CLIENT NOTE

HIGHLIGHTS OF THE SINGAPORE COPYRIGHT REVIEW REPORT

20 February 2019

Introduction

1. In 2016 and 2017, the Ministry of Law ("**MinLaw**") and the Intellectual Property Office of Singapore ("**IPOS**") conducted public consultations on Singapore's copyright regime. This culminated in the *Singapore Copyright Review Report* (the "**Report"**), which was jointly-released by MinLaw and IPOS on 17 January 2019.

2. This Client Note summarises six of the proposals in the Report which may have an impact on your business.

(A) Default Ownership of Commissioned Works

3. Under the current Copyright Act (Cap. 63) (the "**CA**"), creators are generally given default ownership of copyrighted works. However, where certain works are commissioned or created by employees, the commissioning party or the employer will have default ownership. Parties may contract out of these default positions.

4. During the review, a proposal was tabled to amend the CA such that default copyright ownership of all commissioned and employee-created works would vest in the creators instead.

5. The Report noted that this proposal was viable in relation to commissioned works, but not employee-created works. In reaching this conclusion, the Report considered, amongst other things, which party would benefit most from default ownership and be incentivised to create and commercialise more works:

   a. As regards commissioned works, the creators are more likely to commercialise the works beyond the purposes of the particular commissioning. As such, the CA will be amended such that default ownership of commissioned works would be with the creator.

   b. As regards employee-created works, an employer's objective of having its employees create works is for the works to be commercially exploited. As such, the default ownership of employee created works will remain with the employer.

6. The Report also reviewed Section 30(4) CA, which caters specifically to authors employed by newspapers, magazines, or similar periodicals. These authors will retain default ownership over their works, although their employers have publication rights. The Report clarified that this section serves a specific function, to allow these authors to create works that serve other additional purposes beyond their employment. Accordingly, the relevant CA provisions will be retained.

For any queries relating to this article, please contact:

Tan Tee Jim, *S.C.*
tanteejim@leenlee.com.sg

Jasper Lim
jasperlim@leenlee.com.sg

Authors:
Tan Tee Jim, *S.C.*
Jasper Lim

With special thanks to:
Marcus Hoh (Trainee)
Loo Fang Hui (Trainee)

Lee & Lee
50 Raffles Place
#06-00 Singapore Land Tower
Singapore 048623
Tel: +65 6220 0666

(B) The Right of Attribution

7. At present, authors and performers do not have a right to be attributed (i.e. identified) when their work or performance is used. This invariably gives rise to the concern that due credit would not be given for their creative efforts.

8. The Report therefore proposed to introduce a right of attribution for authors and performers – it also acknowledged that such a right should not hinder the efficient transactions of copyrighted works. To that end, the Report proposed to exclude the right of attribution in respect of certain types of work – for example, works which typically involve *multiple co-creators* (such as computer programmes) or works created in the course of employment. Additionally, this new right would only last for the duration of copyright or performance protection.

9. The Report also accepted that there should be defences and exceptions against a claim of infringement of this new right of attribution, as there may be situations where it may be "impractical" or "unreasonable" to require attribution. However, it rejected a broad defence of reasonableness, preferring instead *specific* defences which would provide authors and performers greater certainty in enforcing their rights. Examples of the proposed defences and exceptions to the right of attribution include:

    a. Reporting of current events;
    b. Examinations;
    c. Judicial proceedings;
    d. Incidental inclusions;
    e. Written waivers of right; and
    f. Consent.

10. Finally, the Report – citing the need to strike a balance "*between certainty and flexibility*" – proposed that the courts should have the *discretion* to consider all facts and circumstances in deciding the appropriate remedy for each case of infringement of the right of attribution. To assist the courts in this exercise, the Report recommended the provision of a statutory list of non-exhaustive factors "*based on the practicalities of the circumstances, cost of compliance and the behaviour of the defendant*".

(C) The General "Fair Dealing/Use" Exception

11. The general "fair dealing" exception in Section 35 CA provides that in certain circumstances, a dealing with a copyrighted work or adaptation without the proprietor's consent might not constitute infringement, if such dealing was fair and reasonable.

12. Section 35(2) CA identifies a non-exhaustive list of factors that must be considered when determining whether the exception applies. The factors listed are as follows:

    a. The purpose and character of the dealing;
    b. The nature of the copyrighted work or adaptation;
    c. The amount and substantiality of copying;
    d. The effect upon the potential market for, or value of the work or adaptation; and

e. The possibility of obtaining the work or adaptation within a reasonable time, at an ordinary commercial price (the "**Fifth Factor**").

13. Two proposals were made in relation to the "fair dealing" exception:

a. The first proposal was to amend the CA to rename the "fair dealing" exception as the "fair use" exception. This is because Section 35 CA is commonly seen as an adaptation of the "fair use" exception found in US copyright law. The Report noted that further amendments would be made to clarify how the newly named "fair use" exception operates *vis-à-vis* other provisions in the CA.

b. The second proposal was for the Fifth Factor to be deleted. The Report noted that this factor often leads to misconceptions on the operation of the exception by both users and right holders. In particular, some assumed that the Fifth Factor would be determinative of whether the use is "fair".

14. The adoption of these two proposals will help to clarify the scope and application of Section 35 CA.

(D) Text and Data Mining

15. The Report defines text and data mining as "*the use of automated techniques to analyse text, data and other content to generate insights and information which otherwise would not have been possible to obtain through manual effort*". Given that text/data mining potentially involves the use of copyrighted materials, such use may constitute infringement under the CA since there is currently no statutory exception to such activities.

16. The Report recommended the inclusion of a statutory exception for text/data mining, covering both non-commercial and commercial activities. It cited the wide-ranging benefits of such activities in promoting economic growth and innovation in Singapore.

17. In this regard, the Report recommended a *specific* exception for text/data mining, as opposed to relying on the *general* "fair dealing" defence. A specific exception provides certainty and would enable the calibration of safeguards to address rights-holders' specific concerns. To that end, the Report proposed the following limits to the scope of the exception:

a. The proposed exception will only cover acts of copying;
b. The copying must be for the purpose of data analysis;
c. The user must have lawful access to the works that are copied;
d. The user cannot distribute the works to those without lawful access to the works; and
e. Rights-holders will be allowed to take reasonable measures to maintain the security and stability of their computer system or network.

(E) Collective Rights Management

18. Collective Management Organisations ("**CMOs**") are entities which facilitate licensing and royalty collection on behalf of content creators. In recent years, concerns have been raised by both content creators and users regarding the transparency and accountability of such organisations. It has also been noted that the existing dispute resolution mechanisms are inadequate.

19. The Report noted that such concerns were valid, and that the CMO ecosystem in Singapore was deficient. Accordingly, a class licensing scheme will be introduced and administered by IPOS, which will set out a mandatory code of conduct for all CMOs. The focus will be to set standards for transparency, accountability, governance, and efficiency for CMOs. However, IPOS will not intervene to set or approve licensing fees.

20. Further public consultations will be held to determine the specific provisions and operation of this proposed class licensing scheme, as well as the related code of conduct.

(F) Set-top Boxes

21. During the public consultations, content providers and cablecasters highlighted the prevalence of the marketing of set-top boxes which enabled access to audio-visual contents that emanated from unauthorised sources. Through apps installed on the boxes, the contents could be streamed to a display device (e.g. a television) from a source on the Internet which is not authorised by the rights-holders. In some cases, the set-top box would be pre-configured to provide the access. In other cases, retailers would, as part of the sale, configure the set-top box for the customer.

22. In the Report, MinLaw and IPOS indicated that they would not allow commercial gains to be derived from enabling access to content from unauthorised sources. They will introduce new legislative provisions to impose civil and criminal liability on people who wilfully make, import for sale, commercially distribute or sell a product (a hardware device or a software application) which can be used to access audio-visual content from an unauthorised source and additionally is

    (1) designed or make primarily for providing access to such content;
    (2) advertised as providing access to such content; or
    (3) sold as providing access to such content where the retailer sells a generic device with the understanding that "add-on" services (such as the provision of website links, instructions or installation of subscription services) will subsequently be provided.

Concluding Remarks

23. The Report contains proposals which may have impact on your business.

24. Moving forward, you should consider updating your business practices to take into account the proposed changes to the CA, for example, renegotiating your contracts for commissioned works to ensure you own the copyright of the work. Please do not hesitate to contact us if you have any queries concerning this Client Note, or require any further advice on copyright law in Singapore.

CLIENT NOTE

About Lee & Lee

Lee & Lee is one of Singapore's leading law firms being continuously rated over the years amongst the top law firms in Singapore. Lee & Lee remains committed to serving its clients' best interests, and continuing its tradition of excellence and integrity. The firm provides a comprehensive range of legal services to serve the differing needs of corporates, financial institutions and individuals. For more information: visit www.leenlee.com.sg.

The following partners lead our departments:

Kwa Kim Li
Managing Partner
kwakimli@leenlee.com.sg

Quek Mong Hua
Litigation & Dispute Resolution
quekmonghua@leenlee.com.sg

Owyong Thian Soo
Real Estate
owyongthiansoo@leenlee.com.sg

Tan Tee Jim, S.C.
Intellectual Property
tanteejim@leenlee.com.sg

Adrian Chan
Corporate
adrianchan@leenlee.com.sg

Louise Tan
Banking
louisetan@leenlee.com.sg