updated list of factors proposed by Linden JA of the Federal Court of Appeal to determine fairness:⁶⁴ “(1) [T]he purpose of the dealing; (2) the character of the dealing; (3) the amount of the dealing; (4) alternatives to the dealing; (5) the nature of the work; and (6) the effect of the dealing on the work.”⁶⁵ These judge-made factors are very similar to the list of US statutory fair use factors, and the courts may additionally consider other relevant factors.

43 Unlike the US fair use factors, the Canadian fair dealing factors may not be relevant, considered or applied in every case (*ie*, the six criteria are open-ended and can be changed or added to). However, it is a fair observation that while the Canadian courts have a more flexible “fairness” test, the US is still broader when it comes to the permitted purposes to which a use is put since it maintains an open-list of permissible purposes. Overall, on the issue of the fair dealing and fair use exception, there is a narrowing of the gap between the two jurisdictions.

44 In relation to the second cause of action, the court stated that: “[A] person does not authorize infringement by authorizing the mere use of equipment that could be used to infringe copyright.”⁶⁶ It also affirmed the presumption that persons who authorise activities only authorise them to the extent that is in accordance with the law. The presumption may be rebutted where a sufficient degree of control, or a relationship, between the person authorising the use of equipment and the person committing the act of photocopying is established (*eg*, an

that the conditions of “research or private study” were met on very generous grounds, stating that: “‘Research’ must be given a large and liberal interpretation in order to ensure that Users’ rights are not unduly constrained, and is not limited to non-commercial or private contexts.” Hence, “research for the purpose of advising clients, giving opinions, arguing cases, preparing briefs and factums is nonetheless research” even if it may be for a commercial and profit-making purpose or in the public context. Citing with approval the Court of Appeal in *CCH Canadian Ltd v Law Society of Upper Canada* [2002] 4 FC 213; [2002] FCA 187 at [128] ([2004] 1 SCR 339; [2004] SCC 13 at [51]).

64 *CCH Canadian Ltd v Law Society of Upper Canada* [2004] 1 SCR 339; [2004] SCC 13 at [53].

65 *CCH Canadian Ltd v Law Society of Upper Canada* [2002] 4 FC 213; [2002] FCA 187 available at <<http://www.canlii.org/en/ca/fca/doc/2002/2002fca187/2002fca187.html>> (accessed 1 February 2012).

66 *CCH Canadian Ltd v Law Society of Upper Canada* [2004] 1 SCR 339; [2004] SCC 13 at [38].

employer-employee relationship). The court found no evidence that the photocopiers had been used to infringe copyright and stated that even if the photocopiers had been so used, the library lacked sufficient control over its patrons that may amount to authorisation of infringement.

(2) *The application of the CCH fair dealing treatment to RecordTV's iDVR service*

45 The Canadian Supreme Court took the view that the “dealing” referred to in s 29 of the Canadian Copyright Act was not confined to individual acts,⁶⁷ but also included a general practice or system including the custom photocopy service that was operated by the Great Library and governed by the Access Policy which imposed limits on the types of patron requests which would be processed.⁶⁸ With the “dealing” requirement satisfied, the court went on to decide that the Law Society was able to rely on the general practices which governed the Great Library’s photocopying activities to establish a “fair” dealing on its part.

46 The court agreed that the purpose and character of the Law Society’s dealing with the copyrighted works was connected with the dealings of its patrons. The court also determined that the Law Society as the intermediate copyst raising this defence does not even have to adduce evidence that the *actual* user of the copied works (*ie*, its patrons) deals with the material for a legitimate purpose under the statute or in a fair dealing manner in order to avail itself of the defence and to avoid liability for copyright infringement, whether as a primary party to such infringement or otherwise.⁶⁹

47 What parallels can we draw from these findings and how are they applicable in RecordTV’s scenario? First, an analogy can be made between the facts in *RecordTV* and *CCH*. As noted, in *CCH*, the fairness determination with respect to the actual usage of materials by the end-user is similarly taken into consideration in determining the availability of the defence of fair dealing to the defendant’s *primary* infringement despite being the service provider, although ultimately the focus is on

67 Section 29 of the Copyright Act (RSC 1985 c C-42) (Canada) states that: “Fair dealing for the purpose of research or private study does not infringe copyright.”

68 *Ie*, as long as the actual copying was part of a course of dealing in which the work was ultimately used for research or private study (a legitimate purpose under the list of exceptions), there was a “dealing” within the scope of the defence.

69 *CCH Canadian Ltd v Law Society of Upper Canada* [2004] 1 SCR 339; [2004] SCC 13 at [62]. In fact, the complainant may be given the evidentiary burden of proving that the alleged infringer’s use negatively affected its market, particularly if it has the better ability to adduce such evidence (*ie*, obtain or gather relevant information) *vis-à-vis* the latter.

the dealing by the service provider that is pertinent.⁷⁰ They were not mutually exclusive and were inter-connected and this was relevant to the court's analysis. The same approach can be taken in relation to the iDVR in that the dealing in question entails a holistic inquiry into the fairness of the entire chain of events from the provision of the service by RecordTV to the ultimate use and enjoyment of the service by the RUs.

48 As noted, the Supreme Court endorsed the series of factors outlined by Linden JA of the Federal Court of Appeal as relevant in the assessment of whether a form of dealing is fair. These factors were drawn together from the approaches adopted by the UK and US courts.⁷¹ They are similar to the fair dealing factors in our copyright legislation and as such the Canadian analysis is also very helpful and can be of persuasive value.

(a) **The purpose of the dealing.** As with the interpretation of all the enumerated grounds, the court asserted that this first criterion “should not be given a restrictive interpretation or this could result in the undue restriction of Users’ rights”.⁷² It should not make a difference whether RecordTV is a primary user or an authoriser of infringement as long as the actual dealing, which is the focus of this factor, is fair. This is similar to the manner in which fair use was extended to Sony Corp as a defence to secondary infringement in *Sony Betamax*, based on the assessment of the use by users (here, the VCR was capable of “substantial” or “commercially significant” non-infringing uses). The objectives of DVRs like RecordTV’s iDVR have a real useful social purpose beneficial to its users and RecordTV was not a commercial enterprise (although its profit-making purpose would likely have become more apparent over time, probably with a view to the future generation of revenue).

70 See *CCH Canadian Ltd v Law Society of Upper Canada* [2004] 1 SCR 339; [2004] SCC 13 at [63]:

Persons or institutions relying on the ... fair dealing exception need only prove that their own dealings with the copyrighted works were for the purpose of research or private study and were fair. They may do this either by showing that their own practices and policies were research-based and fair, or by showing that all individual dealings with the materials were in fact research-based and fair.

Proving in the alternative (or cumulatively) the facts relating to the intermediary or the user to decipher the purpose of the dealing and to determine fairness makes it easier for the copyist in such cases to prove fair dealing.

71 *CCH Canadian Ltd v Law Society of Upper Canada* [2004] 1 SCR 339; [2004] SCC 13 at [53], referring to Linden JA’s decision in *CCH Canadian Ltd v Law Society of Upper Canada* [2002] 4 FC 213; [2002] FCA 187 at [144]–[160].

72 *CCH Canadian Ltd v Law Society of Upper Canada* [2004] 1 SCR 339; [2004] SCC 13 at [54].

(b) **The character of the dealing.** The focus here is on how the works were dealt with. For example, in *CCH*, widely distributed multiple copies could have been adjudged as unfair; however, it was determined that the Law Society's dealing was fair because only single copies were made available to individual members of the legal profession.⁷³ Furthermore, the court stated that if the copy was destroyed after use, this could favour a finding of fairness. Also, the court suggested that custom or practice in the industry could also be used to assess fairness.⁷⁴ RecordTV makes single copies available to each of its individual RUs upon request (whether technically it operated in the "SIS", "Mixed" or "Multiple Copy" mode may not be significant here),⁷⁵ it retains the files for only a 15-day period and destroys them after that. The DVR practices of RecordTV are also on the conservative side relative and in comparison to the practices of other DVRs on the market, and these files are accessed by the RUs via *streaming* technology and not via *downloading* technology. All in all, this factor favours RecordTV as well.

(c) **The amount of the dealing.** This factor seems to have been a weaker consideration in *CCH*. The logic is plain: the larger the taking, the less fair the dealing. But of course, in several circumstances, as in the case of photographs, it may be impossible to deal fairly with the work without copying the entire work. The court noted that, "for the purpose of research or private study, it may be essential to copy an entire academic article or an entire judicial decision".⁷⁶ Similarly, to fulfill its purpose, RecordTV had to provide the Mediacorp programmes in full. Ironically, if the programmes were edited or if the users were given the option of selective viewing (eg, iViTV and TiVo), especially with the removal of advertisements, the lesser amount

73 *CCH Canadian Ltd v Law Society of Upper Canada* [2004] 1 SCR 339; [2004] SCC 13 at [67].

74 *CCH Canadian Ltd v Law Society of Upper Canada* [2004] 1 SCR 339; [2004] SCC 13 at [55].

75 RecordTV's "SIS" mode involved "the storage in RecordTV's recording computers of one copy of the time-shifted recording of a MediaCorp show, regardless of the number of recording requests made for that show". The "Mixed" mode operated essentially on a "Multiple Copy" basis based on the number of requests received from registered users, but fell back on the "SIS" mode if system resources were insufficient. The "Multiple Copy" mode was where multiple copies of the recording of the same show would be made based on the number of individual requests received. *RecordTV Pte Ltd v MediaCorp TV Singapore Pte Ltd* [2010] 2 SLR 152 at [11] (HC). RecordTV was working towards instituting the latter mode, presumably to render it more likely to be considered "legally compliant" (*RecordTV Pte Ltd v MediaCorp TV Singapore Pte Ltd* [2010] 2 SLR 152 at [14] (HC)).

76 *CCH Canadian Ltd v Law Society of Upper Canada* [2004] 1 SCR 339; [2004] SCC 13 at [56].

(quantitatively) may be even more objectionable and less “fair” (qualitatively) than a frame-for-frame copying without exception or manipulation.

(d) **Alternatives to the dealing.** A court may decide against fair dealing where a non-copyrighted work was available as an alternative; and the use of the copyrighted work was not “reasonably necessary to achieve the ultimate purpose”.⁷⁷ At the relevant point in time, the alternatives would be to catch the programmes at a rebroadcast in a restricted date and time slot or to use XinMSN, which offered only selected programmes on demand (and was thus not a perfect substitute to the iDVR).

(e) **The nature of the work.** According to the court, “if a work is unpublished, the dealing may be more fair in that its reproduction with acknowledgement could lead to a wider public dissemination of the work”.⁷⁸ This is because the court was of the view that this would serve one of the goals of copyright.⁷⁹

(f) **The effect of the dealing on the work.** If the work in question competes for the market of the original work, it is less likely that the dealing will be found to be fair. In underscoring that the market factor “is neither the only factor nor the most important factor”,⁸⁰ the *CCH* court seemed to suggest that this factor is less important than the others.⁸¹ The decision suggests that the onus may be reversed if the defendant cannot access market-impact evidence and especially so if the other party has the information and is in a better position to provide it (*ie*, failure to provide such information may elicit an adverse inference). Also, a defendant need not adduce evidence that every use of the provided material is conducted fairly but can rely on its own general practices.⁸²

77 *CCH Canadian Ltd v Law Society of Upper Canada* [2004] 1 SCR 339; [2004] SCC 13 at [57].

78 *CCH Canadian Ltd v Law Society of Upper Canada* [2004] 1 SCR 339; [2004] SCC 13 at [58].

79 It is nonetheless a marked departure from previous Canadian case law and the reasoning in UK and US case law. *Cf, eg, Hyde Park Residence Ltd v Yelland* [2000] EWCA Civ 37.

80 *CCH Canadian Ltd v Law Society of Upper Canada* [2004] 1 SCR 339; [2004] SCC 13 at [59].

81 This market-substitute factor is more important in the UK. See, *eg, Ashdown v Telegraph Group Ltd* [2001] EWCA Civ 1142; [2002] Ch 149.

82 *CCH Canadian Ltd v Law Society of Upper Canada* [2004] 1 SCR 339; [2004] SCC 13 at [63].

49 Reasonable industry safeguards (eg, the Great Library's Access Policy in *CCH*) can also legitimise the process.⁸³ Similarly, RecordTV had built in several safeguards such as user access by streaming (and not downloading) by valid television licence holders,⁸⁴ the act-upon-request, 15-day deletion and copy-to-user ratio that may be considered reasonable and necessary to fulfil its function, particularly if it fulfils a valuable social and public interest objective and if alternatives were limited or non-existent.⁸⁵

50 In the Canadian Supreme Court case of *Théberge v Galerie d'Art du Petit Champlain Inc*,⁸⁶ Binnie J made several statements regarding the purpose and nature of copyright law in which he characterised it as a balance between public and private interests, a limited economic right and the need for constant fine-tuning and adjustments to allow for the incorporation and embellishment of creative innovation in the long-term interests of society, proper utilisation of creative works and the addition of new protections to reflect new technology.⁸⁷

51 In the third significant case from the Canadian Supreme Court on copyright law, *Society of Composers, Authors & Music Publishers of Canada v Canadian Association of Internet Providers*,⁸⁸ it was noted that knowledge of the potential of end-user infringement will not, absent express knowledge of end-user infringing activity, be seen as the intermediary authorising end-user infringement.⁸⁹ It also once again illustrates the court's pro-user take on copyright law.

83 *CCH Canadian Ltd v Law Society of Upper Canada* [2004] 1 SCR 339; [2004] SCC 13 at [61]–[64]. *Id.*, the alleged intermediary infringer can rely on its internal policy as well as individual end-user practices.

84 RecordTV's policy on streaming for private and domestic consumption by those holding valid television licences is also a fair and reasonable practice. See *RecordTV Pte Ltd v MediaCorp TV Singapore Pte Ltd* [2011] 1 SLR 830 at [8] and [62] (CA) and *RecordTV Pte Ltd v MediaCorp TV Singapore Pte Ltd* [2010] 2 SLR 152 at [97] and [98] (HC).

85 A type of dealing or form of use can become less fair or unfair over time based on changed circumstances, but the point of assessment cannot take into account such prospective changes.

86 [2002] 2 SCR 336.

87 *Théberge v Galerie d'Art du Petit Champlain Inc* [2002] 2 SCR 336 at [30]–[32]. A note on *CCH Canadian Ltd v Law Society of Upper Canada* [2004] 1 SCR 339; [2004] SCC 13, *Society of Composers, Authors & Music Publishers of Canada v Canadian Association of Internet Providers* [2004] 2 SCR 427 and *Théberge v Galerie d'Art du Petit Champlain Inc* [2002] 2 SCR 336, known together as the "Canadian copyright trilogy", is available at <http://blakes.com/english/view_printer_bulletin.asp?ID=181> (accessed 1 February 2012).

88 [2004] 2 SCR 427.

89 *Society of Composers, Authors & Music Publishers of Canada v Canadian Association of Internet Providers* [2004] 2 SCR 427 at [126]–[128].

52 In any case, the way that the Canadian Supreme Court favoured user's rights, which is reflected in the Singapore Court of Appeal's outlook in this context, and the manner in which it applied its series of factors can be helpful in arguing fair dealing for RecordTV, particularly after the amendments to the fair dealing exception in Singapore. The open-ended purposes to which the provision can apply and the discretion in weight apportionment accorded to the fair dealing factors in effect favour a flexible and a more user- and inventor-centric approach.

(3) *The user-centric approach of the CCH court*

53 As noted above, the approach of favouring user's rights over owner's rights has actually become a legitimate approach in Canada since *CCH*.⁹⁰ This is relevant here for several reasons. First, DVR service providers like RecordTV can benefit from the end-user's rights and interests, as the intermediary that directly facilitates the exercise of such rights. Second, the policy stance of the courts clearly favours user's rights and as such, taking such a reading or making such an application of the fair dealing factors on that basis will lead to a more user-centric approach and an outcome that will similarly favour RecordTV and other DVR purveyors. Third, this approach is closely tied to the development and advancement of modern forms of information technology with their attendant socio-economic benefits.

D. The recommended application of the Singapore fair dealing defence in favour of RecordTV's iDVR

54 We will now consolidate and bring together all of the arguments in favour of a fair dealing assessment of RecordTV's iDVR within the context of the current Singapore fair dealing provision. The statutory defence, which RecordTV may rely on to exonerate its provision of the iDVR service, is the defence of fair dealing found in ss 35 and 109 of the Singapore Copyright Act.

55 Before approaching the issue of "fairness", it is important to approach the matter of the "purpose" to make several clarifications even though the "dealing" is now important only insofar as it relates to the issue of fairness. First, whether or not we make the assumption that

90 *CCH Canadian Ltd v Law Society of Upper Canada* [2004] 1 SCR 339; [2004] SCC 13 at [10] and [48]. In essence, the point of favouring user's rights can be overstated. In reality, the court was merely realigning the balance, which has tended to be skewed to owner's rights. Thus, relatively speaking, it favoured user's rights, although on the whole, it was merely reassessing an "appropriate balance between the two goals" of "public interest" (which includes user's rights) and "creator's rights" (but who may not be the owner).

RecordTV is a primary infringer, it has been shown that the fair use and fair dealing defence (in their respective jurisdictions) can be equally applicable as a defence to a secondary infringer as well as an authoriser of infringement.⁹¹ However, RecordTV must assert the defence in its own capacity in either case, meaning that it should not make the defence as the “ministerial agent” or in the place of the end-user.⁹² Making the defence “in its own right and capacity” in defence of an infringement action against itself gives it the *locus standi*.⁹³ Second, RecordTV can still rely on its internal dealings relating to its intermediary functions as well as the ultimate objective (mainly time-shifting) and the direct benefits of its dealing to the end-users (as a facilitator)⁹⁴ in persuading the courts that its dealing is fair.

91 Notably, *Sony Corp of Am v Universal City Studios, Inc* 464 US 417 (1984) and *CCH Canadian Ltd v Law Society of Upper Canada* [2004] 1 SCR 339; [2004] SCC 13.

92 George Wei, “Developments in Singapore Law, 2006–2010, Copyright: A Return to Basic Principles and Issues” in *SAL Conference 2011: Developments in Singapore Law Between 2006–2010 – Trends and Perspectives* (Yeo Tiong Min, Hans Tjio & Tang Hang Wu gen eds) (Academy Publishing, 2011) at para 5.4. Eg, relying on s 114 of the Copyright Act (Cap 63, 2006 Rev Ed) (at para 5.12).

93 George Wei, “Developments in Singapore Law, 2006–2010, Copyright: A Return to Basic Principles and Issues” in *SAL Conference 2011: Developments in Singapore Law Between 2006–2010 – Trends and Perspectives* (Yeo Tiong Min, Hans Tjio & Tang Hang Wu gen eds) (Academy Publishing, 2011) at paras 5.7–5.13.

Ang J rightly did not hold that RecordTV had no *locus standi* to raise the defence: rather what he held was that on the facts RecordTV was not able to show that the dealing was fair. The act of infringement that had to be justified was RecordTV’s act of communicating the recorded broadcasts and films to the public. The exclusive rights conferred on copyright subject-matter are independent and can be infringed by several different persons in the course of a connected transaction. [at para 5.13]

Hence, it was not necessary for the Court of Appeal to consider fair dealing since they decided that there was no infringement committed by RecordTV.

94 If RecordTV’s iDVR service is essential to extend existing and *additional* benefits to users, then surely this should be a relevant factor or consideration for fair dealing assessment and should not be dismissed as a mere “interesting *alternative* [rather] than an *instrumental* primary means of time-shifting” [emphasis in original] (*RecordTV Pte Ltd v MediaCorp TV Singapore Pte Ltd* [2010] 2 SLR 152 at [104] (HC)). There are clearly additional “transformative” processes to the iDVR that strengthens the argument that the dealing was indeed fair. An alternative should not discount the ultimate benefit to be obtained, especially when it is a new and improved alternative, as proven by the increasing popularity of new DVRs as compared to the diminishing interest in the older forms of DVR technology. Coincidentally, the word “dealing” can have a wider connotation than the word “use”, and can refer to the various actors and points in the chain or process leading to a desired outcome.

(1) *Listed factors*

56 Section 109(3) provides a list of five compulsory factors,⁹⁵ which we shall now consider and apply to the facts and circumstances of this case as well as the non-elucidated factors that are also relevant to these facts and circumstances to determine the legal status of DVRs, and in particular the type of service provided by RecordTV's iDVR.

- (a) Factor one: The purpose and character of the dealing, including whether such dealing is of a commercial nature or is for non-profit educational purposes

57 This factor seeks a balance between public benefit on the one hand and the private interests of copyright owners on the other.

58 The iDVR was not a paid service insofar as the RUs were concerned, although it was likely offered free in order for RecordTV to build up a base of users with a view to a paid service or to generate advertisement revenue in the future, in which case it would constitute a commercial dealing. Even then, although commerciality is an important component of assessment, it is not necessarily the only consideration here. Since *CCH*, commerciality and profit-motive do not mean that the use cannot still be fair.

59 The purpose assessment should also be influenced by the benefits of the service to society and to users (*eg*, increased mobility and accessibility from space and time-shifting) and the character of the dealing should be considered against the backdrop of modern consumer behaviour in a "digital society" and culture, which is increasingly reliant on information technology.⁹⁶

95 Section 109(1) of the Singapore Copyright Act (Cap 63, 2006 Rev Ed) states that: "[A] fair dealing with an audio-visual item for any purpose ... shall not constitute an infringement of the copyright in the item or in any work or other audio-visual item included in the item." Section 109(3) further states that:

For the purposes of this Act, the matters to which regard shall be had, in determining whether a dealing with an audio-visual item, being a dealing by way of copying the whole or a part of the audio-visual item, constitutes a fair dealing with the audio-visual item for any purpose ... shall include – (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 audio-visual item; (c) the amount and substantiality of the part copied taken in relation to the whole audio-visual item; (d) the effect of the dealing upon the potential market for, or value of, the audio-visual item; and (e) the possibility of obtaining the audio-visual item within a reasonable time at an ordinary commercial price.

96 See also *RecordTV Pte Ltd v MediaCorp TV Singapore Pte Ltd* [2011] 1 SLR 830 at [2] and [68] ff.

60 Furthermore, on the subject of the purposive nature of the dealing, although the *Sony Betamax* “substantial non-infringing uses” test may not be directly applicable here and the form of technology and the operational aspects are to a certain extent different, the purpose behind the creation of the doctrine is still relevant, particularly given the similar objectives of the iDVR. If one looks at the issue from a strictly technical point of view, RecordTV infringes Mediacorp’s copyright in their works by every copy that it makes. Purposively, however, the nature of the dealing is non-infringing if it is viewed from the perspective that RecordTV acts automatically and only upon the request of the RU (much like the Betamax machine did). In *Sony Betamax* (and also *CCH*), user practices were an important determinant in assessing the “fairness” to be attributed to the product or service provided.

61 In other words, there is no requirement to make the technical distinction when one can look at the purpose of the activity that is to be protected. The CA in *RecordTV* itself eschewed a technical approach and preferred the purposive approach in determining that there was no primary infringement on the part of RecordTV (*ie*, that it was the RU that copied and that communicated the Mediacorp shows). Although the authors argue against allowing such a consideration at that stage of analysis due to the strict liability nature of infringement, there is no barrier to such a consideration here at the fair dealing analysis.

62 It is therefore submitted that there is no reason why this test cannot be included in the overall fair dealing analysis, especially given the amendments to ss 35 and 109 and its applicability to DVRs inasmuch as they perform substantially the same functions as the VHS machine did in its heyday.

63 Also, the removal of the copy within 15 days should also be considered as well in determining the fairness of the dealing.⁹⁷

(b) Factor two: The nature of the audio-visual item

64 The nature of audio-visual items like television shows generally require synchronicity in moving image and sound and for shows to be presented in their entirety in order to achieve their purpose (*ie*, for entertainment and information dissemination).

97 It is certainly not system or user caching (ss 193E and 193C of the Copyright Act (Cap 63, 2006 Rev Ed)) or temporary reproduction made in the course of communication (s 38A) or storage (s 193D) for the purposes of statutory exemption, but it can be analogised to the objective of those functions and justified in terms of the necessity to serve its purpose (length of copy, length of retention/storage), the (limited) extent of harm and so on – which renders it *reasonable* and hence fair.

65 *CCH* posited that the furthering of a “wider public dissemination of [an unpublished] work” reproduced with acknowledgment can be a valid objective and render the unauthorised dealing more fair.⁹⁸ The *CCH* court weighed non-publication in favour of fair dealing. Perhaps the same argument can be made for a broadcasted show where the original publication is rigid and fixed by date, time and number of broadcasts (*ie*, limited accessibility). Any form of subsequent replication, particularly with flexibility in time and space for future single or multiple viewing, will also serve the objective of wider public dissemination and add utilitarian value through a positive “net social benefit” outcome to the works concerned.

(c) Factor three: The amount and substantiality of the part copied taken in relation to the whole audio-visual item

66 Substantiality has never been an impermeable wall for a finding of fair use or dealing, particularly if the other factors weigh strongly in favour of such a finding. Certainly, Mediacorp’s television programmes have to be copied and communicated in their entirety for RecordTV to serve its purpose; for most, if not all, users would not want the option of watching only a portion of a programme. This can be compared, for example, to the outcome in the images search engine series of cases in the US,⁹⁹ where image replication or minimisation that is generated, transposed and produced by search engines required the use of the full picture to be effective for the purpose of producing and displaying image search results to search engine users.

67 An analogy can also be made with *CCH* where in the court’s view, multiple copies of copyright material that are widely distributed may amount to an unfair dealing, but single copies made available to individual members of the legal profession was considered fair.¹⁰⁰ Similarly, single copies of shows made specifically for and at the request of individual RUs (who can only stream to view, but not download to keep, programmes) can be considered fair as well. Furthermore, the *CCH* court stated that if the copy is destroyed after use, this may favour a finding of fairness.¹⁰¹

98 *CCH Canadian Ltd v Law Society of Upper Canada* [2004] 1 SCR 339; [2004] SCC 13 at [58].

99 See *Kelly v Arriba Soft Corp* 280 F3d 934 (CA9, 2002) *withdrawn*, refiled at 336 F 3d 811 (CA9, 2003); *Perfect 10 v Google, Inc, et al* 416 F Supp 2d 828 (CD Cal, 2006); and *Perfect 10, Inc v Amazon.com, Inc* 487 F 3d 701 (9th Cir, 2007) respectively.

100 *CCH Canadian Ltd v Law Society of Upper Canada* [2004] 1 SCR 339; [2004] SCC 13 at [67].

101 *CCH Canadian Ltd v Law Society of Upper Canada* [2004] 1 SCR 339; [2004] SCC 13 at [55].

- (d) Factor four: The effect of the dealing upon the potential market for, or value of, the audio-visual item

68 The only effect of the iDVR is on the potential resale market and also the possible impact on advertisement revenue or sales that can be generated from subsequent broadcasts, whether or not on the same platform or model as RecordTV, such as the XinMSN. The adverse effects for Mediacorp would arguably be lower in the event that the likely RUs are those who would have missed the original broadcast anyway (and thus require the time-shifting option). In contrast, there would have been a higher likelihood of negative impact on Mediacorp's potential advertising revenue for the original television broadcast timeslots if RecordTV were to have provided a wider range of services and value-added features, where the detriment to Mediacorp would have been disproportionate to the additional benefits to users on the whole. These can include, for example, "autoskip" or "commercial advance" services, which allows skipping of advertisements and portions of a show, and a "send show" feature, which allows sharing of shows with other users including those likely not to have a right to watch.¹⁰² These cases are more likely to contribute to a drop in viewership in the original broadcast of the programmes concerned.

69 Mediacorp may also face problems with proving and quantifying losses or damages in monetary terms, which can tend to be speculative.¹⁰³ Its programmes are also not generally sold to rebroadcasters or to consumers that is a common practice in other countries such as the US (where broadcast syndication and the home video market is huge). Moreover, the iDVR was only offered and limited to the local jurisdiction, which arguably should not affect its market overseas.

102 Features that were available in Digital Network's ReplayTV and greatly objected to by the entertainment industry players, but that have since been discontinued. See also Aaron A Hurowitz, "Copyright in the New Millennium: Is the Case Against ReplayTV a New Betamax for the Digital Age?" (2003) 11 CommLaw Conspectus 145 at 156. Similarly, the set top box equivalents: TiVo and Microsoft's UltimateTV.

103 See also *RecordTV Pte Ltd v MediaCorp TV Singapore Pte Ltd* [2011] 1 SLR 830 at [70], where the court stated that Mediacorp would have "already factored in its alleged 'loss' of revenue with respect to its copyright in those shows" that it offers on a free-to-air basis to members of the public (including Registered Users) who hold valid television licences and who are thus legally entitled to view and record the same for their own private and domestic use".

- (e) Factor five: The possibility of obtaining the audio-visual item within a reasonable time at an ordinary commercial price¹⁰⁴

70 This factor is similar to the concept of a “fair use by reason of necessity”.¹⁰⁵ Arguably it is not possible for users to obtain Mediacorp shows within a reasonable time as Mediacorp fully controls the broadcast date and time of its shows and there is no release beyond the original television broadcast or very limited rebroadcasts.

(2) *Additional factors*

71 Since the list of fair dealing factors is not closed,¹⁰⁶ the following are recommended factors that add weight to a finding of fair dealing in favour of RecordTV’s iDVR. It is also a summary of the tests that have emerged from other jurisdictions and that have been canvassed above, but reconceptualised and reapplied to the fact situation in this case.

(a) Alternatives to the dealing

72 The fourth factor in the Canadian analysis may be applicable here. Alternatives can refer to the work, or the source or availability of a work.

73 At the time of the trial, the alternatives available to users in relation to Mediacorp programmes (other than viewing the shows at their scheduled timeslot) were limited to the offerings of Mediacorp through its XinMSN website. There was no option or user choice of the programmes to be offered and selected, even if they already had a right to view these programmes ordinarily. The other alternative was for users to record the programme for themselves using a home DVR device

104 This fifth factor was included into ss 35 and 109 of the Copyright Act (Cap 63, 2006 Rev Ed) and took effect on 1 January 2005 together with the other amendments to the provision. It brings the list of factors in line with the Australian version and list of factors. See s 40(2) of the Australian Copyright Act of 1968.

105 *Basic Books v Kinko’s Graphics Corp* F Supp 1522 at 1538 (SDNY, 1991). Another factor is the possibility of the copyright owner’s monopolistic and competitive practices, such as severely limiting production and availability of a social good in order to render it exclusive and drive up the demand and price. Yet another potential factor that was considered in *Basic Books* and in *CCH Canadian Ltd v Law Society of Upper Canada* [2004] 1 SCR 339; [2004] SCC 13 relates to industry practices and institutional policies.

106 The language of the Singapore Copyright Act (Cap 63, 2006 Rev Ed) explicitly suggests that additional non-enumerated factors can also be relevant and considered by the courts. These factors can be independent of or lie within one of the enumerated factors. For example, even though bad faith is not one of the enumerated factors, the US Supreme Court has considered it in evaluating the “purpose and character” of the questioned use. See *Campbell v Acuff-Rose Music, Inc* 510 US 569 (1994).

rather than the remote DVR service offered by RecordTV, which would perform the same function legitimately and with no different effect to Mediacorp's concerns *vis-à-vis* the iDVR.

(b) Good faith and fair practices

74 The issue of good faith is increasingly relevant, particularly in relation to an action based on secondary liability or the authorisation of infringement. Courts of various jurisdictions have increasingly referred to this factor in varying degrees of importance, whether indirectly and in relation to the expectation of due diligence as in *Universal Music Australia Pty Ltd v Sharman License Holdings Ltd*¹⁰⁷ (“Kazaa”) or as an integral factor in *MGM Studios, Inc v Grokster, Ltd*¹⁰⁸ (“Grokster”) (where many academics argue that an “inducement test” has emerged as an additional substantive factor).

75 Although jurisprudentially this factor has arisen more in relation to the fair use defence for indirect infringement in the US, by extension, it may be argued that it is also relevant to a fair dealing assessment on primary infringement. There is no reason why the defence itself can be extended to the former while additional factors cannot, where relevant, be transposed to the latter situation. Also, there is no obstruction for fair use or dealing and its factors to be applied in relation to other forms of copyright infringement, such as authorising infringement in the Singapore context when a relevant case such as this arises to determine the issue, which is also an opportunity for case law development in this area of law.

76 It was observed by the courts in this case that RecordTV had taken measures in the actual or apparent attempt to comply with the law. Indeed, it was certainly their prerogative to take steps to avoid legal liability and to preemptively better its legal position in the case of a dispute. Arguably, this is a perfectly legitimate approach for any person or legal entity to take. First, it obtained the approval of the Infocomm Development Authority (“IDA”) and the Media Development Authority of Singapore (“MDA”), which are the two statutory boards of the Singapore government and agencies of the Ministry of Information, Communications and the Arts (“MICA”) that deal with internet and IT-related issues. Second, it operated on the basis of a set of “Terms of Use” that, at the very least and on the face of it, adhere to the copyright regime and exhort its RUs via its terms to observe and abide by its provisions.¹⁰⁹ In fact, both courses of action led to the CA determining

107 [2005] FCA 1242.

108 545 US 913 (2005).

109 Clause 3A of the “Terms of Use”. The “Frequently Asked Questions” or FAQs posted by RecordTV also contained consistent provisions in relation to copyright
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that there was no authorisation liability.¹¹⁰ The “factual matrix” of this case, consisting of RecordTV’s actions that convinced the CA to find a lack of authorisation of infringement on RecordTV’s part, can similarly contribute to a finding of good faith. They include: warning users to comply with copyright laws; non-commerciality of the service;¹¹¹ using streaming technology rather than allowing users to download the shows and the lack of knowledge of specific infringement by users.¹¹² RecordTV had also tailored its practices to render them fair and less likely for abuse, such as limiting its area or jurisdiction of operation, the storage duration and working towards the multiple copy mode of delivery, as noted before.

(c) Public interest¹¹³

77 Considerations of public interest should not have featured in the CA’s determination of primary copyright liability but are more relevant in the context of a fair dealing assessment. There is arguably a stronger justification for public interest and policy arguments to be made in the context of a fair dealing analysis,¹¹⁴ as the concept is

law for the information of users. Compare this to the “Access Policy” in *CCH Canadian Ltd v Law Society of Upper Canada* [2004] 1 SCR 339; [2004] SCC 13 at [61]–[64].

110 Departing from the High Court’s determination that there was authorisation to copy. See *RecordTV Pte Ltd v MediaCorp TV Singapore Pte Ltd* [2011] 1 SLR 830 at [45]–[64] (CA).

111 Although evidence had shown that RecordTV had plans to eventually generate revenue from the iDVR service whether through subscription fees, selling advertisement space or licensing its technology. As the High Court judge stated, it was not meant to “run as a charity” in the long term. See *RecordTV Pte Ltd v MediaCorp TV Singapore Pte Ltd* [2010] 2 SLR 152 at [103] (HC).

112 *RecordTV Pte Ltd v MediaCorp TV Singapore Pte Ltd* [2011] 1 SLR 830 at [62] and [63] (CA) respectively. See also *RecordTV Pte Ltd v MediaCorp TV Singapore Pte Ltd* [2010] 2 SLR 152 at [97]–[98] (HC), which the Court of Appeal referred to regarding RecordTV’s use of the streaming technique and its effects.

113 On whether there is a common law public interest defence to copyright liability that is independent of the statutory fair dealing defence, see Saw Cheng Lim, “Is there a Defence of Public Interest in the Law of Copyright in Singapore?” [2003] *Sing JLS* 519. Given the uncertainties relating to the incorporation of such a doctrine into Singapore copyright law, public interest remains a relevant and important consideration under a more liberal and holistic fair dealing assessment, especially given the fundamental basis for the copyright regime that recognises the need to balance interests that are intertwined with public or social concerns. Also, the value and utility of an independent common law public interest defence diminishes in the face of a more expansive (and liberal interpretation of the) fair dealing provision (*ie*, ss 35 and 109 of the Copyright Act (Cap 63, 2006 Rev Ed)), post-amendment.

114 For the linkage of fair dealing to public interest, see, *eg*, Carys J Craig, “The Changing Face of Fair Dealing in Canadian Copyright Law” in *In the Public Interest: The Future of Canadian Copyright Law* (Michael Geist ed) (Toronto: Irwin Law, 2005) at p 437.

compatible with the open-model of Singapore's hybrid fair dealing package. It is in fact consistent with the objectives of the fair dealing defence even at the pre-amendment stage. Its application can be expanded to modern technological advances that are beneficial to society as a whole from its narrower confines in the past, such as to "newsworthy information".

78 As noted elsewhere,¹¹⁵ considerations of public interest by the CA were certainly relevant but not so much in the context of determining strict liability copyright infringement, but rather, as a factor weighing in favour of the fairness assessment under fair dealing. As the CA had noted, RecordTV's iDVR service offered "tangible benefits" to users of time-shifting programmes and hence was certainly a "more convenient and User-friendly" alternative than having to adhere to Mediacorp's broadcast schedule.¹¹⁶ On the other hand, the operational differences between the iDVR system and the traditional VCR were "immaterial" in contrast to the "significant technological improvement" offered by the iDVR service.¹¹⁷ Other strong arguments on the social benefits of technological innovations and advancements and the need for unfettered development of technology in this field have already been canvassed earlier.

79 To reiterate, the overarching objectives of copyright law are to strike the appropriate balance between the rights and interests of copyright owners on the one hand, and the rights and interests of the public on the other in gaining access to and benefiting from the copyright work(s) in question, whilst at the same time satisfying the larger public interest in the use and development of new technology.¹¹⁸

115 See Saw Cheng Lim & Warren Chik, "Where Copyright Law and Technology Once Again Cross Paths – The Continuing Saga: *RecordTV Pte Ltd v MediaCorp TV Singapore Pte Ltd* [2011] 1 SLR 830" (2011) 23 SAclJ 653.

116 See *RecordTV Pte Ltd v MediaCorp TV Singapore Pte Ltd* [2011] 1 SLR 830 at [21], [22], [61] and [68]–[71]. See also *RecordTV Pte Ltd v MediaCorp TV Singapore Pte Ltd* [2010] 2 SLR 152 at [95]–[98]. See further George Wei, "Developments in Singapore Law, 2006–2010, Copyright: A Return to Basic Principles and Issues" in *SAL Conference 2011: Developments in Singapore Law Between 2006–2010 – Trends and Perspectives* (Yeo Tiong Min, Hans Tjio & Tang Hang Wu gen eds) (Academy Publishing, 2011) on the utilitarian foundation of copyright law and the importance of balancing creativity and innovation in both creative works and technological inventions.

117 George Wei, "Developments in Singapore Law, 2006–2010, Copyright: A Return to Basic Principles and Issues" in *SAL Conference 2011: Developments in Singapore Law Between 2006–2010 – Trends and Perspectives* (Yeo Tiong Min, Hans Tjio & Tang Hang Wu gen eds) (Academy Publishing, 2011) at para 2.5.

118 *RecordTV Pte Ltd v MediaCorp TV Singapore Pte Ltd* [2011] 1 SLR 830 at [68]–[71]. See Art 7 of the TRIPS Agreement 1994, which states that:

The protection and enforcement of intellectual property rights should contribute to the *promotion of technological innovation* and to the transfer and dissemination of technology, to the mutual advantage of producers and Users

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E. Customary internet norms and the new global consciousness

80 It has been argued elsewhere that customary internet norms should have a role to play in law-making and development of the law.¹¹⁹ The challenge posed by emerging social norms on the WWW and in the digital arena has given rise to fundamental questions regarding the intersection between law and morality as well as the usefulness of custom, usage and practices to the formation of new legal norms. The HC judge himself noted the absurdity if “copyright law would have thieves of us all”.¹²⁰ The judge’s call to “construe the provisions of the Copyright Act in a manner that balances sanction with sense, and enforceability with efficacy”¹²¹ can also be read as the judge taking some guidance from customary norms, behaviour and practices.

F. The High Court’s rejection of the applicability of the fair dealing defence

81 As noted, the HC rejected the various defences pleaded by RecordTV and also found against RecordTV on an assessment of the fair dealing defence.¹²² However, the authors respectfully differ in opinion from the arguments put forth by the judge in determining the issue.

of technological knowledge and in a manner *conducive to social and economic welfare*, and to a *balance* of rights and obligations. [emphasis added]

119 See Warren B Chik, “Customary Internet-ional Law’: Creating a Body of Customary Law for Cyberspace, Pt I: Developing Rules for Transitioning Custom into Law” (2010) 26(1) *Computer Law & Security Review* 3 and Warren B Chik, “Customary Internet-ional Law’: Creating a Body of Customary Law for Cyberspace, Pt II: Applying Custom as Law to the Internet Infrastructure” (2010) 26(2) *Computer Law & Security Review* 185.

120 *RecordTV Pte Ltd v MediaCorp TV Singapore Pte Ltd* [2010] 2 SLR 152 at [114] (HC). The judge also noted that “[a] construction of the copyright law in a manner that leads to widespread unenforceability would only serve to undermine the very regime upon which copyright relies”. See further John Tehranian, “Infringement Nation: Copyright Reform and the Law/Norm Gap” [2007] *Utah L Rev* 537.

121 *RecordTV Pte Ltd v MediaCorp TV Singapore Pte Ltd* [2010] 2 SLR 152 at [114] (HC).

122 The High Court judge, Ang J, in *RecordTV Pte Ltd v MediaCorp TV Singapore Pte Ltd* [2010] 2 SLR 152 at [104] and [109] held that the social benefit of RecordTV’s iDVR had “largely already been provided for by existing time-shifting technologies such as the VCR”, and stated that the iDVR was “more of an interesting *alternative* than an *instrumental* primary means of time-shifting” [emphasis in original]. Hence, “the balance between private gain and public benefit was simply of a different order from what had been countenanced in [*Sony Corp of Am v Universal City Studios, Inc* 464 US 417 (1984)]”. Thus, the plaintiff failed to qualify for the fair dealing defence under s 109 of the Copyright Act (Cap 63, 2006 Rev Ed) on this basis.

82 First, the judge held against RecordTV on the first factor, reasoning that it was merely an *alternative* as opposed to an *instrumental* means of time-shifting, which he acknowledged to be a valuable social tool, and hence was of the opinion that RecordTV was merely engaging in a soon-to-be commercial venture with minimal societal gain. It is contended that the iDVR and other modern forms of DVR technology should be judged on their own merits or basis and on their *transformative functions* and should not be compared to earlier incarnations or analogues that may provide similar benefits.¹²³ Moreover, there are certainly more benefits to these newer forms of technology, including the benefits of greater mobility, easier functionality, faster delivery, wireless transmission, greater consumer-user options and choice, remote operation, differential format and viewing via inter-operable (including hand-held) devices. History has also shown how new technologies evolve from and replace older versions of such technology. Earlier DVR technologies such as the VHS/VCR were replaced in the market by DVD and VCD recorders, which are in turn being substituted by current DVR products and services and P2P technologies.¹²⁴ Those differences aside, the authors agree with the judge's opinion that, other than for the above purposes in identifying the additional benefits of new forms of DVRs, there should be no significant distinction made between the characteristics of new and old DVR technology in determining fair dealing.¹²⁵ In fact, the CA affirmed the HC's decision that RecordTV did not copy Mediacorp shows on the basis that the iDVR (and similar technologies) "not only serves the same purpose as the traditional DVR/VCR", but is "also a significant technological improvement over the latter with tangible benefits to Users, in that RecordTV's iDVR is more convenient and User-friendly".¹²⁶

123 In a similar manner, search engine indexing should not be considered any less beneficial or transformative due to earlier forms of manual or computerised cataloguing such as by libraries and archives, or even competing services in the market.

124 In fact, the very inclusion of the Singtel Mio TV STS-DVR and the Starhub Hubstation STS-DVR as examples of existing time-shifting instruments shows the usefulness and importance of such various alternatives on the market, which also increases competition and technological innovations as well as serves as the impetus for transitions to new business models (*RecordTV Pte Ltd v MediaCorp TV Singapore Pte Ltd* [2010] 2 SLR 152 at [105] (HC)).

125 "To my mind, it should make no difference, without more, whether technology for time-shifting purposes exists as a service or as a product. If time-shifting is fair use, then it is fair use, period": *RecordTV Pte Ltd v MediaCorp TV Singapore Pte Ltd* [2010] 2 SLR 152 at [99] (HC). "There is no need *whatsoever* to distinguish between the minutiae of whether a DVR operates locally or remotely, whether DVR technology is being implemented as a product or a service, or whether recording is done digitally or via analog means": at [117].

126 *RecordTV Pte Ltd v MediaCorp TV Singapore Pte Ltd* [2011] 1 SLR 830 at [22] (CA). The Court of Appeal also elaborated that registered users need not be
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83 The judge himself admitted that he was “greatly influenced” by the fact that the iDVR was intended to be a “commercial project” in the long run,¹²⁷ while acknowledging that commercial gain was not a deal-breaker.¹²⁸ As has been shown through the approach of the courts in the US and Canada, the game-changing outcome of IT developments have shifted the goal post, and the relative importance of commerciality has fallen *vis-à-vis* the socially beneficial and transformative uses that technology provides.¹²⁹ The CA also took the view that RecordTV had yet to profit from the iDVR and that even if it did, it would not be wrong to do so.¹³⁰

84 In contrast, the authors agree with the judge in his determination that the second factor (“the nature of the audio-visual item”) and the fourth factor (“the effect of the dealing upon the potential market for, or value of, the audio-visual item”) fall in RecordTV’s favour, based on the market as it existed at the time that the action was brought.¹³¹ The third factor on the amount and substantiality

restricted by nor take note of the channel, date and time of the original broadcast. The iDVR also allowed the recording of several episodes of a show thus further adding to the convenience accorded to users. The Court of Appeal also later stated that “RecordTV provided a more convenient and/or more useful time-shifting facility than the time-shifting services that are currently available” (at [70]). Also, the Court of Appeal’s view that RecordTV’s exploitation of the relationship between Mediacorp and the public as not necessarily unlawful or tortuous is interesting.

127 The judge observed in *RecordTV Pte Ltd v MediaCorp TV Singapore Pte Ltd* [2010] 2 SLR 152 at [119] (HC) that:

[T]he possibility [remains] that a DVR or VCR product or service, operating remotely or locally, digitally or via analog means, could amount to fair dealing under our Copyright Act when employed *only* for the non-commercial facilitation of Users’ time-shifting ... it is inconsistent that the VCR is permitted to be sold at a price (in stores) but the RS-DVR (through advertising revenue) is not.

128 *RecordTV Pte Ltd v MediaCorp TV Singapore Pte Ltd* [2010] 2 SLR 152 at [109] (HC).

129 In *CCH Canadian Ltd v Law Society of Upper Canada* [2004] 1 SCR 339; [2004] SCC 13 at [51], for instance, “research” was held to extend to both non-commercial and commercial research-related activities, such as lawyers’ research in the course of their business in preparing submissions for litigation or providing advice to their clients. The removal of the research and study restrictions in ss 35 and 109 of the Copyright Act (Cap 63, 2006 Rev Ed) would likewise appear to remove this restriction for the purpose requirement and potentially dilute its importance and weight in assessing fairness.

130 *RecordTV Pte Ltd v MediaCorp TV Singapore Pte Ltd* [2011] 1 SLR 830 (CA) at [61]. The social benefits to registered users and the impetus it provides to Mediacorp to improve its services competitively were also noted in favour of the iDVR.

131 Observing that the MediaCorp Online Broadband Television or “MOBTV” was not a perfect substitute for the iDVR as it was a video-on-demand service and not a time-shifting service and did not screen every show broadcasted by Mediacorp but only a limited selection of syndicated programmes (*RecordTV Pte Ltd v MediaCorp TV Singapore Pte Ltd* [2010] 2 SLR 152 at [105]). Similarly for

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of the part copied was held to weigh against fair dealing because entire shows and episodic series were recorded.¹³² As for the fifth factor, the possibility of obtaining the item “within a reasonable time” at “an ordinary commercial price” is another factor, from the perspective of the user, to determine any lack of *accessibility* which the iDVR can remedy. The lack of any reasonable alternative offered by Mediacorp for access to a programme after the original broadcast on the above bases is certainly relevant. Again, the comparison to existing services and the VHS/VCR (to which the price function is irrelevant) is a red herring and the factor should not have been considered “moot” at all,¹³³ but rather in favour of RecordTV.

85 Many of the arguments made against the finding of fair dealing by the HC judge were also indirectly rebutted by the CA, albeit in the context of determining non-infringement. In any event, the points made by the CA are also relevant to determining the fairness element of the defence, as noted above.

86 Another point that was considered by the HC judge in the context of the user was the defence for private and domestic use.¹³⁴ This was relevant as it was RecordTV’s contention that the end-users were not in fact infringing copyright by using its iDVR service (and hence, removing the essential requirement of end-user primary infringement

XinMSN. Hence, there was no realistic market for broadcasted MediaCorp programmes. The reason for the judge finding in the plaintiff’s favour on the second factor was that the broadcaster had already made available the free-to-air programmes to its subscribers through other time-shifting technology options (*ie*, Singtel Mio TV STS-DVR and Starhub Hubstation STS-DVR).

132 However, substantiality is not an insurmountable or even an important impediment if other factors such as the benefits of time-shifting offer an effective counter-balance. See, *eg*, *Kelly v Arriba Soft Corp* 336 F 3d 811 (9th Cir, 2003) and *Perfect 10 v Amazon.com, Inc* 508 F 3d 1154 (9th Cir, 2007), on the “transformative uses” of copying and thumbnailing of full-sized copyrighted images for the objective of providing images search engine services, which was found to outweigh and overwhelm all other opposing factors, thus protecting the images search engine function from copyright liability.

133 The failure to program the VHS and the DVRs to record at the point of broadcast will render the programme virtually unobtainable unless and until Mediacorp chooses to put it on the market or share the programme online. George Wei, “Developments in Singapore Law, 2006–2010, Copyright: A Return to Basic Principles and Issues” in *SAL Conference 2011: Developments in Singapore Law Between 2006–2010 – Trends and Perspectives* (Yeo Tiong Min, Hans Tjio & Tang Hang Wu gen eds) (Academy Publishing, 2011) at para 5.19 also noted that:

Even if this falls outside the strict language of the fifth factor, the Court should still be able to address the point as the statutory factors are not intended to be exhaustive. At the end of the day the Court is entitled to assess all relevant facts and circumstances bearing in mind the policy objectives of the fair dealing defence and the objectives and goals of copyright.

134 Under s 114 of the Copyright Act (Cap 63, 2006 Rev Ed). See *RecordTV Pte Ltd v MediaCorp TV Singapore Pte Ltd* [2010] 2 SLR 152 at [45]–[47].

upon which an action for authorising infringement by RecordTV could be based).¹³⁵ It has been argued by the authors that the “factual matrix” surrounding the use by end-users is also pertinent to the wider inquiry as to fair dealing by RecordTV itself, particularly in relation to the *Sony Betamax* “substantial non-infringing uses” test.¹³⁶ Such use is not necessarily constrained by the statutory exceptions to the private and domestic use defence, as is the case under that provision.¹³⁷ Even in the case of authorisation of infringement or indirect infringement, the end-user’s use may also be relevant (*per Sony Betamax* and *CCH*),¹³⁸ although it may not ultimately lead to a finding of fair use or fair dealing, as the case may be, if other facts weigh more strongly in favour of a finding otherwise.¹³⁹

87 It is to be noted that the judge nevertheless, in examining the availability of the fair dealing defence to RecordTV, was doing it on the undisputed understanding that it was available beyond a primary infringer to an alleged authoriser of infringement as well.

G. Overcoming the Berne three-step test and reconciling the exemption of DVRs and the iDVR

88 The concept of fair use/dealing as an exception to copyright has been reinforced by international treaties that have put constraints on carve-outs of rights on Member States that encompass almost all the countries in the world. Article 9(2) of the Berne Convention,¹⁴⁰ Art 13 of the Agreement on Trade-Related Aspects of Intellectual Property Rights

135 See *Ong Seow Pheng v Lotus Development Corp* [1997] 2 SLR(R) 113.

136 The High Court judge, Ang J, in *RecordTV Pte Ltd v MediaCorp TV Singapore Pte Ltd* [2010] 2 SLR 152 at [44] (HC) followed and applied the “commercially significant non-infringing uses” test and outcome in the case of *Sony Music Entertainment (UK) Ltd v EasyInternetCafe Ltd* [2003] FSR 48 to determine contributory liability, which facts are far less analogous to this case than the *Sony Corp of Am v Universal City Studios, Inc* 464 US 417 (1984) scenario in relation to fair use (but that was instead distinguished).

137 *Ie*, Copyright Act (Cap 63, 2006 Rev Ed) s 114(3).

138 The iDVR can be said to be a “necessary condition” and “part of the process” to achieve the end-user’s objective and the outcome that is the time-shifting of programmes. See *CCH Canadian Ltd v Law Society of Upper Canada* [2004] 1 SCR 339; [2004] SCC 13 at [64], where the fair dealing defence was available to the copyist even though the actual use of the work copied for the relevant purpose was by another (similar in nature to the statutory library exemptions).

139 *RecordTV Pte Ltd v MediaCorp TV Singapore Pte Ltd* [2010] 2 SLR 152 at [101]–[102], citing *Princeton University Press v Michigan Document Services Inc* 99 F 3d 1381 (6th Cir, 1996) for the proposition that one party cannot rely on another’s fair dealing defence to exonerate its own culpable behaviour. This is different from relying on the facts of the other’s dealing which may be relevant to its own defence of fair dealing.

140 Berne Convention for the Protection of Literary and Artistic Work (“Berne Convention”) (9 September 1886) (rev 24 July 1971) 1161 UNTS 3 at 31.

(“TRIPS”),¹⁴¹ Art 10 of the World Intellectual Property Organization (“WIPO”) Copyright Treaty¹⁴² and Art 16 of the WIPO Performances and Phonograms Treaty¹⁴³ contain a three-step test for assessing the validity of exceptions to the exclusive rights of copyright owners. Under this test, exceptions to the rights of copyright owners are restricted to certain special cases that do not conflict with a normal exploitation of the work nor unreasonably prejudice the legitimate interests of the copyright holder.¹⁴⁴

89 Any proposals to amend or add exceptions in the relevant copyright legislation of Member States must be consistent with this test.¹⁴⁵ In fact, the US has been subject to criticism for the open-ended nature of its fair use provision.¹⁴⁶ However, it has successfully retained and even successfully exported this concept,¹⁴⁷ including to Singapore, and many have made cogent arguments in defence of its scope. The trend towards the application of the spirit, if not the form, of fair use in common law jurisdictions, is also growing.¹⁴⁸ By the amendment to bring our closed-norm model of the “fair dealing” doctrine substantively in line with the open-norm model of the US “fair use”, the very provision may be subject to a three-step challenge. However, the open-ended fair use doctrine which has been in existence for a long time has been gaining influence and generating interest in many countries, and there have also not been formal challenges brought against it in any international dispute resolution forum.¹⁴⁹ Moreover, there are many

141 TRIPS, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, Art 13 (15 April 1994) 1869 UNTS 299 at 305. This Article was derived from the Berne Convention.

142 World Intellectual Property Organization (“WIPO”) Copyright Treaty, Art 10 (20 December 1996) 36 ILM 65 at 71.

143 WIPO Performance and Phonograms Treaty, Art 16 (20 December 1996) 36 ILM 76 at 85–86.

144 On the three-step test as applied to copyright law, see Martin Senftleben, *Copyright Limitations and the Three-Step Test* (Kluwer Law International, 2004) at pp 283–293; and D Gervais, “Towards A New Core International Copyright Norm: The Reverse Three-Step Test” (2005) 9 Marq Intell Prop L Rev 1.

145 Eric Barendt, “Copyright and Free Speech Theory” in *Copyright and Free Speech: Comparative and International Analyses* (Jonathan Griffiths & Uma Suthersanen eds) (Oxford University Press, 2005) at pp 47–50 and 163–164.

146 See Ruth Okediji, “Toward an International Fair Use Doctrine” (2000) 39 Colum J Transnat’l L 75 at 113–114. Also on the possibility of developing international copyright norms, see, Jane C Ginsburg, “Toward Supranational Copyright Law?: The WTO Panel Decision and the ‘Three-Step Test’ for Copyright Exceptions” (2001) *Revue Internationale du Droit D’Auteur* 187.

147 The concept of an open-ended fair use-type of doctrine or similar “public interest” doctrine. See Richard J Peltz, “Global Warming Trend? The Creeping Indulgence of Fair Use in International Copyright Law” (2009) 17 Tex Intell Prop LJ 267.

148 Richard J Peltz, “Global Warming Trend? The Creeping Indulgence of Fair Use in International Copyright Law” (2009) 17 Tex Intell Prop LJ 267 at 277–288.

149 Gerald Dworkin, “Copyright, the Public Interest, and Freedom of Speech: A UK Copyright Lawyer’s Perspective” in *Copyright and Free Speech: Comparative and*

arguments made to qualify the doctrine as a legitimate exception under the three-step assessment.¹⁵⁰ Similar arguments ought to apply here in relation to the open-ended Singapore fair dealing provision, which will arguably permit the creation and operation of RecordTV's iDVR within the jurisdiction.

90 Particularly in the context of the digital age where what may be considered "normal exploitation" may evolve or expand due to rapid technological progress, user behaviour and consumer preferences,¹⁵¹ a more flexible and holistic "dynamic view" (which is more forward-looking in assessment) is preferred over a strict "fixed view" (with strict adherence to existing conditions),¹⁵² and this realisation as well as the recognition and preference for this reading and interpretation of the three-step test is finding greater popularity and more proponents.¹⁵³

91 In short, the three-step test should not be an impediment here as: first, with public interest, utility and benefits in mind, these exception or exemption provisions should be interpreted more flexibly; and second, there is increasing support for a holistic and discretionary

International Analyses (Jonathan Griffiths & Uma Suthersanen eds) (Oxford University Press, 2005) at pp 162–163. There are not many actual international disputes that required an interpretation of the test in relation to certain statutory exemptions. See the World Trade Organisation ("WTO") 2000 Dispute Resolution Panel Report on Section 110(5) of the United States Copyright Act (WTO Panel ruling 15/06/00 WT/DS160/R) <http://www.wto.org/english/tratop_e/dispu_e/1234da.pdf> (accessed 1 February 2012).

150 See, eg, Martin Senftleben, *Copyright Limitations and the Three-Step Test* (Kluwer Law International, 2004). However, the problem has not been resolved in any forum. See Martin Senftleben above at p 113, and Gerald Dworkin, "Copyright, the Public Interest, and Freedom of Speech: A UK Copyright Lawyer's Perspective" in *Copyright and Free Speech: Comparative and International Analyses* (Jonathan Griffiths & Uma Suthersanen eds) (Oxford University Press, 2005) at pp 153 and 161–162. There are also theses that argue that fair use fails the three-step test: see Sam Ricketson, *The Berne Convention for the Protection of Literary and Artistic Works: 1886-1986* (Centre for Commercial Law Studies, Queen Mary College, 1987) at p 482; Mihaly Ficsor, *The Law of Copyright and the Internet: The 1996 WIPO Treaties, Their Interpretation and Implementation* (Oxford University Press, 2002) at p 284; and Herman Cohen Jehoram, "Restrictions on Copyright and their Abuse" (2005) 27 EIPR359 at 360 and 362.

151 Jo Oliver, "Copyright in the WTO: The Panel Decision on the Three-Step Test" (2002) 25 Colum JL & Arts 119 at 158. Also, on the assessment of "special cases", there can be different approaches such as the "empirical approach" or "normative approach" or both (at 155–157).

152 Jo Oliver, "Copyright in the WTO: The Panel Decision on the Three-Step Test" (2002) 25 Colum JL & Arts 119 at 159.

153 See, eg, Annette Kur, "Of Oceans, Islands, and Inland Water – How Much Room for Exceptions and Limitations Under the Three-Step Test?" (2009) 8 Rich J Global L & Bus 287, for a more flexible interpretation of the test.

assessment based on assessing the three “steps” more as “factors” (like the fair use factors).¹⁵⁴

IV. Conclusion

92 In this article, it has been argued that the fair dealing doctrine – as amended statutorily and with its inherent flexibility – should have been the instrument of choice by the courts in applying their policy approach and decision-making powers in support of DVR technology (such as RecordTV’s iDVR service) against the strict liability infringement provisions under the Singapore Copyright Act.¹⁵⁵ The reasons for this are based on the expansion of the fair dealing provision, the techno-centric (and consequently the user-centric) policy reflected in the CA’s judgment and the outcome of the very application of the various fair dealing factors to the facts and circumstances of this case. The trends in other jurisdictions have also shown that this is the right approach to take bearing in mind the implications for future similar forms of technology.

93 Finally, in the larger picture, perhaps to remove any doubts and to meet public policy and socio-economic objectives, statutory amendments providing for more robust safe harbour protections for internet intermediaries and service providers as well as a larger suite of specific exemptions for users – all of which must be compatible with the Berne three-step test – should also be considered as the Internet and the WWW matures.¹⁵⁶ This, it is submitted, is not a radical suggestion as

154 See Christophe Geiger *et al*, “Declaration: A Balanced Interpretation of the ‘Three-Step Test’ in Copyright Law” (2008) 39 Int’l Rev Intell Prop & Competition L 707 at 708; Daniel J Gervais, “Towards a New Core International Copyright Norm: The Reverse Three-Step Test” (2005) 9 Marq Intell Prop L Rev 1 at 25; and Kamiel J Koelman, “Fixing the Three-Step Test” (2006) Eur Intell Prop Rev 407 at 411.

155 See also Saw Cheng Lim & Warren Chik, “Where Copyright Law and Technology Once Again Cross Paths – The Continuing Saga: *RecordTV Pte Ltd v MediaCorp TV Singapore Pte Ltd* [2011] 1 SLR 830” (2011) 23 SAclJ 653.

156 The judges in the RecordTV case acknowledged this as much themselves. “[There is a need for a] proper reformation of copyright law to reflect the wide array of societal interests in the digital revolution”: *RecordTV Pte Ltd v MediaCorp TV Singapore Pte Ltd* [2010] 2 SLR 152 at [118] (HC). The Court of Appeal also stated as much in the opening statements of its judgment that “[w]here the statute is not clear [on the balance of rights and interests of all the relevant stakeholders], however, the Courts have to perform this difficult task [after considering the socio-economic implications]”: *RecordTV Pte Ltd v MediaCorp TV Singapore Pte Ltd* [2011] 1 SLR 830 at [2] (CA). Therefore, in a common law legal system, it is within the judge’s power not to “manipulate outpaced legislation” but rather to purposively interpret it to cope with new contexts and situations. In fact, the fair dealing provisions in their currently more liberal incarnations (as well as the flexible nature of the doctrine) are certainly not outdated and should be capable of answering the questions relating to the legitimacy and legality of DVR technology, amongst others, *vis-à-vis* copyright law. Just as the Court of Appeal noted that “the
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amendments to accommodate new technology (most notably the internet functionality mechanisms) as well as to counter them (*eg*, digital rights management, technological protection measures and anti-circumvention laws) have all been instituted in recent years in an attempt to recalibrate the balance of rights and interests vested in creative works in the context of the digital environment.

Courts should not be quick to construe a statutory provision so liberally as to deter or restrict technological innovations by preventing them from being applied in a manner which would benefit the public without harming the rights of the copyright owner" ([2011] 1 SLR 830 at [64] (CA)), similarly, the courts should interpret a statutory provision like fair dealing sufficiently liberally so as to protect such technological innovations.