

REVISITING AUTHORISATION LIABILITY IN COPYRIGHT LAW

In this article, the authors revisit the origins and purpose of the law on authorising infringement and propose that the word “authorise” should bear the dictionary meaning of “sanction, approve, countenance”, in lieu of the phrase “grant or purported grant” as adopted in the *CBS Songs Ltd v Amstrad Consumer Electronics plc* ([1988] AC 1013) decision. The authors will also examine a non-exhaustive list of factors for determining authorisation liability. The suggested approach seeks to expand the scope of indirect copyright liability in Singapore, which is necessary in the face of increasing incursions into the sphere of copyright protection.

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I. Introduction

1 In this article, the authors will revisit the law on authorising copyright infringement (or “infringing authorisation” as it is sometimes known). It may appear at first blush to readers who are somewhat familiar with the subject, that the law in this area is well settled and beyond controversy. The reality, however, is that nothing could be further from the truth. The article will attempt to bring the reader through the various difficulties, uncertainties and controversies surrounding this seemingly innocuous aspect of infringement in the law of copyright by raising, and attempting to provide satisfactory answers to, two overarching and fundamental questions:

- (a) What does the word “authorise” or “authorisation” mean in copyright parlance?; and

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(b) When does or should authorisation liability arise (or under what circumstances would a court arrive at a finding of authorisation)?

2 Owing to constraints of space, it is assumed that the reader has some prior knowledge of the subject and is generally well acquainted with the facts of the leading cases on authorisation liability.

II. Background and history

3 Authorisation liability in the law of copyright has had a fairly long history.¹ In Singapore, the action for authorising infringement is to be found in section 31(1) of the Copyright Act,² which reads thus:

Subject to the provisions of this Act, the copyright in a literary, dramatic, musical or artistic work is infringed by a person who, not being the owner of the copyright, and without the licence of the owner of the copyright, does in Singapore, or *authorises* the doing in Singapore of, any act comprised in the copyright. [emphasis added]

4 This provision is modelled after section 36(1) of the Australian Copyright Act 1968,³ and similar provisions exist in the copyright statutes of other leading Commonwealth jurisdictions.⁴ The allied concepts in the US, on the other hand, are the actions for contributory, vicarious and (more recently) inducing infringement, each of which is based on well-established principles at common law.⁵

5 Two preliminary matters will be addressed at the outset. First, because the respective causes of action for authorising infringement and primary infringement are both contained in the same statutory provision, it may be tempting – on a plain construction of section 31(1)

1 For an excellent historical account of authorisation liability in Australia and the UK, see Gummow J's decision in *WEA International Inc v Hanimex Corp Ltd* (1987) 17 FCR 274 at 281 *et seq.*

2 Cap 63, 2006 Rev Ed; see also s 9(2) of the Copyright Act (Cap 63, 2006 Rev Ed):
For the purposes of this Act, the exclusive right to do an act in relation to a work, an adaptation of a work or any other subject-matter includes the exclusive right to *authorise* a person to do that act in relation to that work, adaptation or other subject-matter. [emphasis added]

3 Act No 63 of 1968 (Cth). As to the corresponding provision for neighbouring rights, see s 103(1) of the Singapore Copyright Act (Cap 63, 2006 Rev Ed), which is modelled after s 101(1) of the Australian Copyright Act 1968 (Act No 63 of 1968) (Cth).

4 See, eg, s 16(2) of the UK Copyright, Designs and Patents Act 1988 (c 48); ss 3(1) and 27(1) of the Canadian Copyright Act 1985 (RSC 1985, c C-42).

5 See, eg, *Sony Corp of America v Universal City Studios Inc* 464 US 417 (1984); *A&M Records Inc v Napster Inc* 239 F 3d 1004 (9th Cir, 2001); and *Metro-Goldwyn-Mayer Studios Inc v Grokster Ltd* 545 US 913 (2005).

of the Copyright Act⁶ – to treat both actions as strict liability torts. However, whilst it is true that the former is clearly a “species of infringement”,⁷ the historical evolution of copyright law (both in the UK and Australia) suggests that the concept of “authorisation” in the statute has “its own *independent operation* from what one might call primary infringement” [emphasis added].⁸ Indeed, section 1(2) of the UK Copyright Act 1911,⁹ for example, gave “the owner of copyright in a literary work both the sole right of reproducing it and the sole right of authorising such reproduction and that *those rights were separate and distinct so that infringement of each was a distinct tort*” [emphasis added].¹⁰ It is therefore inappropriate to consider and examine the law on authorising infringement in the same light as that on primary infringement, especially when the former concerns the potential liability of an accessory and not the direct or primary infringer of copyright (that is, it is concerned with the liability of a person who has made it possible for other third parties to commit primary acts of copyright infringement by, for example, having supplied the means for infringement). It will be explained in greater detail below why, unlike the action for primary infringement and contrary to the plain language of the statute, “the word ‘authorise’ [in the action for authorising infringement] connotes a *mental element*” [emphasis added].¹¹

6 Second, given its historical significance, it is crucial to keep in mind the *raison d'être* of the action for authorising infringement. A look back in history reveals that “[t]he introduction of the concept of ‘authorisation’ plainly was designed to meet perceived *deficiencies* in existing legislation” and, more specifically, that “[t]he word ‘cause’¹² was

6 Cap 63, 2006 Rev Ed.

7 *WEA International Inc v Hanimex Corp Ltd* (1987) 17 FCR 274 at 282, per Gummow J.

8 *WEA International Inc v Hanimex Corp Ltd* (1987) 17 FCR 274 at 284. This view was endorsed by the Full Court in *Australasian Performing Right Association Ltd v Jain* (1990) 26 FCR 53 at 57.

9 c 46.

10 *WEA International Inc v Hanimex Corp Ltd* (1987) 17 FCR 274 at 284, citing *Ash v Hutchinson and Co (Publishers) Ltd* [1936] Ch 489. Gummow J opined that this was also the position in Australia under the Copyright Act 1968 (Act No 63 of 1968) (Cth) (Aust) – as endorsed by the High Court in *University of New South Wales v Moorhouse* (1975) 133 CLR 1.

11 Per Gibbs J in *University of New South Wales v Moorhouse* (1975) 133 CLR 1 at 12.

12 For example, in *Sarpy v Holland* [1908] 2 Ch 198 at 199, the English Court of Appeal had remarked thus: “Neville J [in the court below] decided on the facts that the defendant Holland did not ‘wilfully cause or permit an unauthorised performance knowing it to be unauthorised’ and was therefore protected by [s 3 of the UK Copyright (Musical Compositions) Act 1888 (c 17)]”. Additionally in *Falcon v Famous Players Film Co* [1926] 2 KB 474, Bankes LJ in the English Court of Appeal opined thus (at 491): “[the] object of introducing the word ‘authorise’ [in s 1(2) of the UK Copyright Act 1911 (c 46)] was to get rid of the effect of certain decisions, of which *Karno v Pathé Frères* [(1909) 100 LT 260] was the most
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deliberately discarded in favour of ‘authorise’” [emphases added].¹³ Indeed, this view had already been underscored much earlier by Scrutton LJ in the seminal decision of the English Court of Appeal in *Falcon v Famous Players Film Co* (“*Falcon*”):¹⁴

Any one familiar with the old Copyright Acts knows that they were very lengthily worded, and ran ‘shall make or cause to be made, or sell or cause to be sold, or import or cause to be imported, or represent or cause to be represented’, and so on, with a number of other verbs. In the present Act [that is, the UK Copyright Act 1911] that verbiage has been omitted; the words ‘cause to’, which had had a *very restricted meaning* put upon them, dropped out, and for them was *substituted the word ‘authorise’ with a much wider meaning* ... In my view the wording of the Act of 1911 was *intended to enlarge the protection to authors, and to sweep away those decisions by which their rights had been limited*, as against the makers of mechanical instruments by which their works could be reproduced. [emphases added]

7 Scrutton LJ’s dicta suggest, in no uncertain terms, that the notion of infringement by “authorisation” was clearly intended by legislators at the time to assume a much *broader* role within the statutory copyright framework than was previously available to copyright owners.¹⁵ The authors are of the view that it is precisely this defining historical perspective that must be borne in mind throughout the analysis in this article, of the proper meaning that ought to be presently attributed to the word “authorise”, as well as the appropriate ambit of the statutory cause of action for authorising infringement.

recent, in which it was held upon the language of earlier statutes that a defendant who for reward gave permission to a third person to represent a play in breach of the owner’s copyright did not ‘cause it to be represented’, unless the person so representing it was the servant or agent of the defendant. In the present statute that language has been deliberately dropped, and for the word ‘cause’ has been substituted the word ‘authorise’”. For some examples of earlier UK copyright statutes that contained the word “cause”, see s 1 of the Dramatic Literary Property Act 1833 (c 15) (UK); s 3 of the Sculpture Copyright Act 1814 (c 56) (UK); and s 15 of the Copyright Act 1842 (c 45) (UK).

13 *WEA International Inc v Hanimex Corp Ltd* (1987) 17 FCR 274 at 283, *per* Gummow J.

14 [1926] 2 KB 474 at 496.

15 See also Hugh Laddie, Peter Prescott & Mary Vitoria, *The Modern Law of Copyright and Designs* (Butterworths, 3rd Ed, 2000) at para 39.14: “The inclusion of this type of tort has been explained as evidence of a *legislative desire to broaden the scope of protection* of the right concerned” [emphasis added]. See further *Roadshow Films Pty Ltd v iiNet Ltd* (2012) 286 ALR 466 at [42]: “That amendment [effected by s 1(2) of the UK Copyright Act 1911 (c 46)] enlarged the copyright owner’s protection in circumstances where the liability of a person for ‘causing’ an infringement (a formulation found in prior legislation) had been construed as limited to situations involving employment and agency.”

III. Meaning of “authorise”

8 It is trite that the meaning of the word “authorise” is not defined in any copyright statute, with the unfortunate consequence that numerous formulations of the word abound in the case law.¹⁶ There are essentially two main schools of thought.

A. “Sanction, approve, countenance”

9 Several cases – particularly from Australia, but also from the UK and Canada – endorse the so-called *broader* view that the word “authorise” or “authorisation” should assume its dictionary meaning of “sanction, approve, countenance”.¹⁷ There is, however, some debate as to whether the phrase “sanction, approve, countenance” ought to be read conjunctively or disjunctively. The phrase that was originally formulated by Bankes LJ in *Falcon*¹⁸ was “sanction, approve *and* countenance” and this, so said the English Court of Appeal in *Pensher Security Door Co Ltd v Sunderland City Council*,¹⁹ could only mean that the phrase was meant to be read conjunctively.²⁰ However, it is also the case that the expression has been judicially interpreted in the disjunctive sense.²¹ The problem that has arisen as a result of this controversy is that there is no

16 *Roadshow Films Pty Ltd v iiNet Ltd (No 3)* (2010) 263 ALR 215 at [358], *per* Cowdroy J: “The authority on authorisation has become a mire. There seems to be little certainty other than the basic maxim that authorisation is a question of fact to be decided in the particular circumstances of each case.” For a helpful summary of the different permutations, see Brendan Scott, “Authorisation under Copyright Law and ‘the Nature of Any Relationship’” (2011) 22 AIPJ 172 at 174.

17 See, *eg*, *Monckton v Pathé Frères Pathephone Ltd* [1914] 1 KB 395; *Evans v E Hulton & Co Ltd* [1923–1928] MacG Cop Cas 51 at 59–60; *Falcon v Famous Players Film Co* [1926] 2 KB 474 at 491 (*per* Bankes LJ); and *contra* Atkin LJ, who adopted the alternative but narrower definition discussed below); *A & M Records Inc v Audio Magnetics Inc (UK) Ltd* [1979] FSR 1 at 9; *Standen Engineering Ltd v A Spalding & Sons Ltd* [1984] FSR 554 at 557; *Adelaide Corp v Australasian Performing Right Association Ltd* (1928) 40 CLR 481 at 489; *Winstone v Wurlitzer Automatic Phonograph Co of Australia Pty Ltd* [1946] VLR 338 at 345; *University of New South Wales v Moorhouse* (1975) 133 CLR 1 at 12 (*per* Gibbs J); *WEA International Inc v Hanimex Corp Ltd* (1987) 17 FCR 274 at 288; *Universal Music Australia Pty Ltd v Sharman License Holdings Ltd* (2005) 220 ALR 1 at [402]; *CCH Canadian Ltd v Law Society of Upper Canada* [2004] 1 SCR 339 at [38]; and *Lotus Development Corp v Ong Seow Pheng* [1996] 2 SLR(R) 514 (HC) at [28].

18 *Falcon v Famous Players Film Co* [1926] 2 KB 474 at 491.

19 [2000] RPC 249 at 277.

20 See also *CCH Canadian Ltd v Law Society of Upper Canada* [2004] 1 SCR 339 at [38] where the Canadian Supreme Court adopted the phrase in the conjunctive sense.

21 See, *eg*, *Winstone v Wurlitzer Automatic Phonograph Co of Australia Pty Ltd* [1946] VLR 338 at 345; *WEA International Inc v Hanimex Corp Ltd* (1987) 17 FCR 274 at 288; *Universal Music Australia Pty Ltd v Sharman License Holdings Ltd* (2005) 220 ALR 1 at [402]; and *Roadshow Films Pty Ltd v iiNet Ltd* (2011) 275 ALR 1 at [173].

consistency at all in the manner in which the word “authorise” has been defined by the courts that have adopted this school of thought, thereby leading to confusion and uncertainty. Indeed, the word “authorise” has also been taken to mean, *inter alia*, “permit”²² as well as the extension of an “invitation”.²³

10 Another difficulty with the expression “sanction, approve, countenance” is that the words, taken individually, are not perfect synonyms or good substitutes for one another. Indeed, “[c]ountenancing does not mean the same thing as approving”.²⁴ To compound matters further, some of the accepted meanings for “countenance” are not co-extensive with the word “authorise” – for example, if “countenance” is taken to mean “condone”²⁵ or, in the words of the Canadian Supreme Court in *CCH Canadian Ltd v Law Society of Upper Canada* (“CCH”), “[c]ountenance in the context of authorising copyright infringement must be understood in its strongest dictionary meaning, namely, ‘[g]ive approval to; sanction, permit; favour, encourage’”.²⁶ Yet, in relation to the latter view, the High Court of Australia in *Roadshow Films Pty Ltd v iiNet Ltd* (“iiNet”) has cautioned that “it would be wrong to take from [the expression ‘sanction, approve, countenance’] one element, such as ‘countenance’, and by fixing upon the broadest dictionary meaning of that word to seek to expand the core notion of ‘authorise’”.²⁷

11 Be that as it may, the authors are of the view that it is still more appropriate to adopt the phrase “sanction, approve, countenance” – at the very least – as a helpful *working definition* of the word “authorise” in copyright legislation. If, indeed, it were true that the phrase “sanction, approve, countenance” indicates a *broader* definitional ambit for the word “authorise” (as opposed to the alternative meaning of a “grant or purported grant”, which will be discussed in the following section), then

22 *University of New South Wales v Moorhouse* (1975) 133 CLR 1 at 12 (Gibbs J); *Roadshow Films Pty Ltd v iiNet Ltd* (2011) 275 ALR 1 at [25] (Emmett J).

23 Jacobs J, in *University of New South Wales v Moorhouse* (1975) 133 CLR 1 at 20–21 (with whom McTiernan ACJ agreed), proffered a much broader definition for the word “authorise” to also include the extending of an “invitation” (express or implied) to other third parties to do any act comprised in the copyright. This, with respect, is much too broad an interpretation (particularly when compared against the pro-users’ right stance adopted by the Canadian Supreme Court in *CCH Canadian Ltd v Law Society of Upper Canada* [2004] 1 SCR 339, which is discussed below), and the authors are, in this regard, in complete agreement with George Wei’s critique of this interpretation in George Wei, *The Law of Copyright in Singapore* (Singapore National Printers, 2nd Ed, 2000) at pp 595–596.

24 *Roadshow Films Pty Ltd v iiNet Ltd* (2011) 275 ALR 1 at [173], *per* Emmett J.

25 See *Amstrad Consumer Electronics plc v British Phonographic Industry Ltd* [1986] FSR 159 at 207.

26 [2004] 1 SCR 339 at [38].

27 (2012) 286 ALR 466 at [125].

it appears unobjectionable, in principle, to embrace it wholeheartedly, given that this interpretation also accords perfectly with the legislative intent prevailing at the time of its inception – namely, to have the notion of infringement by “authorisation” assume a much *broader* role within the statutory framework so as to enlarge the scope of protection afforded to copyright owners.²⁸ This argument is even more compelling in the present age of digital technology. In so far as Singapore’s copyright legislation is concerned, it also seems more logical – particularly from a policy angle – to adopt the dictionary meaning of the word “authorise” (which is the accepted definition in Australia at present) because our Copyright Act is, after all, modelled on the Australian equivalent.²⁹

12 Perhaps it should not matter in the final analysis which particular interpretation of the word “authorise” is accepted, or whether it ought to mean “sanction, approve and countenance” or “sanction, approve or countenance”. In any event, no court has ever reached a finding of authorisation simply on the sole basis of the judge’s perceived understanding of that word and without recourse to at least some other pertinent factor(s) (such as “control” or “knowledge” of underlying infringing activity). Indeed, the authors will ultimately submit that the best way forward (and the most appropriate solution to this quagmire) is for the courts to eschew any attempt at defining the word “authorise” with any degree of semantic precision. Instead, for the reasons given above, Singapore courts should simply endorse the phrase “sanction, approve, countenance” as a helpful *working definition* (whilst acknowledging that it is not a perfect definition nor the only definition possible) and reach a determination on the issue of authorisation only after carefully considering a non-exhaustive list of factors (which will be expounded in greater detail below). However, the authors also venture to suggest that whilst judges should not be too fixated in trying to unravel the precise meaning of the word “authorise”, the alternative meaning – that of a “grant or purported grant” – attributed to “authorise” and endorsed by the courts in the UK and Singapore should, with respect, be jettisoned for reasons that will be explored presently.

28 See the earlier discussion at Part II above.

29 See also the reasons proffered by George Wei in *The Law of Copyright in Singapore* (Singapore National Printers, 2nd Ed, 2000) at pp 608–609 (fn 458): “It may be suggested therefore that when Parliament in Singapore adopted provisions [viz, s 34 of the Singapore Copyright Act (Cap 63, 2006 Rev Ed)] equivalent to s 39A [of the Australian Copyright Act 1968 (Act No 63 of 1968) (Cth)], that it was likely to have been on the basis that *authorisation is to be given the same meaning as that used in the Moorhouse case.* [emphasis added]”

B. “To grant or purport to grant” (a “grant or purported grant”)

13 The alternative meaning given to the word “authorise” – which is generally perceived as being narrower or more restrictive in character and which appears to be the prevailing judicial preference in the UK and Singapore – originates from Atkin LJ’s judgment in *Falcon*:³⁰

[I]t appears to me that to ‘authorise’ means to grant or purport to grant to a third person the right to do the act complained of, whether the intention is that the grantee shall do the act on his own account, or only on account of the grantor.

14 This view of authorisation was endorsed by Whitford J in *CBS Inc v Ames Records & Tapes Ltd* (“Ames”) in the following terms:³¹

Any ordinary person would ... assume that an authorisation can only come from somebody having or purporting to have authority and that an act is not authorised by somebody who merely enables or possibly assists or even encourages another to do that act, but does not purport to have any authority which he can grant to justify the doing of the act.

Although Whitford J did not expressly reject the broader meaning of “sanction, approve, countenance”, it appears that his Lordship preferred the narrower approach.

15 This narrower definition of the word “authorise” is both vague and confusing. What does it mean to say that the defendant has *granted* (or *has purported to grant*) to a third party the right or permission to do the act complained of? Additionally, because of Whitford J’s use of the word “authority”, does this definition import any of the principles traditionally associated with the law of agency, for example, concepts relating to actual and apparent authority?

16 Atkin LJ’s formulation of “grant or purport to grant” was subsequently approved by Lawton LJ in *Amstrad Consumer Electronics plc v British Phonographic Industry Ltd*,³² who was in turn endorsed on appeal by Lord Templeman in *CBS Songs Ltd v Amstrad Consumer Electronics plc*³³ (“Amstrad”). In delivering the judgment of the House of Lords, Lord Templeman stated:³⁴

30 *Falcon v Famous Players Film Co* [1926] 2 KB 474 at 499.

31 [1982] Ch 91 at 106.

32 [1986] FSR 159 at 207.

33 [1988] AC 1013 at 1054.

34 *CBS Songs Ltd v Amstrad Consumer Electronics plc* [1988] AC 1013 at 1053.

[N]o purchaser of an Amstrad model could reasonably deduce from the facilities incorporated in the model or from Amstrad's advertisement that Amstrad *possessed or purported to possess the authority to grant any required permission* for a record to be copied. [emphasis added]

Then after citing the respective meanings of the word "authorise" as articulated by Bankes and Atkin LJ in *Falcon*,³⁵ his Lordship continued thus:³⁶

In the present case, Amstrad *did not sanction, approve or countenance* an infringing use of their model and I respectfully agree with Atkin LJ [in *Falcon v Famous Players Film Co* [1926] 2 KB 474 at 499] ... that in the context of the Copyright Act 1956 an authorisation means a *grant or purported grant, which may be express or implied, of the right to do the act complained of*. Amstrad conferred on the purchaser the power to copy but did not grant or purport to grant the right to copy. [emphases added]

17 With respect, it is rather confusing to have Lord Templeman in his judgment in *Amstrad* make reference to *both* meanings of the word "authorise" (presumably because on either interpretation, Amstrad Consumer Electronics plc ("Amstrad") would not have been found by the court to have authorised the infringing acts of third-party purchasers of its tape recorders), although it appears that his Lordship had a clear preference for the much narrower definition propounded by Atkin LJ in *Falcon*.

18 Still, as noted earlier, it is by no means clear whether Lord Templeman, in preferring Atkin LJ's formulation of a "grant or purported grant", had intended to apply this definition in the context of the principles traditionally associated with the law of agency and which concern the notion of "authority". In other words, did his Lordship mean to ask – in so far as the narrower meaning of "authorisation" is concerned – whether the defendant had granted (or had purported to grant) to a third party the right or permission to commit the infringing act *in the latter's capacity as an agent*? Indeed, his Lordship (like Whitford J in *Ames*) did not explain, in any detail, what the definition of a "grant or purported grant" meant in law. At best, it is only known for a certainty when the definition is not satisfied, namely, that "an act is not authorised by somebody who merely enables or possibly assists or even

35 [1926] 2 KB 474.

36 *CBS Songs Ltd v Amstrad Consumer Electronics plc* ("Amstrad") [1988] AC 1013 at 1054. The *Amstrad* formulation has been endorsed in Singapore by the Court of Appeal in *Ong Seow Pheng v Lotus Development Corp* [1997] 2 SLR(R) 113 and reaffirmed by the same court in *RecordTV Pte Ltd v MediaCorp TV Singapore Pte Ltd* [2011] 1 SLR 830.

encourages another to do that act”.³⁷ Beyond this, however, one is left no wiser as to the precise meaning and ambit of the expression “grant or purported grant”.

19 The authors will therefore attempt to identify what Lord Templeman might have meant in endorsing the narrower definition of the word “authorise”. Two matters will become apparent in due course: first, that there is a palpable reluctance for courts to reach a finding of authorisation where this narrower definition of a “grant or purported grant” is adopted; and second, that Atkin LJ’s formulation is much too restrictive (as to be of limited application and utility, if any) if it is to be applied strictly in the context of agency principles. This is because it is virtually impossible to establish authorisation liability on this narrow interpretation, short of the rarest case where there is an explicit or formal direction by the defendant to the third party to commit the infringing act in question. However, even then, the question remains as to whether the defendant in such a situation possessed (or purported to possess) the authority to grant to a third party the right or permission to do the act complained of, in accordance with the approaches advocated by Whitford J in *Ames* as well as by Lord Templeman in *Amstrad*.

20 By definition, no defendant would ever be able to confer on a third party the right or permission to do the act complained of, or to “clothe [a third party] with authority, particularly legal authority, thereby giving a right to act”³⁸ – simply because the defendant is not himself the “principal” (in whom actual authority, which is capable of being granted, resides) nor the owner of copyright in the subject matter in question.³⁹ Notably, in many of the cases that concern authorisation

37 *CBS Inc v Ames Records & Tapes Ltd* [1982] Ch 91 at 106, *per* Whitford J.

38 *Roadshow Films Pty Ltd v iiNet Ltd* (2012) 286 ALR 466 at [122].

39 As Lord Templeman correctly observed in *CBS Songs Ltd v Amstrad Consumer Electronics plc* [1988] AC 1013 at 1053: “No manufacturer and no machine confers on the purchaser authority to copy unlawfully.” The Court of Appeal also expressed the same sentiments in *Ong Seow Pheng v Lotus Development Corp* [1997] 2 SLR(R) 113 at [35] (“Lur [the third party infringer], being himself a trader in pirated computer [programs], clearly knew that Ong [the alleged authoriser] was in no position to grant the right to make infringing copies”), as did the same court in *RecordTV Pte Ltd v MediaCorp TV Singapore Pte Ltd* [2011] 1 SLR 830 at [45] (“RecordTV could not have granted any right to the Registered Users to copy the MediaCorp shows and/or communicate them to the public as it did not itself have the right to copy and/or communicate to the public those shows”). See further *Sony Corp of America v Universal City Studios Inc* 464 US 417 at 435 (1984): “The lack of clarity in this area may, in part, be attributable to the fact that an infringer is not merely one who uses a work without authorisation by the copyright owner but also one who authorises the use of a copyrighted work without actual authority from the copyright owner.” Indeed, having recourse to early copyright legislation (see, *eg*, s 13(1) of the Australian Copyright Act 1905 (Act No 25 of 1905) (Cth) (*cont’d on the next page*)

liability, the relationship or connection between the alleged authoriser and primary infringer of copyright is typically that of vendor–purchaser,⁴⁰ or provider/distributor of copying technology and consumer/end-user.⁴¹ Indeed, the observation above – that no defendant would ever be able to confer on a third party the right or permission to do the act complained of – is particularly pertinent and revealing in cases such as *Ong Seow Pheng v Lotus Development Corp*⁴² (“*Ong Seow Pheng*”), where the defendant and third party were both engaged in the business of copyright piracy. In *Ong Seow Pheng*, the defendant (alleged authoriser) was “in the business of making unlicensed copies of software programs and manuals for sale on an organised large-scale basis,”⁴³ whereas the third party was “a self-admitted [retail] dealer in pirated computer products.”⁴⁴

21 Even in the case of an employer–employee or principal–agent relationship, the employer or principal (the alleged authoriser) does not possess any authority whatsoever that he can possibly grant to the employee or agent (third party) to commit the underlying act of infringement, for the same reason (because he is neither a true “principal” who is capable of granting actual authority nor the owner of copyright). In any event, there is no need for the copyright owner to rely on authorising infringement as a statutory cause of action against the employer or principal, since the infringing acts of the employee or agent are, at common law, generally referable to the former (for instance, under the doctrine of vicarious liability or the principles of agency law), who must assume or accept copyright liability on their behalf.⁴⁵

and s 1(2) of the UK Copyright Act 1911 (c 46)), it is apparent that the owner of copyright in a work is the *only person* who has the power (exclusive right) to authorise – whether in his capacity as the copyright owner or a principal in whom actual authority, which is capable of being granted, resides – some other third party to do any act comprised in the copyright. Section 13(1) of the Australian Copyright Act 1905 (Act No 25 of 1905) (Cth) reads: “*The copyright in a book means the exclusive right to do, or authorise another person to do, all or any of the following things in respect of it.*” [emphases added]

40 See, eg, *CBS Songs Ltd v Amstrad Consumer Electronics plc* [1988] AC 1013; *Sony Corp of America v Universal City Studios Inc* 464 US 417 (1984); and *Australian Tape Manufacturers Association Ltd v Commonwealth* (1993) 176 CLR 480.

41 See, eg, *University of New South Wales v Moorhouse* (1975) 133 CLR 1; *Metro-Goldwyn-Mayer Studios Inc v Gokster Ltd* 545 US 913 (2005); *Universal Music Australia Pty Ltd v Sharman License Holdings Ltd* (2005) 220 ALR 1; *Twentieth Century Fox Film Corp v Newzbin Ltd* [2010] FSR 21; and *Dramatico Entertainment Ltd v British Sky Broadcasting Ltd* [2012] EWHC 268 (Ch).

42 [1997] 2 SLR(R) 113 (CA). See, in particular, [35], which is cited in n 39 above.

43 *Ong Seow Pheng v Lotus Development Corp* [1997] 2 SLR(R) 113 (CA) at [5].

44 *Ong Seow Pheng v Lotus Development Corp* [1997] 2 SLR(R) 113 (CA) at [7].

45 *University of New South Wales v Moorhouse* (1975) 133 CLR 1 at 20, per Jacobs J: “It is established that the word [‘authorise’] is not limited to the authorising of an agent by a principal. Where there is such an authority *the act of the agent is the act* (cont’d on the next page)

22 Whether or not the alleged authoriser *purports* to possess such authority depends on whether, in the eyes of the third-party infringer, the former *appears* to have such authority (like a form of “holding out”, where the defendant gives the impression that he is possessed of authority) – for example, by applying the principles of agency law, upon proof of the defendant’s apparent or ostensible authority (which is again most unlikely because this would require proof of some form of representation *emanating from the copyright owner* that the alleged authoriser had the authority to grant to the third party the right to do the act complained of).⁴⁶ Alternatively, the alleged authoriser may *appear* to possess such authority if he, through his conduct, intentionally or deliberately sets out to encourage, induce or incite the third party to commit copyright infringement. Yet, one is repeatedly reminded in the case law that this act alone does not amount to an authorisation.⁴⁷ If this highly restrictive and narrow judicial interpretation of the word “authorise” (according to the manner in which it is explained in this article) is accepted as correct, then what sort

of the principal and thus the principal himself may be said to do the act comprised in the copyright. But authorisation is wider than authority.” [emphasis added]

46 See, eg, *Freeman & Lockyer v Buckhurst Park Properties (Mangal) Ltd* [1964] 2 QB 480; and *Sigma Cable Co (Pte) Ltd v NEI Parsons Ltd* [1992] 2 SLR(R) 403. See also *RecordTV Pte Ltd v MediaCorp TV Singapore Pte Ltd* [2011] 1 SLR 830 at [48]: “[T]he reference to RecordTV [the alleged authoriser] having obtained all the necessary licences from the Infocomm Development Authority of Singapore (‘IDA’) and [the Media Development Authority of Singapore (‘MDA’)] did not and could not mean that RecordTV had obtained the requisite authority from MediaCorp [the copyright owner] to authorise the copying and/or the communication to the public of the MediaCorp shows. It was *MediaCorp’s* approval, not IDA’s and/or MDA’s, which mattered, since copyright in the MediaCorp shows vested in MediaCorp, and not IDA and/or MDA. [emphasis in original]” It is trite law that in an agency relationship, a third party (that is, the primary infringer) cannot – no matter how misguided he may be – rely upon the representation of the agent (that is, the alleged authoriser) as to his actual authority. The representation must emanate from the principal himself (that is, the copyright owner). In the event that the third-party infringer misguidedly relies upon the representation of the alleged authoriser as to his actual authority and proceeds to infringe copyright, then the third-party infringer’s only recourse is against the alleged authoriser for breach of warranty of authority. This possibility was canvassed by Gummow and Hayne JJ in the context of the alleged authoriser–third party relationship in their joint judgment in *Roadshow Films Pty Ltd v iiNet Ltd* (2012) 286 ALR 466 at [123]. On the subject of breach of warranty of authority, see Peter Watts & F M B Reynolds, *Bowstead and Reynolds on Agency* (Sweet & Maxwell, 19th Ed, 2010) at para 9-060 ff.

47 See, eg, *CBS Inc v Ames Records & Tapes Ltd* [1982] Ch 91; *CBS Songs Ltd v Amstrad Consumer Electronics plc* [1988] AC 1013; and *Ong Seow Pheng v Lotus Development Corp* [1997] 2 SLR(R) 113 (CA). However, *contra Universal Music Australia Pty Ltd v Sharman License Holdings Ltd* (2005) 220 ALR 1; *Metro-Goldwyn-Mayer Studios Inc v Grokster Ltd* 545 US 913 (2005); and *Dramatico Entertainment Ltd v British Sky Broadcasting Ltd* [2012] EWHC 268 (Ch).

of conduct on the defendant's part will ever amount to a purported grant of authority (hence an authorisation) in law?⁴⁸

23 Apart from the foregoing arguments, the definition of a "grant or purported grant" of authority to a third party to do the act complained of may be difficult to apply in practice, in light of the Canadian Supreme Court's cautionary remarks that "[c]ourts should presume that a person who authorises an activity does so only so far as it is in accordance with the law".⁴⁹

24 The authors are therefore of the view that Lord Templeman in *Amstrad*, by endorsing Atkin LJ's formulation of a "grant or purported grant", could *not* have intended the scope of that expression to apply within the realm of agency law only.⁵⁰ In other words, in applying the definition of a "grant or purported grant", it would be wrong for a court to ask whether the defendant had conferred (or purported to confer) authority on a third party *in the latter's capacity as an agent*. As Jacobs J rightly pointed out in *University of New South Wales v Moorhouse* ("*Moorhouse*"):⁵¹

It is established that the word ['authorise'] is not limited to the authorising of an agent by a principal. Where there is such an authority the act of the agent is the act of the principal and thus the principal himself may be said to do the act comprised in the copyright. *But authorisation is wider than authority.* [emphasis added]

48 Interestingly, Arnold J in *Dramatico Entertainment Ltd v British Sky Broadcasting Ltd* [2012] EWHC 268 (Ch) had no difficulty in reaching the conclusion (at [81]) that the alleged authoriser in this case (that is, the operators of "The Pirate Bay", a well-known peer-to-peer file-sharing website) had purported to grant to its users the right to do the acts complained of, notwithstanding that all (or, at least, a vast majority of) its users *clearly knew* that the alleged authoriser was *in no position* to grant them the right to make infringing copies. See further Hugh Laddie, Peter Prescott & Mary Vitoria, *The Modern Law of Copyright and Designs* (Butterworths, 3rd Ed, 2000) at para 39.17: "It is submitted that the reference to granting or purporting to grant the right to do something cannot properly be construed as a reference to the purported grant of the 'right' to use the copyright work, for this does not occur where both parties know perfectly well that a piratical use is intended, yet in such cases liability clearly arises."

49 *CCH Canadian Ltd v Law Society of Upper Canada* [2004] 1 SCR 339 at [38].

50 Indeed, Judith Prakash J in the Singapore High Court was of the view that "[i]n the case of copyright infringement, such a restrictive definition of 'authorise' [as adopted by the House of Lords in *Amstrad*] can lead to unjust results" (*Lotus Development Corp v Ong Seow Pheng* [1996] 2 SLR(R) 514 at [29]). See also Hugh Laddie, Peter Prescott & Mary Vitoria, *The Modern Law of Copyright and Designs* (LexisNexis, 4th Ed, 2011) at para 19.5 where the learned authors submit that the notion of a "grant or purported grant" is *not* "the same as purporting to grant a licence under a copyright or other right" and that "the alleged authoriser does not have to purport to be in a position to grant such a licence".

51 (1975) 133 CLR 1 at 20.

25 This view is further fortified by the manner in which the notion of “authorisation” in copyright infringement actions has evolved historically. It will be recalled that prior to the introduction of the word “authorise” in section 1(2) of the UK Copyright Act 1911,⁵² a defendant could only be held liable for “causing” (a formulation that was used in prior legislation) an infringement committed by a third party in situations involving employment or *agency*,⁵³ and that the effect of the amendment (in substituting the word “authorise” for “cause”) was precisely to remedy this limiting deficiency in the legislation. If the formulation of a “grant or purported grant” were to be interpreted and applied within the strict confines of agency principles, this would certainly run counter to the legislative intent then prevailing.⁵⁴

26 Another perspective has been offered by the learned authors, Laddie, Prescott and Vitoria, who have sought to explain the *Amstrad* approach thus:⁵⁵

As was stated in [*Amstrad Consumer Electronics plc v British Phonographic Industry Ltd* [1986] FSR 159], the *very essence* of a grant or a purported grant is that the grantor has some degree of *actual or apparent right to control* the relevant actions of the grantee and it is this element of control which is *determinative*. [emphases added; original citations omitted]

It may well be that the notion of a “grant or purported grant” as the alternative definition for the word “authorise” has nothing to do with accepted principles of agency law, and instead, is nothing more than a reflection or restatement of the element of “control”.⁵⁶ Nevertheless, as will be explained below, the element of “control” – *viz*, whether the defendant retains the ability or power to control the use to which the copying technology is put by other third parties – is ultimately artificial and illusory in character and hence should not be relied upon, at least in the first instance, in the determination of authorisation liability.⁵⁷

27 If, indeed, the element of “control” were truly “determinative” of authorisation, then it may be asked why recent English first-instance decisions that dealt with this very issue had judges – who were clearly

52 c 46.

53 See, eg, *Karno v Pathé Frères Ltd* (1909) 100 LT 260, as well as n 15 above.

54 See the discussion at Part II above.

55 Hugh Laddie, Peter Prescott & Mary Vitoria, *The Modern Law of Copyright and Designs* (LexisNexis, 4th Ed, 2011) at para 19.4.

56 See, eg, Slade LJ’s remarks in *Amstrad Consumer Electronics plc v British Phonographic Industry Ltd* [1986] FSR 159 at 211: “The very essence of a grant or purported grant of this nature is that the grantor has some degree of actual or apparent right to control the relevant actions of the grantee”. See also *CBS Songs Ltd v Amstrad Consumer Electronics plc* [1988] AC 1013 at 1054.

57 See the discussion in paras 69–78 below.

bound by the *Amstrad* precedent – all refer, in their respective judgments, to factors beyond that of “control” in the determination of authorisation liability?⁵⁸ These were all factors that closely mirrored those found in sections 36(1A) and 101(1A) of the Australian Copyright Act 1968,⁵⁹ provisions that had codified Gibbs J’s dicta in the *Moorhouse* decision.⁶⁰ It will be further explained below that Gibbs J’s dicta – on control, actual/constructive knowledge of underlying infringement and the taking of reasonable steps to prevent or limit infringement – were all made in the context of his Honour’s endorsement of the broader, dictionary meaning of the word “authorise” (*viz*, “sanction, approve, countenance”), and not upon the narrower *Amstrad* formulation of a “grant or purported grant”. To exacerbate matters further, their Lordships in these first-instance decisions then arrived at their respective conclusions on the issue of authorisation by categorically applying *both* the *Amstrad* and *Moorhouse* approaches.⁶¹ This is indeed a troubling development to which the reader’s attention must now turn.

C. Conflating the two approaches

28 Thus far, two generally accepted definitions for the word “authorise” have been uncovered in the case law: “sanction, approve, countenance” or “to grant or purport to grant”.

58 See, *eg*, *Twentieth Century Fox Film Corp v Newzbin Ltd* [2010] FSR 21 at [90]; and *Dramatico Entertainment Ltd v British Sky Broadcasting Ltd* [2012] EWHC 268 (Ch) at [74] *ff*.

59 Sections 36(1A) and 101(1A) of the Australian Copyright Act 1968 (Act No 63 of 1968) (Cth) set out a non-exhaustive list of factors that courts in Australia must have recourse to when determining the issue of authorising infringement:

- (a) the extent (if any) of the person’s power to prevent the doing of the act concerned;
- (b) the nature of any relationship existing between the person and the person who did the act concerned; and
- (c) whether the person took any other reasonable steps to prevent or avoid the doing of the act, including whether the person complied with any relevant industry codes of practice.

60 See *University of New South Wales v Moorhouse* (1975) 133 CLR 1 at 13:

It seems to me to follow from these statements of principle that a person who has *under his control* the means by which an infringement of copyright may be committed – such as a photocopying machine – and who makes it available to other persons, *knowing, or having reason to suspect*, that it is likely to be used for the purpose of committing an infringement, and omitting to take *reasonable steps to limit its use to legitimate purposes*, would authorise any infringement that resulted from its use. [emphases added]

61 *Twentieth Century Fox Film Corp v Newzbin Ltd* [2010] FSR 21 at [102]; *Dramatico Entertainment Ltd v British Sky Broadcasting Ltd* [2012] EWHC 268 (Ch) at [81].

29 In the Singapore context, the *Amstrad* formulation has been endorsed by the Court of Appeal in two important local decisions.⁶² In *RecordTV Pte Ltd v MediaCorp TV Singapore Pte Ltd*⁶³ (“*RecordTV*”), for example, it is noteworthy that after the court had considered and applied the *Amstrad* definition, it proceeded to examine four “authorisation liability factors”, which, in its view, “courts ought to take into account in determining whether authorisation to do an act comprised in the copyright has been granted illegitimately”.⁶⁴ These four “authorisation liability factors” are:⁶⁵

- (a) whether the alleged authoriser had control over the means by which copyright infringement was committed and, hence, a power to prevent such infringement (‘the first authorisation liability factor’);
- (b) the nature of the relationship (if any) between the alleged authoriser and the actual infringer (‘the second authorisation liability factor’);
- (c) whether the alleged authoriser took reasonable steps to prevent or avoid copyright infringement (‘the third authorisation liability factor’); and
- (d) whether the alleged authoriser had actual or constructive knowledge of the occurrence of copyright infringement and/or the likelihood of such infringement occurring (‘the fourth authorisation liability factor’).

30 It appears that the “authorisation liability factors” articulated in *RecordTV* mirror very closely the remarks made by Gibbs J in the *Moorhouse* decision⁶⁶ as well as the three factors enumerated in

62 *Ong Seow Pheng v Lotus Development Corp* [1997] 2 SLR(R) 113; *RecordTV Pte Ltd v MediaCorp TV Singapore Pte Ltd* [2011] 1 SLR 830.

63 [2011] 1 SLR 830.

64 [2011] 1 SLR 830 at [50]. Cf the rather similar approach adopted by Kitchin J in *Twentieth Century Fox Film Corp v Newzbin Ltd* [2010] FSR 21 at [90]: “In my judgment it is clear from this passage that ‘authorise’ means the grant or purported grant of the right to do the act complained of. It does not extend to mere enablement, assistance or even encouragement. The grant or purported grant to do the relevant act may be express or implied from all the relevant circumstances. In a case which involves an allegation of authorisation by supply, these circumstances may include the nature of the relationship between the alleged authoriser and the primary infringer, whether the equipment or other material supplied constitutes the means used to infringe, whether it is inevitable it will be used to infringe, the degree of control which the supplier retains and whether he has taken any steps to prevent infringement. These are matters to be taken into account and may or may not be determinative depending upon all the other circumstances” (see also [102]). Cf further Arnold J’s judgment in *Dramatico Entertainment Ltd v British Sky Broadcasting Ltd* [2012] EWHC 268 (Ch) at [73]–[81].

65 *RecordTV Pte Ltd v MediaCorp TV Singapore Pte Ltd* [2011] 1 SLR 830 at [50].

66 *University of New South Wales v Moorhouse* (1975) 133 CLR 1 at 13, and see n 60 above.

sections 36(1A) and 101(1A) of the Australian Copyright Act 1968.⁶⁷ However, it is worth pointing out that Gibbs J's approach to authorisation liability (which was apparently codified by the passing of the Australian Copyright Amendment (Digital Agenda) Act 2000 that introduced sections 36(1A) and 101(1A) of the Copyright Act 1968)⁶⁸ was premised on his Honour's adoption of the broader dictionary definition of the word "authorise" – that is, "sanction, approve, countenance".⁶⁹

31 Herein lies the possibility of resulting confusion in the Singapore law on authorisation liability. Whilst it is true that the Court of Appeal in *RecordTV* had unreservedly endorsed the narrower *Amstrad* definition of a "grant or purported grant", it did not *expressly and unequivocally reject* the alternative, dictionary meaning of "sanction, approve, countenance" altogether (and, for that matter, neither did Lord Templeman in *Amstrad*).⁷⁰ Instead, the Court of Appeal went on to examine four "authorisation liability factors", which were formulated and considered in the specific context of the broader, Australian approach, thereby suggesting an *implicit endorsement* by the Court of Appeal of the *Moorhouse* definition and approach. The authors therefore suggest, with respect, that the *RecordTV* decision has introduced yet another dimension of uncertainty in the law on authorisation liability in Singapore.⁷¹

32 It seems logical that the copyright statute in Australia mandates judicial consideration of the factors in sections 36(1A) and 101(1A) of the Copyright Act 1968⁷² in the determination of authorisation liability, since its law on authorising infringement has all along developed

67 Act No 63 of 1968 (Cth). See n 59 above.

68 Copyright Amendment (Digital Agenda) Act 2000 (Act No 110 of 2000) (Cth) (Aust). It seems clear that the intention then behind introducing sections 36(1A) and 101(1A) in the Australian Copyright Act 1968 (Act No 63 of 1968) (Cth) was to elucidate, rather than to vary, the pre-existing case law on authorisation – see *Universal Music Australia Pty Ltd v Sharman License Holdings Ltd* (2005) 220 ALR 1 at [402] and *Roadshow Films Pty Ltd v iiNet Ltd* (2012) 286 ALR 466 at [22] and [52].

69 See *University of New South Wales v Moorhouse* (1975) 133 CLR 1 at 12.

70 See *Lotus Development Corp v Ong Seow Pheng* [1996] 2 SLR(R) 514 (HC) at [31].

71 As did Kitchin J (and probably more so) in the English High Court in *Twentieth Century Fox Film Corp v Newzbin Ltd* [2010] FSR 21, where his Lordship, in coming to his conclusion, made a finding of authorisation thus (at [102]): "For all these reasons I am entirely satisfied that a reasonable member would deduce from the defendant's activities that it *purports to possess the authority to grant any required permission* to copy any film that a member may choose from the Movies category on Newzbin and that the defendant has *sanctioned, approved and countenanced* the copying of the claimants' films" [emphases added]. To similar effect, see Arnold J's judgment in *Dramatico Entertainment Ltd v British Sky Broadcasting Ltd* [2012] EWHC 268 (Ch) at [81] (cited in n 73 below).

72 Act No 63 of 1968 (Cth) (Aust).

jurisprudentially on the basis of the *broader* (pro-liability) definition of “sanction, approve, countenance”. It would certainly be unwise for any Australian court to construe a statutory provision in such a manner as to confer any greater protection than a copyright owner truly deserves, particularly as regards the more controversial action for authorising infringement. However, if the notion of authorisation were to be perceived through the lens of the much *narrower* definition endorsed in *Amstrad* (and there appears to be some judicial support, albeit implicit, for the view that the *Amstrad* approach is narrower than the *Moorhouse* approach),⁷³ one wonders how necessary and relevant it is for a court to have further recourse to the “authorisation liability factors” articulated in *RecordTV*. In other words, if a court is indeed satisfied after applying the *Amstrad* formulation, that the defendant did *not* possess or purport to possess any authority to grant to a third party the right to do the act complained of (as the Court of Appeal in *RecordTV* was), can authorisation liability nevertheless arise upon the court’s further consideration of the four “authorisation liability factors”? It therefore seems that such factors will only come into play in a meaningful way when a court adopts – as part of the overall approach for determining authorisation liability – the broader, dictionary meaning of “sanction, approve, countenance” for the word “authorise”, and *not* when the *Amstrad* formulation is employed.

D. *The authors’ view of the meaning of “authorise”*

33 Which approach, therefore, should one adopt? Ultimately, the decision may just boil down to a matter of perspective. A court that endorses a pro-liability view of authorisation will probably adopt the broader, dictionary definition of “sanction, approve, countenance” and correspondingly apply the *Moorhouse* approach, whereas the converse is true for the narrower *Amstrad* approach, which adopts the formulation of a “grant or purported grant”. On occasion, applying either standard to the same set of facts may well yield the same outcome.⁷⁴ Yet, on other occasions, applying the same standard (namely, “sanction, approve,

73 As to which, see Arnold J’s judgment in *Dramatico Entertainment Ltd v British Sky Broadcasting Ltd* [2012] EWHC 268 (Ch) at [81]: “In my judgment, the operators of [The Pirate Bay] do authorise its users’ infringing acts of copying and communication to the public. They go far beyond merely enabling or assisting. *On any view, they ‘sanction, approve and countenance’* the infringements of copyright committed by its users. *But in my view they also purport to grant users the right to do the acts complained of* [without saying why this is so or explaining what the expression ‘purport to grant’ actually means].” [emphases added]

74 Eg, *RecordTV Pte Ltd v MediaCorp TV Singapore Pte Ltd* [2011] 1 SLR 830; *Twentieth Century Fox Film Corp v Newzbin Ltd* [2010] FSR 21; *Dramatico Entertainment Ltd v British Sky Broadcasting Ltd* [2012] EWHC 268 (Ch).

countenance”) in two separate cases but on facts that were almost indistinguishable, yielded contrasting results.⁷⁵

34 Be that as it may, having two possible meanings for the word “authorise” does not conduce towards certainty in the law. Given the vagaries and ambiguities surrounding the interpretation of the *Amstrad* formulation that the authors have sought to underscore in the discussion above (exacerbated only by the manner in which recent decisions have unwittingly conflated the two approaches), it would be argued that the definition of a “grant or purported grant” for the word “authorise” be jettisoned in favour of its dictionary meaning of “sanction, approve, countenance”.⁷⁶

35 Despite the criticisms that have been levelled at Bankes LJ’s formulation of “sanction, approve, countenance” (which is actually in keeping with the legislative intent then prevailing, to adopt a more expansive interpretation of “authorisation”), its perceived breadth would ultimately be circumscribed by the court having regard, almost as a matter of course, to a non-exhaustive list of factors – such as those that appear in sections 36(1A) and 101(1A) of the Australian Copyright Act 1968.⁷⁷ Given the characteristic flexibility of the common law system, however, it is not imperative that there be similar legislative intervention elsewhere in introducing factors akin to those found in the Australian Act, as the Singapore experience has clearly shown.⁷⁸

36 In summary, it is submitted that the phrase “sanction, approve, countenance” provides a better *working definition* for the word “authorise”, and as alluded to earlier, courts should eschew any attempt at defining the word “authorise” with any degree of semantic precision. Indeed, one might even go further to assert that the terminology selected for the word “authorise” amounts in the end to nothing more than *convenient labels* to be used, especially in combination with a non-exhaustive list of factors (which will be examined in the next

75 Contrast *University of New South Wales v Moorhouse* (1975) 133 CLR 1 with *CCH Canadian Ltd v Law Society of Upper Canada* [2004] 1 SCR 339.

76 See the earlier discussion in paras 9–12 above.

77 Act No 63 of 1968 (Cth). These factors have all been considered to be relevant by the courts in Singapore (*RecordTV Pte Ltd v MediaCorp TV Singapore Pte Ltd* [2011] 1 SLR 830 at [50]), Canada (*CCH Canadian Ltd v Law Society of Upper Canada* [2004] 1 SCR 339 at [38]) and the UK (*Twentieth Century Fox Film Corp v Newzbin Ltd* [2010] FSR 21 at [90]; *Dramatico Entertainment Ltd v British Sky Broadcasting Ltd* [2012] EWHC 268 (Ch) at [73]–[74]).

78 See *RecordTV Pte Ltd v MediaCorp TV Singapore Pte Ltd* [2011] 1 SLR 830 at [50] where V K Rajah JA opined that courts in Singapore ought to take into account four “authorisation liability factors” when determining the question of authorisation liability.

section),⁷⁹ to guide the court in answering the overarching question as to whether the conduct of the alleged authoriser justifies an inference of authorisation. This is ultimately a question of fact and is dependent on an objective assessment of all the relevant circumstances.

IV. Factors to consider in determining authorisation liability

37 Since the question of authorisation is ultimately one of fact, the list of interrelated factors contained in sections 36(1A) and 101(1A) of the Australian Copyright Act 1968⁸⁰ as well as those articulated in case law (for example, *RecordTV's* “authorisation liability factors”) – namely, the element of control, the relationship between the parties as well as knowledge of underlying infringing activity and hence the ability to take reasonable steps to prevent or avoid infringement – will all be relevant in the overall determination of authorisation liability. Their importance and place in the law on authorising infringement cannot be overemphasised. Obviously, proving one or even a majority of these factors in either the alleged authoriser’s or the copyright owner’s favour will not necessarily be decisive,⁸¹ since other factors may also be relevant in the particular circumstances of the case.

38 As the class of factors to which a court may have recourse is not closed, it is suggested that in addition to those already spelt out in both statute and case law, courts should further examine other (perhaps even more important) factors – such as the “state of mind” of the alleged authoriser, which, in the authors’ view, should actually be considered by the courts in the very first instance. It is to this, therefore, that the article now turns.

A. State of mind of the alleged authoriser

39 It is true that copyright statutes, in the respective provisions on authorisation liability, are generally silent as to the need for some mental

79 See *Roadshow Films Pty Ltd v iiNet Ltd* (2012) 286 ALR 466 at [68]: “In both the United Kingdom and Canada, it has been observed that some of the meanings of ‘countenance’ are not co-extensive with ‘authorise’. ... Such meanings are remote from the reality of authorisation which the statute contemplates. The argument highlights the danger in placing reliance on one of the synonyms for ‘authorise’ to be found in a dictionary. *Whilst resort to such meanings may have been necessary in the past, attention is now directed in the first place to s 101(1A)* [of the Copyright Act 1968 (Act No 63 of 1968) (Cth) (Aust)]. That provision is intended to inform the drawing of an inference of authorisation by reference to the facts and circumstances there identified, and recourse must be had to it. That is an express requirement.” [emphasis added]

80 Act No 63 of 1968 (Cth).

81 See *RecordTV Pte Ltd v MediaCorp TV Singapore Pte Ltd* [2011] 1 SLR 830 at [50].

element on the part of the defendant. However, it appears from the case law that some degree of knowledge on the defendant's part, as well as the defendant's intentions and motives, are indeed relevant for the purposes of establishing whether his conduct justifies an inference of authorisation. As a matter of logic and common sense, how can a defendant be said to have authorised the doing of an activity if the defendant had no knowledge whatsoever of the nature of the underlying activity (or of what the activity entailed)?

40 As Gibbs J pointed out in *Moorhouse*:⁸²

[T]he word 'authorise' connotes a mental element and it could not be inferred that a person had, by mere inactivity, authorised something to be done if he neither *knew nor had reason to suspect* that the act might be done. [emphases added]

In other words, if inactivity or indifference on the defendant's part may, under certain circumstances, justify an inference of authorisation, then this must be on the basis of the defendant's possession of either actual or constructive knowledge of the occurrence of copyright infringement to which the defendant has decided to turn a blind eye. It was also recognised by Wilcox J in *Universal Music Australia Pty Ltd v Sharman License Holdings Ltd* ("*Kazaa*") that, although not a statutory requirement, "[k]nowledge, or lack of knowledge, is an important factor in determining whether a person has authorised an infringement".⁸³

41 Likewise, Kitchin J, in finding liability in *Twentieth Century Fox Film Corp v Newzbin Ltd* ("*Newzbin*"), engaged in a lengthy and detailed discussion of the defendant's state of mind (regarding the defendant's knowledge of infringing material that had been made available through the Newzbin website).⁸⁴ In so far as Singapore is concerned, the "fourth authorisation liability factor" articulated by the Court of Appeal in *RecordTV* specifically makes reference to "whether the alleged authoriser had actual or constructive knowledge of the occurrence of copyright infringement and/or the likelihood of such infringement occurring".⁸⁵

82 *University of New South Wales v Moorhouse* (1975) 133 CLR 1 at 12–13.

83 (2005) 220 ALR 1 at [370].

84 [2010] FSR 21 at [65]–[78]. At [78], Kitchin J said: "In light of all the foregoing, the structure of Newzbin, the categorisation of content and the encouragement given to editors to report films, I have no doubt that the defendant *is and has been aware* for very many years that the vast majority of films in the Movies category of Newzbin are commercial and so very likely to be protected by copyright, and that members of Newzbin who use its NZB facility to download those materials, including the claimants' films, are infringing that copyright." [emphasis added]

85 *RecordTV Pte Ltd v MediaCorp TV Singapore Pte Ltd* [2011] 1 SLR 830 at [50].

42 Apart from knowledge, the other mental element to which the courts have paid attention is that of intention (or the motives of the defendant). For example, Arnold J in *Dramatico Entertainment Ltd v British Sky Broadcasting Ltd* (“*The Pirate Bay*”) was particularly swayed by the following consideration: “Infringement is not merely an inevitable consequence of the provision of torrent files by [The Pirate Bay (‘TPB’)]. It is the operators of TPB’s *objective and intention*” [emphasis added].⁸⁶ Similarly, Prakash J was also mindful of the unspoken intent of the defendant copyright pirate in *Lotus Development Corp v Ong Seow Pheng* where her Honour (who was overturned on appeal but with whom we are in agreement) reached a finding of liability in the following terms:⁸⁷

In these circumstances to allow the defendants to escape the full consequences of their breaches of the plaintiffs’ copyright by agreeing that they did not authorise the duplication of the programmes [*sic*] that they supplied simply because their customers knew that they were pirates would be wrong. I was satisfied the defendants did authorise such copying because when they sold the programmes [*sic*] they did so with the *intention* that the same would be copied. [emphasis added]

43 There is therefore judicial support for the view that the state of mind of the alleged authoriser – be it knowledge, intention or motives – must, at the very least, be a relevant consideration in the overall analysis of authorisation liability. In the authors’ view, it ought to be the *foremost* factor to which courts should have regard.

44 To further substantiate the argument that the state of mind of the alleged authoriser is of paramount importance in the law on authorising infringement, it is apposite at this juncture to briefly consider the established jurisprudence at common law concerning joint and several liability in tort. It is trite learning that the intention or motives of the defendant play a critical (and often determinative) role in a court’s finding of joint and several liability – arising, for example, from joint tortfeasorship or procuring an infringement of an intellectual property (“IP”) right (whether by inducement, incitement or persuasion).⁸⁸ For example, the notion of joint tortfeasorship can only be established where the joint tortfeasor had acted in concert with the primary tortfeasor pursuant to a *common design*.

86 [2012] EWHC 268 (Ch) at [78].

87 [1996] 2 SLR(R) 514 (HC) at [29].

88 As to the latter, see *CBS Songs Ltd v Amstrad Consumer Electronics plc* [1988] AC 1013 at 1057–1058; *MCA Records Inc v Charly Records Ltd* [2002] FSR 26; and *Twentieth Century Fox Film Corp v Newzbin Ltd* [2010] FSR 21. An examination of the law on joint liability in tort is beyond the scope of this article.

45 The question that naturally arises is whether, in so far as the state of mind of the defendant is concerned, such an analogy between authorising infringements of copyright (which is a statute-based tort) and joint tortfeasorship (as well as other related doctrines) at common law is at all sound. Indeed it is, because authorisation liability under the statute concerns not direct or primary copyright liability but *indirect or accessory* liability – where, at common law, the mental state of the defendant plays an important role in establishing liability.⁸⁹ Therefore, notwithstanding that the statute does not prescribe a mental requirement for the alleged authoriser, the authors are of the view that because there are commonalities between the common law actions giving rise to joint and several liability in tort and the concept of authorisation under the statute (these are all actions giving rise to *indirect or accessory* liability), the defendant’s state of mind is equally relevant and significant in establishing authorisation liability pursuant to the statutory regime.

46 Indeed, it is possible to draw further lessons from similar developments in other areas of IP law. For example, there is a concept of indirect or contributory infringement under the UK patent regime whereby a defendant is alleged to have facilitated or contributed to the underlying act of patent infringement by knowingly supplying the means for infringement. According to section 60(2) of the UK Patents Act 1977⁹⁰ (which has no equivalent in Singapore’s Patents Act 1994):⁹¹

[A] person (other than the proprietor of the patent) also infringes a patent for an invention if, while the patent is in force and without the consent of the proprietor, he supplies or offers to supply in the United Kingdom a person other than a licensee or other person entitled to work the invention with any of the means, relating to an essential element of the invention, for putting the invention into effect when he *knows, or it is obvious to a reasonable person in the circumstances*, that those means are suitable for putting, and are intended to put, the invention into effect in the United Kingdom. [emphasis added]

47 It is clear that indirect or contributory infringement (as opposed to direct or primary infringement where liability is absolute or strict) can only arise under the patent regime in the UK, where the defendant possesses either actual or constructive knowledge. This again

89 Cf joint tortfeasorship, conspiracy and other related doctrines, as well as the notion of abetment in criminal law.

90 c 37.

91 Patents Act 1994 (Act 21 of 1994). See also s 60(3) of the UK Patents Act 1977 (c 37): “[Section 60(2)] shall not apply to the supply or offer of a staple commercial product unless the supply or the offer is made *for the purpose of inducing* the person supplied or, as the case may be, the person to whom the offer is made to do an act which constitutes an infringement of the patent” [emphasis added].

demonstrates the significance of the knowledge requirement (or, more generally, the state of mind of the defendant) in the overall determination of indirect or accessory liability in IP law in general. Another good example in the Singapore context is section 27(5) of the Trade Marks Act,⁹² which provides:

[A] person who —

(a) applies a sign to any material used or intended to be used for labelling or packaging goods; or

(b) uses a sign on any document described in [section 27(4)(d)] or in advertising,

is deemed not to use the sign if, at the time of such application or use, he *does not know nor has reason to believe* that the proprietor or a licensee of the registered trade mark did not consent to such application or use of the sign. [emphasis added]

48 Finally, the common law concept of contributory liability in the US – requiring, *inter alia*, knowledge of, and material contribution to, the underlying act of infringement⁹³ – was transposed from patent law and applied in the context of *indirect* copyright infringement.⁹⁴ It is also noteworthy that the US courts almost invariably substitute the statutory notion of “authorisation” (contained in section 106 of the US Copyright Act)⁹⁵ with common law theories of contributory, vicarious, and now, inducement, liability.⁹⁶

49 It is therefore not entirely radical to propose that the statutory action for authorising infringement (which concerns *indirect or accessory* liability) be premised on like principles that are already well established in other areas of IP law or indeed at common law (such as those pertaining to joint and several liability in tort).

92 Cap 332, 2005 Rev Ed.

93 *Polygram International Publishing Inc v Nevada/TG Inc* 855 F Supp 1314 at 1320 (D Massachusetts, 1994).

94 See, eg, *Playboy Enterprises Inc v Russ Hardenburgh Inc* 982 F Supp 503 at 505 (ND Ohio, 1997); *Sega Enterprises Ltd v MAPHIA* 857 F Supp 679 at 686–687 (ND California, 1994); *Playboy Enterprises Inc v Frena* 839 F Supp 1552 at 1556 (MD Florida, 1993); *Cable/Home Communication Corp v Network Productions Inc* 902 F 2d 829 at 845 (11th Cir, 1990); *Sony Corp of America v Universal City Studios Inc* 464 US 417 at 442 (1984).

95 Copyrights 17 USC (US); Copyright Act of 1976 Pub L No 94-553, 90 Stat 2541 (1976).

96 Graeme W Austin, “Importing Kazaa – Exporting Grokster” (2006) 22 Santa Clara Computer & High Tech LJ 577 at 581 (see also footnotes 18 and 19 therein). See further Gummow J’s remarks in *WEA International Inc v Hanimex Corp Ltd* (1987) 17 FCR 274 at 285: “In [*Sony Corp of America v Universal City Studios Inc* 464 US 417 (1984)], whilst the Supreme Court referred to s 106 of the 1976 Act, which speaks of ‘authorisation’, it proceeded on the footing that s 106 imported the pre-existing [common law] doctrine of contributory infringement.”

50 Proceeding then on the basis that the defendant's mental state – be it knowledge, intention or motives – is a relevant and important facet of authorisation liability under the statute, what sort of evidence in that regard can possibly justify an inference of authorisation? This is where it may be helpful to turn to US jurisprudence on secondary or indirect copyright liability for guidance. Statutory reference is made to “authorisation” in section 106 of the US Copyright Act,⁹⁷ which provides for the right of the copyright owner “to do and to authorise” the doing of a list of acts that comprise the rights of the copyright owner. It is still a matter of some debate as to whether the word “authorise” in the US statute, which only appeared in the 1976 amendment, introduces an additional cause of action for primary or direct infringement, or actually codifies the common law doctrines of secondary or indirect infringement.⁹⁸ The congressional report appears to support the latter view, by stating that the “use of the phrase ‘to authorise’ is intended to avoid any questions as to the liability of contributory infringers”.⁹⁹ It is clear, however, that any such codification does not change the common law construct of secondary liability developed by the US courts. Crucially, it appears that the American courts (including the Supreme Court in *Metro-Goldwyn-Mayer Studios Inc v Grokster Ltd*¹⁰⁰ (“*Grokster*”)) invariably substitute the statutory concept of “authorisation” with common law theories of contributory, vicarious, and now, inducement, liability.¹⁰¹ It is suggested that the Singapore courts borrow and apply these US legal doctrines on secondary or indirect copyright liability in the local context (where relevant) for the purpose of *enhancing* the action for authorising infringement (which similarly concerns indirect or accessory liability), particularly when the Singapore legislature has seen fit to leave the word “authorise” undefined.

51 It will in due course be submitted that the doctrine of inducement (famously enunciated in *Grokster* is particularly relevant in cases involving more overt forms of conduct, where the evidence clearly reveals that there is a culpable or bad faith intent on the defendant's part to actively or purposefully induce or foster copyright infringement. For somewhat less overt forms of conduct, authorisation can still be inferred through the application of the *Sony Corp of America v Universal City Studios Inc* (“*Sony*”) doctrine (where the enquiry turns on the nature

97 Copyrights 17 USC (US); Copyright Act of 1976.

98 See *Subafilms Ltd v MGM-Pathé Communications Co* 24 F 3d 1088, 30 USPQ 2d (BNA) 1746 (9th Cir, 1994) (*en banc*), cert denied, 115 S Ct 512 (1994).

99 See the US House of Representatives Report No 1476 at p 61, reprinted in 1976 USCCAN at p 5674.

100 545 US 913 (2005).

101 See the discussion in Graeme W Austin, “Importing *Kazaa* – Exporting *Grokster*” (2006) 22 Santa Clara Computer & High Tech LJ 577 at 581 (see also fns 18 and 19 therein). See further Melville B Nimmer & David Nimmer, *Nimmer on Copyright* § 12.04[A] (Matthew Bender, Rev Ed) at para 12-71 *ff*.

and design of the copying device, technology or service and whether it is capable of “substantial non-infringing uses”¹⁰² or through asking whether the defendant’s conduct – to his knowledge – would inherently or inevitably cause or lead to the underlying infringement.

(1) *The doctrine of inducement (or inducing copyright infringement)*

52 A legacy of the US Supreme Court’s celebrated decision in *Grokster*, the inducement rule imposed indirect or contributory copyright liability where the copying device or technology (for example, peer-to-peer (“P2P”) file-sharing software) had been distributed by the defendant “with the *object* of *promoting* its use to infringe copyright, as shown by clear expression or other affirmative steps taken to *foster* infringement” [emphases added].¹⁰³ The defendants in *Grokster* were held liable for the resulting acts of infringement committed by their users on the basis of the following: the defendants were actively soliciting infringing users (for instance, former Napster users); the defendants’ business model was premised on making profits from increased use of their software (especially infringing uses); and the defendants had failed to employ filtering technology so as to prevent or curtail (large-scale) infringement. There was therefore clear evidence in *Grokster* – to support liability based on an inducement theory – which showed that the defendants’ intention was to promote the distribution of a device that was suitable for (predominantly) infringing use, and that the defendants had acted with *culpable or bad faith intent* to further their objectives.¹⁰⁴

53 Likewise, where the evidence in any given case clearly reveals that the alleged authoriser had intentionally or deliberately set out to actively induce or foster copyright infringement, an inference of authorisation is more readily justified on the basis of the defendant’s *culpable or bad faith intent*, since the doctrine of inducement has been said to premise liability on “purposeful, culpable expression and conduct”.¹⁰⁵ In this regard, the inducement rule is necessarily at odds

102 464 US 417 at 442 (1984).

103 Per Souter J in *Metro-Goldwyn-Mayer Studios Inc v Grokster Ltd* 545 US 913 at 936–937 (2005).

104 As the US Supreme Court openly noted in *Metro-Goldwyn-Mayer Studios Inc v Grokster Ltd* (“*Grokster*”) 545 US 913 at 940 (2005): “The unlawful objective is unmistakable.” The defendants in *Grokster* were certainly not “innovator[s] ‘innocently’ developing a new technology which might inevitably spawn infringements in its wake” (Jane Ginsburg & Sam Ricketson, “Inducers and Authorisers: A Comparison of the US Supreme Court’s *Grokster* Decision and the Australian Federal Court’s *KaZaa* Ruling” (2006) 11 Media & Arts L Rev 1 at 17).

105 *Metro-Goldwyn-Mayer Studios Inc v Grokster Ltd* 545 US 913 at 937 (2005). See also the “LimeWire” decision in *Arista Records LLC v Lime Group LLC* 715 F Supp 2d 481 (cont’d on the next page)

with the line of cases in the UK and Singapore that repeatedly maintain that the bare act of encouraging, inducing or inciting a third party to commit copyright infringement does not, in the absence of a “grant or purported grant” of authority, amount to an authorisation.¹⁰⁶

54 This shift in emphasis in US jurisprudence from fixing indirect copyright liability based on a defendant’s “control” over, and ability to, supervise the infringing activities of other third parties (like in *A&M Records Inc v Napster Inc*¹⁰⁷ (“*Napster*”)) to one that is premised on the culpability of the defendant’s intentions or motives in purposefully inducing others to commit copyright infringement (like in *Grokster*), is indeed a timely development that ought to be welcomed. One suspects that such a shift in thinking could well have been a judicial response to the changing norms and practices of online providers or distributors of copying technology (all potential defendants), who must have seized upon the opportunities presented by the control-centric bias of the *Napster* and *Amstrad* decisions, and in attempting to circumvent the effect of those decisions, started to creatively design their online wares in a way that allowed them to divest themselves of control over the infringements committed by their users – for example, through highly sophisticated and decentralised systems of operation.

55 Indeed, the most illuminating justification for grounding authorisation liability in cases like *Kazaa*, *Newzbin* and *The Pirate Bay* – as revealed by the evidence in each of these cases – would have been on the basis of the doctrine of inducement (the *Grokster* standard),¹⁰⁸ rather than on the somewhat artificial and illusory element of “control” (which will be touched on again in greater detail below). For example, Wilcox J in *Kazaa* could have easily justified a finding of authorisation on the basis of the *Grokster* standard because the operators of the Kazaa system had, on their website, exhorted users (particularly younger users) to increase their illegitimate file-sharing and downloading activities and to

(SDNY, 2010); Kevin Garnett, Gillian Davies & Gwilym Harbottle, *Copinger and Skone James on Copyright* (Sweet & Maxwell, 16th Ed, 2011) at p 1107.

106 See *CBS Inc v Ames Records & Tapes Ltd* [1982] Ch 91 at 106; *CBS Songs Ltd v Amstrad Consumer Electronics plc* [1988] AC 1013 at 1054; *Ong Seow Pheng v Lotus Development Corp* [1997] 2 SLR(R) 113 (CA) at [34]; and *RecordTV Pte Ltd v MediaCorp TV Singapore Pte Ltd* [2011] 1 SLR 830 at [43].

107 239 F 3d 1004 (9th Cir, 2001).

108 See Arnold J’s judgment in *Dramatico Entertainment Ltd v British Sky Broadcasting Ltd* [2012] EWHC 268 (Ch) at [78]: “Infringement is not merely an inevitable consequence of the provision of torrent files by [The Pirate Bay (“TPB”)]. It is the operators of TPB’s *objective and intention*” [emphasis added]. It is not inconceivable that the *Metro-Goldwyn-Mayer Studios Inc v Grokster Ltd* (545 US 913 (2005)) standard would have also been satisfied on the facts of *Universal Music Australia Pty Ltd v Sharman License Holdings Ltd* (2005) 220 ALR 1 and *Twentieth Century Fox Film Corp v Newzbin Ltd* [2010] FSR 21.

defy the record companies (which they said was “cool” to do so) through their “Join the Revolution” campaign – thereby revealing, in the clearest possible terms, their culpable or bad faith intent.¹⁰⁹ On the other hand, *bona fide* online intermediaries – such as internet service providers (“ISPs”), which merely perform the role of a conduit in supplying customers with the means or facilities for online connection – have nothing to fear since it is trite that simply enabling, assisting or facilitating copyright infringement, without more, does not amount to evidence of authorisation.¹¹⁰

56 As alluded to above in the discussion of *Grokster*, it would also be far easier to justify an inference of authorisation on the basis of the inducement rule where the financial interests and business plan of the alleged authoriser, having supplied the means for infringement, depend on ever-increasing (rather than decreasing) volumes of infringing activity. For example, in *Kazaa*, the evidence revealed that high volumes of illegitimate file-sharing activities undertaken by online users were essential in boosting the advertising revenues of the operators of the Kazaa system.¹¹¹ Additionally, in *Cooper v Universal Music Australia Pty Ltd*¹¹² (“*Cooper*”), Branson J held that the financial benefits reaped by the alleged authoriser (Cooper) from sponsorship and advertisements on his website went towards establishing a sufficient *relationship* between Cooper and third-party internet users who were the primary infringers of copyright – since these internet users were attracted by Cooper’s website to download unauthorised music files and Cooper had a commercial interest in attracting users to his website for this purpose.¹¹³

109 See *Universal Music Australia Pty Ltd v Sharman License Holdings Ltd* (2005) 220 ALR 1 at [405]. Cf also the facts in *Dramatico Entertainment Ltd v British Sky Broadcasting Ltd* [2012] EWHC 268 (Ch).

110 For example, the Australian internet service provider (“ISP”), iiNet, was found not to have had any intention or desire to see any of the plaintiffs’ copyrights infringed in *Roadshow Films Pty Ltd v iiNet Ltd* (2012) 286 ALR 466 (HC) at [112]; (2011) 275 ALR 1 (Full Fed Ct) at [775]. This is also in line with the legislative thinking behind the statutory immunity accorded to ISPs through the safe harbour provisions in Part IXA of the Singapore Copyright Act (Cap 63, 2006 Rev Ed) – see, in particular, ss 193B and 193DA(5)(a). See also ss 39B and 112E and Division 2AA of Part V of the Australian Copyright Act 1968 (Act No 63 of 1968) (Cth).

111 See *Universal Music Australia Pty Ltd v Sharman License Holdings Ltd* (2005) 220 ALR 1 at [309] where it was acknowledged that “advertising was the life-blood of the Kazaa system”. The same is also true for the operators of the hugely popular peer-to-peer file-sharing website named “The Pirate Bay” – see *Dramatico Entertainment Ltd v British Sky Broadcasting Ltd* [2012] EWHC 268 (Ch) at [29]. Cf further the US common law doctrine of vicarious copyright liability.

112 (2006) 237 ALR 714 at [48].

113 The nature of any relationship – in *Cooper v Universal Music Australia Pty Ltd* (2006) 237 ALR 714, a *commercial* relationship – existing between the alleged authoriser and the primary infringer of copyright is one factor that the court must take into account in determining authorisation liability in Australia: see ss 36(1A)(b) and 101(1A)(b) of the Australian Copyright Act 1968 (Act No 63 of 1968) (cont’d on the next page)

- (2) *The Sony Corp of America v Universal City Studios Inc*¹¹⁴
doctrine – Whether the device, technology or service is capable of
“substantial non-infringing uses”

57 On the other hand, where there is no clear evidence of a culpable or bad faith intent on the defendant's part to actively induce or foster infringement, but the defendant has nevertheless designed and made available a device, technology or service that is capable of being used by others for infringing purposes (for instance, a twin-deck cassette tape recorder, the Betamax video cassette recorder, P2P file-sharing technology and so on), then it is, in the authors' view, perfectly relevant – in determining the question of authorisation – to examine the nature and design of the product or service in question and to ask whether it is also capable of “*substantial non-infringing uses*”.

58 The doctrine of “substantial non-infringing uses” (or the “staple article of commerce” doctrine), which, under US *patent* law, absolves the defendant from contributory infringement, was accepted by the US Supreme Court in *Sony* as a legitimate defence to an action for contributory *copyright* infringement.¹¹⁵ Although the doctrine of “substantial non-infringing uses” was applied in the *Sony* decision in the context of absolving the defendant from contributory copyright liability (“the *Sony* doctrine”), it is proposed that in the context of this article, the *Sony* doctrine can equally be applied in assessing the state of mind of the alleged authoriser, in so far as the action for authorising infringement is concerned.

59 In other words, it would be far easier to infer authorisation if the product or service designed and supplied by the defendant – to his knowledge (reflecting yet again the significance of the defendant's state of mind) – would subsequently be used by others either solely or predominantly for infringing purposes, even if the defendant had not purposefully sought to induce or foster copyright infringement. Conversely, an inference of authorisation is less likely where, according to the *Sony* doctrine, the defendant's product or service is indeed

1968) (Cth). Kenny J in the same case (at [150]) opined that there was a “relevant and direct” relationship between Cooper and the primary infringers of copyright.

114 464 US 417 (1984).

115 *Sony Corp of America v Universal City Studios Inc* 464 US 417 at 442 (1984): “[T]he sale of copying equipment, like the sale of other articles of commerce, does not constitute contributory infringement if the product is widely used for legitimate, unobjectionable purposes. Indeed, it need merely be capable of *substantial non-infringing uses*” [emphasis added]. On the facts, the majority of the US Supreme Court found that the Betamax video tape recorders were capable of “commercially significant non-infringing uses” (eg, the legitimate time-shifting of television broadcasts by home viewers) and hence Sony was not held liable for contributory copyright infringement.

capable of “substantial non-infringing uses”. It is suggested that the respective defendants in cases such as *Amstrad*, *iiNet* and *RecordTV* could well have availed themselves of the *Sony* doctrine, in defence of the action for authorising infringement.

- (3) *Whether the defendant’s conduct – to his knowledge – would inherently or inevitably cause or lead to the underlying infringement*

60 This is a variation of the *Sony* doctrine discussed above.¹¹⁶ Where the evidence does not clearly reveal that the defendant has purposefully set out to induce or foster copyright infringement, but the defendant’s conduct – to his knowledge – is such that it *inherently or inevitably causes or leads to* an underlying act of infringement, then this line of behaviour reflects a certain state of mind of the defendant that ought also to give rise to an inference of authorisation. In other words, not only is there a *causal* relationship between the alleged authorisation and the ensuing infringement,¹¹⁷ the defendant’s conduct must have had a *major influence on* or must have *materially contributed to* a third party’s *inevitable* decision to infringe copyright.

61 To better illustrate this argument, consider the Singapore Court of Appeal decision in *Ong Seow Pheng* and contrast it with the House of Lords decision in *Amstrad*. In *Ong Seow Pheng*, the defendant pirate (who sold infringing computer manuals and programs to a third-party dealer who, in turn, copied them) was not held liable for authorising the resulting infringements of copyright principally because the defendant – post-sale – had no “control” over the subsequent actions of the third party. The Court of Appeal relied heavily on Lord Templeman’s judgment in *Amstrad*, where his Lordship had decided that *Amstrad* did not grant or purport to grant third-party purchasers of their twin-deck cassette tape recorders the right to make infringing copies because *Amstrad* had no “control” over the use of those machines once they were sold.

62 There are material differences between these two cases that make them readily distinguishable from each other. It is true that in

116 Cf also Lord Templeman’s “bound to infringe” analogy articulated in *CBS Songs Ltd v Amstrad Consumer Electronics plc* [1988] AC 1013 at 1053, in reference to Tomlin J’s remarks in *Evans v E Hulton & Co Ltd* [1923–1928] MacG Cop Cas 51 at 60.

117 See Foster J’s judgment in *A & M Records Inc v Audio Magnetics Inc (UK) Ltd* [1979] FSR 1, where his Lordship expressed the view (at 9–10) that authorisation meant “sanctioning, express approval or countenancing of an actual breach of copyright by some act *directly related* to that breach, and involves some element of *causation*” [emphases added]. See also *RCA Corp v John Fairfax & Sons Ltd* [1982] RPC 91; *Cooper v Universal Music Australia Pty Ltd* (2006) 237 ALR 714.

both cases, the alleged authoriser – post-sale – had no “control” over what a third-party infringer would do with, respectively, the infringing computer program and manuals,¹¹⁸ and the twin-deck cassette tape recorder.¹¹⁹ However, that is the extent of the overlap,¹²⁰ and the differences are discussed below.

63 First, in *Amstrad*, the twin-deck cassette tape recorder, which was manufactured, marketed and sold by the defendant, was clearly capable of other (probably substantial) non-infringing uses by third-party purchasers.¹²¹ In *Ong Seow Pheng*, however, an infringing copy of computer software and infringing copies of instruction manuals accompanying that software, when sold by one copyright pirate to another copyright pirate, can only be subsequently used by the latter – on any reasonable interpretation – for purposes of copyright infringement.

64 Second, it would be difficult, on the facts of *Amstrad*, to raise the inference of authorisation because the manufacturer or vendor of the twin-deck cassette tape recorder could conceivably envisage and intend that the purchaser utilise the equipment for a whole range of perfectly legitimate purposes, notwithstanding that he may have also known that his product could potentially be used for purposes of copyright infringement.¹²² Indeed, it can hardly be sustained that *Amstrad*’s manufacture and sale of twin-deck cassette tape recorders – to its knowledge – would have inherently or inevitably caused or led to the resulting acts of infringement. There was also no evidence to suggest that *Amstrad* had marketed and sold the product for the very purpose of encroaching on the business and IP rights of the plaintiffs, hence it is

118 *Ong Seow Pheng v Lotus Development Corp* [1997] 2 SLR(R) 113 (CA) at [34].

119 *CBS Songs Ltd v Amstrad Consumer Electronics plc* [1988] AC 1013 at 1054.

120 In any event, the lack of “control” over the underlying infringement is not, in itself, determinative of the question of authorisation, and as will be further expounded below, the element of “control” has its own limitations in the overall enquiry.

121 *CBS Songs Ltd v Amstrad Consumer Electronics plc* [1988] AC 1013 at 1052, per Lord Templeman: “Blank tapes are capable of being employed for recording or copying. Copying may be lawful or unlawful. Every tape recorder confers on the operator who acquires a blank tape the facility of copying”. Again at 1057: “*Amstrad* sold a machine and the purchaser or the operator of the machine decided the purpose for which the machine should from time to time be used. The machine was capable of being used for lawful or unlawful purposes. All recording machines and many other machines are capable of being used for unlawful purposes but manufacturers and retailers are not joint infringers if purchasers choose to break the law.” See also *Australian Tape Manufacturers Association Ltd v Commonwealth* (1993) 176 CLR 480 at 498.

122 After all, it ought to be presumed, as reminded by the Canadian Supreme Court in *CCH Canadian Ltd v Law Society of Upper Canada* [2004] 1 SCR 339 at [38] that “a person who authorises an activity does so only so far as it is in accordance with the law”.

difficult to identify any culpable or bad faith intent on Amstrad's part. Quite the contrary, Amstrad had explicitly notified its customers through a footnote in its advertisements that the device should only be used in accordance with what the law permitted (essentially a copyright warning notice stating that the recording and playback of certain material might only be possible with permission).

65 However, on the specific facts of *Ong Seow Pheng*, it would have been far easier to raise the irresistible inference that the alleged authoriser *must have known* (reflecting once again the significance of the defendant's state of mind) that the infringing copy of computer software and infringing copies of instruction manuals, once sold and handed over to the third-party dealer in pirated software, would *inevitably* be used by the latter for purposes of copyright infringement, *particularly when both the defendant and third-party dealer were themselves in the business of software piracy*. For what other purpose, it may be asked, would a copyright pirate sell infringing copies of copyright material to another copyright pirate? The effect or consequence of that particular sale in *Ong Seow Pheng* was bound, in a causative sense, to lead directly and inevitably to downstream copyright infringement.¹²³ Under such circumstances, an inference of authorisation is well justified. This view is further fortified by the following remarks of the learned authors, Laddie, Prescott and Vitoria:¹²⁴

[A] person may be said to authorise another to commit an infringement if one has some form of control over the other at the time of infringement or, if he has *no such control*, is responsible for

123 See *Ong Seow Pheng v Lotus Development Corp* [1997] 2 SLR(R) 113 (CA) at [32], where the court cited the third-party dealer's affidavit evidence-in-chief thus: "I should clarify that what Ong [the alleged authoriser] would sell me would be various pirated copies of the manuals for the software programs and one pirated copy of the software program itself which Ong *told me to make copies to sell as required. I would then make whatever copies I needed of the relevant software program and sell it together with the pirated manuals I bought from him*" [emphasis added]. In this regard, the authors are in agreement with the views expressed by Judith Prakash J in the court below in *Lotus Development Corp v Ong Seow Pheng* [1996] 2 SLR(R) 514 (HC) at [29]: "In these circumstances to allow the defendants to escape the full consequences of their breaches of the plaintiffs' copyright by agreeing that they did not authorise the duplication of the programmes [*sic*] that they supplied simply because their customers knew that they were pirates would be wrong. I was satisfied the defendants did authorise such copying because when they sold the programmes [*sic*] they did so with the *intention* that the same would be copied." [emphasis added]

124 Hugh Laddie, Peter Prescott & Mary Vitoria, *The Modern Law of Copyright* (Butterworths, 1980) at p 403. Whilst Lord Templeman in *CBS Songs Ltd v Amstrad Consumer Electronics plc* [1988] AC 1013 did express the view that this proposition had been "stated much too widely" (at 1054–1055), the authors are nevertheless in complete agreement with it, as was Kearney J in the Supreme Court of New South Wales in *RCA Corp v John Fairfax & Sons Ltd* [1982] RPC 91 at 100.

placing in the other's hands materials which by their nature *are almost inevitably to be used for the purpose of infringement*. [emphases added]

66 No doubt, it is the third-party dealer (being the primary infringer of copyright) who ultimately decides to engage in the infringing activity in question. However, on the facts of *Ong Seow Pheng*, it is quite clear that the defendant's sale of infringing copies of copyright material to the third party had a *major influence on or materially contributed to* the latter's subsequent and *inevitable* decision to infringe copyright. Indeed, the third party's infringing activities can only be attributed to one source – the defendant – thus establishing an *inevitable, causal relationship* between the alleged authorisation and the ensuing infringement.

67 In any event, it should be immaterial that the third-party dealer – being a software pirate himself – did not need the defendant nor anyone else to tell him (explicitly) to make further infringing copies,¹²⁵ because a finding of authorisation can be made upon the court's drawing of an inference from the defendant's overall conduct (which may well extend to *inactivity or indifference* under the broader Australian approach),¹²⁶ and not just from express or affirmative words or instructions alone. Indeed, if the evidence had otherwise revealed that the defendant in *Ong Seow Pheng* had blatantly induced or incited the third-party dealer to commit copyright infringement, a finding of authorisation could well have been made on the basis of the defendant's culpable or bad faith intent to actively induce or foster infringement (the *Grokster* standard).

68 In summary, the totality of the evidence in *Ong Seow Pheng* suggests that the defendant's conduct – to his full knowledge – would have inherently or inevitably caused or led to the resulting acts of copyright infringement by the third party, which would have also warranted an inference of authorisation.¹²⁷ As such, the authors have to respectfully disagree with the overall result reached by the Court of Appeal, as well as with the analysis and reasoning at paras 33 and 34 of

125 A fact that was apparently relevant in the Court of Appeal's finding of a lack of authorisation on the defendant's part – see *Ong Seow Pheng v Lotus Development Corp* [1997] 2 SLR(R) 113 (CA) at [33].

126 See *University of New South Wales v Moorhouse* (1975) 133 CLR 1 at 12: "Express or formal permission or sanction, or active conduct indicating approval, is not essential to constitute an authorisation; Inactivity or 'indifference, exhibited by acts of commission or omission, may reach a degree from which an authorisation or permission may be inferred'."

127 Such conduct on the part of the defendant could well attract contributory copyright liability in the US – as to which, see *Cable/Home Communication Corp v Network Productions Inc* 902 F 2d 829 (11th Cir, 1990); *Sony Corp of America v Universal City Studios Inc* 464 US 417 (1984); and *Gershwin Publishing Corp v Columbia Artists Management Inc* 443 F 2d 1159 (2d Cir, 1971).

the judgment,¹²⁸ although it may well be that the action for authorising infringement might have also failed before the final appellate court, due in no small part to evidential deficiencies.¹²⁹

B. The element of “control”

69 The element of control – in one form or another¹³⁰ – will invariably be considered by the courts in cases that address the question of authorisation liability. Indeed, it has been suggested that this particular element played a “determinative” role in the application of the “grant or purported grant” approach in the *Amstrad* litigation.¹³¹ It will be submitted in due course that the element of control is largely artificial and illusory in character, and as such ought to rank lowest in the pecking order of “authorisation liability factors”.

70 In the majority of cases, the alleged authoriser hardly retains any form of (especially actual or physical) control over, and cannot possibly monitor, the behaviour or activities of other third parties.¹³² The earlier discussion of *Ong Seow Pheng* eminently illustrates this point. Ultimately, it is the third-party infringer who alone determines

128 Instead, the authors are in agreement with the approach and reasoning adopted by Judith Prakash J in the High Court decision (which was overturned on appeal) in *Lotus Development Corp v Ong Seow Pheng* [1996] 2 SLR(R) 514 (especially at [27]–[29]).

129 See *Ong Seow Pheng v Lotus Development Corp* [1997] 2 SLR(R) 113 (CA) at [36].

130 Sections 36(1A)(a) and 101(1A)(a) of the Australian Copyright Act 1968 (Act No 63 of 1968) (Cth) spell out the element of control thus: “the extent (if any) of the person’s power to prevent the doing of the act concerned”. On the other hand, “the first authorisation liability factor” articulated by the Court of Appeal in *RecordTV Pte Ltd v MediaCorp TV Singapore Pte Ltd* [2011] 1 SLR 830 at [50] reads: “[W]hether the alleged authoriser had control over the means by which copyright infringement was committed and, hence, a power to prevent such infringement.”

131 See Hugh Laddie, Peter Prescott & Mary Vitoria, *The Modern Law of Copyright and Designs* (LexisNexis, 4th Ed, 2011) at para 19.4, in reference to *Amstrad Consumer Electronics plc v British Phonographic Industry Ltd* [1986] FSR 159 (CA) and *CBS Songs Ltd v Amstrad Consumer Electronics plc* [1988] AC 1013 (HL).

132 This is because in many of the cases that concern authorisation liability, the relationship between the alleged authoriser and primary infringer of copyright is typically that of vendor–purchaser (eg, *CBS Songs Ltd v Amstrad Consumer Electronics plc* [1988] AC 1013; *Sony Corp of America v Universal City Studios Inc* 464 US 417 (1984); *Australian Tape Manufacturers Association Ltd v Commonwealth* (1993) 176 CLR 480), or provider/distributor of technology and consumer/end-user (eg, *Metro-Goldwyn-Mayer Studios Inc v Grokster Ltd* 545 US 913 (2005); *Universal Music Australia Pty Ltd v Sharman License Holdings Ltd* (2005) 220 ALR 1). On the other hand, cases in which the alleged authoriser was found to have retained some form of control over the underlying infringing activities include: *University of New South Wales v Moorhouse* (1975) 133 CLR 1; *Cooper v Universal Music Australia Pty Ltd* (2006) 237 ALR 714; and *Roadshow Films Pty Ltd v iiNet Ltd* (2012) 286 ALR 466 (HC); (2011) 275 ALR 1 (Full Fed Ct).

whether he shall make a copy and what material he shall copy. In any event, common sense dictates that it is unlikely that any alleged authoriser would want to be associated with the ability to control the subsequent activities of third-party infringers for fear of being fixed with authorisation liability.

71 Ordinarily, control (over the means by which the infringement is committed and therefore having a power to prevent such infringement) can only be exerted by the defendant on the third-party infringer if there is some form of ongoing or continuing relationship or connection between them, such as an employer–employee (or master–servant) relationship, a service provider–customer relationship (which is essentially contractual in nature due to the existence of a customer relationship agreement between the parties)¹³³ or in cases involving educational institutions and students.¹³⁴ However, in so far as the last example is concerned, to what extent can it be argued that the educational institution (for example, the University of New South Wales (“UNSW”)) – in providing self-service photocopying machines in the library (out of necessity) – actually had under its “control” the means by which infringements of copyright may be committed by its students? Is it practicable for the university to control and supervise the photocopying activities of each and every student who makes use of these machines, short of employing sufficient attendants to stand guard over all these machines at all times of the library’s operation?¹³⁵ To what extent then does the university have the ability to retain actual or physical control over, or to actually prevent infringements resulting from, the photocopying activities of its students?

72 Practically speaking, the only way that the university can be certain of preventing copyright infringement *completely* (and it has the power to ensure this) is to stop providing photocopying facilities on

133 See, eg, *Roadshow Films Pty Ltd v iiNet Ltd* (2012) 286 ALR 466 (HC); (2011) 275 ALR 1 (Full Fed Ct); *RecordTV Pte Ltd v MediaCorp TV Singapore Pte Ltd* [2011] 1 SLR 830.

134 The outcome of the decision in *University of New South Wales v Moorhouse* (“*Moorhouse*”) (1975) 133 CLR 1 (especially at 13–14) appears to have been justified and explained on the basis, *inter alia*, that the university had “control” over the means of infringement. However, see Branson J’s remarks in *Cooper v Universal Music Australia Pty Ltd* (2006) 237 ALR 714 at [36]: “It seems to me that both Jacobs and Gibbs JJ [in *Moorhouse*] concentrated on the *behaviour* of the University in making the photocopier available for use in the library *rather than* on the issue of the University’s *capacity to control* the use of the photocopier once it had been made available to library users. [emphases added]”

135 This was apparently what the University of New South Wales had tried to do in *University of New South Wales v Moorhouse* (1975) 133 CLR 1, but which unfortunately led Gibbs J to say in his judgment that “on the evidence to which [he had] referred it [was] not possible to hold that the supervision [had been] of an effective kind” (at 16).

campus. Is this, however, a viable or reasonable alternative? By parity of reasoning, the only way that the distributor of P2P file-sharing software can be absolutely certain of preventing online users from subsequently committing acts of copyright infringement is not to offer the facility in the very first place.¹³⁶ Likewise, the only way that an ISP can be absolutely certain of preventing its customers from subsequently committing acts of copyright infringement (for instance, via the BitTorrent P2P file-sharing protocol supplied by other third parties) is to terminate the contractual relationship it has with its customers.¹³⁷ Yet again, who will be the poorer for it?

73 At best, the alleged authoriser can only be said to retain *constructive or indirect* (as opposed to actual or physical) control over the activities of third-party infringers, which therefore leads to the view that the element of control – said to be “determinative” of the *Amstrad* approach – ultimately appears to be *artificial* and *illusory* in character.¹³⁸ To buttress the present argument, two Australian cases shall be briefly considered.

74 In *Cooper*, Cooper (the alleged authoriser) created and operated the website called “mp3s4free”, which allowed internet users to illegitimately access and download music files for free from remote websites via hyperlinks. Unsurprisingly, Cooper argued in defence that he did not have the power to control or prevent the underlying acts of infringement and thus could not be said to have authorised these infringements pursuant to section 101(1) of the Australian Copyright Act 1968.¹³⁹ The Full Federal Court rejected this argument and held, after considering all the factors in section 101(1A), that Cooper was liable for authorising infringement because he was responsible for creating and maintaining his website, which was deliberately designed and calculated to facilitate the unauthorised downloading of music files by third-party internet users.

75 In considering the section 101(1A)(a) factor (the element of control), Branson J opined that “a person’s power to prevent the doing of an act comprised in a copyright includes the person’s power not to facilitate the doing of that act by, for example, *making available* to the

136 *Universal Music Australia Pty Ltd v Sharman License Holdings Ltd* (2005) 220 ALR 1; *Cooper v Universal Music Australia Pty Ltd* (2006) 237 ALR 714.

137 See *Roadshow Films Pty Ltd v iiNet Ltd* (2012) 286 ALR 466 at [78]. This was described by the High Court of Australia as an internet service provider’s “indirect power” – or, rather, no direct technical power ([65]) but having contractual power ([70] and [139]) – to prevent primary infringements by its customers.

138 For a critique of the “control” factor as it has been considered and applied in Australian case law, see Brendan Scott, “Authorisation under Copyright Law and ‘the Nature of Any Relationship’” (2011) 22 AIPJ 172 at 182 *ff.*

139 Act No 63 of 1968 (Cth).

public a *technical capacity calculated to lead to the doing of that act*” [emphasis added].¹⁴⁰ Cooper was held to have had the power to prevent the underlying acts of infringement via his website, since he was responsible for creating and maintaining a website that was designed specifically to facilitate infringing activity – notwithstanding that he *lacked the physical ability to control or prevent* each and every infringing act that resulted from the use of his website.¹⁴¹ This conclusion – which clearly supports an expansive reading of the notion of “authorisation” and which comes very close to the *Grokster* standard – further buttresses the view that the element of control is all but illusory and is ultimately an artificial construct. Perhaps the decision reached by the Court of Appeal in *Ong Seow Pheng* ought, with respect, to be revisited and reconsidered in this light.¹⁴²

76 Next, consider *Kazaa* where Wilcox J expressed the following view:¹⁴³

Sharman was *not able to control* the decisions of individual users as to whether or not they would engage in file-sharing and, if so, which particular works they would place into their ‘My Shared Folder’ file or download from other people. However, Sharman was in a position, through keyword filtering or gold file flood filtering, to prevent or

140 *Cooper v Universal Music Australia Pty Ltd* (2006) 237 ALR 714 at [41]. On the other hand, Kenny J, in addressing the s 101(1A)(a) factor (of the Copyright Act 1968 (Act No 63 of 1968) (Cth) (Aust)), opined that Cooper chose to create and operate his website even though he “could have prevented these infringing acts, either by not establishing the link in the first place or, subsequently, by disabling or removing the link” (at [148]).

141 In this regard, Cooper was found to have intentionally *divested himself of control* from the way he designed his website. As Branson J noted in her judgment (*Cooper v Universal Music Australia Pty Ltd* (2006) 237 ALR 714 at [41]): “The evidence leads to the inexorable inference that it was the *deliberate choice* of Mr Cooper to establish and maintain his website in a form which *did not give him the power* immediately to prevent, or immediately to restrict, internet users from using links on his website to access remote websites for the purpose of copying sound recordings in which copyright subsisted. [emphases added]” See also *Cooper v Universal Music Australia Pty Ltd* (2006) 237 ALR 714 at [43] and *Universal Music Australia Pty Ltd v Sharman License Holdings Ltd* (2005) 220 ALR 1.

142 It will be recalled that in *Ong Seow Pheng v Lotus Development Corp* (“*Ong Seow Pheng*”) [1997] 2 SLR(R) 113, the Court of Appeal was particularly persuaded by the fact that the alleged authoriser (Ong), having sold and delivered the infringing manuals and computer software to the third-party dealer (Lur), had no control over what the latter would do with them, since the decision as to whether to make further infringing copies lay with Lur alone (see [33]–[35]). Indeed, to adopt the language of Branson J in *Cooper v Universal Music Australia Pty Ltd* (2006) 237 ALR 714 at [41], it may be argued that “[Ong’s] power to prevent the doing of an act comprised in a copyright includes [Ong’s] power not to facilitate the doing of that act by, for example, *making available* to [Lur] a *technical capacity calculated to lead to the doing of that act*” [emphases added].

143 *Universal Music Australia Pty Ltd v Sharman License Holdings Ltd* (2005) 220 ALR 1 at [414].

restrict users' access to identified copyright works; *in that sense*, *Sharman could control* users' copyright infringing activities. Sharman did not do so; with the result that the relevant applicant's copyright in each of the Defined Recordings was infringed. [emphases added]

Yet again, this conclusion, which clearly demonstrates the extent to which judges are prepared to engage in legal gymnastics just to arrive at their desired outcome on the question of liability, supports the contention that the element of control is all but artificial and illusory.

77 Before leaving this element of control, consider what Professors Jane Ginsburg and Sam Ricketson have perceptively pointed out in relation to the drafting of section 101(1A)(a) of the Australian Copyright Act 1968¹⁴⁴ – *viz*, “the extent (*if any*) of the person’s power to prevent the doing of the act concerned”. Given the specific inclusion of the qualifying words “if any”, it is entirely plausible that “liability for authorisation may arise, even where the authoriser has *no power* to prevent the infringement, for example, where he or she has deliberately put themselves in a position where they cannot intervene to prevent the infringement” [emphasis added].¹⁴⁵ In other words, a defendant may, on the facts, still be found liable for authorising infringement under Australian copyright law even if he has (deliberately) relinquished *all control* over end-user conduct – control that he could reasonably have exercised had he designed his service or facility differently.¹⁴⁶ If so,

144 Act No 63 of 1968 (Cth).

145 Jane Ginsburg & Sam Ricketson, “Inducers and Authorisers: A Comparison of the US Supreme Court’s *Grokster* Decision and the Australian Federal Court’s *KaZaa* Ruling” (2006) 11 Media & Arts L Rev 1 at 14 (see also *Roadshow Films Pty Ltd v iiNet Ltd* (2011) 275 ALR 1 at [424], *per* Jagot J). In highlighting this possibility that authorisation liability may well arise even where the alleged authoriser lacked control over the underlying acts of infringement because he had deliberately divested himself of such control (*eg*, operators of so-called “decentralised” peer-to-peer file-sharing networks), one need only be reminded of the facts in *Cooper v Universal Music Australia Pty Ltd* (2006) 237 ALR 714 and *Universal Music Australia Pty Ltd v Sharman License Holdings Ltd* (2005) 220 ALR 1, both of which make for excellent illustration.

146 This necessarily means that the following remarks by Gibbs J must now be reconsidered in light of the legislative drafting in s 101(1A)(a) of the Copyright Act 1968 (Act No 63 of 1968) (Cth) (Aust): “A person cannot be said to authorise an infringement of copyright unless he has some power to prevent it” (*University of New South Wales v Moorhouse* (1975) 133 CLR 1 at 12). So, too, in the English context, where the notion of a “grant or purported grant” appears to be predicated on the element of control – see *Amstrad Consumer Electronics plc v British Phonographic Industry Ltd* [1986] FSR 159 at 217 (*per* Glidewell LJ): “[A] person cannot ‘authorise’ an act unless he has the power either to permit the act or to prevent it” (and see also *Amstrad Consumer Electronics plc v British Phonographic Industry Ltd* [1986] FSR 159 at 211, *per* Slade LJ); similar sentiments were expressed by the House of Lords in *CBS Songs Ltd v Amstrad Consumer Electronics plc* [1988] AC 1013 at 1054.

the practical utility of the element of control in the overall determination of authorisation liability, at least in Australia, becomes further undermined.

78 Indeed, if the element of control were to be “determinative” of the question of authorisation, it would then be far too easy for the alleged authoriser to circumvent the *Amstrad* and *Napster* decisions (and resulting authorisation liability) by simply divesting himself of all control over the underlying activities of other third parties.¹⁴⁷ It is therefore submitted that the element of control, whilst not entirely irrelevant or redundant, ought to be treated with circumspection, and in appropriate circumstances, ought to be relegated to the bottom of the pecking order of “authorisation liability factors”. On the other hand, what is perhaps a more helpful factor in the court’s assessment of authorisation liability concerns the question as to whether the defendant, under the circumstances, could have taken “reasonable steps” to prevent or avoid the underlying infringement.

C. Taking reasonable steps to prevent or avoid copyright infringement

79 This factor is codified in sections 36(1A)(c) and 101(1A)(c) of the Australian Copyright Act 1968,¹⁴⁸ and is also “the third authorisation liability factor” articulated in *RecordTV*. It is usually examined in combination with *RecordTV*’s fourth “authorisation liability factor” – namely, “whether the alleged authoriser had actual or constructive knowledge of the occurrence of copyright infringement and/or the likelihood of such infringement occurring”.¹⁴⁹ Instead of examining whether the alleged authoriser had the power to prevent the underlying infringement (that is, the problematic element of “control”), it is far more helpful and desirable to enquire whether the alleged authoriser, if possessed of actual or constructive knowledge of the occurrence of copyright infringement, could have taken “reasonable steps” to prevent or avoid the infringement. As this factor specifically examines the kind of knowledge possessed by the defendant, it also reflects the defendant’s “state of mind” and overlaps, to some extent, with what has been considered to be the foremost “authorisation liability factor” (that is, the state of mind of the alleged authoriser, as discussed above).

147 Cf operators or distributors of so-called “decentralised” peer-to-peer file-sharing networks with cases such as *Cooper v Universal Music Australia Pty Ltd* (2006) 237 ALR 714, *Universal Music Australia Pty Ltd v Sharman License Holdings Ltd* (2005) 220 ALR 1 and *Metro-Goldwyn-Mayer Studios Inc v Grokster Ltd* 545 US 913 (2005).

148 Act No 63 of 1968 (Cth).

149 See also Gibbs J’s dicta in *University of New South Wales v Moorhouse* (1975) 133 CLR 1 at 13, cited in n 60 above.

80 The touchstone here is that of “reasonableness”. The alleged authoriser (for example, a facilitator or an intermediary) is not expected to take all possible steps, but only “reasonable steps”, to prevent infringement. After all, in the assessment of “reasonableness”, it is necessary to consider whether it is fair and reasonable to impose on the alleged authoriser the financial costs and administrative (including technical and logistical) burden of policing the underlying activities of third-party infringers.¹⁵⁰ Therefore if the defendant could have taken reasonable steps to prevent infringement but – with actual or constructive knowledge of the occurrence of such infringement – yet chose to turn a blind eye, then this may well demonstrate a deliberate course of conduct on the defendant’s part, which would appropriately justify an inference of authorisation.¹⁵¹ This approach is also in keeping with the view that conduct indicative of authorisation may encompass both acts of commission as well as *omission*. Indeed, it has been said that inactivity or indifference may reach such a degree from which an authorisation or permission may be inferred.¹⁵²

81 On the other hand, just because the defendant did take some measures to prevent or curtail infringement, this does not necessarily mean that the defendant is, *ipso facto*, off the hook for authorisation liability. For example, what is the effect of the defendant’s contractual restrictions (or copyright warning notices found in end-user licence

150 See, eg, *Roadshow Films Pty Ltd v iiNet Ltd* (2012) 286 ALR 466 (HC); (2011) 275 ALR 1 (Full Fed Ct) where there was some detailed discussion in the Full Court’s majority judgment as well as in the two separate High Court judgments (see, in particular, *Roadshow Films Pty Ltd v iiNet Ltd* (2012) 286 ALR 466 at [71]–[76]) as to what these “reasonable steps” might entail in the specific context of that case (where the tussle was between copyright owners of films and television shows and an internet service provider). See also *Universal Music Australia Pty Ltd v Sharman License Holdings Ltd* (2005) 220 ALR 1 at [411] and [414]; *Twentieth Century Fox Film Corp v Newzbin Ltd* [2010] FSR 21 at [101]; and *RecordTV Pte Ltd v MediaCorp TV Singapore Pte Ltd* [2011] 1 SLR 830 at [62]. See further Whitford J’s remarks in *CBS Inc v Ames Records & Tapes Ltd* [1982] Ch 91 at 112: “Is this again a case of the indifference of somebody who did not consider it his business to interfere, who had no desire to see another person’s copyright infringed, but whose view was that *copyright and infringement were matters in this case not for him, but for the owners of the copyright?*” [emphasis added]

151 Contrast the outcomes in *Roadshow Films Pty Ltd v iiNet Ltd* (2012) 286 ALR 466, on the one hand, and *University of New South Wales v Moorhouse* (1975) 133 CLR 1, *Australasian Performing Right Association Ltd v Jain* (1990) 26 FCR 53 and *Universal Music Australia Pty Ltd v Sharman License Holdings Ltd* (2005) 220 ALR 1, on the other. Cf also the US common law doctrine of contributory copyright liability as applied in *A&M Records Inc v Napster Inc* 239 F 3d 1004 (9th Cir, 2001) and *In re Aimster Copyright Litigation* 334 F 3d 643 (7th Cir, 2003).

152 See *Performing Right Society Ltd v Cyril Theatrical Syndicate Ltd* [1924] 1 KB 1 at 9; *University of New South Wales v Moorhouse* (1975) 133 CLR 1 at 12; and *CCH Canadian Ltd v Law Society of Upper Canada* [2004] 1 SCR 339 at [38].

agreements) on third parties (for instance, customers of a service provider) in relation to infringing activity? At the very least, the defendant, in offering his copying service or facility to other third parties, is expected to incorporate copyright warning notices in the end-user licence agreements. However, even this may not be enough to absolve the defendant from authorisation liability, since the court may well view such measures as “cosmetic” or simply an attempt at “window dressing”, particularly if such warning notices are found to be inconsistent with the overall structure, operation and business model of the service or facility in question.¹⁵³

82 Further, it is this factor of taking reasonable steps to prevent infringement, rather than that of control, which best explains the pro-liability result of the *Moorhouse* decision.¹⁵⁴ The High Court of Australia made a finding of authorisation not so much on the basis that UNSW had the ability to physically control the photocopying activities of its students, given the criticisms of the element of control in the discussion above. Rather, because of the institution–student relationship, because the photocopying facility was provided by the institution on its premises and, above all, because UNSW possessed actual and/or constructive knowledge of infringements committed by its students using the photocopying facility, UNSW ought to have taken “reasonable steps” to minimise the occurrence of infringement by, at the very least, putting up suitable and adequate copyright notices on the photocopiers.¹⁵⁵ The university’s failure to adopt such measures resulted in authorisation liability.

83 The significance of the “reasonable steps” factor – over that of “control” – may further explain why, in response to the *Moorhouse* decision, Parliament decided to introduce a statutory provision, in the guise of section 34, in the Copyright Act¹⁵⁶ (which is based on

153 See *Twentieth Century Fox Film Corp v Newzbin Ltd* [2010] FSR 21 at [101] and *Cooper v Universal Music Australia Pty Ltd* (2006) 237 ALR 714 at [49].

154 This view appears to have been shared by Branson J in *Cooper v Universal Music Australia Pty Ltd* (2006) 237 ALR 714 at [36]: “It seems to me that both Jacobs and Gibbs JJ [in *Moorhouse*] concentrated on the *behaviour* of the University in making the photocopier available for use in the library rather than on the issue of the University’s *capacity to control* the use of the photocopier once it had been made available to library users” [emphases added]. The same is probably true of the outcome reached in *Universal Music Australia Pty Ltd v Sharman License Holdings Ltd* (2005) 220 ALR 1 (see [414]).

155 See *University of New South Wales v Moorhouse* (1975) 133 CLR 1 at 14, and especially at 17: “[T]he *fatal weakness* in the case for the University is the fact that *no adequate notice was placed on the machines* for the purpose of informing users that the machines were not to be used in a manner that would constitute an infringement of copyright.” [emphases added]

156 Cap 63, 2006 Rev Ed.

section 39A of the Australian Copyright Act 1968)¹⁵⁷ to exempt libraries from being fixed with authorisation liability by virtue of their provision of self-service photocopying facilities.¹⁵⁸ As libraries cannot reasonably be expected to control what their patrons photocopy on their machines at all times, they are generally absolved from liability, so long as they have affixed to these machines, in a place readily visible to users, copyright warning notices in the prescribed form. It would appear that nothing more than what is deemed reasonable by the statute can be expected of libraries in this regard.

84 Going forward, what still remains unsettled in Singapore concerns the situation where a library fails to adopt the measures stipulated in section 34 of the Copyright Act.¹⁵⁹ Would a Singapore court, following *Moorhouse*, find authorisation liability in such a case (since section 34 is inapplicable to absolve the library), or would it follow the result reached by the Canadian Supreme Court in *CCH* instead?¹⁶⁰

157 Act No 63 of 1968 (Cth).

158 Section 34 of the Copyright Act (Cap 63, 2006 Rev Ed) reads:

Where —

(a) a person makes an infringing copy of, or part of, a work or a published edition of a work or of 2 or more works on a machine for the making, by reprographic reproduction, of copies of documents, being a machine installed by or with the approval of the body administering a library or archives on the premises of the library or archives, or outside those premises for the convenience of persons using the library or archives; and

(b) there is affixed to, or in close proximity to, the machine, in a place readily visible to persons using the machine, a notice of the prescribed dimensions and in accordance with the prescribed form, neither the body administering the library or archives nor the officer-in-charge of the library or archives shall be taken to have authorised the making of the infringing copy by reason only that the copy was made on that machine.

159 Cap 63, 2006 Rev Ed.

160 The *University of New South Wales v Moorhouse* (“*Moorhouse*”) (1975) 133 CLR 1 and *CCH Canadian Ltd v Law Society of Upper Canada* (“*CCH*”) [2004] 1 SCR 339 dichotomy, involving two separate cases with facts that were almost indistinguishable, is fascinating. In *Moorhouse*, the photocopiers were operated and maintained by the library in the University of New South Wales (“UNSW”), whereas in *CCH*, they were operated and maintained by the Law Society of Upper Canada (“Law Society”) in the Great Library (a law research library at Osgoode Hall in Toronto). In so far as the element of “control” is concerned, the extent to which UNSW had under its control the means by which infringements of copyright may be committed by its students is, arguably, on par with that between the Law Society and the patrons of the Great Library. Where the courts differed in opinion related to the need for the alleged authoriser to take “reasonable steps” to prevent infringement. In *Moorhouse*, the High Court of Australia held that the university library – possessed of actual or constructive knowledge of the occurrence of copyright infringement – ought to have taken reasonable steps to limit infringement, whereas the Canadian Supreme Court in *CCH* thought otherwise about the need for the Law Society to take similar measures (because, firstly, even though the photocopiers in the Great Library could have been used to infringe
(cont’d on the next page)

85 Further, there is added controversy and uncertainty surrounding the issue of authorisation, where a library, having taken the necessary measures in section 34 of the Copyright Act, is nevertheless aware that acts of infringement continue to result from the photocopying activities of its patrons, despite these warning notices.¹⁶¹ Would a Singapore court, under such circumstances, still hold the library liable for authorising infringement if it fails to take additional measures to address the problem of infringement? If so, it will be tempting to ask what these additional measures (which must be of a “reasonable” nature) might entail.

V. Conclusion

86 It is apparent that whilst there has been much discourse in the case law regarding the notion of infringement by “authorisation”, there is still no clear consensus as to the proper meaning or definition that the word “authorise” in copyright parlance ought to assume. In the interest of certainty and predictability, and because Singapore’s copyright legislation is modelled on the Australian equivalent, it ought to be reiterated that the Singapore courts should endorse the dictionary definition of “sanction, approve, countenance” for the word “authorise”, in preference to the alternative meaning of a “grant or purported grant”

copyright, it was “equally plausible that the patrons using the machines were doing so in a lawful manner” (*CCH* at [43]), and secondly, it should be presumed that “a person who authorises an activity does so only so far as it is in accordance with the law” (*CCH* at [43])). As such, UNSW (but not the Law Society) was found liable for authorising infringement. The divergence in views in this regard clearly reflects the differing judicial sentiment – while the Australian approach is pro-rights owners and pro-liability, the Canadian position (despite the court adopting the equivalent dictionary definition of “sanction, approve, countenance” for the word “authorise”) is far more weighted in favour of users’ rights. According to the Canadian Supreme Court in *CCH* at [41], “the *Moorhouse* approach to authorisation shifts the balance in copyright too far in favour of the owner’s rights and unnecessarily interferes with the proper use of copyrighted works for the good of society as a whole”. Notably, *CCH* was recently endorsed, yet again, by the Canadian Supreme Court in *Society of Composers, Authors and Music Publishers of Canada v Bell Canada* (2012) SCC 36 (12 July 2012).

161 It has been argued that mere compliance with s 34 of the Copyright Act (Cap 63, 2006 Rev Ed) should not be taken as a complete defence to an action for authorising infringement. As George Wei asserted: “If a library officer is aware that users are abusing their photocopying privileges by copying amounts outside of that allowed under any fair dealing defence, and if they continue to do nothing further to stop this, liability on the basis of the Australian *Moorhouse* decision may still arise ... Provision of the machine coupled with knowledge that infringing copying is taking place despite the notice may still give rise to the possibility of infringing authorisation if no further steps are taken to control the use of the machine.” See George Wei, *The Law of Copyright in Singapore* (Singapore National Printers, 2nd Ed, 2000) at p 611). Query, though, what “further steps” (of a “reasonable” nature) might be required of the library under such circumstances?

as adopted in the *Amstrad* decision (which, as was respectfully suggested earlier, ought to be jettisoned). It has also been emphasised in the arguments above, that it is most unhelpful (and very confusing indeed) for the courts – particularly in the UK and Singapore – to adopt and apply both sets of definition (unwittingly or otherwise) in their analysis of authorisation liability.

87 It is conceded that the phrase “sanction, approve, countenance” is not a perfect (or the only possible) definition for the word “authorise”, but it is suggested that this formulation be accepted as a helpful *working definition* to kick-start the analysis, and that courts should eschew any attempt at defining the word “authorise” with any degree of semantic precision. There seems to be no in-principle objection to applying this broader approach, since a finding of authorisation is ultimately reached only after an objective, multifactorial assessment (arising from a non-exhaustive list of factors) is made by the court of all the facts and circumstances of the case. This comparatively more expansive view of authorisation also appears to be consistent with the manner in which the action for authorising infringement has evolved chronologically.

88 Notwithstanding Herring CJ’s advice against prescribing beforehand “ready-made tests for determining on which side of the line a particular case will fall”,¹⁶² it seems inevitable that all courts (including those that have endorsed the *Amstrad* approach), when faced with the question of authorisation liability, will invariably have regard to a non-exhaustive list of factors, the genesis of which can be traced to Gibbs J’s dicta in *Moorhouse*.¹⁶³ Unfortunately, judges also tend to examine this entire range of factors in a rather haphazard fashion, without giving due regard to the fact that some of these factors may well be more important and relevant than others.

89 Judicial consideration of this non-exhaustive list of factors ought to follow a suggested pecking order. To determine whether the conduct of the alleged authoriser in any given case justifies an inference of authorisation in law, courts should first and foremost have regard to the “state of mind” (for example, knowledge, intention or motives) of the alleged authoriser. This, as was suggested, can be examined from the perspective of the doctrine of inducement (*Grokster*) or the *Sony* doctrine, or by asking whether the defendant’s conduct (to his knowledge) would inherently or inevitably cause or lead to the

162 *Winstone v Wurlitzer Automatic Phonograph Co of Australia Pty Ltd* [1946] VLR 338 at 345 (Supreme Court of Victoria).

163 *University of New South Wales v Moorhouse* (1975) 133 CLR 1 at 13, cited in n 60 above. These factors have also been considered by the Court of Appeal – as four “authorisation liability factors” – in *RecordTV Pte Ltd v MediaCorp TV Singapore Pte Ltd* [2011] 1 SLR 830 at [50].

underlying infringement. Other relevant “authorisation liability factors” (*per RecordTV*) include: the nature of the relationship, if any, between the alleged authoriser and the third-party infringer; whether the alleged authoriser had actual or constructive knowledge of the occurrence of copyright infringement (again reflecting the “state of mind” of the alleged authoriser), and hence could have taken reasonable steps to prevent or avoid such infringement; and whether the alleged authoriser had control over the means by which copyright infringement was committed, and hence a power to prevent such infringement. This last-mentioned factor refers to the problematic element of “control”, which is largely artificial and illusory in character, and as explained earlier, ought to be relegated to the bottom of the pecking order of factors in appropriate circumstances.

90 Ultimately, owners of copyright turn to authorisation liability under the statute – in addition to allied common law actions in tort on joint and several liability – as a (practical) means of targeting the indirect or contributory infringer, and *not* the direct or primary infringer of copyright (who may be elusive and difficult to identify, particularly in the online environment). The accessory is also someone who:

- (a) is in some way associated with, and hence ought to be made responsible for, the underlying infringement;
- (b) in manufacturing or distributing copying technology (particularly P2P file-sharing technology, which is widely shared online and which causes irrepressible and widespread infringement), has made it easier for the primary infringer to engage in copyright infringement; and/or
- (c) is more likely to come to court with deeper pockets.

Further, in bringing suit and obtaining injunctive relief against the indirect infringer under the statute, copyright owners hope to nip the problem of copyright piracy in the bud because the technology or facility manufactured or distributed by the indirect infringer is often the *source* of all subsequent infringements committed by third-party infringers.¹⁶⁴ It would therefore seem ludicrous, on one view, to have Parliament include the word “authorise” in the Copyright Act (but deliberately choosing not to define it) if the resulting statutory cause of

164 See also Hugh Laddie, Peter Prescott & Mary Vitoria, *The Modern Law of Copyright and Designs* (LexisNexis, 4th Ed, 2011) at para 19.5: “Yet surely this is just the kind of activity [referring to cases where operators of ‘pirate websites’, eg, The Pirate Bay) facilitate the unauthorised downloading by internet users of online copyright material from such websites] which *the legislature must have intended to cover.*” [emphasis added]

action – in the guise of authorising infringement and one that is meant to operate independently of the established common law principles governing joint and several liability in tort – were to lack any bite or be devoid of any utility whatsoever.¹⁶⁵ After all, the protection conferred by the statutory regime ought to be “effective – not merely symbolic”.¹⁶⁶

91 On the other hand, these pro-liability considerations must be counterbalanced by other equally compelling pro-user, public policy objectives¹⁶⁷ – namely, the potential deprivation of consumer needs, conveniences and other benefits that such copying technology would otherwise provide (for example, the photocopier, the twin-deck cassette tape recorder, the Betamax video cassette recorder, P2P file-sharing software, Internet video recording devices, other forms of digital technology and so on), as well as the potential stifling of technological development and advancement to the detriment of society at large.¹⁶⁸ It is therefore hoped that the doctrinal approach to the law on authorising infringement offered in this article – resulting from the need to constantly adapt longstanding principles of copyright law to problems engendered by new technologies – will go some way towards achieving the appropriate balance between these two competing perspectives as well as injecting some clarity to the otherwise perplexed state of the law at present.

92 Some 24 years ago, Lord Templeman in the House of Lords concluded his judgment in *Amstrad* with the following remarks:¹⁶⁹

These proceedings will have served a useful purpose if they remind Parliament of the grievances of the recording companies and other owners of copyright and if at the same time they draw the attention of Parliament to the fact that home copying cannot be prevented, is widely practised and brings the law into disrepute.

165 *WEA International Inc v Hanimex Corp Ltd* (1987) 17 FCR 274 at 283–284, per Gummow J: “The first question that arose with the introduction of ‘authorisation’ into the legislation was whether it added anything to the common law principles governing the liability of joint tortfeasors and, if it did so, whether it was conceptually distinct from those principles. Scrutton LJ expressed the view that the inclusion of the word ‘authorise’ in s 1 of the [Copyright Act 1911] was superfluous: *Performing Right Society Ltd v Caryl Theatrical Syndicate Ltd* [1924] 1 KB 1 at 12. So did McCardie J: *Performing Right Society Ltd v Mitchell and Booker (Palais De Danse) Ltd* [1924] 1 KB 762 at 773. *But that was a view that did not prevail*” [emphasis added]. See also n 164 above.

166 *Sony Corp of America v Universal City Studios Inc* 464 US 417 at 442 (1984).

167 See, in particular, *CCH Canadian Ltd v Law Society of Upper Canada* [2004] 1 SCR 339 at [41].

168 Cf the policy-laden nature of the respective judgments in *CBS Songs Ltd v Amstrad Consumer Electronics plc* [1988] AC 1013 at 1060–1062 and *RecordTV Pte Ltd v MediaCorp TV Singapore Pte Ltd* [2011] 1 SLR 830 at [64] and [69].

169 *CBS Songs Ltd v Amstrad Consumer Electronics plc* [1988] AC 1013 at 1062.

Likewise, in the same vein, this article will have served a useful purpose if it reminds the relevant authorities of the grievances of copyright owners in the music, film, entertainment and software industries (amongst others), and if, at the same time, it draws the attention of the authorities to the fact that home copying (and other forms of domestic, end-user infringement) cannot be prevented, is widely practised and continues to challenge the boundaries of copyright law and amplify the difficulties of copyright enforcement.
