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RE: PUBLIC CONSULTATION ON PROPOSED CHANGES TO SINGAPORE'S COPYRIGHT REGIME

Thank you for the opportunity to submit comments as part of the public consultation on the proposed changes to Singapore's Copyright law. We have focused this submission on the proposal to remove the fifth factor, the ability to obtain a copy of the work within a reasonable time at an ordinary commercial price.

FIFTH FACTOR OF FAIR USE EXCEPTION

- ❖ *Do you agree to the removal of the fifth factor, which relates to obtaining a copy of the work within a reasonable time at an ordinary commercial price, from the exception of "fair use"?*

We agree that Singapore should remove the so-called "fifth factor" from the fair use

provision of the law for the following reasons.

INTRODUCTION: THE FIFTH FACTOR REDUCES THE PROVEN FLEXIBILITY AND ADAPTABILITY OF FAIR USE

The fifth factor substantially duplicates the immediately preceding fourth consideration: “the effect of the use upon the potential market for or value of the work”. This fact underlines the proposition that the fifth factor is unnecessary, and also points to the main risk of retaining it: that doing so would skew analysis under this section in the direction of giving greater weight to economic considerations than they would receive under a four-factor approach.

One of the great successes of U.S. fair use jurisprudence in the last 25 years has been the clarification of the doctrine’s application, as appropriate, to commercial as well as non-commercial users; it is this development that has made fair use useful to filmmakers, publishers, technology providers, and other important actors in the cultural marketplace.

Another success has been the liberation of four-factor analysis from a mechanically or reductively economic approach, in which considerations of market effect receive the greatest emphasis. Instead, U.S. courts have come to appreciate that the first factor (“the purpose and character of the use”) is at least as, if not more, important: that where the use under scrutiny has a new, “transformative,” purpose, the relevance of strictly economic considerations in overall balancing is correspondingly reduced.¹

A four-factor approach however, by no means disregards rightsholders’ legitimate economic interests. As the U.S. jurisprudence demonstrates, “transformative” uses are, by definition, ones that do not pose a danger of consumer substitution. Thus, for example, a teacher could not invoke fair use to justify sharing excerpts from a copyrighted textbook with his or her class if the effect would be to depress purchases of the book itself.²

THE FIFTH FACTOR IS INCONSISTENT WITH THE PRECEDING FOUR FACTORS

There are two central reasons why reform to remove the fifth factor would increase the beneficial impact of the law. The first reason is that it is duplicative of, and unnecessarily

¹ Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 579 (1994) (“[T]he more transformative the new work, the less will be the significance of other factors, like commercialism, that may weigh against a finding of fair use.”)

² Authors Guild v. Google, Inc., 804 F.3d 202, 223 (2d Cir. 2015), cert. denied sub nom. The Authors Guild v. Google, Inc., 136 S. Ct. 1658, 194 L. Ed. 2d 800 (2016) (“*Campbell* stressed the close linkage between the first and fourth factors, in that the more the copying is done to achieve a purpose that differs from the purpose of the original, the less likely it is that the copy will serve as a satisfactory substitute for the original. 510 U.S. at 591, 114 S.Ct. 1164.”); Authors Guild v. Google, Inc., 804 F.3d at 224 (“But the possibility, or even the probability or certainty, of some loss of sales does not suffice to make the copy an effectively competing substitute that would tilt the weighty fourth factor in favor of the rights holder in the original. There must be a meaningful or significant effect “upon the potential market for or value of the copyrighted work.” 17 U.S.C. § 107(4). Furthermore, the type of loss of sale envisioned above will generally occur in relation to interests that are not protected by the copyright.”)

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narrows the “market harm” factor. The second reason is that it creates complications in the legal analysis of substitution and market harm without any offsetting benefit to providing accuracy and balance in legal decisionmaking.

THE FIFTH FACTOR PREJUDICES THE MARKET HARM ANALYSIS AGAINST A FINDING OF FAIR USE

A core problem with the fifth factor is that, if read broadly, it becomes an automatic influence against any finding of fair use, skewing the flexible framework of the other four factors against such a result. If “obtaining a copy” can mean any form of access to all or part of a work, including access by license, then this criterion will count against fair use in all cases, except when the work is not being commercialized in any way (an orphan work, for example). The fourth factor, as stated, give the decisionmaker the appropriate amount of discretion, in considering what represents the market for the original work, whereas, by contrast the fifth factor creates uncertainty in when and how a decisionmaker must consider a potential licensing market. Therefore, when analyzing the impact of the fifth factor, “the possibility of obtaining the work within a reasonable time at an ordinary commercial price,” the analysis must rationally focus on market substitution for the original work, i.e. that instead of purchasing the full work, the user is relying on fair use. Thus, the fifth factor acts as just a more stringent version of the fourth factor, flattening the evaluation of market harm to merely whether the work may be available at a reasonable commercial price, without taking to consideration the type and scope of original market for the use, and the impact, or lack thereof, of the new use on that market.

THE FIFTH FACTOR IS INCONSISTENT WITH THE TRANSFORMATIVENESS ANALYSIS

Assuming, therefore that the fifth factor functions as a clarification or sub-specification of the fourth factor, it exists in tension with the transformativeness analysis that is the heart of fair use analysis, at least in the United States. Transformativeness, and specifically the first factor, focusing on the purpose and character of the use, recognizes that a use is more likely to be transformative, and thus more likely to be a fair use, when the use is outside of the original context of the work. The fifth factor, however, pushes the evaluation of the effect on any potential market harm towards an assumption of harm, regardless of any difference in the purpose and character of the new use. Instead, truly transformative use should influence a decisionmaker towards an assumption that there is no substitutive market harm.³ For example, instructional use of a segment of popular work for the purpose of study or teaching should not have its fair use status placed into doubt by the wide commercial availability of the whole work.

³ Authors Guild, Inc. v. HathiTrust, 755 F.3d 87, 99 (2d Cir. 2014) (“At the outset, it is important to recall that the Factor Four analysis is concerned with only one type of economic injury to a copyright holder: the harm that results because the secondary use serves as a substitute for the original work. See Campbell, 510 U.S. at 591 (“cognizable market harm” is limited to “market substitution”). In other words, under Factor Four, any economic “harm” caused by transformative uses does not count because such uses, by definition, do not serve as substitutes for the original work. See Bill Graham Archives, 448 F.3d at 614.”); Authors Guild, Inc., at 100 (2d Cir. 2014) (“Thus, it is irrelevant that the Libraries might be willing to purchase licenses in order to engage in this transformative use (if the use were deemed unfair). Lost licensing revenue counts under Factor Four only when the use serves as a substitute for the original and the full-text-search use does not.”)

REMOVING THE FIFTH FACTOR ALIGNS SINGAPOREAN FAIR USE WITH OTHER FAIR USE JURISDICTIONS

Finally, while not a substantive concern, the elimination of the fifth factor brings Singapore's copyright law into conceptual/doctrinal alignment with other countries who have adopted a U.S. style fair use. This fact that newer fair use jurisdictions share the same basic four factors as the United States allows for their courts to borrow as much (or as little) caselaw from other countries as is useful or necessary. In the Israeli experience, this has had the effect of allowing courts to craft a localized approach to implementing fair use without having to reinvent the basic jurisprudence in the field.⁴

CONCLUSION: KEEPING THE FIFTH FACTOR LIMITS THE POSITIVE PRO-INNOVATION FUNCTION OF FAIR USE

For the reasons just described, in the US a four-factor approach has proved to be especially hospitable in both the cultural and technological sectors. While we have focused in this submission on a close analysis on the fifth factor, the broader importance is that the current four factor fair use in the US experience creates a space for innovation in both the cultural and technological sectors that is narrowed by the inclusion of the fifth factor.⁵

In contrast, four-factor fair use envisions enabling innovation as a core value of copyright policy, in balance with rights holder interests. Four-factor fair use has functioned as an unparalleled engine for technological innovation precisely because of the flexibility it offers decisionmakers to consider the impact of new technologies on social, cultural and economic life. Thus, for example, it is by means of four-factor analysis, which places consideration of market harm in a larger analytic framework, that such forward-looking initiatives as the development of Internet search tools and services has been justified in the United States⁶ In contrast, the inclusion of the fifth factor turns the analysis

⁴ Lior Zemer, *Copyright Departures: The Fall of the Last Imperial Copyright Dominion and the Case of Fair Use*, 60 DePaul L. Rev. 1051, 1074-80 (2011). See also, generally, Niva Elkin-Koren, *The New Frontiers of Users Rights*, 32 Am. U. Int'l L. Rev. 1 (2016).

⁵ Authors Guild v. Google, Inc., 804 F.3d 202, 217 (2d Cir. 2015), cert. denied sub nom. The Authors Guild v. Google, Inc., 136 S. Ct. 1658 (2016). ("As with *HathiTrust* (and *iParadigms*), the purpose of Google's copying of the original copyrighted books is to make available significant information *about those books*, permitting a searcher to identify those that contain a word or term of interest, as well as those that do not include reference to it. In addition, through the ngrams tool, Google allows readers to learn the frequency of usage of selected words in the aggregate corpus of published books in different historical periods. We have no doubt that the purpose of this copying is the sort of transformative purpose described in *Campbell* as strongly favoring satisfaction of the first factor.") Authors Guild, Inc. v. HathiTrust, 755 F.3d 87, 99 (2d Cir. 2014) (rejecting the claim that a copyright holder's theoretical future licensing market might defeat the fair use claims for an innovative search engine.)

⁶ Kelly v. Arriba Soft Corp., 336 F.3d 811, 820 (9th Cir. 2003) ("The Copyright Act was intended to promote creativity, thereby benefitting the artist and the public alike. To preserve the potential future use of artistic works for purposes of teaching, research, criticism, and news reporting, Congress created the fair use exception. Arriba's use of Kelly's images promotes the goals of the Copyright Act and the fair use exception."); Perfect 10, Inc. v. Amazon.com, Inc., 508 F.3d 1146, 1165 (9th Cir. 2007) ("Although an image may have been created originally to serve an entertainment, aesthetic, or informative function, a search engine transforms the image into a pointer directing a user to a source of information. Just as a "parody has an obvious claim to transformative value" because "it can provide social benefit, by shedding light on an earlier work, and, in the

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into a backward facing one to the detriment of innovation in technology, education, and art and disfavoring citizens' interest in access to innovation, tipping the scales against fair use commercially works with any commercial viability, no matter how small or remote..

Respectfully Submitted,

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process, creating a new one," Campbell, 510 U.S. at 579, a search engine provides social benefit by incorporating an original work into a new work, namely, an electronic reference tool. Indeed, a search engine may be more transformative than a parody because a search engine provides an entirely new use for the original work, while a parody typically has the same entertainment purpose as the original work.")