

A BILL

i n t i t u l e d

An Act to amend the Copyright Act 1987.

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ENACTED by the Parliament of Malaysia as follows:

Short title and commencement

1. (1) This Act may be cited as the Copyright (Amendment) Act 2010.

(2) This Act comes into operation on a date to be appointed by the Minister by notification in the *Gazette*.

General amendment

2. The Copyright Act 1987 [*Act 332*], which is referred to as the “principal Act” in this Act, is amended by substituting for the words “live performance” wherever appearing the word “performance”.

Amendment of section 3**3. Section 3 of the principal Act is amended—**

- (a) by substituting for the definition of “licensing body” the following definition:

“licensing body” means a society or organization which is declared as a licensing body under section 27A;’;

- (b) in the definition of “literary work”, by inserting after the words “judicial decisions” the words “, or political speeches and political debates, or speeches delivered in the course of legal proceedings, and the official translation thereof”;

- (c) by inserting after the definition of “sound recording” the following definition:

“technological protection measure” means any technology, device or component that, in the normal course of its operation, effectively prevents or limits the doing of any act that results in an infringement of the copyright in a work;’;

- (d) by substituting for the definition of “performer” the following definition:

“performer” means an actor, singer, musician, dancer or any person who acts, sings, delivers, declaims, plays in, interprets, or otherwise performs a performance;’; and

- (e) in the definition of “fixation”, by inserting after the word “duration” the words “by using a device”.

Amendment of section 4

- 4.** Paragraph 4(1)(d) of the principal Act is amended by inserting before the words “performance shall be deemed” the word “fixed”.

Amendment of section 5

5. Section 5 of the principal Act is amended—

(a) in subsection (2)—

(i) by substituting for the words “The Corporation” the words “The Minister”; and

(ii) by substituting for the word “it” the words “the Minister”; and

(b) by inserting after subsection (4) the following subsection:

“ (5) The Controller or Deputy Controller may perform all the duties imposed and exercise all the powers conferred on an Assistant Controller under this Act.”.

Amendment of section 7

6. Section 7 of the principal Act is amended by deleting subsection (6).

Amendment of section 8

7. Subsection 8(1) of the principal Act is amended by substituting for paragraph (b) the following paragraph:

“(b) collections of works eligible for copyright, or compilation of mere data whether in machine readable or other form, which constitute intellectual creation by reason of the selection and arrangement of their contents.”.

Amendment of section 9

8. Subsection 9(4) of the principal Act is amended—

(a) by substituting for the words “the purposes of” the words “any purpose including”; and

(b) by inserting after the words “reporting of” the words “news or”.

Amendment of section 13**9. Section 13 of the principal Act is amended—**

(a) in subsection (1), by substituting for the words “of the whole work or a substantial part thereof, either in its original or derivative form provided that, without prejudice to paragraph (e), the exclusive right to control the distribution of copies refer only to the act of putting into circulation copies not previously put into circulation in Malaysia and not to any subsequent distribution of those copies or any subsequent importation of those copies into Malaysia” the following words:

“of the whole work or a substantial part thereof, either in its original or derivative form provided that—

- (A) the exclusive right to control the distribution of copies refer only to the act of putting into circulation copies not previously put into circulation in Malaysia and not to any subsequent distribution of those copies or any subsequent importation of those copies into Malaysia; and
- (B) the exclusive right to control commercial rental in relation to films shall only apply when such commercial rental has led to widespread copying of such work materially impairing the exclusive right of reproduction”;

(b) in subsection (2)—

- (i) by substituting for paragraph (a) the following paragraph:

“(a) the doing of any of the acts referred to in subsection (1) by way of fair dealing including for purposes of research, private study, criticism, review or the reporting of news or current events:

Provided that it is accompanied by an acknowledgement of the title of the work and its authorship, except

that no acknowledgment is required in connection with the reporting of news or current events by means of a sound recording, film or broadcast;”

- (ii) in paragraph (*g*), by substituting for the word “recording” the word “reproduction”;
 - (iii) by substituting for paragraph (*g*) the following paragraph:
 - “(g) the making and issuing of copies of any work into a format to cater for the special needs of people who are visually or hearing impaired and the issuing of such copies to the public by non-profit making bodies or institutions and on such terms as the Minister may determine;”;
 - (iv) in paragraph (*j*), by deleting the words “wholly-owned by the Government”;
 - (v) in paragraph (*o*), by deleting the word “and” at the end of the paragraph;
 - (vi) in paragraph (*p*), by substituting for the full stop at the end of the paragraph the word “; and”; and
 - (vii) by inserting after paragraph (*p*) the following paragraph:
 - “(q) the making of a transient and incidental electronic copy of a work made available on a network if the making of such copy is required for the viewing, listening or utilization of the said work.”; and
- (c) by inserting after subsection (2) the following subsection:
- “(2A) For the purposes of paragraph (2)(a), in determining whether a dealing constitutes a fair dealing, the factors to be considered shall include—
 - (a) the purpose and character of the dealing, including whether such dealing is of a commercial nature or is for non-profit educational purposes;

- (b) the nature of the copyright work;
- (c) the amount and substantiality of the portion used in relation to the copyright work as a whole; and
- (d) the effect of the dealing upon the potential market for or value of the copyright work.”.

Amendment of section 13B

10. Section 13B of the principal Act is amended—

- (a) in paragraph (1)(a), by substituting for the words “section and sections 13A and 13C” the word “Act”; and
- (b) in subsection (2), by substituting for the words “Without prejudice to subsection 7(6), after” the word “After”.

Deletion of section 13C

11. The principal Act is amended by deleting section 13C.

Amendment of section 16A

12. Section 16A of the principal Act is amended—

- (a) in subsection (1)—
 - (i) by substituting for paragraph (c) the following paragraph:
 - “(c) the reproduction of the fixation of a performance;”;
 - (ii) in paragraph (d), by substituting for the words “making available” the word “distribution”; and
 - (iii) in paragraph (e), by inserting before the word “rental” the words “the commercial”;

(b) in subsection (2)—

- (i) by substituting for the words “subsection (1) once has” the words “paragraph (1)(b) once he has”; and
- (ii) in the national language text, by substituting for the words “persembahan secara langsungnya” the word “persembahannya”; and

(c) in subsection (3)—

- (i) in subparagraph (b)(i), by substituting for the word “affairs” the word “events”;
- (ii) by substituting for subparagraph (b)(iii) the following subparagraph:

“(iii) made for the purpose of a judicial proceeding, a proceeding of a royal commission or legislative body, a statutory or Governmental inquiry, or the report of any such proceeding or inquiry, or for the purpose of the giving of professional advice by a legal practitioner;” and

(iii) by substituting for paragraph (d) the following paragraph:

“(d) a direct sound recording or film of a performance made by or under the direction or control of a broadcasting service who has the consent of the performer to broadcast the performance, and such recording or film is destroyed before the end of the period of six months immediately following the making of the recording or film or such longer period as may be agreed between the broadcasting service and the performer;”.

Amendment of section 16B

13. Section 16B of the principal Act is amended—

- (a) in subsection (2), by deleting the words “or at the time of the transfer of the rental right”;
- (b) in subsection (3) of the national language text, by substituting for the words “persembahan secara langsungnya” the word “persembahannya”;
- (c) by inserting after subsection (3) the following subsections:

“ (3A) In the absence of a contract on the equitable remuneration payable under subsection (1), the performer may apply to the Tribunal to determine the amount payable as equitable remuneration.

(3B) The performer may also apply to the Tribunal—

- (a) to vary any contract as to the amount payable as equitable remuneration; or
- (b) to vary any previous determination of the Tribunal relating to the equitable remuneration.

(3C) An application by a performer under paragraph (3B)(b) may only be made within twelve months from the date of a previous determination, unless special leave by the Tribunal has been obtained.

(3D) On an application under this section, the Tribunal shall consider the matter and make such order as to the method of calculation and payment of equitable remuneration as it may determine to be reasonable in the circumstances, taking into account the importance of the contribution of the performer to the sound recording.

(3E) A contract is of no effect in so far as it purports to prevent a performer questioning the amount of equitable remuneration or to restrict the powers of the Tribunal under this section.”; and

(d) by substituting for subsection (4) the following subsection:

“(4) For the purpose of this section, “published for commercial purpose” means the sound recording has been made available to the public by wire or wireless means in such a way that members of the public may access them from a place and at a time individually chosen by them.”.

Amendment of section 23A

14. Section 23A of the principal Act is amended by inserting after the words “was given” the words “or was fixed in a sound recording”.

Amendment of section 25A

15. Section 25A of the English language text of the principal Act is amended in the shoulder note by substituting for the word “**right**” the word “**rights**”.

New sections 26A, 26B and 26C

16. The principal Act is amended by inserting after section 26 the following sections:

“Voluntary notification of copyright

26A. (1) A notification of copyright in any work may be made to the Controller by or on behalf of the author of the work, the owner of the copyright in the work, an assignee of the copyright, or a person to whom an interest in the copyright has been granted by licence.

(2) A notification of copyright shall not be entertained unless the prescribed fee has been paid to the Controller.

(3) A notification of copyright shall contain the following particulars:

- (a) the name, address and nationality of the owner of the copyright;
- (b) a statutory declaration that the applicant is the author of the work, or the owner of the copyright in the work, or an assignee of the copyright, or a person to whom an interest in the copyright has been granted by licence;
- (c) the category of the work;
- (d) the title of the work;
- (e) the name of the author and, if the author is dead, the date of the author's death, if known;
- (f) in the case of a published work, the date and place of the first publication; and
- (g) any other information as the Minister may determine.

Register of Copyright

26B. (1) The Controller shall keep and maintain a register called the Register of Copyright.

(2) The Register of Copyright shall contain all such particulars relating to a copyright in a work as notified to the Controller under section 26A.

(3) The Register of Copyright shall be kept in such form and on such medium as the Minister may determine.

(4) Any person may examine the Register of Copyright at such times and upon such conditions as may be determined by the Minister, and may obtain certified extracts from the Register on payment of the prescribed fee.

(5) The Controller or Deputy Controller may certify true extracts from the Register of Copyright which shall be *prima facie* evidence of the particulars entered therein and such certified extracts of the Register of Copyright shall be admissible in all courts.

Amendments to the Register of Copyright

26c. (1) The Controller may correct any clerical error in any entry made in the Register of Copyright.

(2) Any interested person may apply to the court for an order to—

- (a) correct any error in an entry in the Register; or
- (b) expunge or amend any entry wrongly made in or remaining in the Register,

and any correction, expungement or amendment made under this section shall be effective from such date as the court may order.

(3) For the purpose of this section, “court” means the appropriate High Court in Malaysia.”.

Amendment of section 27A

17. The principal Act is amended by substituting for section 27A the following section:

“Licensing body

27A. (1) A society or an organization may apply to the Controller to be declared as a licensing body for copyright owners or for a specified class of copyright owners.

(2) An application for a declaration shall be made in such form and on such medium as the Controller may determine which shall contain the following information:

- (a) the applicant’s constituent document, which has as its main object, or one of its main objects, the negotiation or granting, either as owner or prospective owner of copyright or as agent for him, of copyright licences, and whose objects also include the granting of licences covering works of more than one author; and
- (b) the list of copyright owners or their agents who are members of the applicant.

(3) Upon receipt of an application, the Controller may declare an applicant to be a licensing body and issue a declaration in writing to that effect to the said applicant.

(4) Notwithstanding subsection (3), the Controller shall refuse an application if the information provided by the applicant pursuant to subsection (2) is insufficient or unsatisfactory to show that the applicant is fit and proper to be a licensing body.

(5) A declaration of a society or organization as a licensing body under this section shall mean that the licensing body has the right to act for and on behalf of its members on matters relating to the rights of the members as provided under this Act in accordance with—

- (a) the licensing body's rules; and
- (b) any contractual arrangement that may be entered into between the licensing body and its members.

(6) The licensing body shall provide the Controller with a copy of its profit and loss account, balance sheet and auditor's report which are tabled at the licensing body's annual general meeting not later than one month after the date of the annual general meeting.

(7) The Controller may revoke a declaration given to a licensing body if he is satisfied that the licensing body—

- (a) is not functioning adequately as a licensing body;
- (b) no longer has the authority to act on behalf of all its members;
- (c) is not acting in accordance with its rules or in the best interests of its members, or their agents;
- (d) has altered its rules so that it no longer complies with any provision of this Act;
- (e) has refused, or failed, without reasonable excuse, to comply with the provisions of this Act; or
- (f) has been dissolved.

(8) A licensing body which is aggrieved by the decision of the Controller under subsection (7) may appeal to the Tribunal within one month from the date of the decision.”.

New section 27AA

18. The principal Act is amended by inserting after section 27A the following section:

“Licensing schemes to which sections 27B to 27G apply

27AA. (1) Sections 27B to 27G shall apply to licensing schemes operated by licensing bodies in relation to the copyright in any work, so far as they relate to licences for—

- (a) reproducing the work;
- (b) performing, showing or playing the work in public;
- (c) communicating the work to the public;
- (d) rebroadcasting the work;
- (e) the commercial rental of the work to the public; or
- (f) making adaptation of the work.

(2) For the purposes of sections 27B to 27G, “licensing scheme” means any of the licensing schemes described in subsection (1).”.

Amendment of section 27C

19. Subsection 27C(1) of the principal Act is amended—

- (a) in paragraph (a), by deleting the word “or” appearing at the end of the paragraph;
- (b) in paragraph (b), by substituting for the comma the word “; or”;

(c) by inserting after paragraph (b) the following paragraph:

“(c) a person who has been granted a licence to which the licensing scheme applies,”; and

(d) by inserting before the words “person or organization” the word “operator,”.

Amendment of section 27D

20. Subsection 27D(1) of the principal Act is amended—

(a) by substituting for the word “Where” the words “Subject to subsection (2), where”;

(b) in paragraph (b), by deleting the word “or” appearing at the end of the paragraph;

(c) in paragraph (c), by substituting for the comma the word “; or”; and

(d) by inserting after paragraph (c) the following paragraph:

“(d) a person who has been granted a licence to which the licensing scheme applies,”.

Amendment of section 28

21. Section 28 of the principal Act is amended—

(a) in the shoulder note, by inserting after the word “**Establishment**” the words “**and powers**”;

(b) by renumbering the section as subsection (1); and

(c) by inserting after subsection (1) the following subsection:

“(2) The Tribunal shall have the power to decide on the following matters:

(a) an application by a performer under section 16B;

(b) any reference by an operator, a person or an organization referred to in Part IVA;

- (c) an appeal by a licensing body under subsection 27A(8); and
- (d) the exercise of the power under section 31.”.

Amendment of section 29

22. Section 29 of the principal Act is amended—

- (a) in subsection (1)—
 - (i) in paragraph (b), by substituting for the words “a Deputy Chairman” the words “five Deputy Chairmen”; and
 - (ii) in paragraph (c), by substituting for the words “not more than twenty persons as” the words “twelve persons whom”; and
- (b) in subsections (2), (3), (5) and (6) of the English language text, by substituting for the words “Deputy Chairman” the words “Deputy Chairmen”.

Amendment of section 30

23. Section 30 of the principal Act is amended—

- (a) in subsection (3), by substituting for the words “another member of the Tribunal to act as Chairman for the purposes of that proceedings” the words “a Deputy Chairman to act as chairman for the purposes of that proceedings.”;
- (b) in subsection (5), by substituting for the words “or the member presiding” the words “of the proceedings”;
- (c) by substituting for subsection (7) the following subsection:
 - “(7) In any such case as is mentioned in subsection (6) where the member who is unable to continue is the chairman of the proceedings, then the Minister shall—
 - (a) appoint from amongst the remaining members a new chairman for the purpose of the continued proceedings; and

- (b) where appropriate, appoint a Deputy Chairman to attend the proceedings to advise the members of the proceedings on any issue that may arise during the proceedings.”.

Amendment of section 31

24. Section 31 of the principal Act is amended—

- (a) in subsection (1), by inserting after the words “the national language” the words “or other vernacular languages in Malaysia”;
- (b) in subsection (2), paragraphs (3)(a) and (g) and subsections (5) and (6), by inserting after the words “the national language” the words “or other vernacular languages”; and
- (c) in subparagraph (3)(b)(ii), by substituting for the words “find the owner” the words “trace or ascertain the owner;”.

Amendment of section 36

25. Section 36 of the principal Act is amended by deleting subsections (3), (4) and (5).

New sections 36A and 36B

26. The principal Act is amended by inserting after section 36 the following sections:

“Circumvention of technological protection measure

36A. (1) If a technological protection measure is applied to a copy of a work by or with the authorization of the owner of the copyright in the work, no person shall circumvent, or cause or authorize any other person to circumvent, the technological protection measure—

- (a) that is used by the owner of the copyright in connection with the exercise of his rights under this Act; and

(b) that restricts acts in respect of his works which are not authorized by the owner concerned or permitted by law.

(2) Subsection (1) does not apply if the circumvention of technological protection measure is—

(a) for the sole purpose of achieving interoperability of an independently created computer program with the original program or any other programs;

(b) for the sole purpose of identifying and analyzing flaws and vulnerabilities of encryption technology;

(c) for the sole purpose of testing, investigating or correcting the security of a computer, computer system or computer network;

(d) for the sole purpose of identifying and disabling an undisclosed capability to collect or disseminate personally identifying information about the online activities of a natural person;

(e) in relation to anything lawfully done for the sole purpose of—

(i) law enforcement;

(ii) national security; or

(iii) performing a statutory function; or

(f) done by a library, an archive or an educational institution for the sole purpose of making an acquisition decision in relation to a work in which copyright subsists.

(3) No person shall—

(a) manufacture for sale or hire;

(b) import otherwise than for his private and domestic use;
or

(c) in the course of a business—

(i) sell or let for hire;

(ii) offer or expose for sale or hire;

(iii) advertise for sale or hire;

- (iv) possess; or
- (v) distribute;
- (d) distribute for purposes other than in the course of a business to such an extent as to affect prejudicially the owner of the copyright; or
- (e) offer to the public or provide any service in relation to,

any technology, device or component which—

- (A) is promoted, advertised or marketed for the purpose of the circumvention of technological protection measure;
- (B) has only a limited commercially significant purpose or use other than to circumvent technological protection measure; or
- (C) is primarily designed, produced, adapted or performed for the purpose of enabling or facilitating the circumvention of technological protection measure.

(4) The Minister may prescribe any technology, device or component which may operate as a technological protection measure to be exempted from the application of this section.

Rights management information

36B. (1) No person shall—

- (a) remove or alter any electronic rights management information without authority; or
- (b) distribute, import for distribution or communicate to the public, without authority, of works or copies of works knowing that electronic rights management information has been removed or altered without authority,

and knowing or having reasonable grounds to know that such act will induce, enable, facilitate or conceal an infringement of any rights under this Act.

(2) Subsection (1) does not apply if the removal or alteration of any electronic rights management information without authority is—

(a) in relation to anything lawfully done for the sole purpose of—

- (i) law enforcement;
- (ii) national security; or
- (iii) performing a statutory function; or

(b) done by a library, an archive or an educational institution for the sole purpose of making an acquisition decision in relation to a work in which copyright subsists.

(3) For the purposes of this section and section 41, “rights management information” means information which identifies the work, the author of the work, the owner of any right in the work, the performer or the terms and conditions of use of the work, any number or codes that represent such information, when any of these items is attached to a copy of a work or appears in connection with the communication of a work to the public.”.

Amendment of section 37

27. The principal Act is amended by substituting for section 37 the following section:

“**37.** (1) Infringements of copyrights and the prohibited acts under sections 36A and 36B shall be actionable at the suit of the owner of the copyright and, in any action for such an infringement or prohibited act, the court may grant the following types of relief:

- (a) an order for injunction;
- (b) damages;
- (c) an account of profits;
- (d) statutory damages of not more than twenty-five thousand ringgit for each work, but not more than five hundred thousand ringgit in the aggregate; or
- (e) any other order as the court deems fit.

(2) Notwithstanding subsection (1), all such relief shall be available to the plaintiff in an action under subsection 36A(3) except for statutory damages.

(3) In making an award under paragraph (1)(b), the court may also make an order under paragraph (1)(c) for an account of any profits attributable to the infringement or prohibited act that have not been taken into account in computing the damages.

(4) Except as provided in subsection (3), the types of relief referred to in paragraphs (1)(b), (c) and (d) are mutually exclusive.

(5) For the purpose of paragraph (1)(d), all parts of a collective work shall constitute one work.

(6) Where in an action under this section it is established that an infringement or a prohibited act under section 36A or 36B was committed but it is also established that at the time of the infringement or commission of the prohibited act the defendant was not aware, and had no reasonable grounds for suspecting, that the act was an infringement of the copyright or prohibited under section 36A or 36B, the plaintiff shall not be entitled under this section to any damages against the defendant in respect of the infringement or commission of the prohibited act, but shall be entitled to an account of profits or statutory damages whether or not any other relief is granted under this section.

(7) Where in an action under this section an infringement of copyright or the commission of a prohibited act under section 36A or 36B is established, the court may, in assessing damages for the infringement or commission of the prohibited act, award such additional damages as it may consider appropriate in the circumstances if it is satisfied that it is proper to do so having regard to—

- (a) the flagrancy of the infringement or prohibited act;
- (b) any benefit shown to have accrued to the defendant by reason of the infringement or prohibited act; and
- (c) all other relevant matters.

(8) In awarding statutory damages under paragraph (1)(d), the court shall have regard to—

- (a) the nature and purpose of the infringing act or prohibited act, including whether the infringing act or prohibited act was of a commercial nature or otherwise;
- (b) the flagrancy of the infringement or prohibited act;
- (c) whether the defendant acted in bad faith;
- (d) any loss that the plaintiff has suffered or is likely to suffer by reason of the infringement or prohibited act;
- (e) any benefit shown to have accrued to the defendant by reason of the infringement or prohibited act;
- (f) the conduct of the parties before and during the proceedings;
- (g) the need to deter other similar infringement or prohibited act; and
- (h) all other relevant matters.

(9) An injunction shall not be issued in any proceedings under this section if it requires a completed or partly built building to be demolished or prevents the completion of a partly built building.

(10) For the purposes of this section and section 38—

- (a) “action” includes a counterclaim, and reference to the plaintiff and to the defendant in an action shall be construed accordingly;
- (b) “collective work” means a work in which relevant materials, constituting separate and independent works in themselves, are assembled into a collective whole; and
- (c) “court” means the appropriate High Court in Malaysia.

(11) For the purpose of this section, “owner of the copyright” means the first owner or an assignee of the relevant part of the copyright.”.

Amendment of section 38

28. Subsection 38(7) of the principal Act is amended—

- (a) in paragraph (a), by inserting after the words “for the payment of damages” the words “or statutory damages”; and
- (b) in paragraph (b), by inserting after the words “awarding either damages” the words “, statutory damages”.

Amendment of section 40

29. Subsection 40(1) of the principal Act is amended by substituting for the words “Subject to subsection (2),” the words “Notwithstanding any express contract condition to the contrary,”.

Amendment of section 41

30. Section 41 of the principal Act is amended—

- (a) in subsection (1)—
 - (i) in paragraph (h)—
 - (A) by inserting after the words “or causes” the words “or authorizes”; and
 - (B) by substituting for the words “subsection 36(3)” the words “subsection 36A(1)”;
 - (ii) by inserting after paragraph (h) the following paragraph:

“(ha) manufactures, imports or sells any technology or device for the purpose of the circumvention of technological protection measure referred to in subsection 36A(3);”;
 - (iii) in paragraph (i), by inserting before the words “without authority” the words “referred to in section 36B”; and
 - (vi) in paragraph (ii), by substituting for the words “paragraph (g)” the words “paragraphs (g) and (ha)”;

- (b) in subsection (3), by substituting for the words “a literary, or musical work” the words “a literary or musical work, sound recording or film”; and
- (c) by substituting for subsection (4) the following subsection:

“(4) Where an offence under this section is committed by a body corporate or by a person who is a partner in a firm, every director, chief executive officer, chief operating officer, secretary, manager or other similar officer of the body corporate or every other partner in the firm or was purporting to act in any such capacity or was in any manner or to any extent responsible for the management of the affairs of the body corporate or firm or was assisting in such management, as the case may be, shall be deemed to be guilty of the offence and may be charged severally or jointly in the same proceedings with the body corporate or firm unless he proves that the offence was committed without his consent or connivance and that he exercised all due diligence to prevent the commission of the offence.”.

Amendment of section 42

31. Subsection 42(1) of the principal Act is amended by inserting after the words “An affidavit” the words “, certified extracts of the Register of Copyright referred to in section 26B”.

New Parts VIA and VIB

32. The principal Act is amended by inserting after Part VI the following Parts:

“PART VIA

ANTI-CAMCORDING

Offences relating to anti-camcording

43A. (1) Any person who operates an audiovisual recording device in a screening room to record any film in whole or in part shall be guilty of an offence and shall on conviction be liable to a fine of not less than ten thousand ringgit and not more than one hundred thousand ringgit or to imprisonment for a term not exceeding five years or to both.

(2) Any person who is guilty of an attempt to commit an offence under subsection (1) shall on conviction be liable to a fine of not less than five thousand ringgit and not more than fifty thousand ringgit or to imprisonment for a term not exceeding one year or to both.

(3) For the purpose of this section, the expression—

“audiovisual recording device” means any device which is capable of recording or transmitting a motion picture or any part thereof;

“motion picture” means film;

“screening room” means any venue which is utilized for the exhibition or screening of a motion picture, including a motion picture theatre.

PART VI B

LIMITATION OF LIABILITIES OF THE SERVICE PROVIDER

Interpretation

43B. For the purpose of this Part, the expression—

“another network” means any type of network that is able to connect with the primary network;

“court” means the appropriate High Court in Malaysia;

“electronic copy” in relation to any work means a copy of the work in an electronic form and includes the original version of the work in that form on a network;

“originating network” means another network from which an electronic copy originates;

“primary network” in relation to a service provider means a network controlled or operated by or for the service provider;

“routing” means directing or choosing the means or routes for the transmission of data;

“service provider”—

- (a) for the purpose of section 43c, means a person who provides services relating to, or provides connections for, the access, transmission or routing of data; and
- (b) for the purpose of this Part other than section 43c, means a person who provides, or operates facilities for, online services or network access and includes a person referred to in paragraph (a).

Transmission, routing and provision of connections

43c. (1) A service provider shall not be held liable for infringement of copyright in any work if the infringement occurs by reason of—

- (a) the transmission or routing, or the provision of connections, by the service provider of an electronic copy of the work through its primary network; or
- (b) any transient storage by the service provider of an electronic copy of the work in the course of such transmission, routing or provision of connections:

Provided that—

- (A) the transmission of the electronic copy of the work was initiated by or at the direction of a person other than the service provider;
- (B) the transmission, routing, provision of connections or storage is carried out through an automatic technical process without any selection of the electronic copy of the work by the service provider;
- (C) the service provider does not select the recipient of the electronic copy of the work except as an automatic response to the request of another person; or

- (D) the service provider does not make any modification, other than a modification made as part of a technical process, to the content of the electronic copy of the work during its transmission through the primary network.

(2) Where infringing material has been identified to come from an online location outside Malaysia or from a specified account and if the court is satisfied that subsection (1) applies to the service provider, the court may order the service provider—

- (a) to take reasonable steps to disable access to an online location that is physically situated outside Malaysia;
or
- (b) to terminate the specified account.

System caching

43D. (1) A service provider shall not be held liable for infringement of copyright for the making of any electronic copy of the work on its primary network if it is—

- (a) from an electronic copy of the work made available on an originating network;
- (b) through an automatic process;
- (c) in response to an action by a user of its primary network;
or
- (d) in order to facilitate efficient access to the work by a user:

Provided that—

- (A) the service provider does not make any substantive modification, other than a modification made as part of a technical process, to the content of the electronic copy during the transmission of such copy to users of its primary network or another network; and

- (B) the service provider satisfies such other conditions as the Minister may determine in relation to—
- (i) access to the electronic copy by users of its primary network or another network;
 - (ii) the refreshing, reloading or updating of the electronic copy; and
 - (iii) non-interference with the technology used at the originating network to obtain information about the use of any work on the originating network, being technology that is consistent with industry standards in Malaysia.

(2) A service provider shall not be held liable under this section if the copyright owner or his agent has not given any notification under section 43H.

Storage and information location tools

43E. (1) A service provider shall not be held liable for infringement of copyright in any work where such infringement occurs by reason of—

- (a) the electronic copy of the work being stored at the direction of a user of its primary network;
- (b) the service provider referring or linking a user to an online location on an originating network at which an electronic copy of the work is made available by the use of an information location tool such as a hyperlink or directory, or an information location service such as a search engine, if—
 - (i) the service provider—
 - (aa) does not have actual knowledge that the electronic copy of the work or activity is infringing; or
 - (bb) in the absence of such actual knowledge, is not aware of the facts or circumstances from which the infringing activity is apparent;

- (ii) the service provider does not receive any financial benefit directly attributable to the infringement of the copyright in the work that occurs in, or in the course of, making available the electronic copy on its primary network or on another network, and that the service provider does not have the right and ability to control the infringing activity; and
- (iii) upon receipt of a notification of any infringement under section 43H, the service provider responds within the time specified to remove or disable access to the material that is claimed to be infringing or to be the subject of the infringing activity.

(2) In determining whether a financial benefit is directly attributable to the infringement of copyright in the work, the court shall have regard to—

- (a) the industry practice in relation to the charging of services by a service provider;
- (b) whether the financial benefit was greater than the benefit that would usually result from charging in accordance with accepted industry practices; and
- (c) any other matter that the court considers relevant.

(3) A service provider shall not be held liable under this section if the copyright owner or his agent has not given any notification under section 43H.

Exemption of service provider from liability for removal of copy or other activities from network

43F. (1) A service provider acting in compliance with subsection 43H(1) and in accordance with this Part shall not be subject to any liability in respect of an action taken in good faith in relation to—

- (a) the removal of an electronic copy of a work from its primary network; or
- (b) the disabling of access to an electronic copy of a work on its primary network or another network.

(2) Upon removing or disabling access to an electronic copy of a work under subsection (1), the service provider shall notify, as far as may be practicable, the person who made available the electronic copy of the action taken by the service provider and enclosing therewith a copy of the notification received by it pursuant to subsection 43H(1).

(3) Notwithstanding anything to the contrary, if—

- (a) as a result of a settlement between the copyright owner of the work and the person who made available the electronic copy of the work, the service provider receives a written notification from either party to restore the electronic copy to the network or to restore access to that copy; or
- (b) the person who made available the electronic copy of the work was adjudicated by any court or tribunal as the rightful copyright owner of the work,

the service provider shall, as far as practicable—

- (A) restore the electronic copy of the work to its primary network; or
- (B) restore access to the electronic copy of the work on its primary network or another network:

Provided that the service provider is furnished with the proper documentation relating to the settlement between the parties or judgment or decision of the court or tribunal.

(4) A service provider shall not be treated as having authorized the doing of any act which is an infringement of copyright under this Act solely by reason of the service provider having provided a facility which was used by a person to perform the infringing act.

Information on service provider

43G. (1) In providing its service to the users, a service provider shall make available the following information in a manner which is accessible to any person using the service:

- (a) the name and address of the service provider; and
- (b) the details and particulars of a designated agent to receive any complaint or notice regarding an allegation of infringement of copyright.

(2) Failure by a service provider to comply with subsection (1) shall not entitle the service provider to rely on the protection provided under this Part.

Notification by copyright owner and its effect

43H. (1) If an electronic copy of any work accessible in a network infringes the copyright of a work, the owner of the copyright which has been infringed may notify the service provider of the network of such infringement by issuing to the service provider a notification in the manner as determined by the Minister, requiring the service provider to remove or disable any access to the electronic copy on the service provider's network:

Provided that the owner of the copyright shall undertake to compensate the service provider or any other person against any damages, loss or liability arising from the compliance by the service provider of such notification.

(2) A service provider who has received a notification under subsection (1) shall remove or disable any access to the infringing electronic copy on its network not later than forty-eight hours from the time the notification was received.

(3) The person whose electronic copy of the work was removed or to which access has been disabled pursuant to subsection (2) may issue to the service provider a counter notification in the manner as may be determined by the Minister, requiring the service provider to restore the electronic copy or access to it on the service provider's primary network:

Provided that the person shall undertake to compensate the service provider or any other person against any damages, loss or liability arising from the compliance by the service provider of such counter notification.

(4) A service provider shall—

- (a) upon receipt of a counter notification, promptly provide the issuer of the notification under subsection (1) with a copy of the counter notification and inform such issuer that the removed material or access to the said material will be restored in ten business days; and

- (b) restore the removed material or access to it not less than ten business days following receipt of the counter notification, unless the service provider has received another notification from the issuer of the notification under subsection (1) that he has filed an action seeking a court order to restrain the issuer of the counter notification under subsection (3) from engaging in any infringing activity relating to the material on the service provider's network.

(5) A counter notification shall be issued to the service provider's designated agent containing the following information:

- (a) a physical or electronic signature of the subscriber;
- (b) identification of the material that has been removed or to which access has been disabled and the location at which the material appeared before it was removed or access to it was disabled;
- (c) a statement under penalty of perjury that the issuer has a good faith belief that the material was removed or disabled as a result of mistake or misidentification of the material to be removed or disabled; and
- (d) the issuer's name, address, telephone number and a statement that the issuer consents to the jurisdiction of the court in which the address is located, or if the issuer's address is outside Malaysia, in which the service provider may be found, and that the subscriber will accept service of process from the person who provided the notification under subsection (1) or an agent of such person.

Maker of false notice guilty of offence and liable in damages

43I. (1) If a person making a notification in accordance with section 43H makes any statement which is false, which he knows to be false or does not believe to be true, and which touches on any point material to the object of the notice—

- (a) he shall be guilty of an offence and shall on conviction be liable to a fine not exceeding one hundred thousand ringgit or to imprisonment for a term not exceeding five years or to both; and

(b) he shall be liable to compensate any person who suffers any loss or damages as a result of making the notification.

(2) Subsection (1) shall apply whether or not the statement is made in Malaysia, and if a person makes the statement outside Malaysia, he may be dealt with under paragraph (1)(a) as if the offence was committed in Malaysia.”.

New section 45A

33. The principal Act is amended by inserting after section 45 the following section:

“Access to computerized or digitalized data

45A. (1) Any Assistant Controller or a police officer not below the rank of Inspector shall, in the exercise of his powers under section 44, if it is necessary, be given access to computerized or digitalized data whether stored in a computer or any other medium.

(2) For the purpose of this section, “access” includes being provided with the necessary password, encryption code, decryption code, software or hardware and any other means required to enable comprehension of the computerized data.”.

Amendment of section 50

34. Subsection 50(2) of the principal Act is amended by inserting after the words “police investigation” the words “in seizable cases given by the Criminal Procedure Code [*Act 593*]”.

New section 50B

35. The principal Act is amended by inserting after section 50A the following section:

“Power to intercept communications

50B. (1) Notwithstanding the provisions of any other written law, the Public Prosecutor, if he considers that any communications is likely to contain any information which

is relevant for the purpose of any investigation into an offence under this Act or its subsidiary legislation, may, on the application of an Assistant Controller or a police officer not below the rank of Inspector, authorize the officer to intercept or to listen to any communications transmitted or received by any communications.

(2) When any person is charged with an offence under this Act or its subsidiary legislation, any information obtained by an Assistant Controller or a police officer under subsection (1), whether before or after the person is charged, shall be admissible at his trial in evidence.

(3) An authorization by the Public Prosecutor under subsection (1) may be given either orally or in writing; but if an oral authorization is given, the Public Prosecutor shall, as soon as practicable, reduce the authorization into writing.

(4) A certificate by the Public Prosecutor stating that the action taken by an Assistant Controller or a police officer under subsection (1) had been authorized by him under that subsection shall be conclusive evidence that it had been so authorized, and the certificate shall be admissible in evidence without proof of his signature there.

(5) No person shall be under any duty, obligation or liability, or be in any manner compelled, to disclose in any proceedings the procedure, method, manner or means, or any matter related to it, of anything done under subsection (1).”.

New section 51A

36. The principal Act is amended by inserting after section 51 the following section:

“Evidence of *agent provocateur* is admissible

51A. (1) Notwithstanding any written law or rule of law to the contrary, no *agent provocateur* shall be presumed to be unworthy of credit by reason only of his having attempted to abet or abetted the commission of an offence by any person under this Act if the attempt to abet or abetment was for the sole purpose of securing evidence against such person.

(2) Notwithstanding any written law or rule of law to the contrary, any statement, whether oral or in writing made to the *agent provocateur* by any person who subsequently is charged with an offence under this Act shall be admissible as evidence at his trial.”.

New section 52A

37. The principal Act is amended by inserting after section 52 the following section:

“Tipping-off

52A. (1) Any person who—

- (a) knows or has reason to suspect that an Assistant Controller or a police officer not below the rank of Inspector is acting, or is proposing to act, in connection with an investigation which is being, or is about to be, conducted under or for the purposes of this Act and discloses to any other person information or any other matter which is likely to prejudice that investigation or proposed investigation; or
- (b) knows or has reason to suspect that a disclosure has been made to an Assistant Controller or a police officer under this Act and discloses to any other person information or any other matter which is likely to prejudice any investigation which might be conducted following the disclosure,

shall be guilty of an offence under this Act.

(2) Nothing in subsection (1) makes it an offence for an advocate and solicitor or his employee to disclose any information or other matter—

- (a) to his client or the client’s representative in connection with the giving of advice to the client in the course and for the purpose of the professional employment of the advocate and solicitor; or
- (b) to any person in contemplation of, or in connection with and for the purpose of, any legal proceedings.”.

Savings and transitional

38. (1) The Deputy Controllers of Copyright, Assistant Controllers of Copyright and other officers appointed by the Corporation before the date of coming into operation of this Act shall be deemed to have been appointed under subsection 5(2) of the principal Act as amended by this Act.

(2) All societies or organizations which, prior to the coming into operation of this Act, are operating as licensing bodies shall continue to operate as licensing bodies:

Provided that such society or organization shall, within a period of three months after the coming into operation of this Act, register with the Controller.

(3) The Controller shall issue to the society or organization which has registered with the Controller under subsection (2) a declaration that it is a licensing body under subsection 27A(3) of the principal Act.

EXPLANATORY STATEMENT

This Bill seeks to amend the Copyright Act 1987 (“Act 332”).

2. The current Copyright Act 1987 provides protection for literary works, artistic works, musical works, sound recordings, films, broadcasts and protection for performers. The proposed amendments include provisions to fulfill the requirements for accession to the WIPO Copyright Treaty (WCT) and WIPO Phonograms and Performances Treaty (WPPT). The proposed amendments would ensure that Malaysia’s copyright law is consistent and up-to-date with new developments and new international standards.

3. *Clause 1* contains the short title and provisions on the commencement of the proposed Bill.

4. *Clause 2* seeks to delete the word “live” from the term “live performance” throughout the Act because the word “performance” is capable to imply action that is performed live. This proposed amendment is also consistent with Article 2 of the WPPT.

5. *Clause 3* seeks to further clarify certain words which are defined in section 3, such as the definition of “fixation” and “literary work”. The amendment to the definition of “literary work” is also to be in line with the definition which is applied in the Berne Convention. The term “technological protection measure” is introduced to support the new provision made in *clause 26* on offences relating to technological protection measure.

6. *Clause 4* seeks to amend paragraph 4(1)(d) to clarify that a performance has to be in a fixed form in order to amount to publication.

7. *Clause 5* seeks to amend subsection 5(2) to confer the power to appoint the Deputy Controllers, Assistant Controllers and any other officers to administer the Act on the Minister. It also seeks to empower the Controller and Deputy Controllers to exercise all the powers of an Assistant Controller as provided under the Act.

8. *Clause 6* seeks to delete subsection 7(6) with regard to the exploitation of design of artistic works, thus allowing the copyright owner to enjoy the protection provided under this Act for the duration of 25 years from the date it was first marketed, which is the date the product was first actually delivered pursuant to orders received.

9. *Clause 7* seeks to amend paragraph 8(b) to extend copyright protection to compilation of database which, by virtue of its arrangement, constitutes an intellectual creation.

10. *Clause 8* seeks to amend section 9 by expanding the purposes in which a reproduction of typographical arrangement of a published edition does not infringe copyright for as long as the reproduction is compatible with the concept of fair dealing.

11. *Clause 9* seeks to amend subsection 13(1) by incorporating the elements of the WCT on rights of commercial rental for films to the author in the event the commercial rental would impair the rights of reproduction. Paragraph 13(2)(a) is also amended to extend the exception and limitation from the present paragraph (a) for the purpose of research, private study and reporting of current event. The amendment to paragraph (gggg) is to enable the modification of works into a format for persons with vision impairment or is physically or mentally handicapped. The amendment to paragraph (j) is to expand the right of reproduction of any work via broadcasting to all broadcasters other than broadcast owned by the Government. The inclusion of a new paragraph (q) is to accommodate fair usage through internet.

12. *Clause 10* is a consequence of the amendment made in *clause 6*.

13. *Clause 11* seeks to delete section 13c which is no longer applicable in Malaysia.

14. *Clause 12* seeks to amend subsection 16A(1) to be consistent with the requirements of Article 15 of WPPT in relation to the rights on reproduction of a fixed performance. *Clause 12* also seek to expand the element of exceptions and limitations to the exclusive rights of the performer in paragraph 16A(3)(b)

by including any judicial proceedings, proceedings of a royal commission, a legislative body, a statutory or Governmental inquiry, or of any report of any such proceedings or for the purpose of the giving of professional advice by a legal practitioner.

15. *Clause 13* seeks to amend section 16B to further clarify the performers' rights in respect of equitable remuneration. It also provides for the right of the performer to refer any grievances in relation to equitable remuneration to the Copyright Tribunal.

16. *Clause 14* seeks to amend section 23A to comply with the requirement in Article 17 of the WPPT in providing clarification on the calculation of the protection period for fixed performances.

17. *Clause 16* seeks to introduce new sections 26A, 26B and 26C to provide for new provisions relating to voluntary notification mechanism of copyright works. The notification is on a voluntary basis and does not impede the requirement of non-formality for the enjoyment and exercise of the copyright protection under the Berne Convention. The certificate of notification issued by the Controller shall be *prima facie* evidence of the particulars relating to the copyright as stated in the Register of Copyright.

18. *Clause 17* seeks to introduce a new section on the declaration of a society or organization as a licensing body. Thus, only a fit and proper body will be able to carry on the business of a licensing body.

19. *Clauses 18, 19 and 20* seek to amend sections 27A, 27C and 27D respectively in relation to the operation of licensing schemes. This amendment seeks to confer equal right for licensees and operators to refer any disputes on licensing scheme to the Tribunal.

20. *Clause 21 and 22* seek to amend sections 28 and 29 in relation to the Tribunal by setting out the powers of the Tribunal clearly and to increase the number of Deputy Chairman from one to five and to reduce the number of members from not less than twenty to twelve. This is to cater for the need to convene simultaneous multiple proceedings.

21. *Clause 23* seeks to amend section 30 to allow the Deputy Chairman or a member of the Tribunal to act as chairman of the Tribunal's proceeding in circumstances where the Chairman is not able to chair a proceeding.

22. *Clause 24* seeks to amend section 31 to allow application for compulsory licence to produce and publish a translation of literary works into other vernacular languages in Malaysia.

23. *Clause 25* seeks to amend section 36 which is a consequence of *clause 26* which introduces two new sections on technological protection measure and rights management information.

24. *Clause 26* seeks to introduce new sections 36A and 36B on technological protection measure and rights management information, consistent with Article 18 of WPPT and Article 11 of WCT. The new section 36A provides for the prohibition of the act of circumventing technological protection measure and section 36B provides for the prohibition of removing or altering electronic rights management information.

25. *Clause 27* seeks to amend section 37 to provide for statutory damages as a relief in civil claims for infringement of copyrights as well as the prohibited acts under sections 36A and 36B and matters relating to the award of statutory damages.

26. *Clause 28* seeks to amend section 38 as a consequence of the amendments in *clause 27*.

27. *Clause 29* seeks to amend subsection 40(1) to provide clarity on matters relating to back-up copy of computer programs.

28. *Clause 30* seeks to amend section 41 to provide for the prohibited acts under the new sections 36A and 36B as offences, as well as to provide for the liability of persons where the offence is committed by a body corporate.

29. *Clause 31* seeks to amend section 42 as a consequence of *clause 16* relating to certified extracts of the Register of Copyright which are to be included as admissible in evidence.

30. *Clause 32* seeks to introduce new Parts VIA and IVB which contain sections 43A on anti-camcording and sections 43B to 43I on limitation of liabilities of the service provider. The new section 43A deals with matters to combat camcording activities in a place for the screening of any film or cinematography and the new sections 43B to 43I provide for some limitations on the liabilities of the internet service providers.

31. *Clause 33* seeks to introduce a new section 45A to empower an Assistant Controller or police officer not below the rank of Inspector to have access to computerized or digitalized data in carrying out investigations under the Act.

32. *Clause 34* seeks to amend section 50 to be consistent with the power given in seizable cases by the Criminal Procedure Code [Act 593].

33. *Clause 35* seeks to introduce a new section 50B to empower an Assistant Controller or police officer not below the rank of Inspector, with the authorization of the Public Prosecutor, to intercept communications which are likely to contain any information relevant for the purpose of investigation into an offence under this Act.

34. *Clause 36* seeks to introduce new section 51A regarding evidence given by an *agent provocateur* to eliminate the allegation of entrapment towards the accused by allowing the evidence given by *agent provocateur* admissible.

35. *Clause 37* seeks to introduce a new section 52A to ensure that raids done by enforcement are effective. It also seeks to curb the information leakage regarding a prospective raid so that the suspect doesn't have the opportunity to destroy the evidence.

36. *Clause 38* contains savings and transitional provisions.

37. Other amendments not specifically mentioned in this Statement are minor or consequential in nature.

FINANCIAL IMPLICATIONS

This Bill will not involve the Government in any extra financial expenditure.

[PN(U²)2750]