

## Are Prayer Outfits Eligible for Copyright Protection?

A CASE NOTE BY LEE CHIAO YING.

### Introduction

Some may be wondering what a “*telekung*” is as it is probably not a common term. A Telekung is a Muslim prayer outfit for females. The general perception of prayer outfits is that they are dull and unfashionable as they have to be modest rather than trendy. However, there has been a drastic shift in the fashion industry in recent years where there are an increasing number of fashionable yet modest clothes in both local and international markets.

The recent High Court case of **Siti Khadijah Apparel Sdn Bhd v Ariani Textiles & Manufacturing (M) Sdn Bhd**<sup>1</sup> concerns the telekung sold by the plaintiff, **Siti Khadijah Apparel Sdn Bhd** (“Siti Khadijah”), and the defendant, **Ariani Textiles & Manufacturing (M) Sdn Bhd** (“Ariani Textiles”). Siti Khadijah sells the “**Telekung Siti Khadijah Klasik**” (“Siti Khadijah’s Telekung”) while Ariani Textiles sells the “**Ariani x WOW Telekung Nur Aleesya**”. Siti Khadijah has commenced an action against Ariani Textiles for copyright infringement.

This article will focus on the following two main issues:

- a. Whether a telekung is eligible for copyright under the Copyright Act 1987 (“CA”) in view of its religious function (for prayers).
- b. If the answer to the above question is affirmative, whether the copyright in the telekung has ceased under the then applicable section 7(6) CA.

### Is a telekung eligible for copyright under CA?

Under the CA, copyright will subsist automatically in the work if the following conditions under CA have been fulfilled:

- a. It is original;
- b. It has been written down, recorded or otherwise reduced to material form;
- c. It belongs to one of the categories of protected works; and
- d. It complies with the qualifications for copyright.

(collectively referred to as the “Conditions”)

Once the Conditions are fulfilled, a work is protected irrespective of the quality and purpose for which it was created<sup>2</sup>.

Relying on the Court of Appeal case of **The News Straits Times Press (M) Bhd & Anor v Admal Sdn Bhd**<sup>3</sup>, Ariani Textiles argued that a telekung is not eligible for copyright under CA due to its religious function (for prayers). This argument raised by Ariani Textiles was dismissed by the High Court on the following grounds:

- a. That a telekung (including Siti Khadijah’s Telekung) fulfils the Conditions.
- b. Section 7(2) CA provides that works shall be protected by copyright “*irrespective of ... the purpose for which they were created*”. Therefore a purely functional work is entitled to copyright protection if it fulfils the Conditions.

- c. Contrary to the idea of a spelling competition which was the subject in *The News Straits Times Press*, a telekung (including Siti Khadijah's Telekung) is not solely an idea nor is it purely functional (for prayers). Siti Khadijah's Telekung also gives comfort and elegance to its user. A telekung is therefore protected by copyright.

### Has Siti Khadijah's copyright in Siti Khadijah's Telekung ceased under s 7(6) CA?

Subsection 7(6) CA reads as follows:

*"Copyright in any design which is capable of being registered under any written law relating to industrial design, but which has not been so registered, shall cease as soon as any article to which the design has been applied has been reproduced more than fifty times by an industrial process by the owner of the copyright, or with his license, by any other person."*

Relying on section 7(6) CA, Ariani Textiles further argued that even if it was assumed that Siti Khadijah owned copyright in Siti Khadijah's Telekung, the copyright that subsisted in Siti Khadijah's Telekung had ceased when more than 50 of Siti Khadijah's Telekung were reproduced.

This argument was again rejected by the High Court. For a design to be registered under the **Industrial Design Act 1996** ("IDA"), the design must fall within the definition of an *"industrial design"* and fulfil the following three elements:

- a. Industrial design means features of shape, configuration, pattern or ornament which in the finished article appeal to and are judged by the eye ("Eye Appeal Features");
- b. the Eye Appeal Features are "applied to an article by any industrial process or means"; and
- c. the Eye Appeal Features cannot include:
  - a method or principle of construction; or
  - features of shape or configuration of an article which
    - i. are dictated solely by the function which the article has to perform; or
    - ii. are dependent upon the appearance of another article of which the article is intended by the author of the design to form an integral part.

The learned Judge found that Siti Khadijah's Telekung is not applied to an article<sup>4</sup> by any industrial process or means. By failing to fulfill the second element stated above, Siti Khadijah's Telekung cannot constitute an *"industrial design"*. Siti Khadijah's Telekung is not caught by section 7(6) CA as Siti Khadijah's Telekung is not "capable of being registered under IDA".

### Conclusion

The novel issue of whether a work that is functional is eligible for copyright protection has been clarified and answered in the affirmative by the High Court. While an article that is functional may not qualify and enjoy the protection as an industrial design, it may still be entitled to copyright protection. The High Court has also affirmed, in *Siti Khadijah Apparel*, the position that a work is entitled to copyright protection once the Conditions are fulfilled.

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<sup>1</sup> [2018] MLJU 1118

<sup>2</sup> Section 7(2), Copyright Act 1987.

<sup>3</sup> [2013] 9 CLJ 955a

<sup>4</sup> Section 3 of the IDA.

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