

Creative Expression – Benefiting From Your Copyright and Using the Copyright Works of Others in Your Business; IP and the Digital Economy”

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Susanna H.S. LEONG

Associate Professor & Vice Dean

NUS Business School, National University of Singapore

What is COPYRIGHT?

- **A right conferred by the law to prevent others from copying works of intellectual and creative efforts.**
- **It is given to authors of original literary, dramatic, musical and artistic works.**
- **It is also given to owners of other works like sound recording, films, broadcasts, cable programmes and typographical format of published editions of works.**

Basic Principles

- **Copyright does not protect ideas, it only protects the expression of ideas.**
- **All works will only be protected by copyright if the requirement of fixation is satisfied.**
- **This essentially means that the works must be reduced to writing or some other material form.**
- **Copyright is infringed only if there is copying.**
- **It does not confer on the owner an absolute monopoly over his work like patent does.**

Basic Principles

- **Copyright is a personal right to prevent copying and it must be distinguished from the property right granting ownership over the property in which the copyright resides.**
- **In order to enjoy copyright in Singapore, there must be a connecting factor with Singapore.**
- **Copyright arises automatically.**
- **There are no formal requirements of registration to secure copyright.**

Basic Principles

- **Copyright can exist in published and unpublished works.**
- **Copyright is not a single right.**
- **Instead, it is a **bundle of rights** in one work and the totality of these different rights is conveniently referred to as “the copyright in the work”.**
 - A product such as a cinematographic film may comprise a number of different ‘works’ (such as the novel from which a screenplay is written; the screenplay itself; the songs and sound recordings incorporated in the film; and the performances by the actors) and copyright (in the form of a multiplicity of rights) subsists in each of these works independently.
 - Therefore, it is important to dissect the product so as to ascertain the underlying works and the exclusive copyrights conferred on them.

Preserving the Balance between Authors' Exclusive Rights and the Public's Right of Access

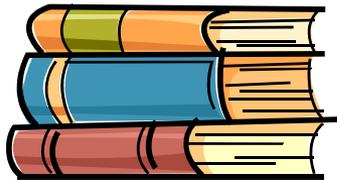
- **Fundamentally important for the law to preserve the right balance between authors'/copyright owners' exclusive rights to exploit their works and the copyright users'/public's right of access to information and ideas.**
 - (a) The idea/expression and the fact/expression dichotomies;
 - (b) The need to prove copying for copyright infringement;
 - (c) A fixed period of copyright protection;
 - (d) Permitted acts which do not constitute copyright infringement;
 - (e) Competition laws;
 - (d) The international obligation in TRIPS to confine limitations or exceptions to exclusive rights to certain special cases which do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the right holder.

Materials protected by copyright

Two main categories

Materials protected by copyright

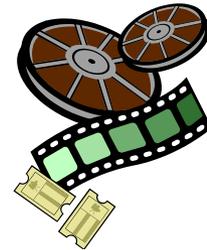
- **Authors' works:**
 - original literary work;
 - original dramatic work;
 - original musical work; and
 - original artistic work



Materials protected by copyright

Entrepreneurial copyright or neighbouring rights :

- sound recordings;
- cinematography films;
- television broadcasts and sound broadcasts;
- cable programmes; and
- published editions of works.



Originality

- To qualify for copyright protection, a work must be original
- The meaning of “original”
- Differs from jurisdiction to jurisdiction
- In general, it means originates from the author, not a slavish copy of another person’s work and there is sufficient skill, labour or judgement in the creation of the work
- A fairly low threshold

What is a literary work?

- A literary work is a work which comprises of one or more words which are designed to offer information, pleasure or instruction to the reader.
- Literary merit is completely irrelevant.
- A wide range of diverse materials has been held to be protected as a type of literary work: registered list of bills of sale, trade catalogues, railway timetables, mathematics examination papers, a compilation of radio and television schedules, letters to newspapers, instructions, translations etc.
- In certain jurisdiction, literary work includes a compilation in any form and a computer program.

What is a dramatic work?

- **Dramatic work includes -**
- **a. a choreographic show or other dumb show if described in writing in the form in which the show is to be presented; and**
- **b. a scenario or script for a cinematograph film, but does not include a cinematograph film as distinct from the scenario or script for a cinematograph film.**
- **Examples: plays, mime and dance**

What is a musical work?

- The authors in “Modern Law of Copyright” defines a musical work to be "the product of the mind of human author which is intended to be performed by the production of a combination of sounds to be appreciated by the ear for reasons other than linguistic content."
- What about computer generated music or sounds?
- Examples: songs, operas and musicals
- Songs, operas and musicals - two distinct copyright

What is an original artistic work?

- **Artistic work refers to:**
 - **a. paintings, sculptures, drawings, engravings, photographs, irrespective of artistic quality;**
 - **b. buildings and/or models of buildings, irrespective of artistic quality; and**
 - **c. works of artistic craftsmanship that are not within (a) or (b).**

What is an original artistic work?

- "Drawings" include "any diagram, map, chart or plan".
- "Photograph" is defined as meaning a product of photography or of a process similar to photography.
- What is a painting?
- Sculptures include casts or models made for purposes of sculptures.
- Engraving includes an etching, lithograph, product of photogravure, woodcut, print or similar work, not being a photograph.

Entrepreneurial copyright

- **What is a sound recording?**
- **What is a cinematography film?**
- **What is a television broadcast?**
- **What is a sound broadcast?**
- **What is a cable programme?**
- **What is a published edition of works?**

To Obtain Copyright Protection

- **No need for registration, the protection arises automatically if certain connecting factors are satisfied.**
 - **Author is a qualified person - a citizen or a person resident in the country in which copyright protection is sought.**
 - **First publication within jurisdiction**
 - **First made within jurisdiction**

The Duration of Copyright Protection

- The duration of copyright protection varies depending of the works involved.
- In most jurisdictions, the duration of copyright for a work (i.e. literary, dramatic, musical and artistic work other than a photograph) is life of the author plus 50 years. But, in some countries, like Singapore, Europe and the US, the period of protection is longer – life of the author plus 70 years.
- In Singapore, copyright subsisting in a photograph shall continue to subsist until the expiration of 70 years after the expiration of the calendar year in which the photograph is first published.

The Duration of Copyright Protection

- In Singapore, the duration of copyright in a sound recording is 70 years after the recording is first published.
- In Singapore, the duration of copyright in film is 70 years after first publication.

The Duration of Copyright Protection

- In Singapore, duration of copyright in a television broadcasts and sound broadcasts is 50 year after first broadcast.
- In Singapore, duration of copyright in cable programmes is 50 year after the first inclusion in the cable programme service.
- In Singapore, the duration of copyright for a published edition of works is shorter, 25 years from the year in which the edition was first published.

Who owns the copyright?

- In the case of a work (i.e. literary, dramatic, musical or artistic work), the general rule is that the author is the first owner of the copyright subsisting in the work.
- Who is this person whom the law refers to as the author of a work?
- Author is the **creator** of the work.

Exceptions

- a. **work of a employee-journalist;**
- b. **work of a commissioned artist and photographer;**
- c. **work of an employee;**
- d. **work executed under an agreement to the contrary.**

Who owns the copyright?

- In the case of entrepreneurial copyright or neighbouring rights, the copyright belongs to the entrepreneur i.e. the producer or the manufacturer of the subject matter.



Dickens



Joint authors

- **The joint authors hold the copyright in their work as tenants in common and not joint tenants.**
- **When one of the joint authors dies, his interest is passed to his beneficiaries in law rather than to his fellow joint authors.**
- **In the absence of contrary agreement, each of the joint authors holds equal undivided shares.**

The Protection of Foreign Copyright Materials

- **Bilateral treaties between countries to secure reciprocal recognition of copyrights.**
- **For example, Singapore is now signatory to the Berne Convention of 1886, last revised in Paris in 1971. Under the convention, member countries must accord similar rights and privileges to each other with regard to all works originating from member countries of the same convention. See the Copyright (International Protection) Regulations.**
- **The impact of TRIPs is also significant as in the agreement, there is Article 3 which states that national treatment must be accorded to signatory countries with regard to the rights and privileges stated in the agreement.**

How can copyright be exploited?

- **By licensing or by assignment.**

What are the exclusive rights conferred on a copyright owner?

- **In the case of a literary, dramatic or musical work, to do all or any of the following acts:**
 - (i) To reproduce the work in a material form;
 - (ii) To publish the work if the work is unpublished;
 - (iii) To perform the work in public;
 - (iv) To communicate the work to the public;
 - (v) To make an adaptation of the work;
- **To do, in relation to a work that is an adaptation of the first-mentioned work, any of the acts specified in relation to the first-mentioned work in sub-paragraphs (i) to (v)**

What are the exclusive rights conferred on a copyright owner?

- To “communicate” means to –
- “transmit by electronic means (whether over a path, or a combination of paths, provided by a material substance or by wireless means or otherwise) a work or other subject matter, whether or not it is sent in response to a request, and includes-
 - (a) **broadcasting** of a work or other subject matter;
 - (b) the **inclusion** of a work or other subject matter **in a cable programme**;
 - (c) the **making available** of a work or other subject matter (on a network or otherwise) in such a way that the work or subject matter may be accessed by any person from a place and at a time chosen by him.”

What are the exclusive rights conferred on a copyright owner?

- In the case of an artistic work, to do all or any of the following acts:
 - (i) to reproduce the work in a material form;
 - (ii) to publish the work;
 - (iii) to communicate the work to the public; and
- In the case of a computer program, to enter into a commercial rental arrangement in respect of the program unless the program is not the essential object of the rental.

What are the exclusive rights conferred on a copyright owner?

- **In the case of sound recordings; cinematography films; television broadcasts and sound broadcasts; cable programmes; and published editions of works, each category are conferred different exclusive rights.**

What are the exclusive rights conferred on a copyright owner?

- These rights discussed in the previous two slides are generally referred to as primary rights of the copyright owner.
- There are also secondary rights : rights to prohibit the importation, sale, offer for sale, letting for hire or any distribution for the purpose of trade in Singapore which was made in infringement of copyright in the country in which it was made.

Infringement

The meaning of copying or reproduction.

1. Counterfeiting copying

2. Substantial copying

- a question of fact
- a question of quality of the part taken
- originality of the part taken
- how essential is the part taken
- purpose of the taking

Infringement

- **Copyright is infringed if there is proof of copying:**
 - **the alleged “copied work” must be shown to have been derived from the original earlier work.**
 - **there must be objective similarity between the copyright work and the infringing work**
 - **there must be a causal connection between the two works**

Defences

- **Fair dealing defences**
 - **Fair dealing in relation to works**
 - **Fair dealing for purpose of criticism or review**
 - **Fair dealing for purpose of reporting current events**
 - **Reproduction for purposes of judicial proceedings or professional advice**

Fair dealing in relation to works

Whether the dealing is fair depends:

- **the purpose and character of the dealing;**
- **nature of the work or adaptation;**
- **how much has been taken;**
- **the effect of the dealing on the potential market for the work or the value of the work;**
- **the possibility of obtaining the work or adaptation within a reasonable time at an ordinary commercial price**

Remedies available to the copyright owner

- **Civil Proceedings**
 - injunction
 - damages
 - account for profits
 - delivery up
 - forfeiture
 - destruction or disposal of infringing copies of the copyright work
- The copyright owner may sue the person who **does** the infringing acts or any person who **authorises** the doing of the infringing acts.
- **Criminal Proceedings**

Intellectual Property in the Digital Economy

The World Wide Web

- A mechanism, or system, for linking together millions of electronic documents, or web pages, each of which can be accessed through a unique, yet changeable, Universal Resource Locator (URL).
- A website = a collection of web pages

Origins of the Internet

- 1969
- Experimental project of the Advanced Research Project Agency (ARPA) and was called ARPANET.
- This network linked computers and computer networks owned by the military, defense contractors, and university laboratories conducting defense-related research.

Origins of the Internet

- ARPANET evolved beyond its research origins in the US to universities, companies and most individuals in the world.

ARPANET → DARPA → Internet

Copyright related issues

The Problem

- Digital technology, in particular the Internet, has revolutionized the way authors', composers' and artists' works are reproduced, accessed, communicated and distributed.
- New technologies have enabled and encouraged more works to be reconstituted as digital products and distributed through a virtual communications network on the Internet -- a far cry from the early days whereby Internet technology was used merely to process goods or services delivered through conventional means.

The Problem

- Computer technologies that have been making waves in the digital world include the MP3, peer-to-peer (“P2P”) file sharing software like Grokster, Kazaa, and eDonkey, blogging, podcasting and streaming – new ways of distributing content to listeners and viewers via the Internet.
- These technologies have dramatically altered the structure and economics of the business models under which copyrighted works are published and distributed to the public.

The Problem

- A virtual market-place for music and entertainment products now exists notionally in cyberspace.
- Its existence is not contained by national boundaries or borders and it challenges traditional legal protection norms such as national copyright laws that are typically territorial in nature.

The Problem

- Possibly, the most difficult task for legislators and the courts to date has been the regulation of the use or abuse of copyrighted digital products accessed through the Internet.
- For copyright owners, the ability to exclude others from unauthorised access to their digitally constituted works on the Internet is crucial to the commercial profitability or viability of their business enterprises.

The Problem

- In order to take legal action for copyright infringement on the Internet, copyright owners must address three fundamental issues: (1) who is liable for the infringement; (2) which jurisdiction does he take his action in and which national law is applicable in his case; and (3) what acts of infringement have been committed under the applicable law.
- In light of the strong territorial premise of copyright laws, the localization of an act of copyright infringement within a particular jurisdiction for the unauthorized transmission of online copyrighted materials in a spatial dimension like cyberspace is a complex and problematic exercise.

Infringement of copyright in cyberspace

- Meaning of "reproduction"
- Reproduction in relation to any work, or subject matter other than a work, includes the making of a copy which is transient or is incidental to some other use of the work or subject matter other than a work.

Infringement of copyright in cyberspace

- The exception of user caching
- The law expressly provides that copyright in any material is not infringed by the making of a transient or incidental electronic copy of the material from an electronic copy of the material made available on a network, if the making of the first-mentioned copy is required for the viewing, listening or utilisation of the material by a user of this or another network.
- An "electronic copy" in relation to any material has been defined to mean a copy of the material in an electronic form, and includes the original version of the material in that form.

The position of browsing, framing and linking web pages

- **Browsing**
- As a result of the amendments and the provision for the exception of user caching, browsing does not infringe the copyright in the materials made available in an electronic form on the Internet.

The position of browsing, framing and linking web pages

- **Framing**
- Framing or content windows refers to the technology which allows a Web site owner to enable users to view all or part of third parties' Web sites while remaining at the first Web site.
- The third parties' Web sites are usually "framed" or surrounded with the advertisements of the first Web site and the advertisements of the third parties' Web sites are omitted.

The position of browsing, framing and linking web pages

- In the United States, a law suit was filed on 20 February 1997 by a number of newspapers and periodicals in the Southern District Court of New York against TotalNews, Inc. alleging that TotalNews had designed "a parasite Web that republishes the news and editorial content of others' Web sites in order to attract both advertisers and users."
- This would have been an excellent opportunity for the courts in the United States to deliberate on this on framing but the case was settled.
- The parties agreed that TotalNews could continue to link to the newspapers' sites but the linking was restricted to text links only, no logos were allowed and framing must ceased.
- See *The Washington Post Co., et al. v TotalNews Inc., et al.*, 97 Civ 1190 (filed February 20, 1997).

The position of browsing, framing and linking web pages

- **Linking**
- Linking refers to the creation of “hypertext links” – links to hypertext somewhere else on the Web, which is constructed in a computer language called hypertext markup language, or HTML.
- The ability to create these links is one of the main advantages of the Internet and is essential to its operation.

New Authors' Rights relevant to Cyberspace

- Right of Communication
- Right of Making Available

The Right of Communication to the Public and the Right of Making Available to the Public

- The right of communication to the public is not, by any means, a novel right.
- It has its roots in the Berne Convention for the Protection of Literary and Artistic Works 1886 (“Berne Convention”), although commentators have rightly pointed out the inadequacies of protection conferred by the provisions therein.
- The modern incarnation of the communication right is to be found, *inter alia*, in Article 8 of the WIPO Copyright Treaty 1996 (“WCT”).
- From the plain wording of the provision, it is clear that Article 8 WCT encompasses not only the concept of “communication” to the public, but also provides for a specific and distinct right of “making available” to the public.

The Right of Communication to the Public and the Right of Making Available to the Public

- Singapore, a recent signatory to the WCT, chose to implement the Article 8 obligation through a fairly broad definition of the word “communicate” in section 7(1) of the Copyright Act 1987.
- In Singapore, therefore, the right of communication to the public comprises – (i) the “traditional” rights of the copyright owner to broadcast a work and to include the work in a cable programme, and (ii) the more “contemporary” right of the copyright owner to *communicate* or *transmit* his works to the public through the Internet and other digital media as well as to *make available* those works to the public within the meaning of Article 8 WCT.

The Right of Communication to the Public and the Right of Making Available to the Public

- It is important to distinguish between the concepts of “communication” on the one hand and “making available” on the other, as well as to identify some types of Internet activity which may fall within the scope of each right.
- The act of communicating is synonymous with the act of transmitting, which must mean that there is a start point and an end point to the whole process.

The Right of Communication to the Public and the Right of Making Available to the Public

- There is, first of all, the source or origin of the transmission and, at the other end, the point of reception.
- Obviously, the communication process is not complete without proper transmission and reception.
- In this regard, ISPs which help transmit digital material on the Internet from a host website/server to an end-user have necessarily participated in acts of communication, and the same is true for those who are engaged in broadcasting and cable-casting (generally, operators of “push” technologies).

The Right of Communication to the Public and the Right of Making Available to the Public

- In contrast, there is only one point of reference in relation to the act of “making available”.
- A work is, according to Article 8 WCT, made available to the public once members of the public can access the work from a place and at a time individually chosen by them.

The Right of Communication to the Public and the Right of Making Available to the Public

- The process of “making available” is therefore complete as soon as the act of providing access to the work in question is performed, and there is absolutely no need to make further reference to the point(s) of reception.
- In this respect, a content provider who uploads digital content onto a web server (and generally, operators of “pull” technologies) would have made the requisite information available to the public at that point, regardless of the subsequent number of recipients and their location.

The Right of Communication to the Public and the Right of Making Available to the Public

- Therefore, whilst the drafters of national copyright laws may have framed the Article 8 WCT obligation under the broad “umbrella” provision of the right of communication to the public, it must be emphasized that the copyright owner’s specific right of “making available” to the public is necessarily a separate and distinct right.

The Right of Communication to the Public and the Right of Making Available to the Public

- Consequently, even where it has been alleged that the copyright owner's exclusive right of communication to the public has been infringed, it is necessary, especially in light of the territoriality principle in copyright law, to enquire further into the precise nature of the defendant's infringing activity when determining where an infringement of copyright has occurred.

Does linking infringe the right of communication to the public?

- Recent Court of Justice of the European Union (CJEU) case - Nils Svensson and others v Retriever Sverige AB Case C-466-12.
- A reading of the CJEU decision suggests that "providing on a website a link to another website, where a copyright work is “freely available”, does not constitute an ‘act of communication to the public’ in the meaning of Article 3(1) of Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights. Consequently linking is not copyright infringement."
- It appears that if the work linked is already freely accessible to the public, there is no issue.
- However, if “where a clickable link makes it possible for users of the site on which that link appears to circumvent restrictions put in place by the site on which the protected work appears in order to restrict public access to that work to the latter site’s subscribers only, and the link accordingly constitutes an intervention without which those users would not be able to access the works transmitted, all those users must be deemed to be **a new public**, which was not taken into account by the copyright holders when they authorised the initial communication, and accordingly the holders’ authorisation is required for such a communication to the public.”
- In such a case, the linking is likely to be considered to have infringed copyright in particular the right of communication/right of making available.

Do the following acts constitute copyright infringement?

- 1. *Fly-by-nite* (a sole proprietor) runs an online business where, for a small fee, members of the Internet community can visit his virtual “store” and purchase unauthorised digital copies of the latest hit song.
- 2. *Techie*, the IT manager of a medium-sized dot.com company, downloads for a fee an original piece of computer software (e.g. *Macromedia Flash*) and, as instructed by his superiors, makes multiple copies of it for the use of all company employees in the IT and web-design departments.

Do the following acts constitute copyright infringement?

- 3. *JJ*, a private individual, uploads to an Internet host server/website a digital copy each of several Hollywood films (prior to their official commercial release) for other Internet users to download for free.
- 4. *Digital Philanthropist*, a private individual, designates several files in his computer's hard drive as being available for sharing/swapping (for free, of course) with other users of a P2P file-sharing network.

Do the following acts constitute copyright infringement?

- 5. *Chatty*, a 25-year-old student, has numerous online “chat mates” with whom he ICQs on a daily basis. Recently, over several chat sessions, *Chatty* forwarded a large number of unauthorised MP3 files to all his online pals for their listening pleasure.
- 6. *Touch-me-not*, a university undergraduate, habitually downloads from the Internet – for his own personal consumption – unauthorised copies of music and movie files (each file or collection of files corresponding to a distinct song or movie title) and now has some 50 Gigabytes (GB) of copyright material stored in his computer’s hard drive.

Thank you!