

Copyright Infringement - Locus Standi and the Right of Communication to the Public

Composers and Authors Society of Singapore Ltd v Fox Networks Group Singapore Pte Ltd [2021] SGHC 2411

This case provides useful insights for those bringing or defending against a claim for copyright infringement. First, who can sue for copyright infringement? Second, for the purposes of s 26(1)(a)(iv) of the Copyright Act (Chapter 63, 2006 Revised Edition) (“**Copyright Act**”), do point-to-point satellite transmissions (“**PTP transmissions**”) constitute communication of a work to the public?

On the first issue of locus *standi*, only the owner or exclusive licensee of the right to do the acts comprised in the copyright (“**Underlying Right**”) may institute a claim for copyright infringement. One who merely owns or only granted an exclusive right to authorise others to exercise the Underlying Right (“**Right of Authorisation**”), but does not itself possess the Underlying Right, does not have locus *standi*. The two rights are distinct and severable.

On the second issue, it was held that PTP transmissions generally do not constitute communication of a work to the public. For one, such transmissions do not fall within the meaning of “communicate”, nor do they meet the threshold of “communication to the public” since they do not involve a direct transmission to the general public or a part thereof, but only transmission to another broadcaster or a handful of broadcasters.

Background

Composers and Authors Society of Singapore Ltd (“**COMPASS**”) is a collecting society which administers the rights of public performance, broadcast, diffusion and reproduction in musical and associated literary works on behalf of its members. Fox Networks Group Singapore Pte Ltd (“**Fox**”) is a broadcasting company, providing subscription pay television channels in an encrypted format (“**Encrypted Channels**”) only accessible to various independent content distributors (of which only two are in Singapore - Singtel and Starhub). The distributors own, operate and manage their own television platforms, and members of the public in the country would subscribe to these television platforms. The distributors also provide their subscribers with the necessary equipment to view the content (which includes the channels of Fox) on their television platform.

COMPASS brought an action in the High Court of Singapore for alleged copyright infringement on Fox’s part. It was claimed that the uplinking of the Encrypted Channels, which contained programmes with musical works of owners represented by COMPASS (“**Disputed Musical Works**”), for satellite transmission to third parties (including the distributors and their end-users) constituted a communication to the public of the Disputed Musical Works without licence. The High Court had to consider whether COMPASS had locus *standi* to sue for copyright infringement, and if so, whether Fox’s activities could constitute infringement.

Locus *standi* to sue for infringement of copyright

The High Court found that COMPASS had no standing to sue for infringement. Based on the wording of the agreements between COMPASS and the copyright owner, COMPASS was merely the exclusive licensee of the Right of Authorisation, and this did not mean or imply it was also the exclusive licensee of the Underlying Right.

In particular, COMPASS was only granted the right to “*authorise the public performance, broadcasting and inclusion in a cable programme of [the relevant works] ...*”, or to “*grant the necessary authorisations for all public performances ... [of the relevant works]*”, and nothing more.

As a starting point, a copyright owner has both the Underlying Right and the Right of Authorisation. However, the Underlying Right and the Right of Authorisation are conceptually distinct, and these rights can be severed from each other, such as via assignment or exclusive license. Once the rights are severed, owning or being an exclusive licensee of the Right of Authorisation does not necessarily imply that one was also the owner or exclusive licensee of the Underlying Right, and vice versa.

Only an owner or exclusive licensee of the Underlying Right can sue for infringement of copyright. The owner or exclusive licensee of the Right of Authorisation -- without more -- has no standing to sue. Thus, COMPASS lacked standing to bring any claim for primary infringement.

Whether uplinking of television channels to satellite constitutes communication of a work to the public

Notwithstanding the issue of standing, COMPASS’ claims against Fox for primary infringement would also have failed, as the High Court found that Fox’s act of uplinking its Encrypted Channels for PTP transmissions did not amount to “communication to the public” for the reasons below.

Communication

s 7(1) of the Copyright Act defines “*communicate*” as follows:

“... to transmit by electronic means (whether over a path, or a combination of paths, provided by a material substance or by wireless means or otherwise) a work or other subject-matter, whether or not it is sent in response to a request, and includes —

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

A “broadcast” is one way to “communicate” a work for the purposes of the right of “communication to the public”. The High Court found that PTP transmissions were not “broadcasts”. Broadcasts must objectively involve direct transmission to the general public or a part thereof, and PTP transmissions do not achieve this. Thus, Fox did not “broadcast” the Disputed Musical Works.

“Making available” of a work is another way to “communicate” the work. The High Court found that for a work to have been made available within the meaning of Section 7(1) of the Copyright Act, any person must be able to exercise their “individual choice” to access the work. By uplinking the Encrypted Channels, the Disputed Musical Works were not made available for access to any person at their choosing. Only the distributors of Fox, who were provided with the decoder devices to decrypt the signals at the downlinking site, were able to access such works. Fox’s transmissions therefore did not result in the work being “made available”, as the transmissions were encrypted and not accessible by anyone other than Singtel or Starhub.

For these two reasons, Fox did not “communicate” the Disputed Musical Works.

To the public

The High Court noted that “the public” is confined to persons within Singapore. Persons outside of Singapore do not form the relevant public.

Multiple factors are considered in determining whether a communication has been made to “the public”. A relevant factor in establishing this is where the communication reaches all members of the community or a section of the public, or a fairly large number of persons. Another factor is whether the recipients of the communication are the copyright owner’s public, i.e. the recipients of the communication were persons from whom the owner is entitled to expect payment for the work’s authorised communication. The communication may also be more likely to be to “the public” if it was made in a commercial setting, though this is not determinative.

Despite the presence of the latter two factors, Fox’s transmission only reached Singtel and Starhub, and a mere two entities cannot be said to be “the public”. As such, Fox’s activities did not amount to “communication to the public”, and COMPASS’ claim for infringement failed.

Takeaways

Parties entering into agreements involving the assignment or license of particular rights comprised in the copyright should be clear and specific on the type of rights that are included and excluded from the assignment or licence. Otherwise, a party may find itself without certain rights that it may wish to exploit in future. Similarly, a copyright owner who wishes to authorise an exclusive licensee to enforce its Underlying Right on its behalf must take care to ensure that the Underlying Right has been properly licensed.

The case is also of special importance to those involved in the satellite broadcasts of copyrighted works. Based on this decision, PTP transmissions sent in an encrypted manner to a limited number of intermediate distributors, do not constitute a communication to the public. From an enforcement perspective, rights holders are likely to focus their attention on broadcasters/distributors who receive such PTP transmissions for purposes of direct broadcasting to the public. It would be vital to ensure that proper rights clearance is obtained prior to carrying out any direct broadcast to the public.

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This article is intended to provide general information only and should not be relied upon as an exhaustive or comprehensive statement of law. Should you have any specific questions, please speak with one of our above contacts, or your usual contact at Amica Law LLC.

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