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Malaysia
11 March 2020

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Much Ado about "Bohsias": Federal Court discusses approach to comparison of works in determining copyright infringement

A copyright dispute involving a top grossing local film released in 2009 which centered on the "bohsia" (a colloquial term for wayward and promiscuous teenage girls) social phenomenon in Malaysia and a novelist claiming copyright infringement, found its way up to the apex court in Malaysia.

Background

The plaintiff/respondent, who is author of the novel "*Aku Bohsia*", sued the defendants/appellants, Mohd Syamsul Md Yusof (lead actor, lead scriptwriter and director), his father Yusof Haslam (producer) and Skop Production Sdn Bhd (distributor) for reproducing several of the novel's content, themes, plots and characters in their movie "*Bohsia: Jangan Pilih Jalan Hitam*".

At the High Court, the respondent's claim for copyright infringement was dismissed as the judge found that the similarities between the novel and the movie were not as a result of copying but rather a take on the "*bohsia*" phenomenon which was a common social issue in Malaysia. The judge had undertaken a comparison of the novel and movie, and excluded ideas and elements associated with "*bohsia*" which are commonplace and general ideas in society, leaving similarities which extended only to certain parts of the movie which could not, in the view of the judge, be said to be substantial similarities that goes to the root of the novel and the movie.

On appeal, the Court of Appeal reversed the trial judge's findings and found that there were substantial similarities between the novel and the movie which were not "*merely coincidental*" or mere "*similarities in ideas*". In arriving at its decision, the Court of Appeal relied on assertions in the statement of claim on the similarities without examining and evaluating the evidence adduced by both parties during the trial.

Two questions of law were posed to the Federal Court, namely:

(1) Is publication itself sufficient satisfaction to the legal requirement of causal connection in order to succeed in a claim on infringement of copyright; and
(2) In carrying out the test in *Megnaway Enterprise Sdn Bhd v Soon Lian Hock [2009] 3 MLJ 525,* is there a legal duty to examine and evaluate both the distinct materials being the subject matter under the claim on infringement of copyright.

In allowing the appeal, the Federal Court only dealt with Question 2, which was sufficient to dispose of the appeal, and held that under a claim for copyright infringement the court has a legal duty to examine and evaluate both the original and the infringing work. It held that the question of objective similarity between the two works in question and its substantiality can only be determined by direct comparison between the two works. In other words, the novel needs to be read in full and the movie needs to be seen, as was done by the trial judge.

Analysis

The decision of the Federal Court relied primarily on the settled principle that an appellate court, in reviewing a finding of fact, should only displace the conclusion reached by the trial judge if it was satisfied that the trial judge was plainly wrong and that any advantage which he enjoyed by having seen and heard the witness was not sufficient to explain his conclusion. The Federal Court was critical of the approach taken by the Court of Appeal in relying only on the particulars in the pleadings without appreciating the evidence tendered before the trial judge, and that the trial judge had carefully reviewed all evidence available as well as the novel and the film.

An interesting point to note is that in determining similarity and substantiality, the Federal Court had said that both the original and the alleged infringing work must be evaluated. Whilst that is the position for determining similarity, its application on substantiality seems to be inconsistent with the position taken by the House of Lords in *Designers Guild Ltd v Russell Williams (Textiles) Ltd [2000] All ER 1950* which held that the issue of substantiality depends on the qualitative importance of the part that has been copied assessed in relation to the copyright work as a whole, and it does not depend upon its importance to the alleged infringing work. Further clarification on this point from the Federal Court will be helpful.

This case illustrates that in a copyright infringement action, care must be taken to identify the substantial part that has been copied in the infringing work. In some cases, this may not be immediately apparent, in particular, if only a small albeit significant portion of the part of the work is copied. Evidence must be directed to show the qualitative importance of the part taken or copied. The fact that there are some similarities between the impugned work and the copyrighted work is not sufficient for a finding of copyright infringement.

If you have any questions or require any additional information, please contact **Ong Boo Seng** or **Kimberly Tey** of Zaid Ibrahim & Co. (a member of ZICO Law).
