

## THE COST OF GOING VIRAL – INTELLECTUAL PROPERTY PERSPECTIVES

In today's digital era, going viral is often seen as the ultimate achievement in social media, a gateway to instant fame and widespread recognition. For individuals, it can mean the rapid accumulation of followers, an expanded digital footprint, and often, a fast track to online influencer status. Brands, on the other hand, can achieve what years of marketing might not – massive brand awareness and a surge in consumer engagement.

The allure of virality lies in its promise of instant visibility, transforming ordinary individuals and brands into internet sensations overnight. For example, a simple, innovative recipe shared by a home cook could quickly spread across various platforms, leading to countless users sharing their own versions and adaptations. This cooking trend not only racked up millions of views but also inspired a wide audience, from amateur cooks to renowned chefs and celebrities, to participate. This scenario is a classic example of virality, where an everyday piece of content becomes a widespread cultural phenomenon, re-shared and adapted, embedding itself into the digital society's fabric.

However, while the allure of going viral can be intensely captivating, it is crucial for social media users, influencers and content creators to comprehend the intricacies of intellectual property laws. This understanding is key to ensuring that their moment in the digital spotlight is not just a fleeting instance of fame, but a step towards sustainable success.

### **Understanding Intellectual Property Rights**

A prevalent misunderstanding among social media user is that if something is online, it's free to use. However, this isn't true. Contrary to this belief, a significant portion of online content falls under the protection of intellectual property laws, and its unauthorized use can lead to infringement allegations.

In the sphere of content creation, the legal landscape is primarily sculpted by copyright law. Under the Malaysian Copyright Act 1987, copyright is defined as an exclusive right granted

to the creator of a work. This right empowers creators to control the use and distribution of their creations, covering a variety of creative forms such as literary, musical, artistic works, films, sound recordings, broadcasts and derivative works. This ensures that the original creators maintain a say in how their works are utilized.

However, when a content goes viral, these rights can often be infringed upon if the content is shared or used without proper licensing or authorization, potentially leading to legal disputes. This situation is exacerbated by the common misunderstanding of the notion of "fair dealing." Fair dealing allows limited use of copyrighted content under specific conditions, such as for criticism, review or the reporting of news or current events, but it is often wrongly interpreted as a free pass to use copyrighted material without consent. It's important to note that fair dealing does not automatically apply to all uses, especially those that are commercial in nature.

### **Malaysian Case Study: Upholding Copyright in Viral Content**

In the case of ***Sara Nadzirah bt Zulkifli v Khirulanuar bin Mohamadiyah (t/a Ezydurian Services) [2023] MLJU 267***, the plaintiff, a social media influencer, filed a lawsuit against the defendant for copyright infringement. In this case, the plaintiff uploaded a 51-second video she recorded of herself on her iPhone eating some durian she bought from another vendor using a particular Instagram account. This video had garnered significant attention. Thereafter, the defendant had uploaded the video onto his Facebook account, without the plaintiff's permission and consent, to promote his durian-selling business. When the defendant refused to remove the video from his Facebook despite her demands to him to do so, she brought this action against him for copyright infringement.

As highlighted by the Court, the defendant does not dispute that he had uploaded the video onto his Facebook. He only tries to make excuses for doing so and/or explain it away. The defendant's first excuse/explanation was that his uploading the video onto his Facebook was not copyright infringement for being a parody, pastiche and caricature under Section 13(2)(b), (c) and (d) of the Copyright Act 1987. However, the Court rejected this for the reasons that (i) uploading the video onto his Facebook clearly does not fall under the definition of "parody, pastiche or caricature"[1]; (ii) his Facebook is clearly not a film or broadcast, and the video is not an artistic work situated in a place where it can be viewed by the public; and (iii) uploading the video on his Facebook was clearly not the reproduction and distribution of copies of any artistic work, and the video is not an artistic work situated in a place where it can be viewed by the public.

The defendant also alleges that the video had been circulated on a WhatsApp group that he belonged to; that he does not know the plaintiff; that the words that he put alongside the video amount to a disclaimer and/or apology; that he was reaching out to the plaintiff to give her some of his products; that by uploading it, he was in effect asking anyone who knew her to inform her to contact him; that he did not derive any benefit or opportunity from uploading it; and that he meant her no harm. However, the Court is of the view that none of

those excuses afford him a defence to the plaintiff's claim, and none of them raise any issue to be tried.

The Court found in favor of the plaintiff, allowing the plaintiff's summary judgment application. The High Court judge determined that by uploading the video to Facebook without the plaintiff's permission, the defendant had indeed infringed upon her copyright.

This case illustrates the protections that the Malaysian Copyright Act 1987 affords to creators of original content. It underscores that even if content goes viral and is shared widely on social media, the creator's rights remain intact, and any commercial use by others without permission constitutes infringement. The Court's ruling also highlighted that the defenses often used to justify unauthorized use of copyrighted material, such as fair use in the form of parody, pastiche or caricature or the content being previously circulated, do not automatically apply. Each defense must be closely scrutinized to ensure it is valid under the specifics of the case.

From this case, influencers and content creators can take away a clear message: the importance of obtaining appropriate permissions when using content that is not their own. This case also sets a precedent that emphasizes respect for the intellectual property rights of digital content creators.

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[1] The Oxford English Dictionary defines them as follows:

- (a) "parody" "a piece of writing, art or music that deliberately copies the style of someone or something, in order to be funny";
- (b) "pastiche" "a piece of writing or work of art reproduced in a style that imitates that of another work, artist or period"; and
- (c) "caricature" a picture in which a person's distinctive features are amusingly exaggerated".

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