

## Intellectual Property Law Update

### Proposed Amendments under the Copyright Bill

#### Overview

On 6 July 2021, proposed amendments to the Copyright Act (“**the Act**”) were tabled in Parliament under a Copyright Bill (“**the Bill**”). These amendments are expected to come into effect by the end of 2021 if the Bill is passed. The following is a summary of the key amendments proposed under the Bill, which amongst others seeks to accord stronger moral rights to authors and performers, and make the law more accessible to laypersons.

#### Creators own copyright to their works by default, even if the work was commissioned

Under the proposed amendments, creators of certain commissioned works (i.e. photographs, portraits, engravings, sound recordings, and films) will now own the copyright to these works. This changes the position under the current Act, where the commissioner owns the copyright by default.

The new amendment however only changes the default position. Creators and commissioners are still free to enter into a contract, which could transfer ownership rights as agreed.

This amendment would not however apply to those who are in an employer-employee relationship. In such situations, employers will still have default ownership of copyright in all works created by employees in accordance with their terms of employment.

Where the employee is a journalist, the current position under the Act will remain the same: employers own the copyright in literary, dramatic, musical, and artistic works by default.

#### Creators must be identified in relation to their works

The proposed amendments introduce a new right for creators of literary, dramatic, musical and artistic works to be credited if their materials and creations are published publicly. Creators must be identified in a manner which is clear and reasonably prominent. This right of attribution enhances the protection afforded to creators and performers – under the current Act, creators and performers have only a right to prevent false attribution of authorship or identity. The right of attribution will subsist for the duration of copyright protection of the work.

Where the work is used for commercial purposes, the new identification requirement would not displace the existing requirement to seek consent for using any works for commercial purposes. This means that a user of copyrighted work for commercial purposes will have to seek consent for such use and ensure that the creator is acknowledged in relation to their work.

This right to be identified would not apply to specified works and performances, for example, computer programmes or works created in the course of employment.

#### New ‘computational data analysis’ exception to copyright infringement claims

Under the new regulations, the use of works for the technical process of employing computational data analysis techniques (e.g. text and data mining, analytics) will be expressly exempted from claims of

copyright infringement or reproduction. This exception would cover both commercial and non-commercial activities.

The exception includes cases where software is used to identify, extract and analyse data from a work or a recording of a performance, or use of the work or recording itself to improve the functioning of a computer program (i.e. machine learning).

Such work or recording must have been accessed lawfully, unless the user was unaware that it was an infringing copy. Creators may not prohibit the use of works for such purposes if it had already been published publicly. Thus, if the works had been lawfully accessed, users would be allowed to use the work for computational data analysis even if such use is prohibited by the terms of use.

There is some ambiguity as to what constitutes 'lawful access'. For instance, it is unclear if a user will be able to claim that lawful access exists by relying on the fair use provision. It will be difficult for copyright owners to be aware of whether their copyright has been used in a manner which amounts to 'unlawful access'.

#### New 'educational use' exception to copyright infringement claims

According to the proposed changes, the use of online works in materials which are freely available for educational purposes will be exempted from claims of copyright infringement or reproduction.

This use of online works or recordings includes the reproduction, adaptation, or communication of such work in the course of an activity that has an educational purpose. This activity must be carried out in connection with a non-profit organization, and the user of the online work or recording must credit and acknowledge the source of the work. The user must cease using the online work or recording should they discover that the source from which the work was obtained has infringed copyright.

#### Expanded list of mandatory exceptions

The proposed amendments will expand the list of exceptions that may not be restricted by contract to include additional exceptions, such as the "computational data analysis" exception mentioned above. Another exception allows for galleries, libraries, archives and museums to make copies of items, or publicly perform audio-visual materials for purposes of exhibition, if the reproduction is not a reasonable substitution for the work, film or recording.

All other exceptions may only be restricted or excluded by contract if:

- (a) the contract is individually negotiated (i.e. it is not a standard form contract); or
- (b) the restrictive term or covenant satisfies the requirement of reasonableness set out in the Bill.

#### Impact of the proposed changes

The proposed Copyright Bill caters to the changing landscape of copyright through the adoption of technology-neutral language so that the law will be applicable to current technologies while remaining flexible enough to apply to emerging technologies. The structure of the Copyright Bill and its use of plain English will allow members of the public to better understand their rights and allow legal practitioners to navigate through Singapore's copyright law with greater ease.

In the commercial context, businesses which engage creators for marketing or publicity campaigns may request that creators waive their right to be identified in relation to their works to circumvent the uncertainties concerning ownership of the works.

Companies which engage freelance creators should also ensure that they obtain assignment of the copyright from creators if they wish to own copyright in the works or content.

The proposed changes above would restrict a business' ability to exclude or modify copyright exceptions. It will no longer be possible to exclude the operation of copyright exceptions through standard form contracts, and terms excluding or modifying copyright exceptions in individually negotiated contracts will only be allowed if they are "fair and reasonable".

Some factors which would determine the fairness and reasonableness of the term include:

- (a) the parties' relative bargaining positions;
- (b) the question of whether there was any inducement to the counterparty who agreed to the restrictive term; and
- (c) actual or constructive knowledge of the restrictive term and its effect.

In light of the proposed changes to the Copyright Act, businesses may wish to undertake a preliminary review of their contracts to ensure that the terms contained therein will continue to be valid after the Copyright Bill is passed, and review existing in-house policies and processes to ensure compliance with these new laws.

*Should you have any queries as to how this update may affect you or your organisation or require further information, please do not hesitate to email us.*



Max Ng  
Managing Director  
Gateway Law Corporation

Email: max.ng@gateway-law.com



Amira Budiitano  
Associate Director  
Gateway Law Corporation

Email: amira.budiitano@gateway-law.com

*This article is intended to discuss the proposed amendments under the Copyright Bill, and it is not intended to be comprehensive nor should it be construed as legal advice. This article is updated as of 25 August 2021.*

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