Copyright Law in Malaysia: Does the Balance Hold?*

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I. Introductory Remarks

If we were to take a very simplistic view of the copyright landscape in Malaysia, we could be forgiven for surmising that Malaysia is a country of suppliers, retailers and consumers of pirated VCDs and DVDs of music and films, and software; and that copyright law basically deals with criminal activities. We also could be forgiven for thinking that the question of balance under our copyright law is a non-issue. Indeed, copyright owners may feel, given the proliferation of pirated products, the balance is heavily stacked against them; while consumers may think that enforcement activities have unfairly prejudiced or frustrated their access to cheap and ready supplies of copyright works, and conclude that the balance is most definitely tilted in favour of the copyright owners. For where else is the Government more involved in the protection of a form of private property right, the owners of which are mainly foreign? Granted there is an overemphasis on the portrayal of copyright infringement as criminal activities, thus giving rise to the perception, rightly or wrongly, that copyright law is enforced by the State on behalf of copyright owners. However, while it is tempting to argue that this underscores a leaning towards the copyright owner, it should be made clear that the enforcement of the criminal provisions is quite different from the balancing act that copyright law does.

In its long history from the time of its statutory embodiment in the form of the English Statute of Anne of 1709, copyright law has always attempted to maintain a balance between or among the various com-

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peting interests, the principal of which are those of the authors, their competitors, and the users or the public. This is reflected in the Preamble to the Statute of Anne itself, which very clearly stated that it was "an Act for the encouragement of learning, by vesting the copies of printed books in the authors or purchasers of such copies, during the times therein mentioned". The rationale underlying the balance can be viewed from several perspectives.[1] One is based on the notion of natural right, that the author has a natural right to the property in the work created. The second is based on the notion of fairness, that the author or creator, and by extension the entrepreneurs, should be rewarded for the effort expanded in the creation of the work, or for the risks taken to exploit such works, in the case of entrepreneurs. The third is based on the notion of incentive, that in order to encourage cultural and creative activities and at the same time enable the public to obtain access to work and knowledge, authors and those who exploit creative works must be given sufficient incentive to create and to exploit such works.

To achieve this balance, the law grants to copyright owners a bundle of rights with respect to their works and at the same time tries to ensure through its various concepts, the delineation between protected works and the public domains, and through its limitations and exceptions, provisions for permitted acts. And from its evolution from books or materials in print to fine art, music, drama, film photography, broadcasting, audio technologies, computer programs and multimedia, all of which have implications on the law of copyright in terms of its scope and extent of rights granted, the law has been constant in trying to maintain, with varying degrees of success, this balance.

In international conventions dealing with copyright and other intellectual property rights, the need to balance the rights of right-holders with those of the public is universally acknowledged. Hence, Article 7 of the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPs) asserts:

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[1] See generally, Davies, G, *Copyright and the Public Interest* (London: Sweet & Maxwell, 2nd ed, 2002) Ch 2.

> The protection and enforcement of IPRs should contribute to the promotion of technological innovation and to the transfer of technology to the mutual advantage of producers and the uses of technological knowledge and in a manner conducive to social and economic welfare and to a balance of rights and obligations.[2]

The latest conventions dealing with copyright and related rights, the World Intellectual Property Organization (WIPO) Copyright Treaty and the WIPO Performances and Phonograms Treaty, also recognise the need to maintain a balance between the rights of authors and the larger public interests, particularly in education, research and access to information.[3]

II. A Constant Need to Maintain Balance

However, it has become a challenge to maintain this balance in the face of technology which has opened up new platforms for the creation, exploitation and distribution of new as well as existing copyright works. Recording technologies have enabled music composers and music studios to explore new opportunities for creation and distribution; digital processing technology has resulted in the development of digitised content such as movies, music and other creative works. The Internet, developments in compression techniques, peer-to-peer technology, increased capacity of storage devices and bigger bandwidth have made possible easier and speedier distribution and transmission of such content worldwide.[4]

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[2] See also the Preamble to the TRIPs Agreement which recognises, among others, that Intellectual Property rights are private rights and the underlying public policy objectives of national systems for the protection of intellectual property, including developmental and technological objectives. See, generally, Gervais, D, *The TRIPs Agreement – Drafting History and Analysis* (London: Sweet & Maxwell, 2nd ed, 2003).

[3] See generally, Ficsor, M, *The Law of Copyright and the Internet* (Oxford: Oxford University Press, 2002) Ch 5.

[4] Digital processing technology and the networked environment appear to generate more heated debates than past technologies, probably because of their impact on existing works and their dissemination, as well as their ability to create new works: See Drier, T, "Balancing Proprietary and Public Domain Interests: Inside or Outside of Proprietary Rights?" in Dreyfuss, RC, Zimmerman, DL & First, H (eds), *Expanding the Boundaries of Intellectual Property Innovation Policy for the Knowledge Society* (Oxford: Oxford University Press, 2001) at pp 295-296.

At the same time, there is a flipside to these technologies. Just as they have allowed authors and creators to expand their creative energies, these technologies have put the power of copying and distribution in the hands of consumers. Reprography technology allows us to make copies cheaply and easily while recording equipment enables us to make copies of our favourite songs and music. Digital processing technology promises the copyright owner a market without boundaries; at the same time, it has also rendered it easier the making and distribution of unauthorised copies at a fraction of the costs of acquiring the original copies.

In this digital age, and with the emphasis on the knowledge economy, the challenge is to maintain an acceptable and appropriate level of balance. Copyright owners are concerned that technology has put into the hands of the users the ability to copy and to distribute copies of their copyright works without any financial benefit to themselves. They want greater protection. Users would like to have easy and cheap, if not free access to information and copyright works, and if technology offers that prospect, are not unwilling to utilise it. They want less or no protection. On the one hand, there is the expectation of the copyright owner to benefit financially from the wider dissemination of his work; on the other, there is the expectation on the part of the user to be able to access information and cultural products cheaply and readily. How are these expectations to be managed within the context of copyright law?

In this context, it is noteworthy that to overcome what are seen as failures in the system to protect their rights in the new environment, copyright owners have resorted to deploying technology protection measures or TPMs to protect their content, mostly by denying access, save on terms and conditions imposed, mostly by way of non-negotiable contracts, or making it difficult for their works to be copied. There is, however, a problem with technology; just as there are measures to protect, there are those that can bypass or circumvent them. To add more teeth to the deployment of technology, copyright owners have successfully lobbied for legal protection for such technology protection measures, in the form of what are generally known as anti-circumvention provisions. These provisions proscribe circumvention of technology

protection measures, and may be aimed at the act of circumvention itself, or activities that assist or facilitate circumvention, such as the manufacture of circumvention devices, or both. One of the effects of the anti-circumvention provisions is to enable the copyright owner to control or restrict access to his work. To the extent that the control or restriction is linked, whether directly or indirectly, to copyright-related activities, such a right would appear to be generally acceptable. However, the position becomes untenable if what is created is in effect a right to control access to work. Naturally, there are also concerns that such provisions may affect the balance that copyright law has always attempted to maintain between the interests of the copyright owners and those of the users or the public, which I will examine later on.

III. Balance in the Malaysian Copyright Law

I venture now to look at some of the provisions of the Malaysian Copyright Act 1987[5] and examine the orientation of our copyright law, whether it truly balances the various competing interests or whether it is more copyright owner-centric.

First, allow me to expand a little on the mechanism by which the balance is sought to be achieved. As with copyright laws elsewhere, Malaysia's copyright law contains provisions that attempt to achieve the balance in two ways; first, through the operation of its basic principles, such as categories of protected works, idea-expression dichotomy, the duration of protection conferred, and the scope of protection; and secondly, and more notably by way of limitations and exceptions to the exclusive rights conferred upon copyright owners. Typically, these permitted acts include fair dealing, or as it is known in some countries, fair use, exceptions created for educational and other purposes, the making of back-up copies of computer programs, and statutory or compulsory licensing.

As far as the principles of copyright are concerned, there are at least four areas that I wish to outline. First, although copyright law covers a wide range of subject matter, not all works are protected.

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[5] Act 332.

Before any work may be protected, it must fall within one of the categories of protected works,[6] it must be original in the sense that it was the result of the skill and effort of the author or creator, and it must be in some material form.[7]

Secondly, it is a fundamental principle, now given statutory imprimatur in the form of section 7(2A), that copyright only protects expressions and not ideas.[8] In simple terms, this means that while the idea underlying any work may be freely copied, the expression of that idea may not. In that way copyright ensures that there is a free flow of ideas, and that ideas as such do not become the monopoly of those who reduced these ideas into expression. However, the distinction between idea and expression is not always easy to define or maintain. Much depends on the court deciding the case. Take for instance, drawings of designs for the manufacture of articles. Does copying the drawing or the article made from the drawing constitute taking the idea or the expression of the design? In Malaysia, there are two views on the matter. In *Peko Wallsend Operations Ltd v Linatex Process Rubber Bhd*,[9] the defendants were alleged to have copied the plaintiffs' slurry pump by way of reverse engineering. In response to one of the questions posed by the plaintiffs, whether such copying constituted an infringement of their copyright in drawings of the slurry pump, the High Court answered in the affirmative. In contrast, in the case of *Goodyear Tire & Rubber & Anor v Silverstone Tire & Rubber Co Sdn*,[10] which dealt with the question of whether the defendant had copied the tread design of the plaintiffs' Aquatred tyres, thereby infringing the plaintiffs' copyright in drawings of their tyres, the High Court refused to grant an injunction. The Court held that what the plaintiffs were basically seeking to protect was the idea of the function of the tyre, which being an idea, the law of copyright did not protect. The process

[6] These include literary, musical and artistic works, films, sound recordings, broadcasts, derivative works and published editions; see Copyright Act 1987, ss 7(1), 8 and 9.

[7] Copyright Act 1987, s 7(3).

[8] S 7(2A) was inserted pursuant to our treaty obligations under the TRIPs Agreement. The subsection was modelled upon art 9(2) of the TRIPs Agreement.

[9] [1993] 1 MLJ 225.

[10] [1994] 1 MLJ 348.

of defining the idea-expression dichotomy continues and I suspect it will not be made easier with the inclusion of section 7(2A).

The third way by which copyright strives to maintain a balance between the competing interests is by ensuring that protection is only for a prescribed period of time after which the work falls into the public domain to be freely available for the use of the public. The typical period of protection is life of the author plus 50 years after his death.[11] Some may ask, why this figure of 50 years? When copyright was first introduced into the various components of present-day Malaysia, the duration of copyright was generally 50 years. When our first national copyright law was introduced in 1969, the duration was shortened to 25 years. Under our existing copyright law which replaced the 1969 law in 1987, the duration was brought back to the internationally-accepted norm, that is, 50 years.[12] How and why 50 years is chosen is purely historical.[13] There is little basis to suggest that the duration of 50 years is sufficient for the protection of the copyright owners or that public good would be served if copyright was so limited. Even so, there have been moves in some countries to extend the duration of copyright to more than 70 years, ostensibly on the basis of the increased life expectancy and for the benefit of the heirs of the authors beyond the first generation.[14] The more cynical among us would of course ascribe commercial reasons behind such a move. However, the duration of 50 years is now the minimum period fixed by international conventions though perhaps not for long.

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[11] Copyright Act 1987, ss 17-23.

[12] The Berne Convention for the Protection of Literary and Artistic Works 1886 (Paris Act 1971) prescribes a minimum period of life plus 50 years: see art 7. Art 12 of the TRIPs Agreement also has a similar minimum period of protection.

[13] See Garnett, HK, Davies, G & Harbottle, G, *Copinger & Skone James on Copyright*, Vol 1 (London: Sweet & Maxwell, 15th ed, 2004) at paras 6-02-6-10.

[14] For instance, in 1996, the United Kingdom amended its law to extend the duration to 70 years in line with the EU Directive 93/98 to harmonise the term of protection of copyright and certain related rights. By the Copyright Term Extension Act (CTEA) 1998, the United States enlarged the duration of copyright by 20 years. An unsuccessful attempt was made before the United States Supreme Court in 2002 to challenge the constitutionality of the CTEA in the case of *Eldred v Ashcroft* (2003) 56 IPR 608. Singapore has also extended the term of protection to 70 years under the Copyright (Amendment) Act 2004, as part of its obligations under the US-Singapore Free Trade Agreement signed in 2004.

The duration of copyright protection is much longer than that under patent law. However, unlike patent law, copyright does not confer a true monopoly on the rights holder, which brings us to the fourth way by which copyright maintains a balance between the private rights of the copyright owner and the interest of the public in the public domain. Copyright does not proscribe independent creation. When an action is brought against a defendant for alleged copying, it is not sufficient to prove that there are similarities between his work and that of the plaintiff. Before any infringement of copyright could be said to have occurred, there must be some nexus between the original work and that of the defendant's work, that is, the defendant must have copied the plaintiff's work. If the defendant had fortuitously created a work which bears similarities to that of the plaintiff but had not copied or had any access to the plaintiff's work, the defendant is not liable for infringement. In this way, everyone is free to create any work no matter how unoriginal or similar so long as there is no copying of any existing work.

Finally, I come to the permitted acts. Copyright law entitles the copyright owner to control the doing of a variety of acts. However, in certain circumstances, the users may have access to and use of copyright works for various purposes without having to seek the permission of the copyright owner and without infringing copyright, notably in the areas of education, research, the media and access to information; the copyright owner's right to control does not extend to these acts. In the Malaysian context, there are altogether at least 20 permitted acts, applicable, with some exceptions, to all works protected under the Act.[15]

One significant example of a permitted act is that of fair dealing or what is known as "fair use" in some countries. Under our law, acts done by way of fair dealing for the purposes of private study, non-profit research, criticism, review or reporting of current events and accompanied by acknowledgements are not infringing acts.[16]

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[15] See Copyright Act 1987, ss 13(2), 9(4) & (5) and 15(2).

[16] S 13(2)(a).

There are also other permitted acts which may be classified broadly under education, press or mass media, legal and judicial, and government. These include exceptions made for the press, broadcasters such as the use of short quotations from published works, newspaper articles and periodicals, the reproduction of articles published in newspapers or periodicals on current topics and the reproduction of lectures and addresses delivered in public. There are also exceptions for the use of a work in judicial proceedings. Of relevance to us in the university is the provision permitting use of a work by prescribed educational, scientific or professional institutions, libraries or archives.[17] In so far as education is concerned, apart from the fair dealing provisions, there are provisions permitting the use of literary or artistic works for the purpose of illustrations used in teaching; recordings made in schools, universities or educational institutions of broadcasts meant for such bodies; provisions for use of work for the purpose of setting examination questions, and others.

It should be noted that there is no defence of private use as such, unlike the position under the repealed Copyright Act 1969, under which fair dealing for private use was permitted.[18] You will note that this has become a much debated issue currently with the right-holders commencing actions against individual users who swap music using peer-to-peer networks over the Internet.[19] Users would like to claim the defence of personal use, particularly in relation to copies which they have purchased, which may very well hold water in some jurisdictions but which is suspect in this country.

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[17] S 13(2)(i). Such use must be in the public interest and is compatible with fair practice and the provisions of any regulations (which to date have not been made), and no profit is derived or no admission fee is charged. For a list of the prescribed institutions, see the Copyright (Public Libraries and Educational, Scientific or Professional Bodies) Order 1987 as amended by PU(A) 295/94 and PU(A) 154/96.

[18] Copyright Act 1969, s 8(1)(a). Under the Copyright Act 1987, "private use" was substituted with "private study", which was not found under the 1969 provision.

[19] Apart from lawsuits against service providers and peer-to-peer software or service providers, music companies have also instituted legal actions against computer network users in what are known as "John Doe" lawsuits, or named individuals: see generally, www.riaa.com.

IV. Does the Balance Hold?

Let me now give a few examples of where I think there are gaps in our efforts to strike a balance between or among the competing interests.

I examine first of all our fair dealing provision. Our fair dealing provision has not had the benefit of judicial interpretation, leaving its application and compliance in an unsatisfactory position. However, as it has its roots in the United Kingdom's copyright laws, the natural inclination is to rely on decisions delivered in the United Kingdom as well as in other common law countries for its meaning, nature and scope. Relying on these decisions, it would appear that the defence of fair dealing is narrow. The permitted acts must be for the purposes of private study, non-profit research, criticism, review or reporting of current events, and apparently no other. Acts done even if it could be considered to be fair dealing are not permitted if they do not fall within any of the prescribed purposes.[20] Hence, an act done for the purpose of teaching or in the public interest is not sufficient to attract the defence of fair dealing. Contrast this with the fair use provision of the United States's copyright law where there are no prescribed purposes thus allowing for flexibility and adaptability to new technologies and conditions.[21]

Even within the stated purposes, the defence is quite limited. Private study and non-profit research are available only to the person undertaking such study or research.[22] Hence, for instance, a teacher or lecturer cannot make copies for his students as part of the course materials. It would also appear that a lecturer instructing his students to make copies may even fall foul of the provision. A provider of value-added products or services, such as media-monitoring or press-clipping or indexing or abstracting services would not be able to avail himself of

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[20] *Beloff v Pressdram Ltd & Anor* [1973] 1 All ER 241.

[21] United States Copyright Act 1976, s 107 permits fair use of a copyrighted work, "including such use by reproduction in copies or phonorecords or by any other means specified by that section, for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research ...".

[22] *University Press Ltd v University Tutorial Press Ltd* [1916] 2 Ch 601, *Sillitoe & Ors v McGraw-Hill Book Co (UK) Ltd* [1983] FSR 545.

the defence.[23] There is apparently no research involved in such activities, and even if there is, the research is for commercial reasons. Even assuming that it could be classified as research, the defence can only be claimed by the researcher and not by anyone, and certainly not the provider of the above services, doing research on his behalf.

Once the purpose of the fair dealing is established, there must be a determination of whether the activities conducted pursuant thereto are fair. So how many pages can one photocopy for one's private study before one crosses the line into the terrain of unfair dealing? In this age of reprographic and scanning technology, this is not an easy question to answer. Unlike some countries, our law offers little or no guidance on the permissible limits of reprographic activities, whether for educational, library, archival or other related activities. Although there are no guidelines by which fairness or otherwise of the dealing could be assessed, case law has established that it is a matter of degree and impression whether a use of the work falls within the scope of fair dealing.[24] Industry could of course issue guidelines of what is permissible. However, such guidelines would be dictated by what industry perceives to be fair according to its requirements. Thus far, no guidelines have been issued in Malaysia.

Arguably, one could resort to the provision dealing with government use, which basically permits any use of copyright works by the Government or prescribed libraries, educational, scientific or professional institutions.[25] But such use must be in the public interest, compatible with fair practice and any relevant regulations, and must be non-profit in nature. Public interest, as we all know is an unruly horse, you never know where it will take you; fair practice is as clear as "fair dealing" and offers no guidance whatsoever; relevant regulations do not exist, and you are as good as being in the dark. I remember in the late 1990s, I had had a few meetings with the then Chief Librarian of the Main Library of the University of Malaya to advise on the legality of

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[23] See, for instance, *De Garis & Anor v Neville Jeffress Pidler* (1990) 95 ALR 625, *Televison New Zealand Ltd v Newsmonitor Services Ltd & Anor* [1994] 3 LRC 638.

[24] See *Hubbard v Vospser* [1972] 2 QB 84.

[25] Copyright Act 1987, s 13(2)(i).

various activities relating to copying and distributing of copied materials for its users. Librarians are very law-abiding citizens and have no wish to infringe copyright law. But their lot is not an easy one; they know that there are permissible acts but they do not know the boundaries and, understandably are not keen to test them. The lack of clarity will result in either widespread disregard of the law or excessive caution on the part of the user.

One recurrent theme in relation to the fair dealing provision is whether the limitations and exceptions imposed to achieve the balance as applied in the offline or print world should be applied with equal force in the online world. One goes back to the rationale underlying fair dealing or fair use. When it was first introduced, the idea was that it was acceptable for copying to take place for private study or research. Before the age of reprography or photocopying, when copying was done typically by transcribing parts of the work needed, this was acceptable, given the constraints in this method of copying; there were only so many lines or passages that could be transcribed at any one time. But in the age of reprography and digital technology, the notion of what is permissible under the concept of fair dealing or fair use is being challenged; copying when done is not restricted to a few lines or passages. When applied to creative works such as music and movies, it becomes difficult to see how the concept of fair dealing could be applied when movies and songs could be downloaded not in bits and bobs but as a whole. In this regard, there are views that the fair dealing concept may have to be re-examined and not just redefined to make it more relevant.

There is another development that I want to refer to, and one that I feel is fairly urgent, and that is the trend of distributing content on-line or in the form of databases. Typically, such contents are made available to users by way of licensing, with standard terms and conditions. Academic libraries are the main subscribers or users. For them, there are issues such the proportion of print versus electronic or online collection to be acquired, budgeting and retrospective access. But for our purpose today, there is the issue of access. As I mentioned earlier, to protect electronic or online contents, content owners have resorted to technology protection measures or TPMs. Generally, TPMs may be

classified broadly as follows: access control measures and copy control measures. The former, as the name suggests, are used to control access to a work, which may or may not be copyright protected. Examples of access control measures include passwords, encryption and set-top boxes. Copy control measures are more closely linked to copyright as they control the extent to which a user who has lawful access to the work can make use of the work, such as making copies on other formats. In some cases, TPMs may control both access and copying or they may be used in conjunction with restrictions or conditions imposed by contracts, or with or as part of a digital rights management system (DRMS), that is, technology that is deployed to enable copyright owners to track, manage or prevent copying of their digital work, such as the digital watermarking system.

To protect TPMs, anti-circumvention provisions have been introduced. Our own anti-circumvention provision together with provisions dealing with DRMS were introduced into our law in 1997 and came into effect in 1999. Basically, the anti-circumvention provision makes it unlawful for any person to circumvent any technological protection measures deployed by the copyright owner whether to control access to the work or copying of the work. The scope of the provision has yet to be tested. However, like all anti-circumvention provisions elsewhere, our section 36(3) of the Copyright Act 1987 has raised several important issues[26] but I only want to raise one that is related to the question of balance and its impact on library resources.

Although the circumvention of any TPM is considered an infringement of copyright, there is, unlike anti-circumvention provisions elsewhere, no express provision for any permitted acts. Also of concern is the lack of clarity on whether our anti-circumvention provision operates within the current system of restricted and permitted acts as found in the Act. Assuming a person wishes to access a database for his non-profit research or private study, which are permitted acts, but does not have lawful access to the database which is protected by a TPM. Would he be entitled to make use of the defence of fair dealing if he

[26] See generally, Khaw, LT, "The Anti-Circumvention Provision of the Malaysian Copyright Act 1987" [2005] *EIPR* 53.

were to bypass or circumvent the TPM in order to have access to the contents? Arguably, the answer would be yes, in so far as the contents of the database are concerned, but doubtful in relation to the anti-circumvention provision. Prima facie, the lack of any provision to that effect would suggest that while the doing of any restricted act with respect to the protected copyright work may be excused by reason of, for instance, fair dealing, the act of circumventing the TPM may not. The failure of section 36(3) to provide for permitted acts would prevent access to works for any of the legitimate purposes such as fair dealing for research, private study etc, and would in effect nullify legitimate access under any of the exceptions under section 13(2) once a TPM has been installed.

Imagine the impact on library resources and access to information and knowledge. In so far as print materials are concerned, once they are bought and made available on the shelves, access to and use of such materials is almost limitless. There is no necessity to bypass any circumvention measures to read the material. Archival copies are available. There is no barrier to distribution. Contrast this with materials in the electronic or the online format. Access and use may be governed by security measures as well as contract. To read the contents, you will need permission in the form of a password even if it is for a permitted purpose under copyright law. There may not be any archival copies available. Subsequent distribution can be controlled because of contract. More importantly, materials under the public domain and no longer protected by copyright may be compiled as databases, the access to which may be controlled by contract and access control measures. There are also fears that private contractual arrangements may sideline copyright principles.

To the extent that TPMs control copying of copyright works or other activities that are linked to the infringement of copyright, there is some degree of acceptance of such measures because of their nexus with copyright law. In such cases, with or without any legal protection of TPM, any act of copying would in any event attract liability under copyright law. The real concern is with TPMs that control access but once access has been obtained, do not prevent copying. There are fears that such measures may deny access to all except those who are

willing to pay and on such terms and conditions as may be imposed by the copyright owners. Indeed, TPMs used in conjunction with contracts, typically in standard and non-negotiable form, or together with DRMS to control access as well as impose other terms and conditions, may result in enabling right-holders to exert a greater degree of control over their works than is statutorily permitted. It may even have the effect of expanding the scope of the rights controlled by the copyright owner and modifying or overriding the legitimate use or access to works as provided by the law. The balance sought to be struck by copyright law may be overtaken by private arrangements between sellers and consumers, to the prejudice of the latter. This may have a tremendous impact on access to information which, in the age of information and the knowledge economy, is so vital.

Apart from the failure to clarify the relationship between our anti-circumvention provision and existing exceptions within the legislative framework, our Act is also silent with respect to any other exceptions that may well be relevant in relation to the impact that TPMs may have on uses connected with the technology. It should be noted that in other jurisdictions, such as the United States under their Digital Millennium Copyright Act, exceptions cover certain acts by non-profit libraries, archives and educational institutions; law enforcement, intelligence and other government activities; reverse engineering of computer programs for purposes of achieving interoperability among computer programs; encryption research; prevention of access of minors to harmful material on the Internet; protection of personally identifying information; and computer security testing. The Australian statute provides for exceptions for "permitted purposes" such as the right to reproduce computer programs to make interoperable products, to correct errors and for security testing, activities covered by the libraries and archives exception, activities covered by statutory licences for educational institutions and institutions assisting persons with a disability.[27]

There is yet another area where our statute has failed to provide for specific exceptions for computer programs. The only significant

[27] See the Australian Copyright Act 1968 as amended by the Copyright Amendment (Digital Agenda) Act 2000, s 116A(7).

exception made affecting computer programs is with respect to the right to make back-up copies of computer programs – something that is already a common practice. Unlike other jurisdictions, such as the United States and the European Union, we do not have any provision for reverse engineering or decompilation for the purpose of correcting errors or making interoperable programs or products. Arguably, the fair dealing provision may apply but it is not satisfactory. In line with our visions for the Multimedia Super Corridor (MSC) and the Information Technology industry, a provision permitting decompilation for prescribed purposes should be considered.

Over the years, the bundle of exclusive rights granted to the copyright owner has changed in nature and scope, giving, it would appear, more rights to the copyright owner. For instance, when the 1987 Copyright Act was enacted, it included a new right, that is, the distribution right which incorporated the right to control the rental or lending of a work. Traditionally, a copyright owner has the right to control the first distribution of his work to the public only. Once distributed, he loses any right to control further distribution or other dealings with respect to copies of his work;[28] in Intellectual Property parlance, his right with respect to further distribution is exhausted. However, although the property in the physical copy may have passed to the buyer, the property in the copyright remains with the copyright owner. What this means in real terms is that the owner of the physical copy can do whatever he likes with the copy so long as he does not infringe the copyright in the work. So he can sell it, lend it, use it, keep it, throw it away, whatever, without having to seek the copyright owner's permission. Libraries, for instance, can lend books without infringing any copyright, thereby facilitating the dissemination of information and knowledge. What the user cannot do is to copy it, read it or perform it in public, or broadcast it, all of which are within the exclusive control of the copyright owner. The introduction of the right to control distribution in 1987, with no qualifications, had two major implications. First, the ability of a purchaser of the physical copy of a copyright work, such as a book or a CD, to sell or lend that copy was restricted, if not

[28] Proviso to s 13(1) of the Copyright Act 1987.

abrogated; the right to control any subsequent dealings with the physical copy remained with the copyright owner. Secondly, it also had the effect of enabling the copyright owner the right to proceed against any distributor of illegal copies without having to prove intent or knowledge on the part of the distributor, as is required in most jurisdictions.

Fortunately, the law with respect to this provision has now changed, and the copyright owner is only entitled to control the first distribution in Malaysia, but there is an exception.[29] The copyright owner continues to control the commercial rental of copyright works, a right that is not exhausted by the act of first distribution.[30] Seemingly, this does not extend to the lending activities of libraries, or at least libraries that do not charge for borrowing.

There is, however, another important effect arising from the amendment to the distribution rule. By this amendment, arguably, the law may have inadvertently taken away the civil right of the copyright owner to proceed against any distributor of illegal copies. His only recourse is to rely on the government to enforce the criminal provisions relating to such activities,[31] surely a step backwards and a perpetuation of the perception alluded to in my introductory remarks.

Another instance of the expansion of the rights of the copyright owner is with respect to sound recordings. Previously, under the 1969 copyright regime, the copyright owner of a sound recording had only the right to control the making of copies of the sound recording. The right to control the public performance of the recording and the broadcasting of the recording were not granted; they were abrogated. These rights were restored in 1987. As a result, the consent of copyright owners is now required when sound recordings are played in public or when transmitted over radio or television broadcasts. You will recall, I am sure, the furore caused by the restoration. Basically, it was, and still is difficult for users of sound recordings to accept that they have to pay for playing something in public which they have paid

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[29] *Ibid.*

[30] Copyright Act 1987, s 13(1)(f).

[31] Copyright Act 1987, s 41.

for. Over and above this, they have to pay the music composers and authors whose works form the subject matter of the sound recordings.

V. Impact of External Factors on the Development of our Copyright Law

As can be seen from the above, there are gaps that require legislative attention, not so much as to tilt the balance in favour of one group over another, but to maintain an acceptable level of balance in line with developments elsewhere. The issue of balance or the lack of it in copyright law is not unique to Malaysia. Indeed, it is an issue that is consistently and constantly discussed and debated, particularly in the face of any emerging technology or international developments. However, while most jurisdictions have, among other things, discussions, debates, papers and even test cases argued in courts by law professors on exceptions and limitations in the face of new technologies, the discussion in Malaysia has yet to begin. Why is that the case? It is my humble contention that the reason is very much linked to the reason for the introduction of copyright law in Malaysia.

Historically, Malaysia's copyright laws are not homegrown; global developments have always had an impact on the introduction and subsequent development of our copyright law. In the early days, English copyright laws were applied in the Straits Settlements by virtue of their status as British colonies.[32] In the Federated Malay States, on the other hand, it was thanks to those in the performing arts that this branch of intellectual property was introduced into the states concerned; the failure of these artists then to clear copyright, presumably of English plays, had incurred the wrath of copyright owners in England and resulted in petitions being made to the Board of Trade for action to be taken to ensure that such activities were regulated. The era of independence saw developing countries attempting to roll back what was perceived to be an unfair bargain largely in favour of the developed world. Copyright laws of newly-independent countries typically provided for shorter duration of protection and a narrower scope of exclusive

[32] For a historical background of our copyright law, see Khaw, LT, *Copyright Law in Malaysia* (Kuala Lumpur: Malayan Law Journal, 2nd ed, 2001) Ch 1.

rights, and Malaysia was no exception. It enacted its Copyright Act 1969 with the conscious aim of reflecting "the present prevailing trends in developing countries with regard to the concept of national and international copyright protection, while at the same time containing specific provisions to meet Malaysia's needs". This state of affairs did not last long. Countries, including Malaysia, were forced to strengthen their copyright laws in the face of pressures from producer countries of copyright works who were also developed countries. Domestic copyright laws were no longer regarded as adequate; participation in international copyright relations was required. After a brief flirtation with the idea of bilateral copyright relations, Malaysia decided to join the international copyright community by acceding to the Berne Convention for the Protection of Literary and Artistic Works in 1990. Soon, trade and intellectual property issues were linked and sanctions imposed as a penalty for failing to ensure strong intellectual property protection, as exemplified by section 301 of the United States's Trade Act 1974. This strategy was pursued at the international fora and as they say, it is now history that the world has moved yet another level to a more harmonised system of intellectual property laws under the auspices of World Trade Organization (WTO) and TRIPs. As a member of WTO, Malaysia amended its copyright law to ensure compliance with TRIPs.

But that is by no means the end of the impact of international conventions on domestic legislation. Writing in 1992 before the conclusion of TRIPs, I predicted that with Malaysia's participation in international copyright relations and in view of the trend to link intellectual property issues with international trade issues, the development of Malaysia's copyright law must be considered in the context of its international copyright obligations and trading position.[33] That is still true today. We appear to be moving towards bilateral copyright and intellectual property relations again in the form of free trade agreements. In May this year, Malaysia and the United States signed a Trade and Investment Framework Accord for the creation of a Joint Council for the discussion of trade issues such as intellectual property rights. This Accord is the

[33] See Khaw, LT, "Developments in Malaysian Copyright Law, 1969-1991, Selected Issues" in Sharifah Suhana Syed Ahmad (ed), *Developments in Malaysian Law* (Kuala Lumpur: Pelanduk Publications, 1992) 261 at pp 293-294.

first step towards a Free Trade Agreement (FTA) between the two countries. It may be too early for conjecture but if the experience of other countries which have entered into FTAs is to go by, we can expect several changes to, among others, our copyright law. For a start, I am sure there will be more comprehensive provisions on anti-circumvention targeting not only conduct, but also devices which can be used for circumvention activities. Arguably, this may not be all bad news, as there are exceptions and limitations built into the system, unlike ours. But the point I am trying to make here is that our laws will once again be dictated by outside influences, with little or scant regard to the national or public interests.

VI. Concluding Remarks

In trying to strike a balance in copyright law, the "battle" is not only between the interests of the copyright owners versus those of the users or the public. If in the developed countries, the issue of balance is typically fought out between producers of copyright works and consumers or users of such works, in the developing countries, the counterparts are the developed countries on the one side and the developing countries on the other. The copyright as well as other Intellectual Property rights of the developing countries are usually negotiated from a position of relative weakness, and at most times, in ignorance of the benefits of such intangible property rights as copyright and other intellectual property rights.

Emerging as forces to be reckoned with are movements that seem to strike at the very root of copyright law. There is on the one hand, a demand for unrestricted access to copyright material at the lowest possible costs or for free. Leading this group are non-government organizations, resource centres, and users. Some label this movement as "consumer politics", the "freedom to copy", "the politics of IP". At the other end of the spectrum, is the movement led by right-holders to place increasing restrictions against not only copying but also access to their works by deploying technologies, by the imposition of terms and conditions on use and by instituting legal action not only against parties who facilitate copying but individual users as well.

Both movements are actually premised on the public interest to be served by copyright. It is in the public interest to promote learning, and to do this, creators must be given the incentive to innovate while at the same time, the public must be given access so that they can use the knowledge created and build upon it.

To redress this imbalance, there is a need for every developing country including Malaysia to develop a policy for its intellectual property. In this regard, I am heartened that the Ministry of Domestic Trade and Consumer Affairs has prepared a draft Intellectual Property Policy, which is hoped will enable us to craft our laws to suit our own developmental needs.

As so very aptly asserted by the Commission on Intellectual Property Rights on *Integrating Intellectual Property Rights and Development Policy* in its Report at page 637:

> Unrestricted access to, as a well as an unrestricted flow of, information and ideas are essential to the well-being of democratic government, the welfare of society, trade, industry, culture and education. Copyright is not just a law for the protection of creators and copyright owners. Copyright is designed to encourage the creation and protection of new works and to serve the public interest by disseminating ideas and information.

Damages for Personal Injuries and Causing Death: A Critical Survey*

*Dato' P Balan***

Introduction

Malaysian law on damages for personal injuries and causing death is a dynamic subject, judging from the number of reported judgments each year. In the last 20 years the law on this subject has witnessed radical changes. In this lecture I propose, with your kind indulgence, to undertake a critical survey of some parts of the subject and to put forward suggestions for its reform. It will be my thesis that a thorough study of the subject with a view to reform of the law is long overdue.

Malaysian law on this subject has its genesis in the English Common Law. However, Malaysian law on this subject has its own peculiar features. Some of these are the result of judicial activity and some the result of statutory intervention, in particular the Civil Law (Amendment) Act 1984, which came into force on 1 October 1984. The 1984 Amendment Act made sweeping changes to the law by removing or altering many Common Law principles which benefited injured persons or the dependants of deceased persons.

At the outset I must state that time constraints do not allow me to deal with all areas of the law where, in my opinion, change and reform are necessary. One area which I am compelled to omit is the perennial problem encountered in the area of special damages, namely, as to whether an injured person may claim the cost of treatment in a private hospital when the same treatment could have been obtained at a much cheaper cost in a government hospital. Differing judicial decisions on the subject and the absence of clear principles from a superior court have caused some uncertainty in this area of the law.

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