

## PROVING AUTHORSHIP AND OWNERSHIP UNDER MALAYSIAN COPYRIGHT LAW

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**Abstract:** Authorship and ownership are distinct concepts in copyright law. It is important to distinguish the two for several good reasons. However, there has been some confusion about the two concepts, as demonstrated in a few Malaysian court decisions on copyright matters. The presumption of authorship in section 26(4)(a) of the Copyright Act 1987, in particular, has been applied to determine copyright ownership. This undoubtedly blurs the demarcation between authorship and copyright ownership. Hence, this article aims to clear the air by first explaining the two concepts and the necessity of differentiating authorship from copyright ownership. Next, this article analyses the case law in which confusion on the two concepts arose. This is followed by a discussion on proving authorship and ownership, respectively, in accordance with the Copyright Act 1987.

**Keywords:** Copyright law; authorship; ownership; presumption of authorship; voluntary notification of copyright

### 1. INTRODUCTION

In lay person's terms, an "author"<sup>1</sup> is the creator or maker of a work while a "copyright owner" refers to the person or body who owns copyright in a work. In the beginning, an author is, usually, also the copyright owner.<sup>2</sup> This is clearly provided in section 26(1) of the Copyright Act 1987 (hereinafter referred to as "the Act") which states that copyright "shall vest initially in the author".<sup>3</sup> Since copyright is transferable as a movable property,<sup>4</sup> copyright may not remain the author's property at all times. When the copyright in a work passes to another person or body, the other person or body becomes the copyright owner of the work and thus the copyright no longer vests in the author. It should be noted that while copyright ownership may change hands; authorship, obviously, does not.

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<sup>1</sup> See the definition of 'author' in section 3 of the Copyright Act 1987 (hereinafter "the Act").

<sup>2</sup> This is so except in respect of the works prescribed in section 11 of the Act.

<sup>3</sup> This is subject to an exception as provided in section 26(3) of the Act. Section 26(3) (read with section 11 of the Act) states that copyright in works made by or under the direction or control of the Government, Government organizations and any prescribed international body shall vest initially with the Government, Government organizations or international body, and not the author.

<sup>4</sup> See section 27(1) of the Act. See *Rock Records (M) Sdn Bhd v Audio One Entertainment Sdn Bhd* [2005] 3 MLJ 552 which involved an assignment of the copyright in a sound recording.

While copyright may be transferred by way of assignment, testamentary disposition, or by operation of law,<sup>5</sup> it may also be deemed to be transferred in two circumstances, as prescribed in section 26(2) of the Act. First, section 26(2)(a) provides that where the author is commissioned to produce a work, copyright in the work shall be deemed to be transferred to the person who commissioned the work. In *Syed Ahmad bin Jamal v Dato Bandar Kuala Lumpur*,<sup>6</sup> for instance, the late Dato' Syed Ahmad bin Jamal was commissioned by a company, UMBC Harta Sdn Bhd, to design a sculpture named "Lunar Peaks" (or "Puncak Purnama" in Malay). Undoubtedly, the late Dato' Syed Ahmad bin Jamal was the author of the sculpture, but the copyright in the sculpture belonged to UMBC, which commissioned the work.

Second, section 26(2)(b) of the Act states that where the author creates a work in the course of his employment, copyright in the work shall be deemed to be transferred to his employer. In *Radion Trading Sdn Bhd v Sin Besteam Equipment Sdn Bhd & Ors*,<sup>7</sup> for example, the technical design drawings for an automatic swing gate actuator were created by the plaintiff's director. By virtue of section 26(2)(b), copyright was transferred to the plaintiff due to the author's employment with the company.

Both deeming provisions are subject to any express agreement between the parties which may exclude or limit such transfer.<sup>8</sup> An example of an express agreement excluding such transfer of copyright may be seen in *Wedding Galore Sdn Bhd v Rasdah Ahmad*,<sup>9</sup> where disputes arose regarding the ownership of copyright in pre-wedding photographs shot by the respondent. The appellant argued that if there was any copyright in the photographs, the copyright belonged to the wedding couple who commissioned the respondent for the making of the works. However, the court found that the terms and conditions attached to the invoice expressly stipulated that the photographs taken shall be treated as the respondent's intellectual property and that the respondent would transfer the copyright in the photographs to the client for a sum of RM 1000. Accordingly, the court held that the agreement between the respondent and the client excluded the transfer of the copyright in the photographs to the client.

It is clear that under the Act, in most cases,<sup>10</sup> an author of a work is the first copyright owner of the work but may not always remain the copyright owner. Hence, the concepts of "authorship" and "ownership" should not be

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<sup>5</sup> See section 27(1) of the Act.

<sup>6</sup> [2010] MLJU 1015; [2011] 2 CLJ 569; [2011] 1 AMCR 145.

<sup>7</sup> [2010] 9 MLJ 648; [2010] 6 CLJ 334; [2010] AMEJ 0124.

<sup>8</sup> Section 26(2) of the Act.

<sup>9</sup> [2016] 6 CLJ 621; [2016] 1 AMCR 976.

<sup>10</sup> This is subject to an exception provided in section 26(3) of the Act. Section 26(3) states that copyright in works Government, Government organizations and any prescribed international body (see section 11 of the Act) shall vest initially in the Government, Government organizations or international body, and not the author.

intermingled. As observed by Steve Shim J in *Yeoh Kee Aun v PI Capital Asset Management Sdn Bhd & Anor*,<sup>11</sup> “authorship” and “ownership” are “quite clearly two different concepts under the Copyright Act.”<sup>12</sup> It is crucial to treat and deal with the two distinctly for the reasons which are discussed next.

## 2. “AUTHORSHIP” VS “OWNERSHIP”

A clear distinction between authorship and ownership is imperative, and with good reason. First, it is authorship which plays an important role in determining subsistence of copyright. A literary, musical or artistic work shall be original in order to be protected by copyright in Malaysia.<sup>13</sup> As indicated in section 7(3)(a) of the Act, the originality condition requires sufficient effort being expended in creating the work. “Originality” has been explained in case law as meaning that the work shall originate from the author, and shall not be copied from others.<sup>14</sup> It follows that the author is the protagonist to be focused on in ascertaining “originality” of a work.

In addition, section 10 of the Act provides three alternatives in which a work may be qualified for copyright protection in Malaysia.<sup>15</sup> One way for a work to be so qualified is that if the author is a qualified person<sup>16</sup> at the time when the work is made as provided in section 10(1)(a) of the Act. If it involves a work of joint authorship, the work is qualified for copyright protection if any of the authors is a qualified person.<sup>17</sup> Again, the author, not the copyright owner, takes the centre stage in deciding the qualification requirement.

Section 17(1) of the Act provides that copyright in a literary, musical or artistic work subsists during the life

of the author, plus fifty years after the death of the author.<sup>18</sup> It follows that the author’s lifespan and the date of his death, as opposed to the copyright owner’s, determine the duration of copyright in literary, musical or artistic works.

As discussed earlier, except in respect of works of government, government organizations or international bodies, an author is always the first copyright owner but he may divest himself of ownership. When this takes place, the author is no longer entitled to enjoy the exclusive rights that are exercisable only by a copyright owner, also known as the economic rights. The economic rights of a copyright owner, such as the exclusive rights to control the reproduction or communication to the public of a copyright work, are contained in section 13(1) of the Act.<sup>19</sup>

On the other hand, authors are entitled to moral rights, which are inalienable, as provided in section 25 of the Act. Moral rights of an author subsist as long as copyright subsists in the work and are exercisable by the author or his personal representative after the author’s death.<sup>20</sup> Authors’ moral rights under the Act comprise the right to be identified as the author;<sup>21</sup> and the right to object to modifications on the work with a negative impact on the author’s honour or reputation.<sup>22</sup> The case of *Syed Ahmad bin Jamal v Dato Bandar Kuala Lumpur*<sup>23</sup> provides an example of circumstances where the author based his action on moral rights.

It should also be noted that copyright owners’ exclusive rights as prescribed in section 13(1) are limited by, or subject to, the exceptions listed in section 13(2). Several exceptions in section 13(2) impose a common requirement, that is, a proper acknowledgement of the title of the work and its authorship. For instance, the fair dealing exception requires the doing of an act, to fall within section 13(2)(a), to be accompanied by an acknowledgement of the said matters. It is the authorship, instead of copyright ownership, of the work that shall be acknowledged. A similar requirement on an acknowledgement of the authorship of the work is also imposed under the exception for inclusion of a work as illustration for teaching purposes in section 13(2)(f) and the exception for making quotations in section 13(2)(m).<sup>24</sup> It follows that while the establishment of

<sup>11</sup> [2000] 4 MLJ 508.

<sup>12</sup> [2000] 4 MLJ 508 at 515-516.

<sup>13</sup> A literary, musical or artistic work shall meet four conditions to be protected by copyright in Malaysia, namely, it falls within one of the categories of works eligible for copyright as stated in section 7(1) of the Act; it is original as required under section 7(3)(a) of the Act; it has been reduced to material form as provided in section 7(3)(b) of the Act; and it is qualified for copyright protection in Malaysia as stated in section 10 of the Act. Other works, namely, broadcasts, films and sound recordings, only have to meet two conditions regarding the categories of works eligible for copyright and qualification.

<sup>14</sup> See *University of London Press Ltd v University Tutorial Press Ltd* [1916] 2 Ch 601 at 608.

<sup>15</sup> Section 10(1)(b) of the Act provides that a literary, musical or artistic work, film, or sound recording is qualified for copyright protection if it is first published in Malaysia. Whereas a work of architecture erected in Malaysia or an artistic work incorporated in a building situated in Malaysia is similarly qualified. A broadcast is likewise qualified if it is transmitted from Malaysia. Section 10(1)(c) of the Act, on the other hand, qualifies a work for copyright protection if it is made in Malaysia.

<sup>16</sup> See the definition of ‘qualified person’ in section 3 of the Act.

<sup>17</sup> Section 10(1)(a) of the Act.

<sup>18</sup> As for copyright duration of other works, see sections 18, 19, 20, 22 & 23 of the Act.

<sup>19</sup> See also sections 36A and 36B of the Act which provide additional rights exercisable by copyright owners in relation to technological protection measures applied to their copyright works in digital forms.

<sup>20</sup> Section 25(2) of the Act.

<sup>21</sup> Section 25(2)(a) of the Act.

<sup>22</sup> Section 25(2)(b) of the Act.

<sup>23</sup> [2010] MLJU 1015; [2011] 2 CLJ 569; [2011] 1 AMCR 145.

<sup>24</sup> The exception for the reading or recitation in public or in a broadcast of any reasonable extract from a published literary work in section 13(2)(h) imposes a condition that the act shall be accompanied by “sufficient acknowledgement”, which may reasonably be construed as

those exceptions may defeat a copyright owner's claim for copyright infringement, the acknowledgement which is required to be made is with regard to authorship, not ownership, of the work.

Lastly, as discussed earlier, copyright in a work initially vests in the author and may be transmitted to another person or body. When copyright ownership is in dispute, it is necessary to determine first who is the author, and next, if and how copyright has been transferred to another person or body. In many instances, it is inevitable to trace the transactions back to the very beginning when the author was also the first copyright owner. For example, the plaintiff's claim to copyright ownership in a photograph in *Ultra Dimension Sdn Bhd v American Home Assurance Company; Rewardstreet.com (Malaysia) Sdn Bhd (Third Party)*<sup>25</sup> failed because the court found that the copyright was not assigned to the plaintiff by the group of people who took the said photograph, namely, the authors of the photograph.<sup>26</sup> The chain of ownership shall be unbroken and established.<sup>27</sup>

### 3. MISAPPLICATION OF SECTION 26(4)(A)

Section 26(4)(a) of the Act states that the name on a work purporting to be the name of its author shall be regarded as such, unless the contrary is proved. Plainly, section 26(4)(a) provides for presumed authorship of a work, as opposed to the presumed author's legal representative in section 26(4)(b),<sup>28</sup> or the presumed copyright ownership in section 26(4)(c).<sup>29</sup> Nevertheless, the rule on presumed authorship in section 26(4)(a) was applied to determine the question of copyright ownership in several local court decisions.

In *Microsoft Corp. v Conquest Computer Centre Sdn Bhd*,<sup>30</sup> disputes arose relating to the sale of a PC loaded with Microsoft Windows 7 Home Premium by the defendant. One of the questions was whether the plaintiff is the copyright owner of the computer software. The High Court took note of the display of the plaintiff's name, "Microsoft", on the original CD-ROMs of

the computer software, the CD-ROMs casing, and the screen of the computer downloaded with the software. The court then went on to hold that "as the defendant had failed to prove the contrary, the copyright in the computer software was vested in the plaintiff under section 26(4) of the Act."<sup>31</sup> As it may be seen here, the court had applied the statutory presumption of authorship to determine ownership of copyright, which is an entirely different matter from authorship. In deciding the question, the court cited the case of *Creative Purpose Sdn Bhd & Anor v Integrated Trans Corp Sdn Bhd & Ors.*<sup>32</sup>

In *Creative Purpose Sdn Bhd*, questions arose regarding copyright ownership in a computer programs. The plaintiffs argued in the case that there was a statutory presumption in favour of the copyright ownership being vested in them by virtue of section 26(4) of the Act while the defendants emphasized that the authorship of a work is totally different from ownership of the work.<sup>33</sup> The defendants' submission was, however, rejected by the court on the ground that such submission failed to take into account the full import of section 26, which reads "First ownership of copyright".<sup>34</sup> The court proceeded to express as follows:

It is obvious therefore that where there is a claim to authorship which can be presumed by the name of the author appearing on the works, then by virtue of sub-s (3)..., the claim to ownership (subject to s 11 of the Act...), shall be presumed to also vest with the authorship.<sup>35</sup>

The court concluded that the presumption raised in section 26(4) "cannot be limited to mere authorship, but should be properly read to cover the issue of ownership."<sup>36</sup>

A few comments may be made on the interpretation of the provisions relating to authorship and ownership in *Creative Purpose Sdn Bhd* as stated above. First, section 26 does not deal with ownership of copyright

an acknowledgement of the title of the work and its authorship.

<sup>25</sup> [2009] 9 CLJ 589.

<sup>26</sup> [2009] 9 CLJ 589 at para 14.

<sup>27</sup> See *Dura-Mine Sdn Bhd v Elster Metering Ltd & Anor* [2015] 3 MLJ 1 at para 26.

<sup>28</sup> Section 26(4)(b) provides that the publisher indicated in the work is the presumed legal representative of the author in respect of an anonymous or pseudonymous work, unless the contrary is proved. Section 26(5) of the Act provides that this rule ceases to apply once the identity of the author is known.

<sup>29</sup> Section 26(4)(c) deals with an unpublished work where the author's identity is unknown but there is every reason to assume that he is a Malaysian citizen. Section 26(4)(c) provides that the *copyright* in such work shall be deemed to vest in the Minister in charge of culture. See also section 26(5) of the Act.

<sup>30</sup> [2015] 7 MLJ 243.

<sup>31</sup> [2015] 7 MLJ 243 at para 13.

<sup>32</sup> [1997] 2 MLJ 429.

<sup>33</sup> [1997] 2 MLJ 429 at 444.

<sup>34</sup> [1997] 2 MLJ 429 at 445.

<sup>35</sup> [1997] 2 MLJ 429 at 445.

<sup>36</sup> [1997] 2 MLJ 429 at 445. The court also stated that section 10(1) of the Act should be considered in contemplating the question of statutory presumption of ownership under section 26(4). Section 10(1) provides that copyright shall subsist in a work if the author, at the time of making of the work, is a qualified person. Referring to section 10(1), the court concluded that this provision makes it abundantly clear that 'author' and 'qualified person' share a common meaning. Accordingly, the court held that since the definition of "qualified person" in section 3 of the Act includes a body corporate, 'author' in section 26(4) must also include a body corporate. This was to answer another question raised in the case as to whether a body corporate could be an "author" under the Act, which is beyond the scope of this article.

exclusively. It reads ‘First ownership of copyright’ and not just ‘Ownership of copyright’. As explained earlier, first ownership, subject to section 11, shall vest in the author. Considering the full import, section 26 of the Act provides for authorship and first ownership. Section 26(4) of the Act, in particular, is concerned with statutory presumptions on various subject matters in different circumstances as explained earlier. However, nothing in section 26 indicates that “authorship” is synonymous with “ownership”.<sup>37</sup>

Second, the basis of the statements quoted above is far from clear. It is difficult to grasp why when authorship is presumed by the name of the author shown on the works, ownership may likewise be presumed. It is even more bizarre how that is so “by virtue of sub-s (3)”. Section 26(3) of the Act provides a special rule for the works of government, government organizations and international bodies, that is, copyright in those works shall vest initially in the government, government organizations and international bodies. Section 26(3) may be viewed as an exception to the general rule contained in section 26(1). It is by no means a general rule applicable to any work in all circumstances. More importantly, there is nothing in section 26(3) which suggests that the presumption of authorship in section 26(4)(a) may be extended to apply to ownership.

In *Creative Purpose*, Kamalanathan Ratnam JC, as he then was, referred to his own judgment in *Berjasa Information System Sdn Bhd v Tan Gaik Leong (t/a Jurukur Berjasa) & Anor*.<sup>38</sup> Although the issue of the presumption of ownership under section 26(4)(a) was not raised in *Berjasa Information System Sdn Bhd*, the court took note of the fact that the plaintiff company’s copyright notice was displayed at the commencement of the software system. The defendant who used the software system had never raised any objection to the plaintiff’s claim to copyright as indicated in the copyright notice.<sup>39</sup> It appeared that in the opinion of Kamalanathan Ratnam JC, the identification of the plaintiff company in the copyright notice raised not only a presumption of authorship, but a presumption of ownership as well.<sup>40</sup>

The misapplication of section 26(4)(a) as illustrated in the cases discussed above blurs the demarcation between the concepts of “authorship” and “ownership”. Misapplied presumption of authorship as such may in effect amount to creating a rule on presumed ownership which is not provided in the Act and thus could not have

been intended by the legislature. More significantly, this bears impact on the burden of proof imposed on the parties in a court action for copyright infringement.

#### 4. DETERMINING AUTHORSHIP AND OWNERSHIP

In view of the misapplied presumption of authorship in ascertaining the question of copyright ownership, questions may arise as to how copyright ownership should be determined and established. In many situations, determining ownership of a work may require one to first identify the author of the work. This was demonstrated in *Dura-Mine Sdn Bhd v Elster Metering Ltd & Anor*<sup>41</sup> in which disputes arose concerning copyright ownership in respect of certain engineering drawings for a water meter. After having ascertained the authorship of the engineering drawing, the Federal Court noted that the first respondent in the case had acquired the copyright in the drawings from the author, namely, the first respondent’s predecessor in title. The court was satisfied that the first respondent had given “a complete account, all authenticated by documents, of the claim of ownership of the copyright from the beginning to the lap of the first respondent”.<sup>42</sup>

In determining authorship, the crux of the matter is whether a person falls within the definition of “author” as provided in section 3 of the Act. “Author” in section 3 is defined with reference to the category of copyright work. For instance, the “author” of a literary work refers to the writer or maker of the work; while the “author” of a musical work means the composer. Essentially, “author” of a work refers to the person who made or created the work.<sup>43</sup>

Proving authorship may not be a clear-cut task in some circumstances, especially where it concerns highly collaborative works. A collaborative work may be regarded as a work of joint authorship if the work is resulted from the collaboration of two or more authors. However, the Act requires that the contribution of each author shall not be separable from the contribution of the other author or authors.<sup>44</sup> It follows that to be qualified as a co-author of a work, one has to show that he has contributed to the creation of the work, and also that his contribution is merged and inseparable from the contribution of the other author or authors.

<sup>37</sup> See Khaw, L.T., *Copyright Law in Malaysia* (3<sup>rd</sup> ed), Petaling Jaya: LexisNexis, 2008, at 65, 160 (observing that there was confusion between authorship and ownership in *Creative Purpose Sdn Bhd*).

<sup>38</sup> [1996] 1 MLJ 808.

<sup>39</sup> [1997] 2 MLJ 429 at 445-446.

<sup>40</sup> Khaw commented on the confusion between authorship and ownership in *Berjasa Information System Sdn Bhd* where the two terms were used interchangeably. See Khaw, L.T., *Copyright Law in Malaysia* (3<sup>rd</sup> ed), Petaling Jaya: LexisNexis, 2008, at 158.

<sup>41</sup> [2015] 3 MLJ 1.

<sup>42</sup> [2015] 3 MLJ 1, at para 26.

<sup>43</sup> Issues may arise as to whether the person who merely reduced the work to a material form, while the ideas and expression in the work originated from another person, could be regarded as the “author” of the work. See *Donoghue v Allied Newspapers Ltd* [1938] Ch 106; *Walter v Lane* [1900] AC 539.

<sup>44</sup> “Work of joint authorship” is defined in section 3 of the Act as “a work produced by the collaboration of two or more authors in which the contribution of each author is not separable from the contribution of the other author or authors.”

In circumstances where disputes arise as to who the author is and there is a name indicated on the work, section 26(4)(a) applies. The name so stated on the work will be regarded as its author, unless the person who contends otherwise may rebut the presumption by proving the contrary. The application of section 26(4)(a) may be seen in *Dura-Mine Sdn Bhd v Elster Metering Ltd & Anr*,<sup>45</sup> as mentioned earlier. In this case, the Federal Court noted that the name of the predecessor in title of the first respondent appeared on each of the engineering drawings for the water meter in dispute. The presumption of authorship in section 26(4)(a) applied and was not rebutted by any evidence to the contrary.<sup>46</sup> Hence, it was concluded that the first respondent's predecessor in title was the author of the engineering drawings.

With the author being identified, section 26(1) applies with the effect that copyright in the work vests initially in the author. This rule, however, does not apply to works of Government, Government organizations and international bodies, as stated in section 26(3). Where anonymous or pseudonymous works are involved, section 26(4)(b) is relevant and the publisher of the work will be presumed to be the author's legal representative. The publisher will thus be entitled to exercise and protect the author's rights under the Act, namely, the economic rights as well as the moral rights. Whereas if the anonymous or pseudonymous work is unpublished but the author is believed to be a Malaysian, section 26(4)(c) applies with the effect that the copyright of the work is deemed to vest in the Minister in charge of culture. The presumption in section 26(4)(b) and (c) is inapplicable once the identity of the author is ascertained.

In any event, copyright may be transferred to others by assignment,<sup>47</sup> testamentary disposition, or by operation of law, as provided in section 27(1) of the Act. Section 27 has two deeming provisions on dealings with copyright, which are of relevance to determining ownership. First, section 27(5) provides that persons shall be deemed to be co-owners if they share a joint interest in the whole or any part of a copyright. Second, section 27(7) provides that under a testamentary disposition, a person who is entitled to the manuscript of a literary, musical, or artistic work which has not been published before the death of the testator will be deemed to be entitled to the copyright in the work as well. This is so if the testator was the copyright owner immediately before his death.

Since copyright protection does not depend on any registration or formalities, proving copyright subsistence, authorship, and ownership of copyright could be a strenuous task. The 2012 amendments to the Act<sup>48</sup> have introduced a voluntary notification system.<sup>49</sup>

The author of a work, the copyright owner of a work, an assignee of copyright, or a person to whom an interest in the copyright has been granted by licence, may file a notification of copyright in the work with Intellectual Property Corporation of Malaysia (MyIPO).<sup>50</sup> The notification shall contain, inter alia, 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.<sup>51</sup> Regulation 5 of the Copyright (Voluntary Notification) Regulations 2012 requires a copy of the work to be filed together with the statutory declaration.

All copyright notifications as prescribed in section 26A are to be kept in a register called the Register of Copyright.<sup>52</sup> Certified true extracts from the Register of Copyright may be obtained for a fee.<sup>53</sup> Section 26B(5) provides that certified true extracts from the Register of Copyright 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".<sup>54</sup> It is clear that section 26B(5) has provided another means of proving copyright ownership, apart from that found under section 42, which will be discussed below. More significantly, it is submitted that the certified extracts of the Register of Copyright may also serve as prima facie evidence of authorship since a copyright notification includes a statutory declaration made by the applicant, who could be the author of a work, claiming that the applicant is the author of the work.

It should be noted that section 42 of the Act provides for the means by which copyright ownership may be established. Prior to the 2012 amendments, section 42 provided that an affidavit or statutory declaration made by a person claiming to be the copyright owner of a work shall be admissible in evidence in any court proceedings under the Act and such affidavit or statutory declaration shall be prima facie evidence of the facts contained therein.<sup>55</sup> As explained by Justice Abdul Malik Ishak in *Rock Records (M) Sdn Bhd v Audio One Entertainment*,<sup>56</sup> section 42 was intended "to facilitate and ease the process of proving copyright ownership."<sup>57</sup> The effect of having filed such an affidavit or statutory declaration is to shift the burden of proof to the defendant, the alleged infringer, to challenge and displace the plaintiff's prima facie ownership.<sup>58</sup>

<sup>45</sup> [2015] 3 MLJ 1.

<sup>46</sup> [2015] 3 MLJ 1 at para 26.

<sup>47</sup> Section 27(3) requires an assignment of copyright as well as a licence to be in writing.

<sup>48</sup> Act A1420, which came into force on 1 March 2012.

<sup>49</sup> See sections 26A, 26B and 26C.

<sup>50</sup> Section 26A(1).

<sup>51</sup> Section 26A(3)(b).

<sup>52</sup> Section 26B.

<sup>53</sup> Section 26B(4).

<sup>54</sup> Section 26B(5).

<sup>55</sup> Section 42(1).

<sup>56</sup> [2005] 3 MLJ 552.

<sup>57</sup> [2005] 3 MLJ 552, at 560.

<sup>58</sup> See *Microsoft Corporation v Yong Wai Hong* [2008] 6 CLJ 223, at 232. The defendant may do so, for instance, by showing that some other person is the copyright owner.

It should be noted that the methods prescribed in section 42 are not intended to be the only means of proving ownership.<sup>59</sup> As rightly explained by the Federal Court in *Dura-Mine Sdn Bhd v Elster Metering Ltd & Anr*,<sup>60</sup> other than the means prescribed in section 42, a person claiming copyright could adduce oral evidence and tender other evidence.<sup>61</sup> Oral evidence is open to cross-examination and thus of higher evidential value. Accordingly, the court may allow oral evidence 'to augment, correct, or even supplant', a defective affidavit or statutory declaration filed under section 42.<sup>62</sup>

With the introduction of the voluntary notification system in 2012, section 42 was also amended whereby "certified extracts of the Register of Copyright referred to in section 26B" were included as the admissible evidence and, thus, prima facie evidence of copyright ownership. Section 42(1)(a) now reads:<sup>63</sup>

- (1) An affidavit, certified extracts of the Register of Copyright referred to in section 26B or statutory declaration made before any person having authority to administer oath by or on behalf of any person claiming to be—
  - (a) the owner of the copyright in any works eligible for copyright under this Act stating that—
    - (i) at the time specified herein copyright subsisted in such work;
    - (ii) he or the person named therein is the owner of the copyright; and
    - (iii) a copy of the work annexed thereto is the true copy thereof; or
  - ...
  - shall be admissible in evidence any proceedings under this Act and shall be prima facie evidence of the facts contained therein. (emphasis added)

It is indisputable that section 42(1)(a) provides the various means in which subsistence of copyright and ownership of copyright may be proved, be it through an affidavit, certified extracts of the Register of Copyright, or a statutory declaration. However, section 42(1)(a) is confined to the situations where the affidavit, the certified extract of the Register of Copyright, or the

statutory declaration was made by a person or body claiming that copyright subsists in the work and that he or the person named is the copyright owner. This is supported further by the fact that section 42 is placed in Part VI of the Act entitled "Remedies for Infringements and Offences", which is concerned with the exercise of copyright owners' rights. It follows that sections 26B(5) and 42(1) overlap in so far as proving copyright subsistence and ownership is concerned. However, section 26B(5) appears to have introduced a statutory means of proving authorship of a work, that is, through certified extracts of the Register of Copyright.

## 5. CONCLUSION

The preceding discussion draws a clear distinction between authorship and ownership. Given the significant differences between the two and the resulting implications under copyright law, authorship should not be mistaken for ownership. The two terms should not be used interchangeably as it will lead to confusion and misapplication of the rules on presumption embodied in section 26, and, potentially, those in section 27 as well. The misapplied presumption of authorship in determining ownership in effect creates a new rule on presumption of ownership, which is beyond the scope of the Act.

The question of ownership should be determined and established in accordance with the Act which provides a number of means for the plaintiff to do so, as discussed above. Consequent to the 2012 amendments, it may be said that the Act also provides a new method of establishing authorship, that is, through the certified extracts of the Register of Copyright. In light of the assorted means which render the proving of authorship and ownership easier for a plaintiff, there is no need and no room for the invention of a new rule on presumption of authorship which may adversely affect the burden of proof of the parties in a court action on copyright infringement.

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*Donoghue v Allied Newspapers Ltd* [1938] Ch 106; *Walter v Lane* [1900] AC 539.

*Dura-Mine Sdn Bhd v Elster Metering Ltd & Anor* [2015] 3 MLJ 1 at para 26.

*Jamal v Dato Bandar Kuala Lumpur* [2010] MLJU 1015; [2011] 2 CLJ 569; [2011] 1 AMCR 145.

*Microsoft Corp. v Conquest Computer Centre Sdn Bhd* [2015] 7 MLJ 243.

<sup>59</sup> See *Rock Records & Tapes Co Ltd & 5 Ors v Season Karaoke Sdn Bhd & 4 Ors* [1999] 1 AMR 78.

<sup>60</sup> [2015] 3 MLJ 1.

<sup>61</sup> [2015] 3 MLJ 1 at para 28.

<sup>62</sup> [2015] 3 MLJ 1 at para 28. The Federal Court held in this case that strict compliance with section 42 is necessary for an affidavit or statutory declaration to be admissible evidence, see para 28.

<sup>63</sup> Section 42(1)(b) provides for affidavit, statutory declaration or certified extracts of the Register of Copyright made by a performer in respect of a live performance eligible for performers' rights.

*Microsoft Corporation v Yong Wai Hong* [2008] 6 CLJ 223

*Radion Trading Sdn Bhd v Sin Besteam Equipment Sdn Bhd & Others* [2010] 9 MLJ 648; [2010] 6 CLJ 334; [2010] AMEJ 0124.

*Rock Records & Tapes Co Ltd & 5 Ors v Season Karaoke Sdn Bhd & 4 Ors* [1999] 1 AMR 78.

*Rock Records (M) Sdn Bhd v Audio One Entertainment Sdn Bhd* [2005] 3 MLJ 552

*Syed Ahmad Bin Jamal v Dato Bandar Kuala Lumpur* [2010] MLJU 1015; [2011] 2 CLJ 569; [2011] 1 AMCR 145.

*Ultra Dimension Sdn Bhd v American Home Assurance Company; Rewardstreet.com (Malaysia) Sdn Bhd (Third Party)* [2009] 9 CLJ 589.

*University of London Press Ltd v University Tutorial Press Ltd* [1916] 2 Ch 601 at 608.

*Wedding Galore Sdn Bhd v Rasdah Ahmad* [2016] 6 CLJ 621; [2016] 1 AMCR 976.

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