

## COPYRIGHT INFRINGEMENT IN THE ERA OF TECHNOLOGY ADVANCEMENT: A MALAYSIAN PERSPECTIVE

Zeti Zuryani Mohd Zakuan<sup>1</sup>, Ida Rosnita Ismail<sup>2</sup>, Roshayati Abd Hamid<sup>3</sup>,  
Suria Fadhillah Md Pauzi<sup>4</sup>

<sup>1</sup> Law Department, Universiti Teknologi MARA Perlis, <sup>2</sup> UKM-Graduate School of Business, Universiti Kebangsaan Malaysia, <sup>3</sup> Faculty of Economics and Management, Universiti Kebangsaan Malaysia, <sup>4</sup> Department of Law, Universiti Teknologi MARA Pahang.  
MALAYSIA.

<sup>1</sup>zeti@perlis.uitm.edu.my, <sup>2</sup>idarosnita@ukm.edu.my, <sup>3</sup>wanrose@ukm.edu.my,  
<sup>4</sup>suriapauzi@pahang.uitm.edu.my

### ABSTRACT

*In the era of advance technology, information is just a click away. Information is accessible anytime and anywhere. In order to get information, people will tend to copy the information which is available online. The act of copying is an act of stealing intellectual property. This scenario affected the owner of intellectual property as their property is in jeopardy. In order to protect the owner of intellectual property, the Malaysian government has enacted certain laws. The laws provide certain rights to the owner. One of the rights provided is copyright which is illustrated in Copyright Act 1987. The Act has been amended in 2012 to give better protection to the owner of copyright. Based on doctrinal research and by applying content analysis method, this paper will analyse the protection conferred by Copyright Act 1987 in protecting the owner of intellectual property in Malaysia. Relevant provisions under the Copyright Act is analysed to see whether the Act is able to provide comprehensive protection to the copyright owners in Malaysia.*

**Keywords:** Copyright Act 1987, copyright, copyright infringement, Malaysia

### INTRODUCTION

In the 21<sup>st</sup> century, technology is growing rapidly. People depend on it to get access into doors of information and opportunities. As information now is at our fingertips due to the growth of the technology, intellectual property has become unsecured and unprotected. Laws are enacted to provide some protections to the owner of the intellectual property. That is, the owner of the intellectual property is given certain rights under the law as a means of protection. These rights are exclusive rights granted upon the owner or creator of an original work which includes the right to copy, distribute and adopt the work and he may do as he wishes without any disturbance. One of the rights given to the owner is copyright. The protection is conferred to encourage innovation and to ensure confidence in the innovators that their ideas will not be stolen by others. The rights also will be able to promote public welfare. Without those rights, free riders can appropriate the value created by innovators and thereby undermine the incentive to innovate through piracy, internet fraud and marketing scams (Spinello, 2013; Wolf & Shorr, 1997). Copyright piracy issue is inevitable. Hence, Malaysia is trying its best to be at par with other countries in handling issues regarding copyright infringement by introducing the Copyright Act 1987 and continuously making amendments to the Act. In this study, we discuss the copyright infringement and the legal protection conferred in Malaysia. The study is conducted to highlight the copyright infringement issues and the legal protection in Malaysia.

## **TECHNOLOGY ADVANCEMENT IN MALAYSIA**

Trade liberalisation brings with it internet technology. Innovation of the internet has introduced a method of dealing with an online network. In Malaysia, to further promote the use of Internet among Malaysians, the government has established an impressive infrastructure which is the Multimedia Super Corridor (MSC). MSC is the brainchild of former Prime Minister of Malaysia, Tun Dr. Mahathir Mohamad in 1996. It is established to create an electronic environment so that people will use electronics in their daily life such as e-banking, e-learning and e-commerce. The MSC provides a platform for the operation of information and communication technology (ICT) sector in Malaysia.

The acceptance of ICT in Malaysia has shown a positive result. The number of internet users has increased from 1.7 million in 1996 to 13.7 million in 2012 (The Ninth Malaysian Plan, 2006). The government has invested a lot to build e based services to reach all the citizens in all areas. The government is serious about giving the society great value and always emphasize that everyone has the right to benefit from the technology. The rising demand for technology usage is due to the initiatives taken up by the government (al-Madhagy, 2012). The infrastructure created by the government provides a great opportunity for the society to use technology in their daily lives. Technology now becomes part of their life. Easy access to technology however, will widen the opportunity for infringement of copyright as copyrightable works are accessible anytime, anywhere and at any place.

## **COPYRIGHT LAW IN MALAYSIA**

Copyright is a protection provided by the law to an individual or entity for original works produced by the individual such as computer software, music items and books. This property has been one of the leading issues in recent international trade negotiations. It is because the intellectual property requires extensive amounts of research and money to create but yet they are easily reproduced and illegally sold by pirates at the expense of the developers (Besen and Raskind, 1991). Individuals are, however, indifferent to copyright laws and sometimes view unauthorised reproductions of copyrighted products to be an opportune way of obtaining near-exact replicas for a fraction of the full price (Chiang & Assane, 2002b).

Malaysian copyright law has its origin in the law of England. Varian (2005) reported that in England, copyright law became important in the mid-16<sup>th</sup> century as books were widely printed by printing companies. These printing companies merged and established a company by the name of Stationer's Company (Varian, 2005). The Stationer's Company decided that it would not print books which the other company has printed. The company continued with the business with that particular agreement in mind. Nevertheless, new printing companies that entered the market later started to print everything as they like, the Stationer's Company petitioned the King for a monopoly in such printing. The petition was granted, luckily. This exclusive right granted by the King to print copies of books become a copyright. This right, consequently, becomes the ultimate source of today's copyright law all over the world.

Law of copyright in Malaysia is governed by the Copyright Act 1987, which came into force on 1<sup>st</sup> of December 1987. It is an act which provides for the law relating to copyright and for other matters connected therewith. It provides comprehensive protection for copyrightable works. Section 2 of the Act specifies that the Act shall be applied in relation to works made before the commencement of the Act as well as for works made after the commencement of the Act. Being a signatory of the Berne Convention (Paris), Malaysia needs to amend its Copyright Act 1987 to comply with the WIPO Copyright Treaty. Hence, the Copyright Act 1987 was amended to accord better protection to the copyrightable works. The Copyright Act 1987 was replaced by the Copyright Act 1997 in response to the booming of the Internet industry. Later, the Act was tabled in the Parliament for amendment in 2011 and the new

amended Act came into force in 2012. This new Act may be cited as the Copyright (Amendment) Act 2012. This Copyright (Amendment Act) 2012 should be read together with Copyright Act 1987.

Section 7(1) of the Copyright Act 1987 provides for works, which shall be eligible for copyright, which includes *literary works; musical works; artistic works; films; sound recordings; and broadcasts. Derivative works* under section 8 and *published editions of works* under section 9 shall also be eligible for copyright. Section 7(2) provides that *works shall be protected irrespective of their quality and the purpose for which they were created.* According to section 7(2A), however, *protection shall not extend to any idea, procedure, method of operation or mathematical concept.* As for qualification for protection, section 10(1) specifies that *copyright shall subsist in every work eligible for copyright of which the author or in the case of a work of joint authorship, any of the author is, at the time when the work is made, a qualified person.* Qualified person refers to anyone who is a citizen or a permanent resident in Malaysia (section 10(1) (a)), or a body corporate established in Malaysia and constituted or vested with legal personality under the laws of Malaysia (section 10(1)(b)).

Copyright protection has been clearly defined under the Malaysian copyright law. In *Sherrina Nur Elena bt Abdullah v Kent Well Edar Sdn. Bhd.* [2011] MLJU 150, the plaintiff sued the defendant for copyright infringement. The plaintiff claimed that the defendant had taken her photograph and published without consent her image by placing it on the packaging of the defendant's product. The packaging product image was displayed on a large advertisement board in Kota Kinabalu. The plaintiff, however, failed in her claim. The High Court held that the plaintiff is not the owner of the copyright even though it involved her photograph and image. The photograph of her was created by the photographer and according to section 10(1) Copyright Act 1987, the photographer is the owner of the photograph and the image. If the photograph created by the photographer in his course of employment with Kent Well Edar Sdn. Bhd., then Kent Well Edar Sdn. Bhd. is the owner of the copyright. This is provided under section 26 (2) Copyright Act 1987 which provides that *where a work (a) is commissioned by a person who is not the author's employer under a contract of service or apprenticeship; or (b) not having been so commissioned, is made in the course of the author's employment, the copyright shall be deemed to be transferred to the person who commissioned the work of the author's employer, subject to any agreement between the parties excluding or limiting such transfer.*

*Rock Records (M) Sdn. Bhd. v Audio One Entertainment Sdn. Bhd.* [2005] 1 CLJ 200 clearly illustrates that sound recording is protected under Copyright Act 1987. Rock Records (M) Sdn. Bhd. recorded the sound of an artiste, thus Rock Records (M) Sdn. Bhd. becomes the owner of the copyright. Rock Records granted a licence to the defendant to produce sound recording in the laser disc format. The defendant, however, extended the licence to produce sound recording in the karaoke video CD format. The court held that the defendant has no right to produce sound recording in the karaoke video CD format because the act amounted to infringement of copyright.

In *Kohwai & Young Publication (M) Sdn. Bhd. v Lembaga Pengelda Dewan Bahasa dan Pustaka* [2013] 10 CLJ 365, the plaintiff claimed copyright for 3 artistic works (i.e., drawings) in the form of three animals; namely a snake, a turtle and a lion. The defendants had published these 3 drawings in their book entitled 'Pendidikan Islam Tahun 1'. The defendants argued that the three drawings were similar to other drawings anywhere and, therefore, deserved no copyright protection. The court held that the plaintiff owns the copyright for the drawings as the plaintiff has fulfilled the requirement under section 7(3) (a)

and (b) Copyright Act 1987 whereby the plaintiff has put sufficient effort to make the work original and has expressed it in material form. Section 7(3)(a) provides *that sufficient effort has been expended to make the work original in character ; and (b) the work has been written down, recorded or otherwise reduced to material form.*

It should be noted that the meaning of ‘original’ work differs from the common understanding of the public. Within legal context, the definition of ‘original’ can be found in Justice Peterson’s explanation in the case of University of London Press Ltd v University Tutorial Press Ltd [1912] 2 Ch. 601.:

*...the word ‘original’ does not in this connection mean that the work must be the expression of original or inventive thought. Copyright Acts are not concerned with the originality of ideas, but with the expression of thought, and, in the case of ‘literary work’, with the expression of thought in print or writing. The originality which is required relates to the expression of the thought. But the Act does not require that the expression must be original or novel in form, but that the work must not be copied from another that it should originate from the author.*

From the definition above, it is clear that once the literary work is been put into writing, it will become original and it is copyrightable. If the literary work is still in form of ideas or thought, then it is not copyrightable.

The duration for protection is governed by section 17 until section 23 of the Copyright Act 1987. For literary, musical, artistic works, copyright shall subsist during the life of the author and shall continue to subsist until the expiry of a period of fifty years after his death. In addition, copyright in published editions, sound recording, broadcasts, films, government works, works of government organizations and works of international bodies shall subsist until the expiry of a period of fifty years.

The above discussion indicates that a work can be protected under the Copyright Act 1987 if the work falls under one of these categories; literary works, musical works, artistic works, films, sound recordings, or broadcasts. Also, the work must be made by a qualified person and it must be original in nature. The one who owns the ownership of the work is the author of the work or his employer. Duration of copyright for the copyrightable works is provided under section 17 until section 23 of the Copyright Act 1987.

## COPYRIGHT INFRINGEMENT IN MALAYSIA

**Table 1. Types of copyright infringements**

No.	Types	Activities
1.	Hard Goods	Infringement of copyright of hard goods in the night market
2.	Internet	Online infringement of all copyright content
3.	Enterprise End-User Software	The use of new computer with pirated software
4.	Camcorder	Captured films using camcorder in cinemas and make it available online.
5.	Internet Cafe Server	Unauthorised use of copyright materials at internet cafes or internet game room.
6.	Book	Infringements on books available online, for download or for copying.
7.	Mobile	Infringements over wireless mobile networks.

Source: Tshin, 2012

Although copyright law is intended to protect author of copyrighted works, copyright infringement is an inevitable serious issue in the era of technology advancement. Malaysia is of no exception to the copyright infringement issue. Tshin (2012) identified several types of copyright infringements, which are on the rise in Malaysia. These infringements are illustrated in above Table 1.

Copyright infringement is provided under section 36 Copyright Act 1987 which provides that:

- (1) *Copyright is infringed by any person who does, or causes any other person to do, without the license of the owner of the copyright, an act the doing of which is controlled by copyright under this Act.*
- (2) *Copyright is infringed by any person who, without the consent or licence of the owner of the copyright, imports an article into Malaysia for the purpose of –*
  - (a) *selling, letting for hire, or by way of trade, offering or exposing for sale or hire, the article;*
  - (b) *distributing the article –*
    - (i) *for the purpose of trade; or*
    - (ii) *for any other purpose to an extent that it will affect prejudicially the owner of the copyright; or*
  - (c) *by way of trade, exhibiting the article in public,*

*Where he knows and ought reasonably to know that the making of the article was carried out without the consent or license of the owner of the copyright.*

As for action for copyright infringement, it is provided under Section 37 of the Copyright Act 1987 which provides:

- (1) *Subject to this Act, infringements of copyright shall be actionable at the suit of the owner of the copyright and in any action for such an infringement, all such relief by way of damages, injunction, accounts or otherwise, shall be available to the plaintiff as are available in any corresponding proceedings in respect of infringement of other proprietary rights.*

Section 41 Copyright Act 1987 lists down the offences and the penalties relating to copyright infringement. Any person who makes for sale or hire any infringing copy; sells, lets for hire or by way of trade, exposes or offers for sale or hire any infringing copy; distributes infringing copies; possesses, otherwise than for his private and domestic use, any infringing copy; and by way of trade, exhibits in public any infringing copy; and/or imports into Malaysia, otherwise than for his private and domestic use, an infringing copy, shall be guilty of an offence and shall on conviction be liable to a fine of not less than two thousand ringgit (RM 2000) for each infringing copy, or to imprisonment for a term not exceeding five years, or to both. This section also provides that for subsequent offence, the person shall on conviction be liable to a fine of not less than four thousand ringgit (RM 4000) and not more than forty thousand ringgit (RM 40 000) for each infringing copy or imprisonment for a term not exceeding twenty years, or to both. Any person who makes or has in his possession any contrivance used or intended to be used for the purposes of making infringing copies shall be guilty of an offence and shall on conviction be liable to a fine of not less than four thousand ringgit (RM 4000) and not more than forty thousand ringgit (RM 40 000) for each contrivance in respect of which the offence was committed or to imprisonment for a term not

exceeding ten years, or to both, and for any subsequent offence, the person shall on conviction be liable to a fine not less than eight thousand ringgit (RM 8 000) for each contrivance in respect of which the offence was committed or to imprisonment for a term not exceeding twenty years, or to both. Any person who circumvents or causes the circumvention of any effective technological measures referred to in subsection 36(3); removes or alters any electronic rights management information without authority; or distributes, imports for distribution or communicates to the public, without authority, works or copies of works in respect of which electronic rights management information has been removed or altered without authority, shall be guilty of an offence and shall on conviction be liable to a fine not exceeding two hundred and fifty thousand ringgit (RM 250 000) or to imprisonment for a term not exceeding five years, or to both. For any subsequent offence, the person shall on conviction be liable to a fine not exceeding five hundred thousand ringgit or to imprisonment for a term not exceeding ten years, or to both.

According to section 37(1) Copyright Act 1987, only the owner can bring an action for infringement of copyright. *Sherrina Nur Elena bt Abdullah v Kent Well Edar Sdn. Bhd.* [2011] MLJU 150 explains who is the owner of copyright. The plaintiff was one of the subjects in a photograph and she argued that she was one of the owners of the photograph since her image appeared in the photograph. Image of another two women were also in the photograph. The court held that the owner of the copyright is Sabah Tourism Board since the photograph was published by the Board in a book called "Cultures, Customs and Traditions of Sabah, Malaysia: An Introduction". Because the plaintiff was not the owner of the copyright in the photograph, she had no right to sue the defendant for infringement of copyright.

*Mohd. Ramly Ismail v Sarimah Film Production Sdn. Bhd. & Anor* [1984] CLJ Rep 247 clearly established that literary works are considered published according to section 4(1) Copyright Act 1987 and, thus, the owner of copyright is protected under Copyright Act 1987. In this case, the dispute evolved around the film "Dia Ibuku". The plaintiff claimed that he was the owner of the copyright in a literary work and that the defendant had plagiarised his work and turned his work into the film "Dia Ibuku". The plaintiff also alleged the infringement as to the distribution of the said film. The plaintiff claimed for a declaration as to authorship, an injunction restraining both defendants from letting or distributing the said film, and for damages, accounts of profits, delivery of all infringing films and costs. The defendants deny that the plaintiff was the owner of the copyright in the film "Dia Ibuku". Mohamed Dzaidin J held that "*to establish infringement of copyright, there must be the two elements of sufficient objective, similarity between infringing work and the copyright work and that the copyright work must be the source from which the infringing work is derived*". Since the plaintiff did not fulfill these two objectives, the plaintiff could not be considered as the author and that there was no infringement of copyright committed by the defendant.

In *Ultra Dimension Sdn. Bhd. v Ketua Pengarah Lembaga Penggalakan Pelancongan Malaysia & Ors.* [2010] 8 CLJ 245, the plaintiff photographed the images of Kuala Lumpur Skyline with emphasis on sceneries and landmarks such as the KLCC and the KL Tower. The defendant published the Visit Malaysia Year Brochure 2007, which included the photographs taken by the plaintiff. The plaintiff brought an action against the defendant for copyright infringement. Actually the photos were photographed by a group of photographers. They collaborated and contributed towards the creation of the photographs. The plaintiff failed to prove that he was the owner of the copyright of the photographs; thus he could not sue for infringement of copyright of the photographs.

From the above discussion, it is clear that the owner of the copyright shall have the right of action in case of infringement of copyright. Fine and imprisonment of up to ten years will be imposed for offences committed. It seems that the owner of copyright is well protected by the existing Copyright Act 1987. Nevertheless, the existing Act is not able to cater for such protection when it comes to the Internet and cross border issues,. Thus, the owners of copyright need to protect their own works for their own good.

## CONCLUSION

Copyright law is intended to protect creators and other producers of copyrighted works and services. In Malaysia, copyright protection is governed by the Copyright Act 1987, which provides comprehensive protection for copyrightable works. The Act outlines the nature of works eligible for copyright (which includes computer software), the scope of protection, and the manner in which the protection is accorded. The amendment of the Act in 1997 and the latest in 2012 brings a new hope for the owner of copyright in the area of Internet and technology. However, protection accorded by the amended Act is doubtful as its application is still at infancy stage. The advancement of technology also has become deterrence in the application of the Act. Realising this matter, the government needs to make necessary changes to the existing copyright law so as to cope with the advancement in technology. It is vital for the government to continue to take the necessary steps to put an end to this issue but it is also important for the copyright owners themselves to play an important role in protecting their own works.

## REFERENCES

- [1]. Besen, S., & Raskind, L. (1991). An Introduction to the law and economics of intellectual property. *The Journal of Economic Perspectives*. 5, 3-7.
- [2]. Chiang, E., & Assane, D. (2002a). Copyright piracy on the university campus: trends and lessons from the software and music industries. *The International Journal on Media Management*, 4( 3), 145-149.
- [3]. Chiang, E., & Assane, D. (2002b). Software copyright infringement among college students. *Applied Economics*, 34, 157-166.
- [4]. Gerlach, J.H., Kuo, F.Y.B., & Lin, C.S. (2009). Self sanction and regulative sanction against copyright infringement: A comparison between U.S. and China college students. *Journal of the American Society for Information Science and Technology*. 60(8),1687 – 1701.
- [5]. Goles, T., Jayatilaka, B., George, B., Parsons, L., Chambers, V., Taylor, D., & Brune, R. (2008). Softlifting: Exploring determinants of attitude. *Journal of Business Ethics*. 77, 481-449.
- [6]. Gopal, R.D. & Saunders, G.L. (1998). International software piracy: Analysis of key issues and impacts. *Information Systems Research*. 9(4), 380-397.
- [7]. Hinduja, S. (2003). Trends and patterns among online software pirates. *Ethics and Information Technology*.5: 49-61.
- [8]. Moores, T., Nill, A., & Rothenberger, M. (2009). Knowledge of software piracy as antecedent to reducing pirating behaviour. *Journal of Computer Information Systems*. 50(1), 82-89.

- [9]. Rahim, M., Seyal, A., & Rahman, M. (2001). Factors affecting softlifting intention of computing students: An empirical study. *Journal of Education Computing Research*. 4(4), 385-405.
- [10]. Wolf, C., & Shorr, S. (1997). Cybercops are cracking down on internet fraud. *The National Law Journal*. The New York Law Publishing Company.
- [11]. Spinello, R.A. (2014). *Cyberethics: Morality and Law in Cyberspace*. USA: Jones & Bartlett Learning
- [12]. Tshin, M.P.N. (2012). Malaysia's New Copyright Act to Make Owning Single Counterfeit DVD Illegal. *Jurnal Pengurusan Awam*, 61-65.
- [13]. Krishnasamy, N. (2006). Country Paper on Copyright Issues in Malaysia, 12<sup>th</sup> ABU Copyright Committee Meeting and Seminar in Brunei, 15-17 Mei 2006.
- [14]. Rashidah Ridha Sheikh Khalid, (2011). IP Law and Administration in Malaysia, MyIPO Training for Trainers Programmes on IP Assets Management by SMEs.
- [15]. Al-Madhagy, T.H.G. (2012). ICT Development in Malaysian. *ICT Infrastructure & Services*.
- [16]. Varian, H.L. (2005). Copying and Copyright. *Journal of Economic Perspectives*. 19(2). 121-138.