How should copyright laws apply to new technologies e.g. cloud computing, that would allow for automated and on-demand access to and delivery of copyrighted content? Should the courts place a limit on protecting copyright owners at the expense of consumer choice?

Information technologies offer new possibilities for the distribution and use of all kind of works (literary works, films, videotapes, records, databases, software and so on) whereby the works can be available in non-material form and can be transferred using networks throughout the world. The advent of new technologies is a real challenge for copyright regulation due largely to the fact that new technologies generate new works of the human intellect deserving of protection.

Cloud computing has become the new buzzword driven largely by marketing and service offerings from big corporate players like Google, IBM and Amazon. Basically, cloud computing is an umbrella term for an internet-based service that has been changing how most people use the web and store their files. It is the structure that runs sites like Facebook, Amazon and Tweeter and it is a core that allows us to take advantage of services like Google Docs, Gmail or the lease of backup storage.

While the global accessibility appears to be one of the most significant merits to the notion of cloud computing as one can easily access to the cloud services immediately wherever there exists an internet connection, the significance of cloud computing which would allow for automated and on-demand access to and delivery of copyrighted content, has triggered renewed interests and established new issues to discussions of an ongoing legal concern – copyright infringement.

Websites such as Facebook which is associated with cloud computing technology allows users to upload and store their photographs, share videos or articles, download applications of their preferences and communicate with friends all over the world without any delay. The resulting effect from cloud computing technology towards copyright owners is that the copyright owners will be able to benefit from the cost, efficiency as well as the ease of communicating their digitised copyrighted works to the consumer users. Simultaneously, this situation creates the issue of copyright infringement as the creative efforts of copyright owners in their works tend to be neglected with the convenience provided by cloud computing technology. Therefore, there exists the need to maintain a balanced environment in which people are encouraged to create new works and the need to allow copyrighted works to enter the public domain which subsequently become freely available to all.

**SAFE-HARBOUR LAWS**

In order to deal with the difficult issues arose from copyright infringement in today's technological world, laws related to the transmission, routing and connection of communications like the Online Copyright Infringement Liability Limitation Act (OCILLA) which creates a conditional safe harbor for online service providers (OSPs, including ISPs) has been introduced in the United States. This law conditionally protects online service providers and other Internet intermediaries by shielding them for their own acts of direct

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1 Emanuela Reale; Features – Copyright and New Technologies: A Challenge Which Involves Both Information Professionals and Scholars <http://www.llrx.com/features/copyright.htm>
infringement as well as shielding them from potential secondary liability for the infringing acts of others.²

Internet intermediaries may continue to be shielded from the liability for copyright infringement so long as the rules contained in the safe harbour laws are complied with. In the case of OCILLA, the Internet intermediaries are obliged to:³

- respond expeditiously to block or remove the material as soon as they receive notice and they cannot have actual knowledge of the infringement;
- disclose the identity of their users whom had allegedly infringed the copyrighted works; and
- avoid any financial benefit from the infringement if they have control over the infringing activity.

Applying OCILLA into a situation which involve the technology of cloud computing whereby copyrighted works can be accessed by the request of digital users who sit in front of Internet-ready computers, such heavy-handed law reforms may deter copyright infringers as the Internet intermediaries are obliged to disclose the identity of the copyright infringers as requested under the safe harbour laws in order for them to continue to enjoy the immunity provided. It is clear from the above that the safe harbour law attempts to strike a balance between the competing interest of copyright owners and digital users by exempting Internet intermediaries from copyright infringement liability provided they follow certain rules.

The act of the Malaysian legislature to propose new provisions in relation to limitation of liabilities of the service providers to the Malaysian Copyright Act 1987 which aims to limit the liabilities of service providers in the country is a noteworthy point which shows that the country is moving forward to be in line with the international practices where the service provider is not responsible for the copyright infringement of their subscribers if the service providers confine and act within the Act. Therefore, safe harbour laws should be taken into serious consideration so as to minimize the infringing acts as well as to encourage more creative digital copyrighted works being produced in the future.

**ADHERENCE TO INTERNATIONAL TREATIES**

Adherence and implementation of copyright-related treaties offer various benefits for countries regardless of their stage of development. It provides important economic incentives to creative individuals and companies in the new digital environment.

As a case in point, the WIPO Copyright Treaty requires countries to provide full protection within their territories to copyright owners when the creations owned by them are exploited abroad, thereby protecting their interests and ensuring that local creators and enterprises enjoy the economic rewards from outside the country. These benefits are particularly important in the era of global digital networks, when the distinction between the domestic and foreign markers is blurring, if not disappearing, as the dissemination of works and other subject matter cannot be limited to within national borders.⁴

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² Online Copyright Infringement Liability Limitation Act <https://secure.wikimedia.org/wikipedia/en/wiki/Online_Copyright_Infringement_Liability_Limitation_Act>


⁴ The International Bureau of WIPO, The Advantages of Adherence To The WIPO Copyright Treaty (WCT) And The
Membership in international treaties would enable a country to keep track of the latest developments in copyright law. Further, dissemination of information and updates on current issues relating to copyright law could be done extensively and effectively if a country is a member in international treaties. 5

International treaties which impose criminal penalties on copyright infringers would contribute positive effects to participating countries as the adherence to international treaties is capable of protecting copyrighted works which are a few clicks away while enabling the digital users to have a share of the creative works by others.

**COMPULSORY LICENSING**

Compulsory licensing appears to be another great solution to eliminate the ability of the copyright owners to have the sole right to use a piece of copyrighted work. Compulsory licensing on one hand gives copyright owners a fair return for their creative works and the other hand, the copyright users’ chances to reach those copyrighted works. This licensing system plays an important role at the digital world today especially with the development of new technology like cloud computing which allows copyrighted materials to be transmitted instantly through the convenience of internet.

The United States Code 6 creates compulsory licenses for certain types of copyrighted materials and under a compulsory licensing provision, copyright owners are not allowed to deny permission for the uses covered by the provision, and the royalty rate they receive is set by the Copyright Arbitration Royalty Panels 7.

While compulsory licensing helps in solving copyright issues where it is difficult or impossible to obtain copyright clearance from the owners of the copyrighted works, this system of licensing would also make possible a situation whereby it allows anyone to take advantage of whatever works are covered by the license without obtaining the permissions that would otherwise be required. It is essentially an exception made to copyright law that takes away a person’s right to control how copies of their material are handled.8

**THE MALAYSIAN COPYRIGHT ACT 1987**

In response to Articles 11 and 12 of the WIPO Copyright Treaty, the Malaysian Copyright Act 1987 (“the 1987 Act”) was amended in 1997 whereby the new Section 36(3), (4) and (5) which prohibit circumvention of technological measures for the protection of works as stated in Article 11 and unauthorized modification of rights management information contained in works in Article 12 were incorporated.

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5 Haliza A Shukor, Cultivating Intellectual Property Protection Awareness Within A Research Environment [2009] MLJ xxxiv

6 See § 111(c); §114(d)(1)&(2); §115 and §118 of the United States Code, Title 17, Chapter 1.

7 See Compulsory License for Making and Distributing Phonorecords by The United States Copyright Office <http://www.copyright.gov/circs/circ73.pdf>

8 See Global License <http://p2pfoundation.net/Global_License>
Section 36(3) of the 1987 Act reads “Copyright is infringed by any person who circumvents or causes any other person to circumvent any effective technological measures that are used by authors in connection with the exercise of their rights under this Act and that restrict acts, in respect of their works, which are not authorized by the authors concerned or permitted by law.”

The phrase ‘…which are not authorised by the authors concerned or permitted by law.’ under s 36(3), when strictly interpreted, it seems to vest a very high power towards the authors. This phrase means that an author who is recognised by the Act under this provision, has the exclusive right to determine whether or not an act falls under the ambit of this section. In other words, when a person does an act (e.g. reverse engineering) which is permitted by the law, that person will still be liable under s 36(3) when the author of the work does not authorise the said act.

The anti-circumvention provision found in the 1987 Act is no doubt a very useful provision which protects the rights of copyright owners especially in today’s digital world where most of the time, copyrighted works can be obtained via the Internet easily without any hassle. However, the absence of exceptions and limitations under the said provision has clearly given copyright owners a domination control towards the copyrighted works and thus creating an imbalance situation between the authors and members of the society, a situation which would definitely not to be intended by the legislature. Hence, it is in the author’s humble view that there is a need to introduce certain exceptions and limitations into this particular provision in order to strike a balance between the copyright owners and the public in the society.

**Conclusion**

The above discussion discuss ways which might help to loosen the tight relationship involving the copyright owners, the digital users as well as the Internet intermediaries towards copyright issues posed by technology such as cloud computing. Although there is seldom a perfect solution to the controversial issues arising from copyright laws trying to keep up with the development of technology, we hope that the discussion will continue in the technological and copyright space in the quest to find a balanced solution.

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9 Copyright Act 1987 (Act 332)