

CHAPTER FIFTEEN

CRIMINALIZING PRIMARY COPYRIGHT INFRINGEMENT IN SINGAPORE: WHO ARE THE REAL ONLINE CULPRITS

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INTRODUCTION

It is axiomatic in the international copyright arena for the law to impose criminal liability on secondary acts of copyright infringement. Such acts of infringement (which may also attract civil liability) typically entail the commercial exploitation of infringing copies of copyright material by unlicensed vendors. Take, for example, the ubiquitous street vendor in Bangkok's hugely-popular Patpong district who, on a daily basis, hawks pirated CDs and DVDs to throngs of foreign tourists. Although street scenes such as these are fairly commonplace and representative of the livelihoods of numerous other unlicensed vendors the world over, the law clearly frowns upon such practices and, for some time now, has imposed penal sanctions on these secondary infringers of copyright.¹ The use of the criminal law under such circumstances to aid in the effective enforcement of intellectual property rights is understandable, because the sale of each unauthorised copy of music, film or software will, correspondingly, deprive the relevant copyright owner of the economic benefits of a legitimate transaction. Yet the fact remains that many of these so-called copyright pirates have continued to operate

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¹ See, generally, Division 5 of Part V of the Singapore Copyright Act 1987; and section 107 of the UK Copyright, Designs and Patents Act (CDPA) 1988.

under the present legal environment simply because of high consumer demand; there is, after all, a sizeable global market for illegitimate products of intellectual property. The irony, of course, is this: that whilst it is a criminal offence to trade in illegitimate copies of copyright material, it is – at least under copyright law – not a crime nor an actionable civil wrong to purchase or acquire such copies for private and domestic use.²

However, in light of the rapid advancements in computer, digital and Internet technologies, consumers and other end-users have begun to take things into their own hands. Instead of purchasing illegitimate copies of copyright material from the street vendor, they now discover that it is far more efficient and cost-effective to acquire digital copies for themselves in the privacy of their own rooms from certain Internet websites or through peer-to-peer (P2P) file-sharing networks. They may further decide to share these digital copies with others in the Internet or P2P file-sharing community. In the process, however, they inadvertently expose themselves to civil action for having committed primary acts of copyright infringement, and, in Singapore at least, they may also face criminal prosecution if primary infringers like themselves are found guilty of wilful infringements of copyright.

Against this backdrop, the authors will, in this paper, examine the newly-introduced criminal provisions in Singapore's copyright legislation which target primary acts of copyright infringement and will consider, in particular, the consequences of prosecuting offenders pursuant to these provisions in the context of a number of hypothetical scenarios involving acts of infringement committed on the Internet. These Internet-based scenarios are particularly relevant and timely in the present discussion in light of recent reports in the local media concerning – (1) the various measures taken by the Intellectual Property Office of Singapore (and other local agencies) to encourage all companies and businesses to use legal or licensed software in the conduct of their day-to-day business; as well as (2) the recent arrest and

² Note, however, that there is a statutory presumption in section 136(7) of the Singapore Copyright Act 1987 to this effect: that a person who has in his possession 5 or more infringing copies of a work shall, unless the contrary is proved, be presumed to be in possession of such copies otherwise than for private and domestic use, or to be in possession of such copies for the purpose of sale.

prosecution of two individuals in Singapore for allegedly distributing unauthorised music files via an Internet chat program.³ This paper therefore aims to offer an academic perspective of the various types of online activity which, in the authors' view, will likely attract criminal liability under the new provisions (as well as those which ought not to).

CRIMINALIZING PRIMARY COPYRIGHT INFRINGEMENT

One significant consequence of the signing of the United States – Singapore Free Trade Agreement (USSFTA)⁴ in May 2003 is the introduction, for the very first time in Singapore's copyright history, of criminal provisions targeting primary acts of copyright infringement. By an amendment to the Singapore Copyright Act 1987,⁵ we now have a new section 136(3A), which provision came into force in Singapore on 1 January 2005. Therefore, in addition to civil liability, it is also a criminal offence in Singapore for primary infringers of copyright to commit *wilful* copyright infringement where the extent of the infringement is *significant* and/or where the infringement is committed to obtain a *commercial advantage*.⁶ The statute provides that in determining whether the extent of the infringement is significant, the court shall have regard to the following matters:⁷

- (a) the volume of any articles that are infringing copies;
- (b) the value of any articles that are infringing copies;

³ See *The Straits Times*, 14 January 2006, page 3. For an update of this story (which will be discussed in greater detail below), see *The Straits Times*, 18 February 2006, page H3.

⁴ The US-Singapore Free Trade Agreement (USSFTA) is the first free trade agreement to be concluded between the US and an Asian country. See, in particular, Article 16.9.21 of the USSFTA and *cf.* Article 61 of the TRIPS Agreement 1994. The full text of the IP Chapter (Chapter 16) of the USSFTA may be viewed online at <<http://www.fta.gov.sg>>.

⁵ See the Copyright (Amendment) Act 2004 (Act No. 52 of 2004) which was passed by the Singapore Parliament on 16 November 2004 and which came into force in Singapore on 1 January 2005.

⁶ See section 136(3A) of the Singapore Copyright Act 1987. First-time offenders face up to a S\$20,000 fine and/or imprisonment of up to six months.

⁷ See section 136(6A) of the Singapore Copyright Act 1987.

- (c) whether the infringement has a substantial prejudicial impact on the owner of the copyright; and
- (d) all other relevant matters.

Further, a person is deemed by law to have committed an infringement for the purpose of obtaining a commercial advantage if the infringing act in question was done to obtain a direct advantage, benefit or financial gain for a business or trade carried on by him.⁸

Before we examine these provisions further and against the backdrop of a number of Internet-based hypothetical scenarios, it is appropriate at this juncture to briefly outline the various acts of primary infringement which are relevant to the discussion in this paper. There is, first of all, the infringing act of *reproduction* in material form – for example, downloading an infringing file from the Internet and subsequently saving it in the computer’s hard drive.⁹ It is also an infringement of the copyright in a work to *communicate* the work to the public.¹⁰ The statutory definition of the word “communicate” is “to *transmit* by electronic means (whether over a path, or a combination of paths, provided by a material substance or by wireless means or otherwise) a work or other subject-matter, whether or not it is sent in response to a request, and includes –

- (a) the broadcasting of a work or other subject-matter;
- (b) the inclusion of a work or other subject-matter in a cable programme; and
- (c) the *making available* of a work or other subject-matter (on a network or otherwise) in such a way that the work or subject-

⁸ See section 136(6B) of the Singapore Copyright Act 1987.

⁹ See section 17 of the Singapore Copyright Act 1987.

¹⁰ See, for example, section 26(1)(a) of the Singapore Copyright Act 1987. It should be noted that the exclusive right to *communicate* a work to the public is generally available to the owners of copyright in authors’ works and in cinematograph films (amongst other forms of copyright subject-matter). Producers of sound recordings, on the other hand, enjoy the exclusive right to *make available* to the public a sound recording by means of, or as part of, a digital audio transmission (defined, in section 7(1) of the Singapore Copyright Act 1987, as “a transmission of a sound recording, in whole or in part, in a digital or other non-analogue form”).

matter may be accessed by any person from a place and at a time chosen by him”.¹¹

The statute therefore recognises two distinct forms of communication – (1) *transmission* of a work by electronic means (for example, by broadcasting or cable-casting), and (2) *making available* a work in such a way that the work may be accessed by any person from a place and at a time chosen by him (in this situation, transmission of a work is said to be recipient-initiated). The former mode of communication is generally characteristic of “push” technologies (where there is an *active communicator* with multiple *passive recipients*), whilst the latter is generally characteristic of “pull” technologies (*passive communicator* with multiple *active recipients*). We shall explore these different forms of communication in greater detail below when we examine the (criminal) implications of wilful copyright infringement in the online environment. Suffice it to say, for present purposes, that the right of *making available* a work to the public was specifically introduced by Parliament to enable copyright owners to control the dissemination of their works on the Internet.

Let us now turn to an academic analysis of six Internet-based hypothetical scenarios.

COPYRIGHT INFRINGEMENT IN CYBERSPACE – WHO ARE THE REAL CULPRITS?

To what extent is the conduct in each of the following hypothetical scenarios a violation of section 136(3A) of the Singapore Copyright Act 1987? ¹² Should the primary copyright infringer in each of these examples be subject to criminal prosecution?

¹¹ See section 7(1) of the Singapore Copyright Act 1987 (emphasis added). Cf. also Article 8 of the WIPO Copyright Treaty 1996 as well as Articles 10 and 14 of the WIPO Performances and Phonograms Treaty 1996.

¹² It is not the authors’ intention to deal with issues concerning jurisdiction and territoriality in this paper, as the hypothetical examples set out above have been formulated on the assumption that criminal proceedings, if any, may appropriately be brought before a court of law in Singapore.

1. *Fly-by-nite* (a sole proprietor) runs an online business where, for a small fee, members of the Internet community can visit his virtual “store” and purchase unauthorised digital copies of the latest hit song.¹³
2. *Techie*, the IT manager of a medium-sized dot.com company, downloads for a fee an original piece of computer software (e.g. *Macromedia Flash*) and, as instructed by his superiors, makes multiple copies of it for the use of all company employees in the IT and web-design departments.¹⁴
3. *JJ*, a private individual, uploads to an Internet host server/website a digital copy each of several Hollywood films (prior to their official commercial release) for other Internet users to download for free.
4. *Digital Philanthropist*, a private individual, designates several files in his computer’s hard drive as being available for sharing/swapping (for free, of course) with other users of a P2P file-sharing network.
5. *Chatty*, a 25-year-old student, has numerous online “chat mates” with whom he ICQs on a daily basis. Recently, over several chat sessions, ***Chatty*** forwarded a large number of unauthorised MP3 files to all his online pals for their listening pleasure.
6. *Touch-me-not*, a university undergraduate, habitually downloads from the Internet – for his own personal consumption – unauthorised copies of music and movie files (each file or collection of files corresponding to a distinct song or movie

¹³ For a recent case from Taiwan, see

<<http://www.chinapost.com.tw/detail.asp?ID=78741&GRP=A>> 25 January 2008.

¹⁴ For a real-life example, see the report entitled “Design firm first to face illegal software charges” in *The Straits Times*, 10 March 2006, front page. According to court papers, unauthorised versions of software such as Microsoft Windows and Office, Adobe Photoshop and Autodesk AutoCAD (worth an estimated S\$50,000) had been installed on the firm’s computers in Singapore. This interior design firm was subsequently fined S\$30,000 when the case was brought before the District Court: see *The Straits Times*, 28 April 2006, page H12. This case is now reported as *PP v PDM International Pte Ltd* [2006] SGDC 91.

title) and now has some 50 Gigabytes (GB) of copyright material stored in his computer's hard drive.

Virtually Fly-by-nite

This scenario is fairly straightforward. By running an online music store, Fly-by-nite would have made available to the public (without permission, of course) digital copies of the latest hit songs in such a way that allows any member of the public to purchase and download these songs from a place and at a time chosen by the individual person. This is clearly in breach of the copyright owners' exclusive right of making available (which, as explained above, has been subsumed within the broader communication right under Singapore's copyright legislation).¹⁵ It is equally clear that the infringing act in question was committed for the purpose of obtaining a commercial advantage.¹⁶ Fly-by-nite's online business is in contravention of section 136(3A) of the Singapore Copyright Act 1987 and he is therefore liable to criminal prosecution thereunder.¹⁷

Techie and Macromedia Flash

Literary copyright subsists in the *Macromedia Flash* software program¹⁸ and Techie understands that he has to pay for the downloading of an original version from the Macromedia.com website. Techie and his superiors, however, fail to realise that the amount tendered is only good for the installation of the program on one computer and that a site licence is required for installation on multiple computers within the company. Making multiple copies of a software program (or, indeed, the installation of an original program on multiple computers) constitutes a clear infringement of the copyright owner's exclusive right of reproduction.¹⁹ An offence is committed under section 136(3A) if

¹⁵ See the text accompanying note 10 *et seq.*, above.

¹⁶ For the meaning of "commercial advantage", see the text accompanying note 8, above.

¹⁷ In the alternative, Fly-by-nite may well be prosecuted under the traditional penal provisions in copyright law for his role as an online *secondary* infringer of copyright. See, in this respect, the discussion in the text accompanying note 1, above.

¹⁸ A computer program is protected as a literary work under section 7A(1)(b) of the Singapore Copyright Act 1987.

¹⁹ See also section 17 of the Singapore Copyright Act 1987.

these infringing acts were committed for the purpose of obtaining a commercial advantage,²⁰ which clearly is the case in this example. Techie and his superiors are therefore likely to be prosecuted (along with the company) in light of the evidence that the offence in question had been committed with their consent or connivance.²¹

JJ – the Gateway to Hollywood

Whereas the first two examples were crafted in the commercial context, we turn now to a discussion of several other Internet-based scenarios of a more personal and domestic nature.

It may surprise JJ that infringements of copyright can occur even in the privacy of one's room at home. By uploading unauthorised copies of movie files to an Internet host server for other users to download for free, JJ (like Fly-by-nite in the first example above) has made these files available to the public – in a way that allows any member of the public to access them from any place and at any time chosen by the individual – without first obtaining the requisite consent from the relevant owners of copyright. JJ may have acted with the best of intentions (certainly no commercial underpinnings here) and in accordance with the infectious spirit of giving and sharing that is very much part of Internet culture. Nevertheless, he is a primary infringer of copyright who may now also face criminal prosecution under section 136(3A) if the extent of the infringement committed is deemed *significant*.

As alluded to above,²² the statute sets out some guidelines to help determine whether the extent of the infringement is significant. We can, first of all, consider “the volume of any articles that are infringing copies”. In this hypothetical example, JJ has uploaded a digital copy each of several Hollywood films (say 100 of them). Therefore, there are 100 infringing copies of movie files hosted on the Internet server and let us assume, for the moment, that the number of infringing copies in question (here, 100) is indeed significant. Nevertheless, we are compelled to consider, in assessing whether the extent of the infringement is significant, the volume of *articles* that are infringing

²⁰ For the meaning of “commercial advantage”, see the text accompanying note 8, above.

²¹ See section 201B(4) of the Singapore Copyright Act 1987.

²² See the main text accompanying note 7, above.

copies, and not the volume of infringing copies *per se*. Let us briefly explore this semantic difference.

If JJ were to be found in possession of 100 physical copies of pirated music CDs, it is arguable (based on our earlier assumption) that he is in possession of a significant number of *articles* that are infringing copies. The physical CD itself is an *article* which contains an infringing copy of one or more songs. What, however, does the word “article” mean in the digital context? The unauthorised movie file found hosted on the Internet server is itself an infringing copy, but is it also an “article” that contains an infringing copy? The present authors are of the view that the word “article”, as it is used in the statute, suggests some *physical embodiment* of infringing copies of copyright material and that its precise meaning in the digital context is somewhat unclear. We will, in any event, revisit the difficulties presented by this first guideline when we analyse the final hypothetical scenario below.

Another important guideline stipulated in the statute concerns an enquiry into whether the infringement “has a substantial prejudicial impact on the owner of the copyright”. It is likely that JJ will be prosecuted, if at all, on the premise of this factor in particular. It has often been argued (by those in the industry) that making movie files available at no cost on the Internet to all and sundry will most certainly deprive the relevant owners of copyright of the economic benefits of a legitimate transaction, and particularly so when these files were uploaded prior to the official commercial release of the movies themselves. The point has also been raised that the impact on the copyright owner is particularly damaging in the online environment due to the relative ease and pace of infringement. Employing the force of the criminal law may therefore be necessary to weed out such practices. JJ, the provider of free movie files on the Internet, ought to be wary of this!

Digital Philanthropist

Like JJ in the example above, Digital Philanthropist (DP) is equally in breach of copyright for supporting and engaging in P2P file-sharing activity. It matters not whether the unauthorised digital files are found hosted on an Internet server (as in JJ’s case) or are stored in one’s computer hard drive as “seed” files for other users of a P2P file-sharing network (such as BitTorrent) to download. In either case, the copyright

owner's exclusive right of making available has been infringed – members of the public may access these files from a place and at a time individually chosen by them.

As to whether DP ought to be prosecuted under the new criminal provisions for having committed wilful copyright infringement on a significant scale, the analysis will similarly take into account, *inter alia*, the volume of any articles that are infringing copies (query whether this refers to the actual number of unauthorised files which DP has designated as being available for file-sharing?) as well as the impact of the infringement on the relevant owners of copyright.

Interestingly, there is a recent decision from Hong Kong involving the prosecution of a private individual who had engaged in P2P file-sharing activity in a non-commercial setting. In *HKSAR v Chan Nai Ming*,²³ the accused person was charged under section 118(1)(f) of the Copyright Ordinance (Cap. 528) for distributing or for attempting to distribute unauthorised copies of movie files (otherwise than for the purpose of any trade or business) to such an extent as to affect prejudicially the rights of the copyright owner. Using the BitTorrent file-sharing software, the accused had designated these infringing files (which were stored in his computer's hard drive) as being available for sharing with other users of the BitTorrent network and had further advertised the existence of such files through Internet newsgroups. Defence counsel sought to argue, quite rightly in our view, that the actions of the accused did not at all amount to "distribution" within the meaning of that word as it was used in section 118(1)(f); at most, the accused had *made available* the films in question to the public without the permission of the relevant owners of copyright. The learned magistrate was, however, not persuaded by these arguments and was firmly of the view that the accused had distributed or, at the very least, had attempted to distribute the infringing files in question to other BitTorrent users. Magistrate Colin Mackintosh opined thus:²⁴

His acts were an essential part of the downloading process and were continuing throughout the downloading, even if he had not been sitting at the computer at all times. These acts were an integral part of the enterprise

²³ [2005] 1469 HKCU 1.

²⁴ *Ibid.*, at para 33.

of downloading the infringing copies to other computers. This amounted to distribution.

The present authors do not, with respect, share the views of the learned magistrate. There may well be a fine distinction between file-sharing (in the P2P sense) and file-distribution, but there ought to be a distinction nonetheless.²⁵ A distributor is someone who knows exactly who his recipients are and who actively targets each one of them. A close examination of the P2P file-sharing system will reveal that the transmission of an unauthorised file from the seeder computer (the computer on which the file was originally made available to the public) to another (end-user's) computer is clearly initiated by the (unknown) recipient himself, albeit with the kind assistance of the seeder (whose computer must remain connected to the Internet throughout the transmission/downloading process). It is apparent that the person behind the seeder computer – beyond making the file available for sharing and keeping the computer connected to the Internet – has no further role to play (nor any further need to actively intervene) in the downloading process. He is certainly not a distributor of infringing material. The fact that he advertises the existence of such material through Internet newsgroups and helps facilitate the downloading process that is initiated by other network users simply does not make him a distributor of copyright-infringing material.²⁶ It must be emphasised, once again, that the actual transmission of an infringing file on a P2P file-sharing network is clearly *recipient-initiated*. Accordingly, the person behind the seeder computer (the accused in this case) is, at most, guilty of having *made available* to the public the infringing files in question without proper authorisation.

Be that as it may, one can readily appreciate why the learned magistrate in the *Chan Nai Ming* case came to the conclusion that he did and why the position in Singapore – were the accused to be tried in Singapore instead – could well be different. The Copyright Ordinance of Hong Kong (Cap. 528) does not contain a provision that is equivalent to

²⁵ See also, in this respect, our discussion of the fifth hypothetical scenario below.

²⁶ Indeed, the conduct of the accused in this case is clear evidence of his having authorised the primary infringement of other BitTorrent users in the downloading process. Such conduct, however, cannot amount to “distribution” – in the ordinary sense of the word – on the part of the accused.

section 136(3A) of the Singapore Copyright Act 1987. Under Hong Kong's copyright laws, the making available to the public of copyright works without prior approval is an actionable wrong that only attracts civil liability.²⁷ In contrast, the same act, if committed in Singapore, may well attract criminal liability if the extent of the infringement committed (in a non-commercial context) is deemed significant. We have, of course, already discussed the legal implications of this in relation to JJ and DP in the hypothetical examples above.

We are further fortified in our views by a more recent English decision involving an application for summary judgment. In *Polydor Limited v Brown*,²⁸ Justice Lawrence Collins took the view that the act of connecting a computer (on which unauthorised music files were stored in a shared directory) to the Internet for P2P file-sharing purposes fell squarely within the types of activity prohibited by sections 16(1)(d) and 20 of the UK CDPA 1988 – namely the *making available* to the public of copyright works by electronic transmission in such a way that members of the public may access these works from a place and at a time individually chosen by them. It is therefore submitted that if the accused in *Chan Nai Ming* were to be tried in a court of law in Singapore, the prosecution will very likely press charges against him pursuant to section 136(3A) of the Singapore Copyright Act 1987.²⁹

Chatty and the ICQ Craze

The ability to communicate with people from all over the world over the Internet and in the comfort of one's own room has made ICQ (short for "I Seek You") such a success amongst the younger generation. Online

²⁷ See sections 22(1)(d) and 26 of the Hong Kong Copyright Ordinance (Cap. 528).

²⁸ [2005] EWHC 3191 (Ch).

²⁹ It may, however, interest the reader to know that the District Court of Paris (*Tribunal de Grande Instance de Paris*) recently ruled in favour of a private individual who had been hauled to court by a French recording industry organisation (Société Civile des Producteurs Phonographiques) for having uploaded and downloaded 1,212 music files using the Kazaa file-sharing software as well as for having in his computer hard drive 1,875 unauthorised digital files. The copyright infringer in this case was let off on account of the non-commercial nature of his actions – the defendant had downloaded these infringing files for his private and personal use. This case is reported at <http://www.theregister.co.uk/2006/02/08/france_legalises_p2p/> 25 January 2008 and at <<http://arstechnica.com/news.ars/post/20060207-6135.html>> 25 January 2008.

chat-rooms are perpetually cluttered with droves of registered users who keep in touch with one another through instant messaging. Chatty in our present example is but one ardent supporter of the ICQ phenomenon. Yet, in what appears to be an innocuous act of simply chatting with other like-minded people, Chatty does not realise that he cannot, additionally, forward or transmit to all his online friends copyright-protected MP3 files without first seeking approval. Sending file attachments (electronically) to other ICQ users in the course of a chat session constitutes a clear infringement of the copyright owners' exclusive right of communication.³⁰ Therefore, if the infringement is wilful and the extent of which is deemed significant,³¹ Chatty may also be subject to criminal prosecution under section 136(3A) of the Singapore Copyright Act 1987. Alternatively, Chatty may be charged under the other (long-standing) provisions in section 136 of the Act – which prohibit secondary acts of copyright infringement generally and which also carry heavier penalties – if the prosecution takes the view that his act of *distributing* infringing MP3 files to other ICQ users for non-trade/profit purposes was to such an extent as to affect prejudicially the relevant owner(s) of copyright.³²

Download Junky Touch-me-not

The copyright owners' exclusive right of reproduction in material form is clearly infringed when Touch-me-not downloads (without authorisation) digital files from the Internet and stores them in his computer's hard drive.³³ An action for infringement can, of course, be

³⁰ As alluded to earlier, one form of communication that is contemplated under the Singapore Copyright Act 1987 is the *transmission* of a work by electronic means – see, in this respect, the text accompanying note 11 *et seq.*, above.

³¹ The act of transmitting a large number of unauthorised MP3 files to numerous other ICQ users will, arguably, have a substantial prejudicial impact on the owner(s) of copyright: see section 136(6A) of the Singapore Copyright Act 1987 as well as the text accompanying note 7, above.

³² See, for example, sections 136(2)(b) and 136(3) of the Singapore Copyright Act 1987; and *cf.* section 107(1)(e) of the UK CDPA 1988. See also *The Straits Times*, 18 February 2006, page H3, where it was reported that two men had, for the first time in Singapore's copyright history, been sentenced to jail (for 3 and 4 months, respectively) for having illegally distributed (in a non-trade/profit context) hundreds of pirated MP3 files via a privately-operated Internet chat program.

³³ See section 17 of the Singapore Copyright Act 1987.

brought against him by the relevant owners of copyright.³⁴ Is he, however, also criminally liable under section 136(3A) of the Singapore Copyright Act 1987 for wilful copyright infringement on a significant scale? In this instance, Touch-me-not has downloaded an array of music and movie files for his own personal enjoyment. He is not, by any means, a copyright pirate – one who deals in infringing copies of copyright material on a commercial scale. Nevertheless, if the extent of his infringement is deemed significant (albeit non-commercial in nature), he may still be subject to prosecution under the new criminal provisions of the Copyright Act. What, then, is the meaning of “significant” in this context?

If the domestic end-user is an occasional downloader who only has a handful of digital files stored in his computer’s hard drive, he is unlikely to be prosecuted under the law. However, we are here faced with a compulsive downloader who has downloaded some 50 GB of copyright material. At first blush, the extent of Touch-me-not’s infringement appears “significant”. Regard, however, must be had to the list of factors contained in section 136(6A) of the Singapore Copyright Act 1987,³⁵ to which our discussion now turns.

The first factor concerns “the volume of any articles that are infringing copies”. We observe right at the outset that our assessment of this first factor is concerned only with the volume of *articles* that are infringing copies, and not with the volume of infringing copies *per se*. This interpretation clearly accords with a plain reading of the provision. In the instant example, Touch-me-not has illegally downloaded some 50 GB of files to his computer’s hard drive. Each music/movie file downloaded by him is clearly an infringing copy, such that in aggregate, the volume of infringing copies found stored in his computer’s hard drive is arguably significant. But is each music/movie file also to be

³⁴ Indeed, the US Court of Appeals for the Seventh Circuit recently decided that the act of downloading (30) copyrighted songs from the Kazaa file-sharing network (even if for the purposes of music sampling) clearly amounted to copyright infringement and could not be defended on the ground of fair use: see *BMG Music v Gonzalez*, Case No. 05-1314 (7th Cir, 2005).

³⁵ See the text accompanying note 7, above.

treated as an “article” that is an infringing copy of the underlying work or subject-matter in question? We think not.

If a comparison is made of the statutory language used in this first factor with that used in the other section 136 provisions (i.e. provisions which generally prohibit secondary acts of copyright infringement),³⁶ it appears to us that Parliament had intended the word “article” (as used in all these provisions) to refer to the *physical medium* in which the infringing copy resides. In other words, a pirated CD-ROM, for example, is an “article” that contains one or more infringing copies of copyright material. Insofar as downloaded music/movie files are concerned, whilst the music/movie files themselves are infringing copies, the “article” which contains all these infringing copies must, at least on one interpretation, refer to Touch-me-not’s computer hard drive.

Therefore, if we were to apply the foregoing interpretation of this first factor to the instant example, it will be quite untenable to argue that the extent of Touch-me-not’s infringement is significant. Whilst it is true that Touch-me-not is now in possession of a sizeable volume of infringing copies, we are reminded, once again, that it is not the volume of infringing copies *per se* that is relevant to the enquiry. Instead, an argument may well be made that Touch-me-not is merely in possession of a *single article* (here, the computer hard drive) which contains an infringing digital copy each of numerous (and distinct) copyright works or subject-matter.

The question, of course, remains as to whether Parliament had truly intended to criminalize the act of Internet downloading in the domestic context based simply on the evidence of the sheer number of infringing files possessed by the accused. In the absence of clear and unambiguous language to this effect in the statute,³⁷ the present authors are of the

³⁶ See, for example, sections 136(1), (2) and (3) of the Singapore Copyright Act 1987. See also the definition of an “infringing copy” in section 7(1) of the Singapore Copyright Act 1987 – essentially, an infringing copy, in relation to a work, means “a reproduction of the work..., being an article the making of which constituted an infringement of the copyright in the work...”.

³⁷ Contrast, in this respect, the statutory language employed in the Australian Copyright Act 1968 where it is clearly defined in section 132AA that the word “article” (as used in the provisions which set out the various copyright offences) includes “a reproduction or

view that any lingering uncertainty over the precise interpretation and scope of this first factor (particularly in the digital context) ought to be resolved in favour of the accused person.

Before leaving the discussion on this subject, we would like to clarify that the following issues stemming from the statutory language employed in the newly-introduced provisions remain unresolved and that a detailed discussion of these issues would have to be dealt with by the authors elsewhere:

- (1) The meaning of “wilful” copyright infringement;
- (2) To what extent would the infringing activity discussed in the final scenario above constitute a “substantial prejudicial impact” on the copyright owner;
- (3) Whether the defence of fair dealing is available to an accused person charged under section 136(3A).

CONCLUSION

In this paper, we have introduced to the reader the relevant provisions of the Singapore Copyright Act 1987 which aim, for the first time in Singapore’s copyright history, to criminalize primary acts of copyright infringement. In view of the infancy of these provisions, it is as yet unclear what their prosecutorial reach will be. In this regard, we have tested the scope of section 136(3A), which of course is the principal provision, against a number of Internet-based hypothetical scenarios which represent the sorts of activity typically undertaken by those in the online community.

Who, then, are the likely copyright offenders in the online environment? Our analysis, in sum, reveals that individuals (or entities operated by them) who commit primary acts of copyright infringement in the course of a business/trade and obtain a commercial advantage in the process are likely to be prosecuted under section 136(3A). Moving away from

copy of a work or other subject-matter, being a reproduction or copy in *electronic form*” (emphasis added).

the commercial context, it becomes more difficult, in our view, to justify criminalizing primary acts of copyright infringement unless it can be shown that the actions of the alleged infringers have had a *substantial* prejudicial impact on the relevant owners of copyright (where, in other words, the resulting harm to the copyright owner is real, tangible and significant). We have identified some types of online behaviour which may fall into this category and therefore attract criminal liability under section 136(3A) – e.g. where the private individual makes available to the public a large number of unauthorised files on an Internet host server or through a P2P file-sharing network, or where the alleged offender distributes such material to other online users via email, Internet chat programs and the like. We are, however, of the view that prosecutorial discretion under section 136(3A) ought to be exercised even more judiciously when the target in question is an individual downloader of unauthorised content in the private and domestic context. It is submitted that there is arguably some inherent uncertainty over the interpretation and application of the statutory guidelines in section 136(6A) which may militate against a section 136(3A) prosecution under such circumstances.

We must not forget that the relationship between the creators of intellectual property on the one hand and the consumers of intellectual property on the other is a delicate and symbiotic one. Each group of people simply cannot do without the other – just as consumers look forward to new and exciting content, the owners of copyright equally need strong consumer support (financial or otherwise).³⁸ Consumer confidence and trust will be eroded if consumers continue to be sued by the industry and prosecuted by the state for, *inter alia*, private and domestic acts of copyright infringement. We do not, of course, endorse

³⁸ Interestingly, in a study recently conducted by Pollara Inc. and commissioned by the Canadian Recording Industry Association, it was discovered that most consumers had acquired music on their computers through legitimate sources and that approximately 75% of those who obtained music through P2P file-sharing services subsequently purchased the music (having used the various P2P channels as a means of sampling music prior to purchase). The report also carried this message: "... the Pollara study does make a strong case that the recording industry is in real trouble, if people don't like what they're being offered, don't like the way it is priced, and can't find places in which to buy it. That suggests a business model in severe need of evolution – or even intelligent design". See <<http://www.stereophile.com/news/032006cria/index.html>> 25 January 2008.

such acts of infringement. Perhaps there is now a heightened need for further education and long-term persuasion in this respect. If, however, the relevant industry players – which have been perceived by many to be greedy conglomerates that only think of short-changing their customers – do not get their acts together quickly and endeavour to satisfy the changing needs of today’s consumers (by, for example, employing new business models and offering attractive and affordable alternative platforms for entertainment consumption),³⁹ then this will only lead to greater consumer cynicism and disregard, as well as a return to the perennial problem of copyright piracy of an even higher order. Surely, we can all look forward to a better and brighter future.

³⁹ Thankfully, there have been some positive developments in this area. For example, Warner Brothers recently struck a landmark distribution deal with BitTorrent (the infamous provider of P2P file-sharing software) which will, in due course, result in the use of the BitTorrent technology to distribute movies and television shows over the Internet: see <http://news.com.com/2100-1026_3-6070004.html> 25 January 2008 and <http://news.com.com/2100-1025_3-6092296.html> 25 January 2008. Note also the recent announcements by Universal Music Group and EMI Group that they will soon offer their catalogues of recordings and music videos for free downloading on an advertisement-supported website: see <<http://www.siliconvalley.com/mld/siliconvalley/news/editorial/15452661.htm>> 25 January 2008.