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## Legislative Update: The Copyright (Amendment) Act 2021 of Malaysia

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### ABSTRACT

On the last days of 2021, the Malaysian Parliament passed amendments to the Copyright Act 1987 and the Patents Act 1983. In addition, the Geographical Indications Act 2000 was repealed and replaced by a new Geographical Indications Act 2021. This legislative update looks at the amendments made by the Copyright (Amendment) Act 2021. Generally, five areas in the Copyright Act are affected: Collective management organization, Marrakesh Treaty, voluntary notification, streaming technology and enforcement power.

**Keywords:** Copyright (Amendment) Act 2021, Malaysia, Collective management organization, Marrakesh Treaty, Voluntary notification, Streaming technology, Enforcement power

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### 1. Introduction

On the last days of 2021, the Malaysian Parliament passed amendments to the Copyright Act 1987 and the Patents Act 1983. In addition, the Geographical Indications Act 2000 was repealed and replaced by a new Geographical Indications Act 2021.

This legislative update looks at the amendments made by the Copyright (Amendment) Act 2021. Generally, five areas in the Copyright Act are affected: collective management organization, Marrakesh Treaty, voluntary notification, streaming technology and enforcement power.



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At the time of writing, these amendment Acts are awaiting publication in the Federal Gazette and getting a coming into force date. Different provisions may come into force on different dates as appointed by the relevant Minister.<sup>1</sup> For example, the provisions on Marrakesh Treaty may only come into force when Malaysia has joined the treaty and made the necessary subsidiary instruments. Hence, in this legislative update, references to the Copyright Act 1987 include references to provisions as amended by the Copyright (Amendment) Act 2021.

## **2. Collective Management Organization**

The Copyright (Amendment) Act 2021 replaces the term ‘licensing body’ with the term ‘collective management organization’. ‘Collective management organization’ is the term used by the World Intellectual Property Organization (WIPO) to refer to an organisation which represents copyright owners and performers to manage their rights.<sup>2</sup> The term ‘licensing body’ is the term used in United Kingdom’s copyright law, namely the Copyright, Designs and Patents Act 1988. This change in terminology follows recent trends in Malaysia to distance ourselves from British influence and to move closer to international practices such as those of WIPO. For example, following the enactment of the Trademarks Act 2019, we now use the single word ‘trademark’ instead of the two words ‘trade mark’ in British English.

One subtle change made in the definition of a ‘collective management organization’ is the change in the form of the licensing body from ‘a society or organization’ to a ‘body corporate’ in the case of collective management organization. A body corporate, for the purpose of collective management organization, is defined as ‘a company limited by guarantee incorporated under the Companies Act 2016’.<sup>3</sup> That means a society registered under the Registrar of Societies can no longer be a collective management organization.

Notwithstanding the new terminology, the function of a collective management organization remains largely the same, i.e. ‘as a licensing body’ for copyright owners, authors or performers.<sup>4</sup> The new amendment also set a term limit of two years to each declaration of a body corporate as a collective management organization.<sup>5</sup> Another change is that the functions of different collective management organizations are no longer allowed to overlap. In other words, no two or more collective management organizations representing the same group of copyright owners, authors or performers may exist concurrently.<sup>6</sup>

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<sup>1</sup> At the time of writing, the Minister in charge of copyright matters is the Minister of Domestic Trade and Consumer Affairs.

<sup>2</sup> World Intellectual Property Organization, ‘Collective Management of Copyright and Related Rights’ <<https://www.wipo.int/copyright/en/management/>>.

<sup>3</sup> Copyright Act 1987, s 27A(9).

<sup>4</sup> Copyright Act 1987, s 27A(1).

<sup>5</sup> Copyright Act 1987, s 27A(3).

<sup>6</sup> Copyright Act 1987, s 27A(4).

Finally, the Controller of Copyright is now empowered to issue ‘guidelines on any matter relating to the declaration and operation of a collective management organization’ which are binding on the collective management organizations.<sup>7</sup>

### **3. Marrakesh Treaty**

The WIPO-administered Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired or Otherwise Print Disabled (‘Marrakesh Treaty’) is a treaty to permit copyright exceptions and mechanisms to be implemented for the benefits of persons with print disability. Although at the time of passing of the Copyright (Amendment) Act 2021, Malaysia has yet to join the Marrakesh Treaty, provisions have been added to the Copyright Act 1987 in anticipation of eventual membership.

Prior to the 2021 amendment, section 13(2)(gggg) provides for a copyright exception for ‘the making and issuing of copies of any work into a format to cater for the special needs of people who are visually or hearing impaired and the issuing of such copies to the public by non-profit making bodies or institutions and on such terms as the Minister may determine’. Subsequent to the amendment, reference to ‘visual’ in section 13(2)(gggg) has been removed, thus leaving the paragraph to one catering to people who are hearing impaired.

A new paragraph (ggggg) to section 13(2) is added to comply with the requirements of the Marrakesh Treaty. It allows ‘the making and issuing of copies of any work into an accessible format copy on such terms as the Minister may determine’. An ‘accessible format copy’ is defined as ‘a copy of a work in an alternative manner or form which gives a person with print disability access to the work including to permit the person with print disability to have access as feasibly and comfortably as a person without such disability for his exclusive use’.<sup>8</sup>

Two parties are allowed to make and issue such accessible format copies: an authorized entity or ‘a person with print disability or any other person acting on his behalf including his caregiver’.<sup>9</sup> To qualify as a ‘person with print disability’, one needs to be registered under the Persons with Disabilities Act 2008.<sup>10</sup> However, the disability need not be confined to visual; other physical disabilities which may prevent a person from holding or manipulating a book are included under the concept of print disability. Furthermore, although the phrase ‘printed works’ is not specifically defined, international practices in implementing the Marrakesh Treaty have recognised digital content as falling within the meaning of printed works. An ‘authorized entity’ is prescribed entity which is a ‘non-profit making body or institution which provides education, instructional training, adaptive reading or information access to a person with print disability’.<sup>11</sup>

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<sup>7</sup> Copyright Act 1987, ss 27M and 27A(6)(cc).

<sup>8</sup> Copyright Act 1987, s 3.

<sup>9</sup> Copyright Act 1987, s 13(2)(ggggg).

<sup>10</sup> Copyright Act 1987, s 3.

<sup>11</sup> Copyright Act 1987, s 13(2C).

The exclusive exceptions granted to persons with print disability include making ‘an indirect sound recording or film of a performance ... solely for the purpose of assisting people who are hearing impaired or persons with print disability’. The non-applicability of moral rights to an accessible format copy has also been recognised.<sup>12</sup>

Additionally, the authorized entity or a person with print disability is also permitted to circumvent technological protection measures for the sole purpose of making, issuing or distributing copies of any work into an accessible format copy.<sup>13</sup> The fact that technological protection measures only make sense in relation to digital content further supports the argument that the concept of ‘printed works’ include digital content.

#### **4. Voluntary Notification**

The system of voluntary notification introduced by the Copyright (Amendment) Act 2012 (Act A1420) allowed ‘authors of the work, the owner of the copyright in the work, an assignee of the copyright, or a person to whom an interest in the copyright has been granted by license’ to register their interests in a Register of Copyright.<sup>14</sup> Thus, the original wordings of section 26A gave the impression that the Register of Copyright is simultaneously a register of authorship, ownership and licensees.

An amendment to section 26A removed references to authorship and licensee, and henceforth persons who may apply for voluntary notification of copyright are now restricted to copyright owners and their assignees.

#### **5. Streaming Technology**

Ever since the advent of video-on-demand and video streaming services on the Internet, users in Malaysia have access to video and audio content from various overseas sources without having to go through local broadcasters and media outlets. The appearance in the market of IPTV boxes has allowed Internet users to gain access to hundreds of video and audio channels from other countries to the financial detriment of local content licensees.

A new Part VIAA has been added to regulate streaming technology. Section 43AA creates an offence of manufacturing, importing, selling, etc., distributing, offering to the public or providing a streaming technology which commits or facilitates infringement of copyright in any work. A streaming technology is defined to include ‘computer program, device or component ... that results in an infringement of the copyright in a work’.<sup>15</sup>

Hence, it is expected that when the amendment Act comes into force, sale of IPTV boxes will dwindle and only devices which stream licensed content will be allowed in the market.

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<sup>12</sup> Copyright Act 1987, s 25(3A).

<sup>13</sup> Copyright Act 1987, s 36A(2)(g).

<sup>14</sup> Copyright Act 1987, ss 26A and 26B.

<sup>15</sup> Copyright Act 1987, s 43AA(4).

Nevertheless, despite the broad definition of ‘streaming technology’, software and websites which allow access to infringing video content may remain difficult to be eliminated.

## **6. Enforcement Power**

The final aspect of the amendment to the Copyright Act 1987 concerns miscellaneous changes and additions to the enforcement power under the Act. Among the changes are new copyright offences.

A new offence of ‘provid[ing] or shar[ing] access to an online location of any works or copies of works to any other person without authority’.<sup>16</sup> It appears that the purpose of this provision is to criminalise links to infringing copies. However, the wording sounds peculiar and perhaps the word ‘infringing’, just like paragraphs (a) to (g) of section 41(1), should have preceded the word ‘works’.

Concealing the commission of a copyright offence is also an offence.<sup>17</sup> The amendment Act gives power to the Assistant Controller of Copyright to compel disclosure of information.<sup>18</sup> Failure to comply with the direction of the Assistant Controller is also an offence. One issue that appears is that whether the Assistant Controller can compel a potential accused to furnish self-incriminating information. In the United Kingdom, the Regulation of Investigatory Powers Act 2000 allows the police to demand the disclosure of passwords to unlock encrypted information. It remains to be seen whether the powers granted under section 52B includes the ability to demand the disclosure of password leading to incriminating content.

Finally, test purchases is now legally recognised. The Assistant Controller may authorise the copyright owner or person on behalf of the owner to make test purchases to determine whether there is an infringement or offence committed.<sup>19</sup> Finally, a new section on compounding of offences has replaced the existing one.<sup>20</sup>

## **7. Conclusion**

It is hoped that the improvement to the provisions on collective management organizations will help members of the public easily identify and subscribe to a licensing scheme for their use. The ugly episode of two competing licensing bodies attempting to represent the same rights owners should be avoided.<sup>21</sup>

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<sup>16</sup> Copyright Act 1987, s 41(1)(k).

<sup>17</sup> Copyright Act 1987, s 48(f).

<sup>18</sup> Copyright Act 1987, s 52B.

<sup>19</sup> Copyright Act 1987, s 51B.

<sup>20</sup> Copyright Act 1987, s 41A.

<sup>21</sup> *Public Performance Malaysia Sdn Bhd & Anor v Prism Bhd* [2016] 1 Current Law Journal 687 (HC).

The changes to the Copyright Act 1987 in anticipation Malaysia joining the Marrakesh Treaty is patently a positive development. It shows that law can play its role in fostering a caring society and to close the digital divide between people who are sighted and persons with visual disability.

Likewise, restricting the voluntary notification of copyright to only copyright owners make the Register of Copyright a *prima facie* evidence of ownership. Since authors are already the first owners of copyright, there is no need to register authors separate.<sup>22</sup>

Disallowing streaming devices which can be used to access unlicensed content will surely bring a smile to local broadcasters who are paying license fees for content. Similarly, increased enforcement powers and new offences may act as deterrent to infringements of copyright.

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<sup>22</sup> Copyright Act 1987, s 26(1).