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NICK'S LAW NOTES

intellectual property: copyright

COPYRIGHT LAW

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SUBSISTENCE

I. ANCILLARY ISSUES

WHICH **POLICY CONSIDERATIONS** FAVOUR YOUR CASE?

[1] There is a great deal of emphasis on policy considerations by our Singapore Court of Appeal.

- The **legislative history** behind Singapore's copyright legislation illustrates the lengths to which the Government and legislature have gone in **consulting stakeholders on copyright law reform**.

[2] The decision in *RecordTV (CA)* was influenced by the court's perception of the policy that underlay copyright protection.

- In holding that time-shifting was legitimate, CA was influenced by the fact that while RecordTV's service serve the same purpose as traditional time-shift copying on a DVR or VCR, "it is also a **significant technological improvement** over the latter with tangible benefits to users"
- Importance of developing copyright law in a manner so as to **balance the competing interests of stakeholders** and which results in the **most benefits and impose the least cost on society** as a whole.

[3] In *Asia Pacific (CA)*, V K Rajah JA continued that the debate "stem[med] from the difficulty of striking an **appropriate balance between the competing tensions of public and private interests**" and that, "on one hand, there is the interest of the public in securing both new and established works freely and as early as possible, and, on the other, the need to ensure that authors receive a just return for their creative efforts and are thereby encouraged to keep on creating"

- Does it include the effort and labour of making discoveries (fact-finding)?
- The CA in *Asia Pacific* considered that given how technology has taken away so much "labour" out of fact-finding, the focus of older decisions on the **gathering of information as the touchstone** rather than the **productive effort** involved in expression **calls for reconsideration**.

[4] Elsewhere it has been suggested that when the law (the court) concludes that a work is "original", it is really saying that, on the facts, there is **sufficient public benefit** such as to merit the award of a strong but limited copyright monopoly.

IS THERE AN **IMPLIED LICENSE** ARGUMENT TO BE FOUND?

IS **EXPERT EVIDENCE** REQUIRED TO BE ADDUCED IN DETERMINING WHETHER WORK IS L/D/M/A?

If so, take note of artistic works, *s 15(4) + s 69* (see 'Reproduction' under Infringement).

IF **TWO IDENTICAL WORKS** PRODUCED AT THE SAME TIME

Copyright is essentially a **negative right to prevent copying**. This means that **if two identical works were in fact produced independently of one another**, there is no infringement of copyright by one of the other (*Chua Puay Kiang v Singapore Telecommunications Limited* [2000] 3 SLR 640)

- ☒ cf *Virtual Map (Singapore) Pte Ltd v Singapore Land Authority and another application* [2009] 2 SLR(R) 558 and the High Court decision at [2008] 3 SLR 86 where the defence of independent creation **failed** based on the evidence).

IF A WORK CAN BE **CLASSIFIED INTO MORE THAN 1 CATEGORY**

[1] Copyright law generally treats the **separate elements** in a **composite creation** as having **distinct** copyrights.

Exclusive: Should the work be placed in only one category by reference to its main attributes? (Laddie J in *Electronic Techniques v Critchley*)

- It is well known that a particular product may be protected by a number of different categories of copyright. For example a feature film may benefit from copyright in its own right, as well as benefiting from the protection afforded by the copyrights which may exist in the musical works which are employed in the soundtrack, the book from which the film was taken and the script used for the dialogue.
- However although different copyrights can protect simultaneously a particular product and an author can produce more than one copyright work during the course of a single episode of creative effort, for example a competent musician may write the words and the music for a song at the same time, it is quite another thing to say that a *single* piece of work by an author gives rise to two or more copyrights in respect of the *same* creative effort.
- In some cases the borderline between one category of copyright work and another may be difficult to define, but that does not justify giving to the author protection in *both* categories.
- The categories of copyright work are, to some extent, arbitrarily defined. In the case of a borderline work, I think there are compelling arguments that the author must be confined to one or other of the possible categories. **The proper category is that which most nearly suits the characteristics of the work in issue.**

Cumulative: Or may it always be separated into its constituents, each enjoying the relevant type of

copyright to the extent allowed for that type? (Jacob J in *Anacon v Environmental Research*; Pumfrey J in *Sandman v Panasonic*)

[2] An **objective judgment** is needed to determine what the work is; one part can be treated as a **distinct work only when it is reasonably separable**, as with articles in magazines (*Newspaper Licensing Agency v Mark & Spencer*).

- Thus, a **facsimile copy of the single sheet** would be a **copy of the whole** of its typographical arrangement.
- But a **copy of the article on the page**, which gives no indication of how the rest of the page is laid out, **is not a copy of a substantial part** of the published edition constituted by the newspaper.

[3] **Theory of overlapping copyrights:** One should not distinguish between a typographical arrangement which would have been protected if it had been a separate work and one which was part of a composite edition. It would be illogical if a typographical arrangement was denied protection because it was not a substantial part of the published edition when it would have attracted protection on its own.

II. FORMALITIES

2.1 ABSENCE OF FORMALITIES

In Singapore, neither registration nor any formal notification of the claim to copyright has been a prerequisite to securing copyright in a work under the Copyright Act, in adherence to the Berne Convention's conception of **copyright as a property flowing naturally and without formality from the act of creation** (*Berne Convention, art 5(2)*).

2.2 REDUCTION TO MATERIAL FORM

[1] In Singapore, the implicit requirement for an original work to be **reduced to writing or material form** in order to attract copyright for a literary, dramatic or musical work is found by reading *s 27(1)(a)* with *s 16/17*. The requirement appears to undergird the **need for certainty of subject matter** and the **idea-expression dichotomy**, which provides that only particular expressions of ideas are protected, in copyright law.

- **Idea-expression dichotomy:** The need for such a requirement can be appreciated in light of the general policy in copyright which gives protection only to material forms of expression whilst keeping the underlying ideas and information free for all to use.
- **Certainty of subject-matter:** Copyright, as an inchoate property right that is enforceable *in rem*, should only attach to works whose subject-matter is certain, so as "to avoid injustice to the rest of the world" (*Green v Broadcasting Corporation of New Zealand*, per Lord Bridge). After all, copyright is, broadly speaking, monopolistic in nature.
- **Evidential:** Requiring a work to be fixed in a material form also provides a reliable form of evidence upon which the existence of the work may be established and issues of disputed authorship resolved.

[2] Although often used in the sense of **written or printed matter**, **such form of fixation is not necessary** and a work is protected provided that it has been **recorded in or otherwise reduced to some material form** (*ss 16 and 17, CA*).

- Sound recording (audio tape)
- Storage in a computer or any medium by electronic means e.g. CD-ROM, thumbdrive, video

[3] The Copyright Act is silent with regards to whether the requirement of fixation in a material form also applies to artistic works.

DOES REDUCTION OF WORK INTO MATERIAL FORM HAVE TO BE DONE BY MAKER OF SPEECH

 **NO**

[1] Nowhere in the Copyright Act does it require reduction of work into material form to be done by author. Additionally, by asking whose expression the work belongs to, the inquiry properly crystallises the underlying policy considerations of incentivising individuals and protecting author's expressions from misappropriation.

[2] In the case of an [extempore speech/performance of a song] which is recorded by someone other than the [speaker/singer], it is submitted that the act of [writing down the speech/videoing the performance] reduces it to a fixed medium. It creates a work in a copyright sense and confers copyright on the author who is the [maker of the speech/song]. The question whether the human recorder can also assert copyright in the recorded copy is essentially one of degree – how much skill, labour and judgment was expended in the making of the copy? (Jacob LJ, *Hyperion v Sawkins*)

- The idea-expression dichotomy can be resolved with regards to the **quality of skill, labour and effort**: in Lord James' amanuensis example, the assistant's skill, labour and effort lies in **merely reproducing** the work mechanically (similar to

the type of reproduction frowned upon by the HL in *Interlego*) whereas in *Donoghue*, there is **selection and choice involved** in the material reduction (a type of skill and labour our local court in *Virtual Map v Suncool* would grant copyright protection to).

- In the case of *Walter v Lane*, given the context of the early 20th century when technologies for copying or recording works were not as advanced as they are presently, the SLE expended by the reporter at that time to produce a written verbatim report of a speech delivered “live” would have been substantial and considerable.
- **If minimal SLE:** It has long been accepted that a person who arranges for a stenographer to take down his speech is the author of the resulting work, for it has merely been recorded by an assistant (Lord James, *Walter v Lane*).

YES

On the other hand, it could be argued that the maker of the extempore speech would have no copyright over the record since he did not reduce it into material form.

- **Multiple copyrights** over what is essentially the same subject matter.
- **Idea-expression dichotomy:** The need for such a requirement can be appreciated in light of the general policy in copyright which gives protection only to material forms of expression whilst keeping the underlying ideas and information free for all to use.
- **Certainty of subject-matter:** Copyright, as an inchoate property right that is enforceable *in rem*, should only attach to works whose subject-matter is certain, so as “to avoid injustice to the rest of the world” (*Green v Broadcasting Corporation of New Zealand*, per Lord Bridge). After all, copyright is, broadly speaking, monopolistic in nature.
- **Evidential:** Requiring a work to be fixed in a material form also provides a reliable form of evidence upon which the existence of the work may be established and issues of disputed authorship resolved.

III. QUALIFICATION

Works qualify for copyright protection automatically once the relevant connecting factors are satisfied, i.e. there is a **sufficient connection between Singapore and the subject-matter claiming copyright in Singapore**, in order to justify the grant of copyright protection in Singapore.

3.1 LOCAL WORKS

[1] Requirements under s 27(1) and 27(2) are **disjunctive** rather conjunctive (*Asia Pacific* (CA) at [48]).

UNPUBLISHED: s 27(1)

- S 27(1)(a): **Qualified person** at time when work was made
- S 27(1)(b): **Qualified person** for a substantial part of making of work over an extended period

PUBLISHED: s 27(2)

s 27(2) essentially sets out two *alternative* connecting factors for published works, namely, first publication in Singapore (s 27(2)(c)) and the personal status of the author as a qualified person (s 27(2)(d) & (e)).

- S 27(2)(c): Work was first published in **Singapore**
- S 27(2)(d): **Qualified person** at time when work was first published
- S 27(2)(e): If work published after death, **qualified person** immediately before death

Qualified person = a **citizen** of Singapore or a **person resident** in Singapore.

[2] Satisfying either the **personal criterion** or the **territorial criterion** is sufficient for the work to acquire copyright in Singapore (*Asia Pacific* (CA) at [50]).

[3] With regards to qualification by **personal status**, the question has to be asked at the ‘material time’.

- For unpublished LDMA works, that is the **date of making the work**.

- Where the work has been published, it is the **author’s status at the date of first publication** that is in issue; or, if the author died before publication, his status at the date of his death.

3.2 FOREIGN COPYRIGHT MATERIALS

[1] The requirements in s 27(1) and (2) are extended to include foreign works under *s 184* read with the *Copyright (International Protection) Regulations*.

- Thus, a **“qualified person”** is extended to mean a citizen, national or resident of a “Convention country” which is further defined to mean a country which is a party to the Berne Convention or a member of the World Trade Organisation (*reg 2(1)* of the *Copyright (International Protection) Regulations*)

IV. PUBLICATION

4.1 GENERAL PUBLICATION

[1] 'Publication' refers to the **supply of reproductions** of a work or other subject matter to the public whether by sale or otherwise (s 24(1)).

[2] What is not considered 'publication'? Specifically, s 24(3) provides that the following acts shall not constitute publication of the work:

- Performance of LDMA work
- Supplying (by sale or otherwise) to the public of records of LDMA work
- Exhibition of artistic work
- Construction of a building or of a model of a building
- Supply (by sale or otherwise) to the public of photographs or gravings of a building, of a model of a building or of a sculpture

WHAT DOES 'TO THE PUBLIC' MEAN?

Passive availability would suffice; requirement of supplying the public **does not demand any positive act** of reaching out to the public (*British Northrop v Texteam Blackburn*; endorsed in *Television Broadcasts v Mandarin Video Holdings*).

- There is no requirement for an actual physical delivery to, or receipt of the copies of work by, members of the public and it also does not matter if the publication was not advertised or promoted. The mere fact that the copies were **on offer for sale** and **adequate stock was kept** to meet the anticipated demand was sufficient for the court to return a finding that copies of the work have been published (Megarry J in *British Northrop*).
- In Malaysia, HC in *Television Broadcasts v Mandarin Video Holdings* held that in order for an act of publication to take place, it is not necessary to prove any overt or positive act of reaching out to the public. Neither is it

necessary to show that the public have actually taken up copies of work. **"Supply" should be interpreted broadly** so as to include making the reproductions or copies available to the public in the sense of a willingness to supply the reasonable requirements of the public. **If the public is disinterested in the work, it will still be published if reproductions are in fact available** to members of the public.

4.2 COLOURABLE PUBLICATION

[1] However, a publication that is merely colourable, and is not intended to **satisfy the reasonable requirements of the public**, shall be disregarded and will disqualify as a connecting factor to Singapore (s 24(4)) In fact, such a publication may constitute an infringement of copyright or a breach of duty on false attribution of authorship (s 188(1)(b)).

- In this context, the reasonable requirements of the public must **relate to the supply of copies** as opposed to public screening.

[2] Quantity // Colourable?

- *Francis, Day & Hunter Ltd v Feldman & Co*: Even though **only a few copies of the song had been available in the UK**, the court held that the publication was intended to satisfy the public demand for the work. Significance is that even though anticipated demand was initially insignificant, the release represented a genuine intention to fulfil that demand. On the facts, it would have been wholly unreasonable to expect large quantities of the song sheets to be made available when the **commercial viability** of the song was unknown.
- *Television Broadcasts v Mandarin Video Holdings*: Chan J was of the view that whilst **six copies (see above) would not be enough** to meet the reasonable requirements of the public, the 64,267 video cassettes supplied to the dealers in this case would be sufficient.

[3] Illegality // Colourable?

A publication which **does not comply with the law of the country** is considered a colourable publication which was not intended to satisfy the reasonable requirements of the public.

- Thus in *The Bodley Head v Flegon*, court held that the **publication of a book by a clandestine system** known as “samizdat” in Russia was not a good publication for the purpose of acquisition of copyright because possession of such books was illegal in Russia, the books were not passed by the Russian censor, and only a few copies of such books were printed and each copy was passed on by sale or gift after the reader had finished it.

4.3 SIMULTANEOUS PUBLICATION

A work shall be considered as having been published simultaneously in several countries if it has been **published in two or more countries within thirty days of its first publication** (s 24(5)).

V. ORIGINALITY

5.1 ORIGIN VS INVENTIVE ORIGINALITY

[1] The Copyright Act does not require that the expression must be in an original or novel form, but that the work must not be copied from another work and that it **should originate from the author** (*University of London Press*; affirmed in *AUVI Trade Mark*).

[2] Thus, all works are “original” in the eyes of the law if they originate from the author through the author’s own effort and are **not slavish copies** of another person’s work (*Hyperion Records v Sawkins* per Mummery LJ; *Virtual Map v Suncool*).

[3] Work may **even comprise unoriginal elements** such as information or knowledge found in the public domain.

- Thus, in *Warwick Film Productions v Eisinger*, even though both books on the Oscar Wilde trials contained unoriginal information drawn directly from transcripts or shorthand notes of the proceedings, copyright subsisted in them because substantial amount of editorial work was done.
- Likewise in *Virtual Map v Suncool*, copyright subsisted in plaintiff’s maps, which were created from raw material licensed from SLA, because considerable skill, labour and effort were invested.

[4] “Originality” in copyright law is a **question of the source of the work**. The courts, when assessing whether copyright subsists in a work, do not embark on a historical comparison of the “newness” or lack thereof in the expression of the work unlike the requirement of “novelty” in patent law. Considered from this perspective, it is fair to say that **“originality” in the context of copyright is a low threshold requirement** that is quite easily satisfied in most instances.

5.2 SKILL, LABOUR AND JUDGMENT

[1] It is the **skill, labour, judgment and expense** that go into producing the expression of the work which **warrants copyright protection**. As stated by Lord Halsbury LC in *Walter v Lane*, the law did not permit “one man to make profit and appropriate to himself the labour, skill, and capital of another”.

[2] While the amount of skill, labour and judgment expended in the creation of a work is to be determined based on particular facts and is a question of degree, there has to be a **certain level of substantiality**.

- Thus in *G A Cramp & Sons v Frank Smythson*, the HL denied copyright protection to the compilation of information because **negligible amount of skill, labour and judgment had been expended** in its creation; the compilation was of a commonplace character and the selection or arrangement of pieces of information involved the “smallest” of effort. No real exercise of skill, labour and judgment was involved.
- Other examples include the making of additional print from a photographic negative or the photographing of the print itself (*Antiquesportfolio.com v Rodney Fitch*).

5.3 ORIGINALITY AND DERIVATIVE WORK

WALTER V LANE VS INTERLEGO

Law

[1] Should the *Walter v Lane* “sufficient skill, labour and judgment” test or the *Interlego* “material embellishment” test apply to determine originality in derivative works in Singapore? While the High Court in *Real Electronics* and *Virtual Map v Suncool* seems to have adopted the *Interlego* position, the lack of an authoritative pronouncement locally suggests that the issue remains an open question.

[2] It is submitted that the apparent conflict between the two tests should be resolved in favour of the *Walter v Lane* “sufficient skill, labour and judgment” test, with the *Interlego* proposition serving as a corollary qualifier which denies copyright protection to derivative works where the skill, labour and judgment expended amount to nothing more than servile copying (Lord Oliver in *Interlego* at 263).

- First, such a reconciliation (as opposed to adopting *Interlego* wholesale) would find greater coherence with the way the “originality” inquiry in copyright law focuses on the process by which works are made rather than by the final output.
- Second, such a position would also find support in *Sawkins* which, on the authority of *Walter v Lane*, held that certain copied works would attract copyright because they require great talent and technical skill. It would also avoid the absurdity of taking the *Interlego* test to its logical conclusion – that is, poor imitations of masterpieces could attract copyright whereas perfect imitations could not.
- Third, this would strike a better balance between protecting copyright owners’ exclusive rights while ensuring it does not stifle new sources of creativity. This is especially so given that in modern-day context, cultural norms are shifting towards greater acceptance of appropriating copyrighted materials for meaningful and transformative purposes.

[3] ***Interlego* material embellishment test**: Labour, skill and capital should be expended sufficiently to impart to the product some quality or character which the raw material did not possess, and which differentiates the product from the raw material (*Real Electronics*; *Virtual Map v Suncool*).

Policy

[1] Aegis of **public benefit**

- *Walter v Lane*: Prevention of free-riding (unfair competition) + public benefit (since at that time technologies for copying or recording works were not as advanced as they are now)
 - BUT axed out original author of speech i.e. Lord Roseberry
 - However the axing out issue resolved in CDPA 1988
 - See also point on fixation requirement
- *Interlego*: Prevention of perpetual copyright (which would be against public benefit)
- *Sawkin (Lalande)/Qimron (Dead Sea Scrolls)*: Preservation of works which society finds valuable
 - Which applied *Walter v Lane*
- *Virtual Map v Suncool*: Prevention of free-riding

[2] **Personal incentive?**

WHAT ABOUT **RECREATIVE WORKS?**

Prima facie, there appears to be a disjunction between the results arrived at by the courts in *Interlego* and *Sawkins/Qimron*, given that in both types of cases the authors were trying to recreate as accurately and perfectly as possible the expressive content of an antecedent work in its entirety.

However, the difference between *Interlego* and *Sawkins/Qimron* (technical drawing and old master painting or Dead Sea Scrolls) is that in the latter cases there is **room for individual** interpretation even here faithful reproduction is sought while in the former there is not.

- As stated by Jacob LJ in *Sawkins*, “[Sawkins] **recreated Lalande's work using a considerable amount of personal judgment...** [so] as to create something really new using his own original (not merely copied) work” at [86].

WHAT ABOUT **PRELIMINARY VERSIONS** OF WORK?

[1] If, in the course of producing a finished drawing, the author produces one or more preliminary versions, the final finished product does not cease to be his original work simply because he adapts it with minor variations, or even if he simply copies it, from an earlier version. **Each drawing having been made by him, each is his original work** (*Nourse LJ in LA Gear v Hi-Tech Sports*).

- Thus in *LA Gear v Hi-Tech Sports*, in which D copied P's drawing of a man's sport shoe, court rejected D's argument, which relied on *Interlego*, that since P's employee in preparing the drawing of the man's sports shoe had made one or more preliminary versions, copyright would not exist in the finished drawing of the shoe but in the original version.

[2] In assessing the originality of a finished work, produced based on preliminary versions, it is important to make a distinction between the creative process in the production of the work and the manufacturing process which produces the physical embodiment of the work.

- In *The Reject Shop v Robert Manners*, in which P claimed copyright in the enlarged photocopies of his original earlier drawings, Leggatt LJ found that no copyright subsisted in the enlarged photocopies because the **final images were not stages in the production of the artistic work** but were stages in the manufacturing process of the final product which was the tiles.

5.4 PRINCIPLE OF NON-DISCRIMINATION IN QUALITY

[1] **Quality, merit or style of work is generally irrelevant** to the issue of whether work is original. **Simplicity per se does not prevent a work from acquiring copyright** (*University of London Press; British Northrop Ltd*).

- Prof Ng-Loy: Example of assignments – you can get the law wrong but still retain copyright – so merit is irrelevant to originality.
- *University of London Press*:

- Papers set by examiners
- *British Northrop Ltd*:
 - “A single straight line drawn with the aid of a ruler would not seem to me a promising subject for copyright.”
- *AUVI Trade Mark*:
 - The mere fact that a drawing is of an elementary and common place article does not necessarily make it too simple to be the subject of copyright.
 - Even drawings of things in common use such as engines and gear boxes are copyrightable.
- *PH Hydraulics & Engineering*:
 - Plaintiff’s five general arrangement drawings of winches would enjoy copyright protection despite being simple preliminary drawings of winches.

VI. PROTECTED CATEGORIES

6.1 LITERARY WORKS

6.1.1 GENERAL

[1] **Non-exhaustive:** Under *s 7A of the Copyright Act*, 'literary work' is defined to include a **compilation in any form** and a **computer program**.

[2] The expression 'literary work' **generally covers work which is expressed in print or writing, irrespective of whether the quality or style is high.** (*University of London Press*).

- *University of London Press*: **Exam papers** set by examiners.
- So even gibberish works like Lewis Carroll’s poem, *Jabberwocky*, would be considered a literary work because court does not take into account quality or style.

[3] Although often used in the sense of **written or printed matter**, **such form of fixation is not necessary** and a literary work is protected provided that it has been **recorded in or otherwise reduced to some material form**, as, for example, on a tape recording or on a computer diskette or CD-ROM (*ss 16 and 17, CA*).

6.1.2 WORDS, SHORT PHRASES AND NAMES

[1] There is no copyright in a mere collection of words, which is not a compilation and the collection of which has **not involved any literary skill**, or in a **single word** (*Exxon v Exxon Insurance Consultants*).

- *Libraco Ltd v Shaw Walker Ltd* (1913) 30 TLR 22 (words on cards for a card index system);
- *Page v Wisden* (1869) 20 LT 435 (cricket scoring-sheet);
- *Cable v Marks* (1882) 52 LJ Ch 107 (instructions for a pastime);
- *Fournet v Pearson Ltd* (1897) 14 TLR 82, CA (Eng) (experimental writing);

- ☒ *Griffin v Kingston and Pembroke Rly Co* (1889)
17 OR 660 (railway ticket).

[2] A literary work is generally intended to **afford either information, instruction or pleasure**. (*Exxon v Exxon Insurance Consultants*).

- ☒ *Exxon v Exxon Insurance Consultants*: The word **“EXXON” as composed of letters and it is written**, typed or printed is not a literary work.
- ☒ *Express Newspapers v Liverpool Daily Post*: **Game cards on which were printed a series of letters** is a literary work because the grids and five-letter sequences were looked at by those who had cards for the very purpose of acquiring information, namely to find out whether they had won or not. Thus, the whole purpose of their publication was the giving of information, which attracted copyright protection as a literary work.
 - Further, each grid published on each day was a **separate work which enjoyed a separate copyright**. So, the defendants infringed copyright each time they produced a copy
 - **Reasoning**: Difficult to come up with a winning code that will optimise profit-making for company while retaining the possibility of winning for customers – skill, labour and judgment has to be expended – TGMFB is a literary work.
- If you compare *Exxon* and *Express*, clearly the law is distorted to achieve policy goals – unfair competition
 - Notion of **unfair competition**: Noteworthy that in cases where **copyright is found to exist**, the defendant tends to be a direct business competitor; where some other form of relief is available against the unfair competition (e.g. titles – injunction), **copyright tends to be denied**.

- Direct business competitor: e.g. Exxon vs Exxon Insurance = oil vs insurance + relief of injunction available ☒; Express Newspapers vs Liverpool Daily Post = newspaper ☒

[3] Anything which is **appreciated simply with the eye** is not within the scope of literary copyright but may be the subject of artistic copyright (SGHC in *Real Electronics v Nimrod Engineering* affirming Jacob J’s judgment in *Anacon Corp Ltd v Environmental Research Technology*).

- ☒ *Anacon Corp Ltd v Environmental Research Technology*: A **circuit diagram** was a literary work. He noted that circuit diagrams have lots of writing on it though some of it may be written in code. Nevertheless, that should be a literary work.
 - ☒ *Real Electronics v Nimrod Engineering*: **Fax-modem design** contains a considerable body of technical details as would clearly qualify it to be grouped with the family of circuit diagrams.
 - ☒ *Fragrance Foodstuff Pte Ltd v Bee Cheng Hiang*: **Logo comprising the word “France” with its Mandarin equivalent, “xiang”**, not a literary work based on Jacob J’s requirement in *Anacon* because SGHC disagreed that it contained information which was written down, which suggests that the logo was to be appreciated by the eye.

[4] *De minimis* concept: The law is **generally reluctant to grant monopolies to short phrases and texts**, especially if they are generic and attract the use of the same terminology (*Tay Long Kee Impex Ltd v Tan Beng Huwah*).

- ☒ *Warranty*: While the wording of the lifetime warranty of the appellants is in a broad sense a piece of literary work, it really cannot subsist on its own as a literary work. In itself, the warranty as a literary work is hardly consequential.

Really, it is *de minimis* (*Tay Long Kee Impex Ltd v Tan Beng Huwah* (SGCA2000)).

- ☒ Short paragraph of two sentences (*Noah v Shuba*)
- ☒☒ Advertising slogans – depending on whether it goes beyond language in general use in public domain; whether it is commonplace
- ☒ Simple descriptions or instructions (*Promotions Atlantiques v Hardcraft Industries*).
- **Policy:** There may actually be **underlying policy reasons** here why things like warranties will not be given copyright. Warranties may be generic and others may use the same terminology. It may not be fair to give one party a monopoly over text.

[5] Basically, **for short phrases and words, if you want to secure copyright protection, embellish it** in such a way that it can gain copyright under **artistic work** (*AUVI Trade Mark*).

6.1.3 TITLE

[1] As a rule a **title does not involve literary composition** and is **not sufficiently substantial to justify a claim to protection**, although in particular cases a title may be on so substantial a scale, and of so important a character, as to be a proper subject of protection.

- ☒ Exclusion of most titles from scope of copyright applies here and is linked with preclusion of any copyright in the names of characters or in the typical manner in which characters behave (*Kelly v Cinema Houses*).

[2] Furthermore, a title may be **capable of protection on the ground of passing off** if its use misrepresents to the public the authorship of a work.

6.1.4 COMPILATIONS AND TABLES

*Note that legal protection for factual compilations and databases is “thin” as it is limited to only the selection or

arrangement of the contents. However, length of protection is long.

[1] Under *s 7A(3) of CA*, a “compilation” refers to a compilation or table which, by reason of the **selection** or **arrangement** of its contents, constitutes an **intellectual creation**.

- *S 7A(3)* For the purposes of this section – “compilation” means –
 - (a) a compilation, or table, consisting wholly of relevant materials or parts of relevant materials;
 - (b) a compilation, or table, consisting partly of relevant materials or parts of relevant materials; or
 - (c) a compilation, or table, of data other than relevant materials or parts of relevant materials, which, by reason of the selection or arrangement of its contents, constitutes an intellectual creation
- Under *s 7A(3)*, “relevant material” means
 - (a) a work, including a computer program;
 - (b) a sound recording;
 - (c) a cinematograph film;
 - (d) a published edition of a work;
 - (e) a television or sound broadcast;
 - (f) a cable programme; or
 - (g) a recording of a performance within the meaning of Part XII.
- Note *s 7A(2)*: copyright in compilation is in addition to and **independent** of any copyright in the relevant material.

[2] Thus, certain factual compilations or databases may not qualify for protection, particularly those that are **exhaustive** in that they contain all the relevant information but the data or factual information is **arranged according to basic, conventional ways** like alphabetically, numerically or chronologically (*Asia Pacific (CA)* at [37]).

[3] It is also clear from s 7A that **copyright protection is limited only to the selection or arrangement** of the contents of the compilation. This means that the data or factual information itself contained in the compilation is not protected by copyright.

[4] In *Asia Pacific (CA)*, VK Rajah JA summarised the position on copyright for compilations as follows:

- Facts are not copyrightable.
- Compilations of facts are generally copyrightable.
- Essential requirement of copyright is originality.
- Originality means that the work was **independently created by the author** and that it **possesses some minimal degree of creativity** (endorsed *Feist*). Although the **level of creativity required is extremely low**, it must **nevertheless be present** in the work.

6.2 DRAMATIC WORKS

(1) Is it a work of action?

(2) Is it a work of action intended to be or capable of being performed before an audience?

(3) Does work have sufficient unity?

[1] S 7(1): non-exhaustive definition

S 7(1) includes: (a) choreographic show or other dumb show if **described in writing in the form in which the show is to be presented** or (b) a scenario or script for a cinematograph film.

A dumb show can include **shows that involve no speech**. For example, dances and mimes. However, the dances and mimes must be set down in writing, perhaps by drawing.

- Prof Ng-Loy states that this is a **arcane requirement**. Why can't the dance or mime be captured on video? Why do they have to be written down?
- Note also that by reading definition of "dramatic work" in s 7(1) with s 16(1), it appears that only choreographic and dumb shows are subjected to the more restrictive requirement of having to be recorded in writing, compared to "scenarios and scripts for cinematograph films" and other dramatic works such as plays.
- Doesn't appear to be any sound or logical reason why such a distinction should be maintained.
- The UK Act no longer has this requirement

S 7(1) **does not include a cinematographic film** as distinct from the scenario or script for a cinematographic film. In other words, movies are not protected under s 7(1).

- E.g. Ballet dancer performing – author of dramatic work (choreograph written down) may not be performer – not necessarily the same.

[2] Case law suggests that a dramatic work entails a work of action which has **sufficient unity to be capable of performance** (*Green v Broadcasting Corp of New Zealand*; *Nova Productions v Mazooma Games*).

- ☒ *Green v Broadcasting Corp of NZ*: Game show **format** involving key phrases and clap-o-meter held not to be a dramatic work because it does not have sufficient unity to be capable of performance. The elements were unrelated to each other except as accessories to be used in the presentation of some other copyright work.
- ☒ Similarly, in *Nova Productions*, computer games are not considered as dramatic works because (1) it was not a work of action intended to be or capable of being performed before an audience and (2) the sequence of images to be displayed on the screen were dependent on how the game was played and could vary widely, thus the work did not possess sufficient unity within it for it to be capable of performance.

[3] They **must have movement, story or action**; they cannot be purely static (*Creation Records v News Group*).

- ☒ Photograph of a scene that looked very similar to the official photograph chosen by the plaintiffs for their album **not infringing** because scene is static and thus not a dramatic work.
- ☒? Silent composition entitled 4'33' by John Cage would likely not be considered as a dramatic work since it is **not a work of action**.

[4] **Secondary contributions** to scripts written by other playwrights tend **NOT to attract copyright protection** (*Tate v Thomas*).

- ☒ *Tate v Thomas*: A person who supplied a number of ideas, including key lines, which were to be worked out by others secured no part in the eventual copyright.
 - Pf – actor in play | Df – copied certain 'scenic effects' (make-up, acting style)

- Such 'scenic effects' protected as a 'dramatic piece' under Dramatic Copyright Act 1833?

- Held: A **'dramatic piece' was something capable of being printed and published**

- ☒ *Brighton v Jones*: Director of a play who suggested changes to plot and dialogue during rehearsals was not recognised as a joint author largely because the playwright was wholly responsible for the re-writing.

6.3 MUSICAL WORKS

[1] There is **no statutory definition** of a 'musical work' in the Copyright Act. However, given that the notion of what constitutes "music" is not static but dynamic, perhaps the Singapore legislature intended to leave the category of "musical works" **open for a liberal interpretation** by our courts.

[2] Where words are set to music, the two remain distinct works for copyright purposes (*Brown v McAsso*).

[3] In *Hyperion Records v Sawkins*, Mummery LJ elaborated on the statutory definition of "musical work", indicating that **"music" was different from "mere noise"** and "is **intended to produce effects of some kind on the listener's emotions and intellect**".

[4] **"Secondary" activities** such as adaptations and re-arrangements of have been held to attract their own musical copyright.

- **Selecting and arranging older tunes or scores** (*Austin v Columbia*)
- **Orchestrating** (*Metzler v Curwen*; *Godfrey v Lees*)
- **Making a piano reduction** (*Wood v Boosey*; *Redwood Music v Chappell*)
- Prepared works by famous composer for modern performance by **adding a missing string part** figured bass and corrections (CA in *Sawkins v Hyperion Records*; *Rahmatian*).
 - The fact that the end result sounded much like earlier versions was not allowed to deprive him of his claim.
- But **contributing only to performance and interpretation** at a recording of pop songs does not make the person a co-author (*Fylde Microsystems v T Radio Systems*; *Hadley v Kemp*).

- If 4"33' is construed as a work of silence and if silence itself denotes a *total* absence of sound, then silence *per se* (and hence 4"33') cannot be considered music.
- Cage was, however, of the view that there was no such thing as an absolute silence. Rather, he redefined silence as simply the absence of intended sounds.
- If one were to therefore interpret 4"33' as a work which **encompasses unintentional and ambient sound**, can it reasonably be argued that the natural sounds of the environment as well as man-made sounds emanating from the audience (e.g. human chatter) all constitute some sort of "music"?
- With respect, the present author is rather sceptical.
- The result might well be different if such **sounds had been incorporated into a unified work of music**, as is a common feature in "new age" music.
- Furthermore, there is the related problem of authorship – can Cage consider himself to be the "author" of a work which solely comprises such sounds?

SOUNDS OF NATURE?

Similar to above.

Query also whether a recording of the sounds of nature, for example, the sound of waves, birds and so on can be a musical work. Leaving aside the separate copyright in the sound recording, **are the sounds [of nature] a musical work?** Is there **any human author?** Can the person who recorded the sounds claim to be the author?

- This is rather unlikely.
- But, suppose the recorded sounds of nature are arranged and edited by the recordist to form a sort of tune – a conclusion of authorship may become more likely.

SOUND OF SILENCE AS MUSICAL WORK?

Authorship issue.

6.4 ARTISTIC WORKS

6.4.1 GENERAL

[1] Exhaustive definition: “Artistic works” defined in *s 7(1)* as a *painting, sculpture, drawing, engraving or photograph (s 7(1)(a))* or a *building or model of a building (s 7(1)(b))* as well as *any work of artistic craftsmanship* to which neither (a) or (b) applies (*s 7(1)(c)*). Does not apply to layout-designs of integrated circuits.

- For (a) and (b), **artistic quality is disregarded**.
- While most of the decisions set the minimal level of effort required low, by way of counterbalance, the **scope of infringement is narrowly defined** in such cases (see below for *Kenrick v Lawrence*).

[2] Artistic works have to be **permanent or at least durable** (*Merchandising Corp of America v Harpbond*).

- In *Merchandising Corp of America v Harpbond*, the court held that Adam Ant’s face make-up did not have sufficient permanence to attract copyright because “a painting **must be on a surface** of some kind” (at 46).
- Likewise in *Komesaroff v Mickle*, the court, in denying copyright to a product which generates ‘moving sand pictures’ through a mixture of liquid, sands and air bubbles, considered that the product was not a “work” of artistic craftsmanship because “no sand landscape is a static feature for any length of time” at 210.
- See below for more.

[3] What matters in relation to artistic works, particularly drawings, is that which is “**visually significant**” (*Interlego*).

SHOULD ARTISTIC WORKS BE CLASSIFIED INTO **MORE THAN ONE SUB-CATEGORY** E.G. DRAWING AND SCULPTURE?

No, it should not. Based on the central principle that copyright law only protects expression of ideas, in the

case of most artistic works it is only when the particular painting, photograph or other work is executed that the idea for it is transmuted into expression; the act of creation and the “fixation” of the work are indivisible.

- Compare this with literary, dramatic and musical works where the creativity process admits of more stages. A man may conceive a speech in his mind and deliver it from memory without ever writing it down. Some composers, lacking musical literacy, cannot get their works into permanent form by performing for another to write down or through recording.

DOES FIXATION REQUIREMENT APPLY TO ARTISTIC WORKS AS WELL?

YES

[1] Statutory interpretation:

- It may be argued that such a requirement is implied in the definition of an “artistic work” under *s 7(1) CA* given that **only certain material forms of expression** such as a painting, sculpture, drawing, engraving or photograph, etc are explicitly mentioned, and that the principle of “**noscitur a sociis**” (a word is known by the company it keeps) should apply to interpreting “works of artistic craftsmanship”.
- Additionally, a “work of craftsmanship” has also been defined by Viscount Dilhorne and Lord Reid in the leading case of *Hensher v Restawile* to mean “something made by hand and not something mass produced”, which further implies the requirement of permanence.

[2] Case law:

- In *Merchandising Corp of America v Harpbond*, the court held that Adam Ant’s face make-up did not have sufficient permanence to attract copyright because “a painting **must be on a surface** of some kind” (at 46).
- Likewise in *Komesaroff v Mickle*, the court, in denying copyright to a product which generates

‘moving sand pictures’ through a mixture of liquid, sands and air bubbles, considered that the product was not a “work” of artistic craftsmanship because “no sand landscape is a static feature for any length of time” at 210.

[3] Policy:

- **Idea-expression dichotomy:** The need for such a requirement can be appreciated in light of the general policy in copyright which gives protection only to material forms of expression whilst keeping the underlying ideas and information free for all to use.
- **Certainty of subject-matter:** Copyright, as an inchoate property right that is enforceable *in rem*, should only attach to works whose subject-matter is certain, so as “to avoid injustice to the rest of the world” (*Green v Broadcasting Corporation of New Zealand*, per Lord Bridge). After all, copyright is, broadly speaking, monopolistic in nature.
- **Evidential:** Requiring a work to be fixed in a material form also provides a reliable form of evidence upon which the existence of the work may be established and issues of disputed authorship resolved.

❌ NO

[1] Statutory interpretation:

The fact that artistic works are **excluded** from *ss 16 and 17 CA* may suggest that **Parliament did not intend** for the requirement of fixation in a material form to apply to artistic works.

[2] Case law:

Cornish, Llewelyn and Aplin suggests that the assumption that all subject matter requires to exist in some permanent form before it gains copyright does not seem to be an assumption of the CJEU, at least in respect of works covered by the *InfoSoc Directive*. Apparently, **originality is enough to gain protection** (*Football*

Association Premier League v QC Leisure at [97]; *Bezpečnostni* at [45-46]).

[3] Principle:

Fixation requirement may be hard to apply in cases where contents of works are constantly being altered and substituted such as web based databases like Wikipedia and other non-static artistic works (*Komesaroff v Mickle*).

- In *Komesaroff v Mickle*, a product which generates ‘moving sand pictures’ through a mixture of liquid, sands and air bubbles was denied copyright protection. However, it could be said that **at each stage prior to the next change the work had been reduced to a material form** and, so long as this was achieved, copyright subsisted in the work even though this “reduced form” may not remain fixed for long.

6.4.2 DRAWINGS

[1] Under *s 7(1)*, “drawing” includes any diagram, map, chart or plan.

- *Virtual Map v Suncool*: A map is an artistic work.
- It also includes trade logos (*AUVI Trade Mark; Fragrance Foodstuff v Bee Cheng Hiang*).
 - *Fragrance Foodstuff*: A corporate logo comprising the English word “Fragrance” with its Mandarin equivalent “香” is an artistic work within *s 7(1)* of the CA.

[2] Since the **threshold requirement of originality in copyright law is a relatively low** one and **artistic merit is not a prerequisite**, very simple works such as rough sketches or even mindless doodling may qualify for copyright protection.

- Thus, other than “a single straight line drawn with the aid of a ruler” (Megarry J in *British*

Northrop), courts are slow to exclude drawings from copyright on the ground of mere simplicity.

[3] What is important about a drawing is what is **visually significant** about it (*Interlego*); thus a drawing may still be “visually significant” despite simplicity in expression.

[4] However, if work is so simplistic in its form of expression that there is an inevitable merger between the form of expression and the underlying idea which the work is intended to express, then **copyright may not extend to protect such a work since copyright does not protect ideas per se** (*Kenrick v Lawrence*).

- Even if copyright should subsist, the protection is nevertheless a very “thin” one as infringement cannot be established except in the very limited case of an exact reproduction of the work.
- Thus in *Kenrick v Lawrence*, it was held that a drawing of a hand holding a pencil in the act of completing a cross within a square for voting did not attract copyright protection.

6.4.3 PAINTINGS

[1] Although “painting” is not defined in the Copyright Act, it should be treated as an **ordinary English word**. Thus, a painting is “a **picture produced by the art of applying paints to paper or canvas**” (*Collins English Dictionary*).

[2] A **paint without a surface is not a painting** (*Merchandising Corp v Harpbond*).

- ☒ Grease paint make-up on pop star’s face held not to be capable of copyright protection (*Merchandising Corp v Harpbond*)

6.4.4 PHOTOGRAPHS

[1] *Section 7(1) CA* defines “photograph” to mean “a product of photography or of a **process similar to photography**, other than an article or thing in which visual images forming part of a cinematograph film have been embodied, and **includes a product of xerography**”.

[2] The **requirement of originality is low** and it has been said that it could be satisfied “by little more than the opportunistic pointing of the camera and **pressing of the shutter button**” (*Copinger and Skone James on Copyright*).

- Seen in this light, copyright readily subsists in a photograph as long as the author is able to demonstrate that he has expended some degree of skill and labour in the making of the photograph.
- For example, in the selection and composition of the subject matter, the angle at which shot was taken, lightning used, and other photographic techniques.

[3] However, Neuberger J in *Antiquesportfolio.com v Rodney Fitch* identified **two exceptions** in which copyright will be denied to a photograph:

- **(1)** Where a photograph or other printed matter is made that **amounts to nothing more than a slavish copying** (*Bridgeman Art Library v Corel*)

Corp – where photograph of a work of art such as Money or Rembrandt attracted no copyright);

- However, arguable that in *Bridgeman* there is **skill and labour in what the photographer does in transforming a painting to a photographic medium** which arguably goes beyond the example in the Interlego case of the ‘well-executed tracing’

- (2) Where a photographer in producing his photograph merely **reproduced all the elements** such as subject matter, lighting, angle and so forth contained **in an existing photograph**.

6.4.5 ENGRAVING

[1] ‘Engraving’ includes an etching, lithograph, product of photogravure, woodcut, print or similar work, not being a photograph: see the Copyright Act s 7(1). **Modern decisions have tended to give a very extended meaning to the word ‘engraving’.** Thus, the following have been held to be engravings:

- Rubber stereo used to print images on heat transfer paper (*James Arnold and Co Ltd v Miafern Ltd*);
- Mould for making the ‘Frisbee’ flying toy (*Wham-O*)

[2] Note the reluctance in some courts to grant copyright to what are essentially **industrial engravings**.

6.4.6 SCULPTURE

[1] Under s 7(1), “sculpture” is given a non-exhaustive definition which includes “a cast or model made for purposes of sculpture”, which is essentially a circular definition.

[2] In *Lucasfilm v Ainsworth*, Mann J at first instance provided several guidelines drawn from previous authorities that are useful in determining the meaning

of “sculpture”. These were later approved by the Court of Appeal.

- i. some regard had to be had to the **normal use** of the word;
- ii. nevertheless, the concept could be applicable to things going beyond what would normally be expected to be art in the sense of the sort of things expected to be found in art galleries;
- iii. it was inappropriate to stray too far from what would normally be regarded as sculpture;
- iv. **no judgment** was to be made about artistic worth;
- v. **not every three dimensional representation** of a concept could be regarded as a sculpture, otherwise every three dimensional construction or fabrication would be a sculpture;
- vi. ***it was of the essence of a sculpture that it should have, as part of its purpose, a **visual appeal** in the sense that it might be **enjoyed for that purpose alone**, whether or not it might have another purpose as well. The purpose was that of the **creator** and it was this underlying purpose that was important;
- vii. the fact that the object had some other **functional use** did not necessarily disqualify it from being a sculpture, but it still had to have the intrinsic quality of being intended to be enjoyed as a visual thing; and
- viii. the **process of fabrication was relevant but not determinative**. There was no reason why a purely functional item, not intended to be at all decorative, should be treated as a sculpture simply because it had been (for example) carved out of wood or stone.

☒ UTILITARIAN/PURELY FUNCTIONAL

(vii) The fact that the object had some other **functional use did not necessarily disqualify** it from being a sculpture, but it still had to have the **intrinsic quality of being intended to be enjoyed as a visual thing**.

- Thus, the model toy soldier cast in metal in *Britain v Hanks Bros* might be played with but it still had strong visual appeal which might be enjoyed as such.
- Similarly, the “Critters” depictions of animals made with adorned wire in *Wildash v Klein* had other functions but they also had strong purely visual appeal.
- However, the Frisbee and its wooden model in *Wham-O*, the plaster cast of a sandwich toaster in *Breville*, the moulds of a dental impression tray in *J&S Davis* and cartridges in Metix should be excluded because **(1)** they would **not accord with the ordinary view** of what a sculpture is and **(2)** there is no intention that these objects itself should have visual appeal for its own sake and every intention that it be **purely functional**.
- Essentially functional objects should look to protection for their visual merits as registered designs (Mann J in *Lucasfilm (HC)*; affirmed by Jacob LJ in *Lucasfilm (CA)*).

Material used irrelevant; can be transient or even edible

The proposition that a work has to have “permanent existence” (*J&S Davis*) and thus cannot be made of materials that are transient or edible was firmly rejected by Mann J in *Lucasfilm* where he stated that **longevity, while relevant to purpose, cannot be conclusive**. He further pointed out Laddie J’s rebuttal in *Metix* that while an ice sculpture would likely have a shorter existence than the Davis trays, it is nonetheless a sculpture because its **whole ethos and purpose are to gratify the eye**.

- In *J&S Davis*, court dismissed model of a dental impression tray in modelling material as sculpture on the basis that it was never intended should have any permanent existence, being no more than a stage in production, is another.

ARTISTIC PURPOSE

(vi) It is of the essence of a sculpture that it should have, as part of its purpose, a **visual appeal** in the sense that it might be **enjoyed for that purpose alone**, whether or not it might have another purpose as well. The purpose was that of the creator and it was this underlying purpose that was important.

Jacob LJ highlights the **importance of the artistic purpose inquiry** in determining whether a work is a sculpture.

- This reflects the reference to ‘artist’s hand in the judgment of Laddie J in *Metix*. An artist creates something because it has **visual appeal** which he wishes to be enjoyed as such. **He may fail, but that does not matter** (no judgments are to be made about artistic merit). It is the **underlying purpose that is important**. This encapsulates the ideas set out in the reference works referred to in *Wham-O* and in *Encyclopaedia Britannica*.
- Thus, a **pile of bricks** temporarily on display at the Tate Modern is plainly capable of being a sculpture whereas the identical pile of bricks

METHOD OF PRODUCTION/MATERIAL

(viii) The **process of fabrication is relevant but not determinative**. There was no reason why a purely functional item not intended to be at all decorative should be treated as a sculpture simply because it had been (for example) carved out of wood or stone.

Method of production irrelevant

The court also recognised that “present-day sculptors use any materials and methods of manufacture that will serve their purposes”, thus “the **art of sculpture can no longer be identified with any special materials or techniques**”. Thus, in determining whether a work is a sculpture, recourse to the method of production would not suffice and that the central inquiry should be on the **creation of expressive form in three dimension**. (*Wham-O; Lucasfilm (HC)*).

dumped at the end of a driveway in preparation for a building project would not qualify as one. The difference lies in having regard to its purpose (Mann J's example in *Lucasfilm (HC)*).

6.4.7 BUILDING OR MODEL OF BUILDING

Section 7(1) defines "building" to include "a structure of any kind".

An architect is able to assert copyright in the **drawing plans of the building** as well as the **building** itself. However, it should be noted that the assertion of artistic copyright in a building is subject to the **specific defences** set out in *ss 64 and 72*.

6.4.8 WORKS OF ARTISTIC CRAFTSMANSHIP

[1] Whether it is a work of craftsmanship (*Hensher v Restawile*)

- Lord Reid stated that a work of craftsmanship must be a "**durable useful handmade object.**"
- Lord Simon: "even though not confined to handicraft, at least **presupposes special training, skill and knowledge for its production.**"

[2] Whether work has added character of being artistic

Lack of uniform approach by HL in *Hensher*, although all five law lords held that the prototype furniture was not a work of artistic craftsmanship.

- *Lord Reid* and *Lord Morris*: the work was to be viewed in a **detached and objective way** and that while the aim and purpose of the author might provide a pointer the thing produced must itself be assessed without giving decisive weight to the author's scheme of things
- *Lord Simon* held that an artistic piece must be a work of art and that the **intent of the creator and the result** were the decisive factors
- *Lord Kilbrandon*: the **conscious intention of the craftsman** was the primary test

Thus in the subsequent case of *Merlet v Mothercare*, the HC, in determining which of the test espoused by the HL in *Hensher* to apply, focused on the **intention of the maker** and whether he or she **intended to create a work of art**.

- ☒ In *Merlet*, the court held that it was not a work of artistic craftsmanship because the maker of the prototype baby's cape was not concerned with the creation of a work of art but with protecting her child from nature's elements.

One may also observe that by focusing the inquiry on "intention of the maker", it may cause a conflation between a work of artistic craftsmanship and a sculpture given that "artistic purpose" is one of the primary determinants for sculpture. In fact, we see this happening in *Lucasfilm* when the court appears to use them interchangeable?

VII. AUTHORSHIP & OWNERSHIP

7.1 AUTHORSHIP

[1] Definition of 'author' in relation to a photograph: s 7(1)

- *S 7(1) CA* Singapore defines 'author' **only in relation to a photo**. The author of a photo is the person who took it.
- Apart for this definition, there is no other definition of 'author' in the CA.

[2] Originality and authorship: In copyright law, authorship and originality are **correlatives**.

- Keane CJ in *Telstra (CA)*, affirmed by *Asia Pacific (CA)*: "Authorship and originality are correlatives. The question of whether copyright subsists is concerned with the particular form of expression of the work. You must identify authors, and those authors must direct their contribution (assessed as either an 'independent intellectual effort' of a 'sufficient effort of a literary nature') to the particular form of expression of the work. Start with the work. Find its authors. They must have done something, howsoever defined, that can be considered original."

[3] Can a company or incorporated body be considered an author of an original work? **NO** (CA in *Asia Pacific Publishing v Pioneers & Leaders (Publishers)*, overturning HC).

- Compilation deemed original but no author
- Court of Appeal noted that copyright has always been intended for the **protection of authors who are natural persons and not to corporate bodies**, and legal rights flowed only from human authorship.
- The Court further held that if corporate bodies would be allowed to be considered as authors for the purpose of copyright, it could result to copyright protection in perpetuity which is against public policy.

[4] Certain types of effort will not qualify for authorship

(A) Origination of ideas will not qualify as authorship

(*Asia Pacific (CA)*); not even joint authorship. Accordingly, Farwell J held in *Donoghue v Allied Newspapers Ltd* that where a person **communicates an idea to an author and the author clothes the idea in the form of an article, the copyright vests in the author**.

Copyright law does not protect ideas but only their expressions. The author will usually be the person who selects the words and reduces it to material form, thereby creating a work of expression.

- However, ideas and contributions put forward by the readers and horse racing experts would not be protected by the scope of copyright, as copyright protects the material form of a work, and not the ideas in the work. Even if the suggestions could be protected, the readers and horse racing experts were not employees of the Respondent, and correspondingly, the Respondent would not be able to claim copyright ownership of the Tables, if any (*Asia Pacific (CA)* at [76]).
- In *Tate v Fullbrook*, the court held that even though an actor expresses the script, he is not considered a joint-author. **Copyright of the script belongs to the scriptwriter** (and not the actor).
- **Exception:** However, if author employs **shorthand writer** to take down a story which the author is composing, word for word, in shorthand, and the shorthand writer then transcribes it, and the author has it published, the author is the owner of the copyright and not the shorthand writer. A mere amanuensis, does not by taking down word for word the language of the author, become in any sense the owner of the copyright (Lord James' example, *Walter v Lane*).

(B) **Non-productive work:** The CA in *Asia Pacific* considered that given how technology has taken away

so much “labour” out of fact-finding, the focus of older decisions on the **gathering of information as the touchstone** rather than the **productive effort** involved in expression **calls for reconsideration.**

- Accordingly, although the **contributions** of these individuals may have led to the compilation of the work, each individual’s responsibility and contribution would not be the type of effort rewarded by copyright law.
- **Contributions:** Collection of the horse-racing data, such as the horses’ and jockeys’ names, as well as their track work records, and the organisation and selection of such data were either computerised, or done by separate people
- It certainly cannot be said that a reader who writes in with suggestions for the improvement of the publication can be considered an “author”. Neither can the IT employee who entered the names of the horses in a race be considered an “author” of the compilation. Although it is undeniable that both contributed to the end product, data aggregation or input is not creativity (*Asia Pacific (CA)* at [80]).

(C) Person who made arrangements for the production of a work would not be entitled to be the author of the work as this did not generally relate to authorship skills (*Asia Pacific (CA)* at [70]).

- *Alteco’s* innovative tailoring of the term “author” ought not to be followed.

7.2 JOINT AUTHORSHIP

[1] A ‘work of joint authorship’ means a work that has been produced by the collaboration of two or more authors and in which the **contribution of each author is not separate from the contribution of the other author** or the contributions of other authors. A person who claims to be a joint author has to prove that he has contributed sufficiently or (in some cases) substantially to the expression embodied in the work (which entails both literal and non-literal elements) (*Ray v Classic FM*;

Wiseman v George Weidenfeld & Nicolson Ltd and Donaldson).

- ☒ If Author A wrote chapter 1 of a book, Author B chapter 2 and so on, this is NOT a work of joint-authorship. Here, the contribution of each author can be easily made out. A work of joint-authorship only exists where you cannot easily differentiate where each author’s contribution ends and another’s begins.
- ☒ Although the contributions of these individuals may have led to the compilation of the work, **they were not part of the actual process of compilation.** In this context, the *Telstra Appeal* at [92] is instructive. It affirmed that where the work of individuals was **not collaborative**, but was instead **merely organised to facilitate the production** of the work, this would **not be collaboration** of the kind contemplated by the definition of **joint authorship** (*Asia Pacific (CA)*).

[2] There must be a **COMMON DESIGN and co-operation in the work** of carrying out the design to constitute joint authorship (*Levy v Rutley*; *Heptulla v Orient Longman Ltd*).

- Note, however, that it is not necessary to establish the intention that the work be one of joint authorship where **common design can be shown** (*Beckingham v Hodgens*).

[3] A person who makes alterations or additions to the work, for the **PURPOSE of rendering it more attractive**, is NOT a joint author (*Levy v Rutley*; *Wiseman*).

- ☒ Where one party instructs another party to develop computer software, the involvement of the first party in testing the software, identifying defects and providing feedback to the other party does not give rise to joint authorship (*Fylde Microsystems v Key Radio Systems Ltd*).

[4] Although it is not necessary for a putative joint author to make a contribution to the work which is equal in terms of quantity, quality or originality to his collaborators, a **slight contribution is insufficient** (*Hadley v Kemp* [1999] EMLR 589).

[5] Ultimately, it seems that for a claimant to joint authorship in a work, he must establish that he has made a **significant and original contribution** to the creation of the work and that he has **done so pursuant to a common design** (*Cala Homes v Alfred McAlpine Homes East*).

[6] Joint authorship and duration of copyright

- **(A) GENERAL JOINT AUTHORSHIP:** *Section 77 of CA* modifies duration of copyright in original works (s 28) and copying or communication of unpublished works in libraries or archives (s 47) such that any references to the author of a work of joint authorship shall be read as references to the **author who died last**.
- **(B) PSEUDONYMS:**
 - **(i) Where at least one author's name is not under a pseudonym:** Where the work in question is a work of joint authorship and which was published under pseudonyms (*ss 78(1) and (2)*), references made to the 'author' of a work in *s 28, CA* (for purposes of calculating the relevant copyright term) shall be read as references to the author **whose identity was disclosed** or, if the identities of two or more of the authors were disclosed, as references to **whichever of those authors died last** (*s 78(3)*, read with *s 78(4)*). However,
 - **(ii) Entirely pseudonymous/anonymous:** If a work of joint authorship was published *entirely* anonymously or pseudonymously, copyright subsisting in the work shall continue to subsist under the expiration of the period of 70

years after the expiration of the calendar year in which the **work was first published** (*s 29(1)* read with *s 14(2)*).

- Note: If work is entirely under pseudonyms or anonymous, copyright duration will no longer be based on life of author + 70 years but rather 70 years after work was first published.

- **(C) UNQUALIFIED PERSON:** Likewise, *s 79* departs from general rule under *s 30(2)* and states that authorship of original works created by qualified and unqualified persons would vest solely in the qualified person(s).

[8] Exclusive rights granted to author extends to joint author as well (*s 75, CA*).

7.3 OWNERSHIP

Copyright in any literary, dramatic, musical or artistic work **initially vests in the author of the work** (*s 30(2)*). This is subject to assignments (s 194) and assignments of future copyright (s 195).

However, there are exceptions to this general rule:

7.3.1 GENERAL EMPLOYMENT

[1] Where the work is created by an author **in pursuance of the terms of his employment** by another person under a **contract of service** or apprenticeship, the **employer is the first copyright owner** (*s 30(6)*).

[2] The exceptions to the general rule that copyright initially vests in author in employment or commission situations may be **varied by contract** (*s 30(3)* – operation of *ss 4, 5 and 6* may be excluded or modified by agreement).

[3] Copyright can be transferred either as an **entire bundle**, or as a **single, distinct right within the bundle**.

The copyright owner may transfer his rights to another party or entity either partially or wholly.

[4] **OWNERSHIP ≠ AUTHORSHIP**: Authorship refers to the **concept of creating**, while ownership pertains to the **concept of possessing **proprietary rights****. The Court of Appeal pointed out that an author need not be the owner and the owner need not be the author (*Pioneer & Leaders v Asia Pacific Publishing*).

- This distinction was further exemplified in *Radcoflex Australia v James Lim Hwa Chin* where the court held that for copyright to vest in the documents, a connecting factor relating to nationality or residence of author has to be established, and that it is the status of the author and not of the copyright owner which is relevant. On the facts, if the plaintiffs had proven the residence or nationality of their employees in Australia who created the work, there would have copyright over the work. Unfortunately, they assumed wrongly that the country of incorporation of the company was sufficient to attract copyright protection and thus failed to establish that there was copyright vested in the work.

[5] **ASSIGNMENT**: Copyright is **transmissible by assignment**, by **testamentary disposition**, or by **operation of law as personal or movable property** (*s 194(1)*).

Assignment of copyright has to be in writing signed by or on behalf of the assignor to have effect (*s 194(3)*).

- Note that if it is transferred by will, it is NOT assignment by testamentary disposition; just testamentary disposition.

WAS WORK DONE IN THE COURSE OF EMPLOYMENT?

1. Was the author an employee?

Contract of service (employee) vs contract for services (independent contractor – **look at commissioning cases**)

- “The present case affords a good example of a **mixed contract** which is partly a contract of service and partly a contract for services. In so far as Mr. Evans-Hemming prepared and **wrote manuals for the use of a particular client of the Company**, he was doing it as part of his work as a servant of the Company under a contract of service; but, in so far as he **prepared and wrote lectures for delivery to universities and to learned and professional societies**, he was doing so as an accessory to the contract of service and not as part of it.” (Evershed MR in *Stephenson Jordan*)

2. Was the work created in the course of employment?

(A) SOME NON-EXHAUSTIVE FACTORS INCLUDE:

- Factors looked at (*Beloff*):
 - Salary
 - Office space
 - Equipment
 - Secretarial or staff support
 - Whether the work was prepared and written as an integral part of the business
- The work was done within the **job scope** of the employee
- The work was done during **office hours** using **office resources**
- *Stephenson Jordan*: The foreword or “Manchester section” stands on a different footing. There was a good deal of evidence to show that it was **part of a manual prepared for clients**.
 - Stencils were cut by the Company's staff for the multiplication of copies.
 - It was indeed in one of the manuals sent to the clients
 - Placed in the company's library
- *Noah v Shuba*: Copyright of book written by epidemiologist at home in the evenings and

weekends, and which was subsequently published by employer, deemed to be initially vested in author because it was not written by author in the course of his employment.

- In this case, even if it was vested in employer, there was an **implied term** in his contract that the plaintiff was entitled to retain the copyright in works written by him during the course of his employment.

work as a servant of the Company under a contract of service; but, in so far as he **prepared and wrote lectures for delivery to universities and to learned and professional societies**, he was doing so as an accessory to the contract of service and not as part of it (Evershed MR in *Stephenson Jordan*).

- First section (lectures), author = copyright
- Second section (for client), employer = copyright
- Third/fourth/fifth sections (after leaving company), author = copyright
- This Court in the case of *Waites v Franco-British Exhibition* lent support to the view that *prima facie* a man engaged on terms which include that he is called upon to compose and deliver public lectures or lectures to some specified class of persons, **would in the absence of clear terms in the contract of employment to the contrary** be entitled to the copyright in those lectures (*Stephenson Jordan*).

(B) WHETHER WORK WAS DONE AS AN INTEGRAL PART OF THE BUSINESS

The better test is **whether the work was prepared and written as an integral part of the business** of the company or whether it was done as an accessory to it (Denning LJ in *Stephenson Jordan*; affirmed in *Beloff*). Denning LJ gave the example that a man employed under a contract of service may sometimes perform services outside the contract.

- = **author owns copyright**
- A good illustration is *Byrne v Statist*, [1914] 1 K.B. 622, where a man on the regular staff of a newspaper made a translation for the newspaper in his spare time. It was held that the translation was not made under a contract of service but under a contract for services.
- A doctor on the staff of a hospital employed under a contract of service may give lectures to students. If, for his own convenience, he put the lectures into writing then his written work was not done under the contract of service. It might be a useful accessory to his contracted work, but it was not part of it and the copyright vested in him and not in his employers.
- The case of *Stephenson Jordan* provides a good example of a **mixed contract** which is partly a contract of service and partly a contract for services, which resulted in **mixed results**. In so far as Mr. Evans-Hemming prepared and **wrote manuals for the use of a particular client of the Company**, he was doing it as part of his

7.3.2 SPECIFIC EMPLOYMENT (N/M/P)

Special situation for **newspaper/magazine/periodical** employees (*s 30(4)*). Where an employee of a newspaper, magazine or periodical creates a literary, dramatic or artistic work pursuant to the terms of his employment and for the purpose of publication in a newspaper, magazine or periodical, the proprietor of the newspaper, magazine or periodical owns the copyright in respect of publication in or reproduction for the purpose of publication in any newspaper, magazine or periodical. The employee owns the remaining rights that make up the copyright bundle of exclusive rights.

- Old provision. Many other Commonwealth countries have already departed from this position.

7.3.3 COMMISSION

[1] If a **photograph**, the **painting** or **drawing of a portrait** or the making of an **engraving** by the other person is commissioned by another party, the **commissioner is the first copyright owner** (s 30(5)). If the portrait/photograph/engraving is required for a **particular purpose**, this purpose must be communicated to the commissioned party. While the commissioner is the copyright owner, the commissioned party has the **right to stop others from doing any act comprised in the copyright**, unless such act is done for the particular purpose for which the portrait/photograph/engraving is created.

- Likewise, the negative rights or veto rights attached to the commissioned party/author stem from an archaic provision.

[2] For other types of commissioned works: Ownership **belongs to the commissioned party**, unless the commissioner and commissioned party otherwise agree.

INFRINGEMENT

I. ANCILLARY ISSUES

GROUNDLESS THREATS

200.–(1) Where a person, by means of circulars, advertisements or otherwise, **threatens a person with an action or proceeding** in respect of an infringement of copyright, then, whether the person making the threats is or is not the owner of the copyright or an exclusive licensee, a person aggrieved may bring an action against the first-mentioned person and may –

- (a) **obtain a declaration** to the effect that the threats are unjustifiable;
- (b) **obtain an injunction** against the continuance of the threats; and
- (c) **recover such damages**, if any, as he has sustained,

unless the first-mentioned person satisfies the court that the acts in respect of which the action or proceeding was threatened constituted, or, if done, would constitute, an infringement of copyright.

SHOULD COPYRIGHT SUBSIST IN INFRINGING WORKS?

[1] **Subsistence of copyright is distinct from infringement** (*Redwood Music v Chappell*; cf *Ashmore*).

Thus, a derivative work can attract copyright and exclusive rights against 3P infringers but at the same time it can also infringe the copyright of the original work. This characteristic underlines the nature of copyright as a negative monopolistic right.

- E.g. photography occupies a rather unique place in copyright law inasmuch it is (or at least can be) a **creative work protected by copyright** as well as a **vehicle for infringing the copyright of others**.

[2] If the general policy of copyright is to prevent the unfair appropriation of the form of expression produced by the author after he has expended sufficient skill, labour and judgment in its creation, it would be **unfair for the law to deny the author copyright protection in the finished work** simply because he may have **inadvertently infringed** another person's work at some stage of the creative process.

[3] However, to endorse the view that copyright should subsist in infringing works is also problematic as it is **tantamount to giving incentives for others to infringe**.

[4] Solutions:

- Focus on the sufficiency of the skill, labour and judgement expended – if all the author did was copying per se, then based on the concept of originality, no copyright would subsist in the work. If, on the other hand, the author did not engage in copying per se and only some parts of the finished work were infringing, then the proposed solution is to see if the infringing parts may be severed from the finished work.
- If non-infringing parts could be separated from the infringing parts, copyright could still subsist in the rest of the non-infringing parts.
 - E.g. in *Stephenson Jordan*, court found that of the five sections of the book, only the second section was infringing.
- If the non-infringing parts cannot be separated from the infringing parts, an argument could be made that copyright may still subsist in the whole of the work but this copyright should be treated as distinct from, and subject to, the copyright in any prior original work incorporated into it.

II. GENERAL

[1] General: Copyright in a work or “subject-matter other than works” under the Copyright Act is infringed by a person who, not being the owner of the copyright and without the licence of the owner of the copyright, **does** or **authorises** the doing in Singapore of **any act comprised in the copyright** (*s 31; s 103*).

Under the Copyright Act, there are three types of copyright infringement:

2. **Doing** of any of the restricted acts comprised in the exclusive rights
3. **Authorising** the doing of the restricted acts comprised in the exclusive rights
4. **Distributing** or **dealing** with infringing articles once they have been made (commercial exploitation – *s 33*).

[2A] Primary infringement: For (1) and (2), which are known as **primary or direct infringement**, **liability is strict** as no intention to infringe on the part of the defendant needs to be established. A defendant is still liable even though he acts in innocence of the plaintiff’s copyright (*Sony Music Entertainment v Easyinternetcafe*).

- However, in certain cases of innocent infringement, the plaintiff shall not be entitled to any damages against the defendant but shall be entitled to an account of profits in respect of the infringement (*s 119(3)*).

[2B] Secondary infringement: With regards to (3), which is known as **secondary or indirect infringement**, **knowledge on the part of the defendant (actual or constructive)** that he is dealing in infringing articles made without the consent of the copyright owner is a necessary element to be established.

III. PRIMARY INFRINGEMENT

The starting point in this inquiry is *s 31, CA* which states infringement arises from the **doing of any acts comprised in the exclusive rights** of a work **without consent of the owner** of the copyright.

3.1 REPRODUCTION

3.1.1 GENERAL

[1] *Section 26* of the Act states that copyright in relation to a work includes the exclusive right to **reproduce the work in a material form**, and includes storing the work in any medium by electronic means (*s 17*). For this right to be infringed, P has to prove **objective similarity** as well as **causal link** between infringing work and copyright work. Additionally, *s 10(1)(b)* provides that it is not necessary that the whole of the work just be copied – it is enough if there is a **substantial reproduction** or copying of the copyright work.

L/D/M works

For a **literary, dramatic or musical** work, a reproduction in the form of a **sound recording or cinematograph film** and any record embodying such a recording and any copy of such a film shall be deemed to be a reproduction of the work (*s 15(1)*).

Artistic works

Artistic works may be infringed by **transposition from two into three dimensions** and vice versa (*s 15(3)*).

- However, note that infringement would not be found if the **object would not appear to persons who are not experts** in relation to objects of that kind **to be a reproduction** of the artistic work (*s 15(4)* read with *s 69*).

L/D/M/A works

- *S 15(1A)*: For the purposes of this Act, **reproduction**, in relation to any work, includes

the **making of a copy** which is transient or is incidental to some other use of the work.

- *S 15(1B)*: Without limiting the meaning of the term “reproduced”, for the purposes of this Act, a literary, dramatic, musical or artistic work, including a reproduction of such work in the form of a **sound recording** or **cinematograph film**, is reproduced if it is converted into or from a digital or other electronic machine-readable form, and any article embodying the work or reproduction of the work in such a form is taken to be a reproduction of the work.

Other subject matter

As for **other subject matter** such as sound recording, cinematographic film, television and sound broadcasts, cable programmes and published editions of works, reproduction essentially means the **making of a copy**.

[2] Computer programs are protectable under CA as a type of **‘literary work’**. Under s 7(1), definition of ‘computer program’ states that the source code and object code of a computer program are both protectable expressions as well (*Creative Technology v Aztech Systems*).

- By *s 17, CA*, a reproduction of a computer program includes storage thereof in a computer, and the right to make an adaptation thereof.
- By *s 7(1), CA*, an ‘adaptation’ means a version of the computer program, not being a reproduction thereof, whether or not in the language, code or notation in which the computer program was originally expressed.
- Thus in *Creative Technology v Aztech Systems*, copying was found when Aztech ran Creative Technology’s software **through its debugging program**. CA eventually found that the copying was unlawful as Aztech failed to establish any defences.
 - Additionally, Aztech’s **decompilation** of the software was further seen as adaptation of the original work.

WHO IS THE PARTY DEEMED TO HAVE MADE THE REPRODUCTION?

3.1.2 OBJECTIVE SIMILARITY / CAUSAL LINK

A. DIRECT COPYING

To establish copying, there must be a **causal connection** between plaintiff’s work and defendant’s work i.e. that defendant had copied plaintiff’s work.

[1] Direct evidence: The **burden is on plaintiff copyright owner** to prove copying and he can do so by relying on **direct evidence** e.g. testimonies of witnesses privy to the production process.

[2A] Inferential evidence: In the absence of direct evidence, **(1a) proof of similarity** between the alleged infringing work and the original, coupled with **(1b) proof of access to the original**, would raise a *prima facie* case of copying for which the **(2) defendant had to answer** (*Virtual Map v SLA (CA)*).

- Thus in *LB Plastics v Swish*, a *prima facie* case of copyright infringement was established when D **admitted having access** to plaintiff’s drawer and that the **infringing work was similar to plaintiff’s work** and was even meant to be interchangeable with it.

[2B] Fingerprints: P may seek to prove copying by showing that D’s work contains **“fingerprints of copying”**, which are the intentional inclusions by P of “inessentials, the small, redundant, even mistaken elements” in his copyright work (*Virtual Map v SLA (CA)*).

- Thus, in *Virtual Map v SLA*, SLA was successful in relying on “fingerprints of coping” such as phantom or ghost details and intentional errors to show that the Virtual Map did not independently create the maps through the use of GPS data as he had claimed.

- Likewise in *Creative Technology v Aztech*, the literal similarities, including programming errors, between Aztech and Creative firmwares, when viewed in toto, raise the irresistible inference that Aztech had not created its firmware independently.

[3] Possible explanations for D

- **Independent creation** (*Chua Puay Kiang v Singapore Telecommunication* – although causal connection was established, D was able to show via an internal memo that they were already working on a similar system 4 years before they saw P’s work)
- **Constraints by functional or utility considerations** (in an artistic work such as drawing of a useful article, similarities between P and D’s works could be a result of the function of the article) (*Catnic Components v Hill & Smith; Kleeneze v DRG*).
- Both P and D have **copied from common source**
- **Inspiration drawn from an identical source** (*Harman Pictures NV v Osborne*).
- **P copied from D**
- **Pure coincidence** (*Francis Day & Hunter v Bron* – subconscious recollection of song).

B. INDIRECT COPYING

*Note: Photograph cases may implicate indirect copying.

[1] **A copy of a copy is still a copy of the original** (*Interlego*).

- ☑ Thus, in *Interlego v Tyco*, Tyco’s 3D drawings were reverse engineered from Interlego’s toy bricks, which were created based on Interlego’s 2D drawings. Court held that **there was indirect copying**.
- ☑ In *Newspaper Licensing Agency v Marks & Spencer*, it was held that the cuttings supplied by the agency were facsimile copies of parts of the typographical arrangement of the newspapers, and that by copying the cuttings,

Marks and Spencer **indirectly copied** the same parts.

- ☑ In *Hensher v Restawile*, Graham J at first instance found that there was no indirect copying of the drawings of prototype **because ordinary members of the public would not think that the infringing furniture was a reproduction** of claimant’s drawing, thus no objective similarity (equivalent of s 15(4) read with s 69 of SCA).

[2] However, the **causal chain must run in the right direction** (*Purefoy v Sykes Boxall*).

C. SUBCONSCIOUS COPYING

Subconscious copying is a possibility which, if it occurs, may amount to an infringement of copyright. In order to establish liability on this ground, it must be shown that the composer of the offending work was in fact **familiar with the work** alleged to have been copied (*Francis Day & Hunter v Bron*).

- In *Francis Day*, although there was considerable similarity between the first eight bars of D’s song with P’s song, court accepted that D had not consciously heard of P’s song before and further held that there were differences real enough to make D’s work an independent creation.

3.1.1.3 TYPES OF COPYING

[1] **TYPE I – Literal copying**: Making a **reproduction of the whole** of the work, otherwise known as “slavish copying”.

[2] **TYPE II – Non-literal copying**: Where only an **identifiable part** of the copyright work is taken.

- Whether there is infringement would depend on whether a substantial part of the work has been taken.

[3] TYPE III – Altered copying or non-textual copying:

Where copying is done with modifications from P’s work but **no identifiable part** of the work has been taken. Typically involves D **borrowing an idea** and subsequently **translating or transforming that idea** into a new work often called a “transformative work”.

- Dramatisation of a novel
- Creation of a painting inspired by a photograph (*Baumann v Fussell* – D artist painted picture of a cock fight which P alleged was a copy of his photograph)
- Likewise, whether there is infringement depends on whether there has been substantial taking. Often, D would argue that he was merely borrowed an idea from P’s work.

3.1.4 SUBSTANTIAL TAKING

**Distinguish between the various types of copying first!
(per Scott LJ in *Designers Guild*)

[1] Substantiality depends on quality, not quantity (*Designers Guild*; followed by *Virtual Map v SLA (CA)*). Whether the part taken is substantial depends on its importance to the copyright work.

- Sometimes, in view of the **very limited quantity actually taken**, the emphasis upon quality may seem overstretched (*Ludlow Music v Robbie Williams*).
- Where the **quantity taken is large because the work itself is rather short** then there is a greater likelihood that a qualitatively substantial part has been taken (*Larrikin Music Publishing v EMI Songs Australia*).
 - In *Larrikin*, court held that although the question of quantity is secondary to that of quality, it is worthwhile noting that **two of the four bars or phrases of Kookabura** have been reproduced in Down Under (or 50% of the song).

Note that the different tests for non-literal copying vs altered copying is not settled.

[1A] For **non-literal copying** (Type II), the question of substantiality depends on the relationship between what has been copied on the one hand and the original work on the other. **Similarity is no longer relevant.** (Scott LJ, *Designers Guild*). Thus, the court asks if the **allegedly infringing work was a substantial part of the plaintiff’s work**, and it no longer makes references with the defendant’s work (*Millet LJ, Designers Guild*).

- The Court should ask **“is this copied part an important part of the plaintiff’s work?”** The copied part must form a substantial part of the plaintiff’s work but need not be a substantial part of the defendant’s product.
- In *Virtual Map v SLA (DC)*, the Judge held that **there was substantial copying**. It was the resemblances in inessentials, the small, redundant, even mistaken elements of the copyright work, as seen in the “fingerprints” which carried the greatest weight because such seemingly insignificant errors and similarities were, unless proven otherwise, least likely to have been the result of independent design. Ultimately, what was appropriated was **qualitatively significant** to SLA since it was an appropriation of the “skeleton of SLA’s data”, the importance of which lay in the absolute and relative position of any point of the map data.

[1B] For **altered copying** (Type III), the **similarities between the infringing work and the copyright work would actually be determinative** of the question of **substantiality** (Scott LJ, *Designers Guild*).

- Can be seen as conflation of copying + substantial taking limbs.
- Thus in *Designers Guild*, Scott LJ held that on the facts, the similarities between Ixia and Marguerite play a determinative role. If their similarities were so extensive to justify a finding of copying, it must follow that the Marguerite

design incorporated a substantial part of the Ixia design. Logically, it also shows that the pirated design incorporated a substantial part of the skill and labour of the plaintiffs.

[2A – Specific] Essentially, the test of infringement in the case of altered copying is, in principle, no different from any other kind. **Has the infringer incorporated a substantial part of the independent skill, labour etc contributed by the original author** in creating the copyright work, being skill or labour of a literary, dramatic or musical character? If so he has [reproduced] a substantial part (Lord Scott in *Designers Guild*, affirmed by *Virtual Map (HC/CA)*).

- In *Warwick Film*, author's published book, which was based on earlier transcripts of Oscar Wilde's trials, attracted copyright because of his editorial work. However, a defendant who took from it **passages of the transcript but very little of the author's editing** was held NOT to infringe. Thus the case shows a **calibrated approach** towards scope of protection to author's literary efforts.
- Same approach applied to cases where the real skill lies in some **commercial assessment distinct from the expressive content** of the work i.e. football pool coupon cases (*Ladbroke*), where it is the particular selection that is so significant, **protection goes to taking the selection more or less as a whole.**

[2B – Broad] Alternatively, in *Newspaper Licensing Agency*, Lord Hoffman held that the 'quality' inquiry must refer to the **interest protected by copyright** i.e. literary/artistic originality.

**Looks at objective of a particular form of copyright. Note that beyond a superficial unity, copyright really covers a broad spectrum of works and subject matter that are very different in nature, purpose, objective, commercial underpinnings and commercial exploitation.*

- In that case, court held that in relation to a **published edition**, the interest lies in protecting the **presentation and layout of the edition** as a whole. The presence of other material on the page and the spatial relationship of the articles to each other are important parts of its typographical arrangement.
- Thus, a **facsimile copy of the single sheet** would be a **copy of the whole** of its typographical arrangement.
- But a **copy of the article on the page**, which gives no indication of how the rest of the page is laid out, **is not a copy of a substantial part** of the published edition constituted by the newspaper.
- The appeal was dismissed because the facts fell into the latter scenario.

**Implicates idea/expression dichotomy*

[3A – Abstract] As a general rule, in cases of artistic copyright, the **more abstract and simple the copied idea, the less likely it is to constitute a substantial part**. As a corollary to this point, an idea which is padded with **greater detail is more likely to be considered substantial** (Lord Hoffman, *Designers Guild*).

- **Too general:** Thus in *Michael Baigent v Random House Group*, UKCA dismissed appeal on the basis that the central theme in *The Holy Blood and the Holy Grail* comprised elements of too high a level of generality and abstraction to qualify for copyright protection.
- In *John Robert Powers School v Tessensohn*, no infringement was found as the four allegedly infringing extracts were not a 'substantial' part of the course manual because what was copied was the general idea of the manual, which was about keeping track of a student's diet.
- However, an **abstracted part of these features or combination of features of the work** instead of a discrete identifiable part could nevertheless

be regarded by the court as **substantial** (Lord Hoffman, *Designers Guild*).

- Thus in the case of literary works, it may consist of the original elements of the plot of the novel as well as the literary style peculiar to the author.
- For artistic works, these may include a combination of the artist's choice of painting polka dots over stripes, using one colour over another, mixing the colours to create a distinct hue and adopting a particular brush technique to achieve desired effect.

[3B – Simplicity] The more **simple or lacking in substantial originality** the copyright work, the **greater degree of taking will be needed** before the substantial part test is satisfied i.e. exact imitation (*Kenrick v Lawrence*).

- If work is so simplistic in its form of expression that there is an inevitable merger between the form of expression and the underlying idea which the work is intended to express, then **copyright may not extend to protect such a work since copyright does not protect ideas per se** (*Kenrick v Lawrence*).
- Even if copyright should subsist, the protection is nevertheless a very “thin” one as infringement cannot be established except in the very limited case of an exact reproduction of the work.
- ☒ Thus in *Kenrick v Lawrence*, it was held that a drawing of a hand holding a pencil in the act of completing a cross within a square for voting did not attract copyright protection.
- ☒ *Designers Guild* (HL): It is on this ground that the mere notion of combining stripes and flowers would not have amounted to a substantial part of the plaintiff's work. At that level of abstraction, the idea, though expressed in the design, would not have represented

sufficient of the author's skill and labour as to attract copyright protection.

- ☑ But if combined with artistic technique to give rise to original expression, then it would be protected, like how the case was decided by HL in the end.

[3C – No connection with LDMA] A copyright work may express certain ideas which are not protected because they have **no connection with the literary, dramatic, musical or artistic nature of the work**. It is on this ground that, for example, a literary work which describes a system or invention does not entitle the author to claim protection for his system or invention as such. The same is true of an inventive concept expressed in an artistic work. However striking or original it may be, others are (in the absence of patent protection) free to express it in works of their own. (Lord Hoffman, *Designers Guild*).

[4] Note that English courts appear to be **raising protection for artistic or design works** as artistic technique may not be protected if the technique, in combination with author's artistic ideas, gives rise to a distinctive form of artistic expression that is original and not commonplace.

- In *Designers Guild* (UKHL2001), HL held that it was the artistic technique used in conjunction with various elements such as vertical stripes and flowers that give rise to an original expression which the D copied from.
- Similarly, in *Temple Island Collections* (UKHC2012), court held that D copied a substantial part of P's work because D's work included the key combination of the visual contrast features with the basic composition of the scene itself, which was what made P's image visually interesting.

[5] POLICY: The substantial part test reflects the competing policy considerations which underlie the

Copyright Act **permitting a measure of legitimate appropriation of an original work**. It achieves an appropriate balance between protection of original works and promotion of the public interest.

Check to see if P and D are business competitors

[6] UNFAIR COMPETITION CALCULUS:

Case law also suggests that if the defendant's work is in competition with P's copyright work, an appropriation of P's work by D is more likely to be **deemed as a taking of a substantial part of the work**, and vice versa (Peterson J in *University of London Press* case; Lords Reid and Pearce in *Ladbroke*).

3.2 PUBLICATION

[1] 'Publication' refers to the **supply of reproductions** of a work or other subject matter to the public whether by sale or otherwise (s 24(1)).

[2] What is not considered 'publication'? Specifically, s 24(3) provides that the following acts shall not constitute publication of the work:

- Performance of LDMA work
- Supplying (by sale or otherwise) to the public of records of LDMA work
- Exhibition of artistic work
- Construction of a building or of a model of a building
- Supply (by sale or otherwise) to the public of photographs or gravings of a building, of a model of a building or of a sculpture

[3] Any **unauthorised publication** or the doing of any other unauthorised act shall be disregarded (s 24(6)).

- a work or other subject-matter has been published;
- a publication of a work or other subject-matter was the first publication of the work or other subject-matter; or
- a work or other subject-matter was published or otherwise dealt with in the life-time of a person,

WHAT DOES '**TO THE PUBLIC**' MEAN?

Passive availability would suffice; requirement of supplying the public **does not demand any positive act** of reaching out to the public (*British Northrop v Texteam Blackburn*; endorsed in *Television Broadcasts v Mandarin Video Holdings*).

- There is no requirement for an actual physical delivery to, or receipt of the copies of work by, members of the public and it also does not matter if the publication was not advertised or promoted. The mere fact that the copies were **on offer for sale** and **adequate stock was kept** to

meet the anticipated demand was sufficient for the court to return a finding that copies of the work have been published (Megarry J in *British Northrop*).

- In Malaysia, HC in *Television Broadcasts v Mandarin Video Holdings* held that in order for an act of publication to take place, it is not necessary to prove any overt or positive act of reaching out to the public. Neither is it necessary to show that the public have actually taken up copies of work. **“Supply” should be interpreted broadly** so as to include making the reproductions or copies available to the public in the sense of a willingness to supply the reasonable requirements of the public. **If the public is disinterested in the work, it will still be published if reproductions are in fact available** to members of the public.

3.3 PERFORM THE WORK IN PUBLIC

[1] Scope of right: The right to perform the work in public is a right conferred on the copyright owner of a **literary, dramatic or musical work** (s 26(1)(a)(iii)). Copyright owners of an **artistic work** do not enjoy the exclusive right of public performance.

- It is a significant point that under the Copyright Act, artistic works do not enjoy any form of exhibition right unlike those in other jurisdictions. An exhibition is not considered a publication of the work and copyright owners of artistic works also do not enjoy any right of public performance in the exhibition of their work.

[2A] Definition of “performance”: Under s 22(1) of the Copyright Act, a “performance” refers to

- a. **Any mode of visual or aural presentation**, whether the presentation is by the use of any receiving apparatus, by the exhibition of a cinematograph film, by the use of a record or by any other means
 - a. As far as other subject matter such as cinematograph films, broadcasts and cable programmes is concerned, copyright owners are conferred a specific right of causing the subject matter, in so far as it consists of visual images and sounds, to be seen and heard in public respectively.
 - b. This means that any unauthorised screening of a cinematograph film or broadcast of a television, radio or cable programme would constitute infringement in the right of public performance in these other subject matter.
 - c. Note that the law **DOES NOT** confer on copyright owners of sound recordings the exclusive right of public

performance. See *Susanna Leong* at 205-206 for more.

- b. Any delivery of a **lecture**, an **address**, a **speech** or a **sermon**

[2B] The definition is equally applicable to an **adaptation** of a work.

[3] **Performance IN the public ≠ Communication TO the public (vice versa)**: It is also important to distinguish “performance” from the “communication” to the public of a work or other subject matter.

- Communication to the public of a work or other subject matter does not constitute a performance of the work (*s 22(2)(a)*).
- At the same time, causing visual images to be seen or sounds to be heard does not amount to a communication to the public of a work or other subject matter (*s 22(2)(b)*).

WHAT DOES ‘**IN THE PUBLIC**’ MEAN?

[1] In *Jennings v Stephens*, UKCA held that the true criterion of whether a performance is “in public” or not is the **character of the audience** and there are four important factors relevant in determining this:

- Presence or absence of visitors or guests
- Whether performance is paid or gratuitous
- Whether admission is free or for payment
- Number of the audience involved

These factors taken individually or in combination are **not always conclusive**.

- In *PRS v Harlequin Records*, the playing of records at a record shop to an audience consisting of persons present in the shop which the public at large was permitted to enter without any charge, payment or invitation was held to be a performance “in public”.

[2] In considering whether a performance is in public, its **effects on the value to the copyright owner of his**

statutory monopoly is a consideration of significant importance (*Ernest Turner v PRS*).

- Thus performances which would “**whittle down the value of the monopoly**” if permitted would according to this criterion be **considered performances in public and copyright infringing**.

3.4 COMMUNICATE TO THE PUBLIC

[1] **Scope of right**: LDMA + other subject matter

[2] Under s 7(1), “communicate” means to **transmit by electronic means a work** or other subject-matter. It includes:

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

[3A] **Transmission by electronic means**: Includes broadcasting, inclusion in a cable service programme and some form of internet transmissions. These modes of communication are seen as forms of **“push” technologies** (where there is an active communicator with multiple passive recipients)

[3B] **Making available a work**: **Pull technology** (passive communicator with multiple active recipients).

3.5 ADAPT

[1] Scope of right: L/D/M

[2] "adaptation" –

- a) in relation to a literary work in a non-dramatic form, means a version of the work (whether in its original language or in a different language) in a dramatic form;
- b) in relation to a literary work in a dramatic form, means a version of the work (whether in its original language or in a different language) in a non-dramatic form;
- c) in relation to a literary work being a computer program, means a version of the work (whether or not in the language, code or notation in which the work was originally expressed) not being a reproduction of the work;
- d) in relation to a literary work (whether in a non-dramatic form or dramatic form), means –
 - a. (i) a **translation** of the work; or
 - b. (ii) a version of the work in which a story or action is conveyed solely or principally by means of pictures; and
- e) in relation to a musical work, means an arrangement or transcription of the work;.....

[3] In relation to an adaptation of the work, the **copyright owner is further conferred the right** to reproduce the adapted work in material form, the right to publish the adapted work if the work is unpublished, the right to perform the adapted work in public, the right to communicate the adapted work to the public and the right to make an adaptation of the adapted work (*s 26(1)(a)(vi)*).

3.6 AUTHORISING PRIMARY INFRINGEMENT

[1] The concept of **authorisation liability** in *s 31(1)* and *s 103(1)* extends the rights of copyright owners to cover acts of persons which are related, in some way, to an infringement of copyright.

- **Rationale:** Underlying purpose is to **nip the problem in the bud** (e.g. target university so students will stop infringing). Other considerations such as **deeper pockets** and **potential backlash in media publicity**.
- Note also that the doing of an act restricted by the copyright and its authorisation are **separate torts** (*Ash v Hutchinson*; *ABKCO Music & Records v Music Collection International*).
- Ng-Loy: Her view is that for there to be authorisation liability, **primary infringement has to be established**.

[2] In Singapore, the word "authorise" meant to **grant or purport to grant, whether expressly or impliedly, to a third person the right to do the act complained of**, regardless of whether the intention was that the grantee should do the act on his own account or only on account of the grantor (*Ong Seow Pheng v Lotus Development Corp* (SGCA1997); affirmed by *RecordTV v MediaCorp* (SGCA2010)).

[3] It was also held that authorisation **could only emanate from someone having or purporting to have authority to grant the right to do the act complained of**; an act was not authorised by a person who merely enabled, possibly assisted or even encouraged another to do that act, but who did not actually have or who did not purport to have any authority which he could grant to justify the doing of that act.

- The law is more interested in the mastermind behind infringement than its lackeys.

[4] In order for the authorisation of the doing of an act to be a tort, the **act authorised must be an act restricted by the copyright**.

[5] To assist the court in determining whether authorisation to do an act comprised in the copyright has been granted illegitimately, VK Rajah JA in *RecordTV v MediaCorp TV* listed four "**authorisation liability factors**" which should be taken into account:

- (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”).

Courts evaluate the authorisation liability factors in their totality in the context of the factual matrix of each case. Thus, proving one or even several of these factors in either the alleged authoriser’s or the copyright owner’s favour will not invariably be decisive on the question of authorisation liability.

IV. SECONDARY INFRINGEMENT

1. COMMERCIAL EXPLOITATION OF INFRINGING COPIES MADE IN SINGAPORE

[1] Under *s 33*, the law prohibits commercial exploitation of infringing copies made in Singapore by **sale and other dealings**.

[2] To constitute copyright infringement, the act of selling, letting for hire or exhibiting in public for trade of the infringing copies must be carried out within jurisdiction in Singapore.

2. INFRINGING COPIES MADE ELSEWHERE AND COMMERCIALY EXPLOITED IN SINGAPORE

[1] Under *ss 32 and 33*, the law prohibits commercial exploitation of infringing copies made elsewhere by importation into Singapore, distribution, sale or other dealings in Singapore.

[2] Who is the ‘owner of copyright’?: If copies are made with the consent of the copyright owner in the country of manufacturer, then under the law, these copies are **genuine articles** and it is not copyright infringement to import them into Singapore and to deal with them subsequently (*ss 25(3) and 25(4)*).

- But if there is no person entitled to the copyright in the country of manufacturer, copyright will vest in person entitled to it in the country of importation.

3. REQUISITE KNOWLEDGE ON PART OF D

[1] In all cases of secondary infringement under *s 32, 33, 104 and 105*, the burden of proof is on the plaintiff to establish the requisite knowledge on the part of the defendant: that he knows or ought reasonably to know that the making of the copies was carried out without the consent of the copyright owner.

[2] High Court in *PP v Teoh Ai Nee* provided that 'knowledge' includes **actual knowledge** ('where he knows') as well as constructive knowledge ('where he ... ought reasonably to know'). **Constructive knowledge**, or knowledge of circumstances which would put an honest and reasonable man on inquiry, also encompasses: **(1) wilfully shutting one's eyes to the obvious, (2) wilfully and recklessly failing to make such inquiries** as an honest and reasonable man would make, and **(3) knowledge of the circumstances which would indicate the facts** to an honest and reasonable man (then Yong CJ endorsing the five states of mind postulated by Peter Gibson J in *Baden, Delvaux v SociÉTÈ GÈnÈrale*).

- **Actual knowledge:** Established by alleged infringer's (1) own statements or (2) conduct or through the (3) giving of notice by the copyright owner that he is dealing with infringing copies and whether the alleged infringer then makes inquiries during a specified reasonable time.
- **Ought reasonably to know:** Court will take into account the totality of the evidence involved which includes the ordinary understanding expected of persons in the line of business undertaken by the alleged infringer, the publicity given to the general business knowledge, the nature of the business which the alleged infringer undertook and the nature of the copyright work in issue.

Thus in *PP v Teoh Ai Nee*, HC held that D were not liable for copyright infringement as they lacked the requisite knowledge.

- Although it was established that D would have the **general business knowledge** that they could be dealing with infringing copies, this knowledge also included knowledge that recordings could be reproduced under different licences in different countries and that artists could record under different labels.
- **Low purchasing price** of infringing copies and **lack of copyright labels** or EMI labels on copies were **not per se sufficient** to put any honest and

reasonable business man on inquiry that they were buying infringing copies.

- Strong evidence of **D acting reasonably and honestly:**
- D had taken oral and contractual assurances of the legitimacy of their imports from overseas suppliers
- D had also sought and secured legal advice on the legality of their imports from a qualified legal adviser, even though the advice turned out to be wrong

DEFENCES

I. GENERAL FAIR DEALING

Under *s 35(2)*, whether a dealing with a work for any purposes except those stated in *ss 36 and 37* constitutes fair dealing depends on the following factors:

- a) the **purpose and character** of the dealing, including whether such dealing is of a commercial nature or is for non-profit educational purposes;
- b) the **nature of the work** or adaptation;
- c) the **amount and substantiality** of the part copied taken in relation to the whole work or adaptation;
- d) the **effect of the dealing upon the potential market** for, or value of, the work or adaptation; and
- e) the possibility of obtaining the work or adaptation within a **reasonable time** at an **ordinary commercial price**.

1.1 PURPOSE AND CHARACTER

1.2 NATURE OF WORK

Harper & Row Publishers – D took a few lines from memoirs but court considered that it was the heart of the memoir and thus found infringement and no defence – esp since unpublished, fair use did not apply – concept of allowing authors the right and privacy to decide when they want to publish

1.3 AMOUNT AND SUBSTANTIALITY

Sony Corp v Universal Studio – fair use exonerating end user – time-shifting benefits – despite taping down the whole program – the fact that it was the whole program that was copied was not fatal because of circumstances of the case

1.4 EFFECT OF USE UPON POTENTIAL MARKET

II. SPECIFIC FAIR DEALING

2.1 PURPOSE OF RESEARCH OR STUDY

[1] Policy: The defence of fair dealing for purpose of research and study gives effect to the **important policy** that **copyright should not impair activities that are necessary for the generation of new works** by other authors/creators where in particular the use of the work does not interfere unduly with the general exploitation of the copyright work.

Section 35(3) – Notwithstanding subsection (2), a dealing with a literary, dramatic or musical work, or with an adaptation of such a work, being a dealing by way of the copying, for the purposes of research or study –

- (a) if the **work or adaptation comprises an article in a periodical publication**, of the whole or a part of that work or adaptation; or
- (b) in any other case, of **not more than a reasonable portion of the work or adaptation**,

shall be taken to be a fair dealing with that work or adaptation for the purpose of research or study.

[2] Note that even if purposes of research or study are satisfied, still have to satisfy the ‘fairness’ element (refer to *s 35(2)* for list of factors).

- *Ss 35(3) and (4)* are ‘deeming’ provisions – if you fit yourself into that, you are deemed to be fair. But does not mean that if you don’t fit yourself in it, you are unfair. Still got other factors under *s 35(2)*.

[3] Amendments in 2004 suggest that the defence of fair dealing is now applicable to a dealing with the work for

research and study conducted **either for commercial or private purposes**.

STUDYING

- The significance of the word “private” before “study” has its history in the old case of *Sillitoe v McGraw Hill* (see below)
- After 2005, we deleted the word “private” from *s 35*. This has implications. It opens up further the defence in *s 35*.
- The **mere republication** of a copyright work is not a “fair dealing” simply because it was intended for purposes of private study (*University of London Press* case)
 - If an author produced a book of questions for the use of students, another person could not simply with impunity republish the book with the answers to the questions.
- **Studying must be undertaken by the student himself**. A **publisher cannot rely** on the exception to justify reproducing parts of copyright-protected works in study guides (*Sillitoe v McGraw Hill*; approved in *Creative Technology v Aztech System*).
- The word “private” is to **prevent educational institutions and libraries** from relying on this defence (*Creative Technology v Aztech System*).
 - *Section 52* and *s 44-50* suggests that the intention of Parliament in removing ‘private’ from *s 35* is not so much as to render these provisions redundant but merely to expand the defence. **Old rationale would likely still stand** (Ng-Loy’s position).

RESEARCH

- How about the word “research?” Can it include commercial research?

- The old *s 35(5)* stated: “research shall not include industrial research or research carried out by bodies corporate...”
- Today, *s 35(5)* has been deleted since 1998. It was deleted partly because of the *Creative Technology* case. Parliament found that it was **not conducive to innovative commercial research** being undertaken by small and medium sized enterprises here in Singapore.

“Research” must be given a wide interpretation. A two-step approach was stated: first find out **what the purpose is** and secondly ask **if the purpose is fair** (*CCH Canadian v Law Society of Canada*).

2.2 PURPOSE OF CRITICISM OR REVIEW

[1] Under *s 36*, a dealing with a **LDMA** work or with an **adaptation** of such work shall not constitute an infringement of the copyright in that work if it is for the **purpose of criticism or review, whether of that work or another work**, and a **sufficient acknowledge** of the work is made.

[2] **Policy**: Gives effect to the policy that criticism or review in general is a valuable social activity that should not be unduly suppressed.

WHAT IS ‘CRITICISM OR REVIEW’?

[1] **Criticism can be of any kind.**

- In *Pro Sieben Media*, use of copyright material for another television programme criticising “chequebook journalism” was held to be for the purpose of criticism or review of the content of copyright work.

[2] Criticism or review may concern **ideas expressed** as well as the **mode of expression** (*Hubbard v Vosper*).

2.3 PURPOSE OF REPORTING CURRENT EVENTS

[1] Under *s 37*, a fair dealing with a LDMA work, or with an adaptation of such a work, shall not constitute an infringement of the copyright in the work if it is for the purpose of, or is associated with, the reporting of current events

- In a newspaper, magazine or similar periodical with a sufficient acknowledge of the work made; or
- By means of broadcasting or a cable program service or in a cinematograph film.

WHAT IS REPORTING OF 'CURRENT EVENTS'?

[1] In *Pro Sieben Media AG v Carlton UK Television*, a case on chequebook journalism, the defendant was sued for copyright infringement when he used a 30-second film extract from an exclusive television interview contained in P's programme in his own programme.

- With regards to D's pleading of defence of fair dealing for purpose of reporting current events, Laddie J held that the **provision should be construed liberally** and that there as no necessity to restrict the defence of fair dealing to the reporting of news events less than 24h old as the objective of the defence is to allow fair use of copyright material for purpose of reporting matters of current, as opposed to historical, interest or concern.

[2A] In Singapore, the CA in *Bee Cheng Hiang v Fragrance Foodstuff* read into the provision in *s 37* an **implicit requirement of the element of public interest** in order for the defence to apply.

[2B] With regards to the meaning of "reporting current events", CA has endorsed the view that it **should not be restricted to the reporting of current events in general news programmes**. CA was of the view that if there as indeed confusion in the mind of the public as

established by evidence, "that could conceivably constitute a 'current event'".

2.4 WHAT IS 'FAIR'?

Although *s 35(2)* sets out a list of factors to be regarded in determining whether a dealing with a work constitutes a fair dealing, they are only applicable for any purpose (including research and study) other than a purpose referred to in *ss 36 or 37*.

[1] The approach to be taken as per Lord Denning MR in *Hubbard v Vosper*:

- First consider the **number and extent of quotations and extracts**. Are they altogether too many and too long to be fair?
- Next consider the **use made of them**. If they are used as the basis for comment, criticism or review, that would be fair dealing. If they are used to convey the same information as the author, for a rival purpose, that may be unfair.
- Subsequently, **consider the proportions**. To take long extracts and attach short comments may be unfair. But short extracts and long comments may be fair.

[2] The substantiality or quantity of work taken in relation to copyright work **cannot be a factor that is considered in isolation**. Thus, courts have opined that the dealing can still be fair even where D has copied the whole of P's work.

- Letter to magazine containing words of epitaph in its entirety (dozen or 20 words) would still be fair (Megaw LJ, *Hubbard v Vosper*).

[3] Publication of **unpublished works** would generally not be "fair dealing" (Romer J in *British Oxygen v Liquid Air*; affirmed in part by Lord Denning in *Hubbard v Vosper*).

- Rationale: It would be **manifestly unfair** that an unpublished literary work should, **without the consent of the author**, be the subject of public

criticism, review or newspaper summary. Also appears to serve as **quasi-right of privacy**.

- Although a literary work may not be published to the world at large, it may, however, be circulated to such a **wide circle that it is "fair dealing" to criticise it publicly in a newspaper**, or elsewhere. This happens sometimes when a company sends a circular to the whole body of shareholders. It may be of such general interest that it is quite legitimate for a newspaper to make quotations from it, and to criticise them - or review them - without thereby being guilty of infringing copyright. The newspaper must, of course, be careful not to fall foul of the law of libel (Lord Denning, *Hubbard v Vosper*).
- Thus in *Hubbard v Vosper*, court considered the bulletins and letters to have been so widely circulated that it was perfectly "fair dealing" for D to take extracts from them and criticise them in his book.

[4] It is not fair dealing for a **rival in the trade** to take copyright material and **use it for his own benefit** (Lord Denning, *Hubbard v Vosper*).

- Although commercial competition is generally recognised as an important consideration, it is not of overbearing importance and in appropriate circumstances courts are still prepared to hold a dealing to be fair even though P and D are commercial rivals (*British Broadcasting Corp v British Satellite Broadcasting*).