Response to Public Consultation on Proposed Changes to Singapore’s Copyright Regime

October 2016
SUMMARY OF SUBMISSION

Thank you for the opportunity to comment on the proposals in the public consultation paper prepared by the Ministry of Law and Intellectual Property Office of Singapore (Consultation Paper).

We have not addressed every proposal in the paper, but we have commented on a number of issues with reference to the experience in Australia.

Our principal concern is the proposal to extend the ‘remuneration free’ proportion of works that may be systematically copied and shared by educational institutions. The proposed change will erode the economies of scale that enable efficient collective licensing in Singapore, and deprive content creators of income for investment in new content. Legal changes in Canada with similar effect resulted in Canadian education institutions not renewing their licensing agreements, with consequential reduction in investment in new Canadian content.¹

¹ Economic Impacts of the Canadian Educational Sector’s Fair Dealing Guidelines, PwC, accesscopyright.ca/media/94983/access_copyright_report.pdf
ABOUT COPYRIGHT AGENCY
Copyright Agency is an Australian copyright management organisation. It is a non-government, not-for-profit organisation whose members are mostly writers, artists and publishers. Copyright Agency is appointed by the Australian Government to manage statutory licences for the use of text and images in the education and government sectors. Its annual reports are provided to the Minister and tabled in Parliament.

Copyright Agency also manages a range of ‘voluntary’ licences on behalf of its members, including for the corporate sector. Copyright Agency is also appointed by the Australian Government to manage the artists’ resale royalty scheme, and it manages Viscopy’s services for the 10,000 artists Viscopy represents, including image licensing.

Copyright Agency and Viscopy are members of the International Reproduction Rights Organisation (IFRRO), as is Copyright Licensing and Administration Society of Singapore (CLASS). Copyright Agency has bilateral agreements with similar organisations in other countries, such as CLASS, that enable the use of foreign content in Australia under Copyright Agency’s voluntary licences, and the collection of royalties for use of Australian content in other countries.

SIMILARITIES BETWEEN COPYRIGHT LAWS OF SINGAPORE AND AUSTRALIA
Many aspects of Singapore’s copyright legislation are similar to Australia’s, and some are identical. In some respects, therefore, Australian experience may be particularly relevant to future developments in Singapore.

REVIEW OBJECTIVES
The Consultation Paper says that the objectives of the review of Singapore’s Copyright Act are to ensure:

... a copyright regime where rights are:

a) Reasonable – keeping in mind that the copyright regime needs to balance the interests of creators and producers, with the interests of users of copyright, and also not to neglect future creators, producers and users;

b) Clear – so that creators, producers, users and intermediaries all understand the regime and how it can incentivise creation or provide access to works; and

c) Efficiently transacted – to ensure that creators and producers are able to reach out to their audiences, and that interested users can easily seek permission to use creative works.

As we outline below, some of the proposals in the Consultation Paper do not meet these objectives.

1. COPYRIGHT REGISTRY
Our understanding is that copyright registries in other countries do not certify that a person owns copyright, but registration can provide prima facie evidence that a person is the owner
of copyright. This means that, even in countries with registries, copyright ownership can only be conclusively decided through a dispute resolution process.

The Singapore Copyright Act provides for a number of presumptions in court proceedings, including presumptions regarding subsistence and ownership of copyright (sections 130 to 135). These provisions are similar to those in the Australian Copyright Act, but Australia has introduced additional presumptions in recent years that may be of interest in Singapore: see sections 126A, 126B, 129A, 130A–130C. The presumptions include that a person is an owner of copyright if there is a foreign certificate (e.g. a certificate of registration) to that effect.

The proposed fees in the Consultation Paper may be prohibitive for creators who are creating large numbers of works, such as photographers.

Improving the practical information and assistance available to people who want to identify copyright ownership is welcome, but there is a range of ways in which this could be done. It is important that creators for whom registration may not be feasible (e.g. photographers, because of the number of works) are not disadvantaged by users not seeking permission because works have not been registered.

2. OWNERSHIP OF COMMISSIONED WORKS

Australia’s Copyright Act was amended in 1998 to provide that a commissioner of a photograph owns copyright (subject to any agreements to the contrary) only if the photograph was commissioned for private and domestic purposes such as a wedding.

The change was sought by photographers, who argued that it was unfair for the commissioning client in other circumstances to be the first owner of copyright. The change has benefitted photographers, particularly in relation to the subsequent re-use of their photographs.

3. DURATION OF PROTECTION FOR UNPUBLISHED WORKS

The Australian government has released a draft bill that would (amongst other things) introduce a fixed term of protection for unpublished works. The change has been widely supported, including by content creators. The Minister has announced that the bill will be introduced soon.

4. RIGHT OF ATTRIBUTION

Australia introduced moral rights for creators in 2000. The change was significant for creators, who had been seeking the introduction of moral rights in Australia for many years. The change has not had adverse consequences for others, and is widely regarded as fair and reasonable.

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5. RELATIONSHIP BETWEEN CREATORS AND PUBLISHERS/ PRODUCERS
In Australia, creators can seek information and advice from the Australian Copyright Council, a not-for-profit organisation that is partly funded by the Australia Council for the Arts. The Council has a range of information sheets for free download, a free legal advice service, an annual training program and a range of detailed guides. The Council also advocates for creators’ rights.

6. EXCEPTIONS THAT CANNOT BE RESTRICTED BY CONTRACTS
This issue has been considered in Australia on a number of occasions, though it is not clear that there is a widespread problem in practice.

In Australia, proper interpretation of contracts can allow for the operation of copyright exceptions. Australia also has legislation such as the Consumer and Competition Act that protect the interests of consumers.

We also agree with the comments by the Australian Copyright Council in its submission, including those regarding contracts governed by foreign laws.

Institutions and corporations can and do negotiate terms of contracts they elect to enter into. There may be sound commercial reasons for them agreeing not to rely on copyright exceptions, such as favourable commercial terms to make uses for which they do need a licence.

7. FACTORS USED IN DETERMINING ‘FAIR DEALING’

‘Fairness’ factors
The so-called ‘commercial availability’ factor (the possibility of obtaining the creative work within a reasonable time at an ordinary commercial price) forms part of fair dealing exceptions in countries other than Singapore, including Australia and New Zealand. The factor was introduced in Australia in 1980 following recommendations in the 1976 Report of the Copyright Law Committee on Reprographic Reproduction (Franki Report).

The factor was regarded as separate to ‘the effect of the use on the potential market for, or value of, the creative work’. That distinction remains valid.

We disagree that the ‘commercial availability’ factor solely relates to availability of copyright content in physical form. For example, in Australia, if a person can buy an eBook within a reasonable time at an ordinary price then it is unlikely that copying the entire book, or more than a reasonable portion of it, it is fair.

The phrase is also used in the exceptions for libraries and in the statutory licences for education in both the Singaporean and Australian Copyright Acts. Those provisions apply to digital as well as physical content.

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3 copyright.org.au
We also disagree that the increasing availability of content diminishes the need for the factor. The legislation should complement, not undermine, legitimate avenues for obtaining content.

The ‘commercial availability’ factor assists to align the exception to the ‘three-step test’ in international treaties, in particular the requirement that exceptions do not conflict with a normal exploitation of a work.

The test also assists with the review’s objectives of ensuring that the legislative framework is reasonable and clear.

‘Fair dealing’ for ‘any purpose’

More broadly, we have raised significant concerns in Australia about proposals to import, out of context, one aspect of US Copyright Law into Australian law: its ‘fair use’ exception. We have argued that Australian society’s interests are better served by alternative mechanisms for improving the copyright system. These include the successful process that led to consensus proposals for reform from copyright users and owners. The government has accepted those proposals and drafted amendments based on them for the education sector, libraries and people with disabilities.

In the context of the Singaporean review, Singapore’s exceptions that allow ‘fair dealing’ for ‘any purpose’ (and are similar to the US ‘fair use’ exception) do not meet the objectives for the review. For example:

- the development by the US courts of the concept of ‘transformative use’ in its ‘fair use’ exception has led to outcomes that are not reasonable (such as Google’s digitisation of millions of books without any compensation to authors);\(^5\)
- the application of the exceptions to ‘any purpose’ means that they are not clear: for example, the Consultation Paper says that ‘the manner in which [the fair use defence] will be applied by the courts is uncertain’; and
- the availability of an uncertain exception to powerful content users, such as online service providers, contributes to their resistance to negotiating reasonable terms and thus reduced efficiency.

8. ORPHAN WORKS

It is important to distinguish orphan works held in the collections of cultural institutions, which can affect institutions’ plans to digitise their collections, from uses of orphan works by others. There are public interest arguments for enabling citizens to view items held in their country’s cultural collections that do not apply to other uses of orphan works. In addition, the digitisation of collections requires a solution that can apply at scale, which is not the case for other uses.

The US Copyright Office has recommended the introduction of extended collective licensing (ECL) solutions for digitisation of collections.\(^6\) In its view, the US ‘fair use’ exception is not an

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adequate solution. The Office also noted the recent introduction of ECL in a number of countries such as the UK, France and Germany.

In other cases, one of the guiding principles should be that there is no benefit to a licensee in choosing to use an orphan work rather than an equally suitable identified work. We note the legitimate concerns raised by photographers and other image creators in the UK and the US. Identifying information is very easily removed from digital images, meaning that they become ‘orphaned’ after their creators have embedded identifying information.

‘Unreachable’ copyright owners

No response from a copyright owner who has been contacted for permission should be regarded as a refusal of permission.

On the other hand, there may be circumstances in which a work is regarded as an ‘orphan’ if the copyright owner can be identified but not, after reasonable efforts, located.

9. TEXT AND DATA MINING

Text and data mining is a rapidly evolving area, and a range of solutions for managing the copyright implications are being considered around the world. The Singapore Government may benefit from monitoring those developments pending any significant text and data mining activity in Singapore.

Publishers have an interest in enabling text and data mining, and are contributing to its facilitation: see, for example, the declaration by STM association, *Text and Data Mining for Non-Commercial Scientific Research*⁷ and tools such as RightFind™ XML for Mining.⁸

Any consideration of a new exception should:

- ensure that incentives remain for the private sector to develop access and licensing arrangements;
- be confined to not-for-profit entities and research;
- have safeguards to avoid use of other purposes; and
- complement the primary content delivery arrangements (e.g. subscription arrangements).

10. EDUCATIONAL USES

Singapore’s statutory licence for education is very similar to Australia’s. While it is true that the statutory licences were originally introduced to enable photocopying from printed resources such as books and journals, they now clearly cover digital copying and sharing. They are not tied to particular technologies. For example, in Australia, the statutory licence covers materials made available on learning management systems and tablets, interactive whiteboards and Massive Open Online Courses (MOOCs).

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So while it may be true that now ‘much learning takes place in an online environment and education does not merely flow from the educator but can be from the students themselves’, the current arrangements are perfectly capable of enabling these activities.

The activities in the example given in para [3.69] would be covered by the education statutory licence in Australia. If there is doubt that they would be covered by the Singapore statutory licence, we suggest that the government issue guidelines that make it clear that they are covered.

**New exception for giving or receiving instruction**

As noted above, the example given in para [3.69] would seem to be covered by the statutory licence, and thus not a reason for a new exception.

If there is to be a new exception for activities that are not covered by the statutory licence, then it should be clear that it only applies where the statutory licence does not apply: that is, it complementary to (not competing with) the statutory licence.

In 2006, Australia introduced a ‘flexible’ exception for the education sector that applies to activities not covered by the statutory licences, provided the requirements of the international three-step test are met.9

The National Copyright Unit for the Australian school sector lists the following uses that can be covered by the flexible dealing exception:

- making a captioned version of a film for hearing impaired students when it is not possible to buy a captioned version of the film and you need to show the film in class;
- converting 8-track or VHS tapes to DVD where it is not possible to buy a DVD of that film and the DVD is needed for teaching purposes;
- copying a small extract of audiovisual material on a CD-Rom to disc or PowerPoint for classroom display;
- compiling short extracts of audio-visual material for use in class (such as making a DVD of short extracts of several films for an English class) when it is not possible to buy a similar teaching resource;
- copying a French language song that is not available for purchase in digital format to a digital file for inclusion in a podcast for a French language class;
- including short extracts of music in PowerPoint teaching aids;
- translating an extract of an Australian novel into Japanese (where you cannot buy a copy in Japanese) for use in a Japanese language class;
- staging a free practice performance of a play on a drama syllabus for family and friends to allow drama students to practice for a performance assessment;
- preparing an arrangement of a musical work for students to perform in a music class when you cannot buy the arrangement you need; and
- making a three-dimensional sculpture of an image as part of an art class exercise.10

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‘Alignment of copying thresholds’

The ad hoc small-scale copying by individuals for research or study is completely different in nature and consequence to the large-scale, systematic copying done by educational institutions. The implications for production of future content must be assessed according to both the proportion of each work copied without permission, and the overall scale of the aggregated copying.

The statutory licence is consistent with the three-step test because it does not allow the copying of entire publications that are available for purchase, and it provides compensation to content creators who would otherwise be prejudiced by the systematic, large-scale copying allowed by the licence.

Having said that, the licence does allow the copying and sharing of components of publications, such as chapters in books and articles in journals, that have commercial value on their own. For example, there is a market for the supply of individual articles via document delivery services, and, in Australia, via Copyright Agency’s online RightsPortal. In Australia, the subscription-based platform LearningField allows teachers to select individual chapters from different publishers’ textbooks to meet the varying needs of their students.

The proposed amendment would remove the economies of scale that enable collective licensing to operate efficiently, and would deprive content creators of revenue for investment in new content.

Legal changes in Canada that led to educational institutions not renewing their licensing arrangements have had detrimental outcomes, including a decline in production of new content and a raft of litigation.\(^\text{11}\)

11. LIBRARIES AND ARCHIVES

Guides to the application of the library and archives provisions are always welcome. They work best (provide the greatest clarity and confidence) when endorsed by content creators as well as library administrators. Approval by the Singapore Government would also assist. The government’s efforts may be better directed to such guides than to amending the legislation, given legislation (in this and other areas) is really for specialists rather than members of the general public.

If the Singapore Government is intending to redraft the legislation, it should make very clear which aspects of the new drafting merely reflect the scope of the previous provisions, and which aspects are new exceptions.

In Australia, we had a very successful exercise resulting in a consensus proposal for simplifying the statutory licence for education. The proposal was instigated by the Government, and produced by the representatives from the education and content sectors working closely together to reach a consensus position. A similar process could be used for simplifying the library provisions.

\(^{10}\) smartcopying.edu.au/information-sheets/schools/flexible-dealing

\(^{11}\) accesscopyright.ca/media/94983/access_copyright_report.pdf
The consideration of new or extended exceptions should be a separate exercise to enable the best opportunity for a consensus approach to simplifying the legislation.

### Exhibitions by libraries

The current exceptions already allow the preservation of ‘original’ documents such as letters and diaries, and these preservation copies may be displayed as part of an exhibition.

Activities not covered by specific library provisions may also be allowed by the Government use provision (section 198) where the activity is for the service of the Government.

Any merchandising activities associated with exhibitions should, of course, be subject to the usual permissions processes.

### 12. MUSEUMS AND GALLERIES

In Australia, the definition of ‘archives’ is recognised as covering not-for-profit museums (including art museums) that hold collections of items of historical or cultural importance. It would seem that the definition of ‘archives’ in section 10(4) of the Singapore Copyright Act could similarly apply to museums. In Australia, that recognition is now reflected in Notes in the legislation, but the notes merely confirm accepted interpretation of the legislation.

### 13. PRINT-DISABLED USERS

Australia ratified the Marrakesh Treaty in December 2015.

Australia has a similar statutory licence for people with a print disability, but Copyright Agency (which is appointed to manage the licence) decided not to seek any remuneration under the treaty. Copyright Agency has, however, worked with print disability organisations and publishers to improve access to works. The Australian government has released draft amendments that would replace the statutory licence with an exception for institutions assisting people with disabilities.

In Australia, institutions assisting people with disabilities record the accessible-format master copies they make under the statutory licence in an online catalogue that is hosted by Copyright Agency. This enables institutions to see accessible-format versions held by other institutions, and to request a copy rather than create a new accessible-format version from scratch.

### 14. NON-PATENT LITERATURE

In Australia, individual journal articles are available for purchase online on Copyright Agency’s RightsPortal (rightsportal.com.au). This is one example of the market for individual journal articles.

IP Australia may also rely on the statutory licence for governments to provide an article to people interested in the basis for a patent decision.12

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12 This involves negotiation of terms or fair compensation to the rightsholders.
Any consideration of exceptions in this area need to meet the three-step test, and including taking account of the markets for content such as individual journal articles.

15. MATERIALS ON OFFICIAL GOVERNMENT REGISTERS

In Australia, provision of copies of documents in government registers may be covered by the statutory licence for governments.

In 2013, the Copyright Tribunal of Australia determined the amount of equitable remuneration payable by the NSW government for its sale (directly, or via commercial brokers) of registered survey plans.\(^\text{13}\) The surveyors did not seek remuneration for certain administrative uses of survey plans that are directly associated with registration.