



FACULTY OF LAW, UNIVERSITY OF MALAYA



# CELEST

CENTRE FOR LAW AND ETHICS IN SCIENCE AND TECHNOLOGY



## Welcome to CELEST Newsletter!

In this issue, our researcher, Dr Sik Cheng Peng highlights the importance of respecting the copyright in a work when sharing digital content online.

Dr Sik points out that when sharing content online, one should never assume that the copyright owner has authorized the sharing of his work simply because he has published his work on the internet. When sharing content online, it is best practice to provide a link to the original website rather than download the content and then upload it to another website.

By using the recent European Court of Justice's ruling in *Land Nordrhein-Westfalen v Dirk Renckhoff* (Case C-161/17, 7 August 2018) as case study, Dr Sik discusses the reasons as to why, when sharing content online, one should avoid downloading a work and subsequently uploading it.

The judges' legal reasoning in the case is equally applicable in the Malaysian context, even though the decision is not binding on Malaysian courts.

## NEWS:

Congratulations to :

- > Dr Sik Cheng Peng on her appointment as Deputy Director of UM Centre of Innovation and Commercialization beginning from 1 February 2019.
- > Dr Ainee Adam on her appointment as Deputy Dean for Research, Faculty of Law, UM from 18 April 2019.

Research grants :

- > Associate Professor Dr Tay Pek San was awarded a research grant by The Sumitomo Foundation for a research entitled 'The Impact of Artificial Intelligence on the Right to Privacy: A Comparative Study of Data Protection Law in Japan and Malaysia'.
- > Dr Sherin Kunhibava and Dr Md Ershadul Karim were awarded a UM-QRC-IBH Research Grant to conduct a research entitled 'Smart Sukuk Structure: Using the Blockchain Technology' (working under the Malaysian Centre of Regulatory Studies, Faculty of Law, UM).



### NEWS (continued):

#### Publications :

- > Dr Md Ershadul Karim conducted two studies for the Ministry of Justice, the United Arab Emirates:
  - (i) Data Protection under GDPR [Drone, Insolvency and IP issues, GDPR developments]
  - (ii) The regulation of Fake News [Social Media, Defamation, Fact-Checking].
- > Dr Md Ershadul Karim was commissioned by Wolter Kluwer, the Netherlands to write a book on 'Cyber Law in Bangladesh' as part of the International Encyclopedia of Law.

### EVENTS:

8 May 2019: Professor Tomas Lipinski, Dean of the School of Information Studies, University of Wisconsin-Milwaukee presented a talk on 'Recent Copyright Developments in the US and Access to Information in Libraries'.

2 May 2019: CELEST co-organised a stakeholders forum entitled 'Mapping the Malaysian Biobanking Landscape: Challenges and Opportunities' at the Academy of Sciences Malaysia. Dr Mohammad Firdaus Abdul Aziz spoke on 'Informed Consent and Biobanks', Associate Professor Dr Tay Pek San spoke on 'Biobanking and Data Protection Law in Malaysia' while Dr Sharon Kaur moderated the summary panel.

25 April 2019: At the UM eHealth\_CELEST Joint Research Seminar, Associate Professor Dr Tay Pek San and Dr Pardis Tehrani spoke on data protection law in eHealth.

16 April 2019: Dr Sharon Kaur presented on 'International Approaches to Regulation, Policy and Governance' and Dr Mohammad Firdaus presented on 'Regulatory Considerations for Gene Editing in Malaysia' at the public conference on 'Getting the Ethics of Genome Editing Right: Engaging Multiple Perspectives' organized by UM Faculty of Medicine jointly with Johns Hopkins Berman Institute of Bioethics.

1 April 2019: Associate Professor Dr Marina bte Mohd Bakri, Dr Syarifah Nur bte Syed Abdul Rahman and Dr Wan Izlina bte Wan Ibrahim from the Faculty of Dentistry, UM paid CELEST a visit to discuss the possibility of collaboration in a research on predicting stress-related biomarkers of hair shaft.

11-12 February 2019: Dr Kalavathy Maruthavanar presented a paper on 'Banking and Artificial Intelligence - studying its legal and ethical implications' at The Financial Law Amity Symposium, Centre for Banking & Finance Law, National University of Singapore.

### UPCOMING EVENTS:

4 July 2019 at 10-11am at Bilik Persidangan, Faculty of Law, UM: Dr Chai Lay Ching from the Institute of Biological Science, Faculty of Science, UM will be speaking on the ethical/legal aspects of research under the Malaysian Code of Responsible Conduct in Research.

6 August 2019 at 10-11am at Bilik Persidangan, Faculty of Law, UM: Puan Ainul Azlinda bte Inon Shaharuddin, General Manager, Legal Strategy, Intellectual Property, Telekom Malaysia Berhad will be sharing the experience of the telco industry in implementing the Personal Data Protection Act 2010.

Dr Sik Cheng Peng is a senior lecturer at the Faculty of Law, University of Malaya. She is an alumna of the WIPO-WTO Colloquium for Intellectual Property Teachers and teaches copyright law to postgraduate students. Her areas of research focus on intellectual property rights, particularly copyright issues relating to digital technology. Currently, she is also the Deputy Director of UM Centre of Innovation and Commercialization (UMCIC).

### ***Think Again Before You Re-Post Content Online – Lessons taught by Land Nordrhein-Westfalen v Dirk Renckhoff (decision of the European Court of Justice)***

In August 2018, the apex court in Europe, the European Court of Justice (ECJ) handed down a decision backing copyright owners' control over the online publication of copyright content. *Land Nordrhein-Westfalen v Dirk Renckhoff* is a landmark ruling which has a great impact on activities taking place on online platforms including social media such as Facebook, Instagram, YouTube and Twitter.

The lawsuit was brought by a photographer against a school authority, the Land of Nord Rhine-Westphalia (Germany), for the publication of his work in a student's presentation which was posted on the school's website. The presentation included an illustration by way of a photograph in which the copyright belonged to the photographer. The student downloaded the photograph from an online travel portal. The student included a reference to that online travel portal below the photograph. The photographer had

earlier given the operators of the online travel portal a right to use the photograph exclusively. Thus, the photographer claimed that the posting of

the photograph on the school's website infringed his copyright. The photograph in dispute was posted on the online travel portal without any restrictions that could prevent it from being downloaded. In other words, the photograph was available on the internet without access restrictions.

The question that the court had to decide in the case was whether one is required to get consent from the copyright owner to re-post online a work which is freely accessible to all internet users on a third-party website. This required analysing the concept of 'communication to the public' as defined in Article 3(1) of the EU Directive 2001/29. It is an act of 'communication to the public' if a work is made available to a public in such a way that members of that public may access it. This is irrespective of whether or not





they access it.

The ECJ held that the posting of a photograph on one's website after it was first copied onto a private server amounted to making the work available and thus an act of 'communication to the public'. The posting allowed the public to access the photograph on that website. If the posting was done without the authorisation of the copyright owner, it would be an infringement of copyright. This is so even though the photograph was previously published on the online travel portal without restrictions and with the consent of the copyright owner.

**The decision by the ECJ in this case recognizes that a copyright owner's right to control the online dissemination of his or her work is not extinguished simply because the copyright owner had previously authorized the posting of the work on a website which is open to the public.**

### **Sharing content online is prevalent**

The sharing of content online is prevalent in Malaysia. According to the Internet Users Survey 2018 by the Malaysian Communications and Multimedia Commission, the survey respondents spent on average a total of 6.6 hours online per day. The most frequent activities that internet users were engaged in were communicating by text, followed by visiting social networking platforms. The survey found that 61.8% of internet users have shared content online, with educational materials as the most commonly shared content.

Very often, internet users who share content online are oblivious of the relevant copyright issues that may arise. In some instances, internet users download the content and then upload it onto their own social media account; or share it via instant messaging applications such as WhatsApp, Line and WeChat. The process of downloading a copyright work involves reproduction, which is an exclusive right of the copyright owner. When a work is uploaded onto social media or shared via instant messaging applications, it constitutes a communication to the public of the work, which is an exclusive right of the copyright owner.

Incidents of the unauthorised use of content are also rampant on content farms. Content farms or content mills have increased in number in the last few years, such as World of Buzz and Giga Circle of Malaysia. Content farms companies hire a large number of freelance writers to produce huge amounts of content on topics which are popular searches. It is not infrequent to find that the content generated by them feature images or other copyright works which are taken from third party platforms such as individuals' social media accounts. If the copyright works are copied and stored on the content farms' servers without the copyright owners' consent, it may be copyright infringement.

In recent times, it is observed that traditional media, when reporting news also insert images taken or downloaded from social media accounts belonging to others. When a person posts a photograph in which he enjoys copyright on his social media account and shares it with the public without limitations on the privacy setting, such act does not amount to authorising the

public to freely use, share, download or distribute the photograph.

## Similarities in Malaysian and European provisions

The act of downloading a work involves reproduction, which is an act within the exclusive right of the copyright owner. In addition, a copyright owner enjoys the exclusive right to control the communication to the public of a copyright work, as provided in section 13(1)(aa) of the Copyright Act 1987. According to the Act, 'communication to the public' means the transmission of a work or live performance through wire or wireless means to the public, including the making available of the same to the public in such a way that members of the public may access the work or live performance from a place and at a time individually chosen by them.

This definition is modeled on Article 8 of the WIPO Copyright Treaty (1996), an international treaty which Malaysia has signed and ratified. Article 3(1) of the Information Society Directive 2001/29, which was analysed by the ECJ in *Dirk Renckhoff*, also provides for the 'communication to the public' right in a similar manner. Therefore, the case's decision has an impact on how we interpret a corresponding concept in our Copyright Act 1987.

## Does hyperlinking make any difference?

As emphasized above, the photograph in *Dirk Renckhoff* was downloaded and uploaded onto the school website. Clearly, the photograph was stored on the private server. Accordingly, such an act was treated as a new instance of making available the work to the public,

separate from the initial communication to the public, where it was first published on the online travel portal.

If a work is re-posted on a website and is freely accessible by the public without restrictions, one does not infringe the copyright owner's communication to the public right by setting a hyperlink to the website. As explained by the German Federal Court in *Verlagsgruppe Handelsblatt GmbH v Paperboy*, the person setting a hyperlink in such circumstances 'neither keeps the protected work on demand, nor does he transmit it himself following the demand by third parties.' It is the person who initially posted the work who decides whether the work remains available to the public. If the work is removed from the initial website after the setting of the link, the link will not function.

**To constitute a new 'communication to the public', the work must be communicated using technical means different from those previously used.**

**If a work is communicated using the same technical means as the one used in the initial communication, it is necessary to show that the work is communicated to a 'new public'.**

The ECJ's decision in *Svensson v Retriever Sverige AB* is a case in point on the meaning of 'new public'.

In *Svensson*, a group of journalists sued a website operator for providing its clients internet links to articles written by the journalists which were initially published on a Swedish newspaper website. The ECJ accepted that the setting of clickable links to websites

was an act of making available the news articles to the public and, therefore, an act of communication. However, the hyperlinks facilitated access to the same works which were covered by the initial communication, namely, when the articles were made available on the newspaper website. Therefore, to establish copyright infringement, the copyright owners need to prove that the subsequent communication, namely, the setting of the links, was directed to a 'new public'.

A 'new public' means a public that was not included when the copyright owner authorized the initial communication. In *Svensson*, the defendant's clients could also access the same works on the newspaper website even without the links, therefore they were not a 'new public'. As such, no consent was required from the copyright owners to set a hyperlink to the original website.

In the case of *Dirk Renckhoff*, the initial communication of the photograph on the travel portal and the subsequent communication of the same work on the school website was made with the same technical means. More importantly, the photograph on the online travel portal was freely accessible by any member of the public. It was thus doubtful whether the publication of the photograph on the school website was communicated to a 'new public'.

Be that as it may, it should be noted that the subsequent communication in *Dirk Renckhoff* differed from that in *Svensson*. In *Svensson*, the subsequent communication was the setting of hyperlinks alone. However, in *Dirk Renckhoff*, the photograph was first downloaded and then copied onto a server before being posted on the school website. The difference was crucial to the outcome of the case.

If the copyright owner no longer wishes to communicate his photograph on the online travel portal and removes it from the initial website, the photograph would remain available on the school website. In effect, the copyright owner loses the power to control the communication of his work online.

Hence, the ECJ in *Dirk Renckhoff* held that in the circumstances of the case, the public considered by the copyright owner when he authorized the publication on the original website referred only to users of that original website. It did not include users of the website on which the work was later published without the copyright owner's consent.

The ECJ also made it clear that the decision in *Svensson* was inapplicable to circumstances such as those in *Dirk Renckhoff*. To apply *Svensson* in cases like *Dirk Renckhoff* would upset the balance that must be maintained in the digital environment between the interest of copyright owners and the protection of the interests and fundamental rights of users.

**It may therefore be concluded that sharing content online in the form of providing a link to the website on which a work is initially made available as in *Svensson*, contrary to downloading the work and uploading it to another website server as in *Dirk Renckhoff*, raises fewer problems.**

If one merely provides a link to a website on which a copyright work is posted, the link merely informs the public where the work is available. It does not make available the work and thus it is not an infringement of copyright.

## **But wait ... hyperlinking is not always safe**

Providing a link to a website on which a copyright work is published is obviously a better option than keeping it on a server for the purpose of re-posting on a different website. Nonetheless, a person may be subject to liability for copyright infringement if he does more than merely provide a link. For instance, if the works on a website are accessible only by subscribers and a hyperlink allows non-subscribers to access them through bypassing the access restrictions, the non-subscribers would be considered a 'new public'. Linking in such a case may be regarded as a new communication to the public of the works.

Another example where linking may raise copyright issues is where a website aggregates links to other websites that contain infringing copies of copyright works, or which provide access to unauthorized streams of movies or music. Secondary liability may arise if the website operator, by aggregating the links, encourages or promotes the infringing activities by internet users. This is so even though the website operator does not itself make available the copyright works on the websites to which it provides the links. Liability in such cases is imposed by reason of the website operator's contribution to copyright infringement committed by internet users.

**In the Malaysian context, the inclusion of a copyright work in a student's presentation may fall within the fair dealing exception in section 13(2)(a) of the Copyright Act 1987.**

## **Is there no exception applicable?**

One may wonder whether the inclusion of a photograph as an illustration in a student's presentation is not covered by any exception under copyright law. Furthermore, the student in Dirk Renckhoff inserted a reference to the online travel portal below the photograph. The ECJ in Dirk Renckhoff emphasized that its ruling was based on the fact that the posting on the school website made it accessible to all visitors to the website, and not on whether the illustration used by the student for her school presentation was educational in nature. In other words, the student may be excused for including the photograph in her presentation which was made solely for educational purposes. However, the school, in publishing the photograph on the website and making it accessible to all visitors to the website, was not similarly exempted.

In the Malaysian context, the inclusion of a copyright work in a student's presentation may fall within the fair dealing exception in section 13(2)(a) of the Copyright Act 1987. One of the specified permitted purposes of fair dealing is private study. However, this exception may be relied on only by the person conducting the private study, and not anyone else. Hence, while a student may rely on the fair dealing exception for private study, the school is unable to avail itself of the exception. The school may argue that its act of publishing the work on the website falls within the teaching exception in section 13(2)(f) of the Copyright Act 1987, namely, the inclusion of a work made by way of illustration for teaching purposes. Yet, this exception is subject to the requirement that such inclusion of the work is compatible with fair



practice. It is questionable whether the practice is fair if it substantially shrinks the potential market or value of the copyright work.

Is attribution the panacea to all claims of copyright infringement? Contrary to popular belief, attribution alone is not a defence to copyright infringement. Some of the exceptions to copyright in the Copyright Act 1987 require attribution as one of the conditions to be met before the exceptions can apply. Instances include the fair dealing and teaching exceptions. However, as noted above, other requirements have to be satisfied as well, such as the fairness element.

## Crucial Points

In summary, a good rule of thumb in sharing content online is never assume the copyright owner authorizes the sharing or use simply because he has first published it online. If one really must share the content, do so by providing a link to the original website instead of downloading it before publishing it on another website or any social media platform.

In addition, most of the exceptions to copyright infringement are tied to several conditions other than the purpose of the act, including whether the manner in which the copyright work is used is fair. The question of 'fairness' involves weighing the copyright owner's interests and the public interest, which can vary from one case to another.

Lastly, while attribution is not an exception to copyright infringement, it may save one from liability for violating the author's moral right, that is, the right to be identified as the author of his or her work. That aside, it is always ethical to make proper acknowledgment of the work's title and its authorship. As the saying goes, you are never wrong to do the right thing!



## **References**

1. Case C-161/17 (7 August 2018)
2. The Land of Nord Rhine-Westphalia is the authority responsible for the education and supervision of the school called Gesamtschule Waltrop and is the employer of the teaching staff in that school.
3. Svensson and Others C-466/12, para 19; Stichting Brein C-610/15, para 31
4. The survey was based on a sample of 4,160 internet users. See Malaysian Communications and Multimedia Commission, Internet Users Survey 2018 at <https://www.mcmc.gov.my/skmmgovmy/media/General/pdf/Internet-Users-Survey-2018.pdf>.
5. Section 13(1)(a) of the Copyright Act 1987
6. Section 13(1)(aa) of the Copyright Act 1987
7. See the definition of 'communication to the public' in section 3 of the Copyright Act 1987 .
8. A similar right is also available to fixed performances and phonograms in Articles 10 and 14 respectively of the WIPO Performances and Phonograms Treaty (1996)
9. .[2005] ECDR 7
10. [2005] ECDR 7, para 42
11. C-466/12
12. C-466/12, paras 19-23
13. Case C-161/17 (7 August 2018), para 35
14. Case C-161/17 (7 August 2018), para 38
15. Case C-161/17 (7 August 2018), para 41
16. Liability for circumvention of technological protection measures may also arise, see section 36A of the Copyright Act 1987
17. See Twentieth Century Fox v Newzbin [2010] ECDR 8
18. Case C-161/17 (7 August 2018), para 42, 43
19. However, attribution is crucial to ensure that one does not violate the author's identification right. The right to be identified is an aspect of the moral rights which an author enjoys, see section 25(2)(a) of the Copyright Act 1987. For a better understanding of the distinction between copyright ownership and authorship, see Sik CP (2017). Proving Authorship and Ownership under Malaysian Copyright Law. WIPO & WTO. WIPO-WTO Colloquium Research Papers: 2017 Asia Edition