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# The Rights of Creators in Singapore and South Africa

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Singapore recently released its long awaited report on copyright reform.[1] As expected, the report proposes to eliminate the fifth factor of its fair use test – which requires examination of whether a license is available for the activity in question. The proposed reforms go much further, echoing many of the policies and approaches of South Africa's Copyright Amendment Bill in focusing on the rights of individual creators at the center of the reform.

[1] Press Release, Singapore Copyright Review – Enhancing Creators' Rights and Users' Access to Copyrighted Works (January 17, 2019) www.mlaw.gov.sg/content/minlaw/en/news/press-releases/singapore-copyright-review-report-2019.html; Annex A https://www.mlaw.gov.sg/content/dam/minlaw/corp/News/Press%20Release/Singapore%20Copyright%20Review%20Report%202019/Annex%20A%20-%20Copyright%20Review%20Report%2016%20Jan%202019.pdf

## THE RIGHTS OF CREATORS

South Africa recently passed a sweeping copyright reform bill through the first and most important house of its legislature.[2] The reform was initiated by a desire to improve the lot of creators, particularly those in the music and film industries. Creators in emerging software, video games and other digital industries joined the cause to explain particular copyright barriers to innovation in digital technology.

Three broad categories of reform proposals were demanded by creators. South African creators took to describing their reform proposals in terms of fulfilling three key rights.

> *THE RIGHT TO CREATE.*
>
> *Current law lacks many modern exceptions to copyright. We need these exceptions to make original work and to exercise our freedom of expression.*
>
> *THE RIGHT TO OWN.*
>
> *Current law makes the commissioner of many works the default owner of our art. This restricts ability of many to distribute, re-mix and profit.*
>
> *THE RIGHT TO EARN.*
>
> *Current law does not adequately protect us against abuses and exploitation (by collective management organizations).*
>
> *-ReCreate South Africa Statement of Principles, https://www.re-createza.org/*

The Copyright Amendment Bill passed by the South African National Assembly in December advanced each of these creator rights. The Bill expanded the ability of creators to access and use other works in new creations. The bill shifted the default copyright in all works to the author. And it promoted the regulation of collective management organizations. The Government of Singapore has now expressed the intent to adopt a very similar host of reforms.

## The Right to Create

Every creator is a user. To be a creator, one must be able to access and use the works of others including to learn, research, consume, quote, excerpt and otherwise "remix."[3]

The main problem with user rights around the world is often that – drafted decades ago – they fail to articulate standards that can permit modern uses of digital works. Mike Palmedo and I describe the attributes of the most useful exceptions for the digital environment in our USER RIGHTS DATABASE.[4] There, we find that the best user rights are those that protect the market for the original work through a

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[2] See South Africa Copyright Amendment Bill (2018) https://libguides.wits.ac.za/ld.php?content_id=45613747

[3] *See generally*, LAWRENCE LESSIG, REMIX: MAKING ART AND COMMERCE THRIVE IN THE HYBRID ECONOMY (2008) (describing the history and future of remixing as central to creativity).

[4] SEAN FLYNN AND MICHAEL PALMEDO, THE USER RIGHTS DATABASE: MEASURING THE IMPACT OF OPENING COPYRIGHT EXCEPTIONS. PROGRAM ON INFORMATION JUSTICE AND INTELLECTUAL PROPERTY (2018).

***flexible*** fairness test balancing the interests of the user and rights holder, and are ***open*** to the broadest possible range of purposes, activities, works, and types of users. In what follows, I compare the Singapore and South Africa proposals using these criteria.

## Fair Use

> *The fifth factor [on the possibility of obtaining a work within a reasonable time at an ordinary commercial price] 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.*
>
> *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.*

Singapore and South Africa are Commonwealth countries, nearly every one of which has a "fair dealing" exception. Fair dealing rights are flexible rights that are open in most of the ways described above. They can be used to authorize any activity implicating any exclusive right, with any work, by any type of user as long as the use in question is "fair." But traditional fair dealing rights are not open to purpose.

Traditional fair dealing rights can be applied only to a specific list of purposes, such as for criticism or review and news reporting. The US fair use right is similar in history and form. But when put into statute in the 1970s, the US Congress included an opening clause – "such as" – before the list of purposes to which it can apply. As a result, courts have been able to apply it to new purposes over the years, from the recording for time shifting enabled by the VCR to copying for indexing enabled by Internet search tools.

Singapore and South Africa have both proposed to follow the US example and adopt fair use rights.[5] Singapore opened its fair dealing right to any purpose in 2006.[6] But when it did so it added a fifth factor to the fairness test, requiring examination of the possibility of obtaining a work within a reasonable time at an ordinary commercial price. Many criticized the Singapore fifth factor as placing a thumb on the scale against free expression and perpetuating a misconception that users must always try to seek a license before relying on fair use. The removal of Singapore's fifth factor will resolve this concern and bring its fair use factors in accord with those being considered in South Africa and in place elsewhere.[7]

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[5] Even closed list countries, like Canada, can in effect operate as more similar to fair use through liberal interpretation of the purposes. *See* MICHAEL GEIST, THE COPYRIGHT PENTALOGY: HOW THE SUPREME COURT OF CANADA SHOOK THE FOUNDATIONS OF CANADIAN COPYRIGHT LAW (2013) (explaining five cases by the Supreme Court of Canada that has interpreted its fair dealing right toward a more open list of permissible purposes).

[6] See Copyright Act Section 35(1). ("Subject to this section, a fair dealing with a literary, dramatic, musical or artistic work, or with an adaptation of a literary, dramatic or musical work, for any purpose other than a purpose referred to in section 36 or 37 shall not constitute an infringement of the copyright in the work.").

[7] The Report also states that "The legislation will be amended to describe the open-ended exception as 'fair use'" and "clarify how the 'fair use' exception operates vis-à-vis the other exceptions, including the specific fair dealing exceptions." The change in the language of the statute from "fair dealing" to "fair use" is semantic. A "use" and "dealing" in copyright law are the same. South Africa's legislation provides a good example of how to clarify the operation of the exception vis-à-vis other exception, stating: "12A. (1) (a) In addition to uses specifically

## Educational Use

> *There will be a new purpose-based exception for educational uses. . . . 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.*

Even in the US and other regimes with an open general exception, there exist exceptions for specific purposes such as education. Specific exceptions can help improve predictability for users and owners. There is increasing attention around the world on modernizing educational exceptions for the digital age, including gathering demands for an international treaty on the topic.[8] The Singapore proposal takes an important step by explicitly permitting free educational uses of materials that are publicly available on the Internet.

The utility of Singapore's education exceptions depend on whether its fair use right will continue to apply in addition to specific rights. There are presently several very limited educational rights in

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authorised, fair use in respect of a work or the performance of that work, for purposes such as the following, does not infringe copyright in that work."

[8] See, for example, the increasing attention at the World Intellectual Property Organization on a proposal for te new Treaty on Education and Research Activities, http://infojustice.org/tera

Singapore's Copyright Act.[9] The new right expands the law to authorize a greater number of uses of free online materials. But the new right is not fully open.

- It does not apply to all works, but rather only those on the Internet. It does not apply to all exclusive rights, but rather only to reproduction, adaptation and communication. It is unclear, for example, whether the right would include a performance or display of a work.
- The right is not open to any user - it is closed to uses by learners and teachers who are not connected with "a not-for-profit educational institution."
- The new right is not protected from a rights holder's use of a technological protection measure to exclude copying of the work.

South Africa also proposes both a fair use right and a specific exception for educational uses. South Africa's proposed educational exception is broader, however – permitting any educational use of any work, as long as the amount used does not exceed the extent justified by the purpose.[10]

## Libraries and Institutions of Cultural Memory

> *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.*
>
> *. . .*
>
> *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, 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.*

Libraries and other institutions of cultural memory are essential to creators. To make a documentary film, for example, one literally needs access to documents. But as the works of libraries age and as user practices shift to digital, our memory institutions need more freedom to preserve and share to meet their missions.

Both Singapore and South Africa propose to modernize their exceptions to apply to a broader range of works and activities. South Africa provides broadly – "A library, archive, museum or gallery may, without the authorization of the copyright owner, use a copyright work to the extent appropriate to its activities." It then spells out a number of specific permitted activities.

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[9] The law permits the use of "a short extract" in an educational collection (Sec. 40); copying "for non-reprographic means" by a person "undergoing a course of education" (Sec. 50(A)); copying or communication of insubstantial portions (Sec. 51); and "anything" required to administer examinations (Sec. 52).

[10] South Africa's Bill includes among the list of illustrative fair use purposes in Section 12(A) – "scholarship, teaching and education." It also contains a specific right to educational use in Section 12(D): "a person may make copies of works or recordings of works, including broadcasts, for the purposes of educational and academic activities: Provided that the copying does not exceed the extent justified by the purpose."

Singapore provides many specific rights of libraries in its current law, including to copy for users, for other libraries or archives, and for preservation. But most of its exceptions are limited to one right – reproduction – and are for very limited purposes. Many questions are left unanswered – such as whether a library can stream an online video or otherwise perform and display works as part of its collections. Or can an archive put its contents online for general access to the digital form?

Again, the utility of Singapore's exceptions depend how the fair use right is applied vis a vis the specific exceptions. South Africa's fair use right, with its clear application to uses "in addition to" specific rights provides more certainty that all fair uses by libraries will be authorized.

## Data analysis

*There will be a new exception for data analysis.*

*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.*

The potential for machine analysis of information on the Internet to reveal new depths of information is one of the most important frontiers for technological innovation. But that innovation will occur only in places that allow it to flourish.

A debate is emerging on whether data research rights should include commercial research. In the UK, and as proposed in the EU, exceptions to use works for data analysis apply only to uses for "the purpose of non-commercial research." In the US, fair use has always been interpreted to permit commercial as well as non-commercial applications, and this attribute is sometimes described as the reason technology companies continue to choose to base most of their development activities in the US. It will be a rare machine learning venture that will choose to locate in an environment in which only non-commercial data research is permitted.

South Africa and Singapore are both choosing to follow the US model by extending their data analysis rights to commercial and non-commercial activities.[11] This move will likely give them a leg up in attracting technology innovation over countries that follow the UK/EU model.

## Protection from Contractual Override

[11] South Africa does not include an explicit data analysis right, but includes "research" among the illustrative fair use purposes, with no qualification that the research be non-commercial.

> *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 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.*

A user right can be rendered useless if the law permits the right to be too readily contracted away. Content may be protected by so-called "shrink-wrap" licenses where the consumer is deemed to consent to a contract by merely accessing the product.

South Africa and Singapore take slightly different positions on this matter. South Africa proposes to make all contracts that take away user rights invalid. Singapore limits its scope to shrink-wrap style contracts of adhesion (where there is no actual negotiation), and to especially important rights. But it otherwise permits parties to contract around exceptions.

South Africa's approach is more protective of creator interests. Filmmakers, educators and others frequently find themselves unable to access copies of works they can lawfully excerpt from because of contractual overrides and technological protection measures. To fully enable the free expression and creation that copyright is meant to contribute to, exclusive rights should be indefeasible.

## The Right to Own – Commissioned Works

> *The default ownership of commissioned photographs, portraits, engravings, sound recordings, and cinematograph films, would be with the creator instead of the commissioning party.*
>
> *. . .*
>
> *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.*

One of the products of consolidated wealth and power of copyright intermediaries is that the law is often stacked against actual creators. In many cases the actual authors of works – be they teachers, filmmakers, or photographers – do not own the works they make because of the operation of statutory defaults. One common statutory default being reversed in both Singapore and South Africa is over the ownership rights to commissioned works.

In both Singapore and South Africa, present law makes the commissioner of some works the default owner of all copyright, even if the commissioning contract does not address rights ownership. This requirement is highly problematic for individual creators, especially those who are less sophisticated in their contracting. A lack of ownership of the work can inhibit creators from accessing new markets and making new derivative products with their creations. Indeed, it has led to works not reaching the public at all - for example where a broadcaster decides to not to air a commissioned film.

South Africa and Singapore are receiving praise from creators in taking the lead in overturning these presumptions against authors and making all copyright default to authors. Such laws promote a more efficient and just result by vesting rights in the party to a negotiation who often has the least negotiating power.

## The Right to Earn - Collective Management Reform

> *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.*

The final element of the creators rights package in both South Africa and Singapore lies in bolstering creators' right to earn. In many copyright industries, collective management organizations (CMOs)

collect royalties from users and are charged with distributing the proceeds to creators. Without adequate regulation or member control, CMOs can charge massive salaries and other costs.

The proposals in Singapore and South Africa are similar in largely following the regulation, rather than member control, model. Each vests an arm of government with oversight of CMOs with the power to investigate and discipline CMO operations.

South Africa includes a provision requiring that a "collecting society is subject to the control of the authors performers or copyright owners whose rights that collecting society administers." (Section 22(D)). But this provision in the law has no other detailed instruction into how member control will be effected, unlike, for example, its laws governing non-profit organizations. Regulations from the Commission in South Africa or the IP Office in Singapore could expound on this topic, putting forward binding guidelines defining the rights of members of CMOs to appoint its directors, audit its books and otherwise govern the entity acting on their behalf.

## The Path Ahead

Neither the South Africa nor Singapore process is over.

In South Africa, there are still two houses of Parliament (Provinces and Traditional Leaders) who must approve the Bill and then it must be signed by the President. Singapore operates according to a Westminster system in which the Cabinet directs Government and is accountable to Parliament. Ultimately, the government position and Parliament position on a final legislative proposal are likely to coalesce. The Singapore proposal is only a report, however. The next stage is to draft specific legislative language, which "will be made available to the public for comments on the implementation details."

Singapore could take a key lesson from South Africa. As described above, most of Singapore's specific exceptions are very closed and limited. The question of whether it will be a good model for the digital environment rests on the result of its second inquiry not yet decided – "how the 'fair use' exception operates vis-à-vis the other exceptions, including the specific fair dealing exceptions." South Africa's bill offers an excellent model in this regard. The general fair use right should apply at the boundaries of all other rights, creating space for fair uses not specifically covered elsewhere. South Africa's bill accomplishes this flexibility by applying fair use "in addition to uses specifically authorized." If Singapore follows this rule, it greatly increase the utility of its law for creators.

Sean Flynn coordinates the Global Expert Network on Copyright User Rights, which submitted comments on the proposals in both Singapore (http://infojustice.org/archives/37315 ) and South Africa (see http://infojustice.org/b13-comments).