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Infringement of Intellectual Property in Social Media in Malaysia

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ABSTRACT

Background: Social media describes the online interaction of individuals and the exchange of user-generated content or information. Among the examples of social media includes twitter, Facebook, Instagram, YouTube and many more. According to the Britanica Company Merriam Webster, social media means the form of electronic communication which acts at the web sites for social networking and microblogging where users are able to create their own way of online communication in order to communicate to share information, ideas, personal messages and other contents as well. Infringement on the other hand is defined in the free dictionary by Farlex as an act that disregards an agreement or a right. It is also defined as the act of doing something that goes against what has been asked to or to wrongly limit or restrict something such as another individual or corporation's right. **Objective:** This paper is going to analyze the possible infringement of intellectual property in social media. **Results:** At the end of this article, this paper will conclude and come out with suggestion for solution to overcome this matter. **Conclusion:** In conclusion, like any other developed country, infringement of intellectual that happens in Malaysia are usually through social media due to the infringement of copyright by unauthorized persons.

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INTRODUCTION

In Malaysia, infringement is defined in Section 3 of the Copyrights Act 1987. According to this section, if infringement is related to copyright, then it carries the meaning of any reproduction of any work eligible for copyright under the act which constitutes an infringement of the copyright in the work or, any article imported into Malaysia without the consent of the owner of the copyright, the making of which was carried out without the consent of the performer.

Section 3 also state down the meaning of infringement in relation to the performers' right as any reproduction of any recording of a performance which constitutes to an infringement of the performers' rights or any recording that is imported into Malaysia but without the consent of the performer and the making that was carried out without the consent of the performer in the first place.

Examples of social media:

There are many types of social media available nowadays which could be accessed easily by almost everyone at anytime and anywhere they want. Due

to the rapid growth of technology nowadays, social media is seen to be growing rapidly. This is due to the invention of smartphones, internet, and laptop and so on that has made the public at general to communicate in an easier manner since the world is at their fingertips.

Among the examples of social media include Facebook, YouTube, Instagram, twitter, online books and many more.

Facebook is one of the common trend and the must have application that almost everyone regardless of age has an account in facebook. It has become so popular until everything happening around the world could share in matter of seconds. According to WhatIs.com¹, facebook is known as a popular free social networking website that allows registered users to create profiles, upload photo and video, send messages and keep in touch with family and friends.

Next is YouTube. YouTube is a video sharing service that allows its users to watch videos posted by the other users and upload their own video. YouTube's services are designed to cater the needs of ordinary people who wish to publish their video online while some individuals who are in the

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business line use YouTube to promote their business through videos as well.

Other than that is Instagram. Instagram is defined as an online-mobile photo sharing, video sharing and social networking services that allow its users to not only take pictures and videos but they are able to apply the digital filters to them and share it to various other social networking sites such as Facebook, Twitter and many more.

Finally is twitter. Twitter is a free social networking microblogging service that allows its registered members to broadcast short posts called 'tweets'. Members can broadcast tweets and follow other users' tweets by using a multiple platforms and devices. Tweets and replies to tweets can be sent by cell phone text messages, desktop client or by posting at the website.

Infringement of Intellectual Property through Social Media:

There are several ways of how infringement of intellectual property happens through social media, especially in Malaysia. The areas that will be covered in this article are copyright and trade mark.

Infringement of Intellectual Property that happens through social media usually happens due to the infringement of copyright by unauthorized person. Copyright of legal owners are protected by the Copyright Act 1987. 2 main conditions must be met in order for literary, musical or artistic work to be entitled to copyright. The 2 conditions are that sufficient effort must have been expended and reduced to writing form any person that realizes his copyright has been infringed, he or she is advised to submit complaints directly to the website operator in

order for the content to cease its distribution. As an alternative, complaints may also be submitted to the Ministry of Domestic Trade, Co-operatives and Consumerism (KPDNKK). However, it seems that an action for copyright infringement may not be that easy. In Malaysia, there is a 'fair use' exception to the general rule of copyright infringement. The factors considered for exception are research purposes, private study, criticism, review or the reporting of current events. However so, whosoever that is found guilty of an offence for violating any of the copyright laws, the person will be liable to a fine of between RM10,000 to RM50,000, or a term of imprisonment not more than 5 years.

Trade mark is a type of sign that can be in forms of words or logos to distinguish a business from the others. In Malaysia, this area of intellectual property is protected by the Trade Marks Act 1976. Usually, a person who infringes the trade mark of a business intends to gain benefit from the goodwill of the business (impersonation and passing off). In order for the business owner to protect its trade mark and benefit derived from it, the owner has to register at the Malaysian Trade Mark registry.

The trade mark must contain one of the required particulars under the Act for it to be register able. Anyone will be liable to an offence if the person uses the same words or logos that are lawfully the registered owner's trade mark.

As for the application of trade mark infringement through social media, if the trade mark is used by anyone who possesses no rights to use it in a false website, complaints may be submitted to the Ministry of Domestic Trade, Co-operatives and Consumerism (KPDNKK).

	Malaysia	Australia	USA
Patent	20 years	Standard- 20 years Innovation- 8 years Medical - 25 years	20 years
Copyright	50 years	70 years	-70 years -if author is unknown or made for hire protection is 95 years from date of publication or 120 years from date of creation.
Trademark	10 years	10 years	No fixed termination period.
Law Governs	Patent Act 1983 Copyright Act 1987 Trademark Act 1976	Copyright Act 1968 Patent Act 1990 Trademark Act 1995	Trademark- common law and title 15 of the us code Patent- Title 35 of the us code Copyright- Title 17 of the us code

The KPDNKK will then investigate the offence under the Trade Marks Act 1976. Also, if a false website uses a trade mark which belongs to the legal owner, he or she can lodge a complaint to the Regional Centre for Arbitration Kuala Lumpur (www.rcakl.org.my) when the use of ".my" domain name is involved. Furthermore, trademark owners have to take extra measures to prevent name squatting (reservation of names that do no rightfully belong to them) on social media.

In short, although the area of intellectual property infringement through social media has not been fully extensive and developed in Malaysia, the laws that cover and protect intellectual property in

the normal sense are still applicable even if the infringement is done through social medias.

Comparison of Laws Governed in Malaysia Australia and USA:

Duration and Law:

The table above shows the period of protection given by each country. Based on the table, there is a significant difference between the 3 countries. The first is the law that governs the country intellectual property, as can be seen that Malaysia and Australia have their own Statutes for example the Patent Act, Copyright Act and also Trademark Act. However in the United States, intellectual property is governed under the US codes and for trademark, the common

law is applied.

In Patent, the duration period given by America and Malaysia is similar, however in Australia its more specific. In Australia, a standard protection is similar like in the US and Malaysia which is 20 years. But it is different for innovation protection which only protects up to 8 years, and for medical inventions the protection is extended an extra 5 years from the normal 20 years protection. Under the Malaysian Law, there is no such specific protection stated in the Patent Act 1983. In the US there is also no specific duration for certain types of patentable invention.

As far as Copyright is concern, Malaysia has the lowest amount of time of protection among the 3 countries. The protection for copyright is given throughout the whole life of the author, after the author's death the protection in Malaysia is only up to 50 years. In Australia, a copyright protection after the author's death is up to 70 years which is an extra 20 years compare to Malaysia. As for the protection in the US, the protection period is similar which 70 years is. However in US, if the author of copyright is unknown or in some circumstances is made for hire, then the protection durations is 95 years from the date of publication or 120 years from the date of creation whichever is longer.

Finally for trademark, Malaysia and Australia the protection period is similar where it could last up to 10 years. After the 10 years period, the individual could make a renewal of the trademark. On the other hand in the US, the protection period of a trademark is not fixed. Trademark rights may be maintained as long as the trademark remains in use in commerce. If the trademark owner abandons the said trademark, the protection right will cease to exist.

In a nutshell, the only similarity between the 3 countries is the standard protection for patent which is 20 years. Other intellectual property protection if compare to the Malaysian protection which is lower like the 50 years duration for copyright protection while the other two is 20 years longer.

Cases regarding infringement of Intellectual Property through social media:

LaRussa v. Twitter:

The plaintiff, Tony LaRussa is a well-known baseball manager of the St. Louis Cardinals, he had sued Twitter after an unknown Twitter user had pretended to post updates on Twitter by using the name 'Tony LaRussa'.

That unknown user had made negative and vulgar comments about the Cardinals players. LaRussa claimed trademark infringement, cybersquatting, dilution, violation of the right of publicity and misappropriation of name.

The court held that the unknown user had breached the intellectual property rights of the plaintiff and Twitter thus took action to disabled the

user name and transferred the domain name to the plaintiff.

Oneok, Inc. v. Twitter, Inc:

Oneok who is energy services company, in which it owns the registered trademark for ONEOK. It had filed a complaint claiming trademark infringement after an unknown user registered a Twitter account with the user name of 'Oneok'. That unknown user had also posted information about the company. The complaint was that Oneok, Inc., had requested Twitter to transfer the user name to the company; and also to give the company pertinent evidence about who the user for the Twitter account was. However, Twitter had refused to do so.

The complaint was later dismissed by Oneok almost immediately.

It was later held by the court that the user name was to be transferred back to the company (ONEOK).

Grooms v. Legge:

The plaintiff had obtained an injunction to bar the unauthorized use of graphics and designs, and photographs in which bears the Knuckle Marks Names. Despite whether the names were published or not published in the internet which includes such as the following: 'www.knuckleinc.com,' 'www.knuckleinclothing.com,' MySpace, Facebook, and any traditional media channels.

Perfect 10 Inc. v Amazon.com Inc:

The plaintiff- Perfect 10 was an adult entertainment magazine company that promotes and sells copyrighted images of nude models and provided a subscription-only website in which subscribers will pay monthly fees to view the nude pictures provided by Perfect 10's site. The plaintiff also licenses smaller-resolution sized copyrighted images for the purpose of downloading it into smart phones.

The defendant- Google operates a search engine in which it automatically accesses hundreds to thousands of websites on the Internet and categorized them within a database and it is stored on Google's computers. Google's search engine provides results in the form of images, videos or texts.

Google stored smaller thumbnail images on its server. In this case, there were a few website publishers copied Perfect 10's images and Google's search engine automatically indexed the web pages which contains the pirated images. It then provides thumbnail versions of the images in responding to user's inquiries. The plaintiff had sent multiple notices to Google stating that its thumbnail images and in-line linking to the full-size images had indeed infringed Perfect 10's copyright.

Perfect 10 had filed a copyright infringement action against Google, and requested an injunction to prevent Google from infringing its copyright towards

the photographs. The defendant argued that it was a fair use.

In determining whether it was a fair use, the court held that there were four factors or test in which must be fulfilled.

1. The purpose and character of the use:

- Google's uses of thumbnails images are transformative in nature, by merging an original work into a new work for the purpose of being a reference tool. Moreover, its public benefit far surpasses its commercial uses, and unlikely for Google to use it for aesthetic purposes, because enlarging it will sacrifice the clarity.

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2. The nature of the copyrighted work:

- Although prima facie Perfect 10's images are creative in nature, but Google had used thumbnail version in its search directory. However this factor weighed slightly at Perfect 10.

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3. Amount and the substantiality of the portion used:

- This factor does not weigh in favor of any party. This is because Google use of the entire image was reasonable for the purpose of its search engine. It weighed neutral.

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4. Effect of the use on the potential market:

- Google use of thumbnails did not harm the market of or value of Perfect 10's full sized images. Since Google's thumbnail images were highly transformative, it did not favor either party.

The court held in this case that Google's use of the thumbnail images was a fair use, due to the fact that its purpose is to provide a referencing tool and benefit the public socially.

Solutions or Suggestions to Solve Problem of Intellectual Property's Infringement through Social Media in Malaysia:

As we can see that, the rapid growth of social media nowadays caused the problem of Intellectual Property's Infringement through social media in Malaysia. It is getting more and more serious day to day. Therefore, it is very important to find solution to solve such problems to protect the rights owned by the owner of an Intellectual Property.

As discuss above, we can see that countries such as Australia and USA have a longer duration in protecting the owner rights. For copyright, Malaysia only protect the owner rights under intellectual property for 50 years while Australia and USA are 70 years. These 20 years made a big different. Owner's right should be protected as long as a law can help. Therefore, government should implement a longer duration in protecting copyright infringement through social media in Copyright Act 1987.

Besides that, there is a global survey done by Regus who is a Belgium-based workplace solutions

provider. He found out that there are 51% of the Malaysian companies successfully invest their business through social media. 68 % of business in Malaysia tends to use social media for example twitter to engage in their business. Companies also encourage employees to join social network to help to promote their business plan. In this case, infringement of social media will easily happen. To solve this problems, company can establish clear and specific guidelines to guide employees to conduct their business through social media without infringing others intellectual property. Guidelines must be treated as a mandatory obligation on employees. Situations often occur when employees are unaware that certain photographs or videos that are presented online are protected by copyright or trademark. Therefore, they might adopt the similar word, name or symbol in promoting their new products. In this case, infringement of intellectual property indirectly occurred without aware by the employees. Hence, it is very important to set a guideline on what can do and what cannot do. If they failed to comply those guidelines, they might be subjected to disciplinary actions or even termination. These enable employees to avoid from infringing others' intellectual property.

Not only this, even though companies can set a guidelines for the employees, training and awareness are also very important to bring out the problem of intellectual property infringement in Malaysia. This is not only direct to the employees from any companies. Such training and awareness must also being carried out to give awareness to the public. This is because most of public are lack of knowledge on intellectual property's infringement. Public will tend to download music or movies from some illegal websites, copied works of others from online sources and others. In this case, they conducted the action of infringing intellectual property. Awareness campaigns give awareness to them on what is correct and what is not. For employees of any companies, awareness training helps to increase the knowledge of policy against intellectual property's infringement.

Other than that, government in Malaysia should amend the law under Copyright Act 1987, Patent Act 1983 and also Trademark Act 1976 which govern the penalties enforced to those who breached the law in infringing intellectual property. For example, under s 43 of Copyright Act 1987, it is an offence in violating any copyright laws and liable to fine or imprisonment. The amount of fine should be increased or lengthen the term of imprisonment so that people will afraid of the law and avoid themselves from infringing the copyright of intellectual property.

Lastly, the owner of certain intellectual property should protect their IP to prevent people from infringing their intellectual property through social media such as Facebook, Twitter, or Instagram. It is very important to educate them about the social

media and infringement issues. The owner must also aware in monitoring self-produce brand from being copy by others through social media. Before the owner upload their works online in social media, they must at least enforce certain policy to avoid people from disclose their confidential information, copy their works or misuse their trademarks. In this case, the rights of owner on social media can be protected.

In conclusions, these are the solution that we suggested to solve the problem of intellectual property's infringement through social media in Malaysia.

Conclusion:

In conclusion, the areas that intellectual property's infringement is covered in this article are copyright and trade mark. Like any other developed country, infringement of intellectual that happens in Malaysia are usually through social media due to the infringement of copyright by unauthorised persons. In Malaysia, copyright of legal owners are protected by the Copyright Act 1987, any persons that thinks that his copyright has been infringed, he may submit his complaints directly to the website operator to cease the distribution provided that the claim does not fall under the "fair use" exception. Finally, trade mark infringement, this situation occurs when a person infringed the trade mark of a business with the intention to ain benefit from the goodwill of the business. In Malaysia this area of intellectual property is protected under the Trade Marks 1976. Under the act, anyone will be liable to an offence if the person uses the same words or logos that are lawfully the registered owner's trade mark.

It is suggested that several solutions taken to overcome this matter that would minimize the cases of infringement and could possibly prevent it from happening. For examples, there should be specific guidelines made by companies to prevent any of their employees to infringed anything whether intentionally or unintentionally. In addition to that. there should also be an amendment made toward the law which they should enforce a heavier fine and a lengthier imprisonment that would most likely scare the future possible people that has ill intention to infringe the property.

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