

SINGAPORE COPYRIGHT REVIEW REPORT

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PART I: INTRODUCTION

- 1.1 Copyright is a form of intellectual property (“**IP**”) right which gives copyright owners the right, for a limited period of time, to prevent or restrict others from using their works. The copyright system rewards creators to enable them to create more works, and balances this by calibrating the manner in which others can access those works for enjoyment as well as to create new works. In a well-functioning copyright system, copyright will be reasonable, clear and efficiently transacted.
- 1.2 Technological and market changes in the digital age have significantly affected how creative works are created, distributed and consumed. In this context, and with the objectives and functions of the copyright system in mind, MinLaw and IPOS commenced a comprehensive review of Singapore’s copyright system. In the initial part of the review, we arrived at the following high-level conclusions which guided our work:
- (a) Reasonable rights. The sea change in how creative works are being created, distributed and consumed would require us to pay close attention to the balance of rights between rights-holders and users. We would need to examine whether the balance has shifted, the impact of the shift, and whether there is a need to adjust that balance. Further, in developing any adjustments, we would have to identify the constraints that we have to work within, like our international obligations.¹
 - (b) Clear rights. Clarity or certainty undoubtedly benefits all parties. However, in attempting to make the position between rights-holders and users clear or certain, a balance would have to be struck between prescribing detailed positions (thereby providing greater clarity or certainty) and adopting a principles-based formulation (thereby providing flexibility to adapt to changes). Separately, the Copyright Act (“**CA**”) also needs to be rewritten to improve its readability, so that it is more easily understandable by both legal professionals and laypersons alike, in order for the general public to understand their rights and obligations under the act.
 - (c) Efficient transactions. Another impact of the change in how creative works are being created, distributed and consumed is in the area of how such works are being collectively managed. The challenges faced by rights-holders, users and collective management organisations, in particular in the music industry, warranted closer scrutiny.
- 1.3 Our work led to possible actions and questions, for which we conducted public consultations in 2016 and 2017. The public consultation documents provide the

¹ For example, we have received feedback that the current term of protection is too long and should be shortened. The research we have reviewed supports this view, for example, see “Copyright Law and the Supply of Creative Work: Evidence from the Movies” by Professors Ivan Png and Qiu-hong Wang in 2009. However, we are unable to consider a reduction in the current term of protection due to our international obligations, and therefore did not consult on this point.

context for this report and should therefore be read in conjunction with this report. The public consultation documents covered the following issues:

- (a) Whether to establish a voluntary copyright registration system.
- (b) Granting creators the default ownership of certain commissioned works.
- (c) Setting an expiry date for the protection of unpublished works.
- (d) Attributing creators whenever their works are used.
- (e) Providing information to help the creator-publisher/producer relationship.
- (f) Protecting certain exceptions from being restricted by contracts.
- (g) Strengthening the general “fair use” exception.
- (h) Whether and how to enable the use of orphan works.
- (i) Facilitating uses of works for text and data mining.
- (j) Facilitating educational uses by non-profit schools.
- (k) Facilitating the work of galleries, libraries, archives and museums.
- (l) Adjusting existing provisions for print-disabled users.
- (m) Improving access to knowledge in non-patent literature.
- (n) Increasing the availability of materials on official government registers.
- (o) Updating the list of allowable circumventions of technological protection measures.
- (p) How to enhance the collective rights management landscape in Singapore.

- 1.4 A wide range of stakeholders responded, including members of the public, individual and corporate creators, local and international organisations, academia, as well as industry and professional associations. During the public consultation periods, we held public townhalls and also had many meetings with various stakeholder groups and associations.
- 1.5 We received 94 formal written submissions and 283 responses through our structured online feedback form. We also recorded the views that were shared at the public townhalls and various meetings. The list of respondents to the two public consultations can be found in **Annex A** of this report.
- 1.6 The feedback received has been invaluable in both scope and depth, and we thank all respondents for their views. While we have not, in this report, responded to each and every feedback received, all the feedback was considered.
- 1.7 Part II of this report summarises the feedback received and sets out our responses and policy approaches on the issues mentioned in paragraph 1.3 above.² Part III of this report deals with additional issues which were raised by the respondents.

² With the exception of the issue in sub-paragraph (o) relating to the updating of the list of allowable circumventions of technological protection measures. This has already been implemented in the Copyright (Excluded Works) Order (“**EWO**”) 2017, taking into account the feedback given. In addition to the changes proposed during the 2016 public consultation, other changes such as safeguards to prevent potential abuses of the exception for educational use of audio-visual works in massive open online courses, have been implemented after respondents raised concerns over the matter. Separately, a number of respondents commented specifically on the issue of Virtual Private Networks (“**VPNs**”) in relation to the EWO, although this was due to misreporting by the press that our EWO proposal was intended to amend the EWO to allow or to ban VPNs. Upon review of the responses, we also did not find that there was a need to make any changes to the copyright system on the issue of VPNs.

- 1.8 Legislative amendments to the CA will be made to implement the conclusions in this report. We will also be restructuring the CA and revising the language used to make it more readable and understandable. When ready, the draft legislative bill will be made available to the public for comments on the implementation details. We would welcome interested parties to provide their views on the draft bill then.

PART II: SUMMARY OF RESPONSES AND POLICY CONCLUSIONS

Proposal 1:

Whether to Establish a Voluntary Copyright Registration System

Under Singapore's international obligations, Singapore cannot require registration as a condition of copyright protection.³ This is similar to the position of most countries.⁴ Instead, subject to certain criteria in the CA, copyright protection is automatically conferred the moment the work is made.⁵ There is no official registry of copyright in Singapore. However, it is still open to IP offices to set up an official registry for voluntary copyright registration to place on record information such as the date, content and ownership of the work in question.

We asked (a) whether a voluntary system of copyright registration in Singapore would be feasible and useful, and (b) for feedback on possible features of such a copyright registry.

Summary of Feedback

- 2.1.1 More than half of the respondents, comprising largely creators and a few users, agreed that a copyright registry would be useful or suggested features for a copyright registry. Respondents cited the usefulness of a copyright registry to trace ownership of works, facilitate contact of owners, and prove ownership. However, the support was largely conditional on the registration fee being low. In this regard, there were comments that the proposed fees stated in the 2016 public consultation paper were too high.⁶
- 2.1.2 A quarter of the respondents did not think that a copyright registry in Singapore would be useful. These were a mix of creators, users and intermediaries. Reasons for the lack of support included concerns over the possibility of creating false impressions that registration was required for copyright protection or that registration conferred protection, and the cost burden for creators or owners with a large portfolio. These respondents also viewed that existing methods⁷ were sufficient and other copyright registration systems were already available around the world (e.g. the United States Copyright Office's registry). Some respondents also pointed out that there were depositories already existing in Singapore⁸ and that it would be more

³ Article 5(2) of the Berne Convention.

⁴ Refer to the "List of Contracting Parties to the Berne Convention for the Protection of Literary and Artistic Works" for the countries which share this international obligation.

⁵ See Section 27 of the CA for Author's Works and Sections 87-91 of the CA for Subject Matter Other than Works.

⁶ Based on a study of copyright registries in other jurisdictions, it was proposed in the 2016 public consultation paper that fees associated with a "title" registry (i.e. no deposit of works) could go up to S\$50 per submission, while the fees associated with a "deposit" registry could range from S\$50 to S\$120 per submission.

⁷ Existing methods cited in the 2016 consultation paper and affirmed during public engagement sessions include copyright owners (a) keeping digital copies of previous editions and works-in-progress of the works; (b) mailing themselves a copy of their works (and keeping the mailed copy sealed to use the postmark as proof of the date); (c) depositing a sealed copy of their works with a law firm or a third party depository (whether local or foreign); (d) swearing a statutory declaration in the presence of a commissioner of oaths, attaching their works; or (e) a combination of these options.

⁸ The National Library Board ("**NLB**") already operates the legal depository for required publications (including electronic publications) under the National Library Board Act (Cap. 197) such as books, magazines, journals, newspapers, music scores and audio-visual materials in physical carriers. NLB also encourages

beneficial to raise awareness of these existing methods and depositories to creators.

- 2.1.3 There were respondents in both groups who pointed out that voluntary registration meant that such a registry would not be comprehensive and therefore might not be very useful for tracing ownership of works. Concerns were also raised by both groups as to the possibility of abuse of the system with fraudulent registrations since there would be no process for examining the authenticity or verifying the information contained in the applications.
- 2.1.4 Finally, with regard to the question on whether successful registration should confer on the registrant the benefit of a presumption of ownership, there was inconclusive support for such a proposal. While most of the respondents acknowledged that such a presumption would render a copyright registry more attractive, there was no strong support for a change in the existing legal presumptions on ownership.⁹

MinLaw and IPOS's Response

- 2.1.5 It is clear from the responses that both creators and users are of the view that the strongest incentives for registering copyright would be to obtain protection and prove ownership. However, a voluntary copyright registry would not be able to confer such benefits. Firstly, with regard to protection, as Singapore is required by its international obligations to confer protection automatically when the work is made, copyright registration cannot grant protection. Secondly, with regard to ownership, as it is not possible to conclusively determine ownership for copyrighted works that are registered, a copyright registry would only be evidence of ownership; not conclusive proof of creation or ownership. In addition, since registration would be voluntary, it would not be a comprehensive tool to trace ownership of works. It is also noted from the responses, in particular, comments made at townhalls and industry-specific briefings, that the support for the establishment of a copyright registry was largely premised on a misconception that registration would confer ownership or protection of copyright.
- 2.1.6 We also note from the responses that an important factor in the usage of a copyright registry is the affordability of the registration fee. Based on the rather negative feedback on the proposed fees in the 2016 consultation paper that are required to establish and maintain a voluntary copyright registry, there are significant concerns that such a registry would not be well-used.
- 2.1.7 We are therefore of the view that providing information and raising awareness about best practices for proof of ownership and existing repositories or registries appear more useful.

voluntary deposits of other publications such as brochures, posters, gallery catalogues, annual reports and newsletters.

⁹ See Section 130(1B) of the CA whereby if the defendant in a dispute questions the validity or ownership of copyright of the plaintiff in good faith, the burden is on the plaintiff claiming copyright ownership to prove that he is the owner.

Conclusion 1: A voluntary copyright registry will not be set up. We will continue to monitor international and technological developments on this front, and review the issue of a copyright registry if the situation changes in the future.

Proposal 2:

Granting Creators the Default Ownership of Certain Commissioned Works

The CA generally gives creators default ownership of copyrighted works, except in cases involving the commissioning of certain works (photographs, portraits, engravings, sound recordings or cinematograph films), and works created by employees or journalist-employees.¹⁰ In these cases, the commissioning party or the employer (as the case may be) will have default ownership of the works. Although contracts can change this default position, this may not have been done for various reasons such as a lack of rights awareness. Creators may fail to take into account their inability to deal further with their works when agreeing to the commission fees, and in fact, may inadvertently infringe copyright by dealing with these works thereafter (even by reproducing them in a portfolio). Thus, the default copyright ownership rules may prevent unknowing creators from further showcasing and commercialising their works. Considering industry norms and social expectations of copyright ownership in these situations, we therefore asked (a) whether creators of the above-mentioned commissioned works should instead have default copyright ownership, and (b) whether, in the case of works created by employees and journalist-employees, employers should continue to have default copyright ownership.

Commissioned Works

Summary of Feedback

- 2.2.1 The majority of respondents agreed that creators of commissioned photographs, portraits and engravings should have default ownership of their works. This comprised a mix of creators, users and intermediaries from various sectors including music, the arts, and education. Respondents acknowledged that a change in the default ownership position for commissioned works would maximise the value of such works to the creators and protect amateur creators who work without written contracts. Respondents also suggested that such a change would encourage positive mindset shifts – it would increase respect for creators and appreciation of their rights, and encourage creators to be more invested in their body of work and the avenues for commercialising their works beyond the original commissioning. An example that was given would be repurposing commissioned photographs for an editorial (assuming clients' interests were not adversely affected).
- 2.2.2 For similar reasons, many respondents who supported giving default copyright ownership to creators of commissioned photographs, portraits and engravings also agreed that this position should be extended to creators of sound recordings and cinematograph films. Respondents opined that it was not meaningful to distinguish¹¹ between creators of commissioned sound recordings and films and creators of commissioned photographs, portraits and engravings. They were of the view that the fact that the former may be companies or businesses that are better informed about copyright and commercial practices compared to individual creators, was not a good ground to distinguish between them. According to one major arts

¹⁰ Sections 30(4) – 30(6), 97(3) and 98(3) of the CA.

¹¹ Mentioned in para 3.22 of the 2016 public consultation.

organisation, they increasingly work with and commission individuals to create films including promotional videos. This is consistent with the account of another industry veteran, who observed that there were increasingly many small and independent producers of records or music videos who did commissioned projects, and giving them default copyright ownership would help them negotiate a more reasonable fee with commissioning companies.

2.2.3 The minority of respondents who disagreed with giving default copyright ownership to creators of commissioned photographs, portraits and engravings comprised a mix of creators, users and intermediaries from various sectors. A significant proportion of these respondents were from the media, legal and education sectors. Where commissioned sound recordings and films were concerned, many of these respondents, along with several other associations from the media sector, similarly disagreed that creators should have default copyright ownership.

2.2.4 Many of these respondents held the view that the commissioning party would have paid the creator and should therefore own the copyright. While this was the main concern among respondents who disagreed with giving creators default copyright ownership, several other concerns were raised. A few organisations in the media industry were concerned that changing the default ownership for sound recordings and films might upset existing industry practices. Other respondents were concerned about the potential impact on consumers in terms of price increases and misuse of personal data and other privacy concerns in relation to commissioned works of a personal nature. Insofar as the proposal was aimed at helping unknowing or vulnerable creators, a few respondents were sceptical that this was a real problem for creators of commissioned sound recordings and films (as opposed to those of photographs, portraits and engravings), and suggested that if so, education and outreach efforts might be preferred to legislative amendments to change the default ownership position.

MinLaw and IPOS's Response

2.2.5 We highlight that the default ownership rules in the CA will still be subject to change via contractual arrangements. Indeed, for certainty, it is almost always preferable for parties to contractually provide for their rights and obligations. However, that does not always occur, so this proposal is intended to address those less ideal scenarios where there are no contractual arrangements dealing with the ownership of the copyright. In these situations, creators, especially individuals, end up being subject to the default ownership positions in the CA. This could be due to a lack of rights awareness, a lack of legal sophistication to carve out the necessary rights, time or resource constraints, certain sector-specific practices,¹² or a lack of bargaining power. Education and outreach efforts can help in some cases, but such efforts alone may not be sufficient to supplant appropriate legislative measures because the default (or "fall-back") position in the legislation is meant to apply precisely when such efforts have failed.

¹² For example, we understand from the public consultation that photographs of freight ships entering the port may be commissioned over the phone at short notice.

- 2.2.6 In our view, the current position as regards commissioned works should be changed to give creators default copyright ownership. Doing so will improve sustainability of the local creative industry. Individual freelancers and creators from small- and medium-sized enterprises in particular, stand to benefit the most from the amendments. As respondents observed, the amendments would give creators greater bargaining power and put them in a position to negotiate better terms with commissioning parties. For consumers, this may not necessarily lead to an increase in fees, as it is equally open to creators to price according to their clients' intended uses. For example, where photographs are concerned, a photographer suggested that fees can be lowered by allowing a client to use selected photographs for certain uses and/or for a limited period. Being vested with default copyright ownership also encourages creators to carefully consider what rights are being assigned and for what purposes, and to think of new means to commercialise their body of work. Any resulting disruption to existing industry practices would be more limited than certain respondents suggested, given that established players in the industry already have in place standard contracts that apply regardless of the default position under the CA.
- 2.2.7 We also agree that it is not meaningful to distinguish between commissioned photographs, portraits and engravings on the one hand, and commissioned sound recordings and cinematograph films on the other. Maintaining this distinction does not reflect the nature of current engagements, where a party may be commissioned to create a portfolio of various types of works in one commission. It could result in an anomaly, where for example, the creator owns the photographs taken at an event but not the video recording made of the same event. In addition, respondents' feedback about the increasing number of individual creators of videos and sound recordings is consistent with the broader phenomenon of technology democratising content creation in the digital age – with the current state of technology, creating films is no longer the domain of corporations with large budgets and costly film-making equipment. Individuals can create videos as easily as photographs. Therefore, the proposal's aim to protect unknowing creators applies to creators of sound recordings and films, as it does to creators of photographs, portraits and engravings.
- 2.2.8 The changes to default copyright ownership do not affect creators' obligations to observe other laws, including the Personal Data Protection Act (“**PDPA**”). For example, where a photograph or portrait contains images of identifiable people, the owner of the personal data (i.e. the person in the photo or portrait) has the ability to continue to control the use and disclosure of the personal data in question, regardless of who owns the copyright in the work.¹³ Respondents' concerns about

¹³ For example, a photographer commissioned to take portrait photos of a family will, by default, own the copyright (right to prevent other people from copying, publishing etc the photos without permission) to the photos. As the photos are personal data of the family, the family members individually can agree to, or withdraw consent, to certain types of uses or disclosures of their personal data, for example, they can refuse the photographer if the photographer wishes to include the photos on his online portfolio website.

privacy and misuse of personal data in relation to commissioned works of a personal nature are more appropriately addressed under those laws, rather than copyright.

Conclusion 2(a): The default ownership of commissioned photographs, portraits, engravings, sound recordings, and cinematograph films, would be with the creator instead of the commissioning party.

Works Created by Employees and Journalist-Employees

Summary of Feedback

- 2.2.9 In relation to employees and journalist-employees, a large majority of the respondents supported retaining the status quo. These comprised organisations and businesses that employ creators, as well as individual creators and users. The predominant sentiment was that it is fair and generally understood that the employer has default copyright ownership as the employee is paid to create the works as part of his or her job.
- 2.2.10 The minority of respondents who disagreed with retaining the status quo where employees and journalist-employees are concerned, were mostly individual creators who advocated giving employees default copyright ownership from the perspective of employee/creator interests. Two media organisations suggested expanding the scope of default copyright ownership for employers in the case of works created by journalist-employees, to include ownership of works published on digital media. One of these organisations suggested entirely removing the provision on journalist-employees (Section 30(4) of the CA) and subjecting such employees to the general provision on employees (Section 30(6) of the CA) as it was unclear why journalist-employees should be treated any differently from other employees.

MinLaw and IPOS's Response

- 2.2.11 In our view, in considering the default copyright ownership position, it is relevant to examine which party would benefit most from default ownership and in turn, be incentivised to create more works and encouraged to commercialise existing works. In the commissioning situation, it is generally creators who are in a position to commercialise their works beyond the purposes of a particular commissioning, and are incentivised to create more if their business is sustainable. Indeed, for creators who undertake commissioning projects, having ownership of the works they have been commissioned to create may be helpful as these works constitute their professional portfolio that they use to promote themselves and sustain their livelihood. As explained above, such considerations inform our views that creators should have default copyright ownership in commissioning situations. In employment situations, however, the employer's objective of having its employees create works is so that the employer can use the works for its commercial benefit. Further, it is fully in the employer's discretion as to how it wishes to reward its employees. Therefore, we agree with the majority of respondents that the current position giving employers default copyright ownership should be retained.

2.2.12 In relation to the journalist-employee situation,¹⁴ we note that almost all respondents supported the retention of the current position. In relation to the view that it is unclear why journalist-employees should be treated differently from other employees, we make the following observation: unlike most employment situations where employees create a work for the sole purpose of employment, it is contemplated that journalists (and other authors under Section 30(4) of the CA) may create works that can serve other purposes in addition to the employment purpose, and insofar as that is the case, the CA provides that the journalist should have default ownership. For instance, a journalist may write articles for publication in an employer's newspaper, pursuant to the terms of his employment. While the employer would have the exclusive right to publish the work and reproduce it for the purpose of publication in a newspaper, magazine or similar periodical, all other rights vest by default in the journalist, who may for example, choose to compile his articles into a book for sale.¹⁵ Therefore, the specific provision for journalist-employees serves a specific function, and should be retained alongside the general provision that the default ownership of employee created works is with the employer.

2.2.13 Finally, we note that while the CA currently has provisions giving employers default ownership of literary, music, artistic and dramatic works (i.e. authorial works), there are no corresponding provisions for other subject matter (such as sound recordings and films). In our view, the reasons for giving employers default copyright ownership apply regardless of whether authorial works or other subject matter are concerned. As mentioned above, with the current technology, individuals can and do create sound recordings and films for their employers. It would be anomalous if, for example, an employer owns the photographs taken by an employee at an event but the employee owns the video clips. We will therefore amend the legislation to also give employers default copyright ownership of other copyright subject matter (such as sound recordings and films).

Conclusion 2(b): The current default ownership rules would be retained for journalist-employees.

For the general employment situation, employers will continue to have default copyright ownership of literary, dramatic, musical and artistic works; in addition, employers will also be given default ownership of the rights in other subject matter (such as sound recordings and cinematograph films) created by employees.

¹⁴ Section 30(4) of the CA.

¹⁵ Example given by leading academic commentator, George Wei, in the Law of Copyright in Singapore (2nd Ed) at [7.32], p. 403.

Proposal 3: Setting an Expiry Date for the Protection of Unpublished Works

Copyright protection generally lasts for a limited period of time. In certain cases however, the duration of protection is calculated from the date of publication.¹⁶ This means that so long as a work remains unpublished, it enjoys perpetual copyright protection. Once the work is published, it would still be subject to the copyright owner's monopoly and withheld from the public domain for yet another 70 years under Singapore's copyright law. For as long as the public does not have access to these works, the knowledge in the works remains locked away. This benefits no one – neither the creator nor potential users. In many other countries with a strong copyright protection system, such as the United Kingdom, Canada, New Zealand, the US and Australia,¹⁷ legislative changes have been effected to limit the duration of copyright in unpublished works.

We therefore asked (a) whether there should be a limit on how long unpublished works can be protected by copyright; (b) whether all literary, dramatic, musical, and artistic works (regardless of whether they had been published within the creator's lifetime) should have the same duration of copyright protection, i.e. until 70 years after death of creator; and (c) whether the duration of protection for sound recordings, cinematograph films, and works with an unknown creator should be (i) until 70 years after first publication, but only if they were published within 50 years from creation; or (ii) until 70 years after creation, if published after 50 years from creation.

Expiry of Copyright Protection for Unpublished Works

Summary of Feedback

- 2.3.1 A majority of respondents, which comprised publishers, intermediaries and users, were agreeable that there should not be an indefinite duration of protection for unpublished works. They noted that the proposed duration of protection would be a sensible and fair length of time, and the expiry of copyright protection would provide an incentive for people to create content.
- 2.3.2 Certain respondents also suggested that the problems associated with unpublished works with perpetual copyright were worse where such works were in the collections of cultural and heritage institutions such as libraries and archives. These institutions would incur ongoing costs associated with storing, cataloguing and maintaining a growing collection of works to which the public might never be able to access freely for as long as the works were protected by copyright.
- 2.3.3 Of the minority who preferred to keep the duration of protection indefinite, the main premise was that the proposal would force unpublished works to be published, which would not respect the creator's right to decide whether or not to make a work available to the public and somehow invade the creator's or his/her estate's privacy.

¹⁶ Refer to 2016 public consultation at para 3.23. These works are: (a) Literary, musical, dramatic works, and engravings, which have not been published before the death of the creator; (b) Photographs; (c) Sound recordings; and (d) Cinematograph films.

¹⁷ Amendments to the Australian Copyright Act 1968 which come into effect as of 1 January 2019.

2.3.4 Some respondents also disagreed with the proposal based on the reason that the estate of the creator deserves the proceeds of the unpublished work for the full duration once it has been published (i.e. until 70 years after publication), if ever. For them, removing perpetual copyright protection for unpublished works may therefore deprive the estate of such proceeds as the estate may not have the full or any benefit of the copyright protection when the work is eventually published after the author dies.

MinLaw and IPOS's Response

2.3.5 To meet the objectives set out in paragraph 1.1 above, the basic framework of the copyright system has been one of granting monopolistic rights for a limited period of time. The balance between the interests of the creators and the users is determined by the scope of the rights and the time period of protection. Granting perpetual copyright protection for unpublished works does not benefit the public as they have no access to the work. It does not encourage or incentivise the creator to create new works either. Placing unpublished works into the public domain at *some* point serves a wider societal benefit – it adds to the store of public knowledge, aids scholarship, and allows users to build upon these works.

2.3.6 Setting an expiry date for the duration of copyright protection for unpublished works will encourage creators to commercialise their works and facilitate public access to the knowledge and creative expressions contained in these works. Now more than ever, creators have less impediments to publishing or making available their works. Whereas such processes were more involved and resource-intensive in the past, technological and market advances have made them simpler and more accessible to all. However, should a creator nevertheless wish to not publish or otherwise not make his or her work available to the public, he or she is free to do so. The proposal does not “force publication” as some respondents had suggested. It simply removes the preferential status currently given to unpublished works, where copyright protection can potentially last indefinitely. All rights-holders, whether of works published or unpublished, will enjoy a limited period during which they can commercialise their works.

2.3.7 For respondents concerned about proceeds due to a creator's estate, the duration of protection, while not unlimited, is nevertheless substantial and in fact, significantly longer compared to the minimum periods under international instruments such as the Berne Convention and World Trade Organisation's Agreement on Trade-Related Aspects of Intellectual Property Rights (“**TRIPS**”).¹⁸ With most authorial works for example, a creator's estate may still enjoy the substantial value from exploiting a work for up to 70 years after the creator's death. (see Conclusion 3(b) below).

Conclusion 3(a): The duration of copyright protection for unpublished works will be limited.

¹⁸ Article 7 of the Berne Convention and Article 12 of TRIPS.

Duration of Protection for All Literary, Dramatic, Musical and Artistic Works

Summary of Feedback

- 2.3.8 Amongst those who responded favourably to the proposal to limit the duration of protection for unpublished works, most agreed that the appropriate period of protection for unpublished literary, dramatic, musical and artistic works should be the same as that for published works, i.e. until 70 years after the death of the author. This would provide consistency to our copyright system, where published and unpublished literary, dramatic, musical and artistic works all have the same duration of protection, regardless of when they are published.
- 2.3.9 However, where the duration of protection for photographs was concerned, it was highlighted that aligning it with the duration of protection for other artistic works might inadvertently extend the existing protection for photographs. Currently, the duration of protection for photographs is tied to publication (i.e. until 70 years after first publication) and not a creator's death.¹⁹ Tying it to a creator's death (as with other artistic works) would extend the term of protection for all photographs published during a creator's lifetime because the 70-year term would only begin when the creator dies, and not when the photograph was first published during the creator's lifetime. The concern was that this would delay the entry of photographs into the public domain, without any suitable justification or economic evidence.

MinLaw and IPOS's Response

- 2.3.10 While having a consistent duration of protection for all artistic works would be ideal, we agree that this would result in the consequences mentioned in paragraph 2.3.9 above, which would not be desirable. There is no compelling reason to depart from the current computation of copyright duration for photographs, which is borne out by the responses. Accordingly, the duration of protection for photographs should continue to be treated differently from other artistic works, and follow the duration for sound recordings and cinematograph films as set out in Conclusion 3(c) below.

Conclusion 3(b): The duration of protection for all literary, dramatic, musical and artistic works (excluding photographs) will be until 70 years after the death of the creator, regardless of when they are published or whether they remain unpublished.

** For ease of reference, refer to Table A at the end of this section, which compares the existing duration of protection with the new duration.*

¹⁹ Under Section 28(6) of the CA, the duration of protection for photographs is until 70 years after the expiration of the calendar year in which the photograph is first published.

Duration of Protection for Sound Recordings, Cinematograph Films and Unknown Creators

Summary of Feedback

2.3.11 Respondents who supported the proposal to limit the duration of protection for unpublished works were divided on the proposed period of protection for unpublished sound recordings, cinematograph films and works by unknown creators²⁰. Many who disagreed found the proposed formulation complicated, with some pointing out that the date of creation might be difficult to pinpoint. Some of these respondents proposed to simplify it by linking the duration of protection to the death of the creator.

MinLaw and IPOS's Response

2.3.12 It would be problematic to link duration of protection of such works to the death of the creator. There may be no human creator in the first place, for example, in many cases, sound recordings and cinematograph films could have a corporate entity as the creator, where the "death" of such an entity could possibly never occur. In the case of works by unknown creators, the concept of the death of the creator would also not be useful. Regarding the concerns raised about the difficulty in determining the "date of creation", there are provisions in the CA relating to the making of a work²¹ which should provide sufficient guidance.

2.3.13 As for the formulation of the new duration of protection, these reflect and are consistent with Singapore's various international obligations relating to the duration of protection.²² We will simplify and streamline the legislative amendments as far as possible.

Conclusion 3(c): The duration of protection for photographs, sound recordings, cinematograph films and anonymous and pseudonymous works will generally be until:

- (i) 70 years after the making of the work (if unpublished or published more than 50 years after the work is made); or
- (ii) 70 years after first publication (if published within 50 years after the work is made).

** For ease of reference, refer to Table A at the end of this section, which compares the existing duration of protection with the new duration.*

²⁰ Specifically, literary, dramatic, musical, and artistic works, which have unknown creators.

²¹ Section 16 of the CA.

²² Such as the US-Singapore Free Trade Agreement, Article 16.4.4: Each Party shall provide that where the term of protection of a work (including a photographic work), performance, or phonogram is to be calculated... (a) on the basis of the life of a natural person, the term shall be not less than the life of the author and 70 years after the author's death; and... (b) on a basis other than the life of a natural person, the term shall be not less than 70 years from the end of the calendar year of the first authorized publication of the work, performance, or phonogram or, failing such authorized publication within 50 years from the creation of the work, performance, or phonogram, not less than 70 years from the end of the calendar year of the creation of the work, performance, or phonogram. See also, EU-Singapore Free Trade Agreement, Article 10.5 (Term of Protection).

Table A: Comparison of Existing and New Duration of Copyright Protection

COPYRIGHT WORKS	EXISTING		NEW	
	Status of Work <i>(i.e. whether published or otherwise made available to the public)</i> ²³	Expiry of Copyright	Status of Work <i>(i.e. whether published or otherwise made available to the public)</i>	Expiry of Copyright
<ul style="list-style-type: none"> • Literary works • Musical works • Dramatic works • Engravings 	Unpublished or not made available to the public.	Perpetual. ²⁴	70 years after death of author. <i>(Duration not dependent on whether or not work is published or otherwise made available to the public)</i>	
	Published or made available to the public before death of author.	70 years after death of author. ²⁵		
	Published or made available to the public after death of author.	70 years after work is first published ²⁶ or made available to the public ²⁷ .		
<ul style="list-style-type: none"> • Artistic works (except photographs and engravings) 	70 years after death of author. ²⁸ <i>(Duration not dependent on whether or not work is published or otherwise made available to the public)</i>			
<ul style="list-style-type: none"> • Photographs • Sound recordings • Cinematograph films • Anonymous and pseudonymous works 	Unpublished.	Perpetual. ²⁹	Unpublished.	70 years after making of the work.
	Published.	70 years after first publication. ³⁰	Published more than 50 years after making of the work.	
			Published within 50 years after making the work.	70 years after first publication.

²³ In this table, “made available to the public” covers the events in section 28(3) of the CA, i.e. publication, performance in public, broadcasting, inclusion in a cable programme, or offering or exposure for sale to the public.

²⁴ Section 28(2) read with 28(3) of the CA.

²⁵ Section 28(2) read with 28(3) of the CA.

²⁶ For engravings: Section 28(5) read with Section 28(2) of the CA.

²⁷ For literary, musical and dramatic works: Section 28(3) read with Section 28(2) of the CA.

²⁸ Section 28(2) of the CA.

²⁹ Section 28(6) (photographs); 92 (sound recordings); 93 (cinematograph films); 29(1) (anonymous and pseudonymous works) of the CA.

³⁰ Section 28(6) (photographs); 92 (sound recordings); 93 (cinematograph films); 29(1) (anonymous and pseudonymous works) of the CA.

Proposal 4: **Attributing Creators Whenever their Works are Used**

Under the CA, authors and performers currently do not have a right to be attributed (i.e. identified) when their work or performance is used. They only have a right to prevent the false attribution of another person as the author or performer.³¹ Proper attribution helps creators and performers build their reputation and incentivises creation of new works. This is especially important in the digital era, where works are easily misattributed or not attributed at all.

We therefore asked (a) whether to introduce a right of attribution for authors and performers and the duration of such right; (b) should there be a defence of consent to an infringement of the new right of attribution; and (c) if there should be other defences to an infringement of the right of attribution.

Introducing a New Right of Attribution and Duration of Protection of Such Right

Summary of Feedback

- 2.4.1 A clear majority of respondents supported this proposal – not just individual creators, but also content intermediaries, publishers and industry associations. A common sentiment was that such a right would help accord authors and performers due respect and recognition for their creative efforts. Respondents also acknowledged the role of such a right in motivating authors and performers, and hence incentivising creation.
- 2.4.2 The respondents who disagreed or were sceptical about this proposal were largely intermediaries or employers. These responses generally raised concerns about implementation and practicality, particularly in situations where copyright works were co-created by multiple parties. Suggestions were made for certain works to be exempted from this right of attribution, especially in the case of computer programmes which not only involve multiple individual programmers but sometimes several companies as well. Some respondents even expressed the view that a statutory right of attribution was unnecessary since there were already established industry practices in place (e.g. in the television and film industries) to attribute creators appropriately. Nevertheless, many of these respondents did acknowledge that a right of attribution would indeed benefit authors and performers.
- 2.4.3 In relation to the duration of this new right of attribution, most respondents agreed with the proposal that the right should be aligned with the duration of copyright, as is the case for the existing moral rights.³² For those who disagreed, a range of suggestions for the protection period were submitted - for instance, perpetual protection, the duration of the lifetime of the creator, or as long as the work is in use.

³¹ Sections 188, 189 and 190 of the CA provide for a right to prevent false attribution, a right to prevent false representation of non-alteration, and a right to prevent false representation of source of reproduction. See para 3.28 of the 2016 public consultation.

³² The obligations under Sections 188, 189 and 190 apply only for so long as copyright subsists in the work, or the protection period for the performance has not expired.

MinLaw and IPOS's Response

- 2.4.4 Considering the support for the proposal and benefits raised by the respondents, we agree that a right of attribution for authors and performers should be introduced in Singapore to supplement the existing rights. At the same time, such a right should not impede efficient transactions of copyrighted works. A practical and reasonable balance must be struck, taking into account the legitimate concerns of those respondents who did not support the proposal.
- 2.4.5 To that end, we will take reference from other jurisdictions³³ to align Singapore with international norms, and take into account specific industry sensitivities and practices highlighted by respondents. For example, attribution will not need to be made in respect of works of a particular nature, such as computer programmes where there is often a large number of programmers involved and it would be impractical to mandate attribution.³⁴ Further, this new right will only last for the duration of copyright or performance protection, as any longer duration (such as a perpetual right of attribution) would be onerous.³⁵

Conclusion 4(a): There will be a new right of attribution for authors of literary, dramatic, musical and artistic works in relation to those works and adaptations of them, and for performers for performances.

- ◆ The right will be personal to the author or performer, and not transferable.
- ◆ The right will last for the duration of copyright or protection period of a performance (as the case may be).
- ◆ The right will not apply to specified works and performances (for example, a computer programme or a work created in the course of employment).

Defence of Consent and Other Defences against Infringement of Right of Attribution

Summary of Feedback

- 2.4.6 The majority of respondents were in favour of creating a defence of consent against a claim of infringement of the new right of attribution. Several respondents also proposed other defences as it might not always be feasible or practical to attribute authors or performers. Examples of proposed defences included: use of orphan works where the author cannot be identified, public interest, incidental inclusion, as well as a general defence of reasonableness. Several respondents also raised that it would be important to permit a waiver of this new right of attribution, but that such waiver should be in writing.

³³ See for example, Sections 79(2) of the UK Copyright, Designs and Patents Act ("CDPA") and Section 45(a) of the Copyright Act 2007 of Israel for exclusion of computer programmes. See for example, Section 79(3) of the CDPA, Section 101 of the Copyright Law of the US, Article 9 of the Copyright Act of Korea and Article 15(2) of the Copyright Law of Japan for exclusion of works created by employees in the course of employment.

³⁴ See comments by Lord Beaverbrook and Lord Lloyd on exclusion of computer programmes on the basis of practicality: Hansard, H.L. Vol. 491, cols 366 – 367 (1987).

³⁵ This is in line with Commonwealth jurisdictions such as the UK, Canada, New Zealand and Australia.

MinLaw and IPOS's Response

- 2.4.7 As mentioned, we recognise that there will be situations where it may be impractical or unreasonable to require attribution. However, a broad defence of reasonableness which would take into account the circumstances in every case may actually create uncertainty for both users and authors/performers alike. A more prescriptive approach, on the other hand, lends greater clarity and certainty and is likely to give authors and performers more confidence in asserting and/or enforcing their rights. This furthers the policy objective of empowering authors and performers through improving recognition of their works and building up their reputation.
- 2.4.8 Therefore, we will again reference other jurisdictions³⁶ and take into account concerns highlighted by respondents in creating specific defences where it will not be necessary to attribute the author or performer. These defences will be based on considerations as to whether it would be unreasonable to mandate attribution (e.g. reporting of current events due to time constraints) or whether lack of attribution would not undermine the author's reputation and commercial value of his works (e.g. examinations, judicial proceedings, incidental inclusion). Further, written waivers will be allowed.
- 2.4.9 In striking a balance between certainty and flexibility, a more discretionary approach will be taken towards the issue of remedies by allowing the courts to decide the appropriate remedy or compensation on a case-by-case basis, taking into account any difficulties in making attribution in each circumstance.³⁷

Conclusion 4(b): There will be defences and exceptions to the right of attribution.

- ◆ We will have specific defences rather than a broad defence of reasonableness (for example, reporting of current events, examinations, judicial proceedings and incidental inclusions).
- ◆ The right can be waived in writing.
- ◆ Consent can be given to acts that would otherwise infringe the right.

The Courts will have the discretion to take into account the facts and circumstances in deciding the appropriate remedy for each case of infringement of this right of attribution.

- ◆ There will be a statutory list of non-exhaustive factors based on practicalities of the circumstances, cost of compliance and the behaviour of the defendant.
- ◆ The same factors will also be considered in cases of infringement of the existing moral rights in Part IX of the CA.

³⁶ See for example, Sections 79(4) – (7) of the CDPA.

³⁷ See the views of Williams (Attorney-General) in the Copyright Amendment (Moral Rights) Bill 1999 for the need of a wide range of remedies available to the courts to address the injury caused by an infringement of moral rights. See Section 195AZA of the Copyright Amendment (Moral Rights) Act 2000 on the list of remedies available and the factors the court may take into account in exercising its discretion as to the appropriate relief to be granted.

Proposal 5:

Providing Information to Help the Creator-Publisher/Producer Relationship

Creators have traditionally depended on publishers/producers to commercialise their works. While there have been shifts as a consequence of the Internet, and in some industries, a move towards self-publishing, the relationship is still critical for creators to enable their works to be packaged, marketed and distributed, and for them to connect with their audience.

This relationship is usually skewed in favour of the publishers/producers who possess strong bargaining power and a better understanding of contracts and legal rights. This results in creators complaining that they did not fully understand the contract that they entered into, or that the terms and arrangements were unfair. To foster a more balanced relationship between creators and publishers/producers, we asked for feedback on (a) the problems faced by creators and publishers/producers operating in Singapore in dealing with each other; and (b) whether having more information available (such as through a website) would be useful for this situation, including what should be in the content of such information.

Summary of Feedback

2.5.1 MinLaw and IPOS received a large amount of feedback on this topic through online forms and email responses as well as lengthy and frank discussions during several townhalls and industry-specific briefings. The areas of concerns may be summarised as follows:

- (a) A lack of awareness of copyright and contract law, as confirmed during many of the industry-specific briefings. This is especially the case for freelancers. Some of the publishers and producers also shared that they spend time and resources in educating creators that they work with. One of the related concerns is often the lack of written contracts between parties.
- (b) Requests by creators, especially freelancers, for government intervention to police what they claim to be unfair/unreasonable contractual terms that undermine creators' interests. During the townhalls and industry-specific briefings, many creators said that they were almost always forced to accept onerous contractual terms and give up their rights as a condition for publication/distribution. This might lead to situations where creators cannot further develop or exploit their works due to publishers/producers' reluctance or inability to fully commercialise the assigned work(s), or receive inadequate remuneration for what later becomes a highly successful and profit-generating work.

MinLaw and IPOS's Response

2.5.2 We acknowledge that some form of government intervention is required to level the playing field and help the more vulnerable freelancers and small businesses. Any action taken has to be measured so as not to tilt the balance in the relationship the other way or inadvertently distort the market in another direction. For example, on the issue of remuneration, on the one hand, creators may feel that they should receive a greater share, while on the other hand, publishers may feel that they need

to be remunerated for the risk they bear, as not all the creators they represent will be successful. We do not see how the government would be in a position to make a better decision than market forces.

- 2.5.3 There is no consistent or generally agreed approach across jurisdictions on the actions that can be taken to address this issue. Jurisdictions such as the European Union (“EU”) member states (apart from the UK) tend to adopt a more interventionist approach with legislative instruments,³⁸ whereas the UK and Australia do not have such author-protection legislative mechanisms. There has been mixed feedback on the effectiveness of legislative mechanisms including the resultant impact on the market.³⁹ Further, these statutory provisions can be circumvented by appropriate choice of law contractual provisions. Another relevant point is that these statutory rights generally come into play post-contract and require court action to enforce. Yet, individual creators and small businesses tend to lack the financial resources for litigation. The same may be said of a suggestion to introduce a legal mechanism to prohibit unreasonable contractual terms (akin to the Unfair Contract Terms Act provisions for consumer protection). Since what constitutes unreasonableness is highly fact-dependent and determined by the court, the practical usefulness of such a mechanism to creators during the negotiation of their contracts is questionable.
- 2.5.4 More fundamentally, legislative intervention, which will apply equally to all sectors, may be a blunt tool in addressing the real issues faced by freelancers and small businesses. These often differ according to each industry sector and different market considerations may apply in each case. Using copyright law as a blanket solution to such varied market and commercial issues may unintentionally create undesirable effects, such as causing local creators to become relatively less commercially attractive to publishers.
- 2.5.5 We therefore take the view that it would be more effective to address the underlying information asymmetry which has contributed to the power imbalance in dealings between creators and publishers/producers. Self-help resources that are industry-specific and reduce the information gap in areas such as copyright law and contract law will thus go towards levelling the playing field without overly interfering with market forces.
- 2.5.6 Many of the respondents were not averse to making more information available, although publishers and producers were worried about whether such information

³⁸ Examples of such author-protection legislative mechanisms include: copyright laws in Germany and Poland that mandate a right of “reasonable” or “fair” remuneration for authors; copyright laws of France, Germany, Italy, Spain, Hungary and Poland that prescribe that authors can only transfer uses that were known or foreseeable at the time of contract signing; statutory reversion of rights to authors after a specified time period and/or upon certain conditions in countries such as US, Canada and certain EU member states.

³⁹ For example, in the 2014 study report commissioned by the European Parliament’s Committee on Legal Affairs – “Contractual arrangements applicable to creators: Law and practice of selected member states”, it was noted (p. 38) that while “adequate remuneration” provisions in Germany may increase the bargaining power of creators, publishers/producers in Germany had commented that the legal provision ensuring an adequate remuneration creates a situation of legal uncertainty, rendering calculations in the long-term more difficult. Moreover, since the introduction of the “adequate remuneration” provisions into German law in 2002, it has brought about unintended consequences such as an increased number of litigations regarding the definition of “adequate remuneration” and its practical application.

would be so skewed in favour of creators that it would not accurately reflect the industry's realities and practical considerations. Examples of requested content submitted include information sheets, articles, case studies, model contracts, model letters of demand and even guidelines on royalty rates. Accordingly, instead of a one-size fits-all portal, the development of self-help resources with relevant stakeholders, industry bodies and industry-specific government authorities would be a more effective and useful approach to this issue.⁴⁰

Conclusion 5: Collaborate with industry associations to develop sector-specific information resources.

⁴⁰ An example is the Advocate for the Arts: A Legal Handbook for the Creative Industries, launched in January 2018, which was developed and published by the Law Society Pro Bono Services with support from NTUC and inputs from relevant specialised agencies such as IPOS. Besides information on copyright, the handbook also provides information on contracts, insurance, trademark essentials, dispute resolution options and sample contractual clauses.

Proposal 6: Strengthening the General “Fair Use” Exception

Singapore introduced a general open-ended fair dealing exception in 2004 that closely resembled the US’s fair use exception. In addition to the four factors of the US’s fair use exception, the CA sets out a fifth factor on the possibility of obtaining a work within a reasonable time at an ordinary commercial price. These factors are non-exhaustive and given today’s technological advancements, we asked (a) whether the fifth factor should be removed, and (b) whether there were any other changes to be made to the “fair use” defence.

Removal of Fifth Factor

Summary of Feedback

- 2.6.1 Apart from written submissions, this proposal garnered a great deal of debate at industry specific briefings and public townhalls. Respondents were divided, with no clear consensus for or against removing the fifth factor.
- 2.6.2 For users who disagreed with removing the fifth factor, many assumed that retaining it meant that if a user was to fulfil the fifth factor, the exception would automatically apply – that is, so long as a user tried to obtain permission to use a work or searched for a non-infringing copy, but did not succeed, he could simply proceed to rely on this exception to use the work. Conversely, some right holders who disagreed with removing the fifth factor assumed that the “fair use” exception would never apply as long as they actively provided electronic access to their works online for a fee. Other reasons cited for retaining the factor was that it would still be relevant for works not available on the internet, and that it provided more guidance given the lack of jurisprudence.
- 2.6.3 Of those who agreed with the proposal, some pointed out that the presence of the fifth factor would wrongly imply that there was always an obligation to seek a licence before relying on the exception, or that rights-holders’ commercial decisions as to pricing and distribution of their works could convert an infringement into a fair dealing. One respondent highlighted that the Australian Law Reform Commission had recommended that Australia introduce a US-style fair use exception without the fifth factor, the Commission noting that Singapore was the only jurisdiction having this factor amongst jurisdictions with similar open-ended “fair use” provisions.

MinLaw and IPOS’s Response

- 2.6.4 An open-ended “fair use” exception allows future creators (including those in the copyright industries themselves), in reasonable circumstances, to build upon existing works without seeking rights-holders’ consent. For Singapore, the key objective of such an exception was to create an environment conducive to the development of creative works, and to facilitate greater investment, research and development in the copyright industries in Singapore.⁴¹ The “fair use” exception

⁴¹ Second Reading speech for the 2004 Copyright (Amendment) Bill.

expanded upon the specific fair dealing provisions in Singapore to allow new, and sometimes unanticipated, uses of copyrighted works beyond the traditional “fair dealing” categories such as news reporting and criticism and review,⁴² thus providing the flexibility to deal with the dynamic nature of technological changes.

2.6.5 The “fair use” factors give the courts flexibility in applying the exception to the specific facts of each case. The courts must consider all the enumerated factors, and are also free to consider any other relevant factor(s). Certain respondents’ views for or against the proposal appeared to be premised upon a misconception that the fifth factor by itself would be determinative of whether a use is fair. However, in each case, a court would decide the importance of a particular factor to the overall finding of whether a use is “fair”. Therefore, the presence of the fifth factor does not mean that “fair use” would be found in every situation where there is no legitimate copy of a work available at a reasonable time at an ordinary commercial price. Neither would it mean that just because a work was conveniently available online at a reasonable price, users would not be able to rely on the exception or must first attempt to seek a licence before they can rely on the exception.⁴³

2.6.6 In our view, the matters addressed by the fifth factor may be relevant in some but not all cases. It would be undesirable to perpetuate the misconception that as a result of the fifth factor, users of copyrighted works must always try to seek a licence when relying on “fair use”. In some cases, it may not even be appropriate – much less necessary – to consider the “*ordinary commercial price*”, such as the incidental inclusion of works in home videos for private consumption. At the same time, removing the fifth factor, along with any associated misconception that a user must first try to seek a licence, will not compromise rights-holders’ interests in ensuring that the market for their works will not be usurped without compensation. Such interests are already considered as part of the fourth factor (which considers any effects on the potential market for, or value of, a copyrighted work or other subject matter).⁴⁴ In short, the fifth factor can be seen as a subset of the fourth factor. In any event, the fifth factor, where relevant, can always be considered in a particular case, such as for certain works not readily available online (as certain respondents had suggested). Removing it only means that it does not need to be considered in all cases.⁴⁵

Conclusion 6(a): The fifth factor will be removed from the list of non-exhaustive factors that the courts must consider when determining whether or not a use is “fair” under the “fair use” defence.

⁴² As mentioned in the Second Reading speech for the 2004 Copyright (Amendment) Bill: “Presently, Singapore has a fair dealing system that permits the use of copyrighted material for specified activities, namely, research and private study, review and criticism, and news reporting. While this system provides certainty, it is also restrictive in that it does not cater for other new uses which could fall under the concept of fair dealing.”

⁴³ This was acknowledged by the Australian Law Reform Commission, *Copyright and the Digital Economy* at [5.83].

⁴⁴ As was noted by the Court of Appeal in *Global Yellow Pages Ltd v. Promedia Directories Pte Ltd and another matter* [2017] 2 SLR 185 at [85]. See also the views of the Australian Law Reform Commission, *Copyright and the Digital Economy* at [5.99].

⁴⁵ Australian Law Reform Commission, *Copyright and the Digital Economy* (Discussion Paper 79, Nov 2013) at [5.99]: “So, to the extent that it is relevant, it will be considered as part of a fairness determination.”

Other Changes to the “Fair Use” Defence

Summary of Feedback

2.6.7 Many respondents indicated they were uncertain about how to interpret “fair use”; some asked for guidance to be provided, including illustrations and explanatory notes for use of the exception by specific industries or user groups. There were also suggestions for specific dealings or exceptions to be cited as examples of “fair use”, and/or to clarify the relationship between “fair use” and the specific exceptions in the rest of the CA, including the existing fair dealing provisions relating to research and study⁴⁶, current affairs and news reporting⁴⁷, and criticism and review⁴⁸. There was also some confusion as to whether Singapore’s general fair dealing exception should be referred to as “fair use”, given how it is commonly seen as an adaptation of the “fair use” defence in the US.

MinLaw and IPOS’s Response

2.6.8 In our view, it would be more accurate to use the term “fair use” in the CA to describe this general fair dealing exception⁴⁹ in Singapore. By removing the fifth factor, the resulting provision will mirror more closely in form, the US fair use provision with its four factors⁵⁰. The open-ended nature of the Singapore exception is also more akin to the notion of “fair use”, where the exception is more general in nature and not restricted to only certain uses or activities. Given these similarities with “fair use”, the exception should be more accurately called “fair use”. We note this already coincides with the current general understanding and practice, where the Singapore exception is commonly seen as an adaptation of the US “fair use” defence. However, this will be purely a change in terminology; we do not suggest that American jurisprudence will now be more persuasive as a result of calling the exception “fair use”. As was observed by the Singapore Court of Appeal, the underlying factors in Singapore’s exception are of Australian origin and the first four factors also mirror the US “fair use” factors, so both American and Anglo-Australian jurisprudence will be helpful in shaping the law in this area.⁵¹

2.6.9 Further to respondents’ requests, we will also amend the CA to clarify how “fair use” operates vis-à-vis the other exceptions, including the specific fair dealing exceptions.

2.6.10 Lastly, we note respondents’ concerns regarding uncertainty as to the interpretation of the “fair use exception”. Since the 2016 public consultation when these concerns were expressed, the Singapore Court of Appeal had issued a decision that provides guidance as to how each of the “fair use” factors will be interpreted and applied by

⁴⁶ Sections 35(1A) and 109(2) of the CA.

⁴⁷ Sections 37 and 111 of the CA.

⁴⁸ Sections 36 and 110 of the CA.

⁴⁹ Specifically referring to Sections 35 and 109 of the CA.

⁵⁰ US Copyright Act 17 USC § 107.

⁵¹ *Global Yellow Pages Ltd v. Promedia Directories Pte Ltd and another matter* [2017] 2 SLR 185 at [76].

the local courts.⁵² In that case, the Court of Appeal also said that American and Anglo-Australian cases can provide guidance.⁵³ Further, we encourage industry associations to take the lead and issue guidelines on what may be considered “fair use” in a particular industry, as is currently done in the US.⁵⁴ While these do not have the weight of law, they are often negotiated resolutions among the various stakeholders. In such instances, the guidelines reflect some form of consensus as to what may be considered acceptable within an industry, and therefore provide a good degree of certainty to stakeholders in that particular industry.

Conclusion 6(b): The legislation will be amended to describe the open-ended exception as “fair use”. The legislation will also clarify how the “fair use” exception operates vis-à-vis the other exceptions, including the specific fair dealing exceptions.

⁵² *Global Yellow Pages Ltd v. Promedia Directories Pte Ltd and another matter* [2017] 2 SLR 185 at [72] – [91].

⁵³ *Global Yellow Pages Ltd v. Promedia Directories Pte Ltd and another matter* [2017] 2 SLR 185 at [76].

⁵⁴ Examples include guidelines by the American Library Association; the Documentary Filmmakers’ Statement of Best Practices in Fair Use; the Code of Best Practices in Fair Use for Online Video by the Center for Media & Social Media; and the Best Practices in the Fair Use of Copyrighted Materials in Music Scholarship by the American Musicological Society.

Proposal 7:

Whether and How to Enable the Use of Orphan Works

An orphan work is a copyrighted work whose owner cannot be identified or located. The inability to request for permission to use the work means that it cannot be legally used, even if the prospective user has spent much time and effort to find the owner. While it may be possible in some circumstances to argue that the general open-ended fair dealing exception applies,⁵⁵ the lack of certainty has impeded the use of such works, even by schools, galleries, libraries, archives and museums where there is a public benefit to such use. Recently, there has been a growing recognition in jurisdictions that the use of works should not be prevented or impeded if the user tried but could not find or contact the owner, with corresponding solutions in law being implemented or considered.

We therefore asked for feedback on three proposed options for an orphan works register to facilitate the use of such works. In all three models there must first be a due diligence search conducted by the potential user followed by registration on the register. The options relate to the manner in which the compensation should be calculated and paid to the copyright owner of the orphan work, namely:⁵⁶

- (a) Limitation of remedies to a reasonable fee in a subsequent court case or case brought by the copyright owner before a tribunal;*
- (b) Payment of a government-determined fee to a government body, which will be held on behalf of the copyright owner and paid to the owner upon application to the body; and*
- (c) Payment of a government-determined fee directly to the copyright owner if and when the owner approaches the user.*

Summary of Feedback

- 2.7.1 There was no one option that was overwhelmingly supported. Option (c) garnered the most support, followed by option (a), then option (b). The reasons given for supporting option (c) were largely based on the benefit of certainty to users of paying a pre-determined licence fee if and when the copyright owner appears. On the other hand, supporters of option (a) were of the view that this option was the least intrusive and allowed more control by copyright owners. A small number of respondents expressed that none of the options were ideal.
- 2.7.2 Many of the respondents highlighted potential issues for all of the three proposals, including their preferred option. These concerns included whether the government had the expertise or resources to determine the licence fee, difficulties in establishing a suitable threshold for due diligence searches, and whether there should even be a minimum threshold given the diversity in the types of orphan works and the considerations, challenges, practices and resources unique to each type of work.
- 2.7.3 Importantly, a common concern amongst the respondents, regardless of the option they preferred and the roles they identified with (creator, user or intermediary), was

⁵⁵ See Proposal 6 for explanation on the exception of “fair use”.

⁵⁶ See para 3.57 of the 2016 public consultation for full details on the three options which are adapted from the US’ proposal and the orphan works register set up in the UK.

the cost and efficiency of the proposed model and the administrative burden on the government in establishing a registry. Some respondents even questioned whether the cost of setting up and maintaining a specialised registry could be justified, particularly when the likelihood of claims by owners was slim to begin with.

MinLaw and IPOS's Response

2.7.4 Any solution to the orphan works problem must balance between making such works more widely available to benefit users whilst ensuring that identified copyright owners are adequately compensated. The solution should also be efficient to minimise transaction costs and reduce unnecessary burdens on users and the government. It is inconclusive from the responses received that any of the three options would be an ideal solution.

- (a) Both options (b) and (c) have significant market interference and expertise concerns. Not only would the government be intervening in the market, but given that there is likely to be a low volume of cases (based on what we observe in other jurisdictions), and that the cases may well cover wide-ranging situations, it would be difficult to build up the necessary expertise to determine a reasonable licence fee.
- (b) In addition, with regard to the expressed need for certainty by users who supported options (b) or (c), an orphan works registry in whatever form would not entirely eliminate the need for some form of dispute resolution as a registry will not resolve disputes over subsistence of copyright in the work or ownership of the work.
- (c) As for option (a), on top of the administrative costs to the Government of operating the registry, there are also litigation costs for the parties should they not be able to come to an agreement.

2.7.5 With regard to the experiences of other jurisdictions from which these options were derived, there is no clear guidance as to which option would be most appropriate.

- (a) In countries which adopt the model of a government-determined licence fee, such as the UK and Canada, there has been overall low usage of such registries.⁵⁷
- (b) Although the limitation of remedies method was first proposed in the US in 2006⁵⁸ and was similarly recommended by the Australian Law Reform Commission in 2014, it has yet to be implemented in either country.

⁵⁷ Barry Sookman, "Orphan Works: the Canadian solution" (April 2014) observed that the Copyright Board has granted only 277 licences between 1990 and 2013; the UK Intellectual Property Office ("UKIPO") released information in March 2018 that between 2015 and 2017, only 61 applications to the orphan works register were received.

⁵⁸ *Report on Orphan Works – A Report of the Register of Copyrights*, published January 2006.

- 2.7.6 It may well be more effective to encourage parties to enter into mediation than to develop specific administrative structures, fee determination capabilities or limitation of remedies provisions.
- 2.7.7 We also note that the proposal to expand the exceptions available to heritage institutions such as galleries, libraries, archives and museums under Proposal 10 would address the main source of demand for an orphan works solution. In our discussions with counterparts from other jurisdictions that have orphan works registries, we understand that most of the users of the system tended to come from these heritage institutions. As for other potential users, there may be the possibility of relying on the general open-ended fair dealing exception.⁵⁹

Conclusion 7: An orphan works registry will not be established. We will monitor:

- (i) how the expanded exceptions for the cultural and heritage institutions will work for them;
- (ii) the situation domestically and where disputes come to our attention, encourage mediation as a solution; and
- (iii) international developments in the orphan works space, including solutions that might come from technological developments.

⁵⁹ See the Australian Law Reform Commission, *Copyright and the Digital Economy* at [13.59] – [13.63] for an analysis of the application of the US fair use exception to orphan works, including for commercial purposes.

Proposal 8: Facilitating Uses of Works for Text and Data Mining

Text and data mining refers to the use of automated techniques to analyse text, data and other content to generate insights and information that may not have been possible to obtain through manual effort. The economic and social impact of these insights is far-reaching and growing, given the prevalence of data analytics and big data in the current digital economy. However, those involved in this endeavour risk infringing copyright as the initial phase of the work typically involves incidentally extracting or copying data from large quantities of material, which may be protected by copyright. Without an applicable exception, text and data mining may infringe the copyright in these materials. We therefore asked whether there should be a new exception for copying of works for the purpose of data analysis, which would not differentiate between commercial and non-commercial activities.

Summary of Feedback

- 2.8.1 There was majority support for introducing the exception. This came from respondents of diverse profiles, including creators, intermediaries, users, academics and industry associations, who generally acknowledged the value of the knowledge that can be derived from text and data mining. Various examples were cited of the positive applications and benefits of such activities. Respondents also felt that text and data mining should rightly be permitted under copyright law anyway, given that such activities do not consume, trade on, or compete with the expressive value of the underlying materials. Rather, the materials are treated as data (which is not protected by copyright) for unlocking insights that can benefit society at large. Certain respondents further pointed out that such activities were already potentially allowed in Singapore under the general open-ended fair dealing exception⁶⁰ and similarly in the US, could be considered fair use.⁶¹
- 2.8.2 The respondents who disagreed with the proposal were mostly creators, publishers and other intermediaries. They generally advocated market-based, licensing approaches instead, and were concerned that the exception was premature and capable of abuse in the absence of safeguards. The main concerns related to the potential for the exception to legitimise use of infringing content and other unlawful acts (such as breaching confidentiality obligations or circumventing paywalls), and strain or destabilise rights-holders' databases or servers (given the large volume of materials that might be copied at any one time).
- 2.8.3 On extending the exception to cover commercial text and data mining, several respondents representing industry associations and intermediaries in the digital and technology sector were particularly supportive of this aspect of the proposal. However, this was also cited by certain respondents as one of the reasons for opposing the exception. Among these respondents, the strongest views came from industry associations representing publishers' interests and certain collective management organisations. Several respondents who were creators or

⁶⁰ Sections 35 and 109 of the CA.

⁶¹ See for example, *Authors Guild, Inc. v. HathiTrust*, 755 F.3d 87 (2d Cir. 2014) and *Authors Guild, Inc. v. Google Inc.*, No. 13-4829-cv (2d Cir. Oct. 16, 2015).

intermediaries representing creators' interests in the media and music industry indicated a willingness to support the proposal if it did not extend to commercial activities.

MinLaw and IPOS's Response

- 2.8.4 We observe that text and data mining and its applications are crucial to fuelling economic growth and supporting Singapore's drive to catalyse innovation in the digital economy. These applications are used in many industries around the world for research and development, to identify issues and trends, to gain new insights, to speed up processes and to reduce transaction costs.⁶² In Singapore, recent developments include new research and business opportunities and enhanced private-public partnerships in the professional services sector.⁶³ An exception for text and data mining is not premature, but timely – leading IP jurisdictions like Japan and the UK have already introduced a similar exception, while the EU has likewise proposed one to drive innovation and bridge the gap with other jurisdictions.⁶⁴ At the same time, respondents have raised legitimate concerns that need to be addressed.
- 2.8.5 We will therefore introduce an exception for text and data analysis, with safeguards to protect rights-holders' interests. A specific exception for such activities is preferred to relying on the general open-ended fair dealing defence, as it promotes certainty and allows calibration of specific safeguards and conditions to address the concerns raised by respondents. These include conditions to preserve and protect rights-holders' commercial interests and freedom to conduct business based on licensing and subscription models. For example, the exception will be limited to acts of copying, and a user must have lawful access to the works and other subject matter that are copied. If certain material can only be accessed through a paid subscription, the user must pay for the subscription before using the material for text and data mining. The user also cannot distribute the material to anyone without such lawful access. The exception will also not prevent rights-holders from taking reasonable measures to maintain the security and stability of their computer system or network.
- 2.8.6 The exception will not be limited to non-commercial text and data mining activities. Text and data mining is analogous to research work. Both activities involve obtaining data, manipulating and studying it, and coming to conclusions or discovering new ideas. The existing fair dealing exception for research and study is not limited to non-commercial purposes.⁶⁵ This new exception should similarly not be so limited. This position taken for research and study recognises the fact that

⁶² In Singapore's case, see for example, *Data: Engine for Growth – Implications for Competition Law, Personal Data Protection, and Intellectual Property Rights (16 Aug 2017)*, a paper published by the then-Competition Commission of Singapore, which examines data and analytics adoption and practices in the digital media, finance, healthcare, consumer retail, land transport and logistics sectors in Singapore, based on a 2017 study conducted by KPMG Services Pte. Ltd.

⁶³ See for example, A*STAR, "KPMG and A*STAR partner to digitalise professional services", press release (26 July 2018).

⁶⁴ See, for example, *The Exception for Text and Data Mining (TDM) in the Proposed Directive on Copyright in the Digital Single Market – Legal Aspects (Feb 2018)*, an in-depth analysis commissioned by the European Parliament's Policy Department for Citizens' Rights and Constitutional Affairs, at p. 4.

⁶⁵ Section 35(1A) of the CA.

whether an activity is commercial or non-commercial in nature is not always clear. It can start off as being non-commercial in nature but may evolve into activity of a commercial nature. This also holds in the context of text and data mining activities. More importantly, as the purpose of text and data mining is to analyse data and not to consume what copyright seeks to protect (i.e. the creative expression of the copyright materials), it does not appear necessary to restrict uses that may not fall within or interfere with the copyright owner's normal exploitation of the materials in the first place – even if they are commercial in nature. Insofar as text and data mining activities can amount to fair dealing, users are not precluded from relying on such exceptions just because a dealing or use is commercial in nature.⁶⁶ Therefore, in creating a specific exception for text and data mining activities, this new exception should similarly cover activities of a commercial nature. Safeguards will be built in to take into consideration rights-holders' interests (see paragraph 2.8.5 above).

Conclusion 8: There will be a new exception for data analysis. The following are the key elements:

- ◆ The exception will apply to copyright works and other subject matter.
- ◆ The exception will only cover acts of copying (and not other acts protected by copyright).
- ◆ The copying must be for the purpose of data analysis. If no analysis is performed on the work that has been copied, the exception will not apply.
- ◆ Both non-commercial and commercial activities can qualify for the exception.
- ◆ There will be additional safeguards and conditions for the exception to apply. These will include the following:
 - ▶ The user must have lawful access to the works that are copied. If access to the works requires payment (e.g., a paid subscription), the user must have paid.
 - ▶ The user cannot distribute the works to those without lawful access to the works.
- ◆ Rights-holders will not be prevented from taking reasonable measures to maintain the security and stability of their computer system or network.

⁶⁶ See Sections 35(2) and 109(3) of the CA, where the commercial nature of the dealing is only one of the factors to be considered by the Courts in deciding whether a dealing is fair.

Proposal 9: **Facilitating Educational Uses by Non-Profit Schools**

Pedagogy has evolved beyond the traditional classroom-style dissemination of knowledge from one teacher to many students through the use of prescribed standardised physical textbooks and workbooks. Learning in educational institutions now takes many forms, including e-learning, student-directed learning and peer-to-peer learning, with usage of a wide range of materials beyond standard textbooks. The range of such materials has increasingly expanded to include digital materials such as online publications, blogs, videos, and photos, which may be obtained from the Internet. This is fundamentally different from the situations envisioned in the existing copyright exceptions and we have been receiving feedback that there is uncertainty as to whether such uses are permitted. We therefore asked (a) whether to introduce a new purpose-based exception for not-for-profit educational institutions for giving or receiving instruction, regardless of the media or platform of instruction; (b) whether there are any other situations that would not be covered by this new exception, but for which an exception may be required for educational purposes; and (c) whether certain existing exceptions for education can be improved by alignment of the copying thresholds.⁶⁷

New Purpose-Based Exception

Summary of Feedback

- 2.9.1 The majority of respondents supported this proposal – including users, creators, content intermediaries and publishers. These respondents acknowledged that such an exception would meet the demands of current modes of instruction, which often involved peer-to-peer sharing and use of technology, learning portals, and online media. However, many respondents who supported the proposal who were not from the education sector also submitted that the exception should be accompanied by appropriate safeguards and conditions, such as having to acknowledge the source of the works.
- 2.9.2 The respondents who were sceptical or disagreed with the proposal were predominantly publishers. These respondents were generally concerned that the proposal would undermine the sale and licensing of copyrighted works, particularly educational materials. They suggested that the exception may reduce incentives to create and publish educational materials for the local market and impact the sustainability of the education-publishing industry in Singapore. One respondent also believed that traditional modes of instruction (such as use of physical textbooks) remain highly relevant.
- 2.9.3 Several intermediaries preferred a statutory licensing solution to creating an exception as they held the view that creators and publishers should be compensated

⁶⁷ Sections 35 (free copying up to 10% for research and study), 51 (free copying up to 5% initiated from or on the premises of a not-for-profit educational institution) and 52 (copying of up to 10% on behalf of or by a not-for-profit educational institution under a statutory licence) of the CA.

for the uses contemplated by the proposal. For some, no legislative amendments were needed at all; they felt that digital copying and sharing for educational purposes could already be done under the existing statutory licensing scheme⁶⁸ or the existing education-related exceptions.

2.9.4 The existence of one such exception led to differing views among the respondents. This was the general open-ended fair dealing exception.⁶⁹ Respondents who supported the proposal noted that while educational uses might be covered by the fair dealing provisions, the proposed exception could provide greater certainty to users in the education sector, who tend to be risk-averse. Conversely, respondents who disagreed with the proposal thought that the uses covered by the proposed exception could potentially be considered fair dealing, and therefore the proposed exception was unnecessary.

2.9.5 With regard to our question on whether there were situations other than giving or receiving instruction for which an exception might be required for educational purposes, we received various suggestions from users in the educational sector. These ranged from situations involving collaborative research (among staff or students), holistic development of students (e.g. film appreciation and movie nights), to extracurricular activities held on the premises of an educational institution. There was no particular suggestion or concern that appeared to be common to these users; some suggestions in fact appeared to be peculiar to the needs of a particular educational institution, rather than educational institutions in general.

MinLaw and IPOS's Response

2.9.6 We appreciate that the industry for print materials specifically developed for education (such as textbooks and supplementary books) is sustained by the education sector's sizeable demand for such materials. At the same time, licence fees for online content may provide an important additional source of revenue for content creators and intermediaries, especially in the current environment. However, we do not think that the statutory licensing solutions proposed by certain respondents is the most appropriate way to accommodate these concerns. Bearing in mind that one of the main situations we are aiming to help is the use of online materials in student-directed or peer-to-peer learning, it is expected that a large proportion of the materials intended to be covered by the exception are likely to be created by creators who freely put content online and are not represented by any collective management organisations. The volume of online materials used will lead to significant effort expended on record-keeping. The large number of rights-holders, most of whom are likely not represented by any collective management organisation, means that the administrative effort to remunerate them is tremendous. All things considered, a statutory licensing scheme would be disproportionately cumbersome in this context. A statutory licensing scheme which can work in the traditional educational print materials environment is impractical and ineffective in the online environment we are contemplating.

⁶⁸ Section 52 of the CA.

⁶⁹ Sections 35 and 109 of the CA.

2.9.7 Therefore, there is a clear and significant social benefit in having an exception for educational uses. Taking into account the feedback received, particularly the requests for safeguards and conditions, we will craft the scope of the exception so as not to cause any significant commercial impact on the traditional educational print materials industry. These are the parameters of the exception:

- (a) The exception will apply only to online works that are accessible without the need for payment at the time of access. In other words, all print materials and any online materials that are not freely accessible (e.g., online materials accessible via paid subscription), will be outside the scope of the exception. Crafting such a narrow scope ensures that our objectives can be met without significant impact on the businesses of the traditional educational materials publishers.
- (b) Only certain uses of these works will be permitted. These will be limited to reproducing, adapting or communicating the works. Where communication is concerned, further limits will be set on the persons to whom the works can be communicated. For example, staff and students from one educational institution will be able to share materials on the Ministry of Education’s Student Learning Space (an e-learning platform) with other staff and students from the same or another educational institution.⁷⁰ However, they will not be able to communicate the materials to the general public, such as on publicly available websites created by students or through public social media posts.
- (c) The use must be in the course of any activity that has an educational purpose (such as giving or receiving instruction). Respondents’ eclectic suggestions on the various situations where an exception may be required for educational purposes indicate that it will not be helpful to define “educational purpose” exhaustively. Instead, we will consider accommodating some of these suggestions, where reasonable, as examples of “educational purpose”. This will also satisfy certain respondents who asked for greater clarity on the scope of the new exception.
- (d) The relevant activity must be on behalf of, on the premises of, or otherwise in connection with a not-for-profit educational institution. In the local context, it is common for schools to engage vendors to run workshops or activities for their students. Such situations where the educational institution engages the services of a third-party are generally excluded from the exception (unless the third-party itself is a not-for-profit educational institution).
- (e) The persons who can avail themselves of the exception will be limited to students, teachers and government officers who perform curriculum or content development functions.

⁷⁰ As the Student Learning Space is only available to students and teachers, uploading of materials copied under this exception onto the Student Learning Space would be allowed. Likewise, any other closed network which is only available to students or teachers of non-profit educational institutions would be allowed.

2.9.8 We will also introduce other safeguards and conditions as suggested by various respondents, such as having to acknowledge the source of the online work(s); making the exception inapplicable if a user knows or ought reasonably to know that a work was made available online without the rights-holders' consent or the benefit of an exception; and subjecting the exception to any TPMs used by rights-holders to restrict access to their works. This provides room for rights-holders to control access to their works.

Conclusion 9(a): There will be a new purpose-based exception for educational uses. The following are the key elements:

- ◆ The exception will apply to any online work that is accessible without the need for payment at the time of access. Print materials and any online materials that are not freely accessible are outside the scope of the exception.
- ◆ Use of the online work will be limited to reproducing, adapting or communicating it. Where communication is concerned, further limits will be set on the persons to whom the works can be communicated.
- ◆ The use must be in the course of any activity that has an educational purpose (such as giving or receiving instruction).
- ◆ The relevant activity must be on behalf of, on the premises of, or otherwise in connection with a not-for-profit educational institution.
- ◆ The persons who can avail themselves of the exception will be limited to students, teachers and government officers who perform curriculum or content development functions.
- ◆ A user must acknowledge the source of the online work.
- ◆ The exception will not apply if a user knew or ought reasonably to have known that the online work in question was made available without the consent of a rights-holder or the benefit of an exception.
- ◆ Rights-holders will not be prevented from using TPMs to restrict access to their works.

Alignment of Copying Thresholds

Summary of Feedback

2.9.9 The majority of respondents were sceptical or disagreed with this proposal. These respondents were mainly creators, as well as industry associations and intermediaries from the publishing industry. They were mainly concerned that free copying up to 10% for educational use would be one of the highest free copying thresholds for educational use in the world. It might also impact revenue streams for publishers and authors, particularly publishers of print materials designed specifically for education.

2.9.10 A minority, comprising creators and users, agreed with the proposal, but did not provide any compelling justifications for changing the current copying thresholds. There was also some feedback indicating that people found the differences in copying thresholds for the various copyright exceptions for educational purposes and the fair dealing exception confusing.

MinLaw and IPOS's Response

2.9.11 We acknowledge the point made by creators and publishers that this proposal could adversely impact their income, and consequently, their ability to continue to develop quality educational materials. Further, it appears that parties have largely adapted to, and worked with, the current threshold and statutory licensing scheme without significant problems, as seen from the limited demand for this proposal. Therefore, we will not implement these alignment proposals and, instead, will maintain the positions as currently reflected in the CA.

Conclusion 9(b): No changes will be made to the copyright threshold provisions of the existing exceptions for education.

Proposal 10: Facilitating the Work of Galleries, Libraries, Archives and Museums

Galleries, libraries, archives and museums are public cultural institutions which have the socially beneficial function of preserving, curating, and providing the public access to materials of historical, social, cultural and educational significance. Whilst the important role played by libraries and archives are currently recognised and have certain exceptions in the CA, these exceptions do not reflect the needs of these modern public institutions now, such as when libraries and archives exhibit their collections. Such exceptions have also been under-utilised due to a lack of understanding by librarians and archivists. In addition, museums and galleries do not have the exceptions they need even though they similarly preserve and provide the public with access to their collections, especially since they deal with works which are less likely to have commercially available alternatives or replacements.

We therefore asked (a) whether galleries, libraries, archives and museums should have new exceptions which cover reproductions for exhibitions and publicity materials which are made to publicise exhibitions; (b) whether the existing exceptions for libraries and archives should be redrafted, simplified and/or updated for the digital age; and (c) whether museums and galleries should have similar exceptions as libraries and archives, such as those for preservation, and for research and study.

New Exceptions to Copy for the Purpose of Exhibition and Inclusion in Exhibition-related Publicity Materials

Summary of Feedback

- 2.10.1 A clear majority of respondents supported galleries, libraries, archives and museums having these exceptions. These included public cultural institutions (i.e. galleries, libraries, archives and museums) and members of the public, as well as individual creators and industry associations which represented rights-holders, whose support was conditioned on the need to adopt safeguards and conditions which would help to assuage any concerns they had. Generally, rights-holders who were supportive wanted the public cultural institutions to check that a copy of the work could not be otherwise obtained within a reasonable time at an ordinary commercial price, and wanted to exclude online exhibitions from these exceptions. Respondents were also generally agreeable that there was merit in public cultural institutions providing the public with more access to such materials through exhibitions, as long as the commercial interests of rights-holders were not significantly impacted.
- 2.10.2 The respondents who disagreed or were sceptical about this proposal were all creators or industry associations which represented rights-holders. Their concerns stemmed from the possibility that public cultural institutions might abuse the exceptions to avoid seeking permission from the rights-holder, or to avoid using existing licences or avoid purchasing works which were currently in-print. There were also a few respondents who voiced concern that “virtual exhibitions”, or exhibiting copies of works online, would make the issue more complex, although there have also been a few respondents who are public cultural institutions which

expressed interest in being able to provide access to their collection to the public via the internet.

MinLaw and IPOS's Response

- 2.10.3 We recognise the valid concerns voiced by respondents, that any copying for the purposes of exhibition and exhibition-related publicity materials allowed should not replace the purchase of legitimate copies of the work (or licences where available) from commercial sources. As the proposed exceptions are intended to aid public cultural institutions in situations where the original work is unable to be exhibited (e.g. too fragile, damaged or on loan), and where commercially available replacements are not readily available (e.g. when the work in question is one-of-a-kind or out-of-print), we propose that any reproductions for the purpose of exhibition will only be allowed if the institutions had made a reasonable investigation that a copy of the work cannot be obtained within a reasonable time at an ordinary commercial price. This will provide more assurance than our previous proposal, where the institution could still make a copy of up to a reasonable portion of the work, if the work was commercially available.
- 2.10.4 In addition, where the work in question to be exhibited is an audio-visual material (e.g. an old newsreel as part of a historical exhibition, or a video which forms part of an art installation), the mere exhibition of the material, even if it had been legitimately obtained by the public cultural institution, would be an act of publicly performing it. As such, the exception will also cover the public performance of any audio-visual material in the public cultural institution's collection.
- 2.10.5 Specifically for the exception relating to making copies for inclusion in exhibition-related publicity materials, a condition would be imposed to prevent the making of copies which can effectively be a reasonable substitute for the original work. This is to ensure that the commercial market is not usurped by such publicity materials. For example, copies of paintings in an exhibition catalogue must be of a lower quality and/or reduced in size. If it was a literary, dramatic or musical work, the copy must only be of a reasonable portion (i.e. 10% or less). Further, generally there should not be a fee charged for such publicity materials, but if there is, the fee must be on a cost recovery basis only.
- 2.10.6 Lastly, although there is some interest in "virtual exhibitions", we recognise that the technology available today makes it difficult to prevent widespread unauthorised copying of works if they were available online, and that other jurisdictions have yet to adopt copyright exceptions to allow for such exhibitions. "Virtual exhibitions" also effectively require the copying and making available to the public of all of the items in the exhibition, as opposed to only the items which are unable to be exhibited in a traditional exhibition. Therefore, we propose to limit the exception to exhibitions in a physical location for now.

Conclusion 10(a): There will be new exceptions to allow museums and galleries (which are non-profit or when they display items from the National Collection), non-profit libraries and

non-profit archives to make copies of items or publicly perform audio-visual materials for the purposes of exhibition. The following are the key elements:

- ◆ The item or audio-visual material must be in the permanent collection of the institution.
- ◆ Any reproductions can only be allowed after a reasonable investigation that a copy of the work cannot be obtained within a reasonable time at an ordinary commercial price.

Copies of items can also be made for the purpose of inclusion in publicity materials, provided that:

- ◆ Any reproduction should not be at a level to be a reasonable substitute for the work.
- ◆ Any fee charged should only be on a cost-recovery basis.

Update and Simplification of Existing Exceptions Relating to Libraries and Archives

Summary of Feedback

2.10.7 Most of the respondents on this issue agreed with the proposal to redraft the existing exceptions in order to make them easier to understand or apply, and to reflect the digital needs of libraries and archives. One respondent who disagreed suggested that more guidance for librarians and archivists might suffice. Additionally, some respondents were very insistent that libraries and archives must continue to make a reasonable investigation that the copy was not commercially available, having misunderstood that we were proposing to remove that condition.

2.10.8 On whether there were any other impediments or changes to the existing exceptions which would be useful, two respondents who represented public cultural institutions suggested improvements to the preservation exception, to take into account best-practice conservation processes in allowing for pre-emptive preservation of published works, and being able to convert obsolete formats such as VHS tapes to current formats like DVDs. One respondent also highlighted that the current wording made it unclear as to whether digital copies could be made when the provision only provided for “copies”, and whether declarations by users when required by the law can be done electronically. There were also suggestions on removing the requirement to destroy electronic copies used in the process of document delivery, and to widen the exceptions when used by libraries within educational institutions to possibly cover more than 10% of the work, or in relation to works not within the collection of the library or archive.

MinLaw and IPOS’s Response

2.10.9 As part of an overall review of the CA, we intend to redraft the entire Act in plain English, in line with the Attorney-General’s Chambers’s ongoing initiative to simplify the language and presentation of Singapore’s statutes in general. This will help in making these provisions easier to understand for librarians and archivists, as well as for curators of museums and galleries which get to benefit from them (see paragraph 2.10.16 below). The majority of the changes will not affect the content of the exceptions, including the obligations required of the user of the exception. To clarify, we will not be removing any of the existing conditions where the user of the

exception must make a reasonable investigation that a copy of the work is not commercially available.

- 2.10.10 Regarding the suggested improvements to the exceptions, we recognise that a major role that public cultural institutions play is in the preservation of their collection, so where there are best-practice conservation processes which do not affect the commercial market of the work, public cultural institutions should be allowed to adopt them. Therefore, we will extend the current preservation exception to allow for copying to an alternative format if the original is in a format that is obsolete or is becoming obsolete, and also allow for pre-emptive preservation of published works.⁷¹ As the current preservation exception is subject to the obligation of checking that a copy of the work is not already commercially available, the expansion of the exception should not usurp the commercial interests of the rights-holders.
- 2.10.11 Another best-practice conservation process is to have multiple backup copies⁷² – this should also be allowed. If a backup copy is allowed to be made, then subsequent backup copies should automatically be allowable. Such redundant backup copies can only be made to back up a copy already made under the preservation exception, i.e. they are backups of copies of works which are in danger of being or already have been damaged, deteriorated, lost, or stolen. Backup copies cannot be used to increase the total number of copies which may be accessed by the public at any one time.
- 2.10.12 On the issue of whether and how the exceptions apply in the digital age, we believe that the language of the exceptions should already allow for digital copies to be made when the wording of the provisions provides for “copies”. On the issue of the safeguard of requiring signed declarations by people seeking copies from libraries and archives for the purpose of research and study, we believe that it would not be adversely affected by allowing digital versions of such declarations. However, we believe that digital copies made in the process of document delivery (i.e. sending a copy to another library under prescribed circumstances) should continue to be destroyed in order to provide adequate safeguards for the commercial market of the work, to provide equivalence between physical copying and digital copying.
- 2.10.13 In relation to the suggestions by libraries of educational institutions to expand the existing exceptions to include copying more than the current allowable portion of a work even when the work is commercially available, or allowing for the exceptions to apply to items not in the library’s permanent collection, we believe that such suggestions could have an adverse effect on the commercial market of the right-holder that is not justified by the benefit it would bring to the libraries. It is also not clear that libraries currently face a strong barrier in their mission to provide access

⁷¹ Today, Section 48 of the CA already allows for published works to be copied if it has been damaged, deteriorated, lost or stolen. Original versions of works can additionally be copied to preserve it against loss or deterioration (i.e. it has yet to be damaged, deteriorated, lost or stolen). Thus, allowing pre-emptive preservation of published works means that published works would be treated similarly to original versions of works.

⁷² For example, having multiple electronic copies in physically separate locations so as not to rely on just one copy or one site.

to knowledge and information if such exceptions were not provided for. In addition, some of the concerns by libraries in educational institutions might already be addressed by the new purpose-based exception for educational institutions in Proposal 9.

- 2.10.14 Separately, a study of other countries' copyright exceptions for public cultural institutions show that some of them also allow for copying for the purposes of internal record-keeping and cataloguing; for insurance purposes or police investigations; and other similar administrative purposes.⁷³ Where the copies are used in the public cultural institution's internal administrative processes, these copies will not have any effect on the commercial market for such works, and should be allowed.

Conclusion 10(b): The existing exceptions for libraries and archives will be redrafted for clarity and readability, and enhanced in the following ways:

- ◆ All existing exceptions should be tech-neutral, and minimally should make clear that:
 - ▶ electronic copies and copies of digital originals are allowed if the provision allows for copying, and
 - ▶ digital declarations can be utilised where there is a requirement for declarations.
- ◆ The preservation exception (currently s48 and s113) will allow for pre-emptive preservation of published works in their permanent collection and copying to an alternative format if the original is in a format that is obsolete or is becoming obsolete.
- ◆ Public cultural institutions will also be able to make copies of any copies made under the preservation exception for the purpose of mitigating the risk that the preservation copy would be lost. Copies made under this exception cannot be used to increase the total number of copies which may be accessed by the public at any one time.

There will also be a new exception for public cultural institutions to make copies of works in their permanent collection for the purposes of internal record-keeping and cataloguing, insurance purposes or police investigations, and any other similar administrative matters.

- ◆ There is no need to ensure that a copy of the work cannot be obtained within a reasonable time at an ordinary commercial price for this provision, as such use has no effect on the commercial market for such works.

Allowing Museums and Galleries to Make Use of Existing Libraries and Archives Exceptions

Summary of Feedback

- 2.10.15 Most of the respondents agreed that museums and galleries should have exceptions which allow them to make copies of works in their collection for preservation and for research and study, including being able to provide copies for third parties for their research and study purposes. Respondents generally agreed that it would be reasonable to extend the existing exceptions for libraries and archives to museums and galleries, given that the latter institutions also had the socially beneficial function

⁷³ See for example, Sections 30.1(1)(d) and (e) of the Canada Copyright Act and Sections 66(1)(a) and (b) of the Irish Copyright and Related Rights Act.

of preserving, curating, and providing the public access to materials of historical, social, cultural and educational significance. One respondent who opposed the proposal noted that where the materials in question were provided via licence, the licensor might not want the museum to take any action to “preserve” the material or to provide the public access for research and study. The respondent did acknowledge that museums and galleries had the socially beneficial purpose of preserving and providing the public access to materials, but concluded that, by providing such exceptions, we would inadvertently cause rights-holders who did not want their works to be preserved or made publicly available to researchers to keep their works in private collections.

MinLaw and IPOS’s Response

2.10.16 Overall, we note that the existing exceptions available to libraries and archives are reasonably balanced between the needs of public cultural institutions to achieve their aim of preserving, curating and providing public access to the works, whilst ensuring that the commercial interests of rights-holders are not prejudiced. Museums and galleries have the same purpose, and therefore should be able to utilise the same exceptions, given the safeguards already inherent in the exceptions. Whilst we recognise there is a possibility that some rights-holders may now keep their works in private collections, the exceptions will allow museums and galleries to be able to better achieve their mission in relation to the majority of the works in their permanent collection. As the types of museums and galleries covered by the proposed extension of the exceptions will either be non-profit in nature, or only when they are dealing with the National Collection⁷⁴, we strongly encourage the affected rights-holders to keep in mind the importance of preservation and of research and study of the works for society at large, whilst realising that their commercial interests should not be affected.

Conclusion 10(c): The existing exceptions for libraries and archives in relation to preservation of works, and being able to make available copies of works for research and study,⁷⁵ will be extended to cover non-profit museums and galleries when dealing with the works in their permanent collection, or all museums and galleries when dealing with works in the National Collection.

⁷⁴ The National Collection refers to the permanent collection of objects vested in the National Heritage Board (“NHB”), which are primarily exhibited at NHB museums and heritage institutions, Singapore Art Museum and National Gallery Singapore. These objects would generally include artefacts and artwork, used as a means to promote public awareness, appreciation and understanding of the arts, culture and heritage.

⁷⁵ Sections 45, 47, 48, 49, 112, and 113 of the CA.

Proposal 11: Adjusting Existing Provisions for Print-Disabled Users

The CA contains exceptions intended to give persons who are blind, visually impaired or otherwise print-disabled greater and more equal access to copyrighted works.⁷⁶ These exceptions were introduced in 2015 to implement Singapore’s commitments under the World Intellectual Property Organisation’s (“WIPO”) Marrakesh Treaty to Facilitate Access to Published Works for Persons who are Blind, Visually Impaired or Otherwise Print Disabled (“Marrakesh Treaty”). By the time of the 2016 public consultation, print-disabled users and institutions assisting them (also known as authorised entities) have had some experience with these provisions. We therefore asked about certain refinements to enable these exceptions to serve their beneficiaries more effectively, in particular: (a) whether to refer to the beneficiaries of these exceptions as “persons with print disability”, instead of “persons with reading disabilities”; (b) whether to remove the obligation on authorised entities to pay copyright owners for making, distributing or making available copies of works in formats that print-disabled users can access; and (c) whether authorised entities’ record-keeping obligations should be less onerous.

Change in Terminology

Summary of Feedback

- 2.11.1 The CA refers to the beneficiaries of these exceptions as “persons with reading disabilities”. Given that this term could unfairly suggest a cognitive or learning disability, we asked if the term “persons with print disability” would be more appropriate. The Marrakesh Treaty also uses the “print disability” terminology.
- 2.11.2 Respondents were unanimous in supporting this change in terminology, irrespective of whether they identified as creators, users, intermediaries or industry associations representing creators’ or users’ interests.

MinLaw and IPOS’s Response

Conclusion 11(a): The CA will use the term “persons with print disability”, instead of “persons with reading disabilities”.

Removing Obligation to Pay Equitable Remuneration

Summary of Feedback

- 2.11.3 The majority of respondents supported this proposal. Given the social dimension of these exceptions, supporters included not only organisations representing the interest of print-disabled users, but also members of the public, an educational institution, a local collective management organisation, and certain intermediaries and associations representing general users’ interests. These respondents generally agreed with the concerns highlighted in the public consultation. Firstly, the costs of paying equitable remuneration made the process of converting works

⁷⁶ Sections 54 and 115C of the CA.

into accessible formats, which was already expensive and time-consuming, even more so. Secondly, because the volume of conversions was very small, any loss of potential licence fees would also be small. One respondent pointed out that there was no equitable remuneration requirement in the US, suggesting that even in such a market which was far larger than Singapore, publishers had not suffered from the absence of such a requirement.

- 2.11.4 Respondents that disagreed were generally organisations, associations and intermediaries representing rights-holders' and publishers' interests. Several reasons were cited in opposition of the proposal. Firstly, the proposal might be premature and demand for accessible formats could substantially increase in the future once the Marrakesh Treaty was more broadly implemented. Secondly, a right of equitable remuneration provided copyright owners with some recompense in return for diminishing their exclusive rights and should therefore be retained as a matter of fairness and principle. Thirdly, the solution should instead focus on incentivising publishers to make accessible format copies; dispensing with payment of equitable remuneration could in fact disincentivise rights-holders.

MinLaw and IPOS's Response

- 2.11.5 We have evaluated these views, and on balance, agree that the existing obligation for authorised entities to pay equitable remuneration should be removed. At the outset, we note that this proposal is entirely consistent with Singapore's obligations under the Marrakesh Treaty, which does not require countries to provide a right of remuneration.⁷⁷ We further note that the concerns underlying this proposal were validated by the views and experiences of the majority of respondents. In the local context, we understand from discussions with the print-disabled community that a print-disabled user would purchase a print copy, have it converted to an accessible format, and thereafter have on hand a print copy which he cannot use and an accessible format copy which he uses. Therefore, adding the requirement to pay equitable remuneration adds to his cost by effectively causing him to pay twice for the work.
- 2.11.6 In contrast, assertions that the proposal may be premature and demand for accessible formats could substantially increase in the future do not appear to be compelling reasons to have a requirement of equitable remuneration. The feedback from the perspective of print-disabled users is that purchasing an accessible format copy is preferable to purchasing a print copy and going through the effort of the conversion process. Therefore, if publishers foresee a demand for accessible format copies, they should take action to meet that demand. It is also noted that the CA currently provides that the relevant exceptions for print-disabled users will not apply if a new accessible format copy of a particular work has already been published and can be obtained within a reasonable time at an ordinary commercial

⁷⁷ Article 4(5) of the Marrakesh Treaty.

price.⁷⁸ These conditions are consistent with Article 4.4 of the Marrakesh Treaty,⁷⁹ which recognises that the best way of providing a broad and up-to-date supply of accessible format copies is by incentivising rights-holders to supply such copies under reasonable conditions.⁸⁰ Although Article 4.4 is not a mandatory obligation for Singapore and a few respondents even suggested removing these conditions, we recognise that these conditions do signal and potentially incentivise rights-holders to provide accessible format copies. We will not be removing these conditions. While these exceptions serve important humanitarian and social development goals, these goals must be met in a sustainable manner that continues to balance rights-holders' interests.

Conclusion 11(b): Authorised entities will no longer be obliged to pay equitable remuneration to copyright owners for making, distributing or making available copies of works in accessible formats for print-disabled users.

Less Onerous Record-Keeping Obligations

2.11.7 The 2016 public consultation proposed lowering the level of detail in the prescribed forms for record-keeping by:

- (a) Removing from the form, the need to record conversion of printed works (Eleventh Schedule of the Copyright Regulations), the requirement to provide the International Standard Book Number (“**ISBN**”), page number(s), and total number of bytes in an electronic medium of a work.
- (b) Removing from the form, the need to record conversion of sound recordings and other subject matter (Twelfth Schedule of the Copyright Regulations), the requirement to provide the ISBN (where a published edition of a work is involved) and the name of the holder of the broadcasting licence (where a sound broadcast is involved).

Summary of Feedback

2.11.8 Respondents generally agreed that the record-keeping obligations could be made less onerous, although there was disagreement on the details that should be removed. About half of the respondents, comprising mostly members of the public and certain organisations representing print-disabled or other users' interests, agreed that all the details proposed in the public consultation should be removed. For the rest of the respondents, they advocated that details of the ISBN, and to a lesser extent, page number(s), should continue to form part of the records kept by

⁷⁸ Sections 54(4)(b) and 54(10)(d) of the CA. The exception in Section 54(5) of the CA, which relates to copies made for export or to be used by authorised entities or people overseas however, does not have this requirement.

⁷⁹ Article 4.4, Marrakesh Treaty: A Contracting Party may confine limitations or exceptions under this Article to works which, in the particular accessible format, cannot be obtained commercially under reasonable terms for beneficiary persons in that market. Any Contracting Party availing itself of this possibility shall so declare in a notification deposited with the Director General of WIPO at the time of ratification of, acceptance of or accession to this Treaty or at any time thereafter.

⁸⁰ Dr. Mihály J. Ficsor, *Commentary to the Marrakesh Treaty on Accessible Format Copies for the Visually Impaired*, p. 26.

authorised entities. These respondents stressed the function of the ISBN as a unique identifier of a book (including its specific edition), that if removed from the record-keeping requirements, would affect accuracy of the records.

MinLaw and IPOS's Response

2.11.9 We note that proper record-keeping is part of the obligations under the Marrakesh Treaty – authorised entities must maintain records of their handling of copies of copyrighted works, although the treaty does not specify the level of detail required in the records.⁸¹ We recognise that a balance must be struck between the administrative burden on authorised entities, and ensuring accountability and effective identification of copyrighted materials. Taking into account respondents' views above, the existing record-keeping obligations will be simplified to require authorised entities to only record prescribed essential information (such as ISBN, number of copies made). Non-essential information such as the page numbers and total number of bytes will be removed.

Conclusion 11(c): The record-keeping obligations will be simplified to require authorised entities to record only essential information, such as ISBN.

⁸¹ Article 2 of the Marrakesh Treaty defines the term "authorised entity", and requires such entities to establish and follow its own practices to maintain due care in, and records of, its handling of copies of works, while respecting the privacy of beneficiary persons in accordance with Article 8.

Proposal 12: Improving Access to Knowledge in Non-Patent Literature

Non-patent literature (“NPL”) is used by patent examiners to determine the state of the art and assess patentability of an invention. NPL can be in any medium, including journal articles, technical papers, conference proceedings papers, product manuals, even photographs and video clips – all of which may be protected by copyright. Sharing of the knowledge in these materials with persons involved in the patenting process (such as patent applicants, other IP offices and patent examiners) generally helps to strengthen patent quality. In some cases, copies of NPL cited in an examiner’s report are provided pursuant to a country’s international obligations under the WIPO Patent Cooperation Treaty.⁸² However, sharing copies of NPL without the rights-holder’s consent may infringe copyright. We therefore asked whether a specific exception for use of NPL for patent office functions should be introduced, and for any other comments on IPOS’s current practice regarding NPL.⁸³

Proposed Exception for NPL

Summary of Feedback

- 2.12.1 Respondents were divided on this issue and there was no clear consensus on whether to introduce this exception.
- 2.12.2 Respondents who supported the exception were mostly potential applicants or users of search and examination services, and their agents (in particular, lawyers). It was suggested that NPL encouraged prior art searching, freedom to operate analysis and patent validity research, and that the exception would facilitate the patent application process, particularly for SMEs that might not have access to the relevant databases containing NPL.
- 2.12.3 Respondents who disagreed were intermediaries and publishers. From their perspective, as there were licensing options for NPL, the exception would impact rights-holders’ commercial interests. Several took the view that such an exception would be inconsistent with Singapore’s international obligations, as it would conflict with what is commonly known as the “3-step test” under various copyright-related treaties to which Singapore is a party.⁸⁴

⁸² Article 20(3) of the Patent Cooperation Treaty.

⁸³ For local applications not made pursuant to the Patent Cooperation Treaty, IPOS does not provide a copy of the NPL with its search report, although a link to the online publication or website is available upon request. We asked if IPOS should furnish a patent applicant with a copy of the cited NPL, and if a fee should be payable by the applicant for a copy of the NPL, see Question 14(a) of the 2016 public consultation document.

⁸⁴ The 3-step test requires contracting parties to confine any exceptions to special cases which do not conflict with the normal exploitation of a work and do not unreasonably prejudice rights-holders’ legitimate interests. See for example, Article 9(2) of the Berne Convention and Article 13 of TRIPS.

Other Comments on IPOS's Current Practice

Summary of Feedback

2.12.4 Respondents who were potential applicants or users of search and examination services, as well as their agents (in particular, lawyers) all agreed that IPOS should furnish applicants with a copy of any cited NPL (instead of providing only a link to the NPL). It was suggested by some that this would make it more convenient for applicants. Responses were more varied as to whether applicants should pay for a copy of the NPL – several respondents disagreed, while others agreed to pay a reasonable or nominal fee.

MinLaw and IPOS's Response

2.12.5 We note a fairly distinct divide between respondents who supported the proposed exception (mostly potential applicants or users of search and examination services, and their agents) and those who did not (publishers and other intermediaries). The proposed exception and review of IPOS's current practice are meant to improve dissemination of knowledge (about the state of the art as disclosed in the NPL), strengthen patent quality, and facilitate patent processes.

2.12.6 Instead of making changes under this proposal, we believe that these objectives can be achieved in a more sustainable manner (as regards potential impact on licensing fees) that accommodates the concerns of all respondents by leveraging the existing general open-ended fair dealing exception in the CA.⁸⁵ In appropriate cases, the acts contemplated in the 2016 public consultation⁸⁶ may be considered fair dealing and hence exempt from liability. Depending on the case at hand, circumstances that may affect this finding include the non-commercial nature of a dealing; the use of an NPL for patent prosecution or examination purposes that may be different from the purpose for which it was created; the factual nature of an NPL; and the use of only part of an NPL (such as the abstract of an article).⁸⁷ Thus, copies of NPL can still be made and given, but on a case-by-case basis where fair dealing applies. As opposed to creating a specific exception for use of NPL, reliance on fair dealing will provide greater flexibility to take into account matters including rights-holders' commercial interests in specific cases. We will therefore not create a specific exception for use of NPL.

Conclusion 12: There will not be a new exception for use of NPL or change in IPOS's current practice as regards NPL. Where appropriate, copies of NPL can be made or given on the grounds of the general fair dealing exception.

⁸⁵ Sections 35 and 109 of the CA.

⁸⁶ I.e. making and giving copies of NPL by and between IPOS, its patent examiners and other third-party experts engaged by IPOS for patent office functions; giving copies of NPL to applicants and other patent offices upon request.

⁸⁷ The US Patent and Trademark Office similarly considers as fair use, making copies of (unlicensed) copyrighted NPL and providing such copies to an applicant in the course of patent examination, see *USPTO Position on Fair Use of Copies of NPL Made in Patent Examination*, Memorandum dated 19 Jan 2012.

Proposal 13:

Increasing the Availability of Materials on Official Government Registers

Certain laws in Singapore require specific documents and other materials to be submitted to the Government, and for these to be placed on official government registers or open to public inspection. While these requirements are meant to give public access to information in these materials, some of these materials may be protected by copyright. As such, copying or making available the materials without the copyright owner's consent may amount to infringement. This could end up impeding the functionality and use of such government registers. Since access to such information is in the public interest, we asked if an exception should be created to facilitate access to, and copying of, materials on official government registers.

Summary of Feedback

- 2.13.1 The majority of respondents supported this proposal. These included users from both the private and public sectors, creators, intermediaries and members of the public. Among these, the support from several respondents was more qualified – they stressed that the exception should be limited or subject to safeguards, such as considering a statutory licensing solution instead of an exception, excluding commercial use of the materials, and excluding inspection of confidential or sensitive materials.
- 2.13.2 An academic asked if the exception should be extended to include materials disclosed to comply with regulatory requirements.
- 2.13.3 A few respondents were sceptical or disagreed with the proposal. They were mostly individual creators or businesses aligned with creators' interests. There was also one intermediary. One comment was that the exception seemed unnecessary as parties that submit materials would have consented (either expressly or implicitly) to the use of the materials, and therefore any use of the materials would not be infringing.

MinLaw and IPOS's Response

- 2.13.4 We agree with the majority of respondents that this exception should be introduced. In the cases contemplated by this exception, the very purpose of requiring those materials to be accessible to or available for inspection by the public is to give access to information in the materials in line with the statutory public service functions of the government body. Copyright should facilitate and not hinder this. Regarding respondents' point that the exception appeared unnecessary because parties submitting materials would have consented anyway, we note that this is not an objection to the exception, but rather highlighting the possible redundancy of the exception. As the use of such materials may not always be covered by a copyright owner's express consent, and acting on the basis of implied consent can lead to uncertainty as to whether such consent can in fact be implied, thus, in our view, this exception would be beneficial as such uncertainties would be avoided.

2.13.5 We also considered the suggestion of a statutory licensing scheme. In general, the materials required are due to regulatory or permitting reasons, and the government body has determined that it is in the public interest to make them available to the public. The parties creating the materials and submitting them to the government do so because the relevant written laws require it of them. So unlike most cases where copyright incentivises and rewards creation, the economic justification for copyright protection is inapplicable here – the materials in issue would be created and submitted anyway, pursuant to the relevant written laws. Further, as the parties creating the materials generally do not make a living by licensing these materials, they are usually not members of collective management organisations. The absence of a collective management organisation representing the large number of rights-holders means that the administrative effort to remunerate them would be tremendous. In addition, access to or copying of these materials is not intended for commercial exploitation of the materials; in fact, given the often factual nature of the materials, there may be little, if any, creative expression that attracts copyright protection. All things considered, there is no compelling justification for a statutory licensing solution. In this regard, we note that none of the respondents who are creators or collective management organisations advocated for a statutory licensing scheme.

2.13.6 As mentioned in the public consultation, other jurisdictions such as the UK⁸⁸ and New Zealand⁸⁹ have similar exceptions for materials open to public inspection or on official registers. We will frame the new exception with reference to these jurisdictions, and calibrate the scope of the exception and its safeguards according to local needs and respondents' feedback. For example, the exception will be confined in several aspects:

- (a) Specific categories of materials. These will comprise materials placed on any statutory register (i.e. a register maintained pursuant to any written law requirement) or open to public inspection pursuant to any written law.⁹⁰ Considering the above feedback on the scope of the exception, we will also include materials disclosed by government bodies to the general public pursuant to any written law.⁹¹ The same rationale applies to this category of materials – that the relevant laws generally mandate or otherwise provide public access to the materials because the materials contain information that would be of interest to members of the public. The exception will facilitate access to such information.
- (b) Certain permitted acts necessary for improving access to the relevant materials, such as copying the materials and making the materials available online.

⁸⁸ Section 47 of the CDPA.

⁸⁹ Section 61 of the NZ Copyright Act.

⁹⁰ For example, documents relating to a patent application under Section 108(1) of the Patents Act and Rule 93 of the Patents Rules.

⁹¹ For example, a prospectus or profile statement published by the Authority under Section 240(12) of the Securities and Futures Act.

- (c) Limited purposes for which these acts can be done. One of the safeguards suggested was to exclude commercial uses of the materials. However, instead of this, we will define a narrow list of permitted purposes. For example, the exception will generally allow copying and making available of the materials for the purpose of inspection of the relevant materials at another time or place, or facilitating the exercise of any right for the purpose of which the relevant written law is provided. Other jurisdictions with a similar exception likewise allow the exception to be used for similar purposes.⁹² However, those jurisdictions also allow the materials to be copied or made available for the purpose of disseminating information about matters of general scientific, technical, commercial or economic interest.⁹³ On balance, we do not think that the list of permitted purposes should be this broad. Instead, we prefer an approach where the permitted purposes are directly linked to the objectives underlying public access of the materials.

2.13.7 On respondents' concerns about disclosure of confidential or sensitive materials, we are of the view that those concerns are irrelevant in the present context. A decision on whether certain materials are confidential or sensitive would precede a decision to make the materials available to the public. Further, if materials are confidential or sensitive, the appropriate legislative controls are the laws that grant or deny access to the materials, and not copyright law. In creating this exception, our objective is that where the law grants the public access to certain materials, copyright should not hinder that.⁹⁴

Conclusion 13: There will be a new exception to facilitate access to materials that are on statutory registers or otherwise accessible to or available for inspection by the public pursuant to any written law. The following are the key elements:

- ◆ The exception only applies to the following categories of materials:
 - ▶ Materials placed on a statutory register or open to public inspection pursuant to any written law.
 - ▶ Materials disclosed by government bodies to the general public pursuant to any written law.
- ◆ The exception will only cover certain acts, such as copying and making available the relevant materials.
- ◆ These acts can only be done for certain limited purposes, such as enabling inspection of the relevant materials at another time or place, or facilitating the exercise of any right for the purpose of which the relevant written law is provided.
- ◆ The exception will apply concurrently with any conditions for access prescribed in the relevant laws (e.g. for safeguarding confidential or sensitive information). These conditions continue to apply.

⁹² See for example, Section 74(2) of Ireland's Copyright and Related Rights Act, 2000, Section 47(2) of the CDPA, and Section 61(2) of the NZ Copyright Act.

⁹³ See for example, Section 47(3) of the CDPA and Section 61(3) of the NZ Copyright Act.

⁹⁴ For example, under Rule 94 of the Patents Rules, a document filed at or sent to the Registry of Patents may be treated as confidential and not open to public inspection. A member of the public cannot access the document and this exception is of no use to him. However, if the document is not treated as confidential under Rule 94, an interested party would be able to inspect it, and the effect of this exception is that the copying or making available of the document for inspection would not infringe copyright.

Proposal 14:

Protecting Certain Exceptions From Being Restricted by Contracts

Copyright exceptions serve important public interests and represent a legislatively-determined balance between the rights and interests of copyright owners and users. However, certain contractual terms may seek to restrict the application of some or all of these exceptions. Consequently, users may be deprived of the benefit of the exceptions. In particular, where these terms are provided in standard form contracts or a website's terms and conditions, users may have little choice but to accept them.

We therefore asked whether certain exceptions should be prevented from being restricted by contractual terms, and if so, which exceptions.

Summary of Feedback

- 2.14.1 A majority of respondents agreed that in principle, certain exceptions should be prevented from being restricted by contracts. While there was marked support from individual and institutional users and industry associations representing them, the proposal was also supported by academics, lawyers, and institutions and intermediaries representing creators' interests, including those in the media sector that themselves engaged in publishing activities. Many respondents shared the sentiment that copyright exceptions were meant to benefit society and serve certain public interests, so contractually restricting these exceptions might defeat the very purpose of creating them in the first place. Several respondents also observed that allowing contractual restrictions posed a greater problem where contracts had been negotiated on an unequal footing or not negotiated at all, especially when the party seeking to impose terms restricting copyright exceptions had stronger bargaining power and/or better access to legal advice. One association representing consumers' interests noted that where licences were exclusive to a particular copyright holder, consumers did not have the option of transacting with an alternative provider.
- 2.14.2 The minority of respondents who disagreed with, or were sceptical of, prohibiting contractual restrictions, were predominantly publishers and their industry associations. In general, these respondents advocated market-based licensing solutions and were concerned that the proposal would interfere with contractual freedom, especially for contracts that had been carefully negotiated. A related consideration raised by some was that the inability to enforce certain contractual restrictions might cause rights-holders to raise prices, although it was noted by one intermediary acting for creators that this was not always possible as much will depend on parties' relative bargaining power. A few respondents also expressed scepticism about whether there was really a problem of contractual override in practice – a publishers' association stated that its members' standard licences did not contain provisions which explicitly override exceptions, and that its members allowed for negotiation of specific exceptions if requested by customers.
- 2.14.3 Respondents both for and against the proposal also raised issues relating to certainty. A few respondents pointed out that apart from a few specific exceptions

which the CA expressly provided that could not be restricted,⁹⁵ the CA was silent regarding the rest of the exceptions; they asked for greater clarity in this regard. Several respondents who disagreed with the proposal took the view that most exceptions could presently be restricted by contracts,⁹⁶ and preventing contractual restrictions for a larger group of exceptions would create uncertainty as to interpretation and enforcement of contractual terms – it was suggested that rights-holders and users would disagree over the scope and reach of the exceptions, including whether or not a certain term restricted a certain exception and was therefore unenforceable.

- 2.14.4 The list of exceptions proposed in Annex A of the 2016 public consultation document generated varied responses with only a few respondents agreeing to the entire list. A number of respondents expressed concerns that the list in the annex was overly broad as compared to the narrower list of exceptions that could not be contractually restricted in other countries such as the UK, Australia and New Zealand. Some respondents supported the inclusion of the exceptions on fair dealing and for educational institutions, libraries and archives as they ensured access to copyright works for users who were often in a weaker bargaining position and/or did not have access to legal advice. However, other respondents were of the view that as the proposed scope of these exceptions was very broad, they should be subject to contractual terms to ensure certainty in commercial transactions. Other respondents proposed that only unfair contractual restrictions, regardless of the type of exception, should be prohibited, highlighting terms in standard non-negotiable contracts like End User Licence Agreements as examples.

MinLaw and IPOS's Response

- 2.14.5 We identified two differing principles that underlie the disagreement between the two groups of respondents. On the one hand, for respondents who supported the proposal, the combination of copyright and the copyright exceptions established by law represents the balance that has been struck between creators and users, taking into account the interests of all stakeholders as well as broader public and social interests. Therefore, the exceptions should not be capable of being contractually restricted and thereby undermined. On the other hand, for respondents who disagreed with the proposal, contractual freedom is paramount, and parties should have full flexibility in ordering their commercial affairs. In our view, a balance can be achieved without the need to adopt one principle to the exclusion of the other.
- 2.14.6 We are of the view that we should, as far as possible, allow parties to negotiate and craft a solution that fits the specific situation before them. Therefore, our starting point is to allow parties to negotiate and agree to their specific contractual terms and obligations, including how the contract would affect copyright and copyright exceptions. However, we will intervene and not allow contractual terms to override copyright exceptions on these grounds:

⁹⁵ Sections 39, 39A and 39B of the CA.

⁹⁶ Except for Sections 39, 39A and 39B of the CA.

- (a) Unreasonable contract terms. Starting from the premise of respecting parties' freedom to contract, we therefore focus on situations where there is a lack of freedom in contracting. This generally arises in situations where one party is in a significantly weaker bargaining position or is not in a position to negotiate at all. While we should be slow to intervene in fully negotiated contracts, we should be prepared to intervene in situations where this is clearly not the case. In these situations, a contractual term or condition which attempts to override an exception will not be allowed if it is unreasonable. This is increasingly important as the growth in the distribution and consumption of content online leads to the prevalence of non-negotiated contracts such as standard licence terms and website terms and conditions.
- (b) Important public interest. The Government has an obligation to ensure that the public interest is served, so in instances where there is a strong public interest element, regardless of the agreement reached between the parties, contractual restrictions will not be allowed to override copyright exceptions. Therefore, instead of the full list of exceptions proposed in Annex A of the 2016 public consultation, there will be a shorter list of exceptions which cannot be restricted by contract.

2.14.7 Unreasonable contract terms. If a contract has not been individually negotiated (such as standard, non-negotiable End User Licence Agreements), any terms or conditions which restrict copyright exceptions will be automatically considered unreasonable. However, if a contract has been individually negotiated, then any exception (except those that serve an important public interest as identified below) can be restricted by any term or condition that is reasonable. Whether a term or condition is reasonable will be determined by the courts based on a set of statutory guidelines. For this purpose, we will consider the feasibility of adapting the guidelines under the Unfair Contract Terms Act (Cap. 396)⁹⁷, given that they share similar underlying concerns such as the strength of parties' bargaining positions. Taking into account respondents' feedback, we believe this approach gives room for parties to negotiate nuanced commercial deals, while acknowledging the reality that in some cases, a weaker bargaining position is a major limiting factor in concluding a fair deal, and in other cases, a party may even have little or no choice but to accept standard licence terms that exclude the applicability of one or more exceptions.

2.14.8 Important public interest. The exceptions that will be not restricted by contract (in addition to those already specified in the CA) will be:

- (a) Exceptions for reproduction for purposes of judicial proceedings or professional advice.⁹⁸ These exceptions facilitate administration of justice and access to justice for the public at large, and was specifically identified in the

⁹⁷ Guidelines for Application of the Reasonableness Test, as set out in the Second Schedule of the Unfair Contract Terms Act.

⁹⁸ Sections 38 and 106 of the CA.

feedback as one of the exceptions that should be added to the list of exceptions.

- (b) Exceptions relating to galleries, libraries, archives and museums.⁹⁹ Contrary to the views of certain respondents that there might be no problem of contractual overriding in practice, there is substantial evidence of contractual overriding of such exceptions both locally and abroad. Contractual overriding of exceptions for libraries and archives have been noted in Australia¹⁰⁰ and the UK.¹⁰¹ An international response to such practices has even been proposed by the International Federation of Library Associations and Institutions, in its Treaty Proposal on Limitations and Exceptions for Libraries and Archives.¹⁰² We have also received feedback that in Singapore, certain agreements between libraries and online publishing companies expressly prevent libraries from reproducing and communicating works for inter-library loan or preservation purposes, which would otherwise be permitted under the CA.¹⁰³ When these cultural and heritage institutions are prevented from using their specific exceptions, it undermines the public interest in creating these exceptions, ultimately to the detriment of the culture and heritage of society.
- (c) The new exception for text and data mining for the purpose of analysis.¹⁰⁴ Much of the materials used in data analysis may be subject to digital content licences that restrict such activities. In such cases, the benefit of the exception may be lost. Having scoped the exception narrowly to allow copying (and not other acts) for the purpose of data analysis, it is of important public interest to secure the benefit of this exception so that it can fully achieve its objective of developing the useful applications of data analysis that are indispensable to the current digital economy. In this fast growing new area, it is even more important for those involved to have certainty as to what activities are allowed and what are not. This will provide clear boundaries to enterprises as they innovate and develop new technologies and business models. The UK has taken a similar position in preventing their text and data analysis exception from being restricted by contract.¹⁰⁵

2.14.9 Lastly, we have an observation to make regarding certain respondents' suggestion that allowing copyright exceptions to "override" contractual terms would create uncertainty as to the interpretation and enforcement of contractual terms. We are of the view that this is a fallacy. On the contrary, using contractual terms to "override" copyright exceptions creates uncertainty. The default position under the CA is that *all* exceptions apply. This is certain. Uncertainty arises precisely because

⁹⁹ Existing provisions are found in Part III, Division 5, and Sections 112 and 113 of the CA, also refer to Proposal 10 of this paper.

¹⁰⁰ Australian Law Reform Commission, *Copyright and the Digital Economy* at [20.12] – [20.18].

¹⁰¹ Digital Opportunity, A Review of Intellectual Property and Growth, Independent Report by Professor Ian Hargreaves at [5.39].

¹⁰² The proposed Article 15 (Obligations to Respect Exceptions to Copyright and Related Rights), states: "Any contractual provisions that prohibit or restrict the exercise or enjoyment of the limitations and exceptions in copyright adopted by Contracting Parties according to the provisions of this Treaty, shall be null and void".

¹⁰³ Sections 46 and 48 of the CA.

¹⁰⁴ Please refer to Proposal 8 of this paper for further details.

¹⁰⁵ Section 29A(5) of the UK CDPA 1988.

of attempts to deviate from the legislated position and restrict some or all exceptions by contract. As was noted in the UK's review of this issue, the "*possibility of contractual override is harmful because it replaces clarity ('I have the right to make a private copy') with uncertainty ('I must check my licence to confirm that I have the right to make a private copy')*".¹⁰⁶ Such attempts also create further uncertainty as the contractual terms may be unenforceable on grounds of public policy.¹⁰⁷ Ultimately, these terms leave users uncertain as to whether they really have the benefit of the exceptions conferred under the CA. In fact, if certainty was the paramount objective, then an approach that would prevent all contractual restrictions and restore the default position under the CA (where all exceptions apply) would provide the most certainty for users and rights-holders alike.

Conclusion 14: A contractual term which attempts to override an exception will not be allowed if it is unreasonable. The following sets out what would be considered unreasonable:

- ◆ If a contract has not been individually negotiated, any terms or conditions which restricts copyright exceptions will be considered unreasonable.
- ◆ If a contract has been individually negotiated, any exception (except those listed below) can be restricted by any term or condition that is reasonable.
- ◆ The courts will determine whether a term or condition is reasonable based on a set of statutory guidelines, which may be adapted from the guidelines under the Second Schedule of the Unfair Contract Terms Act.

The current list of exceptions that cannot be restricted by contracts will be expanded to include the following exceptions:

- ◆ Exceptions for reproduction for purposes of judicial proceedings or professional advice.
- ◆ Exceptions relating to galleries, libraries, archives and museums.
- ◆ The new exception for data analysis.

¹⁰⁶ Digital Opportunity, A Review of Intellectual Property and Growth, Independent Report by Professor Ian Hargreaves at [5.40].

¹⁰⁷ See for example, the views of the Australian Law Reform Commission, *Copyright and the Digital Economy* at [20.35] – [20.38].

Proposal 15:

How to Enhance the Collective Rights Management Landscape in Singapore

Collective management organisations (“CMOs”) are generally considered a vital link between rights-holders who want access to markets for their works, and users who need simple, cost-effective access to works. CMOs bring about efficient transactions by reducing transaction costs and facilitating royalty collections, thereby facilitating use and rewarding creators. As CMOs handle voluminous transactions involving a multitude of rights-holders and users, it is imperative that they operate with high standards of transparency and governance, and are able to adapt to the digital environment in which works are largely now created, consumed and distributed.¹⁰⁸ We asked for feedback on the current CMO ecosystem in Singapore, and for any suggestions on areas for improvement.

Summary of Feedback

- 2.15.1 The responses from creators, users and CMOs reflect a difference in their expectations of the CMO ecosystem, especially in the realm of collective licensing for music. We set out below the common key issues raised by each group of respondents.
- 2.15.2 **Creators** – The following issues seem to be more prevalent in the music sector, and generally creators in the publishing sector did not have similar complaints of their collective licensing ecosystem.
- (a) **Accounting of licensing fees.** Generally, creators wanted more transparency in how the licence fees that were eventually disbursed to them were derived, citing discrepancies between their own experience of how often their works were used and the final amount that they received. Some respondents understood that this was an effect of certain CMOs not having usage record systems which could electronically generate accurate usage reports to aid in distribution. Instead, those CMOs depended on a sampling method to determine distribution of fees. Creators questioned why those CMOs could not upgrade their systems to be able to produce more accurate usage records.
 - (b) **Control over management of rights.** A large percentage of creators wanted more flexibility or some control in how their rights were handled. Creators generally had to enter into exclusive agreements with a CMO and thus were unable to waive the licence fees for specific situations such as non-commercial use, charity events, or when they perform their own works.

¹⁰⁸ In acknowledgment of the growing importance of the collective management of copyright and related works, WIPO launched in May 2018 a revamped Good Practice Toolkit for CMOs. This is a working compilation of examples of legislation, regulation and codes of conduct in the area of collective management of copyright and related rights from around the world. The purpose is to distil such information into examples of good practices which will serve as a guide to member states to set up their own infrastructure for collective management.

- (c) **Management of CMOs.** Many creators also pointed out perceived issues with how certain CMOs were managed, noting that the current governing structure did not allow for enough accountability to the creators who were members of the CMO.

2.15.3 Users

- (a) **Determination and distribution of licence fees.** Users were generally sceptical as to how the quantum of licence fees were determined and distributed. Some pointed out that similar establishments which used approximately the same amount of music seemed to be charged differently, and asked for greater transparency and rigour on how licence fees are determined. Many users also asked for greater transparency in how the licence fees were distributed. They agreed that the fees ultimately should be used to compensate the creators of the works, but were sceptical that the fees they paid were actually distributed to the correct creators.¹⁰⁹ A handful added that the lack of transparency on the distribution of the fees meant that the creators of the works they were using might not be compensated, and worried about the legal implications of such a situation, i.e. whether users would be considered to be infringing copyright.
- (b) **CMO's rights of administration.** Concerns were also raised as to whether the CMO charging the licence fee actually had such rights of administration over the work. Feedback was received that certain CMOs were not able to prove that they had specific works in their portfolio, even after the user had contacted the CMO specifically on that matter. Suggestions were made that there could be an online registry or a search function provided by the CMO for potential users to check on whether the CMO administered rights to specific works. The lack of transparency on the CMO's portfolio of works that it administered raised concerns as to the state of internal record-keeping by the CMO, which was related to the concerns in paragraph 2.15.2(a) above.
- (c) **Dispute resolution.** The general feedback was divided into two groups - those who were not aware of any dispute resolution mechanisms, such as internal mechanisms of the CMOs or using the Copyright Tribunal; and those who did know about such mechanisms but have not used them before. Only one user who responded had used such mechanisms. Users who were aware of the available dispute resolution mechanisms also suggested further improvements, as some expressed that the existing mechanisms were not satisfactory nor adequate for their purposes.

2.15.4 CMOs

- (a) **Obtaining usage records from users.** A key issue raised by the CMOs was the difficulties they faced in obtaining accurate usage records from users. This

¹⁰⁹ For example, we had a user feedback that even though the requisite licence fee was paid to the CMO, the user was informed by the creator subsequently that the creator did not receive any royalties from that CMO.

in turn created problems with the accurate and timely distribution of royalties. Suggestions were made to improve the usage reporting from users, such as mandating users to provide usage data and leveraging point-of-use technology to record usage and automate reporting to the CMO, which could then be used in an automated royalty distribution system.

- (b) **Dealings with users.** Some CMOs also highlighted that it was difficult getting users to understand the importance of paying licence fees, citing that users merely wanted to pay as low a fee as possible or even not pay. In this regard, CMOs also provided suggestions to improve the various dispute resolution mechanisms, such as the use of mediation before disputes escalated.

2.15.5 The issue of a regulatory framework to ensure transparency and accountability also arose in the public consultation.¹¹⁰ In general, users and creators advocated for some form of regulation to address their concerns, whereas CMOs generally expressed that self-regulation was still best for the industry, citing foreign examples of a Code of Conduct for CMOs.¹¹¹

MinLaw and IPOS's Response

2.15.6 Based on the feedback received, it is clear that there are deficiencies in the current CMO ecosystem, particularly for creators and users. In particular, we note the following:

- (a) Whilst users currently have an institutional mechanism for dispute resolution with CMOs via the Copyright Tribunal, there is no similar mechanism for creators when they have issues with the CMOs. This is very much dependent on whether the CMO in question has an internal mechanism in place for creators (as members of the CMOs) to raise issues, and how effective it is.
- (b) Although we note that there has been successful self-regulation by CMOs in overseas jurisdictions, this does not appear to be the case in Singapore. As pointed out by several respondents, a previous attempt in June 2012 to allow local CMOs to self-regulate through a voluntary code of conduct has since been abandoned by the CMOs involved.

2.15.7 Given the existing problems in the current unregulated or self-regulated environment, we are of the view that there is need for external oversight of CMOs. We are also of the view that the quantum of the licence fees should primarily be left to the market, failing which there should be an effective and efficient dispute resolution mechanism. Therefore, a light touch regulatory framework will be introduced. It will focus on issues relating to transparency, governance,

¹¹⁰ The countries with a regulatory framework cited in the public consultation were Australia, Canada, Germany, Japan, Korea, the UK and the US.

¹¹¹ Examples include Australia's Code of Conduct for Copyright Collecting Societies and the UK's PRS for Music Code of Conduct.

accountability and facilitating efficient transactions of rights. The Copyright Tribunal proceedings will also be reviewed for improvements to be made.

Conclusion 15: A class licensing scheme for CMOs to be administered by IPOS will be introduced. IPOS will not intervene to set rates or approve licence fees. The key elements of the class licensing scheme are as follows:

- ◆ Any entity that carries out collective licensing activities in Singapore will be automatically subject to and have to comply with all licence conditions.
- ◆ The class licence will reference a mandatory Code of Conduct to set standards for transparency, governance, accountability and efficiency. It will require CMOs to have dispute resolution mechanisms in place for creators.
- ◆ The onus for implementation and adherence to the Code of Conduct will be on the management and governing board of the CMO.

As the regulator, IPOS will have the power to:

- ◆ Audit CMOs for compliance with the licence conditions.
- ◆ Issue directions to particular CMOs to take certain actions to comply with the licence conditions.
- ◆ Impose financial penalties in cases of non-compliance.
- ◆ Remove and replace management personnel and board members, if the CMO repeatedly breaches or continues to be in breach of the licence conditions, despite IPOS's directions.
- ◆ Suspend, revoke and reinstate licences.

A public consultation on the licence conditions will subsequently be conducted for CMOs, creators and users to provide input.

In addition, IPOS will also look into proceedings before the Copyright Tribunal, for example in relation to procedural matters, to facilitate the use of this forum by CMOs and users.

PART III: OTHER ISSUES

- 3.1 In the public consultation in 2016, MinLaw and IPOS also asked for views and comments on any relevant issues which might not have been highlighted in the public consultation.
- 3.2 12 respondents raised issues which were not highlighted in the public consultation. Some of the issues have since been dealt with by case law, for example, the requests for the current site-blocking mechanism under the CA to be clarified have benefited from *Disney Enterprises, Inc and Others v. M1 Ltd and others* [2018] SGHC 206. The case clarified that “dynamic” site-blocking injunctions could be obtained. Other suggestions, such as shortening the duration of protection for copyright works to end 50 years after death, would affect our international obligations, and so cannot be considered by Singapore unilaterally. Certain suggestions, such as the scope of performer’s rights, will be looked into but require more time for us to further study and monitor developments in other jurisdictions. We have also received suggestions on how to improve the CA, such as including illustrations to explain key provisions (similar to the Penal Code). We will take these suggestions into account when drafting the legislation.
- 3.3 Some respondents raised the issue of set-top boxes being marketed to the public which enabled access to audio-visual content from unauthorised sources. We agree that this is an important issue that merits review and will touch on this issue below.

Streaming of Audio-Visual Content from Unauthorised Sources on Set-top Boxes

- 3.4 During the 2016 public consultation period, several respondents who were content providers, cablecasters, or associations representing either group, highlighted the prevalence of set-top boxes being marketed to the public which enabled access to a large selection of audio-visual content, coming from sources not authorised by the rights-holders. We understand from our discussions with these respondents that the manner in which these set-top boxes are marketed, sold and provide access to such audio-visual content varies and constantly evolves:
- (a) Typically, the set-top box would be connected to a display device (e.g. a television) and, via apps installed on the set-top box, the set-top box would stream audio-visual content to the display device from a source on the internet (frequently, outside Singapore) that would not be authorised by the rights-holders.
 - (b) In some cases, the set-top box might be pre-configured to provide that access. In other cases, the set-top box might not be so pre-configured, but the retailers would, as part of the sale, configure the set-top box, or aid in the configuration by providing instructions or website links, or help to configure subscription services (it is common that a low subscription fee might even be payable by the purchaser to the content host). These “add-on” services, when combined

with the set-top box, would then allow the consumer to access the audio-visual content from the unauthorised source.

- 3.5 In the past, one common manner in which infringing audio-visual content would reach consumers was by way of such content being encoded onto DVDs, imported, and then sold to consumers. Respondents pointed out that set-top boxes now similarly enabled consumers to access audio-visual content from sources that were not authorised by rights-holders. The retailer of the set-top box, just like the seller of infringing DVDs, would be commercially benefiting from the sale of an article that enabled consumers to access audio-visual content from a source that was not authorised by the rights-holder.
- 3.6 However, unlike DVDs, respondents pointed out that the set-top boxes did not contain infringing content per se, especially when the retailer was in possession of it. Therefore, the respondents were of the opinion that the current provisions in the CA which are usually used against the importers or sellers of infringing DVDs, for example, for importing for sale, offering for sale or selling the articles,¹¹² were not applicable in the context of these set-top boxes. The respondents pointed out that as the CA did not deal directly with the import and sale of these set-top boxes, as it does for DVDs and similar media, this lack of legal clarity meant that retailers often were able to mislead consumers that the content accessible through such boxes was legal, and in some cases, the requisite subscription charges misled consumers into thinking that their regular payments went to rights-holders.

MinLaw and IPOS's Response

- 3.7 Our policy position is not to allow commercial gains derived from enabling access to content from unauthorised sources. A DVD may hold unauthorised content, while a set-top box which streams content may not hold the actual unauthorised content itself. However, we do not view this as a material difference. Therefore, we will not allow manufacturers, importers, distributors and retailers to commercially benefit if they knowingly deal with set-top boxes that are enabled to allow access to content from unauthorised sources, or if they deal with set-top boxes and provide "add-on" services, such as website links or subscription services etc., that enable access to content from unauthorised sources.
- 3.8 We are aware that there are no court decisions¹¹³ on whether the retailer of such set-top boxes are liable for authorising infringement under the current CA.¹¹⁴ However, we agree with the feedback that respondents find it difficult to apply many of the usual avenues of proceeding against retailers of infringing DVDs against retailers of such set-top boxes. As such, we are of the view that legislative amendments are needed to both clarify our policy position and the actions that can be taken against retailers of such set-top boxes. The amendments will complement the existing mechanism

¹¹² Sections 104 and 105 of the CA.

¹¹³ As of January 2019, there is one pending court case on this issue.

¹¹⁴ Section 31(1) of the CA.

for the blocking of flagrantly infringing online locations, which rights-holders can also utilise against the unauthorised sources of the content.¹¹⁵

- 3.9 In considering legislative options, we surveyed how other countries have taken action (or are taking action) against retailers of such set-top boxes. The legal basis for doing so has varied across jurisdictions and there has been no consistent approach on how the sale of such set-top boxes infringes copyright law.¹¹⁶ For example, the UK relies on various offences under other non-copyright statutes to prosecute the sale of such set-top boxes as may be appropriate in the circumstances.¹¹⁷
- 3.10 We are also mindful that any new provisions should not be overly broad that they catch retailers of simply any device that allows the user to access audio-visual content on the internet from a source that is not authorised by the rights-holder. This is because this may inadvertently catch retailers of multi-purpose devices like computers and mobile phones. Retailers of such “general” devices should not be made responsible for how purchasers set up and use such devices. Instead, to incur liability, the retailer should have some degree of knowledge that the device in question can, and very likely will, be used to access content from a source that is not authorised by the rights-holder (e.g. the set-top box was specifically designed to access content from such sources, or the set-top box was advertised or marketed as having such functions, or the retailer has provided some form of assistance to the purchaser of the set-top box to enable him to access such content).
- 3.11 Besides retailers, action should also be possible against those up the supply chain, i.e. manufacturers, importers and distributors, provided that, similar with retailers, the knowledge or additional activity is present too.

¹¹⁵ For example, on 2 November 2018, the Singapore High Court granted an order to block access to eight servers which were integral to the functions of applications on set-top boxes that allow users to stream programmes without the authorisation of the content owners.

¹¹⁶ The Court of Justice of the EU (CJEU) stated that the sale of pre-loaded grey boxes constitutes a (unauthorised) communication to a “new” public (i.e. an audience that is not envisaged by the creator of the content when they authorised the initial communication of the content); see *Stichting Brein v. Jack Frederik Wullems*, 62015CN0527; *Svensson v. Retriever Sverige* [2014] All ER (EC) 609. For Australia, the Federal Court of Appeal held that distributors who sell access to infringing content streams bear civil liability for infringing the right of communication to the public. The basis was that the distributors, by selecting the content offered through the device, determined the content of the communication to the public, and hence were deemed to be the persons making the communication; see *Connect TV Pty Ltd v. All Rounder Investments Pty Ltd (No 5)*, [2016] FCA 338. For Canada, the Federal Court of Appeal upheld an interim injunction on the basis of secondary infringement against sellers of grey boxes which were advertised as a means for consumers to “Get Everything For Free”; *Vincent Wesley dba MTLFREETV.COM et al. v. Bell Canada et al.*, 2017 FCA 55. In the US, a consortium of rights-holders such as Netflix, Amazon, Disney and other major studios recently commenced legal proceedings against a manufacturer and retailer of a particular brand of grey box; see complaint filed with the US District Court for the Central District of California in April 2018. Hong Kong has convicted retailers of grey boxes under Section 273C(1)(f) of its Copyright Ordinance, which is a provision relating to the circumvention of technological protection device; see *HKSAR v. Chung Yu Cheung and Ors* [2017] HKDC 1650; DCCC 236/2017.

¹¹⁷ The UK Government in its published response regarding these illicit streaming devices takes the position that its current legislative framework is sufficiently flexible to capture the supply of such devices via offences contained under the CDPA, Offences under the Fraud Act, inchoate offences contained in the Serious Crime Act 2007 and common law conspiracy to defraud. See the UK Government’s response to the call for views regarding illicit IPTV streaming devices published by the UK Intellectual Property Office on 22 October 2018, p. 10.

- 3.12 Further, similar actions should be possible against service providers who do not sell devices, but instead, for a fee, either sell software, or otherwise enable devices to access content from unauthorised sources (e.g., on devices that a consumer already owns, installing and setting up applications that enable access to content from such sources).
- 3.13 The new provisions signal our intention to deter people from profiting off content from unauthorised sources. To complement this, we strongly encourage the industry to continue their efforts in making more legitimate content available at competitive prices, as the lack of access to legitimate content at reasonable prices is a major reason why users would turn to such set-top boxes.¹¹⁸

Conclusion 16: New legislative provisions will be introduced to impose civil and criminal liability on people who wilfully make, import for sale, commercially distribute or sell a product:

- ◆ where the product can be used to access audio-visual content from an unauthorised source and additionally must be:
 - ▶ designed or made primarily for providing access to such content,
 - ▶ advertised as providing access to such content, or
 - ▶ 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;
- and where the product can be a hardware device or a software application.

New legislative provisions will be introduced to impose civil and criminal liability on people who, for a fee, provide a service to enable devices to access content from unauthorised sources such as the provision of website links, instructions or installation of subscription services.

¹¹⁸ A study done by Sycamore (“*An exploration of piracy and illicit streaming devices (TV boxes) in Singapore*”) in September 2017 showed that 31% of those who actively tune in to pirated content have indicated that they do so because they cannot find the TV shows that they want to watch legally.

PART IV: CONCLUSION

- 4.1 The changes that will be introduced under this review will help creators and users, whether individuals or businesses, adapt to and thrive in the current digital environment and support Singapore's broader objectives of catalysing digital innovation and ensuring that all segments of society benefit from new and emerging digital technologies.
- 4.2 We recognise that the dynamic and fast-paced nature of developments in the field of copyright and collective rights management would require us to continually monitor the implementation of our conclusions for their effectiveness as well as for possible improvements. We will also monitor developments for any further issues that may arise in future and require our attention, to ensure that our copyright system continues to be fit for purpose.

ANNEX A: LIST OF RESPONDENTS FOR THE 2016 AND 2017 PUBLIC CONSULTATIONS

Organisations:

- Access Copyright
- AE Networks Asia
- Agency for Science, Technology and Research
- American University Washington College of Law
- Apple
- Asia Internet Coalition
- Asia Music Publishers Association
- Association of American Publishers
- Australian Copyright Council
- Australian Digital Alliance
- Bird & Bird
- Brill Asia
- Building & Construction Authority
- Business Software Alliance
- CASBAA
- Cathay Organisation Holdings
- Centre for Content Promotion
- Composers and Authors Society of Singapore
- Computer and Communications Industry Association
- Consumers Association of Singapore
- Copyright Agency Australia
- Copyright Licensing Agency
- Copyright Licensing and Administration Society of Singapore Limited
- Copyright Licensing New Zealand
- Creative Commons
- Earthtones Studios
- Esplanade
- Express in Music
- Filipinas Copyright Licensing Society Inc
- Frankfurt Bookfair
- Getty Images
- Golden Village Multiplex
- Google
- Hodder Education
- IBM
- IFPI
- Infocomm Media Development Authority
- Intellectual Property Students Association
- International Association of Scientific Technical and Medical Publishers
- International Authors Forum
- International Confederation of Music Publishers
- International Federation of Libraries and Archives
- International Federation of Reproduction Rights Organisations
- International Publishers Association
- Internet Society
- Irish Copyright Licensing Agency
- Law Society
- MediaCorp
- Microsoft
- Ministry of National Development
- Motion Pictures Association
- Musician's Guild
- National University of Singapore
- Ngee Ann Polytechnic
- Organisation for Transformative Works
- PRS for Music
- Recording Industry Association Singapore
- Recording Industry Music Services (Singapore)
- Recording Industry Performance Singapore
- Restaurant Association of Singapore
- Sage Publications
- Screenwriters Association
- Singapore Book Publishers Association
- Singapore Corporate Counsel Association
- Singapore Management University

- Singapore Nightlife Business Association
- Singapore Press Holdings
- Singapore Repertory Theatre
- SingTel
- Southeast Asian Audio-Visual Association
- SPD
- Springer Nature
- Spotify
- StarHub
- Taylor & Francis
- Times Publishing
- WeCreate
- World Blind Union

Individuals:

- Steven Ang
- Dr Robert Casteels
- Daniel Chia
- Ginette Chittick
- Annie Perumpoykail Gomez
- Ankur Gupta
- Edmund Lam
- Peter Mullins
- Ng-Loy Wee Loon
- Ng Chay Tuan
- Ivan Png
- Rani Singam
- Kelvin Sum
- Harry Tan
- Darren Teoh
- Rex Yeap

- Briefing for Singapore Infocomm Technology Federation – 28 Sep 2016
- Townhall for Arts Community organised by National Arts Council – 6 Oct 2016
- National Book Development Council of Singapore Townhall for Writers and Content Creators – 7 Oct 2016
- Focus Group Feedback Session organised by Six Degrees – 8 Oct 2016
- Briefing for Tertiary Institutions organised by SMU – 11 Oct 2016
- Focus Group Discussions for Schools organised by MOE – 12 Oct 2016
- Briefing for Film and TV Industry – 19 Oct 2016
- Stakeholder Engagement Session for Music Publishers – 5 June 2017
- Stakeholder Engagement Session for Musicians – 6 June 2017

Participants from the following meetings:

- Public Townhall – 8 Sep 2016
- Briefing for American Chamber of Commerce – 15 Sep 2016
- Townhall for Arts Sector Freelancers organised by NTUC – 15 Sep 2016
- Copyright Amendment Student Symposium organised by SMU/NUS – 23 Sep 2016
- Academic Roundtable organised by SMU ARCIALA – 27 Sep 2016