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Editor's Note

In conjunction with the recent amendment of the Copyright Act 1987, "Copyright" has been selected as the theme for this edition of MyIP Bulletin. Among the new regulations to be enforced with the recent amendment include a system of voluntary notification of copyright works and the registration of a licensing body.

MyIPO has introduced expedited examination process for both trade mark and patent applications in February 2011. Under the expedited examination, the registration period for patents only takes 20 months and for trade marks, it takes 6 months 3 weeks. However, this is only applicable for applications which are in order and without any objection being raised by the registrar. This expedited process is hoped to further facilitate IP owners to speed up their IP registration.

As such, in line with its vision to be one of the leading intellectual property organizations, MyIPO has worked hard towards getting the MS ISO 9001:2008 certification for the expedited examination process. As a result, the recent MS ISO certification by SIRIM QAS International Sdn. Bhd. that covers expedited examination process for trademark and patent applications, proves that MyIPO produces quality examination works. Customers can be assured of better service and quality works with this certification.

Thank you,

MyIP Bulletin Editor



Perbadanan Harta Intelekt Malaysia

CONGRATULATIONS



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HAKCIPTA, CIPTA HAK

Mohamed Fairuz bin Mohd Pilus

Pengarah

Bahagian Hakcipta, MyIPO

PENDAHULUAN

Hakcipta, secara harfiahnya, adalah hak terhadap sesebuah ciptaan. Walau bagaimanapun, ciptaan dalam hakcipta adalah berbeza maksud dan kesan perlindungannya dibandingkan dengan paten. Dalam paten, ciptaan merujuk kepada spesifikasi dan fungsi teknologi yang baharu di dunia dalam menghasilkan sesebuah ciptaan. Penciptanya dipanggil perekacipta (*inventor*) dan hasil ciptaannya dipanggil paten (*patent*). Berbalik kepada hakcipta, ianya merujuk kepada karya yang dihasilkan dan penciptanya dipanggil sebagai pengkarya (*author*) sementara hasil ciptaannya pula dipanggil karya (*work*).

Sesuatu yang menarik, ingin penulis berkongsi berkaitan harfiah hakcipta tadi, ialah dalam bahasa Inggeris hakcipta disebut sebagai "*copyright*". Adakah ianya bermaksud "*rights to copy*"? Indahnya Bahasa Melayu, hakcipta adalah cipta hak, tetapi dalam bahasa Inggeris "*copyright*" sinisnya menyatakan "*rights to copy*". Secara mudah dapat dikatakan secara harfiahnya, hak untuk meniru. Untuk maju ke hadapan, pesan orang, belajarlah daripada pengalaman orang lain. Tetapi, dalam hakcipta, adakah ianya mempunyai maksud yang serupa "*rights to copy*"? "*Copy*" maksudnya meniplak, meniru atau mengambil sesuatu karya daripada orang lain untuk digunakan semula. Bagaimanapun, dalam hakcipta, sesuatu yang dicipta atau sesebuah hasil karya itu mempunyai hak eksklusif yang dipegang oleh pengkarya. Hak inilah yang perlu diketahui oleh seseorang pengkarya tentang hak mereka dalam hakcipta, cipta hak.

Dalam membangunkan ekonomi negara berteraskan industri seni atau industri kreatif, dua faktor asas utama perlu diambil kira iaitu prasarana dan perundangan. Dalam konteks prasarana, peranan pihak kerajaan dan sektor swasta adalah seiring pentingnya dalam membangunkan industri kreatif di Malaysia. Dalam membangunkan industri kreatif ini dengan lebih berdaya saing, pihak kerajaan telah memperkenalkan Dasar Industri Kreatif Negara (DIKN). Matlamat DIKN ini antara lain adalah bagi menjadikan industri kreatif negara berdaya saing dan dinamik untuk menyumbang kepada pertumbuhan ekonomi negara dan memartabatkan budaya bangsa. Dari aspek perundangan pula, Akta Hakcipta 1987 menyediakan peruntukan perlindungan kepada asas utama industri kreatif iaitu hasil karya sastera, hasil karya seni, muzik, filem, rakaman bunyi, siaran dan juga karya-karya terbitan.

MEMBUDAYAKAN HAKCIPTA DALAM INDUSTRI KREATIF

Penulis ingin berkongsi pengalaman, ketika bertugas dalam mempromosikan harta intelek 10 tahun dahulu. Apabila jemputan untuk menghadiri seminar harta intelek diedarkan kepada orang awam, ramai pemanggil bertanya apa itu harta intelek, walaupun sudah dijelaskan mengikut tafsiran dan komponen harta intelek, ramai yang masih tidak faham. Namun, apabila disebut cetak rompak, barulah mereka mendapat bayangan akan maksud harta intelek. Jelaslah di sini, gambaran dan perspektif orang ramai tentang perkara negatif dalam harta intelek lebih menyerlah berbanding faedah harta intelek itu yang sepatutnya dipupuk ke dalam budaya masyarakat Malaysia.

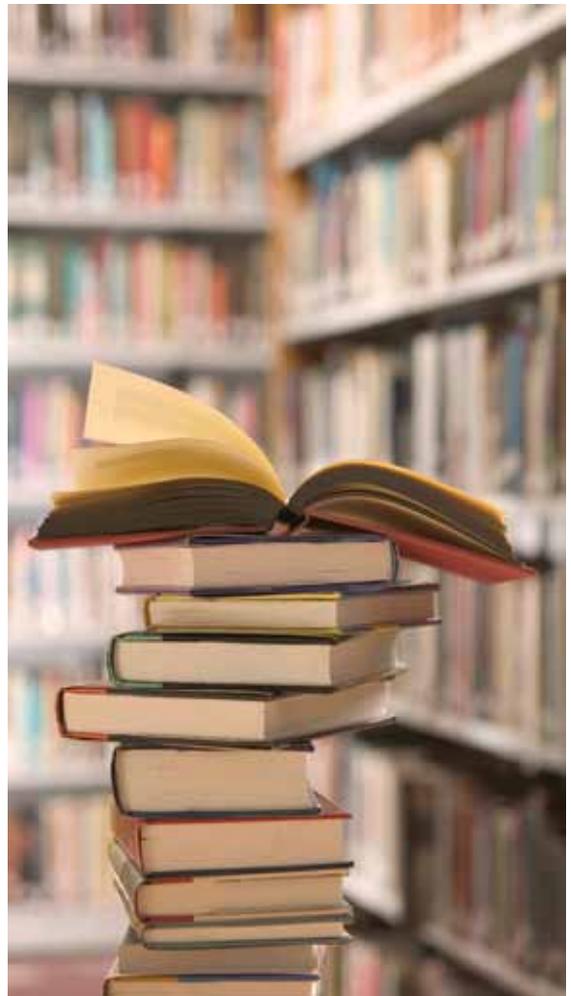
Masa terus berlalu, kefahaman serta kesedaran orang ramai terhadap harta intelek khususnya komponen harta industri (paten, cap dagangan, rekabentuk perindustrian, petunjuk geografi) semakin meningkat. Namun begitu, kefahaman dan kesedaran hakcipta masih belum terkesan dalam masyarakat Malaysia amnya dan penggiat-penggiat seni khususnya. Sering kali di dada-dada akhbar masih terdapat isu-isu berkaitan pertikaian hak penggiat-penggiat seni dipaparkan seolah-olah keupayaan untuk industri kreatif berkembang dengan baik tidak dapat dicapai ekoran pelbagai isu seperti cetak rompak, ketidakseimbangan bayaran saraan, bayaran hasil tayangan produksi dan pelbagai isu-isu lain masih tidak selesai. Mengapakah ini terjadi walaupun kerajaan telah membelanjakan berjuta ringgit dalam menyediakan prasarana untuk pembangunan industri kreatif ini?

Selain itu juga, sekiranya dilihat dari segi membudayakan hakcipta dan harta intelek kita masih jauh ketinggalan. Ini adalah antara persoalan yang perlu dilihat oleh penggiat-penggiat seni tanahair. Adakah hanya isu cetak rompak sahaja yang menjadi pelepas luahan perasaan sedangkan ada pelbagai lagi isu asas yang perlu difahami dan diambil peduli oleh penggiat-penggiat seni ini?

Penggiat-penggiat seni perlu mengupas rasional asas kepentingan harta intelek dan hakcipta itu dengan mengambil pendekatan bahawa harta intelek dan hakcipta berteraskan kepada perkongsian faedah bersama yang digemburkan daripada benih minda, pembajaan kreativiti dan penuaian dari pemasaran terhadap sesuatu hasil karya kreatif tersebut. Misalnya, seorang penulis lirik menghasilkan lirik yang menarik, disulami rentak muzik yang sedap didengar oleh komposer serta nyanyian merdu oleh seorang penyanyi dan tidak lupa sumbangan daripada syarikat rakaman dalam memasarkan album tersebut berjaya menarik minat pendengar untuk menikmati hasil karya lagu tersebut. Adakah wajar bagi pendengar untuk meniadakan kreativiti yang dihasilkan daripada susur alur yang panjang dan melibatkan kos dari segi masa, wang ringgit serta minda yang kreatif? Sebahagian daripada pendengar dan peminat muzik tanah air melihat kos yang perlu dibayar bagi penghasilan sesuatu karya muzik itu hanya mengambil kira nilai muka (*face value*) bagi mencetak sekeping cakera padat iaitu anggaran RM2.00-RM3.00 sahaja. Analogi asas salah ini menjadikan permintaan terhadap cetak rompak

meningkat kerana kos menghasilkan sebuah cakera padat adalah amat rendah berbanding kos keseluruhan penciptaan sesebuah karya hakcipta itu. Begitu juga syarikat rakaman yang mendapat keuntungan dari jualan album yang tinggi jualan, haruskah diketepikan keringat penulis, komposer lagu dan penyanyi? Dalam dunia penulisan dan penerbitan lain pula isunya. Dunia penulisan dicemari dengan isu hak penulis dan penerbit terus menjadi perbualan hangat.

Dalam dunia masa kini, setiap penghasilan karya kreatif perlu meletakkan kepuasan pembeli sebagai sandaran, dan pembeli perlu meletakkan dorongan dan hasil jualan tinggi sebagai rangsangan terhadap penambahan hasil karya kreatif pengkarya dalam kluster hakcipta yang dinyatakan dalam Akta Hakcipta 1987. Budaya inilah yang menjadi cabaran bukan sahaja di kalangan penggiat-penggiat seni tetapi juga pengguna dan Kerajaan.



Mogoknya Datuk A. Samad Said satu masa dahulu adalah berkisarkan kepada isu royalti. Iktibarnya di sini adalah keperluan untuk membudayakan hakcipta dalam kitaran industri kreatif itu sendiri adalah amat penting dan kepentingan hakcipta dalam transaksi ini tidak boleh dipandang mudah. Begitu juga paparan media massa, komentar dan perbincangan hangat tentang isu melibatkan penulis, penerbit buku dan penerbit filem karya Ombak Rindu menjadi satu lagi contoh fenomena, ke arah mana peranan hakcipta dalam menangani isu-isu sebegini. Juga, isu memuat turun Ombak Rindu melalui Astro First. Hakcipta dan harta intelek boleh dianggap sebagai kunci pada sebuah rumah. Walaupun peranan kunci tersebut hanya digunakan pada nisbah yang amat rendah tetapi sekiranya kunci rosak atau hilang akan menjadikan suasana seisi rumah kelam kabut. Begitu juga hakcipta dan harta intelek, walaupun tidak menjadi asas utama dalam menghasilkan sesuatu karya tetapi perlu diambil kira fungsi dan bila perlunya pemakaian hakcipta, cipta hak dalam mana-mana transaksi yang perlu. Secara ironinya, industri kreatif dan hakcipta melibatkan peranan dan fungsi pengkarya, pelaku dan pelabur. Keseimbangan perlu wujud dalam memberansangkan ekonomi industri kreatif memerlukan kesefahaman dan perkongsian pintar di antara penggiat-penggiat seni dan pelabur yang berteraskan garis panduan dalam undang-undang hakcipta, cipta hak.

PERLINDUNGAN HAKCIPTA, CIPTA HAK DALAM INDUSTRI KREATIF

Perniagaan pada masa kini tidak boleh tidak menafikan peranan harta intelek sebagai satu unsur penting dalam meneruskan perniagaan yang mempunyai daya saing yang sihat dan pulangan tinggi. Sesuatu perniagaan berteraskan minda dan intelektual manusia mempunyai risiko tinggi dalam memasarkan produk dan perkhidmatan yang ditawarkan. Lantaran itu, perlindungan terhadap produk dan perkhidmatan berteraskan intelektual tersebut amat diharapkan oleh mana-mana peniaga mahupun penggiat-penggiat seni. Harta intelek seperti harta alih dan harta tidak alih mempunyai hak dan perlindungan dalam prospektifnya sendiri. Intipati utama daripada tafsiran harta intelek adalah penghasilan sesuatu ciptaan atau karya daripada kreativiti minda atau intelektual manusia. Akal manusia adalah aset utama seseorang individu itu tanpa mengambil kira profesion, umur, jantina

mahupun status kehidupan. Seseorang individu bebas menghasilkan sesuatu ciptaan atau karya yang boleh memberi faedah dan kebaikan kepada insan lain.

Dalam industri kreatif, ancaman utama adalah mudahnya satu pihak lain untuk meniru dan meniplak sesuatu hasil karya yang diilham dan dihasilkan oleh seseorang pengkarya. Teknologi informasi masa kini, memberi satu kemudahan untuk mana-mana pihak membuat peniruan dan menghasilkan semula karya pihak orang lain tanpa keizinan. Umumnya, adakah ancaman ini perlu dibiarkan tanpa mengambil langkah atau usaha untuk membanterasnya? Persoalannya, usaha pembanterasannya atau pencegahan perlu bermula dari peringkat mana dan siapakah yang perlu memulakannya?

Akta Hakcipta 1987 menggariskan jenis dan bentuk karya-karya diberi kelayakan sebagai hakcipta; hak pengkarya dan hak-hak berkaitan (*related rights*) dan kaedah-kaedah perlindungan diperolehi, bidang penguatkuasaan dan pengecualian terhadap penguatkuasaan serta pengehadan dan pengecualian yang dibenarkan di bawah Akta Hakcipta. Akta Hakcipta 1987 menyediakan peruntukan perlindungan kepada asas utama industri kreatif iaitu hasil karya sastera, karya seni, muzik, filem, rakaman bunyi, siaran dan juga karya-karya terbitan.

Akta Hakcipta bukan hanya semata-mata melindungi karya filem, muzik dan drama sahaja tetapi lebih dari itu. Akta Hakcipta adalah satu-satunya skop dalam harta intelek yang luas dan sentiasa berkembang dari satu era ke era yang lain dan dari satu isu lapuk ke isu harta intelek yang berkembang pesat sejajar dengan perkembangan intelektual manusia. Lukisan, fotograf, kraftangan melangkaui dunia tanpa sempadan, internet, medium teknologi jalur lebar dan juga isu tuntutan tanggungjawab sosial hasil dari garapan kreativiti yang perlu dipulangkan sebahagiannya kepada masyarakat umum melalui pengehadan dan pengecualian yang dinyatakan dalam Akta Hakcipta untuk mengimbangi peranan kreativiti dalam pembangunan sosial dan ekonomi masyarakat.

Akta Hakcipta 1987 tidak sahaja menggariskan aspek perlindungan terhadap sesuatu karya tetapi pada masa kini usaha telah dibuat, Akta Hakcipta

1987 telah mencapai satu perundangan yang meliputi tuntutan triti-triti antarabangsa yang menjadikannya setaraf dengan perundangan hakcipta dengan negara-negara maju. Perundangan yang setanding ini menarik minat pelabur-pelabur asing dalam memastikan hak harta intelek amnya dan hak hakcipta mereka di Malaysia dijamin melalui perundangan. Walau bagaimanapun, perlindungan melalui Akta Hakcipta 1987 ini akan menjadi sia-sia sekiranya pemakaiannya dalam industri kreatif tanah air tidak dikuatkuasa dan diterimapakai dalam transaksi perniagaan industri kreatif negara.

Kerajaan juga telah memperhebat langkah-langkah penguatkuasaan terhadap pelanggaran karya-karya berhakcipta melalui tindakan penguatkuasaan yang dibuat dari semasa ke semasa terutamanya karya industri kreatif tanah air. Namun begitu, tindakan penguatkuasaan tidak boleh diserahkan secara bulat kepada agensi-agensi penguatkuasaan. Prinsip asas, hak hakcipta adalah hak peribadi seseorang pemilik karya berhakcipta. Oleh itu, kerjasama dan komitmen pemilik karya amat diperlukan dalam membantu sebarang aduan dan penyiasatan dalam kes-kes pelanggaran yang melibatkan hasil karya mereka. Pengurusan terhadap sesuatu hasil karya perlu diperkemas oleh pemilik karya berhakcipta agar sebarang tindakan penguatkuasaan ini dapat dilaksanakan sebaik mungkin samada melalui tindakan jenayah atau tindakan sivil.

Hasil karya seseorang pengkarya adalah aset pengkarya tersebut. Seperti aset lain, ianya juga perlu diurus dengan sebaik mungkin. Pengurusan aset hak cipta adalah amat penting dalam mentadbir urus sesuatu karya tersebut. Dalam mengkomersialkan hasil karya berhakcipta, pemilik hakcipta dibenarkan secara eksklusif menjual, menyewa, lesen dan memindah hakmilik karya tersebut. Gabungan kemahiran melakukan transaksi perniagaan dan mengurus aset hak cipta ini akan memberi nilai tambah serta memberi faedah yang berterusan kepada pemilik karya. Oleh itu, sedikit kefahaman transaksi aset hakcipta, cipta hak akan mengurangkan risiko kehilangan hak atau pegangan eksklusif terhadap hak hakcipta pengkarya melainkan ianya dipindahmilik dengan satu rundingan perniagaan yang tidak merugikan nilai aset hakcipta seseorang pemilik hakcipta, cipta hak tersebut.

PENUTUP

Perbadanan Harta Intelek Malaysia (MyIPO) sebagai pentadbir Akta Hakcipta 1987 telah memainkan peranan dalam menyediakan landskap perundangan hakcipta yang juga merangkumi keperluan triti-triti antarabangsa. Usaha memartabatkan industri kreatif tanah air melalui perundangan, MyIPO telah membuat pindaan yang besar pada pindaan Akta Hakcipta 1987 pada masa kini. Ini termasuklah memperkenalkan Sistem Pendaftaran Pemberitahuan Secara Sukarela yang berperanan memberi perakuan secara statutori yang boleh dijadikan keterangan secara *prima facie* dalam pembuktian keempunyaan seseorang pemilik karya tersebut selaras pematuhan Akta Hakcipta 1987 sama ada dalam transaksi perniagaan atau pertikaian perundangan selain sebagai pusat rujukan industri kreatif generasi masa hadapan.

Kewujudan Tribunal Hakcipta yang diperluas bidanguasanya diharap sebagai platform terbaik penyelesaian isu-isu hakcipta tanah air yang bertindak sebagai timbang tara. Pendaftaran badan pelesenan diharapkan menjadi satu medium untuk penggiat-penggiat seni menjaga kepentingan mereka dengan diurus tadbir dengan lebih telus dalam isu-isu berkaitan kutipan royalti.

Tidak lupa juga usaha kerajaan dalam membanteras cetak rompak dipergiat dengan pengharaman penggunaan kamkorder dalam panggung wayang. Dalam memberi respon penyalahgunaan jalur lebar sebagai medium penyebaran pelanggaran karya hakcipta, peruntukan undang-undang pembanterasannya ini telah dibuat dengan garis panduan yang jelas.

Sebagaimana komponen harta intelek lain yang semakin mendapat perhatian masyarakat umum seperti Cap Dagangan dan Paten, MyIPO juga akan sedaya upaya mendekatkan masyarakat akan kepentingan hakcipta dalam industri kreatif amnya dan kepentingannya dalam ekonomi khususnya. Hakcipta, adalah hak peribadi pengkarya adalah wajarnya pengkarya-pengkarya mengambil inisiatif dalam mengetahui faedah perlindungan hakcipta, cipta hak.

HIGHLIGHTS OF THE COPYRIGHT (AMENDMENT) ACT 2012

PART I

Annie Cheng
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This Article intends to provide a brief insight of the recent amendment to the Copyright Act 1987 ("CA 1987").

The Copyright Bill 2010 ("the Bill") was first presented to the Dewan Rakyat (House of Representatives) for its first reading on 15th December 2010. Later, the Bill was passed by the Dewan Rakyat and Dewan Negara (The Senate) on 3rd October 2011 and 21st December 2011 respectively. It came into force via the Copyright (Amendment) Act 2012 (the "2012 Amendment") on 1st March 2012 and with its coming into force, the 2012 Amendment amended the existing CA 1987.

The 2012 Amendment was driven primarily by Malaysia's possible accession to the WIPO Copyright Treaty (WCT) and WIPO Phonograms and Performances Treaty (WPPT) and to ensure that Malaysia's copyright law is consistent and up-to-date with new developments and new international standards. It is fair to state that the long awaited amendment¹ has not only strengthened the copyright protection for rights owners, but also created a better equilibrium between the interests of the rights owners and the public at large, notably visually and hearing impaired persons.

The 9 major areas of the 2012 Amendment are as follow:

- Enhancing the existing Limitation & Exception (L&E) provisions
- Expanding the Jurisdiction Scope of the Copyright Tribunal

- Introducing Copyright Voluntary Notification
- Regulating the Licensing Body
- Enhancing the existing provisions on Technological Protection Measures (TPMs) and Rights Management Information (RMI)
- Limiting the Liabilities of [Internet] Service Providers
- Introducing Statutory Damages Strengthening the Enforcement Powers
- Introducing Anti-Camcording Provisions

(1) Enhancing the existing L&E provisions

Section 13 of the CA 1987 was amended to include new exceptions and limitations with regards to educational institutions, libraries, archives, handicapped and visually impaired persons.

The effect of the new paragraph (gggg) of Section 13 (2) is that the making and issuing of copies of any work into a format to cater for the special needs of visually or hearing impaired persons and the issuing of such copies to the public by non-profit making bodies or institutions. This exception will subject to terms as the Minister may determine.

The deletion of the words "wholly-owned by the Government" in paragraph (j) of Section 13 (2) will now allow the broadcasting entity which is not wholly-owned by the Government to enjoy the exception to the right of reproduction of any work via broadcasting.

¹ The Copyright Act 1987 was last amended in 2002, via Act A1139.

The new paragraph (q) of Section 13 (2) will allow the making of transient and incidental electronic copy of a work made available on a network provided that the making of such copy is required for the viewing, listening or utilization of the said work.

(2) Expanding the Jurisdiction Scope of the Copyright Tribunal

Prior to the 2012 Amendment, the subject matters that can be heard by the Copyright Tribunal² are confined to matters relating to copyright licensing³, and application for licence to produce and publish translation of literary work⁴. A notable change to the jurisdiction scope of the Tribunal is its power to hear and decide the application by a performer under section 16B and the appeal by a licensing body under section 27A(7).

With the insertion of new subsection (3B) in section 16B, performers may apply to the Tribunal to vary any contract as to the amount payable as equitable remuneration. Furthermore, by virtue of section 16B (3B)(b), the Tribunal is also empowered to hear and decide on its previous determination relating to the equitable remuneration⁵.

The existing section 27A of the CA 1987 is now amended and renumbered as section 27A(2), and section 27A now deals with the regulation of licensing bodies⁶. Under the new section 27A(7), a licensing body which is aggrieved by the decision of the Controller to revoke the declaration given to the licensing body, may appeal to the Tribunal within one month from the date of the decision.

Prior to the 2012 Amendment, only a person claiming that he requires a licence to which the licensing scheme applies ("potential licensee") and an organization claiming to be representative of such potential licensee may refer a dispute regarding a licensing scheme in operation to the Tribunal⁷. The

2012 Amendment made it possible for a person who has been granted a licence to which the licensing scheme applies ("existing licensee") to do the same⁸. A consequential change was made to section 27D (1) of the CA 1987.

The Tribunal's power to grant licence to produce and publish translation of a literary work under section 31 is expanded as the Tribunal may now also grant such licence for translation into other vernacular languages in Malaysia.

(3) Introducing Voluntary Notification of Copyright

One of the significant changes to the CA 1987 is the introduction of the Voluntary Notification of Copyright system ("Copyright Notification"), via new sections 26A – 26C. As its name suggests, this is not a mandatory requirement for obtaining copyright protection, but on a voluntary basis and thus does not impede the non-formality requirement for the enjoyment and exercise of the copyright protection provided under the Berne Convention.

Having striking resemblance to the statutory declaration 'system' under section 42 of the CA 1987, where the statutory declaration serves as the prima facie evidence of the facts contained therein, Copyright Notification is the more formalized and systematic version. Upon entry of the relevant particulars in the Register by the Controller, the Register may assist the potential applicants in proving copyright ownership as the Register serves as a preliminary prima facie evidence for the particulars entered therein. Apart from that, potential user or licensee of a work may find the Register useful as relevant information of a notified work can be found in the Register.⁹

2 Copyright Tribunal is established under section 28 of the CA 1987.

3 Section 27A – 27L of the CA 1987.

4 Section 31 of the CA 1987. Note that under section 31 of the CA 1987, only translation of a literary work into the national language, i.e. Bahasa Malaysia is allowed.

5 There is a time limit for the performer to make an application under section 13B (3B)(b), i.e. within 12 months from the date of a previous determination, unless special leave by the Tribunal has been obtained.

6 The new section 27A will be discussed further under the title of "Regulating the Licensing Body".

7 Section 27C (1) of the CA 1987.

8 Section 27C (1)(c) of the 2012 Amendment.

9 Any person may examine the Register of Copyright subject to the conditions determined by the Minister.

Under Copyright Notification, the author, person on behalf of the author, owner of the copyright in the work, assignee of the copyright or person to whom an interest in the copyright has been granted by licence (“potential applicants”) may make a notification of copyright in any work to the Controller¹⁰. A notification of copyright shall contain a number of particulars as stated in section 26A (3)¹¹. A Register of Copyright ¹² (the “Register”) will be established and all particulars relating to any works notified by the applicant will be entered therein.

(4) Regulating the Licensing Body

Prior to the 2012 Amendment, a licensing body was not regulated under the CA 1987. With the introduction of new section 27A, it is a mandatory requirement for a society or organization intending to operate as a licensing body has to apply to the Controller to be declared as a licensing body. This is to ensure that only a fit and proper society or organization will be able to carry on the activities of a licensing body. Such licensing body may act for different types of copyright owners or for a specified class of copyright owners¹³. Any society or organization which operates as a licensing body without obtaining a declaration from the Controller commits a criminal offence and shall upon conviction be liable to a fine not exceeding RM500,000.00.

Section 27A (2) states that an application for a declaration shall be made in such form and on such medium as the Controller may determine. The detailed procedure for application will be prescribed in the Regulation. Nevertheless, the basic documents required for an application includes the applicant’s constituent document, i.e. the Memorandum and Articles of Association, which has as its main object or one of its main objects the activities of a licensing body, and the list of copyright owners or their agents who are members of the applicant. This basic requirement is to ensure that such society or organization has all the intention and powers to function well as a licensing body.

Upon receipt of an application, the Controller may declare an applicant to be a licensing body. There are two circumstances where the Controller shall refuse an application as provided under section 27A (4), that are, if the information provided by the applicant is insufficient or unsatisfactory to show that the applicant is fit and proper to be a licensing body.

In order to promote transparency and accountability, a declared licensing body is required to submit to the Controller a copy of its profit and loss account, balance sheet and auditor’s report tabled at its annual general meeting, not later than one month after the date of the annual general meeting. Failure to render to the Controller such documents within the specified time frame will puts a licensing body at risk of committing a criminal offence and shall upon conviction be liable to a fine not exceeding RM500,000.00.

A declared licensing body has to function adequately and properly at all times as a declaration conferred is not a perpetual declaration. This is in view of the Controller’s powers to revoke declaration provided under section 27A(6) of the 2012 Amendment. The revocation grounds provided under section 27A (6) are as follow:

- (a) is not functioning adequately as a licensing body;
- (b) no longer has the authority to act on behalf of all its members;
- (c) is not acting in accordance with its rules or in the best interests of its members, or their agents;
- (d) has altered its rules so that it no longer complies with any provision of this Act;
- (e) has refused, or failed, without reasonable excuse, to comply with the provisions of this Act; or
- (f) has been dissolved.

To be continued in the next issue ...

10 The notification of copyright is subject to a prescribed fee, to be determined in the Regulations.

11 The particulars required under section 26A (3), inter alia include the name, address and nationality of the owner of the copyright, the category and title of the work, and statutory declaration that the applicant is the author of the work, or the owner of the copyright in the work, or an assignee of the copyright, or a person to whom an interest in the copyright has been granted by licence.

12 Section 26B (1) of the 2012 Amendment.

13 Section 27A (1) of the 2012 Amendment.

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THE ROLES AND FUNCTIONS OF MACP

Music Authors' Copyright Protection (MACP) Berhad

COLLECTIVE MANAGEMENT ORGANISATIONS

There are thousands if not millions of public performances of copyrighted music in Malaysia each day. Obviously, it would be impossible for a single copyright owner to determine which of these thousands or millions of performances are his music, and take necessary steps to license them or protect his rights through lawsuits for infringements.

Similarly, most law-abiding users would find it practically impossible to seek out individual copyright owners and negotiate individual licenses with them. A hotel, radio station or restaurant or any other user of music would find such administrative costs of licensing alone prohibitive besides paying for the license fees.

Collective management organizations or generally referred to as **performing rights societies** were formed in many countries to solve these problems. The principal objective is to enable a society's members – the writers and publishers of music to license all performances of their works.

At the same time the performing rights society serves as a clearing house for music users by granting a blanket license to the users to obtain the right to perform all works of all members of the local society as well as works of its affiliated foreign society.

MUSIC AUTHORS' COPYRIGHT PROTECTION (MACP)

MACP was incorporated in September 1989 as a company limited by guarantee of its members. MACP is owned and managed exclusively by and for writers (composers & lyricists) and publishers of music. Membership is open to any writer and publishers who meets minimal standards i.e 5 works for writers and 20 works for publishers. As at 31 December 2011, MACP has 2,840 writer members and 113 publisher members.

MACP affairs are overseen by its Board of Directors consisting of six writer members and six publisher members, who are elected by the members at the Annual General Meeting. An elected Director serves for two years on a voluntary basis after which he has to resign but can offer himself for re-election. MACP's current Board comprise Habsah Hassan (Chairman), Ahmad Izham Omar (Vice Chairman) and Carol Chan Choy Fong (Vice Chairman). Other writer directors are Dato' M. Nasir, Johan Nawawi, Ad Samad and publisher directors are Lydia Ong Soh Chen, Norkhayati bt Mohd Hashim, Jack Teo Chen Shin, J Jennifah bt Johari and Janice Foong Wai Hing.



FUNCTIONS OF MACP

The main function of MACP is to collectively manage the public performance rights and the communication rights (or collectively referred to as “performance rights”) of its members in their musical works. Since 2006, MACP also licenses the reproduction rights of the musical works used in the online and mobile environment.

MACP administers these rights based on three main components which are membership and documentation, licensing and distribution.

Apart from the collective management of the performance and reproduction rights of its members, MACP through its Music Development Fund, is also active in giving financial help to members who had fallen on hard times through age and illness. MACP contributes to its members medical and hospitalization expenses, funeral expenses besides giving loans to purchase music instruments and study grants for members and their immediate families to pursue music or related courses. Recently, it set up a cooperative for its members; i.e. Malaysian Music Industry Cooperative Ltd which aims to generate business activities and opportunities for its members.

In addition, MACP plays an important role in promoting and improving the standard of local music. Amongst others, MACP organizes workshops on lyrics writing and song compositions and also holds competitions on song writing. Its annual awards which receive extensive coverage by major dailies give prominence to songwriters who are most often not given recognition by members of the public.

MEMBERSHIP AND DOCUMENTATION

Any composer, lyricist or publisher of musical works that meets the criteria set by MACP’s Board of Directors is eligible to join MACP as a member. Every MACP member signs an identical Deed of Assignment assigning the performance rights in their musical works to MACP to administer.



With this assignment, MACP is empowered to firstly, license users to perform all their current and future works in its repertory. Secondly, the member authorizes MACP to take any legal action in his name against infringers. And thirdly, the member agrees to accept and be bound by MACP’s distribution system, by which royalties are determined.

By virtue of reciprocal agreements with affiliates worldwide such as ASCAP, PRS, APRA, BMI, SESAC, CASH, SOCAN etc, MACP also represents over 2 million international composers and publishers worldwide. This means that if MACP’s members’ works are performed in UK, our affiliate PRS will license its usage and remit the royalties to MACP who will then pay the royalties to its member. Reciprocally, MACP will administer PRS’s members’ works in Malaysia. The full list of MACP’s affiliates can be obtained from www.macp.com.my.

Members will register their compositions with MACP indicating the share of royalties for each work between the composer, lyricist and their music publisher. For example, the song “Aku Cinta Padamu” sung by Siti Nurhaliza; the composer (LY) receives

25% of the royalty to the work, lyricist (Baiduri) 25% and the publisher (Kelarai Sakti Publishing Sdn Bhd) receives the balance 50%. This share distribution is a contractual agreement between the composer or lyricist and his music publisher and is not determined by MACP.

Based on this registration, if the work is performed in Malaysia, MACP will distribute the royalties of this work based on the agreed percentage. Local musical works shall form part of what is known as MACP's local repertoire. Therefore, foreign works managed by MACP under reciprocal agreements with its affiliates shall form MACP's international repertoire and registration is done by the relevant affiliate where the author is a member.

LICENSING

MACP authorizes the use its repertoire by issuing various types of licences to users. For example, MACP's performing right licence authorizes the public performance of its repertoire and is a **blanket** licence authorizing the use all (meaning both local and international) musical works in MACP's repertoire.

MACP issues two types of licences depending of the needs of the user. It can be an Annual Licence or a Permit Licence where an Annual Licence will cover uses of music in their businesses eg broadcasters, hotels, entertainment outlets etc. A permit licence is a one-off licence for a particular date and a specific event. This shall apply to events such as concerts, annual dinner, carnivals, family day and activities of a similar nature.

MACP has established a number of licensing schemes covering the various ways in which music is used. The licensing fees or commonly referred to as MACP's tariffs are determined in accordance to the value of music to the business, the type of music usage (live music or recorded music) and the extent of music used. For example, karaokes and discotheques will pay a higher licence fee as compared to a restaurant. A restaurant will pay a higher licence fee compared to a retail shop. At the same time, a bigger premise (say a departmental store) will pay a higher fee compared to a smaller one e.g. a retail shop. The full list of tariffs can be obtained from the website: www.marp.com.my
Traditionally, MACP's users include persons or

organizations who broadcast copyright music such TV and radio stations and users which publicly perform copyright music as hotels, clubs, restaurants, discotheques, shops, supermarkets, shopping complexes, cinemas, pubs, karaoke lounges, factories, amusement and theme parks, skating rinks, hairdressing salons, dance and aerobic schools, nightclubs, office and factory premises. In recent years, MACP also licences the reproduction right for the publishers in the digital era. This means that MACP also licenses the Telecommunication companies and Internet Service Providers for the use of music in the internet and mobile devices.

DISTRIBUTION

MACP is a non-profit organization in the sense that all revenue received are distributed to members, after deducting only the operating expenses, taxes and an amount up to 2% of its revenue to its Music Development Fund for cultural, social activities and benevolent fund for its members. In recent years, MACP's operating expenses averaged 10% to 11% of total revenue.

MACP distribute royalties to its members based on the information obtained from its licensees. However, in most cases especially relating to general users, they do not provide the details of music usage. As a result, MACP's distribution involves a combination of 100% analysis of music used, use of the sampling and by census method.

Where the usage of music can be determined e.g. for concerts or ringtone downloads, the royalties will be distributed based on the actual usage of the music as provided by the organizer or service provider.

However, for certain cases e.g. radio & TV stations or karaoke outlets, MACP relies on sampling because the license fees received from these users are not sufficient to warrant a complete and thorough analysis. The sampling system serves as a practical method, as in most cases the cost of collecting and processing of information on all usage of musical works would be more than the revenue obtained from such usage of musical works.



In the census method, MACP visits selected outlets to collect information on the musical works performed. The data obtained will be used in distribution of royalties in these business categories.

MACP has a comprehensive Distribution Rules, approved by its Board of Directors containing the formulas used by MACP in distributing payments to its members. A copy of the Rules is distributed to its members together with their annual royalty cheques and distribution statements.

The distribution is audited by auditing firm, Messrs Ernst & Young annually.

INFRINGEMENT & ENFORCEMENT

As provided under the members' Deed of Assignment, MACP also institutes legal action in its name on behalf of its members to enforce their rights by taking civil action (under Section 37 of the Copyright Act, 1987) or criminal action under Section 41(3) of the same Act. Alternatively, MACP also institutes legal proceedings against licensees under the law of contract, based on the breach of the licensing agreements they have entered into with MACP.

Over the years, MACP has successfully taken legal action (civil, criminal or contractual) against infringers from various sectors of music users such as karaoke outlets, hotels, restaurants, concert organizers and many others. However, due to time and cost considerations, MACP is unable to take legal action against all unlicensed music users. This is where assistance from enforcement agencies is necessary for higher compliance amongst music users.

CONCLUSION

As a member of CISAC, International Confederation of Societies of Authors and Composers which is the umbrella body of authors' organizations, MACP adheres to CISAC Professional Rules on conduct, corporate governance, transparency, documentation and distribution laid down by CISAC Board. Non-compliance can lead to membership expulsion.



MACP is now into its 23rd year of operations and over the years MACP has distributed over RM241 million to its members and affiliates and is highly respected amongst its members and by its affiliates as a successful and only collective management organization for music authors.

The role of MACP as a collective management organization has become more pivotal in light of unauthorized and illegal access to musical works due to technological advancement. MACP ensures that the rights of its members are protected and acknowledged and in turn also eases the burden for users to receive legal access to musical works within MACP's repertoire.

The responsibility to ensure that intellectual property rights are protected is a collective responsibility of all, and MACP is committed in working with governmental agencies in enforcement efforts and spreading awareness amongst users of copyright and society in general.

IP FACTS & FIGURES

1. Counterfeiting makes up 5% to 7% of world trade; IP licensing is worth more than \$600 billion annually (cited in the Hargreaves Review); and a quarter of all branded products sold online are fake.
2. National Intellectual Property Day is held annually on 26 April, in conjunction with World Intellectual Property Day to increase awareness and understanding of intellectual property. National Intellectual Property Day was first celebrated in 2005.
3. With over twenty thousand applications filed every year, trade mark protection is the most sought-after protection in Malaysia.
4. The trade mark applications through IP Online has increased by 400% from 994 (2010) to 4,989 (2011).
5. Copyright (Amendment) Act 2012 has been enforced on 1 March 2012.



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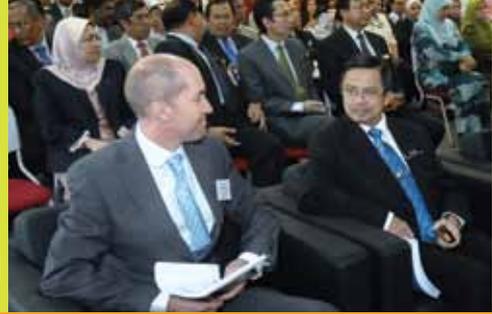


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Sub-regional Workshop on IP Education and Training

IP KEY



Director General of WIPO Working Visit to Malaysia



EVENTS

Seminar on Madrid Protocol



KARYA LAGU ANDA DILINDUNGI?

Mohd Khirin Omar (Keon)

Lunca Emas Sdn Bhd

"Andai dipisah lagu dan irama, lemah tiada berjiwa... hampa!" Memang benar kata-kata ini. Dua unsur yang saling berkait dan memerlukan antara satu sama lain. Untaian kata yang diambil daripada lirik lagu Getaran Jiwa nyanyian Allahyarham Tan Sri P. Ramlee ini sekiranya boleh kita terjemahkan dalam situasi industri muzik masa kini secara komersialnya bolehkah ianya jadi begini: "Andai dipisah harta intelek dan karya seni, lemah tiada berharga... hampa???"

Pentingnya harta intelek kepada sesebuah karya seni di negara ini terbukti dengan pengiktirafan Kerajaan apabila mewujudkan Akta Hakcipta 1987. Akta ini mencetus harapan baru kepada pengkarya seni tanahair dan juga pemilik hakcipta kerana dengan adanya perlindungan harta intelek untuk produk-produk karya seni ini akan dapat menggerakkan lagi perjalanan industri seni tanah air dengan lebih lancar, teratur dan selamat. Akta ini juga telah melalui beberapa siri pindaan dari semasa ke semasa bagi memperkemas lagi perlindungan harta intelek ini.

Terdapat pelbagai bentuk hasil kreativiti yang diklasifikasikan sebagai harta intelek seperti paten, cap dagangan, reka bentuk perindustrian, hakcipta iaitu muzik, filem, penulisan dan beberapa lagi yang dilindungi di negara ini, namun apa yang ingin saya berkongsi pandangan di dalam Buletin Harta Intelek (MyIP Bulletin) kali ini hanyalah berkisar kepada karya-karya lagu, penulisan lirik dan perniagaan muzik rakaman sahaja. Ini kerana bidang seni inilah paling hampir dengan saya dan telah bergelumang hampir 20 tahun di dalam industri muzik tanahair sebagai pengkarya dan penggiat industri.

Karya-karya seperti penulisan lirik, lagu serta karya muzik adalah harta intelek yang memperakui bahawa pencipta karya itu adalah pemilik sah hakcipta karya tersebut. Secara tidak langsung, harta intelek ini juga sama seperti harta-harta yang bersifat fizikal seperti tanah, rumah, barang-barang kemas dan sebagainya dan boleh diperturunkan kepada generasi yang lain, cuma ianya mempunyai tempoh tamat. Hakcipta bagi karya seni bertahan

untuk digunakan sepanjang hayat pencipta karya itu dan tambahan 50 tahun lagi selepas kematian pencipta tersebut. Sepanjang tempoh perlindungan hakcipta ini, ia membenarkan pencipta/pemiliknya berkuasa atas sebarang kebenaran untuk mencetak/ menyalin/ menterjemahkan karya-karya itu ke dalam apa jua bentuk yang lain. Sebagai contoh, sebuah lagu itu boleh disalin semula dalam bentuk atau format yang berbeza seperti cakera padat (CD), kaset, video karaoke dan terkini ke era media baru seperti muat turun lagu daripada internet, telefon bimbit dan apa jua medium baru pada masa akan datang dengan izin pemilik hakcipta tersebut.

Apa itu lagu? Apa itu lirik? Apa pula rakaman bunyi? Bait-bait irama/lagu atau juga dipanggil melodi dan untaian kata-kata/ayat yang disusun lengkap menjadi sebuah lirik lagu merupakan dua bentuk karya berbeza namun saling melengkapi. Susunan muzik yang indah mengiringi melodi dan lirik serta dibawakan oleh penyanyi dan dirakamkan di dalam studio akan membentuk satu hakcipta yang mana istilahnya dipanggil rakaman bunyi (*sound recording*). Kedua-dua bentuk karya (lagu & lirik) berserta rakaman bunyi ini adalah hakcipta kepada pengkarya-pengkarya seni dan pemilik hakcipta rakaman tersebut dan ianya turut dilindungi di bawah Akta Hakcipta demi menjaga kepentingan pengkarya/pemilik. Kesan daripada perlindungan karya-karya ini sangat besar impaknya kepada pengkarya/pemilik rakaman khususnya. Ianya adalah satu pengiktirafan hak pemilikan kepada pengkarya/pemilik hakcipta rakaman tersebut selain mampu memberikan pulangan material dan moral yang tinggi kepada pengkarya/pemilik rakaman melalui perniagaan seni yang sihat.

Apabila lagu tersebut dipasarkan secara komersial baik melalui cara konvensional iaitu fizikal cakera padat CD/DVD (kaset sudah hampir pupus) mahupun pengedaran secara digital melalui media baru seperti muat turun melalui internet dan nada dering telefon, pemilik hakcipta ini akan menikmati pendapatan daripada jualan lagu tersebut. Bagi setiap pembelian lagu-lagu mahupun album, pendapatan pengkarya dan pemilik rakaman dijana melalui kuantiti jualan/ muat turun dimana sistem pengiraannya adalah berbeza. Ini tidak termasuk penjana pendapatan daripada lagu yang sama untuk persembahan awam pula.

Secara mudahnya, setiap lagu yang dipasarkan secara komersial akan mendapat pulangan kewangan melalui pelbagai sumber:

Jualan secara Fizikal	Album CD, DVD karaoke
Jualan secara Digital	Muat turun melalui internet, nada dering telefon
Persembahan awam	Persembahan lagu di radio, televisyen, pusat membeli belah, panggung wayang, penerbangan, pusat hiburan dan mana-mana premis awam
<i>Synchronisation Fee</i>	Karaoke, lagu tema filem, drama TV, dll.

Kesemua fasa yang menjana pendapatan bagi sesebuah lagu ini dapat dinikmati pemilik karya/hakcipta kerana wujudnya harta intelek pada lagu tersebut yang melindungi hak pengkarya dan pemilik rakaman ini.

Di mana kedudukan anda? Sama ada anda komposer, penulis lirik, syarikat rakaman, syarikat penerbitan, penyanyi, pemuzik dan sebagainya, masing-masing ada hak yang dilindungi dan mendapat bahagian masing-masing melalui cara pengagihan royaltinya.

Buat masa ini, terdapat tiga badan pengutip royalti persembahan awam yang aktif beroperasi secara sah di negara kita iaitu *Music Author Copyrights Protection* (MACP), *Public Performance Malaysia* (PPM) dan *Performers & Artistes Rights (Malaysia)* (PRISM/RPM).

MACP mewakili kepentingan komposer, penulis lirik dan syarikat penerbitan, PPM pula mewakili kepentingan pemilik rakaman bunyi seperti syarikat-syarikat rakaman besar dan kecil manakala PRISM/RPM pula mewakili kepentingan pelaku seni seperti penyanyi, penyanyi latar, pemuzik rakaman dan penyusun muzik rakaman.

Secara logiknya, pengkarya adalah insan yang memiliki kelebihan bakat seni anugerah Tuhan kepada mereka untuk digunakan bagi mencari pendapatan atas karya mereka itu. Samada mereka penyanyi, pencipta lagu, penulis lirik, pelukis dan pelbagai lagi cabang seni yang ada di dunia ini, pengkarya memerlukan sebuah tapak untuk memasarkan kreativiti mereka bagi tujuan komersial. Dalam praktis industri muzik, mereka yang berkarya ini sebaiknya perlu ada satu syarikat untuk bernaung bagi menjaga dan memastikan karya-karya mereka lebih terjaga dan diurus dengan baik. Sebagai contoh, penyanyi perlukan syarikat rakaman untuk memajukan lagi karier mereka secara lebih tersusun dan kehadapan manakala pencipta lagu dan penulis lirik perlu syarikat penerbitan untuk pengurusan kutipan royalti dan pentadbiran puluhan atau ratusan karya-karya mereka.

Syarikat tempat saya bekerja dan berkarya, Luncai Emas Sdn. Bhd. adalah antara syarikat rakaman dan penerbit tempatan yang aktif menerbitkan lagu/album dan memayungi ramai pencipta lagu dan penulis lirik tanahair. Syarikat milik artis dan komposer ternama Dato' M. Nasir ini telah beroperasi lebih daripada 20 tahun kini mentadbir ribuan karya-karya Dato' M. Nasir sendiri, Allahyarham Loloq, Azmeer, Tam Spider, S. Amin Shahab, Keon, Seth, Buddhi Hekayat, Ad Samad, Cat Farish, Usop Koprata selain daripada beberapa nama baru lagi.

Kemunculan media baru lewat 10 tahun yang lalu seperti internet dan nada dering telefon telah membuka ruang kepada pengkarya/pemilik hakcipta rakaman untuk memasarkan lagu-lagu secara digital. Cara ini adalah lebih pantas mendekati pendengar terutamanya generasi muda. Perubahan ini disokong pula oleh beberapa siri kejayaan jualan lagu-lagu *single & hits* ini melalui ring back tone atau nada dering pemanggil. Ada lagu yang telah melepasi jualan satu juta muat turun nada dering pemanggil ini.



Persatuan Industri Muzik Rakaman Malaysia (RIM) telah mengatur langkah dan mula berurusan dengan syarikat-syarikat telekomunikasi demi menjaga kepentingan ahli-ahli mereka. Begitu juga dengan badan pengutip royalti persembahan awam PPM & MACP serta PRISM/RPM. Antara isu utama peringkat awal rundingan mereka dengan syarikat telekomunikasi ini adalah penetapan kadar pembahagian harga jualan lagu-lagu untuk nada dering telefon. Kini, setiap syarikat rakaman menjadikan penjualan melalui nada dering pemanggil sebagai sumber utama pendapatan berbanding penjualan fizikal CD yang semakin susut kuantiti jualan.

Masih banyak lagi ruang dan *loop holes* yang perlu diperbaiki dan diperkemas oleh pelbagai pihak mengenai isu harta intelek ini, baik penggiat seni sendiri, badan pengutip royalti persembahan awam, syarikat rakaman dan penerbitan, pihak pengguna, syarikat telekomunikasi, pihak kerajaan termasuk

agensi-agensinya, pihak swasta dan sebagainya bagi memperkasa perlindungan harta intelek untuk produk lagu dan muzik ini. Secara peribadi, saya sendiri merasakan perlu dipertingkatkan lagi usaha ke arah memberi pemahaman mengenai harta intelek ini kepada orang ramai terutamanya generasi muda, sebaiknya bermula dari peringkat sekolah rendah lagi. Hasilnya pasti akan ada perbezaannya pada masa akan datang.

Saya tetap bersyukur kerana keprihatinan kerajaan menangani isu-isu yang melibatkan kepentingan harta intelek ini telah mampu menjadikan pengkarya-pengkarya seni yang asli dan aktif di dalam industri muzik tanahair menikmati hasil karya-karya mereka ini. Setidak-tidaknya, ini adalah titik permulaan kepada sebuah pengiktirafan kerjaya seni di mata masyarakat. Diharap pada masa akan datang tidak akan ada lagi dialog petikan filem Allahyarham Tan Sri P. Ramlee berjudul **Ibu Mertuaku**: "Ahli muzik? Pantang nenek moyang aku!"

BORDER MEASURES MECHANISM FOR COUNTERFEIT TRADE MARK GOODS IN MALAYSIA

Ida Maslinda Maarof

Trade Marks Examiner

Trade Marks Division, MyIPO

The word **counterfeit** is defined as to falsify, deceive, or defraud¹. It also means a copy or imitation of something that is intended to be taken as authentic and genuine in order to deceive another². **Counterfeiting** is defined as the process of fraudulently manufacturing, altering, or distributing a product that is of lesser value than the genuine product³.

As far as trade mark is concerned, counterfeiting is used in its broadest sense and encompasses any manufacturing of a product which so closely imitates the appearance of the product of another to mislead a consumer that it is the product of another. Hence, it may include trade mark infringing goods, as well as copyright infringements. The concept also includes copying of packaging, labelling and any other significant features of the product⁵.

The Agreement on Trade-Related Aspects on Intellectual Property Rights (the TRIPS Agreement) defines counterfeiting as follows:

“counterfeit trade mark goods” shall mean any goods, including packaging, bearing without authorisation a trade mark which is identical to the trade mark validly registered in respect of such goods, or which cannot be distinguished in its essential aspects from such a trade mark, and which thereby infringes the rights of the owner of the trade mark in question under the law of the country of importation;

It is estimated that trade in counterfeit goods is now worth more than 5 per cent of world trade. This high percentage can be attributed to a number of factors, among others⁶:

- advances in technology;
- increased international trade, emerging markets; and
- increased share of products that are attractive to copy such as branded clothing, contraband cigarette and software.

Industry world-wide losses large amounts to counterfeiters. These losses not only affect the producers of genuine items, but they also involve social costs. The ultimate victims of unfair competition are the consumers. They receive poor-quality goods at an excessive price and are sometimes exposed to health and safety dangers especially in relation to pharmaceutical products. Governments lose out on unpaid taxes and incur large costs in enforcing intellectual property rights.



There is also an increasing concern that counterfeiting is related to other criminal activities, such as trade in narcotics, money laundering and terrorism⁷.

1 The Free Dictionary, online, available at <http://www.thefreedictionary.com>

2 Ibid

3 Ibid

4 Hema Vithlani, 'The Economic Impact of Counterfeiting' (1998), Organisation for Economic Co-operation and Development (OECD) Paris

5 Ibid

6 Ibid

7 Ibid



In order to combat counterfeiting, the law has been used as a tool to implement a mechanism to abolish trade mark counterfeiting be it at the national or international level. In order to control the movements of the counterfeit goods, border measure enforcement has been incorporated into the TRIPS Agreement.

Enforcement at the border is dealt with in Art 51-60 of the TRIPS Agreement. These provisions require signatory nations to strengthen the authority given to their respective customs administrations. Signatory nations are required to provide a procedure whereby a trade mark proprietor may make an application to the relevant authority for the suspension by the customs authorities of the release of counterfeit trade mark goods into free circulation.

TRIPS Agreement provides for rules on civil and administrative procedures and remedies to combat infringing and counterfeiting activities. It states that all parties should have measures taken at the border for the suspension of counterfeit and pirated goods by the customs authorities.

The said measures are also known as **border measures**. This term is used interchangeably with the term **border control**. Border control may be defined as the monitoring and control of a country's border⁸. It also refers to the measures taken by a country to monitor or regulate its border⁹. The Black's Law Dictionary defines border control as a country's physical manifestation of its territorial sovereignty , by which it regulates which people and goods may enter and leave¹⁰.

8 Law-Glossary.com-Online Legal Dictionary, online, available at <http://www.law-glossary.com>

9 Babylon Free Dictionary, "Definition of Border Control", online, available at <http://www.dictionary.babylon.com>

10 Garner, B.A. (ed), Black's Law Dictionary, 8th ed., (Thomson West United States of America 2004), p.195

Border measures or border control are needed in order to prevent the counterfeit and pirated goods from being brought into the domestic market, thus causing more damage and losses for IP rights holders. The TRIPS Agreement also mentioned that criminal procedures and penalties sufficient to act as a deterrent should also be imposed.

For the purpose of adhering to the provisions in the TRIPS Agreement, laws in the member countries have been amended so as to incorporate the said provisions. Malaysia also had taken the same step when we amended our Trade Marks Act 1976 via Trade Marks (Amendment) Act 2000 in 2000. This amendment came into force on 1 August 2001 which signifies the introduction of border measures in Malaysia.

The provisions regarding border measures can be found under Part XIV A of the Act. Mentioned in these provisions is about the intervention by the customs authorities in the enforcement of the trade mark rights by its owners. Under Sections 70C to 70P of the Act, 'authorised officers' are conferred power to prohibit any person from importing counterfeit trade mark goods into Malaysia. The 'authorised officers' refer to the Customs officers within the definition of the Customs Act 1967 or any officer appointed by the Minister to exercise the power and perform the related duties¹¹.

The customs officers now have power to prohibit any person from importing counterfeit goods identified in the notice and shall seize goods suspected to bear infringing trade marks at the point of entry into Malaysia. In doing so, they must comply with all the conditions and procedures.

However, it must be remembered that these provisions can only be invoked by the proprietor of a registered trade mark and the goods involved must be **counterfeit trade mark goods**.

Counterfeit trade mark goods is defined as any goods including packaging bearing marks which are identical, so nearly resembling or marks which cannot be distinguished in its essential aspects from the registered trade mark; and which infringes the right of the proprietor of the trade mark¹².

The procedures for restriction on importation of counterfeit trade mark goods are also provided in the Act. The owner of the trade mark or his agent has to submit an application to the Registrar of Trade Marks stating that:

- he is the proprietor of a registered trade mark¹³;
- the counterfeit trade mark goods are expected to be imported at a specified time and place¹⁴; and
- such importation is objected to¹⁵.

This application must be supported by evidence identifying the goods to be seized¹⁶ and that the applicant's registered trade mark must be identified.

Provided, the following details must be attached:

- particulars of the importer;
- expected arrival time of the counterfeit goods;
- registration number of the shipment or vehicle; and
- place of origin of the counterfeit goods.

Upon receipt of the application, the Registrar will determine the application and inform the applicant whether the application is approved¹⁷. The approval is valid for 60 days from date of approval¹⁸. During the period of approval (if not withdrawn), the importation of any counterfeit trademark goods into Malaysia is prohibited¹⁹.

If approved, the trade mark owner has to deposit with the Registrar an amount of money as security sufficient to reimburse the Government for any liability or expense likely to be incurred as a result of the seizure²⁰. It is also to prevent abuse and to

11 Section 70C(a), (b) of the Act

12 Section 70C of the Act

13 Section 70D(1)(a) of the Act

14 Section 70D(1)(b) of the Act

15 Section 70D(1)(c) of the Act

16 Section 70D(2) of the Act

17 Section 70D(3) of the Act

18 Section 70D(5) of the Act

19 Section 70D(6) of the Act

20 Section 70E(1)(a) of the Act

21 Section 70E(1)(b) of the Act

22 Section 70E(1)(c) of the Act 24 Section 70D(8) of the Act

If the Registrar approves, he must immediately inform the customs authorities²³. The customs will then seize and detain the counterfeit goods²⁴. After the seizure, a notice of seizure will be issued by the customs authorities to the Registrar, importer as well as applicant informing about the seizure of the goods and their whereabouts²⁵. The Registrar is also to specify certain **retention period** for the applicant to institute an infringement action within that stipulated timeframe²⁶.

The said notice shall also state that the goods will be released to the importer if the applicant fails to commence an infringement action within the prescribed period²⁷. If the applicant needs more time to take such action, he may apply for an extension of time to the Registrar²⁸.

Upon the expiry of the retention or extended period, the Registrar has to release the seized goods to the importer if the applicant:

- has not instituted an infringement action; or²⁹
- has not given notice to the Registrar stating that the action for infringement has been instituted³⁰.

In the event where the applicant fails to take action for infringement within the retention period, a person aggrieved by such seizure may apply to the Court for an order of compensation against the applicant³¹.

In the event where an infringement action has been instituted but the trade mark owner has not obtained an interlocutory injunction from the court to prevent the release of such goods within 30 days from the date the action for infringement was instituted, the Registrar shall also release the goods back to the importer³².

With regard to the seized goods, the importer and trade mark owners may be allowed to inspect and/or remove a sample of the seized goods from the Registrar's custody provided the requisite undertakings are given³³. The said undertakings are that the party who inspects and/or removes the seized goods is required to return the sample to the Registrar at a specified time³⁴ and that reasonable care must also be taken so as to prevent the sample from being damaged³⁵. The Registrar would not be liable to the importer for any loss or damage suffered by the importer during the said inspection or removal³⁶.

As for the importer, through a written notice to the Registrar, he may give consent to the forfeiture of the seized goods³⁷. If such notice is given, then the seized goods are forfeited and shall be disposed of in the manner prescribed by regulations made under Part XIV A³⁸. Nevertheless, the said notice must be given prior to the institution of the infringement action³⁹. However, in spite of the existence of all these procedures in our Trade Marks Act, the truth is that they are rarely used or no use at all⁴⁰.

As far as Trade Marks Act 1976 is concerned, it only provides for civil remedy while criminal sanction is not provided by the Act⁴¹. Another difficulty observed from the provisions regarding border measures is that trade mark owner is required to deposit sufficient security to the Registrar. This is an onerous duty on trade mark owners because the Registrar has complete discretion as to the amount of security to be deposited. Besides, there is another provision in the Act which provides that any expenses incurred by the Registrar which exceeds the amount of security given shall be treated as a debt due to the Registrar⁴².

23 Section 70D(7) of the Act

25 Section 70G(1) of the Act

26 Section 70G(2) of the Act

27 Section 70G(2) of the Act

28 Section 70G(4) of the Act

29 Section 70J(1)(a) of the Act

30 Section 70J(1)(b) of the Act

31 Section 70K(1) of the Act

32 Section 70J(2)(a) and (b) of the Act

33 Section 70H(1) of the Act

34 Section 70H(2)(a) of the Act

35 Section 70H(2)(b) of the Act

36 Section 70H(5) of the Act

37 Section 70I(1) of the Act

38 Section 70I(3) of the Act

39 Section 70I(2) of the Act

40 Cindy Goh Joo Seong, *Border Measures In Malaysia* (4 December 2006), online, available at

41 *Ibid*

42 *Ibid*



In addition, the strict time period of 30 days imposed to obtain the interlocutory injunction will cause difficulty for trade mark owner. Taking into account the litigation circumstances in Malaysia, it is difficult to obtain an injunction within 30 days. Trade mark owners will face serious consequences if the injunction is lifted or lapsed. The Court may also order them to pay compensation if the infringement action is dismissed⁴³.

The above is the situation in Malaysia. As far as other member countries are concerned, they also have other problems which are faced by us. One of the problems is that lacking of highly trained customs officers to tackle the offender swiftly and efficiently⁴⁴. The offenders always find means to escape the grip

Furthermore, the procedures adopted and the level of effectiveness of the authorities varies from one country to another⁴⁶. Thus, the lack of coordination between the authorities among the member countries also does have impact on the effectiveness of border measure around the world.

Another problem is that the trade mark owners usually are unable to give precise information as required by the law⁴⁷. The information needed to be provided to the Registrar is too detail that it is cumbersome for them to provide such information. Customs need rights holders to provide detailed information on products, routes and normal shipping patterns in order to detect counterfeits. These details are normally unavailable to the trade

43 Ibid

44 Mohd Shafie Apdal, Speech at the Third Advisory Committee on Enforcement, WIPO Geneva, 15 May 2006

45 Ibid

46 Ibid

47 Ibid

Attention also needs to be paid to a situation where the counterfeit trade mark goods are being brought into the country in small number inside personal luggage⁴⁸. In reality it is difficult for the customs to enforce the border measures in this situation. Not only due to the lack of manpower to but also because checking every luggage would cause disruption in the smooth running of an airport or at a border point.

In conclusion, the relevant provisions in the TRIPS Agreement as well as the provisions in the Trade Marks Act 1976 have provided an enforcement mechanism for trade mark counterfeiting. However this mechanism has been proved cumbersome and insufficient in combating trade mark counterfeit activities across the globe. Therefore, the current provisions need to be reviewed in order to improve the efficiency of the law in solving the trade mark counterfeit problems. The international community must work together and give full commitment to every measure proposed so that the law would be effectively implemented. Trade mark counterfeiting is a global issue, thus it takes global efforts too to get the issue solved.

48 Tay Pek San, "Article: The Trade Marks (Amendment) Act 2000" (2000) 4 MLJA 107, p.9

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IP NEWS IN BRIEF

AUSTRALIA

AUSTRALIA TO REVIEW DIGITAL SECTIONS OF COPYRIGHT ACT

Australian Federal Government will review its copyright laws to ensure that they keep abreast of the changing time. According to Attorney-General, Federal Government will ensure the review has enough scope in the key areas of copyright which stakeholders need to provide feedbacks before the Australian Law Reform Commission (ALRC) inquiry begins its work. An examination of the exceptions in the Copyright Act will ensure Australia can continue to take advantage of technology to drive economic and cultural development.

The draft terms of reference ask the ALRC to examine, whether further exceptions should be provided to “facilitate legitimate use of copyright works to create and deliver new products and services of public benefit” and whether exceptions should “allow legitimate non-commercial use of copyright works for uses on the internet such as social networking.” Furthermore, the review will also include the adequacy and appropriateness of a broad range of exceptions in the Copyright Act, including time shifting. The commission inquiry is to report no later than November 30, 2013 and the submissions are due by April 27, 2012.

UNITED KINGDOM

GOVERNMENT PLANS TO IMPROVE UK’S COPYRIGHT LAWS

The United Kingdom government has unveiled the proposals to modernize the copyright system and remove unnecessary barriers to growth in December 2011. It is part of a wider programme of work from government to tackle online infringement of copyright and to ensure the copyright system best encourages the creation and use of music, books, video and other copyright material. According to the Minister of Intellectual Property, the Government encourages businesses to come forward with thoughts and evidence on the proposals. This will help in boosting growth and freeing up some of existing copyright legislation to deliver real value to the economy without risking creative industries.

The proposals include creating an exception to allow limited acts of private copying, widening the exception for non-commercial research to allow data mining, enabling researchers to achieve new medical and scientific advances from existing research, introducing an exception for parody and pastiche so as to give other people the creative freedom to parody someone else’s work without seeking permission, establishing licensing and clearance procedures for orphan works, introducing provision for voluntary extended collective licensing schemes, as well as modernizing other exceptions to copyright.

BANGLADESH

EXPERTS STRESS QUICK ENACTMENT OF GEOGRAPHICAL INDICATION LAW

Speakers at a consultation programme in Dhaka have laid emphasis on quick enactment of a geographical indication law to protect the country's traditional products and encourage the process of inventing new products. According to Dhaka Chamber of Commerce and Industry (DCCI) president, the government has prepared a list of 66 products for providing GI facilities but the registration of the products got stuck due to the absence of related law. In response, Industries Minister said the government would soon formulate the GI law and its draft has already been prepared and posted on the official website of the ministry to have opinions from the stakeholders concerned.

CANADA

MODERNIZING COPYRIGHT LAWS IMPORTANT FOR CANADA

The government of Canada is making an effort to update their copyright laws - the Copyright Modernization Act (Bill C-11) which was last updated in the era of vinyl records and cassette tapes. In doing so, it will provide a much - needed clarity for Canadian artists, businesses and consumers. It will cover all Canadian companies and organizations that have major interest in the bill including record labels, photographers, writers, software developers, internet service providers, online companies, educational institutions and many other sectors of the Canadian economy.

This will help to put into perspective in explaining the importance of the bill which aims to strike a fair balance for all those who will be impacted, including creators, consumers and businesses. The Bill C-11 will also make the copyright laws to be forward-looking and responsive in the fast-paced digital economy, as well as, helping to create jobs, promote innovation and attract new investment opportunities to Canada.

THAILAND

THAILAND TO AMEND INTELLECTUAL PROPERTY LAWS

The Ministry of Commerce Thailand is accelerating amending existing laws and will enforce the revised ones later this year after having been on Washington's Priority Watch List (PWL) for over four years. Thai Deputy Commerce Minister acknowledged the amended laws will cover legal actions against the violators of intellectual property rights through the Internet. Two main hubs of on-line related products in Bangkok have been identified to seek their cooperation against the pirated products. He also warned that decisive punishment will be taken against operators of shopping centres and other business outlets who ignore the amended laws and will join entertainers in public campaigns to create people's proper awareness against fake goods in all forms.

SO I HAVE A PATENT – WHAT SHOULD I DO NOW?

KASS International Sdn Bhd



All that hard work has paid off and your patent has finally been granted. That's all there is to it, right? Not quite. Let us take a look at what one has to do once he has been granted a patent for his invention.

The invention is a single product that can be manufactured and sold independently. We shall assume the patent is owned by a small company or an individual, both with limited resources.

Obtaining a patent is one thing. It is not the end. Doing something with that patent in order to obtain financial returns is a different ballgame altogether.

Commercialization of your invention must ideally be planned well in advance, preferably before filing the patent application. For some it would be preferable to have the business plan even before the invention advances to the prototype phase. If the owner knows precisely how and to whom he will be presenting his invention for possible licensing, even before he files for his patent, chances of him successfully commercializing his invention may be substantially higher.

If you are not in that category, do not despair. Just take a few steps back and consider what each new stage of the invention process is bringing to the table and think about how investors or other parties might be excited or intrigued by the invention. Put aside the fact that you already have your patent. Patentability is completely different from marketability – for example, a patented product may not necessarily be commercialized as there may be other earlier patents that would be infringed if the product is put in the market. Remember, a patent owner does not have the absolute freedom to commercialize his patent if the invention infringes third party patents.

The rule to have a successful product is quite straight forward. A product will only succeed in the market if it satisfies customers' needs, can be economically produced and sold at the right price, and is delivered to the customers through appropriate distribution channels, among others.

Your product must be able to compel your customers to want to spend their money in exchange for the benefits they anticipate from your product. These benefits include a cheaper product, better quality, better output and more. If you plan for your product to enter foreign markets, be sure that your product satisfies foreign customers' needs. Their needs can be different from Malaysians so it would be apt to conduct a survey to ascertain local tastes before attempting to penetrate the market.



Today's economy is truly globalised. This means that your products must be manufactured at the right cost and by the most efficient production means, to successfully compete with products produced in countries where the production cost is very much lower than ours, for instance China and Vietnam. Unless you have the experience and know-how to ensure that your cost is minimized as much as possible, you will probably need assistance from a professional. This is vital if you intend to create a product of real commercial value.

Fast and efficient distribution and timing is critical in many industries, for example, food manufacturers must sell their goods before the expiry date. Building a distribution channel is a costly and time-consuming effort, so it is sometimes wise to look at using an established distribution channel, another manufacturer's channel, or the option of direct sales.

If these issues have not yet been considered, then your product may not be ready to be commercialized. But don't be disheartened – take your newfound knowledge and understanding of the requirements for a better product and get back to the drawing board if you must. With all these criteria in place, you should be able to come up with a more commercially successful product.

Essentially, you have to look at your product just as you would look at a business. Evaluate the invention and see reasons why it works and, more importantly, why it doesn't work. This will allow you to identify the strengths and weaknesses of your product so you can be armed with solutions for any possible concerns well before the invention even enters the market.

FACILITATING THE COMMERCIAL SUCCESS OF AN INVENTION

Unlike big multinational corporations, some companies and individual inventors may not have sufficient funds to produce and sell their patented inventions themselves. Setting up factories, acquiring machines and workforce, and running a business can be a major problem especially for an owner/inventor who is inexperienced in business. This is especially true during times of economic crisis such as the one from which the world is still recovering. During early stages of commercialization, consider contract manufacturing.

The next alternative is to consider licensing the patent to a third party. Licensing the patent does not mean selling the patent – it means you are now allowing a third party to manufacture and/or sell the patented product with a certain payment (royalty) to be made to you. The patent will remain under your name.

WAYS OF LICENSING YOUR INVENTION TO THIRD PARTIES

You would first have to prepare a list of your potential licensees. Your competitors will be your most logical licensees, provided that your invention provides more functionality at a lower cost than the competitors' current model in the market. You should then investigate the licensees by conducting a current patent search. See what patents they have, whether they have been applying to patent new inventions lately, and whether they are licensing patents from other patent owners. If the patent search results suggest that one licensee is more inclined to license inventions from another patent owner, then this would be the licensee to contact.

Next, you should come up with a business plan. This plan should have details and specifics on how the licensee that you are approaching can cut costs, increase their market share, or increase profits by manufacturing your invention rather than continuing to build on their current model. It is imperative to show a specific profit advantage to the licensee, as being in business the licensee will obviously want to see profits.

If your business plan has a clear projection of how profits can be made with your invention, then you are well on your way to impressing a potential licensee. One advantage you have in possessing an issued patent is that you don't have to be concerned about signing a confidential disclosure agreement – something most companies require. Since your patent has been granted and is already a public document, you are free to show the prospective licensee details of the invention, at least on the technology of the invention. If the licensee is not interested to work with you, the existence of your patent will still bar them from commercially exploiting your invention in the country or countries where the patent has been granted.

However, if the licensee does not respond, responds negatively, or is not too excited about your invention and this carries on until you have exhausted your list of potential licensees, then you may need to either evaluate the quality and content of your presentation to the licensees or revisit the commercial potential for your invention.

In a nutshell, although your invention is patented, if you can't demonstrate clear profit potential to the licensee(s), or if you patented an invention that they don't care about, or if the invention simply does not justify the investment, then you may have to come to terms with the fact that the invention may not be a commercially viable one.

On the other hand, if you do not wish to license the invention to a third party but lack the funds to commercialize your invention yourself, you may want to consider selling the patent to others for an appropriate remuneration. By doing so, you give up all your rights to the invention and the third party becomes the new owner of the patent. However, all changes in the ownership of the patent must be recorded at the Patent Office to take effect.

ADVERTORIAL

INTELLECTUAL PROPERTY TRAINING CENTER (IPTC) ROOM FACILITIES

1. TRAINING ROOMS

IPTC has 5 training rooms: Camelia, Lavender, Tulip, Cempaka and Kenanga for various functions such as trainings, meeting, courses, workshops, seminars, conferences and other functions. Each room is fully equipped with advanced audio visual equipment such as PA system, LCD projector, plasma TV and WiFi for Internet connection.

Rooms	Seating Capacity
Camelia	60 participants
Lavender	50 participants
Tulip	50 participants
Cempaka	50 participants
Kenanga	38 participants

2. COMPUTER TRAINING LAB

This computer training lab, Kenanga room provides a total of 38 computers with high speed Internet connection.



3. IPTC BALLROOM

Spanning an area of more than 3,626 square metres, IPTC Ballroom that can accommodate up to 200 participants is equipped with the latest audio visual teaching aids such as PA system, LCD projector, plasma TV and speedy Internet connection.

Rooms	Seating Capacity	Style
IPTC Ballroom	200 participants	Seminar style
IPTC Ballroom	300 participants	Theatre style

4. PUBLIC SEARCH ROOM

The Public Search Room is located on Mezzanine Floor to provide public access to patents, trade marks and industrial designs information. It can accommodate 34 people at one time and is open from 8.30 am-5.15 pm from Monday to Friday. Well-trained staff are available to assist public users.

5. MUSOLLA

IPTC also accentuates on the comfort of performing prayers by providing musolla that can accommodate 50 people at a time.

6. INTELLECTUAL PROPERTY LIBRARY (IP LIBRARY)

IP Library provides a total of 10,000 reference books on intellectual property and general topics, newspapers, journals and magazines. The collection consists of both local and international publications. The library also provides computer facilities with high speed Internet connection that allow the visitors to access information with ease.

