

LEGAL UPDATE



Changes to Singapore's Copyright Regime

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Introduction

1. The Ministry of Law ("MinLaw") and the Intellectual Property Office of Singapore ("IPOS") recently announced that they are reviewing Singapore's Copyright Act (the "Act") to ensure that the rights granted are reasonable, clear, and capable of being efficiently transacted.
2. On 23 August 2016, MinLaw and IPOS jointly published a Public Consultation on Proposed Changes to Singapore's Copyright Regime paper (the "Consultation Paper") setting out proposed changes and inviting public feedback on the same.
3. In this Update, we summarise the principal proposals and provide our views on a number of them.

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What are the proposed changes?

Establishing a voluntary copyright registration system

4. Under the present copyright regime, copyright protection arises automatically once a work has been created into physical form. There is no system of copyright registration in Singapore.
5. MinLaw is considering establishing a voluntary copyright registry to allow copyright owners the option of depositing their works at the proposed registry for a fee. A voluntary registration system would help to
 - (a) simplify the process of establishing copyright ownership; and
 - (b) make the process of tracing copyright ownership easier and cheaper.

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Ownership of commissioned works

6. Under the Act, a person who pays for the creation of certain types of works, e.g. photographs, portraits, engravings, sound recordings, and cinematograph films – otherwise known as the "commissioner" of the works – is the default copyright owner, instead of the creator of the work.
7. The Consultation Paper proposes to amend the Act so that creators of photos, portraits, and engravings would have first ownership over these works. This would prevent unsuspecting creators from unknowingly relinquishing their copyright.
8. MinLaw and IPOS are also considering whether the proposed amendment should extend to sound recordings and cinematograph films, given that the creators of such works tend to be companies that are better informed on copyright and commercial practices than individual creators.

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Duration of protection for unpublished works

9. Under the Act, the duration of copyright protection for certain works such as photographs, sound recordings and cinematograph films is calculated from the date of publication. As long as these works remain unpublished, they would technically enjoy perpetual protection.
10. To prevent such works from being withheld from the public indefinitely, MinLaw and IPOS propose to limit the copyright protection duration for such works to 70 years after the creator's death, regardless of whether and when they are published. It is also proposed that if the creator of a work cannot be identified, the work continues to enjoy 70 years of protection after publication, provided that it is published within 50 years of its creation.

Right of attribution

11. The Consultation Paper proposes to create a new right of attribution, which allows creators and performers of a copyright work to be attributed or credited accordingly.

Relationship between creators and publishers/producers

12. It is proposed to establish an informational website targeted at creators of copyright works. This is to ensure that creators are aware of copyright laws, and are able to understand the terms of contracts which they enter into with publishers or producers.

Exceptions that cannot be restricted by contracts

13. It is common for End User Licence Agreements or website terms and conditions to require users to waive copyright exceptions that are applicable to them.
14. It is proposed to amend the Act such that certain copyright exceptions cannot be excluded by contract. These exceptions relate to, among others, fair dealing, "fair use", education and parallel importation.

Factors used in determining "fair use"

15. The Act presently contains an open-ended "fair use" defence, which allows copyrighted works to be used without consent, as long as the use is "fair". The Act lists several non-exhaustive factors to be considered when determining whether a use is "fair".
16. The Consultation Paper suggests removing one of these factors, namely, "the possibility of obtaining the creative work within a reasonable time at an ordinary commercial price". The reason for the suggestion is that most copyrighted works are now obtainable through various technological media.

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Orphan works

17. “Orphan works” are copyrighted works whose authors or owners are unknown or cannot be located. Examples of such works include old photographs, letters and films. They may be of cultural or historical value and can contribute to education, research and the creation of new copyright works. Yet, access to and use of orphan works are constrained by the inability to seek permission from the authors or owners. Also, libraries, archivists and museums who wish to digitize, scan or make the works available on-line are often unwilling to do so for fear of copyright infringement. Indeed, Google was recently sued for digitizing copyright works (including orphan works) to create an on-line, searchable library.
18. Hence, MinLaw and IPOS are considering various options to allow users to use orphan works. The options include requiring users to first carry out a minimum level of due diligence to locate or reach the copyright owner.

Text and data mining

19. The Consultation Paper recommends creating a new exception to allow copyrighted works to be reproduced for the purposes of data analysis. This would assist companies which wish to carry out text and data mining, which involve the automated analysis of a large volume of data. MinLaw and IPOS are of the view that this is integral to Singapore’s Smart Nation initiative, and would help to create and disseminate knowledge.

Educational uses

20. It is proposed to create a new copyright exception for non-profit educational institutions, which would allow them to use copyrighted material without seeking consent, where the use is for the purpose of giving or receiving instruction.

Libraries and archives / Museums and galleries

21. The Consultation Paper proposes to amend the Act to enable libraries and archives to make copies of the materials in their collection for the purpose of exhibition to the general public. It is also proposed to create a new exception for non-profit museums and galleries to allow them to reproduce artworks and artefacts for the purpose of preservation, exhibition or research and study. The proposed exceptions would allow these organisations to better serve the general public.

Print-disabled users

22. MinLaw and IPOS propose to remove copyright owners’ right to compensation or remuneration for the conversion of printed books into formats that are accessible to print-disabled users (e.g. blind or visually impaired people). This is provided that the conversion is carried out on a negligible scale and is done for a social cause.

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Non-patent literature

23. When patent examiners examine a patent, they will check what has already been made available to the public, which includes non-patent literature (i.e. any literature not already part of a patent or patent application) (“NPL”). In order to reproduce NPL for the purposes of the examination, they would have to seek permission from the copyright owners of the NPL.
24. MinLaw and IPOS propose to create a new exception to allow the reproduction of NPL for certain patent office functions. This would be beneficial for the patent examination process.

Materials on official government registers

25. It is proposed to amend the Act to clarify that public agencies may collect copyrighted material, make it available for public inspection and allow the public to make copies of the material, without infringing the copyright in the material.

Allowed circumventions of Technological Protection Measures

26. Technology Protection Measures (“TPMs”) function as digital locks which restrict the access or use of copyrighted works (e.g. region coding on DVDs and Blu-ray discs). The Act presently contains a list of exceptions where circumvention of TPMs is allowed. Such exceptions cover situations where the circumvention benefits the public and is not piracy-related.
27. MinLaw and IPOS are reviewing the list of exceptions to take into account feedback from stakeholders, problems faced by users of TPMs and guidance from foreign jurisdictions.

Our views

28. The review of Singapore’s copyright law is timely. New digital technologies have rendered the law increasingly incongruous with societal norms and needs. Similar reviews had been conducted in Australia, Canada, Ireland, EU and UK. They all concluded that changes to the law are imperative in this digital age.
29. The reviews sought to re-calibrate the balance between fostering creativity and innovation and allowing greater public access to copyright works. Finding the appropriate balance between these competing interests has been the classic economic, social and legal dilemma since the inception of copyright law. With the advent of the Internet and social media, it is now afflicting the law most acutely.
30. As noted above, MinLaw and IPOS are considering creating a new exception to allow copyrighted works to be reproduced for the purposes of data analysis. Text and data mining (TDM) has become an important commercial tool. It enables businesses to not only extract raw data from copyright works but also to copy, process and analyze the data to predict or detect customer trends and buying patterns. It is however proposed that the exception would allow the copying of copyright works for the purposes of data analysis. The exception would not differentiate between using the TDM for commercial or non-commercial purposes, which means that businesses which sell the data analysis do not need to pay any licence fee for the use. Such an exception is unlikely to be well received by copyright and database owners.

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31. Also under review is the extent to which copyright owners can restrict users from relying on copyright exceptions (such as fair dealing for non-commercial research) in their contracts. A typical example is a "shrink wrap" licence printed on the packaging of a software product. They justify the restriction on the well-established principle of freedom of contract. They also suggest that prohibiting them from imposing the restriction is contrary to the TRIPS Agreement, being in conflict with the normal exploitation of their copyright works and prejudicial to their legitimate interests.
32. However, the case for the prohibition has been persuasively put. The restriction has the tendency to interfere with free competition and undermine social and legal policies underlying the exceptions. Besides, users are often at a commercial disadvantage as most on-line transactions compel them to agree to "contract out" of the exceptions and do not allow negotiation. The prohibition would thus level the playing field.
33. Copyright owners also rely on TPM (such as access codes and encryption) to prevent unauthorized access to and use of their works. These act like digital locks and have been deployed, amongst others, to prevent consumers from making on-line purchases of cheaper goods (e.g. computer games) from other geographical markets (a practice known as "geo-blocking"). They can be disabled or circumvented through technologies such as virtual private network (VPN).
34. The notion that geo-blocking may be legally allowed to be circumvented by VPN technology has recently generated much debate in Singapore. The debate had also raged in the EU and Australia. At the heart of the debate is the issue of the consumer's right to use genuine copyright works that have been lawfully obtained. In the EU, the European Commission adopted in May 2015 the Digital Single Market Strategy which aimed to end "unjustified" geo-blocking between its member countries. In a case concerning Sony's Playstation CD-ROM, the Australian High Court remarked that its geo-blocking practice "reduce(s) global market competition" and "inhibit(s) rights ordinarily acquired by Australian owners of chattels to use and adapt the same, once acquired, to their advantage and for their use as they see fit." The debate in Singapore should similarly focus on this issue, and not on the legality of VPN technology. Using the means of copying which may or may not amount to copyright infringement has not been held to amount to authorisation of the infringement
35. If you have any question on this Update, or require any advice on copyright protection in Singapore, please do not hesitate to contact our Mr Tan Tee Jim, S.C. at tanteejim@leenlee.com.sg or +65 6557 4615.

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