

## **LENDING NO LONGER UNDER THE CONTROL OF COPYRIGHT IN MALAYSIA**

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### **ABSTRACT**

*Reports the amendment made by the Malaysian Copyright (Amendment) Act 1997 which came into force on 1 April 1999. Lending is no longer an exclusive right controlled by a copyright holder under the Malaysian Copyright Act 1987.*

**KEYWORDS:** Copyright; Lending right; Legal issues.

### **INTRODUCTION**

The recent abolishment of the lending right under the Copyright Act is good news for libraries in Malaysia. Section 4(a) of the Copyright (Amendment) Act 1997 (Act A994), which came into force on 1 April 1999 through PU (B) 120/99, removed the word 'lending' from the list of exclusive rights controlled by a copyright holder.

### **LENDING RIGHT**

Prior to the amendment, section 13(1)(e) of the Malaysian Copyright Act 1987 (Act 332) provided a copyright holder of a work the exclusive right to control in Malaysia "the distribution of copies of the work to the public by sale, rental, lease or lending." This clause was added in 1990 under the Copyright (Amendment) Act 1990 (Act A775) which came into force on 1 October 1990 when Malaysia became a party to the Berne

Convention for the Protection of Literary and Artistic Works Treaty.

The word 'lending' was not defined in the Copyright Act. Taking a cue from overseas, we find that section 18A of the United Kingdom's Copyright, Designs and Patents Act 1988 defines 'lending' to mean the "making a copy of the work available for use, on terms that it will or may be returned, otherwise than for direct or indirect economic or commercial advantage, through an establishment which is accessible to the public," and 'rental' to mean the "making a copy of the work available for use, on terms that it will or may be returned, for direct or indirect economic or commercial advantage." Juxtaposed with the word 'rental', it is apparent that 'lending' means lending without payment, which is what most libraries do.

Under the old provision, it was legitimate for a copyright owner to control the

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manner of a work, such as a book, being distributed to the public by way of lending. This lending right can be exercised in various forms. Proposals include a payment to authors according to the frequency of books being lent out from the libraries, or a restriction on the way a book may be lent out. An example of a clause found in the verso of a title page exercising this right reads:

This book is sold subject to the condition that it shall not, by way of trade or otherwise, be lent, resold, hired out, or otherwise circulated without the publisher's prior consent in any form of binding or cover other than that in which it is published and without a similar condition including this condition being imposed on the subsequent purchaser.

In the United Kingdom, the Public Lending Right Act 1979 establishes a scheme for compensating authors of books according to the number of books charged out in the public libraries. The money is paid out of a public fund operated by the Department of Culture, Media and Sport. No similar scheme has ever been implemented in Malaysia, although a clearing house system was discussed informally in previous copyright and intellectual property forums.

#### **COMMERCIAL RENTAL**

The 1997 amendment replaces section 13(1)(e) of the Copyright Act with "the

distribution of copies to the public by sale or other transfer of ownership," and adds paragraph (f), "the commercial rental to the public" as an act under the exclusive control of the copyright owner. In effect, the copyright owner may control the sale and subsequent sales of the work, as well as the commercial rental thereof, but not the lease and lending of the work.

'Commercial rental' or the word 'commercial' are not defined in the Copyright Act. If the United Kingdom Copyright, Designs and Patents Act 1988 is of any help, the definition of rental will show that the word 'commercial' is really to clarify that 'rental' means a rental where economic benefit is involved.

Enterprises which rent books will be caught by paragraph (f), so will video and VCD rental shops which buy an original copy of a movie and rents it out at day rates. Libraries which charge an overdue fine, however, would most probably not be affected although the Act or amendment is silent on this. This should also be the case where the libraries charge their patrons an annual subscription fee not dependent on the number of books borrowed.

#### **IMPLICATIONS FOR LIBRARY PRACTICES**

The abolishment of the lending right is not expected to affect the existing practices of libraries, whether public or private. Rather, it should act as a signal for the establishment of more public library facilities in the country. As re-

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gards the 'commercial rental' clause, a simple guide is that if the books are loaned out without payment of a fee, libraries will not be infringing the law.

It is still not certain whether restrictive clauses found on material prohibiting or restricting lending of books will be enforceable in the light of the amendment. This is still a debate in legal circles known as 'copyright preemption'. In brief, the issue is whether contractual clauses which are against copyright are enforceable. The law of copyright preemption is not settled in Malaysia. The most we can conclude now is that these restrictive clauses derive their authority not from copyright but from contract.