Bird & Bird ATMD

IP Legal Update

Public Consultation on draft Singapore Copyright Bill (Ends 1 April 2021)

February 2021

The Singapore Ministry of Law (MinLaw) and the Intellectual Property Office of Singapore (IPOS) have launched a public consultation to seek feedback on the draft of a proposed Copyright Bill which is intended to replace the current Copyright Act. The consultation period will end on 1 April 2021. The plan is for the new Copyright Act to be passed in the third quarter of this year and to commence 1 month thereafter (save for certain provisions on collective management organisations).

This latest consultation follows from previous extensive public consultations held in 2016 and 2017 on various proposals for amendments to the Singapore copyright regime. These culminated in the publication of a Copyright Review Report in 2019 ("**2019 Report**") setting out the changes to be introduced taking aboard the feedback.

For the present consultation, MinLaw/IPOS have stressed that its purpose is mainly to seek views on whether the draft Bill will appropriately implement the changes set out in the 2019 Report, and *not* to seek views on the policy positions set out in the 2019 Report. Rather, comments are sought as to whether there is any ambiguity or lack of clarity in the framing of the provisions, whether there are any situations where the application of a proposed change may cause practical difficulties, etc.

The draft Bill represents a major overhaul of the current Copyright Act in a number of respects: archaic phrases are replaced with plain English; a principle-based formulation has been adopted to provide for a more dynamic regime that can better adapt to technological changes; a thematic, more streamlined structure has been adopted for improved clarity; and, most importantly, a number of new rights and exceptions have been introduced.

The key proposals are summarised in the table below, accompanied by our comments on their practical implications. Some changes will have a greater impact on the commercialisation and use of copyrighted works by businesses than others. In the interests of brevity and readability, we have described the proposals at a high level. Please refer to the public consultation paper and draft Bill or contact us for more details.

Contact Us

Alban Kang
Partner

Tel: +6564289828
alban.kang@twobirds.com

Pin-Ping Oh
Counsel

Tel: +6564289440
pin-ping.oh@twobirds.com

Key Proposals

S/N	Proposal	Current position	Summary of proposed changes	Practical implications / Practical advice
1.	Commissioned works – Creator will be the default copyright owner	As a general rule, when a customer commissions a third-party vendor to create a work, the copyright in the work will belong to the vendor unless the contract between the parties provides for it to be assigned to the customer. However, currently, the position is different for some types of commissioned works – namely, photographs, portraits, engravings, sound recordings and cinematograph films, where the customer will, by default, be the copyright owner unless the contract provides otherwise.	Creators of these types of commissioned works will be the default copyright owner (instead of the customer). The change will apply to any commissioned work made pursuant to a contract made after the commencement of the provisions.	The default rules as to copyright ownership in the Copyright Act can be modified by contract. It follows that the proposed change will only make a difference where the contract is silent on ownership of copyright in the commissioned work (so that the default rules govern). As a matter of good practice, for certainty, parties should spell out their agreement as to copyright ownership in any commissioning contract. If this is practised, then the proposed change will have little or no practical impact. Notably, the proposed change does not affect creators' obligations to comply with the Personal Data Protection Act (PDPA). Thus, where the commissioned work is a photograph that contains images of identifiable individual or a portrait, the individual has the right to control the use and disclosure of the work by the creator, even if the creator owns the copyright in the work.
2.	Sound recordings and films created by employees in the course of employment – Employer will be the default copyright owner	For literary, musical, artistic and dramatic works (collectively, "**authorial works**") created by an employee in the course of employment, an employer is the default copyright owner. However, currently, the position is different for other copyrighted subject matter such as sound recordings and films. For these works, the employee-creator is the default copyright owner.	An employer will be the default copyright owner of sound recordings and films that are created by its employee in the course of employment. The change will apply to any work made pursuant to a contract made after the commencement of the provisions.	The proposed change aligns the position for sound recordings and films with that for authorial works. Once again, since the default rules can be modified by contract, the proposed change will only make a difference where the employment contract is silent on ownership of copyright in works made by the employee (so that the default rules govern). As a matter of good practice, for certainty, all contracts of service should expressly provide that the copyright (and other IP rights) in works made by the employee in the course of employment will automatically vest in or be assigned to the employer.

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3.	Unpublished works – Duration of copyright protection to be limited	Unpublished works currently enjoy perpetual copyright protection.	The duration of copyright protection for unpublished works will now be limited. The term of protection will depend on the type of work; and for some types of work, how soon the work is made available or published after its making. In summary: • All authorial works: Whether the work is *published or unpublished*: Life of the author + 70 years • Sound recordings - If the work is published *within 50 years* after it is made – 70 years after the publication - If the work is (i) *unpublished*; or (ii) published *more than 50 years* after its making - 70 years after the making of the work • Films - If the work is published or made available to the public *within 50 years* after it is made – 70 years after the publication or making available - If the work is (i) *unpublished*; or (ii) published *more than 50 years* after its making - 70 years after the making of the work The new provisions will apply to all works, including works existing prior to the commencement date of the provisions.	To the extent that the creator of a work chooses not to publish his work, he is still free to do so. However, for sound recordings and films, in particular, there is now arguably a greater incentive to publish or make available the works and to do so within 50 years after their making in order to enjoy a longer term of protection. In any event, this change is expected to have little or no practical impact on works that are created for commercial purposes, since such works are typically published or made available fairly soon after their creation.

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4.	New right of attribution to be given to creators	Currently, creators and performance have a right to prevent false attribution of authorship or a performer's identity. However, they do not have any right – at least under the Copyright Act - to be identified in relation to their works or performances, as the case may be.	A new right of attribution will be introduced. This right is personal to the creator/performer and cannot be assigned but may be waived. The manner of identification must be "*clear and reasonably prominent*". An identification is regarded to be "*reasonably prominent*" if: (i) for authorial works in general (excluding artistic works in the form of a building), it appears on each copy of the work or, if that is not appropriate, the identification is likely to be noticed by a person acquiring a copy; or (ii) in other cases, the identification is likely to be noticed by a person seeing or hearing the performance, exhibition, showing or communication. The right *does not apply* to certain works and performances (e.g., computer programmes, or works created in the course of employment), and the doing of certain acts (e.g., where an artistic work is incidentally included in a film). For existing authorial works (i.e., made before the commencement of the provisions), the right will not apply to any act permitted by virtue of an assignment or licence of copyright. This is so as to minimise disruption to existing agreements. The right will also not apply to performances given before the commencement of the provisions.	The proposal had given rise to some concern about implementation and practicality. The draft Bill sets out a fair number of exceptions to the right, but it is difficult to say if these go far enough to address some of the issues raised in the previous public consultations (e.g., in the case of works which were co-created by multiple parties, it may not be possible to identify all the creators). Additionally, the requirement for the manner of identification to be "*clear and reasonably prominent*" – in particular, the phrase "*likely to be noticed*"- seems open to interpretation. This is one proposal for which more clarity in the drafting or additional examples may be required.

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5.	Changes to be made to the general "fair use" exception	The current Copyright Act includes a general "fair use" exception, under which a particular use need not fall within a specific category in order to qualify as a "fair use". Instead, each use is assessed on its own merits, according to a list of non-exhaustive "fair use" factors, namely: • *the purpose and character of the dealing, including whether such dealing is of a commercial nature or is for non-profit educational purposes;* • *the nature of the work or adaptation;* • *the amount and substantiality of the part copied taken in relation to the whole work or adaptation;* • *the effect of the dealing upon the potential market for, or value of, the work or adaptation; and* • *the possibility of obtaining the work or adaptation within a reasonable time at an ordinary commercial price.* In addition to the general "fair use" exception, there are also specific "fair use" exceptions which cater for particular situations such as (i) research and study, (ii) criticism and review, or (iii) reporting of current affairs. The latter two exceptions have their own unique requirements and are not subject to the "fair use" factors.	The fifth "fair use" factor – that is, *the possibility of obtaining the work or adaptation within a reasonable time at an ordinary commercial price*, will be removed. The specific "fair use" exceptions are retained but will be subject to the "fair use" factors.	The fifth "fair use" factor was removed as it was considered to be irrelevant in some cases, and to be a subset of the fourth factor in any case. In any event, the factors identified in the Copyright Act are non-exhaustive so that it is open for parties in a copyright infringement dispute to argue that the fifth factor should be considered in the particular case. As such, this change is not expected to have a significant impact on the applicability of the general "fair use" exception. The proposal to make the specific "fair use" exceptions subject to the "fair use" factors is more significant. For instance, currently, for the fair use for criticism and review exception, the only requirement is that a "*sufficient acknowledgment*" of the work is made. The proposed change – which requires that the "fair use" factors also be considered in determining if the exception should apply - may make it more difficult for users to invoke these exceptions. At the very least, there will be more room for the copyright owner to argue that the exceptions should not apply in any particular case because the factors weigh against a conclusion that the dealing is a "fair use".

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6.	New exception for reproduction of works for text and data mining	There is currently no specific exception in the Copyright Act that allows use of copyrighted works for text and data mining. Whilst such activities are potentially permitted by the general "fair use" exception, the lack of a specific defence gives rise to uncertainty.	A new exception will be introduced which permits reproduction of works and recordings of performances for "*computational data analysis*" - including preparing works for such analysis. The exception will apply to both commercial and non-commercial activities. "*Computational data analysis*" is defined in the draft Bill as including: • Using a computer program to identify, extract and analyse information or data from the work • Using the work as an example of a type of information or data to improve the functioning of a computer program in relation to that type of information or data - a specific example being the use of images to train a computer program to recognise images. The exception also permits supplying of the works to other persons, provided that this is for the purpose of (i) verifying the results of the computational data analysis carried out by the latter; or (ii) collaborative research or study relating to the purpose of such analysis carried out by the latter. The user must have had lawful access to the work or recording. Access will be unlawful if, for instance, the user circumvented paywall or gained access in breach of the terms of use of a database. If the original version of the work is an infringing copy, the user must not know this. Additionally, if the original is obtained from an online location that has been used to flagrantly infringe copyright, the user must not have any reason to believe that the original is an infringing copy.	The main question will be whether the safeguards and conditions that are proposed to be put in place are sufficient to protect the commercial interests of copyright owners, even whilst allowing legitimate use of copyrighted materials for text and data mining purposes.

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7.	New exception for not-for-profit schools to use works available on the Internet for educational purposes	The current Copyright Act confers on not-for-profit educational institutions a statutory licence which permits them to copy and communication a "*reasonable portion*" of any work, subject to the payment to the copyright owner of equitable remuneration, in a sum to be agreed between the parties or to be determined by the Copyright Tribunal.	A new exception will be introduced which permits not-for-profit schools (including their staff and students) to reproduce, communicate and adapt works or recordings of performances that are accessible for free on the Internet at the time the user accessed the same for "*educational purposes*", without paying any compensation to the copyright owner. "*Educational purposes*" is non-exhaustively defined to include: • Collaborative research • Giving or receiving instruction, and acts to prepare for the same • Organising or participating in an exhibition or competition (whether within the educational institution or at the national or international level) The work may only be communicated on a network operated or controlled by the institution and which is accessible only by its staff and students (e.g., the school's intranet). Additionally, the user must: (i) acknowledge the Internet source from which the work was accessed; and (ii) make "*sufficient acknowledgment*" of the work (i.e., identifying its title and author), but only to the extent that the information is available from the Internet source.	As with the proposal to introduce a new text and data mining exception, the main question will be whether the proposed safeguards and conditions are sufficient to protect the commercial interests of rights-holders. Given that the exception will only apply to works that are made freely available online, businesses can take their materials out of the scope of the exception by putting them behind a paywall. Additionally, if it is desired that the school acknowledges the title and/or author of the work, the information should be provided on all Internet sources (e.g., website, social media page) on which the material is posted.

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8.	New exceptions / amendments to exceptions pertaining to (i) galleries, libraries, archives and museums; (ii) print-disabled users; and (iii) official government registers	There are existing exceptions under the current Copyright Act to cater to these uses. However, there was seen to be a need to simplify and update these provisions.	In a nutshell, the key changes are: • Galleries, libraries, archives and museums will be allowed to make copies of items or publicly perform AV materials for the purposes of exhibition under certain circumstances. • The record-keeping requirements and prescribed forms for the exception relating to print-disabled users will be simplified, and the exception will no longer be subject to a need to pay equitable remuneration. • There will be a new exception which allows the copying and distributing of materials in public registers and other public documents to, e.g., facilitate the inspection of the register or the provision of copies from the register or maintain the register.	The application of these exceptions appears to be fairly narrow, so that they are not expected to have a significant impact on most businesses.
9.	Expansion of the list of exceptions in the Copyright Act that may not be restricted by contracts	There are a number of exceptions in the current Copyright Act that may not be restricted by contract – e.g., exceptions relating to backing up; decompiling; observing, studying and testing a computer program. Apart from these, it is generally open for contracting parties to negotiate and agree to the terms of their contract, including on the operation of any copyright exceptions.	The list of exceptions that may not be restricted by contract will be expanded to include the following: • Exceptions for reproduction for purposes of judicial proceedings or professional advice • Exceptions relating to galleries, libraries, archives and museums • The new exception for text and data mining Additionally, all other exceptions may only be restricted or excluded by contract only (i) if the contract is individually negotiated; and (ii) the term or condition purporting to restrict the exception satisfies the requirement of reasonableness. Whether the term is "fair" will be determined by a set of factors which have been derived from the equivalent test under the Unfair Contract Terms Act (Cap. 396). The provisions will apply to *all contracts* - including contracts which existed at the commencement of the provisions, but only to acts carried out from the commencement of the provisions.	Generally, the proposal is targeted at situations where there is a lack of freedom in contracting or uneven bargaining power (e.g., where the contract is a standard EULA). In such situations, certain restrictions in the contracts made may no longer apply. Business may wish to review their contracts to see if there are any terms in the contracts which conflict or potential conflict with a copyright exception. If so, if the contract is one which is caught by the provisions, the terms may now be superseded by the exceptions.

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10.	Liabilities for engaging in commercial dealings with set-top boxes that stream AV content from unauthorised sources	Currently, importing, offering for sale and sale of copyright-infringing articles will attract both civil and criminal liabilities. However, there is a "lacuna" where dealings with set-top boxes -which do not contain infringing content *per se* - are concerned. Dealings with such set-top boxes are arguably not caught by the provisions in the current Copyright Act, making it difficult for rights-holders to enforce their rights against the parties who deal with such set-top boxes.	Civil liabilities will be imposed on persons who: (i) make, import for sale, distribute or sell set-top boxes that could be configured to provide access to content from unauthorised sources; or (ii) provide services or instructions to configure the set-top box to access unauthorised content, or help to configure subscription services. There is a requirement for knowledge, actual or constructive, in some cases. Additionally, the right-holders' work must have been made available on a flagrantly infringing online location ("**FIOL**"), and the device or service must be capable of facilitating access to the FIOL. Additionally, criminal liability will be imposed if the acts are done wilfully, either to gain a commercial advantage, or if the extent of infringement is significant.	These provisions are said to complement the existing mechanism for rights-holder to apply for site-blocking orders for ISPs to deny access by their subscribers in Singapore to FIOLs. However, the devil is in the details, and questions arise as to whether the requirements for imposing liability are too stringent, even while ensuring that the provisions are not overly broad such that retailer of multi-purpose devices that are inadvertently caught. Content owners who have a stake in this area may be interested to explore the provisions in the draft Bill in more detail and to make submissions.