

PERFORMER'S RIGHT UNDER MALAYSIAN COPYRIGHT LAW

The recognition and/or protection of performer's rights in Malaysia is a relatively recent development in the broader context of copyright law. Unlike copyright, which has a long-established history, the legal framework for performer's rights only emerged in the late 20th and early 21st centuries. This evolution has been driven largely by Malaysia's international obligations and technological advancements that have changed the way performances are created, shared, and exploited.

Evolution of Performer's Rights under Malaysian Copyright Law

The protection of performers under Malaysian law was first introduced in the Copyright Act 1987 ("**CA 1987**") through amendments made in the year 2000. This amendment was primarily motivated by Malaysia's obligations under international treaties by becoming a signatory to the Agreement on Trade-Related Aspects of Intellectual Property Rights ("**TRIPS Agreement**") since 1 January 1995[1] and subsequently, the accession to the WIPO Performances and Phonograms Treaty ("**WPPT**") on 27 September 2012.[2]

Prior to the amendment to the CA 1987, performers in Malaysia, as in many other parts of the world, had no legal protection for their performances, largely due to the transient nature of live performances before the advent of recording technology. The TRIPS Agreement require member states to provide certain exclusive rights to performers. The WPPT on the other hand, complements the TRIPS Agreement by providing more detailed provisions on performer's moral and economic rights.

Performer's Rights under the Malaysia Copyright Act 1987

Performers are granted a range of rights to control the use and dissemination of their performances, as follows:

(a) Right to control the communication of their performances to the public[3]

This includes any transmission of the performance by wire or wireless means, such as cable, satellite, digital, and Internet transmissions.

"Communication to the public" is broadly defined to include making a performance available to the public in a manner that allows individual access at a chosen time and place. However, this right does not extend to live broadcast performances.

(b) Right to control the first fixation (or recording) of their performances[4]

This right includes preventing unauthorized recordings — such as bootlegging — during live performances or broadcasts. The fixation can be in any format, including sound recordings, films, or other audiovisual media. Importantly, once a performer consents to the fixation of their performance, they lose the right to control subsequent fixations.[5] However, if the fixation occurs without the performer's consent, the performer retains control over that fixation, maintaining their right to prevent its unauthorised use.

(c) Right to control the reproduction of the fixation of their performance[6]

The right includes the making of copies of the recorded performance in any form or version, including transient copies that are temporarily stored in digital systems. The scope of this right was expanded by the Copyright (Amendment) Act 2012, which removed earlier limitations,[7] thereby allowing performers unrestricted control over the reproduction of their fixed performances.

(d) Right to control the first distribution to the public of the fixation of their performance or copies thereof[8]

This right covers both physical and electronic distribution, including sales and other transfers of ownership. However, this right is limited to the first distribution, after which the doctrine of exhaustion applies. This means that once a performer has authorised the initial distribution, they cannot control further distribution or sales of those copies, except in cases involving rental rights.[9]

(e) Right to Control Commercial Rental of a Fixed Performance

Performers have the right to control the commercial rental of copies of their performances.[10] This right allows performers to regulate the rental of their performances to the public for commercial or economic advantage, regardless of who owns the physical copy being rented. "Rental" in this context refers to the temporary transfer of a copy for payment, with the expectation that the copy will be returned. This right is particularly relevant in the context of video rental businesses and similar enterprises where copies of performances are frequently rented to consumers.

(f) Right to Equitable Remuneration

Users of a sound recording, including entities that make it available to the public or perform it publicly, must pay equitable remuneration to the performer.[11] This right to remuneration is distinct from copyright ownership and does not extend to licensing fees. [12] If no contract exists regarding remuneration, the performer can seek determination from the Copyright Tribunal.

Moral Rights of Performers in Malaysia

Performers are granted the following moral rights, even if they have transferred their economic rights to others:[13]

(a) Right of Attribution[14]

This right entitles performers to be identified as the performer of their performance whenever their performance is used or displayed. The right of attribution is crucial for ensuring that performers receive proper credit for their work, maintaining their professional reputation and public recognition.

(b) Right of Integrity[15]

This right allows performers to object to any distortion, mutilation, or other modifications of their performances that would be prejudicial to their reputation. The right of integrity is vital for protecting the personal and artistic integrity of performers, ensuring that their performances are not altered in a manner that could harm their reputation or misrepresent their artistic intentions.

The moral rights mentioned above continue to subsist upon the death of the performer and can be exercised by persons or institutions authorised by the performer.[16]

Acts Constituting Infringement of Performer's Rights

The following acts constitute infringement of performer's rights:

(a) Performing any act, or cause another person to do so, that is controlled by the performer without obtaining a license or consent.[17] This includes unauthorised communication, fixation, reproduction, distribution, or commercial rental of the performance.

(b) Importing articles into Malaysia for commercial purposes that have been made without the performer's consent also constitutes infringement.[18] This applies if the importer knew or ought reasonably to have known that the article was made without the performer's authorisation.

The performer may initiate a civil action against the infringer and claim for the available

remedies from the court such as payment of damages, obtain an order of injunction, account of profits, statutory damages, or any other remedy that is deemed fit.[19]

Exceptions to Infringement of Performer's Rights

The following exceptions allow for the use of performances under particular circumstances without requiring the performer's consent:

(a) Direct or indirect sound recordings or films of a performance made for the private and domestic use of the person who made the recording.[20]

(b) Recordings made for scientific research purposes.[21]

(c) Recordings used for reporting news or current affairs, criticism, or review.[22]

(d) Recording of performances used in judicial proceedings, legislative inquiries, or the provision of professional legal advice.[23]

(e) Indirect recordings made by educational institutions for educational purposes or by institutions assisting persons with disabilities for providing necessary support.[24]

(f) If a recording is made by or under the direction of a broadcasting service with the performer's consent, provided it is destroyed within six months or within an agreed longer period.[25]

(g) If a recording is made by someone who reasonably believed, due to fraudulent or innocent misrepresentation, that they had the performer's authorisation.[26]

(h) Legitimate copies made from sound recordings or films in accordance with the above exceptions.[27]

Conclusion

Although performer's rights are incorporated into the CA 1987, they differ fundamentally from copyright in terms of their legal nature and scope. Copyright typically protects original works, granting the creator exclusive rights to control the use and distribution of their work. In contrast, performer's rights protect the actual performance of a work, independent of any underlying copyright. This legal framework ensures that the performers receive fair treatment in commercial dealings, encourage ethical practices in the entertainment industry, and address any violations of their rights, which helps enforce their entitlements and address infringements effectively.

1. World Intellectual Property Organization (WIPO), IP Treaties Collection (World Intellectual Property Organization, n.d.), <<https://www.wipo.int/wipolex/en/treaties/parties/231>>.

2. World Intellectual Property Organization (WIPO), 'WPPT Notification No. 82 WIPO Performances and Phonograms Treaty', TREATY/WPPT/82: [WPPT] Accession by Malaysia (wipo.int).

3. Copyright Act 1987, Section 16A(1)(a).
4. Copyright Act 1987, Section 16A(1)(b).
5. Copyright Act 1987, Section 16A(2).
6. Copyright Act 1987, Section 16A(1)(c).
7. Prior to the Copyright (Amendment) Act 2012, Section 16A(1)(c) of CA 1987 was narrower in scope because it was limited to the right to control the reproduction of the fixation of a performance to specific situations only.
8. Copyright Act 1987, Section 16A(1)(d).
9. This is as described in Section 16A(1)(e) of CA 1987. It is also important to note that this right is strictly limited to the first distribution, contrary to the interpretation in the case of *Sheikh Abdullah Bin Ahmad v Universal Music (M) Sdn Bhd* [2017] 11 MLJ 616, HC, where the High Court erroneously suggested it extended to subsequent distributions as well.
10. Copyright Act 1987, Section 16A(1)(e).
11. Copyright Act 1987, Section 16B(1).
12. *Prism Berhad v Measat Broadcast Network System Sdn Bhd* [2017] 8 CLJ 225, HC.
13. Copyright Act 1987, Section 25A.
14. Copyright Act 1987, Section 25A(1)(a).
15. Copyright Act 1987, Section 25A(1)(b).
16. Copyright Act 1987, Section 25A(2).
17. Copyright Act 1987, Section 36(1).
18. Copyright Act 1987, Section 36(2).
19. Copyright Act 1987, Section 37(1).
20. Copyright Act 1987, Section 16A(3)(a)(i).
21. Copyright Act 1987, Section 16A(3)(a)(ii).
22. Copyright Act 1987, Section 16A(3)(b)(i) and (ii).
23. Copyright Act 1987, Section 16A(3)(b)(iii).
24. Copyright Act 1987, Section 16A(3)(c).
25. Copyright Act 1987, Section 16A(3)(d).
26. Copyright Act 1987, Section 16A(3)(e).
27. Copyright Act 1987, Section 16A(3)(f), (g), and (h).

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