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THE OWNERSHIP OF COPYRIGHTED WORK: A MALAYSIAN LEGAL PERSPECTIVE

Nor Azlina Mohd Noor*
School of Law and Legal and Justice Research Centre,
UUM COLGIS, Universiti Utara Malaysia

Ahmad Shamsul Abd Aziz
School of Law and Legal and Justice Research Centre,
UUM COLGIS, Universiti Utara Malaysia

Nor Adila Mohd Noor
Academy of Contemporary Islamic Studies,
UiTM Cawangan Terengganu, Kampus Dungun

**Corresponding Author's Email: norazlyna@uum.edu.my*

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ABSTRACT

A copyrighted work is a creation by an author, such as a literary, musical, or film work, that falls under section 7(1) of the Copyright Act 1987. The matter of ownership pertaining to copyrighted works that form part of an individual's property is extensively debated during their lifetime. However, the matter regarding the issue of ownership concerning copyrighted works after the owner's demise is hardly addressed. There is a misconception among the public that every copyrighted work automatically enters the public domain or becomes public property after the death of its owner. This article discussed the law regarding the eligibility of works to the copyright protection and the ownership which is applied during the lifetime of the author. This article aims to address the legal position of the copyrighted works ownership during the lifetime and after the death of the owner. The discussion adopts the qualitative doctrinal legal research method and uses content analysis method to analyse the data. This article concludes that the ownership of the copyrighted works owned by the original owner during his lifetime can be transferred to the legal heirs who can enjoy the rights associated with the copyright for a term of fifty years after the death of the owner. However, the principle under Copyright Act 1987 must be read together with the laws relating to the succession of

deceased estates. This paper also suggests that it is high time for the relevant authorities to review the current duration of copyright protection by taking into account the life plus seventy years' duration as applied in other countries such as Singapore and Australia for the benefit of the legal heirs.

Keywords: intellectual property, works, copyright, inheritance, law, Malaysia

1.0 INTRODUCTION

In Malaysia, the statute governing copyright law is the Copyright Act 1987 which provides that copyright can only subsist by virtue of section 6 of the Act. The fundamental tenet of copyright law is that the exclusive right to reproduce an original work created through one's own skill and labour belongs to the author that is the person who created the work (Carmen, 2020). The meaning of author is provided for in section 3 of the Copyright Act 1987 as shown in the following Table 1.

Table 1: Meaning of author under Copyright Act 1987

No	Work in relation to	Means
1	literary works	the writer or the maker of the works;
2	musical works	the composer
3	artistic works other than photographs	the artist
4	Photographs	the person by whom the arrangements for the taking of the photographs were undertaken
5	films or sound recordings	the person by whom the arrangements for the making of the film or recording were undertaken
6	broadcasts transmitted from within any country	(i) the person transmitting the programme, if he has responsibility for the selection of its contents; or (ii) any person providing the programme who makes with the person transmitting it the arrangements necessary for its transmission
7	any other cases	the person by whom the work was made

A person may be held accountable for copyright infringement if they duplicate a work without the express consent of the copyright owner, who is typically the author of the original work. Section 36(1) of the Copyright Act 1987 provides that copyright is infringed by any person who does, without the licence of the owner of the copyright, an act the doing of which is controlled by copyright under the Act. Works are protected by copyright irrespective of their quality and the intended purpose for which they were created (Ahmad Shamsul & Nazura, 2014).

The matter of ownership pertaining to copyrighted works that form part of an individual's property is extensively debated during their lifetime. However, the

matter regarding the issue of ownership concerning copyrighted works after the death of the owner is hardly addressed. There is a misconception among the public that every copyrighted work automatically enters the public domain or becomes public property upon the death of its owner. This article aims to address the legal position of the copyrighted works ownership during the lifetime and after the death of the owner based on the law of succession as applied in Malaysia.

2.0 METHODOLOGY

The article employed qualitative doctrinal legal research in the form of library research as the article intends to discuss in-depth and detailed on the issue of copyrighted works after the demise of the owner. Anwarul (2008) asserts that conducting research in libraries is a fundamental approach to conducting legal research. By using qualitative methods many new aspects of the problem can be identified and thus once they are identified, suggestions would follow resulting in the research result and findings being more beneficial and practical (Nuraisyah Chua,2018). For this purpose, this article adopts the doctrinal content analysis method by examining the existing primary and secondary data gathered from multiple sources including statutory provisions as provided by Copyright Act 1987, Wills Act 1959, case law and other legal and non-legal literatures relating to the copyright law and law of succession in Malaysia.

3.0 ELIGIBILITY OF WORKS FOR COPYRIGHT PROTECTION

With regard to the eligibility of copyright protection, the relevant provision that contains the list of works eligible for such protection is section 7 of the Copyright Act. Literary works, musical works, artistic works, films, sound recordings and broadcasts are works that are eligible for copyright protection in Malaysia. The example of the copyrighted works according to the categories are provided in Table 2 as follows.

Table 2: Example of copyrighted works by categories extracted from section of Copyright Act 1987

No	Categories	List of Copyrighted Work
1	Literary work	novels, stories, books, pamphlets, manuscripts, poetical works and other writings; plays, dramas, stage directions, film scenarios, broadcasting scripts, choreographic works and pantomimes; treatises, histories, biographies, essays and articles; encyclopaedias, dictionaries and other works of reference; letters, reports and memoranda; lectures, addresses, sermons and other works of the same nature; tables or compilations, whether or not expressed in words, figures, or symbols and whether or not in a visible form; and computer programs
2	Musical work	any musical work, and includes works composed for musical accompaniment

3	Artistic work	a graphic work, photograph, sculpture or collage, irrespective of artistic quality or a work of architecture being a building or a model for a building, or a work of artistic craftsmanship, but does not include a layout-design within the meaning of the Layout-Designs of Integrated Circuits Act 2000.
4	Films	any fixation of a sequence of visual images on material of any description, whether translucent or not, so as to be capable by use of that material with or without any assistance of any contrivance- (a) of being shown as a moving picture; or (b) of being recorded on other material, whether translucent or not by the use of which it can be so shown, and includes the sounds embodied in any soundtrack associated with a film.
5	Sound recording	any fixation of a sequence of sounds or of a representation of sounds capable of being perceived aurally and of being reproduced by any means but does not include a sound-track associated with a film.
6	Broadcast	a transmission, by wire or wireless means, of visual images, sounds or other information which- (a) is capable of being lawfully received by members of the public; or (b) is transmitted for presentation to members of the public; and includes the transmission of encrypted signals where the means for decrypting are provided to the public by the broadcasting service or with its consent.

The vital criterion that must be established for eligibility of a literary, musical or artistic work to get copyright protection is that, firstly, sufficient effort had been expended on the work to make it original, and secondly, that such work had been reduced to material form which includes any form (whether visible or not) of storage from which the work or derivative work, or a substantial part of the work or derivative work can be reproduced as stated in section 7(3) of the Copyright Act. On the issue of originality, the court in Kiwi Brands (Malaysia) Sdn Bhd v. Multiview Enterprises Sdn Bhd [1998] 2 CLJ Supp 194, held that the word original that appears in section 7(3)(a) of the Copyright Act 1987 does not mean that the work must be the expression of original or inventive thought instead the work must not be copied from another work and it should originate from the author. A mere idea is not entitled to copyright protection as provided under s. 7(2A) of the Copyright Act 1987. In the Federal Court case of Lau Foo Sun v. Government of Malaysia [1974] 1 MLJ 28, Ali FJ held that copyright only protects originality of expression in the work and not originality of ideas or thoughts in the work.

The third criterion for the works to qualify for copyright protection is provided under section 10 of Copyright Act 1987. The section provides that the artistic work must be made by a "qualified person" that is a Malaysian citizen and Malaysian company respectively and/or the work is first "published" or made in

Malaysia. The court in MRA International Sdn Bhd v. SPC Diatech LLC [2021] CLJU 870 held that a work first published in Malaysia is entitled to copyright in Malaysia irrespective of whether the author is a qualified person which is a citizen or a permanent resident of Malaysia or a body established in Malaysia and constituted or vested with a legal personality or not. Section 4(1)(a) Copyright Act 1987 deems an artistic work to be "published" only if copies of the work have been made available with the consent of the author of the work in a manner sufficient to satisfy the reasonable requirements of the public, whether by sale or otherwise.

4.0 THE OWNERSHIP OF COPYRIGHTED WORKS

In copyrighted works, the terms author, owner and maker are always used interchangeably in determining the ownership. Aliza Sulaiman J in MRA International Sdn Bhd v. SPC Diatech LLC [2021] CLJU 870 motivated by elucidation made by Tee & San (2017) summarised the differences between author, owner and maker of works as follows.

1. The author is the creator or originator of the works and is generally, the first owner of the copyright but he may not always remain so for the duration of the copyright. Where literary works are concerned, the author is the writer or maker of the works.
2. The owner is the person who has put in sufficient skill and effort of his own to produce an original work and is thereby entitled to control the doing of the various restricted acts.
3. The maker is the person who first reduced the work into material form or who completed the work.

Section 26(1) of Copyright Act 1987 provides that copyright in the works shall vest initially in the author as the first owner of the copyrighted work. However, if the works are commissioned by a person who is not the author's employer under a contract of service or apprentice or are made in the course of the author's employment, section 26(2)(a) Copyright Act 1987 provides that copyright in the works shall be deemed to be transferred to the person who commissioned the work or the author's employer, subject to any agreement between the parties excluding or limiting such transfer.

In HSL Plastics Sdn Bhd & Ors v. Lim Kai Meng & Anor [2019] CLJU 525 the court held that the copyrighted works in dispute belong to the person who has commissioned the author to produce the works. Lim Chong Fong J, in deciding Local Publications (M) Sdn Bhd v. Sliya Nu Printing Sdn Bhd & Another Case [2019] CLJU 386 followed the decision made in English case of Trimingham v. Associated Newspapers Ltd [2012] EWHC 1296 where he stated that commissioning was held to mean that there must be an obligation on the part of the commissioned party to produce the work and an obligation on the part of the commissioning party to pay money or money's worth.

Additionally, the court of appeal in DNC Asiatic Holdings Sdn Bhd & Ors v. Honda Giken Kogyo Kabushiki Kaisha & Other Appeals [2020] 1 CLJ 799 upheld the proposition that the works of an employee are deemed to belong to the employer. These cases show that the statutory embodiment under section 26(2)(a) of

Copyright Act 1987 demystifies the oft-misconceived notion that the author of a copyrighted work is of necessity, the owner of the same work.

Nevertheless, the author as the first owner still retains the moral right to his works that's owned by the person who commissioned the work or his employer. Section 25(1) of Copyright Act 1987 provides that where copyright subsists in a work, no person may, without the consent of the author, do or authorize the doing of any of the following acts:

a. the presentation of the work, by any means whatsoever without identifying the author or, under a name other than that of the author; and
b. the distortion, mutilation or other modification of the work if the distortion, mutilation or modification-
    (i) significantly alters the work; and
    (ii) is such that it might reasonably be regarded as adversely affecting the author's honour or reputation.

The court in Aktif Perunding Sdn Bhd v. ZNVA & Associates Sdn Bhd [2017] 10 CLJ 226 held that s. 25(2)(b)(ii) of Copyright Act 1987 has expressly provided for distortion, mutilation or modification of a work which might reasonably be regarded as adversely affecting the author's honour. Additionally, subsection (4) provides that the author may exercise the rights notwithstanding that the copyright in the work is not at the time of the act complained of vested in the author. It shows that even though the author is no longer the owner of the works, he still is protected from acts of modifying his works that could be tarnishing his dignity. A breach of an author's moral rights under section 25(2) of the Copyright Act1987 constitutes a breach of statutory duty under section 25(4) of the Act for which the author may claim damages.

Moreover, according to Nasibah and Zinatul Asyiqin (2018) and Syahirah et al (2020), copyright is an exclusive right granted to the author or the owner of the copyrighted works for a specific timeframe. Under section 13(1)(a) and (aa) of the Copyright Act 1987, the owner of the copyrighted works had the exclusive right to control in Malaysia the reproduction of the works in any material form and the communication of the works to the public of the whole work or a substantial part thereof, either in its original or derivative form. Having this exclusive right grants the owner of the copyrighted works the ability to exercise monopoly power. According to Ahmad Shamsul, Nor Azlina, and Khadijah (2020), the notion of monopoly was developed as part of the copyright law to provide the owner of the copyrighted works with the appropriate compensation in the form of monetary compensation as a result of infringement by impugned or infringed works.

5.0 THE DURATION OF COPYRIGHT PROTECTION

Duration of copyright protection, also known as 'copyright term', refers to how long protection lasts in that work of the author or the owner. Section 17(1) of the Copyright Act 1987 provides that copyright in any literary, musical or artistic work shall subsist during the life of the author and shall continue to subsist until the expiry of a period of fifty years after his death. Section 17(4) of the Copyright Act

1987 then states that in the case of joint authorship, the period of fifty years would only begin after the death of the last author.

6.0 THE COPYRIGHTED WORKS AFTER THE DEATH OF THE OWNER

Fundamental principles governing copyright protection of copyrighted works after the demise of the owner is stipulated under section 27 of the Copyright Act 1987 which provides that copyright shall be transferable by assignment, testamentary disposition, or by operation of law, as movable property and must be in writing. However, testamentary disposition of copyright may be limited only to some of the acts which the owner of the copyright has the exclusive right to control, or to only part of the period of the copyright, or to a specified country or other geographical area. Subsection 7 provides that as regards to the manuscript of a literary or musical work, or to an artistic work, that has not been published before the death of the testator, the testamentary dispositions shall, be construed as including the copyright in the work in so far as the testator was the owner of the copyright immediately before his death, unless a contrary intention is indicated in the testator's will or a codicil.

This section is in compliance with the law of succession and administration of deceased estates in Malaysia. This is so as the law provides for two methods in distributing the deceased estates namely by way of will or testamentary documents if the owner died testate and by operation of law if the owner died intestate. The administration of estate by operation of law is regulated by two sets of laws that are different based on the religion of the deceased owner.

If the owner died leaving a will or other testamentary documents (he will be known as testator), Will Act 1959 will apply to the non-Muslim. On the other hand, Muslim will enactments or any relevant administration of Islamic law enactments based on states will govern the process. Until today only six states in Malaysia have enacted Muslim will enactment namely, the states of Selangor, Melaka, Negeri Sembilan, Pahang, Kelantan and Sabah. Both laws regardless of Wills Act 1959 or Muslim will state enactments required a person who wishes to execute a will must be an adult aged 18 years old as stated in Age of Majority Act 1971, sane and capable of managing property willingly without being forced or coerced by any other person. Under Wills Act 1959, there is no restriction as regard to the distribution. However, Muslim law imposes two principal restrictions upon testamentary power. The first rule is that a testator cannot make a bequest in favour of any of his legal heirs. The second restriction is that the testament is invalid if the testator purports to bequeath more than a third of his estate (Pawancheek,2008). In other words, a person may only bequeath a maximum of one third of his total estate and only to non-eligible heirs (Akmal Hidayah, Nor Azlina & Wan Noraini, 2020).

If the owner died without leaving a will, the process will be governed by the Distribution Act 1958 for the Non-Muslim, and Faraid principle for the Muslim. The primary legal heirs usually came from three categories namely issues, spouses and parents. The law also mandated the appointment of a personal representative to administer the estate of the deceased's owner by applying grant of probate or letter of administration from the Civil High Court (Akmal Hidayah & Nor Azlina, 2014).

Among the duties of the personal representatives are to collect the deceased assets, pay off the deceased debts and liabilities, and distribute the remainder of deceased assets to the entitled legal heirs. (Muhammad Amrullah, Wan Noraini, Muhamad Helmi & Siti Nuramani, 2017; Nor Azlina & Ahmad Shamsul, 2022). The power, duties, and responsibilities of personal representatives are governed by the Probate and Administration Act 1959 (Nor Azlina, Ahmad Shamsul & Nor Adila, 2023).

Hence, the exclusive rights, monopoly rights and moral rights associated with copyright that are acquired by the owner during their lifetime can be inherited or transmitted to the heirs if the owner passes away that will be administered by his personal representatives. Other than section 27, section 25 also explicitly discusses the issue of copyrighted work after the author's death. For instance, the protection in terms of moral rights enjoyed by the authors during his lifetime is extended to his legal heir through the appointment of personal representatives after his death by specific inclusion of the sentence "…after the author's death, his personal representatives…" in section 25(2), (4), (5) and (6) of Copyright Act 1987. The court in Aktif Perunding Sdn Bhd v. ZNVA & Associates Sdn Bhd [2017] 10 CLJ 226 held that those subsections have expressly provided for the scenario when an author of a work has died and the author's personal representative may then act for the author's estate.

As regards the issue of duration of protection, the legal heirs only enjoy the rights associated with the copyright for only fifty years as stated in Section 17 of the Copyright Act 1987.In other words, the works protected by copyright will lose their protection after fifty years. A very good place to start in managing this issue is with the initiative taken by Music Authors' Copyright Protection (MACP) to hold a discussion on the topic of termination of the copyright protection of the late Tan Sri P Ramlee's works such as film and musical works, which began in 1973 and whose maturity period has come to an end in 2023 when it reaches fifty years (Norhayati, 2022). It should be noted that since the copyrighted work's protection period has ended, the heirs are no longer qualified to receive royalties from the collective management organisation as the works will become public domain and freely accessible to the public. In the coming future, many copyrighted works in Malaysia will reach their maturity period of fifty years copyright protection terms.. Now is the time for the relevant regulatory authority to reevaluate the duration of protection to the copyrighted works, following the example from other countries.. Due to the fact that copyright provides the owners with exclusive rights to their works, enabling them to generate financial gains through the monetisation of those rights, an extended copyright term would consequently increase the motivation to produce and benefit the legal heirs of the deceased owner of copyrighted works. Some countries such as Singapore, Australia and the United Kingdom have extended the duration of protection from fifty years to seventy years after the death of the owner. For instance, Singapore has adopted the 'life plus 70 years' duration as stated in section 114 of Singapore Copyright Act 2021 (Chye,2022).

7.0 CONCLUSION

This article concludes that the ownership of the copyrighted works owned by the original owner during his lifetime can be transferred to the legal heirs who can enjoy

the rights associated with the copyright for a term of fifty years after the death of the owner. However, the principle under Copyright Act 1987 must be read together with the laws relating to the succession and administration of deceased estates relating to the appointment of personal representatives. This paper also suggests that it is high time for the relevant authorities to review the current duration of copyright protection by taking into account the life plus seventy years' duration as applied in other countries such as Singapore and Australia for the benefit of the legal heirs of the copyrighted works owner.

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Author Contributions

Mohd Noor, N.A., is the principal author and contributed on the discussion related to of law of succession and administration of deceased estate. Abd Aziz, A.S., is the expert on the intellectual property law and contributed on the discussion on the copyrighted works. Mohd Noor, N.A., contributed to the issue relating to Islamic law.

Conflicts Of Interest

The manuscript has not been published elsewhere and is not under consideration by other journals. All authors have approved the review, agree with its submission and declare no conflict of interest on the manuscript.

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