



CK Lung
Partner
IP & TMT
T: +603 6208 5948
E: ckl@lh-ag.com

27 AUGUST 2020

Of Source Codes and Functions — Balancing Copyright Protection Against Monopolisation

Different categories of works enjoy protection under the Copyright Act 1987.¹ Unlike patents or trademarks, however, copyright law does not preclude similar works or even works “*identical in every way*”² from co-existing, so long as they were created independently of one another.³ The rationale is to prevent monopolisation, as “*copyright is in no sense a monopoly*”.⁴ It is for this reason an “*idea*” is not afforded any copyright protection.⁵

The intricacy of such a balancing exercise dates as far back as the 18th century, as Lord Mansfield in *Sayre v Moore* (1785) 102 ER 139 noted:

“We must take care to guard against two extremes equally prejudicial:

The one, that men of ability, who have employed their time for the service of the community, may not be deprived of their just merits, and the reward of their ingenuity and labour;

The other, that the word may not be deprived of improvements, nor the progress of the arts be retarded.”

¹ Copyright Act 1987 (Act), s 7(1) – literary, musical, artistic, films, sound recordings, and broadcasts.
² *Francis Day & Hunter v Bron* [1963] Ch 587, cited in *Elster Metering Limited v Damini Corporation Sdn Bhd* [2012] MLJU 1753 at para [34]
³ *Copinger and Skone James on Copyright* (13th Ed, 1991), cited in *Goodyear Tire & Rubber Co v Silverstone Tire & Rubber Co Sdn Bhd* [1994] 1 MLJ 348
⁴ *Ladbroke [Football] Ltd v William Hill [Football] Ltd* (1964) HL(E) 1 WLR 273, cited in *Elster Metering Ltd v Dura-Mine Sdn Bhd* [2010] MLJU 2073 at para [9]
⁵ Act, s 7(2)(A)

Delving into the context of software, a computer program is eligible for copyright protection under the Act as a literary work.⁶ Such protection extends to its source code and underlying structure,⁷ but not its “functionalities”.⁸ The courts have recognised “functionalities” as akin to an “idea”⁹ and, consistent with the balancing exercise described above, have held affording protection to “functionalities” would amount to making it “possible to monopolise ideas, to the detriment of technological progress and industrial development”.¹⁰

This principle remains very much relevant today. In *Flexsoft Technology Sdn Bhd v First E-Formatics Sdn Bhd & 4 Ors* [2020] 3 AMR 340, an owner of copyright in a point-of-sale computer program known as “FLEXILITE POS” sued a competitor company for copyright infringement.¹¹ The competitor company argued, inter alia, there were “hundreds of similar software available in the market”. The High Court, however, rejected the argument and held the competitor company had infringed the owner’s copyright. The High Court found, in particular, there was substantial similarity in the features, coding and interface of both software.

Therefore, while the notion against monopolisation may be an attractive argument for a litigant in a copyright infringement case, the courts will ultimately decode and decipher whether the ingredients of an infringement have been proven.

CK Lung and Esther Koh Tsi Jing (Paralegal)

If you have any queries, please contact team partner [CK Lung](#) (ckl@lh-ag.com).

Lee Hishammuddin Allen & Gledhill

Level 6, Menara 1 Dutamas
Solaris Dutamas
No. 1, Jalan Dutamas 1
50480 Kuala Lumpur
Malaysia

T +603 6208 5888
F +603 6201 0122/0136
E enquiry@lh-ag.com
W www.lh-ag.com

Published by the IP & TMT Practice

© Lee Hishammuddin Allen & Gledhill. All rights reserved. The views and opinions attributable to the authors or editor of this publication are not to be imputed to the firm, Lee Hishammuddin Allen & Gledhill. The contents of this publication are intended for purposes of general information and academic discussion only. It should not be construed as legal advice or legal opinion on any fact or circumstance.

[Feedback](#)

[Unsubscribe](#)

⁶ *Creative Purpose Sdn Bhd & Anor v Integrated Trans Corp Sdn Bhd* [1997] 2 MLJ 429, cited in *Onestop Software Solutions (M) Sdn Bhd & Anor v Masteritec Sdn Bhd & Ors* [2009] 8 MLJ 528 (“*Onestop v Masteritec*”) at para [5]; Copyright Act 1987, s 3

⁷ *Ibcos Computers Ltd & Anor v Barclays Mercantile Highland Finance Ltd & Ors* [1994] FSR 275, cited in *Onestop v Masteritec*, *supra* n 6 at para [6]

⁸ *Flexsoft Technology Sdn Bhd v First E-Formatics Sdn Bhd & 4 Ors* [2020] 3 AMR 340 (“*Flexsoft Technology*”) at para [23]; *Petraware Solutions Sdn Bhd v Readsoft Aktielbolag & Anor* [2014] 1 AMCR 112 at [17]

⁹ *Flexsoft Technology*, *supra* n 8 at para [23]

¹⁰ *SAS Institute Inc v World Programming Ltd* [2013] EWHC 69 (Ch) at para [10]

¹¹ *Flexsoft Technology*, *supra* n 8, at paras [1] to [5]