

Copyright Tribunal in Malaysia. The New Paradigm

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Abstract--With the increasing of intellectual property cases in Malaysia, the specialised court ;i.e, the Intellectual Property Court is not the only mechanism for access to justice. Due to the advent of alternative disputes resolution, a Copyright Tribunal was introduced, which is the first and only intellectual property statute in Malaysia that provides ADR as the other alternative settlement. This tribunal functions as an alternative forum for interested person to apply for uses of copyrighted works belongs to others and claim relief by any operator of copyright licensing schemes. It was established under the amended Copyright Act 1987 (Act 332) i. e in section 28 of which came into force on the 1st of March 2012. Recently, through gazette notification published on 3 June 2020, the Minister of Domestic Trade and Consumer Affairs has declared that the 1 July 2020 as the date on which the Malaysian Copyright (Amendment) Act 2020 ("Amendment Act") will come into operation. The new provision section 59c will provide an alternate, cost reducing and time efficient platform for licensing bodies and their members to resolve disputes relating to royalties by providing additional powers to the existing Copyright Tribunal. With this new emergence of the long awaited amendments, the Copyright Tribunal which had not been functioning effectively before, will set to move forward to assist in resolving matters more efficiently in terms of cost, time and at the same time ensuring the interest of all parties involved. This article aims at discussing the needs of Copyright Tribunal in settling disputes between licensing bodies or collecting societies and the members as well as determining issues brought about by users of copyright works (copyright licensee). This article also gives a glance to the establishment of Copyright Tribunal of Australia to observe and learn for improvement.

Keywords : Copyright, Malaysia, Tribunal

I. INTRODUCTION

Intellectual property disputes in Malaysia always involve a technical matters which becomes amongst reasons of the establishment of Intellectual Property Court. However, with the rising of intellectual property cases in Malaysia, the specialised court is not the only mechanism required. Due to the advent of alternative disputes resolution, a Copyright Tribunal was introduced, which is the first and only intellectual property statute in Malaysia that provides ADR as the other mechanism of access to justice. This tribunal functions as an alternative forum for interested

person to apply for uses of copyrighted works belongs to others and claim relief by any operator of copyright licensing schemes.

II. PROBLEMS

Prior to the implementation of the Copyright (Amendment) Act 2012, it was not a requirement for licensing bodies to apply the Copyright controller to be declared as such. Over time, however, it was understood that government control and supervision of licensing bodies was required to deter possible misuse of power by them. Due to the rigidness of courts procedure, the Copyright Tribunal is the best option to resolve disputes relating to collecting societies and all matters connected therewith.

III. RESEARCH METHODS

This articles is written based on qualitative research methodology which is primarily an arm chair research or library research.

IV. DISCUSSION

Collecting Societies as a Licensing bodies in Malaysia

Among the reasons for the formation of the Copyright Tribunal is that to prevent possible abuse of power by the collecting societies. In Malaysia, just after the implementation of the Copyright Act 1987 [1] the establishment of bodies to collectively manage copyright for and on behalf of copyright owners occurred.

The first collecting society in Malaysia was represented to administer the public performance right of sound recording was the Phonographic Industry (Southeast Asia) Sdn Bhd. The Music Author's Copyright Protection Berhad was incorporated the following year to administer the distribution rights of musical and related literary works as well as the public performance and broadcast [2]

An association or entity that is established to negotiate and issue copyright licences for and on behalf of copyright owners is referred to as a 'licensing body' under the CRA 1987. Essentially, the licencing body grants licences and collects royalties on behalf of its members who are the

copyright owners. In *Public Performance Malaysia Sdn Bhd & Anor v PRISM Berhad*, a copyright ownership dispute relating to rights in a number of licencing documents used during the collection of royalties between two licencing bodies was brought to the attention of the High Court. It is the first reported case in Malaysia relating to licencing bodies. [3]

A 'licensing body' referred to in section 3 of the CA 1987 implies a corporation or an entity deemed under section 27A of the Act to be an licensing body. Section 7A(1) allows any corporation or entity that wishes to act as a licensing body for copyright owners or for a designated class of copyright owners to apply to the Copyright Controller to be considered a licensing body. Each licensing body functions within the context of its own licensing scheme. Pursuant to section 27AA(2), the licensing scheme is a scheme which sets out the following two issues. First, it enumerates the types of activities relevant to copyright work in the potential copyright licences, and second, it sets out the terms on which the licenses will be issued.

Before the Copyright (Amendment) Act 2012 is implemented, it was not a requirement for a licensing body to apply to the Copyright Controller to be declared as such. Over time, however, it was understood that government control and supervision of licensing bodies was required to deter possible misuse of power by them. Thus, section 27A of the CRA 1987 was amended to mandate any corporation or association that wishes to act as a licensing body for copyright owners to apply to the Controller of Copyright. With the enforcement of the Copyright (Licensing Body) Regulations 2012 on 1 June 2012, all current and prospective licensing bodies shall apply for the Controller's declaration to act as collective licensing bodies on behalf of their members. However, the government leaves the matters on royalty rate to the parties concerned to decide based on the agreed contractual terms.

As a matter of fact, no obligation for a proposed licensing body to send in the terms of the licensing scheme that the licensing entity plans to run to the Controller, however according to section 27B any entity or individual that requires licenses set out in the proposed licensing scheme to may refer to the Copyright Tribunal for such licensing terms determination. The Copyright Tribunal may affirm or vary the licensing scheme or license. In addition to that, disputes between licensing operator and licensing applicants can also be referred to the Tribunal. Furthermore, an individual alleging to have been denied a license by a licensing scheme provider is also entitled to apply for an award from the Tribunal.

The collective copyright administration by and on behalf of copyright owners was first implemented in Malaysia in the late 1980s, just after the enactment of CRA 1987. Taking into

consideration the first copyright protection was said to be introduced way back in 1902, this movement was believed to be late . The earliest collective management body founded in Malaysia was Public Performance Malaysia Sdn Bhd ('PPM'), which was founded in 1988 to work for Malaysian and foreign recording companies to collectively administer public performance rights in sound recordings in Malaysia. PPM is a commercial shareholder, a wholly-owned company of Recording Industry Association of Malaysia ('RIM'). PPM can only be the collecting body for RIM-member which are the sound recording companies.

Another licensing body or collecting society was established in 1989 to grant copyright licenses to music users comprising of radio and television stations, entertainment channels, stores, digital, online and service providers, and rewarding songwriters and publishers when their works are transmitted and publicly performed. This collecting society operates under the name of Music Authors' Copyright Protection ('MACP') as a public company limited by guarantee.

The CRA 1987 was amended in 2000 as a response to Malaysia obligation towards the Intellectual Property Rights Trade-Related Aspects Agreement (TRIPs), to incorporate performer protection by adding performer rights. In compliance with section 16B of CRA 1987, equitable remuneration was available to performers relating to their public performance, broadcasting or other public communication of sound. The CRA 1987 does not include what constitutes 'equitable remuneration' or its estimation. The amount of remuneration however appears to depend on the utilisation of the works, the economic significance of the work for the licensee and the royalties received. In March 2001 pursuant to the enactment of section 16B, the Performers & Artistes Rights (Malaysia) Sdn Bhd ("PRISM Sdn Bhd") licensing body was set up to protect, execute and collect royalty for its members in respect of the performers' rights of performers members. It is the first body to represent the interests of performers in Malaysia. PRISM Sdn Bhd dissolved in 2012 and replaced by a new organization known by the acronym PRISM Berhad which was created to gather, distribute and safeguard performers' rights.

In the same year a new licensing body formed to reflect the interest of recording artists and musicians, known as Recording Performers Malaysia Berhad ('RPM Bhd'). Presently, PPM is authorised by RPM Bhd in respect of the public performance of, broadcasting or any other communication to the public of all commercial sound recordings which contain their performance and collect royalties for and on behalf of members of RPM. [3]

As to date, there are three (3) Licensing Bodies that had been declared to perform collection

on royalty in relation to the music industry which as follows:

- i. Music Authors' Copyright Protection Berhad (MACP) representing composer and lyricist, declared on 28 September 2012
- ii. Public Performance Malaysia Sdn. Bhd. (PPM) representing recording companies, declared on 05 March 2013.
- iii. Recording Performers Malaysia Berhad (RPM) representing singers and musicians of sound recording, declared on 06 March 2013

Previously, disputes relating to the distribution of royalties between the licencing body and each of its members have been mediated by Music Rights Malaysia Berhad (MRM) or by legal proceedings, where applicable. The Copyright Tribunal, which has not functioned efficiently before, would go forward with this latest emergence of the long-awaited reforms, to help settle matters more effectively in terms of expense, time and, at the same time, to ensure the welfare of all parties concerned. [4]

Seeking Justice from Copyright Tribunal

Because of certain opportunities it offers to justice seekers and administrators of justice, the tribunals exist in addition to the ordinary courts of law all over the world. For strictly administrative purposes, tribunals were needed by the social legislation of the twentieth century: they could provide quicker, cheaper and easy access to justice, necessary for the administration of welfare programmes involving a large number of minor claims, while the judicial process is elaborate, slow and expensive.

What is Tribunal?

As described in The Cambridge Dictionary, Tribunal is a special court or group of people who are officially chosen, especially by the government, to examine (legal) problems of a particular type for example a war crimes tribunal.

Generally, tribunal is "...any person or institution with authority to judge, adjudicate on, or determine claims or disputes, whether or not it is called a tribunal in its title..." [5]. Many governmental bodies that are titled 'tribunals' are so described to emphasize that they are not courts of normal jurisdiction. For example, in Malaysia the Consumer Tribunal is a body specially constituted under the Consumer Protection Act 1999 to assist in consumers dispute settlement, the Homebuyer's Tribunal is an avenue for homebuyers to obtain damages or compensation from the housing developers. The word tribunal implies a judicial (or quasi-judicial) body with a lesser degree of

formality than a court, to which the normal rules of evidence and procedure may not apply, and whose presiding officers are frequently neither judges nor magistrates.

On the same effect, the Copyright Tribunal is an independent body established under the Copyright Act 1987 with a principal task to adjudicate disputes between collective licensing agencies and persons (natural or legal) in a situation whereby the parties are not able to agree between themselves, over terms and conditions of copyright licensing and royalty payments.

Why not court?

While the role of tribunals seems to be similar to court because they settle disputes, they are not part of the court system. Administrative tribunals are set up to be more informal, less costly, and a simpler way to settle issues than using the court of justice system.

The cost borne by the government is relatively smaller in order to make a tribunal functioning, and parties only bear the minimum cost. The tribunal is a much cheaper way to settle cases than resorting to the court's standard procedure. In hearing and deciding cases, the tribunals are much faster than those of the courts. A related benefit of the court system is the certainty that it will be heard on a specified date and that a case will be decided within a specified date.

Tribunals are compliant with an informal process. In the tribunal's trials, the strict rules relating to facts, pleadings and trials common to the courts are not binding. Natural justice and fair play concepts are followed. By exercising discretionary powers, they can rely on hearsay evidence or decide questions relating to the onus of evidence or the admissibility of documents, etc.

The Tribunals are not bound to abide by the rigid law precedent. Therefore, a Tribunal has the ability to amend its previous judgement in any instance or the tribunal will take the view that the previous decision was accurate.

The judges may not be well aware of the cases of the ordinary Court, or it may arise that a judge may not feel comfortable hearing specific types of cases because he does not have proper knowledge of that subject. Tribunals are exempt from this kind of problem. In most cases, the tribunals are made up of people who are experts on tribunal problems.

Copyright Tribunal in the Copyright Act 1987

The need for an agency to serve as a bulwark against the possible misuse of power by collecting societies, to review and assess royalty and licensing payments and to interfere in the event of conflicts between users and collecting societies is evident with the growth of collective administration. Originally, for such oversight and interference, CRA

87 made no provision. In cases where there has been a reluctance to grant a licence or where there was unreasonable terms and conditions involved, the High Court was the only reference.

In 1996, under a new Part IVA entitled 'Copyright Licensing,' the authority of the high court was stripped away and entrusted to a Copyright Tribunal. [5]

As originally formed, the Chairman and not more than 20 other members constituted the Copyright Tribunal. However, by introducing the appointment of Deputy Chairman, the Copyright (Amendment) Act 1996 expanded the composition of the Tribunal. As provided in section 29(1), the Tribunal shall consist of the following persons who shall be appointed by the Minister:

- (a) a Chairman;
- (b) five Deputy Chairmen; and
- (c) twelve persons whom the Minister considers fit and proper to be members of the Tribunal.

The Chairman, Deputy Chairmen, and members of the Tribunal shall be deemed to be public servants and holding office for a period not exceeding three years, after which they shall be eligible to be reappointed. There shall be a Secretary to the Tribunal and such other officers as may be necessary to assist the Tribunal, who shall also be appointed by the Minister.

According to section 30(1), every proceedings before the Tribunal shall be heard and disposed of by the Chairman or Deputy Chairman and two other members selected by the Chairman from among the members appointed under section 29. It is evidently spelled out by the Act that the member of the Tribunal shall not take part in any proceedings before the Tribunal if he has a pecuniary interest in any matter which is to be determined by the Tribunal.

It was established pursuant to the amended Copyright Act 1987 (Act 332) i.e. in section 28 of which came into force on the 1st of March 2012. The Tribunal is a medium to submit complaints to interested parties, who are all included;

- i. performers include actors and actresses, dancer, singers, musicians, or any person who performs a performance;
- ii. Operators, a Copyright Controller licensing agency which is currently running a licensing scheme provided to any individual or company;
- iii. An person or organization (users) using the operator's licensing schemes;
- iv. A Copyright Controller Licensing body whose declaration was withdrawn; and
- v. Any person interested to apply for a license in Malaysia to produce or publish translation of a literary work in other languages in the national or other vernacular languages.
- vi. New provision of section 59c grants additional powers to the current Copyright

Tribunal to settle royalty conflicts between licensing bodies and their representatives. This power has been embedded in the Copyright (Amendment) Act 2020 as was announced by Minister of Domestic Trade and Consumer Affairs on 3 June 2020 and later published in the Gazette on 1 July 2020 which the Malaysian Copyright (Amendment) Act 2020 will come into effect.

There is provision available in section 30A(1) which allows reference of questions of law to High Court. Generally, the Tribunal may of its own motion, or at the request of a party refer a question of law arising in proceedings concluded before it for determination by the High Court and the High Court shall hear and determine the question referred to it as if the reference were an appeal to the High Court against the decision of the Tribunal. Consequently, the High Court shall confirm, vary, substitute or quash the decision, or make such other order as it considers just or necessary and the decision shall be final and conclusive, and no such decision shall be challenged, appealed against, reviewed, quashed or called in question in any other court or before any other authority, judicial or otherwise.

The position of Copyright Tribunal in Australia as a Selected Jurisdiction

The Australia's Copyright Tribunal is an autonomous entity governed by Australia's Federal Court. The Tribunal was created under Part VI, i.e. section 138, the Copyright Act 1968. The Regulations on the Act and Copyright (Tribunal Procedure) stipulate membership, functions, powers and procedures. Australia's Copyright Tribunal consists of a President and any selection of Deputy Presidents and other Governor-General named members. The President must be Australia's Federal Court and a Deputy President must be a district court judge or a State or Territory Supreme Court. A member (other than the chairman or vice chairman) must meet one of the five conditions set out in s 140(2) of the Copyright Act 1968.

The Tribunal has no physical infrastructure. Federal Court workers provide registration and logistical assistance.

The Tribunal has authority over the following forms of licensing:

- (i) Statutory Licences; (or statutory exclusions from infringement) are created by the Act when specified conditions are satisfied. These permit reproduction of certain copyright materials by educational institutions, institutions assisting persons with certain disabilities.
- (ii) Voluntary Licences; are the result of negotiation between a copyright owner

or its representative, such as a collecting society, and the licensee. Many of the Act's provisions relevant to voluntary licences depend on the notion of a "licence scheme". Most licence schemes are administered by collecting societies. Licences granted under licence schemes are often referred to as "blanket licences". They cover all works in the particular collecting society's repertoire.

Generally, the Tribunal can refer to the Federal Court of Australia (section 161) a question of law arising in proceedings before it on its own motion or at the request of a party. [6]

V. CONCLUSION

Recent conflicts in entertainment industry relating to the issue of royalties paid by the collecting society to its member demands the effective role by the Copyright Tribunal. Although, the Malaysian Copyright Tribunal differs from the one in Australia which consists of judges of the judiciary system, the power given is clear as being mandated in section 28 of the Copyright Act 1987. With the new amendment of placing issue of royalty payment under the ambit of Copyright Tribunal, it is foreseen that the Tribunal will be busy receiving numbers of cases to be considered, determined and enforced upon. Since the inception of the Copyright Tribunal, many has put hope to see the change in the way the copyright issues being handled in the copyright industry. The new line of tribunal members is yet to observe and explore cases under its jurisdiction, once presided, it would set a new paradigm which expected to give impact to the copyright society in Malaysia.

ACKNOWLEDGEMENT

This article is produced as part of the output of research grant provided by the Universiti Kebangsaan Malaysia, "Developing a New Legal Protection for the Iban's Traditional Cultural Expressions (TCEs) in Sarawak, Malaysia", GUP-2019-063.

DISCLAIMER

This article is still needed further research to reach more proper and accurate analysis. It is the hope of the author to enhance this writing into a comprehensive piece of work in future.

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