Technical and Legal

Developments Regarding the Internet and Copyright and Related Rights in the Asia-Pacific Region, the Example of Malaysia

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The Copyright Regime

- Granting of exclusive rights to owner of original works.
- Entering of works into public domain upon ending of protection
- A balance between private incentive for creative activity and social benefits for use of creative works.
Works eligible for copyright. (section 7 CA)
- Literary works
- Musical works
- Artistic works
- Films
- Sound recordings
- Broadcasts

The exclusive statutory rights
- To reproduce the copyright work
- To sell, rent, or otherwise distribute copies of the copyright work to the public
- To prepare derivative works based on the copyright work
- Doing any of the exclusive rights with consent of the copyright owner.
- To perform and display publicly the copyright work
The infringing acts

- Doing any of the exclusive rights without consent of the copyright owner.
- Direct infringement
  - person or company actually carries out the infringing copying
- Secondary infringement
  - contributory and vicarious

Technical Development and Digital Technology

- Rapid advance of digital technology creating new conflicts between copyright owners and consumers:
  - over control of legally acquired creative works in digital form
  - the problem of enforcement domestically and internationally
Other impact of digital technology

- Technological advances affect a wider variety of creative works
- Affects on sectors of economy beyond those directly concerned with copyright

Manner of consuming creative works

- Digital media products such as MP3 players, iPod, mobile phones
- New alternatives for making, storing, listening to music
- Digital recording devices
- Can now personalize their television viewing. Time and place.
- Digital products which allows self-censorships
Manner of delivery of works

- New content delivery technologies
- broadband, internet,WIFY, ISP "expanded the marketplace of ideas"
- Allows the delivery of all manner of works, online to millions of internet users.

The Opportunities

- The advantages of digital technologies enables better products, copies
- accessibilities of works
- time and place at individual selections
- wider market for content producers
- development of copyright related industries
The legal challenges

- The development of a legal systems to cope with technological changes:-
  - to continue granting exclusive right to the copyright owner
  - to balance the right of the end user

Core Copyright industries

- Core copyright related industries:-
  - those industries where the main revenues directly are depended on production or dissemination of copyright work.
  - news, entertainment
  - sector, journalism, literature, sound recordings, movies, radio, television, cable broadcasting, computer software
  - newspapers, book publishing industries,
  - Music industries
The challenges

- Owners and distributors of creative works are unwilling to make copyrighted material widely available in digital format unless there are assured of protection.
- Have they the mean of control?
- Can they adequately control access of their works?

The challenges to enforcement

- Infringement by individuals;
- Digitization of creative content with lower cost
- Encouraging infringement
- File-sharing on peer to peer network
- Infringement at international level;
- Ease of replication and redistribution
- Needs for international coordination of enforcement effort
The Malaysian Copyright Regime

- The Copyright Act 1987
- The Copyright Amendment Act 1997
- Incorporation of provision of WCT/WPPT
- Supporting MSC/the digital agenda

Right of Reproduction in the era of Internet

- The right of reproduction are "technology-free"
- Section 13 CA "Copyright shall be the exclusive right to control in Malaysia the reproduction in any material form"
"Reproduction"

- "Means the making of one or more copies of work in any form or version"
- Thus format of analogue, digital or all future invention are covered by the right of reproduction.

"Communication to the public"

- Most seriously affected by technological development.
- Wider coverage.
- Inclusive of:-
  - Rights of public performance
  - Broadcasting
  - Interactive transmission or "on demand transmission"
  - Satellite broadcasting
Communication to the public

"the transmission of a work or live performance through wire or wireless means to the public, including the making available of a work or live performance to the public in such a way that members of public may access the work or live performance from a place and at a time individually chosen by them..."

“On demand transmission”

- Server ----------------- -Member of the public
- request
Today's reality

- Internet and Global village.
- Multi-server and hyper linking
- Difficulty of controlling access to work
- The need to developed "Access Control" by the owner.

The manner of "Access Control"

- Electronic water marking
- "Copy guard"
- "hidden name plate"
- Dongle ( electronic serial number)
- Bus encryption
- Registration key
- Keyfile
- Internet product activation
- Code morphing
"Access Control" in Malaysia

- Section 36(3) CA:
  - "Copyright is infringed by any person who circumvents or causes any other person to circumvent any effective technological measures that are used by authors in connection with the exclusive right granted under the Act."

Dual action

- Primary infringer
  - "any person who circumvent"
- Secondary infringer
  - "any person who causes any other person to circumvent any effective technological measures"
Penal Provision for circumvention

- Section 41 CA
- "Any person who during the subsistence of copyright in a work or performer's right
- h) circumvents or causes the circumvention of any effective technological measures
- Shall unless he is able to prove that he acted in good faith and had no reasonable grounds for supposing that copyright or performers right would or might thereby be infringed, be guilty of an offence...

The penalties

- A fine not exceeding RM250000.00 or to imprisonment for a term not exceeding five years or to both and for any subsequent offence, to a fine not exceeding RM500000.00 or to imprisonment for a term not exceeding 10 years or to both.
“Rights management information”

- Identification of owner.
- Infringement and penal provision for unlawful removal.
- Definition "information which identifies the works, the author of the work, the owner of any rights in the work, information about the terms and condition of use of the work, any numbers or codes that represent such information, when these information is attached to a copy of a work or appears in connection with the communication of a work to the public.

The infringing act

- Section 36(4) "copyright is infringed by any person who knowingly performs any of the following acts knowing or having reasonable grounds to know that it will induce, enable, facilitate or conceal an infringement of any right under this Act:
- a) the removal or alteration of any electronic rights management information without authority
The infringing act

- b) the distribution, importation for distribution or communication to the public, without authority, of works or copies of works knowing that electronic right management information has been removed or altered without authority.

Penal provision

- Section 41(1):-
- i) removes or alters any electronic rights management information without authority or
- J) distributes, imports for distribution or communicates to the public, without authority, works or copies of works in respect of which electronic rights management information has been removed or altered without authority shall be guilty of an offence....
The penalties

- A fine not exceeding RM250,000.00 or to imprisonment for a term not exceeding five years or to both and for any subsequent offence, to a fine not exceeding RM500,000.00 or to imprisonment for a term not exceeding 10 years or to both.

Copyright responsibility of ISP

- Will the carrier/conduit be liable for copyright infringement?
- Uncharted territory in many countries.
Defining ISPs

- A company or corporation providing online services or network access, or the operator of such facilities.
- An entity offering the transmission, routing, or providing of connections for digital online communications, between or among points specified by a user without modification of content sent or received.

The manner of delivery of works

- Digital medium
- Uploading and downloading
- File sharing
- Peer to peer
- The role of ISP
The infringing acts

- Doing any of the exclusive rights without consent of the copyright owner.
- Direct infringement
  - person or company actually carries out the infringing copying
- Secondary infringement
  - contributory and vicarious

Should ISPs be liable for copyright infringement?

- Direct Infringement. Yes
- Playboy Enterprise, Inc. v Frena 1993
- Frena, an operator of BBS was sued for infringing photographic images that was displayed on his service. For a fee anyone can log on to his BBS and look at the pictures. "F" did not load those pictures and was not aware of any infringing activities of his subscribers. Once he was aware of the unlawful activity he remedied the situation.
Playboy case (cont.)

- Court held: He was liable for direct copyright infringement.
- “there is no dispute that Frena supplied a product containing unauthorized copies of a copyright work. It does not matter that Frena claims he did not make the copies itself”.

Secondary infringer

- Sega Enterprises Ltd. V MAPHIA 1996
- “S” a major manufacturer and distributor of computer video game systems and programs sued “M”, an electronic bulletin board and its system operator Sherman. Maphia users were permitted to upload and download Sega games with an authorization password. Since “S” knowingly allowed users to upload and download unauthorized copies of Sega video games
Sega case (cont.)

- He was found liable for contributory copyright infringement. Such liabilities is established where the defendant “with knowledge of the infringing activity, induces, causes or materially contributes to the infringing conduct of another”

Striking a balance for ISPs

- Difficulties in policing the internet
- Imposing an obligation on ISPs to police itself against materials that infringed copyright work would lead to added cost that will be pass to public i.e the internet surfers.
Digital Millennium Copyright Act
1998 (US)

- Limiting ISPs liability for copyright infringement

1. Mere conduit. Transitory digital network communications., or by reason of the intermediate and transient storage of that material in the course of such transmitting, routing, or providing connections, if:
   - (1) the transmission of the material was initiated by or at the direction of a person other than the service provider;
   - (2) the transmission, routing, provision of connections, or storage is carried out through an automatic technical process without selection of the material by the service provider;
   - (3) the service provider does not select the recipients of the material except as an automatic response to the request of another person;

DMCA Safe Harbor shields ISPs from liabilities

- Robert Hendrickson v Ebay, Inc, 2001
- P was copyright owner of "Manson". Pirated version of Manson was being offered for sale on Ebay.
- Ebay was protected by DMCA.
- no knowledge that the activity was infringing
- ISP removed or disabled access to the material
- no financial benefit received
Recording Industry Association of America v Kazaa, Grokster, and others

- The music industry subpoenaed the ISPs for the identities of some of the most active distributors of copyrighted songs.
- This lead to ability to sue 261 individuals it claimed were distributing more than 1000 music files.

Conclusion

- Will the law catch-up with the technological changes?
- Malaysia is amending its Copyright Act for accession to WCT and WPPT.
- Additionally intending to provide limitation of liability for ISP.
• Thank you