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Citation

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**The Case for Criminalising Primary Infringements of Copyright
– Perspectives from Singapore**

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I. Introduction

Hitherto, criminal liability only attached to, *inter alia*, the commercial manufacture, importation, distribution and sale of infringing copies of copyright material.¹ In the non-commercial context, it was also a criminal offence to distribute infringing materials that had a prejudicial impact on the copyright owner.² The defendant therefore could not be subject to criminal prosecution for infringing acts that were not motivated by profit or that did not involve “prejudicial” distribution. Only civil liability attached to copyright infringements for what may be loosely termed “non-commercial” purposes. All this, of course, changed when the United States–Singapore Free Trade Agreement (USSFTA) was concluded in May 2003 and when the Copyright (Amendment) Act 2004 was passed to implement the obligations set out in the IP Chapter (Chapter 16) of the USSFTA. The amendments to the Singapore Copyright Act 1987 came into effect on 1 January 2005 and a new section 136(3A) was born, the effect of which will be examined in greater detail below.

Copyright piracy is not by any means a new phenomenon. For a long time, consumers the world over knew how to physically acquire pirated copies of copyright material (whether in music, film, software or computer games) from illegal vendors. Even though these consumers had obtained pirated (as opposed to legitimate) material, they could enjoy and use such products without having to make an additional copy, hence excluding them from copyright liability. This popular practice may be frowned upon as immoral or unethical but it attracted no liability in copyright insofar as consumers were concerned, which probably explains why criminal liability and enforcement in the terrestrial world had always centered on copyright pirates (or secondary infringers of copyright) who exploit infringing material for commercial purposes. However, consumers of online entertainment encounter a different scenario altogether because such products operate differently in the digital environment. To avail themselves of online material, users invariably have to make a copy of the material in question (legitimate or otherwise). In short, online use requires copying, a consequence which therefore creates a host of complications in the field of copyright liability. Copyright owners now have *locus standi* – pursuant to section 136(3A) – to extend their realm of enforcement (beyond secondary copyright infringers and, indeed, those entities whose equipment and facilities are regarded as having facilitated these acts of infringement) to include online users of infringing material in the private and non-commercial context.

Initially, though, a measure of tolerance was extended in respect of online activities carried out by private individuals for personal and non-commercial purposes. Private copying by Internet users remained at relatively “comfortable” levels. This is, of course, no longer the case today. Advancements in information technology (and, in particular, the introduction of broadband technology) have led to a rapid and significant increase in the levels of online piracy. Illegal online activities such as uploading,

¹ See, generally, section 136 of the Singapore Copyright Act 1987 (and, in particular, sections 136(1), (2) and (3)). Cf. section 107 UK CDPA 1988.

² See section 136(3)(b) of the Singapore Copyright Act 1987. Cf. section 107(1)(e) UK CDPA 1988.

downloading and file-sharing could no longer be safely tolerated, let alone ignored.³ Such forms of activity, which were becoming more rampant by the day and had reached an extent unimaginable a quarter of a century ago, began to pose a real threat to the economic value of copyright. For reasons unbeknown to this author, there also appears to be a misconception, particularly amongst the younger generation, that content on the Internet can be obtained and shared for free. This explains why the notion of exclusive rights (which falls within the purview of copyright law) fits so uncomfortably in a shared resource such as the Internet. There is indeed no social stigma associated with illegal file-sharing and downloading, unlike, say, stealing a CD/DVD from *Borders*. In the face of such developments and online mentality, what enforcement action can copyright owners take to safeguard their economic interests? Let us turn to an analysis of section 136(3A) of the Singapore Copyright Act 1987.

II. How does Section 136(3A) Compare with Like Provisions in Other Jurisdictions?

It is appropriate, at this juncture, to set out section 136(3A) in its entirety:⁴

“Where, at any time when copyright subsists in a work –

- (a) a person does any act that constitutes an infringement of the copyright in a work ...;
- (b) the infringement of the copyright in the work by the person is *wilful*;

and

- (c) *either* or both of the following apply:
 - (i) the extent of the infringement is *significant*;
 - (ii) the person does the act to obtain a commercial advantage,

the person shall be guilty of an offence and shall be liable on conviction to a fine not exceeding \$20,000 or to imprisonment for a term not exceeding 6 months or to both and, in the case of a second or subsequent offence, to a fine not exceeding \$50,000 or to imprisonment for a term not exceeding 3 years or to both.”

It is immediately apparent that Singapore’s copyright legislation has now extended criminal liability to copyright infringements of a ‘wilful’ nature and where the extent of the infringement is ‘significant’.⁵ This particular aspect of the offence in section 136(3A) – which provides for TRIPS-plus standards of copyright protection⁶ – is rooted on the

³ The problem of large-scale copyright infringement, particularly as regards music piracy, is not a new one. For a lesson in history that dates back to the dawn of the 20th century, see I Alexander, “Criminalising Copyright: A Story of Publishers, Pirates and Pieces of Eight” [2007] 66(3) *Cambridge Law Journal* 625. For a historical analysis from the US perspective, see J Hughes, “Copyright and Incomplete Historiographies: Of Piracy, Propertization, and Thomas Jefferson” (2005-2006) 79(5) *Southern California Law Review* 993.

⁴ Section 136(3A) of the Singapore Copyright Act 1987 (emphasis added).

⁵ Section 136(6A) of the Singapore Copyright Act 1987 states that “... in determining whether the extent of the infringement is significant, the court shall have regard to – (a) the volume of any articles that are infringing copies; (b) the value of any articles that are infringing copies; (c) whether the infringement has a substantial prejudicial impact on the owner of the copyright; and (d) all other relevant matters.”

⁶ Cf. Article 61 of the TRIPS Agreement 1994 – “Members shall provide for criminal procedures and penalties to be applied at least in cases of wilful ... copyright piracy on a commercial scale”.

causation of ‘significant’ economic harm to the copyright owner (a point to which we will return below), rather than on the commercial motives of the copyright infringer. The copyright owner’s potential monetary loss may be the result of a slew of infringing activity, but this paper will, in line with the legislative intent of section 136(3A), focus principally on the activities of copyright infringers in the digital environment (such as the uploading and downloading of infringing files).

Given that the impetus for enacting section 136(3A) was a consequence of Singapore’s obligations under the USSFTA, the drafters of the provision would inevitably have consulted section 506(a)(1) of the US Copyright Act 1976.⁷ There are, of course, some structural differences between the two provisions, but what is important for our purposes is that the US provision (in particular, limb (B)) similarly allows for the prosecution of individuals where the infringement in question was not committed for ‘commercial advantage’ or ‘private financial gain’.⁸ The statutory backdrop is much the same in Australia, which also has a Free Trade Agreement with the US that was concluded in 2004. Although section 132AC of the Australian Copyright Act 1968 is titled “commercial-scale infringement prejudicing copyright owner”, the express use of the phrase ‘commercial scale’ does not imply that the relevant provisions therein⁹ are only concerned with infringements that result in financial gain or commercial advantage to the accused.¹⁰ Indeed, criminal prosecution can be brought in Australia against

⁷ Title 17 of the *United States Code*. Section 506(a)(1) states: “Any person who willfully infringes a copyright shall be punished as provided under section 2319 of title 18, if the infringement was committed –
(A) for purposes of commercial advantage or private financial gain;
(B) by the reproduction or distribution, including by electronic means, during any 180-day period, of 1 or more copies or phonorecords of 1 or more copyrighted works, which have a total retail value of more than \$1,000; or
(C) by the distribution of a work being prepared for commercial distribution, by making it available on a computer network accessible to members of the public, if such person knew or should have known that the work was intended for commercial distribution.”

⁸ Section 506(a) of the US Copyright Act 1976 was amended in 1997 by the No Electronic Theft Act (Public Law No. 105-147, 111 Stat. 2678), which eliminated the requirement of ‘private financial gain’ or ‘commercial advantage’ for the imposition of criminal liability.

⁹ Section 132AC(1) of the Australian Copyright Act 1968 states: “A person commits an [indictable] offence if –

- (a) the person engages in conduct; and
- (b) the conduct results in one or more infringements of the copyright in a work or other subject-matter; and
- (c) the infringement or infringements have a substantial prejudicial impact on the owner of the copyright; and
- (d) the infringement or infringements occur on a commercial scale.”

Section 132AC(5) further elaborates: “In determining whether one or more infringements occur on a commercial scale for the purposes of [section 132AC(1)(d)] ..., the following matters are to be taken into account: (a) the volume and value of any articles that are infringing copies that constitute the infringement or infringements; (b) any other relevant matter”. Clearly, the factors listed in section 132AC(5) mirror those found in section 136(6A) of the Singapore Copyright Act 1987 (as to which, see **note 5**, above).

¹⁰ See Article 17.11.26(a) of the Australia-US Free Trade Agreement which defines ‘wilful copyright piracy on a commercial scale’ as including “significant wilful infringements of copyright, that have no direct or indirect motivation of financial gain” – http://www.dfat.gov.au/trade/negotiations/us_fta/final-text/chapter_17.html.

individuals who infringe copyright for private and non-commercial purposes but to such an extent that substantially prejudices the copyright owner.¹¹

Unlike the copyright statutes of the US, Australia and Singapore, the UK CDPA 1988 presents quite a different picture. The relevant criminal provision in the CDPA is section 107(2A),¹² which is only concerned with one specific act of infringement – i.e. the breach of a copyright owner’s right to communicate a work to the public.¹³ What is noteworthy about this provision is that whereas the act of ‘uploading’ or ‘making available’ infringing files (to a ‘prejudicial’ extent) may attract criminal liability under the CDPA, the act of ‘downloading’ the same will not, even if the extent of which is ‘significant’ or has a substantial prejudicial impact on the copyright owner.

The Europeans, on the other hand, generally take a less robust view of the matter. Harmonisation efforts in the EU have led to the “Amended Proposal for a Directive of the European Parliament and of the Council on criminal measures aimed at ensuring the enforcement of intellectual property rights”.¹⁴ Sometimes referred to as the second IPR Enforcement Directive,¹⁵ it aims to harmonise, throughout the EU, the criminal measures necessary to ensure the enforcement of IPRs. Article 3 of the Directive reads as follows: “Member States shall ensure that all intentional infringements of an intellectual property right on a commercial scale, and attempting, aiding or abetting and inciting such infringements, are treated as criminal offences”. In a debate on the Amended Proposal and during its first reading on 25 April 2007,¹⁶ the European Parliament endorsed, *inter alia*, the following definition in Article 2:¹⁷ that infringements on a ‘commercial scale’ means “any infringement of an intellectual property right committed to obtain a commercial advantage; *this excludes acts carried out by private users for personal and not-for-profit purposes*”. Notably, the European Parliament has adopted the view that infringements of IPRs by private individuals for “personal and not-for-profit purposes” (even where the extent of the infringement is significant and may cause direct economic harm to owners of IPRs) are to be expressly excluded from the ambit of the second IPR Enforcement Directive. It is clear, from the European perspective, that such forms of infringement do not attract criminal liability.

¹¹ See *ibid.*

¹² Section 107(2A) UK CDPA 1988 states: “A person who infringes copyright in a work by communicating the work to the public –

(a) in the course of a business, or

(b) otherwise than in the course of a business to such an extent as to affect prejudicially the owner of the copyright,

commits an offence if he knows or has reason to believe that, by doing so, he is infringing copyright in that work.”

¹³ See section 20(2) UK CDPA 1988 for the definition of “communication to the public”.

¹⁴ Brussels, COM (2006) 168 final.

¹⁵ The first being “Directive 2004/48/EC of the European Parliament and of the Council of 29 April 2004 on the enforcement of intellectual property rights”. This IPR Enforcement Directive of 2004 only contains measures and procedures concerning *civil* sanctions and remedies. It was implemented in the UK in Regulations that came into force on 6 April 2006 – the Enforcement Regulations of 2006 (SI 2006/1027).

¹⁶ See <http://www.europarl.europa.eu/oeil/file.jsp?id=5263692>.

¹⁷ See <http://www.europarl.europa.eu/sides/getDoc.do?type=TA&language=EN&reference=P6-TA-2007-0145> (emphasis added).

From the foregoing discussion, we see a polarity of views adopted by different jurisdictions worldwide on the very issue of criminalising primary acts of copyright infringement. The prevailing mindset in Europe appears to be in stark contrast to that in the US and in those countries which have Free Trade Agreements with the US, such as Australia and Singapore. Significantly, the Europeans have decided to maintain a clear distinction between infringements committed to obtain a commercial advantage (which may attract criminal liability) and all other forms of private and non-commercial infringement (which will not). Be that as it may, it remains the objective of this paper to question the bases on which countries like the US, Australia and Singapore are able to justify the imposition of criminal liability on primary acts of copyright infringement in the digital environment which are private and non-commercial in nature. This is a question to which our attention now turns.

III. Justifications for Criminalising Primary Infringements of Copyright

A. Introduction

Why should tortious invasions of property (such as primary infringements of copyright) in the online environment be treated as criminal offences? What are the possible justifications for applying the force of the criminal law to such forms of human behaviour? These are important overarching questions that will help guide us in our examination of the legitimacy of section 136(3A) of the Singapore Copyright Act 1987 (and like provisions elsewhere).

According to conventional wisdom, the criminal law is a coercive and condemnatory tool employed by the State to control the behaviour of its people. The ordering of a person's conduct – to conform to the State's view of how society should behave – certainly calls for proper justification, particularly when it is accompanied by punitive treatment for those who fail to comply as well as the social stigma that is associated with criminal liability. In justifying criminalisation, commentators have suggested the following criteria:¹⁸ (i) the conduct in question must be wrongful (e.g. because it is immoral or causes harm or serious offence to others); (ii) it must be necessary to employ the criminal law to condemn or prevent such conduct (in the sense that the criminal law should only be employed as a “last resort”); and (iii) it must be permissible to criminalise the activity in light of the European Convention on Human Rights which was brought into force in the UK by the Human Rights Act 1998.¹⁹

Indeed, the pro-criminalisation arguments must be even more compelling in the context of the present discussion, since the enforcement of intellectual property rights –

¹⁸ CMV Clarkson, HM Keating and SR Cunningham, *Clarkson and Keating Criminal Law: Text and Materials*, 6th ed. (Thomson Sweet & Maxwell, 2007) at p 4.

¹⁹ A discussion of human rights jurisprudence (in particular, the impact of the UK Human Rights Act 1998) and its relevance to English criminal law is beyond the scope of this paper.

which are essentially personal property interests – is an issue that is already suitably addressed by the civil law. Copyright owners can always avail themselves of civil remedies under the statute, some of which are *quasi* punitive in nature. For example, under section 119(4) of the Singapore Copyright Act 1987 (or section 97(2) UK CDPA 1988), ‘additional damages’ are available for infringements which are flagrant in nature.²⁰ There is also the remedy of ‘statutory damages’ under sections 119(2)(d) and 119(5) of the Singapore statute, a concept borrowed from the US Copyright Act 1976. Under the US statutory damages scheme, enhanced damages may be awarded in cases of ‘wilful’ infringement to “punish” the infringer for his wilfulness.²¹ Likewise, the flagrancy of the infringement is a relevant consideration in the court’s assessment of statutory damages in Singapore. It is therefore not surprising to have commentators make such arguments:²²

“Civil law has a far greater involvement in offences of dishonesty than in violent or sexual offences; the very questions of property ownership and property rights are the subject of a complicated mass of rules relating to contracts, trusts, *intellectual property*, restitution, and so forth. Many property losses could be tackled through the *civil courts*, by suing under one of these heads of civil law. ... If the criminal law is to be reserved for significant challenges to the legal order, *should there not be vigilance about the extension of the criminal sanction into spheres in which civil remedies exist*, or where some non-criminal procedures might be more proportionate?”

Yet, it is worth pointing out that the overall impact of civil remedies on copyright infringers differs significantly from the penal or censoring nature of criminal sanctions (in particular, the threat of imprisonment). After all, the criminal law exists to impose punishment in situations where tortious remedies are an insufficient deterrent. This message was recently underscored by the Singapore Court of Appeal in *Leong Wai Kay v Carrefour Singapore Pte Ltd*.²³ The issue in this case was whether the appellant, who had already paid to the State the fine imposed on him under the criminal charge, remained liable to pay the respondent, as a civil debt, a like amount in respect of the

²⁰ Whilst an award of damages is traditionally understood to be compensatory (rather than exemplary or punitive) in nature, additional damages under section 97(2) of the CDPA 1988 have been held to include damages that will deprecate a defendant’s “couldn’t-care-less” attitude: *Nottinghamshire Healthcare NHS Trust v News Group Newspapers Ltd* [2002] RPC 49. In Australia (where similar provisions on additional damages are set out in section 115(4) of the Copyright Act 1968), case law has established that the courts are not limited to awarding compensatory damages, and that additional damages may be awarded on the basis of aggravated damages as well as exemplary/punitive damages: see, e.g., *Autodesk Inc v Yee* (1996) 35 IPR 415; *Raben Footwear Pty Ltd v Polygram Records Inc* (1997) 37 IPR 417. See, further, M Wong, “Additional Damages for Copyright Infringement” (1998) 2 SJICL 117; C Michalos, “Copyright and Punishment: The Nature of Additional Damages” [2000] EIPR 470.

²¹ Section 504(c) of the US Copyright Act 1976 gives a court discretion to set statutory damages: (i) in a range between US\$750 and US\$30,000 per work “as the court considers just”, or (ii) as ‘enhanced’ damages of not more than US\$150,000 per work in cases of ‘wilful’ infringement. For the full text of section 504(c), see: <http://www.law.cornell.edu/uscode/17/504.html>.

²² A Ashworth, *Principles of Criminal Law*, 5th ed. (Oxford University Press, 2006) at pp 363-364 (emphasis added).

²³ [2007] 3 SLR 78.

bribes received by him. In answering this question in the affirmative, Chan CJ reasoned that criminal proceedings under the statute were *separate and distinct* from civil proceedings which were based on an independent statutory cause of action. The criminal process under the statute was, in his Honour's view, intended to enhance the punishment against offenders and act as a general deterrence (against corruption in this case). As such, the respondent's right (in a civil action) to recover bribes from the appellant remained unaffected by the criminal conviction. By parity of reasoning, it may be argued that the existence of criminal measures and the possibility of prosecution under the Copyright Act (e.g. section 136(3A)) are independent of the availability to the copyright owner of civil remedies under the statute. Criminal proceedings – which may operate as an additional layer of deterrence and to enhance the punishment against (often recalcitrant) offenders – are separate and distinct from the civil remedial process for copyright infringement.²⁴

One other introductory point may be made. The criminal law has long concerned itself with the protection of property interests, whether real or personal. Because intellectual property is recognised and treated as a species of property, criminalising primary infringements of copyright may be legitimized on the same basis as offences concerning the violation of general property interests, such as the law of theft. The extension of the criminal law from the corporeal to the incorporeal sphere may, from this perspective, not seem that unreasonable a stretch after all. We will revisit this theme at several points in this paper.

What, then, are the arguments which have been raised to justify the imposition of criminal liability on conduct that may be deemed “wrongful”? Let us now examine some of these theories against the backdrop of primary infringements of copyright in the digital environment, and, in particular, in the private and non-commercial context.

B. The Harm Principle

Although legislative decision-making should rightfully respect and have regard to individual autonomy (or the personal rights of individuals), the State is nevertheless justified in restricting individual liberty where the conduct of the individual causes *harm* to others in society. As John Stuart Mill so eminently put it:²⁵

²⁴ As Professor Ashworth asserts: “The idea of a crime is that it is something that rightly concerns the State, and not just the person(s) affected by the wrongdoing. Many crimes are civil wrongs as well (torts or breaches of contract, for example), and it is for the injured party to decide whether or not to sue for damages. But the decision to make conduct into a crime implies that there is a public interest in ensuring that such conduct does not happen and that, when it does, there is the possibility of State punishment.” (A Ashworth, *Principles of Criminal Law*, 5th ed. (Oxford University Press, 2006) at p 2)

²⁵ JS Mill, *On Liberty* (1859) at pp 8-9. See also J Feinberg, *Harm to Others* (Oxford University Press, 1984) at p 26: “It is always a good reason in support of penal legislation that it would be effective in preventing (eliminating, reducing) harm to persons other than the actor (the one prohibited from acting) and there is no other means that is equally effective at no greater cost to other values.”

“[T]he only purpose for which power can rightfully be exercised over any member of a civilised community against his will is to prevent harm to others. ... To justify that, the conduct from which it is desired to deter him must be calculated to produce evil to someone else.”

‘Harm’, in turn, has been defined by Joel Feinberg as a “thwarting, setting back or defeating of an interest”,²⁶ and by Professor Ashworth as any violation of “people’s legitimate interests”, bearing in mind the “moral, cultural and political nature of the interests recognised in a particular system”.²⁷ Characteristically, harm is brought about through the impairment of a person’s personal well-being or proprietary resources. However, insofar as online infringements of copyright are concerned, the “legitimate interests” involved here necessarily refer to the copyright owners’ rights in intangible property and the harm that results from such activities relates principally to economic or pecuniary harm. To what extent, then, are private and non-commercial infringements of copyright in the online environment – such as uploading or ‘making available’ infringing files on a server and downloading such files to a computer²⁸ – economically harmful to copyright owners as to warrant criminalisation?

Take, for example, the recent blockbuster *X-Men Origins: Wolverine*, which was leaked onto the Internet several weeks before the movie hit the silver screen. The Internet user who had uploaded an unauthorised copy of the film to a host server – even without any commercial motivation – would nevertheless have deprived the relevant copyright owners of the economic benefits of post-release sales transactions (e.g. box office takings, sales from the DVD release etc.). Furthermore, such economic impact on copyright owners is particularly damaging in the online environment because of the relative ease and pace of infringement.²⁹ In the *Wolverine* example, it was reported in the media that more than 150,000 copies of the movie were downloaded by Netizens worldwide from one file-sharing website alone.³⁰ Likewise, insofar as Internet downloaders are concerned, they have obtained for themselves an illegitimate copy of the copyright work without having paid for it. A serial downloader with tens of thousands of infringing files stored in his computer has caused significant harm to numerous copyright owners. Even though each downloaded work enjoys its own separate and distinct copyright (a point to which we will return below), it is likely the case that many of the works in the infringer’s collection share the same copyright owner(s) – whether it be the same composer, lyricist, script writer, performing artist, or (and much more likely) the

²⁶ J Feinberg, *Harm to Others* (Oxford University Press, 1984) at p 33.

²⁷ A Ashworth, *Principles of Criminal Law*, 5th ed. (Oxford University Press, 2006) at p 30.

²⁸ Uploading and downloading infringing files are acts which constitute a breach of the exclusive rights of the copyright owner – see, generally, the discussion in CL Saw and S Leong, “Criminalising Primary Copyright Infringement in Singapore: Who are the Real Online Culprits?” [2007] EIPR 108.

²⁹ From the speech by Singapore’s Minister for Law at the second reading of the Copyright (Amendment) Bill on 16 November 2004: “With the advent of digital technology, the impact of infringement on the interests of copyright owners has, as a result, become very much more severe. For example, Internet technology now makes it possible for syndicates to post movies and software for all to download for free, sometimes in return for nothing more than recognition and notoriety. While these infringers may not directly profit from these activities, their actions may cause substantial harm to the copyright owner, his investments and creative efforts.” (*Hansard*, vol. 78 col. 1041)

³⁰ See *The Straits Times*, 4 April 2009 at p B2.

same sound recording company (e.g. Sony Music Entertainment) or Hollywood movie studio (e.g. 20th Century Fox). Considering the scale of the infringing activity per Internet user alone clearly illustrates the magnitude of the problem.³¹

Such is the gravity of the harm that may ensue at the level of the “individual” copyright owner. Harm may also have a profound effect at a deeper, “institutional” level. For example, it may be argued that copyright infringement is not simply a matter of a breach of “private” rights. Uncontrolled online piracy hurts not just the private economic interests of the copyright owner; it has an impact on society as a whole. If the scale of online copyright infringement is left unchecked and unregulated, this will ultimately lead to the undermining and the eventual collapse of the IP regime, a proprietary institution that was developed to reward (largely in monetary terms) intellectual effort and creativity. The collective impact of online infringements on a ‘significant’ scale (the notion of ‘cumulative’ harm) may result in authors and entrepreneurs losing the incentive to create new works for the future. To draw an analogy with the law of theft and the stealing of one’s property:³²

“Stealing my old clothes not only sets back the interest, if any, that I have in the clothes; it also *undermines the regime* by which my property right in the clothes is recognized. That is to say, more than one type of interest is at stake when my clothes are stolen. Apart from my immediate interest in the clothes, both I and others have *an interest in the existence of a system for allocating and reallocating property rights* in general. Thus, even where a theft does not set back V’s personal interests, it sets back the interest we all have in the *effective existence of a property law regime*. The regime itself serves our well-being by providing a reliable means by which we can seek to improve our own lives through the voluntary acquisition, use, and exchange of resources. Having such a regime augments our autonomy ...”

³¹ The US copyright industry, for example, estimates its losses due to piracy at about US\$20 billion a year. According to a *Washington Post* report, a study by the International Federation of the Phonographic Industry (IFPI) revealed that approximately 95% of music downloaded in 2008 (or more than 40 billion files) was illegal and not paid for. The picture painted here is a familiar one – that the scale of infringement continues to eat into traditional revenues of the recording industry (the IFPI report also asserts that worldwide music revenue shrank by about 7% in 2008). See: <http://www.washingtonpost.com/wp-dyn/content/article/2009/01/16/AR2009011603077.html>. Turning to software piracy, the Business Software Alliance (BSA) recently reported, through a study conducted by research agency IDC, that worldwide piracy rates rose from 38% in 2007 to 41% in 2008, with losses to companies estimated at US\$53 billion. See: <http://www.washingtonpost.com/wp-dyn/content/article/2009/05/12/AR2009051200095.html>. Interestingly, the BSA report noted that personal computer software piracy in Singapore actually dropped one percentage point to 36% in 2008, although dollar losses continued to increase (rising to US\$163 million from about US\$159 million in 2007). For the situation in the UK where a report by the Strategic Advisory Board for Intellectual Property revealed that about 7 million people there were involved in illegal downloading, see: <http://news.bbc.co.uk/2/hi/technology/8073068.stm>.

³² AP Simester and A von Hirsch, “Rethinking the Offence Principle” (2002) 8 *Legal Theory* 269 at 286 (emphasis added).

It is therefore submitted that just by invoking the harm principle itself justifies the criminalisation of such forms of human behaviour, and that it is clearly inadequate to leave such conduct redressable only by (civil) compensation of the aggrieved party.

Notwithstanding these pro-criminalisation arguments, we proceed to examine if there had been a proper application of the harm principle in Parliament's enactment of section 136(3A). In this regard, Joel Feinberg has helpfully suggested that the following matters be considered when criminalising conduct on the basis of the harm principle: the gravity of the possible harm, its degree of probability/likelihood, the magnitude of the risk of harm, and the social value of the conduct to be prohibited.³³ It may be usefully noted that these guidelines have been duly incorporated in section 136(6A), where, in determining whether the extent of the infringement is 'significant', the court may have regard to such matters as "the volume of any articles that are infringing copies", as well as "whether the infringement has a substantial prejudicial impact on the owner of the copyright". Obviously, the greater the gravity and magnitude of the harm, the stronger the case is for criminal prosecution under section 136(3A).

C. Morally Wrong Behaviour

Another view which has been articulated in support of criminalisation concerns conduct that is "inherently immoral, even though it causes neither harm nor offence to the actor or to others".³⁴ Having argued that the downloading and file-sharing activities of online infringers do result in harmful consequences for copyright owners, the point may further be made that such forms of conduct also constitute, in and of themselves, morally wrong or unethical behaviour.

Morality, when used in this context, refers to an ethical system of rules that specifies the parameters of acceptable behaviour. More specifically, we are here concerned with the notion of 'public' morality,³⁵ where the standards of morally acceptable conduct are to be judged by reasonable and right-minded members of society. In other words, immoral conduct "is something that offends against the community spirit".³⁶ Herein lies the difficulty in assessing the morality of online infringing conduct – this is an issue that will attract highly polarized views from the Internet community.³⁷ Notwithstanding this, the present author will explain, from first principles, why inherent moral turpitude can be attributed to such forms of behaviour and why the "community spirit" should begin to reflect this perspective.

³³ See J Feinberg, *Harm to Others* (Oxford University Press, 1984) at pp 215-216.

³⁴ *Ibid.* at p 27. See also D Husak, *The Philosophy of Criminal Law* (Rowman & Littlefield, 1987), chapter 8; M Moore, *Placing Blame* (Clarendon Press, 1997), chapter 16.

³⁵ See, generally, P Devlin, *The Enforcement of Morals* (Oxford University Press, 1965). Cf. 'private' morality (or morality issues that arise in the "private lives" of individuals) which was the subject of controversy in the 1957 Report of the Wolfenden Committee on Homosexual Offences and Prostitution.

³⁶ CMV Clarkson, HM Keating and SR Cunningham, *Clarkson and Keating Criminal Law: Text and Materials*, 6th ed. (Thomson Sweet & Maxwell, 2007) at p 5.

³⁷ See: <http://www.independent.co.uk/arts-entertainment/music/news/its-not-a-crime-to-download-say-musicians-1643217.html>.

The morality-based arguments (or arguments based on justice and fairness) used to justify the criminalisation of online infringing activity are largely premised on a fundamental tenet in copyright law – that copyright is expressly recognised by statute as a form of personal property.³⁸ In other words, copyright protection comes with the status of property.³⁹ The relationship between the owner and his property was characterised by a notable Scottish philosopher in these terms:

“A man’s property is something related to him: This relation is not natural, but *moral* and founded upon *justice*. ... The origin of justice explains that of property”.⁴⁰

Indeed, commentators often call upon moral and ethical justifications for conferring property rights on intangible assets. Copyright, for example, is justified on the basis that the law recognises an author’s ‘natural rights’ over the products of his intellectual labour and investment.⁴¹ The civil law *droit d’auteur* system in fact places especial emphasis on moral rights and the natural rights of authors in their creations.⁴² Essentially, there are two perspectives of the natural rights theory – one based on George Hegel’s ‘personality’ justification,⁴³ and the other on John Locke’s ‘labour’ justification.⁴⁴ As Professor Hughes notes: “Properly elaborated, the labour and personality theories together exhaust the set of morally acceptable justifications of intellectual property”.⁴⁵

Consider then the habit of illegal downloading against this backdrop. In such cases, the Internet user (copyright infringer named X) would have obtained an illegitimate copy of the song/movie (over which property rights subsist) without having paid for it. It may well be that X has not deprived – not even temporarily – the copyright

³⁸ In Singapore, the proprietary nature of copyright (as ‘personal or movable property’) is recognised in section 194(1) of the Copyright Act 1987.

³⁹ For a historical analysis from the US perspective, see J Hughes, “Copyright and Incomplete Historiographies: Of Piracy, Propertization, and Thomas Jefferson” (2005-2006) 79(5) *Southern California Law Review* 993. Professor Hughes notes thus (at p 1041): “... we must recognize that people have called copyright “property” for the past two hundred years”.

⁴⁰ D Hume, *A Treatise of Human Nature*, LA Selby-Bigge and PH Nidditch (eds.), 2nd ed. (Clarendon Press, 1978) at p 491 (emphasis added).

⁴¹ So fundamental are these ‘natural rights’ that they have earned a place in Article 27(2) of the UN Universal Declaration of Human Rights: “Everyone has the right to the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author”. See also Article 1 of Protocol One of the European Convention on Human Rights: “Every natural or legal person is entitled to the peaceful enjoyment of his possessions”.

⁴² See, e.g., the French Intellectual Property Code 1992. The common law (utilitarian) model of copyright is, in contrast, primarily concerned with an author’s economic rights – see WM Landes and RA Posner, “An Economic Analysis of Copyright Law” (1989) 18 J. Legal Stud. 325.

⁴³ See G Hegel, *Philosophy of Right* (1821), trans. TM Knox (Clarendon Press, 1952). For a detailed discussion of Hegel’s ‘personality’ theory of property, see J Hughes, “The Philosophy of Intellectual Property” (1988) 77 *Georgetown L.J.* 287 (at p 330 *et seq*).

⁴⁴ See J Locke, *Second Treatise of Government* (1694) in *Two Treatises of Government*, P Laslett (ed.) (Cambridge University Press, 1988). For a detailed discussion of Locke’s ‘labour’ theory of property, see J Hughes, “The Philosophy of Intellectual Property” (1988) 77 *Georgetown L.J.* 287 (at p 296 *et seq*).

⁴⁵ J Hughes, “The Philosophy of Intellectual Property” (1988) 77 *Georgetown L.J.* 287 at 290.

owner of possession of the work (nor prevented the latter from exercising his rights to the intangible property), unlike an instance of theft in the traditional sense (a point to which we will return below). However, the fact remains that X has not furnished the requisite *quid pro quo* – he has simply taken or obtained a piece of property (and later enjoying the benefits of acquisition) for nothing, not unlike a thief who steals a CD from a retail shop and later listens to it with pleasure. In restitutionary parlance, X has been “unjustly enriched” by his own behaviour at the expense of the copyright owner. Is it not morally or ethically unacceptable for X to reap, from the unauthorised use of copyright material, an unearned benefit? Is it not common knowledge that it is morally wrong and a crime to steal from someone else, even if for private and non-commercial purposes and whether the object stolen is a diamond ring or a pack of sweets?

The moral high ground taken above in respect of copyright finds further support from the religious perspective. One online commentator, in interpreting the 8th Commandment “Thou shall not steal” (*Exodus* 20:15), expressed the following view:⁴⁶

“People today regard [the 8th Commandment] as a prohibition against any theft of any sort of real property. Does it, however, also include theft of non-real property, like intellectual or creative properties? Does this commandment even allow for the possibility of someone ‘owning’ a creative work and having copyrights over it? Most religious scholars today probably agree that it does, though in doing so they are accepting modern understandings of the nature of property. There were no copyrights or patents among the ancient Hebrews and such oral cultures probably wouldn’t have understood the concepts.”

The 2nd of the ‘Five Precepts’ – which constitute the basic Buddhist code of ethics – teaches all Buddhists to “abstain from taking what is not given”, i.e. to abstain from stealing. Clearly, these religious teachings constantly remind us that taking something that belongs to someone else, without permission, is morally wrong.

It is high time that the Internet community understands and appreciates the moral dimension in copyright protection.⁴⁷ More importantly, online users must begin to equate

⁴⁶ See <http://atheism.about.com/od/tenccommandments/a/commandment08.htm> and cf. Laddie J’s remarks in *Autospin (Oil Seals) Ltd v Beehive Spinning* [1995] RPC 683 at 700. Another online commentary from this website (http://dir.salon.com/story/tech/feature/2004/05/25/christian_pirates/) filed the following report (emphasis added):

“The Gospel Music Association ... has responded to its flock’s cavalier attitude about file trading with a new public-service campaign, hoping to appeal to a churchgoer’s *sense of right and wrong*. The slogan: ‘Music Piracy: Millions of Wrongs Don’t Make It Right’. The campaign will complement the most recent wave of lawsuits, targeting 477 alleged illegal file sharers, unleashed by the Recording Industry Association of America. But Styll [president of the Association] thinks that his group can spread a message about file sharing that even the harsh stick of lawsuits cannot: ‘It’s more than just illegal. *It’s immoral*. It’s breaking the laws of the land, and *it’s stealing* from people, and you shouldn’t do it,’ he says.”

⁴⁷ See W Cornish and D Llewelyn, *Intellectual Property: Patents, Copyright, Trade Marks and Allied Rights*, 6th ed. (Thomson Sweet & Maxwell, 2007) at pp 403-404 (emphasis added):

“The uncalculating exchange of ideas has long been part of scholarship and of shared interests of many kinds. If new technology enables that process to evolve, so much the better. But to suppose

the moral imperative against stealing with the illicit uploading and downloading of copyright material. To the extent that online infringements of copyright constitute moral wrongs, it is submitted that criminalising such behaviour on this basis is eminently justified.

D. Deterrence and Retribution

“[I]f the punishment of people in D’s position would have an overall deterrent effect, then D should be punished”.⁴⁸ This is the utilitarian theory of punishment, the justification for which is the principle of deterrence or the prevention of future crime (what utilitarians call a ‘net social gain’). By criminalising and punishing online infringing conduct, the ‘net social gain’ to be achieved is the prevention of future harm that may be caused by the infringer himself (as a repeat offender) or by other Internet users.⁴⁹ Criminalisation/punishment from the utilitarian perspective is therefore aimed at enhancing the social welfare of the community. On this basis, one may argue that the enactment of section 136(3A) – and its regulatory effects on online behaviour – may have been necessary for the collective good of society. Having the criminal provision in force, it is submitted, sends a strong signal from the Legislature that the State does not condone such forms of activity and serves as a tangible layer of deterrence to potential infringers of copyright who easily fall into temptation whenever the opportunity to upload or download arises.

Section 136(3A) may also be explained by the retributive theory. Retributivism, which is non-utilitarian in character, asserts that criminalisation and punishment are properly justified because, and only because, the offender deserves it. This theory, which may be used to express disapproval and censure of the offender’s conduct, is particularly relevant in cases involving recalcitrant offenders – e.g. those who engage in illegal downloading with full knowledge of its legality but who nevertheless keep at it. In examining the past conduct of the online infringer, the retributive view asserts that punishment is necessary because this offender clearly deserves it and must be taken to task for his behaviour. Herein lies the intrinsic value of punishment that is deserved – the offender must receive his ‘just deserts’ and society has a duty to punish for this reason alone.

E. Summary

that it will supplant the need for informational, educational and entertainment material which is generated upon the *expectation of a market return* is the stuff of dreams. Copyright will remain because it provides necessary protection for the investment of intellectual effort and capital in *material which is not produced in order to be freely shared*. The law may have to be somewhat adapted, but its *moral* mainspring – that works should not be substantially copied or otherwise taken without authority – expresses a justification for legal intervention which will remain very widely accepted.”

⁴⁸ A Ashworth, *Principles of Criminal Law*, 5th ed. (Oxford University Press, 2006) at p 159.

⁴⁹ As to the nature of harm, see the discussion above under ‘The Harm Principle’.

Thus far, this paper has sought to examine the legitimacy of section 136(3A) of the Singapore Copyright Act 1987, a provision which, *inter alia*, criminalises primary acts of copyright infringement on a significant scale, even if the infringements were committed for private and non-commercial purposes. The foregoing analysis has shown that imposing criminal sanctions pursuant to section 136(3A) is eminently justifiable on the basis of the harm principle as well as on grounds of morality. Secondly, the principle of deterrence and the retributive theory may also be raised as possible justifications for deploying the criminal law under such circumstances.

Critics may claim that section 136(3A) was conceived largely because of the politics of lawmaking – as a pragmatic Government response to political pressure from US FTA negotiators (due, of course, to the ferocious lobbying efforts of the various copyright industries in the US).⁵⁰ Be that as it may and for reasons which will be given later, this author is personally in support of such a provision and of the penal approach in general, particularly when viewed as part of a broader, multi-pronged strategy to combat online piracy.

IV. Drawing Parallels with the Law of Theft – is copyright infringement analogous to stealing?

As is well known, the offence of theft has traditionally been classified as a property offence in the criminal law. There has also been, in recent times, a wave of expansion in the scope of the offence with the recognition of new forms of property (in particular, intangible property). Owing to the proprietary nature of copyright (as discussed above), there is a natural tendency to associate all infringements of copyright with the act of stealing.⁵¹ To what extent, though, is this analogy appropriate?

Equating copyright infringement with theft is somewhat problematic from a technical (statutory) perspective. In the Singapore context, it is indefensible for a copyright infringer to be charged with theft under section 378 of the Penal Code.⁵² There are two principal reasons why this is so, apart from the fact that the drafters of the Code had obviously not contemplated such a scenario at the time. Firstly, the offence of theft in Singapore is concerned with the dishonest movement of ‘movable property’. Section 22 of the Code defines ‘movable property’ as ‘corporeal property’, which refers to forms of property that have a physical or material being (e.g. chattels or *choses in possession*). It is doubtful if copyright – an intangible property right – can fit this definition.

⁵⁰ See A Ashworth, “Is the Criminal Law a Lost Cause?” (2000) 116 LQR 225.

⁵¹ Per Jowitt J in *R v Carter* [1993] FSR 303 at 304: “... counterfeiting of video films is a serious offence. In effect to make and distribute pirate copies of films is to steal from the true owner of the copyright, the property for which he has to expend money in order to possess it. It is an offence really of dishonesty”. Cf. also these parliamentary remarks by Lord Beaverbrook: “Whether one calls it piracy, bootlegging or counterfeiting, what we are really talking about is the misappropriation of someone else’s property. That can only be regarded as theft.” (*Hansard*, HL Deb., vol. 491 col. 422)

⁵² Cap. 224 (2008 Rev. Ed.). Section 378 states: “Whoever, intending to take dishonestly any movable property out of the possession of any person without that person’s consent, moves that property in order to such taking, is said to commit theft”.

Copyright *per se*, as we shall see later, is not readily protected by the law of theft. Secondly, theft is treated in the Penal Code as an offence against rights of ‘possession’. Even if an Internet user has downloaded an unauthorised MP3 file, the copyright owner is not thereby dispossessed of the original MP3 file, not even temporarily. An infringement of copyright can occur without exhaustion of the “physical” property itself. In such a scenario, there is simply the creation of an additional (albeit illegal) copy of the copyright work.

Likewise, several impediments stand in the way of prosecuting a copyright infringer under section 1 of the English Theft Act 1968.⁵³ We begin with the *mens rea* requirement that the accused had the ‘intention’ to ‘permanently deprive’ the owner of his property. As was alluded to in the preceding paragraph, there is no deprivation of property when the accused downloads (or even uploads) an infringing file – the copyright owner will not be deprived (not even temporarily, let alone permanently) of his copyright.⁵⁴ It is also inconceivable that the accused did harbour the intention to permanently deprive the owner of his property, since all that the infringer wants for himself is a copy of the original work.⁵⁵ Perhaps it is because the accused knows that the copyright owner is not, in any way, deprived of (nor prevented from exercising his rights to) his property that the accused believes he has not committed theft. More controversially, do intangible property rights fit the definition of ‘property’ under the Theft Act 1968? ‘Property’ is defined in section 4(1) to include “money and all other property, real or personal, including things in action and other intangible property”. On one view, it may be argued that the expansive definition of ‘property’ in section 4(1) contemplates ‘things in action’, and copyright is by nature a *chose in action*. The definition also includes ‘other intangible property’, an example of which is copyright. The better view, however, is that copyright (and indeed IPRs in general) should not be regarded as ‘property’ for the purposes of the law of theft. This is certainly the case insofar as confidential information is concerned.⁵⁶ It is probably fair to assert that it was beyond Parliament’s intention for the offence of theft to extend so far into the realm of

⁵³ Section 1(1) of the Theft Act 1968 states: “A person is guilty of theft if he dishonestly appropriates property belonging to another with the intention of permanently depriving the other of it”.

⁵⁴ Cf. AP Simester and GR Sullivan, *Criminal Law: Theory and Doctrine*, Revised 2nd ed. (Hart Publishing, 2004) at p 427: “Even where the right being interfered with is property for the purposes of the [Theft] Act, the interference may not always count as theft. Breach of copyright, for instance, violates a *chose in action*. But photocopying a textbook does not deprive the copyright owner of the book. Neither does it deprive her of copyright in that book”. See also W Cornish and D Llewelyn, *Intellectual Property: Patents, Copyright, Trade Marks and Allied Rights*, 6th ed. (Thomson Sweet & Maxwell, 2007) at p 37: “If A appropriates B’s invention, both remain able to use it. A does not preclude B from competing in the same measure as when he has appropriated the axe which B previously used for tree-cutting”.

⁵⁵ See A Steel, “Problematic and Unnecessary? Issues with the Use of the Theft Offence to Protect Intangible Property” (2008) 30 *Sydney Law Review* 575 at 603: “... it is unsatisfactory that theft is defined [e.g. in the Theft Act 1968] in such a way that breaches of copyright can amount to all of the *actus reus* elements of theft, and liability is only avoided on the technical ground that the nature of the property right means that the intention of the accused cannot be defined as an intent of permanent deprivation”.

⁵⁶ See *Boardman v Phipps* [1967] 2 AC 46; *Oxford v Moss* (1978) 68 Cr App R 183 (where it was held that confidential information contained in examination questions was not ‘intangible property’ within the meaning of section 4 of the Theft Act 1968); RG Hammond, “Theft of Information” (1984) 100 LQR 252; A Ashworth, *Principles of Criminal Law*, 5th ed. (Oxford University Press, 2006) at p 372.

intangible property.⁵⁷ Otherwise, “an artificial extension of the present structure of the law of theft to cover such cases, which lie far from the ordinary stealing of tangible property, would probably be less successful and might have unexpected side-effects”.⁵⁸ It appears that the English judiciary is also in agreement with this view. In the unanimous decision of the House of Lords in *Rank Film Distributors Ltd v Video Information Centre*,⁵⁹ Lord Wilberforce (who delivered the main speech) expressed the view that “[i]nfringement of copyright is not theft” within the ambit of the Theft Act 1968.⁶⁰

Notwithstanding these arguments which arise from a highly technical interpretation of the law, it is this author’s thesis that drawing parallels with the law of theft – at least from the conceptual/moral dimension – is nevertheless worthwhile in the attempt to justify the criminalisation of non-commercial infringements of copyright on a ‘significant’ scale. It is axiomatic that one of the functions or purposes of the criminal law is to protect rights in property. Since copyright is an intangible personal property right that is enforceable as a *chose in action*, the criminal law should – akin to the manner in which the offence of theft protects tangible personal property – be invoked to protect against breaches of copyright in appropriate circumstances.

It has already been highlighted above that stealing, regardless of motive, is morally or ethically wrong.⁶¹ Stealing for private and non-commercial purposes is certainly not a defence to a charge of theft – the law punishes the thief nonetheless. Arguably, the illicit downloading of copyright works, regardless of motive, is also (like stealing) morally wrong and deserving of criminal sanction.⁶² The only “concession” given to illegal downloaders in this regard (which is absent in the law of theft) is that criminal liability will only attach if the extent of the infringement is ‘significant’ (which reflects the application of the ‘harm principle’). This author is therefore of the view that there is a powerful conceptual/moral nexus between copyright infringement and theft. However, because it is not technically orthodox to charge a copyright infringer with theft, criminal provisions (like section 136(3A)) have been progressively introduced – *sui generis* – to protect copyright owners, and justifiably so for all the reasons given above.

⁵⁷ Indeed, copyright infringement was not an issue at all considered by the Criminal Law Revision Committee in its *Eighth Report: Theft and Related Offences* (Cmnd. 2977, 1966).

⁵⁸ A Ashworth, *Principles of Criminal Law*, 5th ed. (Oxford University Press, 2006) at p 373. See also A Steel, “Problematic and Unnecessary? Issues with the Use of the Theft Offence to Protect Intangible Property” (2008) 30 *Sydney Law Review* 575 (especially at pp 603 and 613).

⁵⁹ [1982] AC 380.

⁶⁰ *Ibid.*, at p 443. Lord Fraser expressed a similar view: “The risk of prosecution under the Theft Act may, I think, be disregarded as remote, because that Act applies to theft of ‘property’ which is defined in a way that *does not appear to include copyright*, but only, so far as this appeal is concerned, to the *physical objects* such as tapes and cassettes which are of small value by themselves” (*ibid.*, at p 445; emphasis added). See also the US decision of Blackmun J in *Dowling v United States* 473 US 207 (1985) at p 217: “interference with copyright does not easily equate with theft, conversion or fraud”.

⁶¹ See the discussion above under ‘Morally Wrong Behaviour’.

⁶² See para 18 in Chapter 4 of the final *Digital Britain* report: “The Government considers online piracy to be a serious offence. Unlawful downloading or uploading, whether via peer-to-peer sites or other means, is effectively a civil form of theft”. The report is available at:

http://www.culture.gov.uk/images/publications/chpt4_digitalbritain-finalreport-jun09.pdf.

V. Section 136(3A): Interpretational Difficulties and Suggestions for Reform

Having assessed and accepted the legitimacy of section 136(3A), the paper proceeds to examine the potential reach of this provision. How wide should the net of criminality be cast in the battle against online copyright infringement? In answering this question, two difficulties with interpreting section 136(3A) are encountered.

The first concerns the meaning of the word ‘significant’. Section 136(6A) states that in determining whether the extent of the infringement is ‘significant’ (for the purposes of section 136(3A)), the court may have regard to “the volume of any *articles* that are infringing copies” (and note that it is not “the volume of infringing copies” *per se*). It has been argued elsewhere that the use of the word ‘articles’ is particularly problematic in the context of online infringements of copyright.⁶³ For example, whilst it may be argued that an Internet user who has downloaded 100,000 infringing MP3 files is in possession of a large volume of infringing copies, it is questionable if he is actually in possession of a large volume of *articles* that are infringing copies. It is plausible, on one view, that there is only one article in this instance – namely, the computer hard drive in which all the infringing copies are stored. The controversial issue is whether a computer file or an electronic copy can constitute an ‘article’. On a plain reading of the provision, this seems unlikely as the word ‘article’ suggests a medium that is tangible or physical in nature.⁶⁴ One possible solution to this problem would be to delete the word ‘articles’ from section 136(6A), although this may result in some linguistic inconsistency between section 136(3A) (when read with section 136(6A)) and the other criminal provisions in section 136 which generally prohibit secondary acts of copyright infringement. The alternative, which seems preferable, is for Singapore’s legislators to follow in the footsteps of their Australian counterparts in providing a definition for the word ‘articles’ on similar terms.⁶⁵

Even if this linguistic ambiguity is subsequently clarified, it must be borne in mind that one of the intended purposes of section 136(3A) is to help contain the proliferation of online copyright piracy. The target offender, particularly when the ‘harm principle’ is taken into consideration, must be someone who is truly guilty of copyright infringement on a ‘significant’ scale. The illegal downloader in my example above may be said to have caused significant economic harm to the copyright industry as a whole (in light of the sheer volume of infringing copies), but is the harm so caused by him suffered by one and the same copyright owner? It is undeniable that he is in actual possession of a large number of infringing files, but it must be remembered that each downloaded work enjoys its own separate copyright and has its own distinct set of copyright owners.

⁶³ See CL Saw and S Leong, “Criminalising Primary Copyright Infringement in Singapore: Who are the Real Online Culprits?” [2007] EIPR 108 at 112-113.

⁶⁴ See also G Wei, *The Law of Copyright in Singapore*, 2nd ed. (SNP Editions, 2000) at p 1284.

⁶⁵ Section 132AA of the Australian Copyright Act 1968 states that the word ‘article’ includes “a reproduction or copy of a work or other subject-matter, being a reproduction or copy in *electronic form*” (emphasis added).

Therefore, whilst the scale of the infringing activity in the aggregate is a good indication of ‘harm’, what is crucially important is that the harm so caused by the infringer must correlate with the harm that is correspondingly suffered by the *individual* copyright owner. Only when the evidence reveals that the individual copyright owner (e.g. a particular sound recording company), amongst others in the infringer’s collection of 100,000 unauthorised files, has suffered ‘significant’ harm should a charge under section 136(3A) be brought against the offender – someone who is likely to be a serial, compulsive and incorrigible downloader.⁶⁶

The second difficulty concerns the *mens rea* element (or lack thereof) of the offence in section 136(3A), which states that the infringement committed by the accused must be ‘wilful’.⁶⁷ There is, unfortunately, no statutory definition for the word ‘wilful’. Apart from this uncertainty, another pertinent issue is whether the offence in section 136(3A) ought to be construed as a strict liability offence, where an accused may be convicted upon proof of the physical elements (*actus reus*) of the crime alone. It would appear rather odd, as a preliminary observation, for section 136(3A) to be treated as a strict liability offence when the other offences contained in section 136 – dealing generally with (more culpable) acts of secondary copyright infringement – do not impose conditions of strict liability.⁶⁸

⁶⁶ See, further, the discussion in CL Saw and S Leong, “Defining Criminal Liability for Primary Acts of Copyright Infringement: The Singapore Experience” [2008] JBL 304 at 310-313.

⁶⁷ The concept of ‘wilfulness’ is also found in section 506(a)(1) of the US Copyright Act 1976, which begins with these words: “Any person who willfully infringes a copyright ...”. There is likewise no statutory definition for the word ‘willfully’, although section 506(a)(2) states that “evidence of reproduction or distribution of a copyrighted work, by itself, shall not be sufficient to establish willful infringement of a copyright”. It is not immediately apparent what further evidence as regards *mens rea* is required (beyond the mere fact of reproduction or distribution, as the case may be) to establish ‘willful’ infringements of copyright under US law. On one view, the statutory language employed in section 506(a)(2) suggests that the offence prescribed in section 506(a)(1) is *not* strict liability. One commentator has argued that the word ‘willful’ in this provision requires the prosecution to prove that the accused intentionally violated a known legal duty and that the accused lacked a good faith belief that the conduct at issue was lawful, a view which clearly rejects the notion of strict liability (see LP Loren, “Digitization, Commodification, Criminalization: The Evolution of Criminal Copyright Infringement and the Importance of the Willfulness Requirement” (1999) 77 *Washington University Law Quarterly* 835 at 888). See also *United States v Rose* 149 USPQ 820 (SDNY 1966) (an act is done ‘willfully’ if done voluntarily and purposefully and with specific intent to do what the law forbids) and *United States v Cross* 816 F2d 297, 303 (7th Cir. 1987) (the defendant must be shown to have engaged in the infringing conduct with *knowledge* that his/her activity was prohibited by law). For comparative purposes, reference may also be made to Article 3 of the EU’s second IPR Enforcement Directive (see above) which criminalises ‘intentional’ infringements of IPRs on a commercial scale, and the word ‘intentional’ means – according to the definition in Article 2 that was adopted by the European Parliament during the first reading of the Directive on 25 April 2007 – “deliberate and conscious”.

⁶⁸ For example, in sections 136(1), (2), (3) and (6) of the Singapore Copyright Act 1987, the requisite mental element for establishing secondary copyright liability is that the accused “*knows, or ought reasonably to know*” that the articles he is dealing with are infringing copies of the work. Cf. also sections 107(1), (2) and (3) UK CDPA 1988 (“knows or has reason to believe”).

‘Wilful’, in ordinary parlance, refers to an act done “deliberately”, “consciously” or “intentionally”.⁶⁹ This could mean either that (1) the conduct was done voluntarily in the sense that it was an act of free will (of one’s own accord/volition), or (2) the conduct was done with a consciousness of the evil which was likely to result (e.g. there was an intention to produce that evil).⁷⁰ On a plain reading of section 136(3A), it is submitted that interpretation (1) is the more likely. The deliberate/conscious/intended nature of the conduct of the accused (X) extends only to the *physical elements* of the offence in question – e.g. that X had the basic intent/aim/objective to download infringing files, and not that X had further intended to commit (in the sense that X knew or ought to have known that he was committing) an infringement of copyright in the course of downloading infringing files.⁷¹ Wilfulness, in the context of section 136(3A), is only concerned with the doing of the physical act itself for the purpose of achieving a desired result.

Such a construction of the word ‘wilful’ naturally leads to the proposition that section 136(3A) prescribes an offence of strict liability.⁷² What this entails is that the prosecution need only prove, for a charge under section 136(3A), that the conduct of the offender (the infringement committed by X) was voluntarily and deliberately performed. There is no need for proof that X, in downloading infringing files, also knew (or ought reasonably to have known) that his actions amounted to an infringement of copyright. The offender’s lack of knowledge of the wrongfulness of his conduct (i.e. lack of *mens rea*) is irrelevant in offences of strict liability. X may be liable to conviction solely on the basis that he did, in fact, commit the acts of infringement deliberately, regardless of whether he was morally culpable or blameworthy.

The notion that criminal liability under section 136(3A) is strict is, of course, consistent with the position at civil law. Civil liability for primary infringements of

⁶⁹ For an analysis of the possible interpretations of the word ‘wilful’ in both the civil and criminal law, see JA Andrews, “Wilfulness: a Lesson in Ambiguity” (1981) 1 *Legal Studies* 303. Professor Andrews notes (at p 323) that insofar as the criminal law is concerned, the word ‘wilfully’ has “continued to be widely interpreted to mean anything which is not accidental, when one would expect this to be precisely the area of law in which it would be given a narrow meaning so as to ensure that defendants are not lightly convicted”. Indeed, one can only hope that “any agreed definition of ‘wilful’ would not include acts or omissions which were merely voluntary.” (*ibid.*)

⁷⁰ Cf. with this illustration: (1) D pulled the trigger of the gun intentionally (without implying that D intended to kill V); and (2) D intended to kill V when he pulled the trigger intentionally. See A Ashworth, *Principles of Criminal Law*, 5th ed. (Oxford University Press, 2006) at p 175, where Professor Ashworth argues that “[l]oose references to whether D ‘acted intentionally’ can blur this distinction”.

⁷¹ What Professor Hart refers to as “doing something with a further intention” – e.g. X downloaded infringing files intentionally/wilfully but also with the further intention/knowledge of committing an infringement of copyright. In other words, X did one thing with the intention/knowledge that something else shall occur. See HLA Hart, *Punishment and Responsibility*, 2nd ed. (Oxford University Press, 2008) at p 117 *et seq.*

⁷² Note that the phrase ‘strict liability’ “does not refer to an offence where no mental element exists at all: rather, it refers to an offence where no blameworthy mental element need be shown” (per Yong CJ in *PP v Yong Heng Yew* [1996] 3 SLR 566 at 569). See also *R v Lemon* [1979] AC 617, where Lord Edmund-Davies (at p 656) opined that an offence may properly be regarded as being of strict liability even though *mens rea* is required regarding other elements of the *actus reus*. In other words, a strict liability offence may involve an *actus reus* element in respect of which *mens rea* is required.

copyright is strict and it matters not that the defendant had no knowledge whatsoever that his actions were in breach of copyright. This is unlike civil liability for secondary infringements of copyright where the “innocence” of the defendant – someone who possesses neither actual nor constructive knowledge – is a complete defence to liability. However, notwithstanding that civil liability for primary copyright infringement is strict, should criminal liability for the same likewise be strict? To answer this question, consider the legal ramifications for an “innocent” infringer of copyright. For an “innocent” infringer who is faced with civil action for primary copyright infringement, the effects of strict liability are somewhat mitigated by the statutory limitation placed on the scope of the plaintiff’s relief. The plaintiff, under such circumstances, will not be entitled to the remedy of damages but only to an account of profits from the defendant.⁷³ There is, however, no corresponding concession given to offenders who lack the *mens rea* for copyright infringement under the criminal process (i.e. those who were not aware, and had no reasonable grounds for suspecting, that their actions were in breach of copyright).⁷⁴ As explained above, criminal liability under section 136(3A) – for ‘wilful’ infringements of copyright – is strict. However, bearing in mind that section 136(3A) is an offence that is punishable with *imprisonment* (and not just a fine),⁷⁵ would it be fair to impose criminal liability on copyright infringers who are “morally innocent”?⁷⁶ It is submitted that out of fairness to the accused person charged under section 136(3A) and for the avoidance of doubt, Parliament should consider amending this provision by deleting the word ‘wilful’ and substituting it with a *mens rea* (fault) element which is similar to and consistent with that found in the other provisions of section 136 which prohibit secondary acts of copyright infringement – i.e. that the accused *knows, or ought reasonably to know*, that his actions constitute an infringement of copyright.⁷⁷ After all, society should not punish, as criminal, those acts which lack the culpability or blameworthiness that is deserving of moral condemnation.⁷⁸

⁷³ See section 119(3) of the Singapore Copyright Act 1987, and cf. section 97(1) UK CDPA 1988 and Article 45 of TRIPS.

⁷⁴ For example, an infringer who is totally ignorant because he has received very little or no education, or someone who is intellectually impaired because of some mental disability (but who is not legally insane or otherwise suffering from mental disorder).

⁷⁵ Professor Ashworth argues thus: “If there are persuasive economic and social arguments in favour of strict liability for minor offences ... then this may be permitted so long as *imprisonment is not available*. There should be recognition of the principle that *no person should be liable to imprisonment without proof of sufficient fault*. This principle should inform the distinction between minor and non-minor offences. The classification of an offence as ‘regulatory’, whatever that may mean, should be irrelevant to the imposition of strict liability: *if imprisonment is available as a sanction, then fault should be required* whether it is called ‘regulatory’ or not” (A Ashworth, *Principles of Criminal Law*, 5th ed. (Oxford University Press, 2006) at p 174; emphasis added). See, further, Article 6.02(4) of the American Law Institute’s Model Penal Code (Rev. Ed., 1985) – where the availability of imprisonment as a punishment should indicate that the offence is not meant to be one of strict liability.

⁷⁶ Per Lord Pearce in *Sweet v Parsley* [1970] AC 132 at 157.

⁷⁷ This view appears to have been shared by the author in JA Andrews, “Wilfulness: a Lesson in Ambiguity” (1981) 1 *Legal Studies* 303 at 323-324. Cf., in a more specific context, the *mens rea* requirement in section 107(2A) UK CDPA 1988 – “knows or has reason to believe”. See, further, the arguments raised in CL Saw and S Leong, “Defining Criminal Liability for Primary Acts of Copyright Infringement: The Singapore Experience” [2008] JBL 304 at 306-310.

⁷⁸ “The criminal law is society’s most condemnatory instrument, and ... respect for individual autonomy requires that criminal liability be imposed only where there has been choice by D. A person should not be

VI. Prosecution of Copyright Offences in Singapore – the exercise of prosecutorial discretion and the question of fairness to the accused

Whilst this paper has sought to justify the legitimacy of section 136(3A), it has also been explained above that the provision, as drafted, may have a fairly broad reach, particularly with an undefined concept such as ‘wilfulness’ and the uncertainty over the meaning of the word ‘significant’. What is clear, however, is that the provision may suitably be used to prosecute Internet users who, in a purely private and non-commercial setting, commit ‘wilful’ infringements of copyright on a ‘significant’ scale. It is true that Parliament provides the authority, tools and resources for law enforcement agents when it creates a criminal offence (this is criminalisation in theory), but decisions about when to invoke and when not to invoke these powers generally fall within the discretion of law enforcement officers (e.g. prosecutors). Professor Ashworth argues that the exercise of such discretionary power provides the key to *practical* instances of criminalisation (or criminalisation in practice).⁷⁹ Given the availability of section 136(3A) in the statute books and its attendant interpretational difficulties, to what extent is there public trust in the prosecution’s judicious exercise of discretion in this regard? Copyright law is, after all, about striking a proper balance between protecting the rights of the copyright owner and the public interest in having reasonable access to information. One can only hope that public prosecutors will take cognizance of this delicate balance and exercise good sense and judgment in deciding whether or not to charge an individual under section 136(3A).

There is, furthermore, an added layer of complexity to the process for prosecuting copyright offences in Singapore (as well as in jurisdictions which adopt a similar system).⁸⁰ Singapore is known to have adopted a “self help” regime for the criminal enforcement of intellectual property rights⁸¹ and this is by way of granting *fiats* to individual IP owners to initiate “private” prosecutions of IP offences usually in parallel with civil enforcement proceedings. Prosecutions under section 136(3A), for example, may be brought by individual copyright owners on a *fiat* from the Public Prosecutor.⁸²

censured (*as distinct, perhaps, from being held civilly liable*) for wrongdoing without proof of choice. This is a fundamental requirement of fairness to defendants.” (A Ashworth, *Principles of Criminal Law*, 5th ed. (Oxford University Press, 2006) at p 166; emphasis added)

⁷⁹ A Ashworth, *Principles of Criminal Law*, 5th ed. (Oxford University Press, 2006) at pp 22-23.

⁸⁰ Cf. Article 9 of the EU’s second IPR Enforcement Directive (see above) where provision is made for IP rights owners to actively assist the police in investigations, thus creating joint investigation teams and (possibly) giving rights owners greater control over criminal proceedings.

⁸¹ See *Microsoft Corporation v SM Summit Holdings Ltd* [1999] 4 SLR 529 at 547-548.

⁸² See section 336(4) of the (Singapore) Criminal Procedure Code (Cap. 68). In relation to civil proceedings for online copyright infringement, a copyright owner may, under procedural laws, make an application in court for a pre-action discovery order against a network service provider (whose subscriber is alleged to have committed the infringing acts in question) to compel the disclosure of the subscriber’s identity – see, in the Singapore context, *Odex Pte Ltd v Pacific Internet Ltd* [2007] SGDC 248 (District Court); [2008] 3 SLR 18 (High Court). To obtain a similar pre-action discovery order in aid of criminal proceedings brought by way of a ‘private’ prosecution, the copyright owner has to rely on the inherent jurisdiction of the court

Herein lies an inherent risk of injustice to copyright infringers accused of contravening section 136(3A). In allowing copyright owners to prosecute under a *fiat*, there is the danger that the broader *public* interests in the prosecution (since the criminal law is, after all, concerned with punishment for the benefit of the community as a whole) may be subjugated to the *private* interests of the copyright owner in obtaining a quick and favourable settlement of the civil enforcement action. This potential clash of interests between the public and the private, arising from the conduct of (parallel) criminal and civil proceedings respectively, is highly undesirable in many respects, not least from the perspective of the defendant (accused person).⁸³ The copyright owner (private prosecutor) may well use the criminal process (which includes the intimidating threat of prosecution of an offence that is punishable with imprisonment) to exert “pressure” – not unlike the notion of ‘undue influence’ in contract law – on the defendant to settle the civil action out of court on an expedited basis and on terms favourable to the former, in return for the former withdrawing or abandoning the prosecution. Using the criminal process this way to bolster the copyright owner’s “bargaining strength” in the civil dispute is akin to the copyright owner getting *de facto* enforcement of his civil rights against the copyright infringer.⁸⁴ Fortunately, proper safeguards are in place – at least in Singapore – to ensure that ultimate control of any prosecution by *fiat* remains vested in the Public Prosecutor and that any settlement or decision to withdraw/abandon the prosecution is subject to prior approval.⁸⁵

Other procedural complexities may also arise as a result of concurrent civil and criminal enforcement proceedings which may prejudice the copyright infringer. For example, the copyright owner concerned may attempt to enforce a civil ‘Anton Piller’ order⁸⁶ and execute a criminal search warrant⁸⁷ contemporaneously. As is well known, the grant of an ‘Anton Piller’ order, given the draconian nature of this procedural weapon, is subject to the stringent conditions laid down by the English Court of Appeal in *Anton Piller KG v Mfg Processes Ltd.*⁸⁸ The criminal search warrant, although in many respects

as enunciated in *Norwich Pharmacal Co v Customs & Excise Commissioner* [1974] AC 133 and as extended in *Ashworth Hospital Authority v MGN Ltd* [2002] 1 WLR 2033.

⁸³ See G Wei, *The Law of Copyright in Singapore*, 2nd ed. (SNP Editions, 2000) at p 986.

⁸⁴ See, further, the views expressed in S Leong, “Pre-Action Discovery Against a Network Service Provider and Unmasking the John Does of Alleged Online Copyright Infringements in Singapore” [2009] EIPR 185 at 190-191. Cf. also Yong CJ’s remarks in *SM Summit Holdings Ltd v Public Prosecutor* [1997] 3 SLR 922 at 936: “In the present proceedings, it is quite clear that the criminal process was used to obtain evidence for pending civil proceedings; these were de facto civil proceedings.”

⁸⁵ It appears, however, that IP rights owners are now pushing for full autonomy and control over the conduct (and termination) of criminal proceedings instituted under a *fiat* – see the AIPPI Yearbook 2002/II at pp 381-382. For the English position, see G Harbottle, “Private Prosecutions in Copyright Cases: should they be stopped?” [1998] 8 EIPR 317.

⁸⁶ To prevent the defendant from hiding, tampering with or destroying all proof of infringement (e.g. infringing copies of copyright material), the plaintiff may, before the civil action goes to trial, make an interlocutory, *ex parte* application for an ‘Anton Piller’ order – an order to enter the defendant’s premises to inspect and seize incriminating evidence of infringement.

⁸⁷ A criminal search warrant is issued by the court pursuant to section 136(9) of the Singapore Copyright Act 1987.

⁸⁸ [1976] Ch 55 at 61-62. Further safeguards governing the grant and enforcement of such orders have been incorporated by the courts in recent years as a result of fears of possible abuse by applicants of the

similar to an ‘Anton Piller’ order, is governed by different rules and procedures in the criminal process. It should be noted that many of the safeguards in the manner in which ‘Anton Piller’ orders are obtained have not been included in the criminal process. As such, a copyright owner who is in control of both the civil suit and the criminal prosecution must be mindful that the ‘Anton Piller’ order should not take on the guise of a criminal search warrant, and *vice versa*. It is also generally not desirable to enforce an ‘Anton Piller’ order and execute a criminal search warrant contemporaneously, particularly from the perspective of the copyright infringer (defendant/accused) who may otherwise be confused and prejudiced by the entire process.⁸⁹ Finally, there is also the unresolved issue of full and frank disclosure. When a copyright owner applies for an *ex parte* ‘Anton Piller’ order, there is a duty imposed on him to make full and frank disclosure of all material facts, including facts which are not in his favour. There is, however, no corresponding duty imposed by statute on the copyright owner – who now assumes the role of a private prosecutor – in an application for a criminal search warrant. The question therefore remains as to whether a private complainant who elects to prosecute a copyright offence under a *fiat* should likewise be subject to the duty of full and frank disclosure when applying for a criminal search warrant.⁹⁰ Insofar as protecting the interests of the copyright infringer is concerned, the real danger in all of this is that “the carefully worked out limitations and safeguards developed in civil law to control *ex parte Anton Piller* orders may be circumvented by resort to criminal search warrants”.⁹¹

VII. Conclusion

With advancements in technology, the ease of copying will only escalate, as will the individual instances of online piracy. Just as the ubiquitous copyright pirate of yesteryear has not been totally eradicated (some of whom may have gone further underground or gone online instead), online copyright infringers (both uploaders and downloaders alike) will not disappear anytime soon. If anything, they are likely to multiply in numbers, especially amongst the younger generation. This is a generation that has grown up with and has become accustomed to digital forms of entertainment (whether in music, film, software or computer games) as well as the comforts of mobile and Internet technology. However, just because we cannot stem the tide of technological development, this does not mean that we should condone the manner in which Internet users obtain and deal with copyright works. Regulation and control in this field are more essential now than ever before.

procedure (e.g. where the ‘Anton Piller’ order is used as an instrument of oppression). See *Universal Themosensors v Hibben* [1992] 3 All ER 257; *Columbia Picture Industries v Robinson* [1986] 3 All ER 338.

⁸⁹ See, further, G Wei, *The Law of Copyright in Singapore*, 2nd ed. (SNP Editions, 2000) at pp 906-909.

⁹⁰ See Yong CJ’s remarks in *SM Summit Holdings Ltd v Public Prosecutor* [1997] 3 SLR 922 at 936: “... The same cannot be said of private individuals making complaints. The very rationale for full and frank disclosure in civil proceedings would apply with equal force. If the terms of the provisions [for search warrants] are reconsidered by Parliament, it may be desirable that Parliament impose a duty of full and frank disclosure in cases where search warrants are sought by private complainants.”

⁹¹ G Wei, *The Law of Copyright in Singapore*, 2nd ed. (SNP Editions, 2000) at p 986.

It is quite likely that civil remedies alone have proven insufficient to adequately protect the economic interests of copyright owners, who have lobbied long and hard for the introduction of new copyright offences. The general impression is that the criminal process is viewed by IP rights owners as a more effective means of securing their economic viability – in particular, the censuring role of the criminal law in stigmatising conduct that society wants to punish. A civil wrongdoer does not suffer the same moral condemnation from society as one who is also convicted of a crime. Furthermore, it has been highlighted that the current behaviour of online users, if left unchecked, will pose a serious threat to the value system inherent in the whole concept of intellectual property. It involves a direct undermining of the proprietary regime. Criminalisation may therefore be necessary in cases where the wrongful conduct affects the well-being of society and threatens a valued proprietary regime. Yet, the impetus for further criminalisation in the sphere of IP infringement must be properly and carefully justified.

This paper has sought to explain why it is entirely appropriate – based upon arguments of principle – to impose criminal liability on primary infringers of copyright in the online environment, even if the infringements were committed for private and non-commercial purposes. The enactment of section 136(3A) in the Singapore Copyright Act 1987 is, in this author’s view, most timely and eminently justified on the basis of the harm principle, ethics and morality, as well as the deterrent and retributive theories. There is also no escaping from the fact that uploading and downloading infringing files are acts of infringement akin to stealing in all but name, particularly at the conceptual level. Such forms of property violation are morally indistinguishable. In the same manner that the law of theft punishes a thief, the use of the criminal law to punish (especially recalcitrant) online infringers of copyright should come as no surprise. It has, of course, been acknowledged by this author that section 136(3A), as drafted, is not entirely free of ambiguity. There remain difficulties with interpretation and the paper has, accordingly, offered some suggestions for future statutory reform. Finally, in a criminal justice system which allows for the “private” prosecution of copyright offences, the question has been raised as to whether adequate safeguards are in place to ensure that the accused person does not suffer any injustice or oppression.

Beyond this, it may further be rationalised that the criminalisation of such wrongful behaviour in the digital environment was legislatively endorsed as a “last resort”.⁹² The ultimate objective in persuading Netizens to respect copyright in online works would have been very difficult, if not impossible, to attain without resorting to criminal punishment.⁹³ Indeed, it appears that all other avenues (including “softer” options) have been exhausted with little success, if any. We should therefore regard

⁹² See CMV Clarkson, HM Keating and SR Cunningham, *Clarkson and Keating Criminal Law: Text and Materials*, 6th ed. (Thomson Sweet & Maxwell, 2007) at p 4 (cited at **note 18**, above).

⁹³ See D Husak, “The Criminal Law as Last Resort” (2004) 24 OJLS 207 at 212. The main difficulty with a platform such as the Internet is this: “The core ethos, and success, of the Internet to date lies in its ability to stimulate shared ideas and content. It also promotes participation, pro-activity and creativity ...” (see section 3.2 of Lord Carter’s interim report on *Digital Britain* released on 29 January 2009). The inclusive/permissive culture on the Internet is further exacerbated by the revolutionary development of the *Creative Commons* (<http://creativecommons.org/>) and the Open Source software movement (<http://www.gnu.org/copyleft/gpl.html>).

section 136(3A) as part of a larger suite of measures – a multi-pronged approach – aimed at combating the rising tide of non-commercial (but ‘significant’) infringements of copyright in the online environment. It is now time to use the “stick” in the ongoing battle against online piracy, no matter how unpopular or inelegant this measure may seem. The multi-pronged approach, as envisaged by this author, may be summarised thus:

(1) Rigorous and effective enforcement of copyright

The mere provision of section 136(3A), amongst other offences, in copyright legislation will be futile without an accompanying scheme of enforcement that is rigorous and robust. The relevant authorities (whether copyright owners or the State Prosecution Service) must identify those egregious and incorrigible offenders (who simply refuse to stop their illegal online activities) and take decisive legal action against them, including prosecution where appropriate. There should also be greater publicity given to successful enforcement cases in the media, particularly in underscoring the remedies and/or penalty awarded against the copyright infringer.

To date, however, there has only been *one* reported case in Singapore concerning the prosecution of two private individuals for having distributed, in a non-commercial context, hundreds of unauthorised MP3 files via an Internet chat programme. They were subsequently sentenced to jail for three months (the accused who distributed almost 300 music files) and four months (the accused who distributed over 600 music files) respectively.⁹⁴ Over in the US, a federal jury in Minneapolis recently ruled against Jammie Thomas-Rasset for having ‘wilfully’ violated music copyrights in 24 songs in the country’s *only* file-sharing case (out of over 30,000 similar cases) to have gone to trial. It was widely reported in the media that the defendant was ordered to pay US\$1.92 million (or US\$80,000 per song) in damages to the recording industry.⁹⁵ The RIAA has, however, made it clear that it has stopped filing lawsuits against private individuals and is now working with Internet Service Providers (ISPs) to tackle the problem of online piracy.⁹⁶

It is, in this author’s view, as yet unclear if this is the right strategy to adopt for the future. Commentators have argued, quite rightly, that the deterrent effect of the criminal law depends very much on “the likelihood of detection of infringement, the likelihood of criminal proceedings being brought, and of the imposition of imprisonment as a sanction”.⁹⁷ It is therefore submitted that rigorous enforcement of the criminal law which dramatically increases the rate of detection and the subsequent prosecution and

⁹⁴ See *The Straits Times*, 14 January 2006 (at p 3) and 18 February 2006 (at p H3). Note, however, that the accused in this case were charged under section 136(3)(b), and not section 136(3A), of the Copyright Act 1987. The only reported decision to date of a prosecution under section 136(3A) involved a company which had infringed copyright in computer software for the purpose of obtaining a ‘commercial advantage’: see *PP v PDM International Pte Ltd* [2006] SGDC 91.

⁹⁵ See http://www.siliconvalley.com/news/ci_12620804?nlick_check=1.

⁹⁶ See http://news.cnet.com/8301-1023_3-10203799-93.html and http://news.cnet.com/8301-1023_3-10204047-93.html.

⁹⁷ C Tapper, “Criminality and copyright”, chapter 19 in *Intellectual Property in the New Millennium*, D Vaver and L Bently, Gen. Eds. (Cambridge University Press, 2004) at p 278.

punishment of the offender can have profound influence on human behaviour and crime rate generally. Lax or selective enforcement may instead bring the criminal law into disrepute and result in the public losing confidence in and respect for the criminal justice system. Accordingly, as long as the criminal provisions in the copyright statute are enforced with some *regularity*, the existence of the criminal law backed by sanctions serves as a “standing disincentive to crime”.⁹⁸

(2) *Innovative business models*

The entertainment industry as a whole must eat humble pie and not give the public the impression that they are just large, greedy and monopolistic business conglomerates, particularly in these economically trying times. There is an urgent need for the industry to respond to changing customer demands and consumer expectations and to reach out to the wider (online) public by growing the audience and winning their trust. In this regard, the industry should engage in continuous innovation to develop alternative business models and market-based strategies which are economically sustainable and which increase consumer options in the digital marketplace – e.g. new royalty payment systems or collective licensing schemes; to introduce variable pricing or price cuts, new and convenient ways of acquiring entertainment products and creative forms of advertising and marketing.⁹⁹

To be fair, the industry, whilst slow to respond, has not rested on its laurels and has begun to understand and adapt to the present psyche of 21st century Netizens. Two examples from the music and software industries are worth citing. A new business partnership between *Universal Music Group* and *Virgin Media* was widely reported in the press in June 2009.¹⁰⁰ To encourage people to pay for online music rather than to turn to illegal file-sharing, *Virgin Media* customers will be able to download as much music as they like for a small monthly fee, which can then be played on iPods or any other MP3 player, mobile phones and computers. *Universal* will, in turn, offer its entire catalogue of works and the music will come free of DRM. New measures have also been introduced by the Intellectual Property Office of Singapore and the local software industry to encourage companies (especially SMEs) to obtain legitimate software for their business operations.¹⁰¹ If these companies were to run voluntary audit checks on their computer

⁹⁸ Per A Ashworth, *Principles of Criminal Law*, 5th ed. (Oxford University Press, 2006) at p 16. There have been some recent legislative developments in the UK and Japan – see, respectively, http://www.billboard.biz/bbbiz/content_display/industry/e3i149b78bd47280165ff144d514104a4cb and http://www.billboard.biz/bbbiz/content_display/industry/e3iecf450e38f03b770bfe0008e0afb801. Note also that several countries are presently negotiating a new ‘Anti-Counterfeiting Trade Agreement’ (ACTA) which aims to combat counterfeiting and online piracy, an instrument through which the push for further strengthening the IPR enforcement mechanism via the criminal process will certainly continue. See http://www.ustr.gov/assets/Document_Library/Fact_Sheets/2009/asset_upload_file917_15546.pdf and M Blakeney, “International Proposals for the Criminal Enforcement of Intellectual Property Rights: International Concern with Counterfeiting and Piracy” [2009] IPQ 1.

⁹⁹ See <http://www.washingtonpost.com/wp-dyn/content/article/2009/06/21/AR2009062100101.html> and MF Schultz, “Live Performance, Copyright and the Future of the Music Business” (2009) 43(2) *University of Richmond Law Review* 685.

¹⁰⁰ See *The Straits Times*, 17 June 2009 at p A19.

¹⁰¹ See *The Straits Times*, 22 April 2009 at p B9.

systems and purge all pirated software material, they will get discounts on legitimate software products. In addition, they will not face legal action from the relevant copyright owners (at least in the first instance) even if such audits root out bootleg versions. These measures, backed by the Business Software Alliance, have been described as a “soft touch” way to promote the use of original software in business.

(3) Working together with ISPs

Copyright owners (particularly those in the entertainment industry) must cultivate a good working relationship with ISPs – their “partners” in copyright enforcement. For example, ISPs can, on receipt of a court order, assist in revealing the identity of their subscribers who have been accused of online infringements of copyright,¹⁰² and can also assist in the smooth implementation of the “notice and take-down” mechanism provided for in copyright legislation.¹⁰³ More recently, ISPs have been accorded greater responsibility in two new initiatives – one in conjunction with the “three-strikes-and-you-are-out” (or “graduated response”) policy that is currently the subject of considerable debate in several jurisdictions,¹⁰⁴ and the other arising from the final *Digital Britain* report that was published recently.¹⁰⁵

(4) Education/Indoctrination in the form of moral persuasion

A slew of educational initiatives have been developed by WIPO,¹⁰⁶ RIAA¹⁰⁷ and the Copyright Society of the USA (CSUSA).¹⁰⁸ Similar programmes are available in

¹⁰² Netizens do not appear to be worried because they believe that it is difficult to “catch” them. Note, however, that *MediaSentry* (a US security company that provides business and marketing intelligence services for digital media consumption) can trace files offered for file-sharing on P2P networks to an individual’s Internet Protocol address and modem.

¹⁰³ See, generally, Part IXA of the Singapore Copyright Act 1987 (and, in particular, sections 193C, 193D and 193DA), provisions which were inspired by the US Digital Millennium Copyright Act 1998. Anecdotal evidence suggests that a majority of downloaders will stop their online infringing activities when told by their ISPs.

¹⁰⁴ For the US, see http://news.cnet.com/8301-1023_3-10203799-93.html, http://news.cnet.com/8301-1023_3-10204047-93.html and <http://blogs.wsj.com/digits/2009/03/26/relationship-status-of-riaa-and-isps-its-complicated/>.

For Ireland, see <http://www.irishtimes.com/newspaper/frontpage/2009/0129/1232923373331.html> and <http://www.irishtimes.com/newspaper/finance/2009/0620/1224249188923.html>.

For France, see <http://news.bbc.co.uk/2/hi/europe/7992262.stm>, http://www.siliconvalley.com/news/cj_12351380,

http://www.nytimes.com/2009/06/11/technology/internet/11net.html?_r=1 and

http://www.billboard.biz/bbbiz/content_display/industry/e3ied6fab8616f8c1a1c127e7fb5c29205f.

For Germany, see

http://www.billboard.biz/bbbiz/content_display/industry/e3i73b3660e2c6025e6507555e3cfec977d.

For Spain, see

http://www.billboard.biz/bbbiz/content_display/industry/e3i8071e0d9c25cb6b8135e1e0e8ea8495f.

For New Zealand, see <http://www.nbr.co.nz/article/section-92a-be-scrapped-89121>.

¹⁰⁵ See, in particular, chapter 4 of the Report:

http://www.culture.gov.uk/what_we_do/broadcasting/6216.aspx. See also

<http://www.guardian.co.uk/technology/2009/jun/16/filesharing-digital-britain>.

¹⁰⁶ WIPO’s 75-page book titled *Learn from the Past, Create the Future - The Arts and Copyright* is aimed at “young students”: http://www.wipo.int/freepublications/en/copyright/935/wipo_pub_935.pdf.

Singapore.¹⁰⁹ Yet, one part of Internet culture (probably a large part) advocates that there is no social stigma associated with illegal file-sharing and downloading, unlike the stealing of an actual CD from a retail shop. In what respect has education in IP fallen short?

Insofar as education/indoctrination is concerned, *respect* for IP as a whole – just like respect for any other form of property, real or personal – must be deeply ingrained in the human psyche as an intrinsic *moral* value that is as fundamental as, say, honesty and integrity.¹¹⁰ A full appreciation and understanding of copyright law’s normative role in this regard is crucial – that copyright is rooted in some deeper understanding of society’s regard for creativity, property, economic efficiency and fundamental notions of justice and fairness. There must be social acceptance (or social “buy-in”) of copyright’s legitimacy, particularly in the online environment. It is therefore suggested that the moral/ethical justifications for criminalising ‘wilful’ infringements of copyright on a ‘significant’ scale be further underscored in educational endeavours so that the public understands the root of the problem. Just as property rights reside in a physical CD/DVD, property rights (albeit intangible in nature) exist too on the Internet (as they do, apparently, in the virtual world of *Second Life*). The public needs to understand that downloading an unauthorised MP3 file is – from both the conceptual and moral perspective – no different from stealing a CD single from a friend. It is a clear sign of human weakness, where succumbing to temptation is far easier and more convenient than taking the moral high road whenever the alternatives present themselves simultaneously – legal but \$0.99 per song, or illegal and free. The choice cannot be more obvious. It is high time that consumers of entertainment exercise greater *moral responsibility* over their online attitudes and behaviour.

We know that society generally accepts, without question, the existence of criminal laws which protect tangible property – e.g. laws against theft, robbery and burglary. There is, in this respect, a shared sense/understanding of what is right and wrong. How then do we strive to achieve such a consensus in thinking in relation to

¹⁰⁷ RIAA’s *Music Rules!* is “a free educational program designed to encourage respect for intellectual property and responsible use of the Internet among students in grades 3-8”: <http://www.music-rules.com/>.

¹⁰⁸ CSUSA’s *Copyright Kids!* website aims to provide, *inter alia*, “an educational tool to define, explain, and apply copyright issues in language understandable to Middle School students” as well as “an educational resource on copyright issues for teachers and parents of 5th - 8th graders who are engaged in a creative process”: <http://www.copyrightkids.org/>.

¹⁰⁹ E.g. the Honour Intellectual Property (HIP) Alliance that “aims to promote a positive attitude amongst the general public towards IP, encourages a pro-IP lifestyle and motivates everyone to ‘Say NO! to piracy’” (<http://www.ipos.gov.sg/topNav/prg/gen/HIP+%28Honour+Intellectual+Property%29+Alliance.htm>), and *iperckidz* which is “an Intellectual Property education and outreach initiative for students and teachers” (<http://www.ipos.gov.sg/topNav/prg/gen/iperckidz.htm>).

¹¹⁰ Per Director-General of WIPO Francis Gurry in his acceptance speech to the WIPO General Assembly on 22 September 2008: “The widespread illegal downloading of music and films from the Internet raises more generally the question of respect for intellectual property” (see http://www.wipo.int/about-wipo/en/dgo/dg_gurry_acceptance_speech_2008.html). See also Lord Carter’s interim *Digital Britain* report released on 29 January 2009 (at p 41): “What will help to deter copyright infringement online by consumers in both the short and longer term is a combination of things. A strong message is needed about the importance of respecting copyright as a necessary part of creating new high quality content.”

intangible property rights? How can we address the incongruity in the public's perception of right and wrong on the Internet?

“Governing people, in the broad meaning of the word, governing people is not a way to force people to do what the governor wants; it is always a versatile equilibrium, with complementarity and conflicts between techniques which assure coercion and processes through which the self is constructed or modified by himself.”¹¹¹

It is hoped that a dynamic but versatile implementation of the multi-pronged approach outlined above will effect, over time, a mindset or behavioural change in all Netizens. Regulators and copyright owners, on the one hand, must acknowledge and validate the “free-sharing” culture of the Internet, whilst consumers of online entertainment must, on the other hand, appreciate and understand the “fee-charging” culture of commercial copyright and cultivate a shared ethos that values creative works on the Internet. The fact remains that online content is not always for free and that the Internet is not and can never be “a lawless Wild West without boundaries”.¹¹²

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¹¹¹ M Foucault, “Hermeneutics of the Self” (1993) 21 *Political Theory* 198 at 203-204.

¹¹² JM Garon, “Normative Copyright: A Conceptual Framework for Copyright Philosophy and Ethics” (2003) 88 *Cornell L. Rev.* 1278 at 1340.