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Copyright Law Of Malaysia

By

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Copyright Law of Malaysia
by
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1. Nature of copyright

1.1 Copyright is very simply defined in the Copyright Act 1987. Under S.3, "copyright" means copyright under this Act. Therefore we need to refer to the other sections of the Act to find out what is "copyright under the Act".

1.2 S.13(1) provides that copyright in a literary, musical or artistic work, a film, or a sound recording shall be the exclusive right to control in Malaysia-
   a. the reproduction in any material form;
   b. the communication to the public;
   c. the broadcasting;
   d. the communication by cable; and
   e. the distribution to the public,
   of the whole work or a substantial part thereof, either in its original or derivative form.

S.14, S.15(1) and S. 9(3) define the other rights to be accorded to works of architecture, broadcasts and published editions of works respectively.¹

S.36(2) and S.39 allow the owner of a copyrighted article to prevent importation into Malaysia of such article.²

S.41 defines the dealings with copyrighted materials which would constitute a criminal offence.³

1.3 The Act therefore affords protection to authors of certain works by granting them "copyright" in their works. This "copyright" is a bundle of rights which consists of:
a. the exclusive right to do and to authorise other persons to do certain acts, breach of which rights is an infringement. (sometimes known as primary infringement)

b. the right to control importation of copies of the works. (sometimes known as secondary infringement)

c. creation of certain offences

2. Subsistence of copyright

2.1. From the combined effects of the various provisions of the Act, three criteria must be satisfied before copyright can subsist in a work. They are:

a. criterion of content
b. criterion of form
c. criterion of status

2.2. Criterion of content

Works eligible for copyright under S.7 are literary, musical, artistic works, films, sound recordings and broadcasts. Under S.8, certain derivative works are protected as original works. S.9 provides that, subject to certain conditions, copyright shall subsist in every published edition of any one or more literary, artistic or musical work.

2.3. Under S. 7(2), works shall be protected irrespective of their quality and the purpose for which they were created. But as far as a literary, musical or artistic work is concerned, S.7(3)(a) provides that sufficient effort must have been expended to make the work original in character.

2.4. Meaning of "original"

The question of what constitutes originality for the purpose of the Act may cause difficulties since the Act does not define it. However, the matter had been considered by the Courts on several occasions.
"Material form" is defined in S.3 as "in relation to a work or a derivative work, includes any form (whether visible or not) of storage from which the work or derivative work, or a substantial part of the work or derivative work can be reproduced."

From the above it can be seen that so long as there is no fixation of the work in a material form there is no copyright. Broadcasts make an interesting contrast because they are essentially a transient activity which is nevertheless protected as such.

Criterion of status.

Having satisfied the criteria of content and form, a work must satisfy the criterion of status in order to be accorded protection. Under the Act there are five ways of satisfying this criterion.

a. Under S.10(1) — when the author is, at the time the work is made, a qualified person. S.3 defines a "qualified person" to mean a person who is a citizen of, or a permanent resident in, Malaysia and in relation to a body corporate, means a body corporate established in Malaysia and constituted or vested with legal personality under the laws of Malaysia.

b. Under S.10(2) — when the work is first published in Malaysia. In the case of a work of architecture, protection is conferred if the work is erected in Malaysia. In the case of a broadcast, if it is transmitted from Malaysia.

Meaning of "published"

S 4(1)(a) provides that a work shall be deemed to have been published only if a copy or copies of the work have been made available with the consent of the author or of any person lawfully claiming under the author in a manner sufficient to satisfy the reasonable requirement of the public, whether by sale or otherwise.

see: Francis Day and Hunter v Feldman 13

Bodley Head v Flagon 14
In Ladbroke (supra), Lord Hodson said, "If the plaintiffs have employed more than negligible skill and labour in their selection of the sixteen lists containing varieties of bets which they offered to their customers, they are entitled to be protected in respect of their coupons as being original compilation."

In contrast, in G.A. Cramp and Son Ltd v Frank Smythson, certain tables of postal information, weight and measures etc were considered "a commonplace selection or arrangement of scrap of information" not involving any real exercise of labour, judgement or skill.

2.6 What qualifies as "work"

To qualify as a literary work, the work must be something that can convey information, or instruction or capable of giving pleasure. This was so held in Exxon Corporation v Exxon Insurance Consultants International Ltd. It was held in Francis Day and Hunter v 20th Century Fox that copyright will not normally subsist in the titles of works since these will not usually constitute "original" work, particularly where a few obvious words have been used. The Court further added that a title does not usually involve literary composition and is not sufficiently substantial to support a claim to copyright protection. But the Court further observed that sometimes a title might be on so extensive a scale and be of so important a character as to be susceptible to protection.

see also Rose v Information Services Ltd

2.7 Criterion of form

It is an assumption of Malaysian copyright law that all subject matter requires to exist in some permanent form before it gains copyright. This is in line with the principle that the protection goes only to the particular expression of idea. S. 7(3)(b) provides that a work shall not be eligible for copyright unless it has been written down, recorded or otherwise reduced to material form.
Meaning of first publication

S.4(3) provides that a publication shall be deemed to be a first publication in Malaysia if the work was first published in Malaysia and not elsewhere. A work is also deemed to be first published in Malaysia if it was first published elsewhere but published in Malaysia within thirty days of such publication elsewhere.

In Poo Loke Ying v Television Broadcasting Ltd, the Supreme Court of Malaysia held that S.5 and S.6 of the Copyright Act 1969 are distinct provisions to be read separately and they operate independently of each other. Therefore when publication in Malaysia took place within a period of 30 days of the earlier publication in Hong Kong, copyright is conferred by virtue of S. 6(1)(a).

c. Under S.10(3) – when the work is made in Malaysia

d. Under S.11(1) – when the work is made by or under the direction or control of the Government and such Government organisations or international bodies as the Minister may by order prescribe.

e. Under S. 59 – when the provisions of the Act is extended to a country which is a party to a treaty or a member of any convention or Union to which Malaysia is also a party or member.

3. Duration of protection

3.1 Published literary, musical or artistic work (other than a photograph) – life of the author and fifty years after his death.

3.2 Unpublished literary, musical or artistic work (other than a photograph) – 50 years from the beginning of the calendar year next following the year in which the work was first published.
3.3 Anonymous work or work of the above types made under a pseudonyms - 50 years from the beginning of the calendar year next following the year in which the work was first published.\(^1\)

3.4 Published edition, sound recording, broadcast, photograph, film and works of the Government, Governmental Organisation and international bodies - 50 years from the beginning of the calendar year next following the year in which the work was first published or made.\(^1\)

4. Ownership

4.1 Under S. 26(1), copyright in literary, musical or artistic work, film, sound recording and broadcast shall vest initially in the author. In the case of published edition, copyright vest in the publisher.\(^2\) S. 26(3) provides that copyright conferred by S.11 shall vest initially in the Government, Governmental organisation or international body and not in the author.

4.2 Who is the author

The effect of S.3 is that the author is the writer, composer, the artist, the person who undertakes the arrangement for the taking of the photograph, the making of the film or recording, the making of the transmission from within Malaysia or in any other case, the person by whom the work was made.

4.3 Commissioned work

Like any other proprietary right, copyright is transferable by way of assignment, testamentary disposition or by operation of law, as a movable property.\(^2\) In the case of a commissioned work, the copyright shall be deemed to be transferred to the person who commissioned the work.\(^2\)

4.4 Employee's work

Where the work is made in the course of the author's employment, copyright shall be deemed to be transferred to the author's employer.\(^2\)
4.5 "In the course of his employment"

The copyright in a work shall not be deemed to be transferred to the author's employer unless the work was actually made in the course of his employment. Thus it was held in Byrne v Statist Co 24 that when a journalist working for the Financial Times agreed to translate a speech in his spare time for an agreed fee, the translation by the employee was not made in normal duties to the employer. Therefore it was not made in the course of employment.

see also Stevenson Jordan and Harrison Ltd v Macdonald and Evan Ltd 25

In Nora Beloff v Pressdram 26 one of the issues was whether an internal memo written by the plaintiff to her editor was made in the course of her employment. It was held that it was so made and therefore copyright vested in her employer, The Observer Ltd.

5. Infringement/offence

5.1 Infringement of copyright is laid down in S. 36(1) and (2). 27 Basically there is an infringement when a person, without consent of the owner, does or causes any other person to do an act the doing of which is controlled by copyright. Subject to certain conditions, there is also an infringement if a person imports into Malaysia copyrighted articles. (refer to para 1.2)

5.2 The offences are laid down in S.41(1) and (3). 28

6. Defences

6.1 The exceptions or defences to infringement are mainly provided for under S.13(2)(a) to (o). For our present purposes the more important exceptions are those laid down in S.13(2)(a),(b), (1), (m),(n), and (o).

6.2 Copying

Before the plaintiff can succeed in his infringement claim, he must prove that, directly or indirectly, the defendant's alleged infringing work is copied from his work.
He must show that this causal connection is the explanation for the similarity between the two works.

Pointers to show copying:

a. striking similarities between the two works
b. the defendant had opportunity to get to know the P's work
c. presence of same errors

see Harman Pictures v Osborne and another

Sub-conscious copying
see Francis Day and Hunter Ltd v Bron

Indirect copying
see King Features Syndicate v Kleeman

6.3 Substantiality

Before the question of exceptions need to be considered, one has to decide whether there is substantial taking. There is no infringement of copyright unless the whole work or a substantial part has been copied - LB Plastic v Swish Product Ltd.

6.4 Meaning of "substantial"

If the whole work is copied there is no problem because proof of infringement will be quite straightforward. If this is not the case difficulties will arise because the Act does not define 'substantial'. Therefore guidance must be sought from decided cases.

In Ladbroke v William Hill Lord Reid said,

"The question whether the defendant has copied a substantial part depends more on the quality than the quantity of what he has taken."

See also Fernald v Jay Lewis Production Ltd

6.5 Exception- fair dealing for purposes of non-profit research, private study, criticism or the reporting of current events.

"Fair dealing" is not defined in the Act. It does not offer difficulties of interpretation until the coming of mechanical processes of copying, in particular, the photocopying machine.
Therefore decided cases have to be looked at to determine what it means. In Hubbard v. Vosper, Lord Denning said,

"It is impossible to define what fair dealing is. It must be a question of degree. You must consider first the number and extent of the quotation and extracts. Are they altogether too many and too long to be fair? Then you must consider the use made of them. If they are used as a basis for comments, criticism or review, that may be fair dealing. If they are used to convey the same information as the author, for a rival purpose, that may be unfair. Next you must consider the proportion. To take long extracts and attach short comments may be unfair. But short extracts and long comments may be fair. Other considerations may come to mind also. But after all is said and done, it must be a matter of impression."

Mcgaw LJ said in the same case,

"The fact that a quotation contains every single word of the work criticised or review does not necessarily preclude a defendant from relying on the defence of fair dealing."

6.6 The defence of private study can only be raised by the person who studies, ie person making use of the work for his own study. A third-party cannot use this defence - University of London Press (supra).

see also Sillitoe v McGraw-Hill Book Co

6.7 Criticism or reporting of current events

Despite its potential range, the defence has not been much elucidated in the case law. In Hubbard v. Vosper (supra), Lord Denning said,

"A literary work consists not only of the literary style but also of the thoughts underlying it, as expressed in the words. Under the defence of fair dealing, both can be criticised. The defendant is entitled to criticize not only the literary style but also the doctrine or philosophy of the plaintiff as expounded by the books."
6.8 Exceptions in S. 13(2)(b), (1), (m), (n), and (o)
exception (b) - parody, pastiche or caricature
exception (l) - judicial proceedings or the giving of professional advice
exception (m) - making of quotations from a published work
exception (n) - articles published in newspapers or periodicals
exception (o) - lectures, addresses etc

6.9 Is there a defence on grounds of public policy?
Publication and reproduction of any work or subject matter may be permissible on the ground of "public interest". There is no statutory provision to this effect but case law has given encouragement to those who maintain its validity.

Ungoed Thomas J in Beloff v Pressdram (supra) said, "The defence of public interest clearly covers and in the authorities does not extend beyond, disclosure, which as Lord Denning emphasised in Hubbard v Vosper, must be disclosure justified in the public interest, of matters, carried out or contemplated, in breach of the public security or breach of law, including statutory duty, fraud, or otherwise destructive of the country or its people, including matters medically dangerous to the public, and doubtless other misdeeds of similar gravity. Public interest as a defence in law, operates to override the right of the individual (including copyright), which would otherwise prevail and which the law is also concern to protect. Such public interest does not extend beyond misdeeds, of a serious nature and importance to the country... The publication of the memo does not disclose any 'iniquity' or "misdeed"."  

see also Lion Laboratories Ltd v Evan 38

7. Moral rights

7.1 The provision for moral rights is laid down in S.25. Under that section, no person may, without the consent of the author, or after his death, of his personal representative, do or authorise the doing of any of the following:
a. the presentation of the work, by any means whatsoever, under a name other than that of the author

b. the presentation of the work by any means whatsoever, in a modified form if the modification -
   (i) significantly alters the work and
   (ii) is such that it might reasonably be regarded as adversely affecting the author's honour or reputation.

see Frisby v BBC 39
Joseph v National Magazine Co Ltd 40
1) **S.14** - Copyright in a work of architecture shall include the exclusive right to control the erection of any building which reproduces the whole or a substantial part of the work either in its original form or in any form recognizably derived from the original:

Provided that the copyright in any such work shall not include the right to control the reconstruction or rehabilitation in the same style as the original, of a building to which that copyright relates.

**S.15 (1)** - Copyright in a broadcast shall be the exclusive right to control in Malaysia the recording, the reproduction, and the rebroadcasting, of the whole or a substantial part of the broadcast, and the communication to the public in a place where an admission fee is charged of the whole or a substantial part of a television broadcast either in its original form or in any way recognizably derived from the original.

**S.9 (3)** - The act restricted by the copyright subsisting by virtue of this section in an edition is the making of a reproduction of the typographical arrangement of the edition.

2) **S.36 (2)** - Copyright is also 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:

   1) for the purpose of trade; or
   2) 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, unless he satisfies the court that he did not know or had no reasonable grounds of knowing that the making of the article would, if the article had been made in Malaysia by the importer, have constituted an infringement of the copyright.

**S.39 (1)** - The owner of copyright in any work may give notice in writing to the Minister:

a) that he is the owner of the copyright in the work; and

b) that he requests the Minister, during a period specified in the notice, to treat as prohibited goods copies of the work to which this section applies:
3. **S.41 (1)** Any person who during the subsistence of copyright in a work:

   a) makes for sale or hire any infringing copy;
   b) sells, lets for hire or by way of trade, exposes or offers for sale or hire any infringing copy;
   c) distributes infringing copies;
   d) possesses, otherwise than for his private and domestic use, any infringing copy;
   e) by way of trade, exhibits in public any infringing copy;
   f) imports into Malaysia, otherwise than for his private and domestic use any copy which if it were made in Malaysia would be an infringing copy; or
   g) makes or has in his possession any contrivance used or intended to be used for the purposes of making infringing copies.

   shall, unless he is able to prove that he had acted in good faith and had no reasonable grounds for supposing that copyright would or might thereby be infringed, be guilty of an offence.

4. **S.8 (1)** - The following derivative works are protected as original works:

   a) translations, adaptations, arrangements and other transformations of literary, musical or artistic works; and
   b) collections of literary, musical or artistic works which, by reason of the selection and arrangement of their contents, constitute intellectual creation.

5. (1916) 2 Ch 601

6. (1964) 1 All ER 468

7. (1984) 10 FSR 64

8. (1980) RPC 213

9. (1944) AC 329

10. (1982) RPC 69

11. (1940) AC 112

12. (1987) FSR 254
13. (1914) 2 Ch 728

14) (1972) WLR 680

15) (1985) 1 CLJ 511

16) S.17 (1) - Except as otherwise provided in this act, copyright in any literary, musical or artistic work (other than a photograph) shall subsist during the life of the author and fifty years after his death.

17) S.17 (2) - Where a literary, musical or artistic work (other than a photograph) had not been published before the death of the author, copyright shall subsist until fifty years from the beginning of the calendar year next following the year in which the work was first published.

18) S.17 (3) - Where a literary, musical or artistic work (other than a photograph) is published anonymously or under a pseudonym, copyright shall subsist until fifty years from the beginning of the calendar year next following the year in which the work was first published:

Provided that in the event of the identity of the author becoming known, the duration of copyright shall be calculated in accordance with subsection (1).

19) S.18 - Copyright in a published edition shall subsist until fifty years from the beginning of the calendar year next following the year in which the edition was first published.

S.19 - Copyright in a sound recording shall subsist until fifty years from the beginning of the calendar year next following the year in which the recording was first published.

S.20 - Copyright in a broadcast shall subsist until fifty years from the beginning of the calendar year next following the year in which the broadcast was first made.

S.21 - Copyright in a photograph shall subsist until fifty years from the beginning of the calendar year next following the year in which the photograph was first published.

S.22 - Copyright in a film shall subsist until fifty years from the beginning of the calendar year next following the year in which the film was first published.

S.23 - Copyright in works of the Government, Government organizations and international bodies shall subsist until fifty years from the beginning of the calendar year next following the year in which the work was first published.
20) S.9 (2) - Subject to the provisions of this Act, the publisher of an edition shall be entitled to any copyright subsisting in the edition by virtue of this section.

21) S.27 (1) - Subject to this section, copyright shall be transferable by assignment, testamentary disposition, or by operation of law, as movable property.

Where a work -

22) S.26 (2) -

a) is commissioned by a person who is not the author's employer under a contract of service or apprenticeship; or

23) S.26 (2) -

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 or the author's employer, subject to any agreement between the parties excluding or limiting such transfer.

24) (1914) 1 KB 622

25) (1952) 69 RPC 10

26) (1973) 1 All ER 241

27) S.36 (1) - Copyright is infringed by any person who does, or causes any other person to do, without the licence of the owner of the copyright, an act the doing of which is controlled by copyright under this Act.

S.36 (2) - Copyright is also 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,

unless he satisfies the court that he did not know or had no reasonable grounds of knowing that the making of the article would, if the article had been made in Malaysia by the importer, have constituted an infringement of the copyright.
28) S.41 (1) - refer to f/n (no. 3)

S.41 (3) - Any person who causes a literary or musical work to be performed in public shall be guilty of an offence under this subsection unless he is able to prove that he had acted in good faith and had no reasonable grounds for supposing that copyright would or might thereby be infringed.

29) S.13 (2) - Notwithstanding subsection (1), the right of control under that subsection does not include the right to control:

a) the doing of any of the acts referred to in subsection (1) by way of fair dealing for purposes of non-profit research, private study, criticism or the reporting of current events, subject to the condition that if such use is public, it is accompanied by an acknowledgement of the title of the work and its authorship, except where the work is incidentally included in a broadcast;

b) the doing of any of the acts referred to in subsection (1) by way of parody, pastiche or caricature;

c) any use made of a work for the purpose of any judicial proceedings or of any report of any such proceedings, or for the purpose of the giving of professional advice by a legal practitioner;

m) the making of quotations from a published work if they are compatible with fair practice and their extent does not exceed that justified by the purpose, including quotations from newspaper articles and periodicals in the form of press summaries;

Provided that mention is made of the source and of the name of the author which appears on the work thus used;

n) the reproduction by the press, the broadcasting or the communication to the public of articles published in newspapers or periodicals on current topics, if such reproduction, broadcasting or communication has not been expressly reserved;

Provided that the source is clearly indicated; and

o) the reproduction by the press, the broadcasting or the communication to the public of lectures, addresses and other works of the same nature which are delivered in public if such use is for informative purposes and has not been expressly reserved.

30) (1967) 2 All ER 324

31) (1963) 2 All ER 16

32) (1941) AC 417

33) (1979) FSR 145
34) (1964) 1 WLR 273
35) (1955) FSR 499
36) (1972) 2 QB 84
37) (1983) FSR 545
38) (1984) 3 WLR 539
39) (1967) 2 All ER 106
40) (1959) 1 Ch. 14

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