

THE FUTURE OF COLLECTIVE LICENSING IN SINGAPORE

The Music Business in Singapore

Music retail in Singapore has evolved with the widespread access to and use of the internet. While sales of physical-format music—records, CDs and even cassette tapes—are still ongoing, consumers are turning to different avenues, including the internet, to purchase music. For instance, music streamed from the internet, websites set up by artists and fans of artists alike, and other music streaming services have been made available to internet users on the basis of ‘sampling’ by potential fans and consumers before they commit to buying whole music albums or compilations; the music is, thus, ‘free-to-try’. Such services also include music track downloads, with usually one or two free tracks being made available in order to entice listeners to buy entire albums. In addition, websites now offer music for sale on a track-by-track basis, meaning that a consumer is able to buy as many or as few tracks as they want from one single album, thus creating a more personalised retail experience.

Music piracy in Singapore before the internet largely took the form of physical-format music piracy, where music CDs were ‘burned’ or ‘ripped’ on to CD-Rs or CD-RWs and exchanged between consumers or sold cheaply at brick-and-mortar establishments, or even night markets or makeshift vendor stalls. This included digitised music stored by compressing each music file into low-quality files such that each burned CD could store numerous songs at any one point of time.

Today, the internet in Singapore is not just accessible, but widespread, with household broadband connection and continually widening coverage of public wireless access. In 2008, 80% of Singapore households had access to a computer while 76% had access to the internet at home; 70% of internet users over 15 years of age used the internet as a communication tool, while 39% used it for leisure activities including downloading and listening to online music. Mobile phone penetration exceeded 131% and the home broadband penetration rate exceeded 99.9%, while the number of broadband subscribers stood at 4,715,900.¹ The second point about the situation in Singapore today is that the computer and internet-savvy population provides a ready base and audience for music downloads and streams, which has led to issues of music piracy, as well as piracy of other digital media and entertainment. This has impacted on the physical-format music industry, as illustrated by the 9.3% drop in Asia’s physical music distribution market in 2008, the biggest drop in the entertainment and media industry in five years.² Thirdly, the recent AC Nielson report of 6 January 2009, which did not distinguish between users engaging in legal or illegally obtained media, reported that in Singapore the most common digital content streamed and downloaded was music or other audio tracks/files. The online survey

found that 59% of Singapore respondents had streamed, on average, four music or audio files in the past month, while 35% had downloaded more than two music or audio files.³ Finally, that said, a January 2007 survey by the International Chamber of Commerce addressing the best and worst performing countries in addressing IP piracy and counterfeiting, ranked Singapore among the top 10 best performers.⁴

There are three points to consider about the illegal distribution of digital music files. First, the Recording Industry Association (Singapore), or RIAS, was formed in 1976 as the Singapore Phonogram Association, with the objective of fostering and maintaining trade ethics and fair business practice within members of the music industry and to serve as the music industry's voice both locally and internationally. RIAS estimates that pirate sales in Singapore amounted to a value of S \$7 million in 2002.⁵ Second, in an unreported decision of February 2006, two Singaporean internet users were convicted for illegally distributing hundreds of MP3 music files to other internet users, under section 136(3)(b) of the Singapore Copyright Act (cap. 63). That same year, RIAS filed 33 criminal complaints against individuals alleged to have been involved in illegal filesharing of music, involving peer-to-peer, or P2P, programmes in international networks. These complaints marked the inaugural expansion of the campaign against illegal file-sharing in South-East Asia.⁶ Third, in October 2008 it was reported by the *Straits Times* that the police, acting on complaints by RIAS, had raided the homes of several music downloaders and seized their computers. In that month RIAS reported 25 new cases of illegal music filesharing to the police.

Downloading music and accessing streams of music online using personal computers is common in Singapore. This is especially so because the total household broadband penetration rate in Singapore stands at 94.3%, while 97% of Singaporeans own a personal computer, according to the AC Nielson report of January 2009. Ease of access to the internet, speedy connections and island-wide hotspots of free wireless internet have made accessing music online a widespread practice in Singapore.

The monetisation of music downloads and streams depends largely on the music host website. Singaporeans are able to access almost all websites available on the worldwide web—web content is not usually blocked or filtered for Singapore access to the extent that it is neither offensive nor undesirable. As such, internationally based and hosted web content, weblogs, filesharing sites and even internet music streaming sites are accessible by Singapore internet users. Music download websites that accept international credit cards are also virtually patronised by Singapore internet users.

We shall now consider the offerings of music for sale, then music for free. There have not been many locally based online sources from which Singapore users could purchase music. Soundbuzz was launched in 1999 as one of the first few legitimate online music sources in Singapore. However, it has since shut down, after being bought by Motorola in 2008. The demise of Soundbuzz could have been partly brought about by its struggle to keep up with other telecommunication giants in the industry, which have since started offering music services from online music stores or mobile handsets for sale bundled with the right to download songs for a specified period of time. Customers would then be free to keep all the music downloaded. However, such schemes were only available with purchase of a mobile handset, and not available for use with handsets from other brands, or without handsets at all. Today, the Singapore market has seen little expansion with regard to online music sources, save for a few international giants, which have started to offer online sales of their music that were not available in Singapore just a few short years before.

There is also music available 'for free'. Singapore users who are able to—and in fact do—access websites of internationally hosted music streams or file downloads without paying any fee, do not typically direct their minds to the legality or illegality of such services. Paid advertisements on websites hosting free music streams and downloads belie the fact that such provision of music is in fact monetised. Online banner or audio advertisements are a viable source of monetisation that allows users to enjoy free music while ensuring that music artists and producers are paid. It is apparent that some online music hosts are beginning to realise that seeking payment from end users for music downloads might well be counterproductive, as end users turn to free, even if illegal, sources of online music. This is certainly so in Singapore, where the prevailing ethos among consumers of online music does not include an expectation to pay for such music, and where a significant proportion of users are not attuned to the potentially illegal nature of unauthorised music downloads, in the face of freely available downloadable music content.

In addition in Singapore, the use of mobile devices to listen to music is widespread; in particular, users enjoy music 'on the go' through the use of mobile phones and portable music players. This fact can lead on to the issue of side-loading, which involves the transfer of data between two locally situated devices, typically between a computer and a mobile device such as a mobile phone or portable music player. Side-loading is common practice among music listeners in Singapore. This often entails a listener 'ripping' the musical contents of a music CD on to a computer before side-loading the musical contents on to a portable music player. Alternatively, music files may be downloaded (legally or otherwise) on to a computer, and then side-loaded into the portable music player.

However, what about fair dealing? An issue that has arisen in relation to side-loading concerns the following scenario. A music listener purchases a music CD and subsequently rips the songs (frequently, 100% of the content) as digitised MP3 content on to a computer, before transferring the files into a portable music player for personal enjoyment and use. Despite arguments that the reproduction involved in the above scenario is a form of copyright infringement not saved by the 'fair dealing' provisions of the Copyright Act in Singapore, local academics have argued otherwise, that this would in fact be legitimate fair dealing on the basis that a person who purchases a legitimate music CD and then copied it into a portable music player would in fact be privately copying work for 'format shifting',⁷ similar in concept with 'time shifting', where one records a broadcast to view or listen to at a more convenient time, qualifying it as permitted 'recording broadcast for private and domestic use', in accordance with section 114 of the Copyright Act.

Current indications do not appear to point to side-loading practices being significantly overtaken by the use of downloading or streaming services, or vice versa. At it stands, both forms appear to serve their own purposes, the choice of either perhaps being dictated by the available music content for the desired selection of users in the circumstances at hand.

The Applicable Law

Singapore's copyright law, which applies to music, is embodied in the Copyright Act (see above) and includes provisions reflecting Singapore's commitment to various copyright-relevant international conventions and bilateral treaties that the country has entered into. As a member of the World Trade Organization (WTO) and of the World Intellectual Property Organization (WIPO), Singapore provides intellectual property protection in accordance with the minimum standards set out in the Agreement on Trade-Related Intellectual Property Rights (TRIPS). In addition, Singapore has acceded to the Berne Convention for the Protection of Literary and Artistic Works (1971 Act). Accordingly, original works of residents or citizens of, or that were first published in, any other WTO country or any of the other signatory countries to the Berne Convention would enjoy copyright protection in Singapore as if they were the original works of Singapore residents or citizens or were first published in Singapore (see below).

The Copyright Act recognises nine categories of works covered by copyright protection, divided into two groups: authors' works or works comprising literary, dramatic, musical and artistic works; and entrepreneurial works or 'subject matter other than works', comprising sound recordings,⁸ cinematographic films, television

broadcast and sound broadcasts, cable programmes and published editions of works. The subject matter of the copyright work must satisfy the protection criteria under the Copyright Act. The work must be 'connected' to Singapore (or the other WTO or Berne Convention countries), whereby the author of an *unpublished* work must be a 'qualified person' (i.e. a Singapore citizen or resident)⁹ and the author of a *published* work must have had the first publication of the work take place in Singapore (or the author must be a citizen or resident at the time of first publication). Other protection criteria include the work having to exist in some material form, to comply with the 'fixation' requirement provided for in section 2(2) of the Berne Convention, and the work having to be 'original', as further discussed below.

Under the structure of the Copyright Act a song would contain two distinct subject matters in relation to copyright—the musical work, in the arrangement of musical notes, and the literary work in the lyrics—so that where the copyright in these two subject matters arise from two separate sources, two separate licences would have to be obtained from those two sources for there to be a proper right of use of the song. Further, when a song is contained in a digital format and hosted on the internet for users to download, it would contain three copyright subject matters—the musical work, the literary work and the sound recording—so that only when licences for all three subject matters have been obtained would a digital sound recording made available for download on the internet be properly licensed.

Prior to 2004, the Copyright Act had only criminalised commercial activities of copyright infringement. With the January 2004 amendments to the Copyright Act and the introduction of the new section 136(3A), wilful infringement of the copyright in a work was made an offence in Singapore if only either (or both) of two conditions was (or were) met—the infringement is significant and the infringing act was done to obtain a commercial advantage—whereby a person convicted of such infringement would be liable to a fine of not more than S \$20,000 or to imprisonment for a term of not more than six months or to both. In the case of a second or subsequent conviction, a person would be liable to a fine of not more than \$50,000 or to imprisonment for a term of not more than three years or to both.

In respect of the above conditions, although the Copyright Act does not expressly define when an infringement is considered 'significant', it sets out the factors that the court might consider when deciding whether the extent of infringement is 'significant', namely: the volume of articles that are infringing copies; the value of the articles that are infringing copies; whether the infringement has a substantial prejudicial impact on the owner of the copyright; and all other relevant matters. Furthermore, the Copyright Act expressly provides that a person is deemed to obtain 'commercial advantage' if 'the act is

done to obtain a direct advantage, benefit or financial gain for a business or trade carried on by him’.

Interestingly, in having occasion to consider the applicability of the above provision of the Copyright Act, the court in *Odex Pte Ltd v. Pacific Internet Ltd* [2008] SLR 18, quoted the statement of the Singapore Minister of Law in the parliamentary proceedings during which the provision was discussed before enactment, that the provision was

‘not intended to catch a person who commits an infringement by occasionally downloading an article of song from the internet for his own personal enjoyment.’¹⁰

on the subject of radio streaming, following amendments to the Copyright Act in December 2008, the Recording Industry Performance Singapore (RIPS), a collective licensing body of 13 record companies that issues licences to broadcast music, requested Singapore radio broadcasters to pay an annual licensing fee if they wanted to continue providing radio streaming services over the internet.¹¹ Previously, radio stations were exempt from paying record companies when providing such services. Notably, internet radio station streaming of the three main radio broadcasters in Singapore, MediaCorp, Safra Radio and SPH UnionWorks, ceased as of March 2009, owing to unresolved negotiations with RIPS for licence payment of royalties to record companies.

Case law has added to interpretation of the copyright provisions in Singapore. The concept of ‘originality’, as mentioned above, is not defined in the Copyright Act. Singapore case law provides guidelines in determining the ‘originality’ of works.

Flamelite (S) Pte Ltd v. Lam Heng Chung [2001] 4 SLR 557 states clearly that an original work does not necessitate originality of ideas or thoughts but rather the form in which the work is expressed, which is consistent with the international standard on the matter as evinced by article 9(2) of TRIPS, providing that copyright ‘protection shall extend to expressions and not to ideas, procedures, methods of operation or mathematical concepts as such’.

Originality also does not mean novelty, uniqueness nor inventiveness, according to *Auvi TM* [1992] 1 SLR 639. The High Court in this case stressed that for copyright purposes, the originality threshold is a relatively low one.

The expression of an author’s work is original if the author has created it and has not copied it from another, and if he has expended towards its creation a substantial amount of skill and

labour, although the exact amount of skill and labour expended cannot be precisely defined, as set out in *Auvi TM* at 648.

Where an author has made use of an existing subject matter (source material) in the creation of his own work, his own work is original if sufficient skill, labour or judgement was expended, and an element of material alteration existed, which makes the entirety of his own work different from the existing subject-matter (derivative work). This was discussed in *Real Electronics Industries Singapore (Pte) Ltd v. Nimrod Engineering Pte Ltd* [1996] 1 SLR 336 and *Virtual Map (Singapore) Pte Ltd v. Suncool International Pte Ltd* [2005] 2 SLR 157.

The fact that a derivative work infringes the copyright in the source material does not impact on the question whether the derivative work is original, as stated in obiter dictum in *Virtual Map*.

Last, in cases involving fact-based works, any inquiries as to originality are focused on whether sufficient skill, labour and judgement were involved in the selection and arrangement of facts, as provided in *Virtual Map*.

Case law involving online music distribution starts, as mentioned above, with the unreported decision in 2006 in the prosecution of two copyright infringers who had distributed numerous music files over the internet. The police found a total of about 2,000 music files in their personal computers, which had been stored with the intention of online distribution through an the internet chat programme, Internet Relay Chat (IRC). The perpetrators were jailed for four months and three months, respectively.

The identity of downloaders is another issue important to the development of case law. In the recent case of *Odex Pte Ltd v. Pacific Internet Ltd* [2008] SLR 18 (see above), the Singapore High Court was faced with an application by a distributor of anime programmes, to compel an ISP in pre-action discovery, to provide the identity of its subscribers, whose Internet Protocol addresses had been tracked through patented technology and found to have engaged in unauthorised uploading and downloading of anime video titles. In disallowing the application, the High Court held that: only copyright owners and exclusive licensees had the locus standi and the right to take action against copyright infringers; and an extremely strong prima facie case of wrongdoing had to be established, before a pre-action discovery application for the disclosure of subscriber identity would be allowed.

How do we believe that the law will develop, given the socio-economic and political climate in Singapore? Singapore recognises that

economic growth and development is strongly tied to intellectual property protection, and is very willing and committed to support effective criminal actions against piracy.¹² However, it is virtually impossible to wipe out music piracy, particularly since, with the availability of online distribution, it is no longer dependent on the existence of multiple physical media in the form of albums, cassettes or CDs, which are more easily identifiable in bulk, and pirated material can sojourn through multiple jurisdictions without physical media needing to pass through border controls.

Singapore's internet-savvy music-listeners have apparently become accustomed to the idea of 'free' music, so that unless copyright laws in Singapore are rigidly enforced, the average internet user would likely not think twice before downloading 'free' music off the internet. The prevailing mentality seems to be that of 'I won't get caught' or 'It isn't a big deal'. Internet users and music listeners who are in their late teens to 20s can be said to be especially resilient to purchasing digital-format music. This group of consumers have grown up in an age where online filesharing is the norm and free and instant gratification is made possible in the borderless realm of the internet; it is possible that music piracy, by any other name, does not seem to be a serious crime in their eyes. Indeed, it is perhaps telling that in the parliamentary discussion of the amendment to the Copyright Act to criminalise wilful copyright infringement, the Minister of Law made clear the intention not

'to catch a person who commits an infringement by occasionally downloading an article of song from the internet for his own personal enjoyment'

The Intellectual Property Rights Branch (IPRB), as part of the Criminal Investigation Department of the police in Singapore, acts on complaints from RIAS and the music industry. Not all these investigations lead to criminal convictions. In fact, the IPRB in July 2009 informed the music industry that it would not commence action against the complainants, recommending instead 'collaborative enforcement' as the best form of action to take.¹³ The IPRB has since confirmed that it would advise the recording industry to commence private prosecution or civil proceedings against infringers.¹⁴

Conclusions

Collective licensing in Singapore is managed by a few key collective management organisations formed or appointed by copyright holders in order to manage the rights in their copyright works. These collective management organisations administer the licensing of rights, collection of royalties and enforcement of rights on behalf of the copyright holders they represent. Collective management organisations also act as a main contact point between copyright

holders and users, even with copyright holders who are not members of the organisations. They are usually structured as non-profit entities, in which, after deducting an administration fee, the rest of the licence fees collected are distributed back to the copyright owners.

The following represent the three main collective management organisations in Singapore.

RIPS is a collective licensing body in Singapore, empowered to exercise the rights of record companies with respect to: the public performance of karaoke and/or music videos; reproduction of sound recordings on to computerised or other storage systems; and MPEG layer 3 or 4 (or MP3 or MP4) licences—in which the copyright is owned or controlled by the record companies represented by RIPS to grant the requisite licenses.

COMPASS, Composers and Authors of Singapore Ltd, is a non-profit company that deals specifically with music copyright and the usage of musical works, including the making available of a work (on a network or otherwise) and reproduction rights in music. By virtue of reciprocal agreements with many other similar music copyright organisations around the world, COMPASS protects a wide selection of works by numerous songwriters and composers worldwide.

The Music Publishers (Singapore) Ltd (MPS), incorporated in 1989, is an association comprising 12 music publishing companies, controlling a large volume of music copyright in Singapore. Its principal activity is to act as a representative of the music publishers, including in particular: lawfully promoting and protecting the interests of the music publishers and other musical copyright owners of Singapore, and all music publishers in general; diffusing among its members information on all matters that affect the business of music publishers; and exercising and enforcing on behalf of its members and their composers all rights and remedies subsisting under the law of copyright in Singapore.

Collective management organisations in Singapore serve as a reliable non-profit, non-commercial conduit for music publishing companies to enforce their rights, whenever needed, in a more efficient and concise manner. This is especially so in a small country like Singapore, where home-grown talent often find it impossible continually to identify and monitor the use of their music by both individuals and establishments. Taking into account the difficulties created by foreign usage and the need to negotiate tariffs and licence fees, collective management organisations are better placed to carry out the necessary actions that would lead to cost savings and higher returns to the rightful owners of the copyright.

It would appear that, based on the observations above, enforcing copyright against music piracy and ensuring authorised use and proper licensing of music in Singapore, including the cultivation of greater awareness of the rights of music owners and producers, would be largely left to and would need to be practically driven by the efforts of copyright owners themselves. To this extent, we are of the view that collective licensing and the associated programmes and activities of collective management organisations provide a significant opportunity in such efforts by copyright owners, within the framework of internationally compliant copyright law in Singapore.

Footnotes:

1. Infocomm Development Authority of Singapore, *Annual Report 2008/09*.
2. 'Battling Music Piracy in Asia', in the *Straits Times*, 3 July 2009.
3. AC Nielsen, 'Singapore Ranks Second in the World as the Country with the Highest Ownership and Usage of Media Technology' (www.sg.nielson.com/site/20090106.htm).
4. *Global Survey on Counterfeiting and Piracy* (29 January 2007), issued by Business Action to Stop Counterfeiting and Piracy, an initiative by the International Chamber of Commerce.
5. RIAS website, www.rias.org.sg/piracy.html.
6. International Federation of the Phonographic Industry, breakdown of legal cases against illegal filesharing, www.ifp.org/content/section_news/20060404a.html.
7. Law of Intellectual Property of Singapore, Ng-Loy Wee Loon, 2008, paragraph 11.3.23.
8. Defined as meaning the aggregate of the sounds embodied in a disc, tape, paper or other device in which sounds are embodied; section 7(1) of the Copyright Act, see definitions of 'sound recording' and 'record'.
9. Section 27(1) of the Copyright Act.
10. *Odex Pte Ltd v. Pacific Internet Ltd* [2008] SLR 18, at paragraph 74.
11. Channelnewsasia.com, 25 March 2009, 'Singapore's Internet Radio Streaming Dries Up'.
12. International Intellectual Property Alliance House IP Subcommittee Testimony, October 18, 2007, p. 15.
13. International Intellectual Property Alliance 2008 Special 301, Special Mention, Singapore, p. 431.
14. Telephone call made to IPRB on 19 November 2009.