

**Public Consultation on Proposed Changes to Singapore’s Copyright Regime  
Comments of the Organization for Transformative Works  
23 October 2016**

The Organization for Transformative Works (OTW) appreciates the opportunity to comment on Singapore’s proposed reforms, many of which represent clear progress towards the goal of “a copyright regime where rights are reasonable, clear and efficiently transacted.” Consultation ¶ 1.3. The OTW’s nonprofit website hosting transformative noncommercial works, the Archive of Our Own, has over 900,000 registered users and receives over 130 million page views per week. Based on IP addresses, Singapore is the 11th most common country of origin for our users, representing approximately 65,000 user sessions per week, and the 20th most common country of origin for our creators. We represent artists who make works commenting on and transforming existing works, adding new meaning and insights—from reworking a film from the perspective of the “villain” to retelling the story as if a woman, instead of a man, were the hero. These “fanworks” have a variety as great as their creators. Because many fanworks are based on works whose copyright still subsists, the OTW has a significant interest in the appropriate boundaries of copyright and fair use, especially for noncommercial works.

Creating fanworks is a particularly popular activity for young people, with many benefits for their writing skills, technical abilities, and other qualities of vital importance to 21<sup>st</sup>-century societies. For example, Rebecca Black’s empirical research has revealed that young writers using online fan fiction sites can effectively learn English, as well as different cultural perspectives, through interaction with an English-literate online community.<sup>1</sup> Love of the

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<sup>1</sup> See, e.g., Rebecca W. Black, Access and Affiliation: The Literacy and Composition Practices of English Language Learners in an Online Fanfiction Community, 49 *J. Adolescent & Adult Literacy* 118 (2005) [hereinafter Black,

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original source motivates people to spend hours writing and reviewing in English.

Transformation of existing material is the glue that creates the community—audience members, even strangers, volunteer to help creators improve because they want more commentary on their favorite sources.<sup>2</sup> This provides new learners with powerful motivation to continue writing and posting. The community encourages writers to develop original and innovative storylines using existing characters. For example, when one fanwork creator realized that many of her readers didn't know much about Chinese and Japanese history, she wrote stories responding to that gap.<sup>3</sup>

The OTW has heard from many others in similar situations.<sup>4</sup> Ania, whose first language is Polish, agreed that fandom helped her learn English, which also allowed her to improve her grades and get a summer job at a Harry-Potter themed summer camp. Noel Olafsen writes, “Before I found fandom, and started creating fanworks, I hated reading and I really despised English. ... Fandom changed my view of English completely, because now, I read, speak and consume English daily.” Noel's English grades went from middling to top-tier.<sup>5</sup> Maëlle P. agrees: fandom “forced and helped me to learn English, which I now speak as well as my first

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Access and Affiliation]; Rebecca W. Black, *Language, Culture, and Identity in Online Fanfiction*, 3 *E-Learning* 170 (2006).

<sup>2</sup> Black, *Access and Affiliation*, *supra* note 127, at 123-24.

<sup>3</sup> See Rebecca W. Black, *Access and Affiliation: Adolescent English Language Learners Learning To Be Writers in an Online Fanfiction Space* 16 (dissertation, 2006).

<sup>4</sup> The following stories come from our 2013 submission to the U.S. National Telecommunications and Information Administration/Patent & Trademark Office inquiry on remix and fair use. Nat'l Telecomm. & Info. Admin., Request for Comments on Department of Commerce Green Paper, Copyright Policy, Creativity, and Innovation in the Digital Economy, Comments of Organization For Transformative Works (Nov. 13, 2013), available at [http://www.ntia.doc.gov/files/ntia/organization\\_for\\_transformative\\_works\\_comments.pdf](http://www.ntia.doc.gov/files/ntia/organization_for_transformative_works_comments.pdf) (“OTW NTIA comments”).

<sup>5</sup> Noel continues: “[N]ot only has fandom taught me things from English to photoshop to webdesign, it has taught me how to be a better person with how it breaks down problematic content and works to better it. Most importantly though, it saved my life. Fandom and fanworks has been my way of escaping to a safe place when real life became too much to bear, and without it, I don't know where I would have been today or if I would even be alive. I've found passions I never knew I had, I've learned to know myself better in ways I don't think I would otherwise. Today I'm teaching myself German, webdesign, sign language and much more, all because of fandom. Fandom and fanworks means so much to me, and it's such a huge and integrated part of my life today. Honestly, it's a part of me now and I don't think I'd survive without.”

language.” Tonje A., another non-native speaker, credits fandom with improving her English far beyond what she learned in school, so much so that she is now pursuing a Masters in English literature. “Being in a community that encouraged and praised my attempts at writing stories, and interacting with and critiquing fiction has been invaluable for my current academic ‘career.’”

Similarly, the feedback Anna Marie M. received from people who shared an interest in the same characters taught her enough about style and about English that she has begun publishing ebooks. Anatsuno’s language skills led to her current career, as she explains:

Taking part in online English-speaking fandom and consuming, then creating, English-language transformative works has been a *huge* influence on my English literacy levels, and has no doubt thus played a direct role in my decision to start working in an entirely new professional field and become a literary translator (English to French).

The phenomenon is by no means limited to English. Remix creators often translate foreign-language texts into English (or their own native languages), in order to understand the original better and create new works based on the originals. According to academic studies, this love for a particular source provides a powerful motivation for learning languages.<sup>6</sup>

Ricarda F., who holds an MA in Japanese studies, spent significant amounts of time translating Japanese source material for non-Japanese speaking fans. This gave her a translation portfolio, and she was ultimately hired by the very company that produced the original Japanese

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<sup>6</sup> See, e.g., Chatarina Edfeldt et al., Fan Culture as an Informal Learning Environment, NGL 2012 Next Generation Learning Conference, <http://du.se/Global/dokument/NGL/NGL%202012/Conference%20proceedings.pdf#page=109> (investigating translation practices in informal fan environments and concluding that they provide strong motives for non-Japanese-speaking students to learn Japanese and engage in dialogue with native speakers); Kara Lenore Williams, The Impact of Popular Culture Fandom on Perceptions of Japanese Language and Culture Learning: The Case of Student Anime Fans (Doctoral thesis, University of Texas-Austin, 2006) (concluding that that generating or capitalizing on interest in the popular culture of the target language group may be a useful tool in motivating language students, given the challenges many language programs face in attracting and retaining students).

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texts of which she was a fan. “This is how fandom has given me the chance to further hone my skills, by providing a platform where feedback was almost instantaneous, where the curiosity about a specific topic and other people seeking help in understanding source material created a motivating drive much more effective than anything I have ever encountered in a formal study of language setting. And I have learned so much from discussing the cultural and linguistic differences between Japan, the USA, and other European nations.” Natalie B.’s story is similar: “writing anime and manga fanfiction brought me to the attention of people at US publishing houses who then gave me freelance work based on my skills and reputation. (I’ve done proofreading and rewriting of Japanese manga and light novels as well as Korean manhwa.)”

We have focused on the benefits of creating written fanworks because most of the works we currently host are written. However, similar stories abound through all forms of media; creating transformative works requires and encourages young people to develop important skills in art, video editing, coding, and many other areas, as detailed in the OTW’s submission to the U.S. National Telecommunications and Information Administration/Patent & Trademark Office inquiry on remix and fair use.<sup>7</sup> For example, the transformative vidding community, discussed below in the context of DRM, has been particularly valuable as a “female training ground,” teaching technical skills to women: web design, coding, video and image editing, and filmmaking.<sup>8</sup> Because of the engaged audience, participants can receive far more focused and intensive assistance developing their craft than is available even in the most dedicated formal

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<sup>7</sup> See supra note 4.

<sup>8</sup> Jesse Walker, *Remixing Television*, Reason Magazine, August/September 2008.

training programs. A school semester offers only a few opportunities to evaluate each student's creative work, while a fan community has almost limitless capacity to respond to fanworks.<sup>9</sup>

With this background, we turn to specific questions asked in the consultation document on which the OTW has relevant expertise.

**Question 3(a):** Do you agree that there should be a limit on how long creative works can be protected under copyright?<sup>10</sup>

The world's countries have moved to limiting how long creative works are protected under copyright. Some countries have defined the triggering event as publication, leaving unpublished works perpetually protected, but the move to transitioning unpublished works to a limited term has occurred in the United Kingdom, United States, and Canada. The reasons for doing so are compelling: copyright's economic incentive rationale for allowing a creator to control whether a work is ready for publication loses its force when a work remains unpublished for decades after its creation and after the death of its creator or creators. In addition, older unpublished works may have their main importance for historical, cultural, or educational uses, such as in biographies of important figures or studies of everyday social life; requiring a fair use or fair dealing analysis for every such use when the works are very old creates unnecessary uncertainty without sufficient corresponding benefit to copyright owners. To the extent that

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<sup>9</sup> According to Ania, "I got more practice with video- and audio-editing doing *Sherlock* fanvids than I did at uni, even though my studies are related to that (telecommunication with focus on audio processing)."

<sup>10</sup> The duration portion of this submission was written by Dr. Elizabeth Townsend Gard, the leading U.S. expert on copyright duration. For the past ten years, Dr. Townsend Gard has researched the term of copyright in every country in the world, and founded the Copyright Research Lab, see [copyright.tulane.edu](http://copyright.tulane.edu). The suggestions here are based on that body of research. More information is available, if needed, particularly on common-law jurisdictions and their transitions with unpublished materials. We are happy to further research and consult on what we have found (the services of the Copyright Research Lab are available without charge). Dr. Townsend Gard may be reached at [copyright@tulane.edu](mailto:copyright@tulane.edu).

there are other interests in privacy related to the protection of unpublished works, a balanced privacy regime is better suited to protect those interests, rather than a copyright law that is primarily geared towards protecting economic rights and sometimes protects the moral rights of the creator (rather than the privacy of the subjects of the work).

**Question 3(b):** Should all literary, musical, dramatic and artistic works (regardless of whether they had been published within the creator’s lifetime) have the same duration of copyright protection i.e. 70 years after death of creator?

Yes. All literary, musical, dramatic and artistic works should have the same duration of protection, regardless of whether the works are published within the creator’s lifetime.

Simplicity and clarity are key to a strong, working copyright system, with clear definable boundaries, and anything that furthers that goal is encouraged. By not distinguishing between published and unpublished, one also alleviates the problem of defining “publication.”

Around the world, most author-based works carried the same term for published and unpublished works, with the death of the author serving as the triggering event, regardless of whether the work was published or not. Publication often relies on a work being made available to the public from an authorized copyright holder, which is not always easy to determine.

Publication is not a consistent definition around the world.<sup>11</sup>

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<sup>11</sup> For example, Mozambique’s definition of publication is: “ ‘published’ means that copies of the work have been made available to the public with the author’s consent, on condition that, due account being taken of the nature of the work, the number of copies published is sufficient to meet the normal requirements of the public. A work may also be considered ‘published’ if it is recorded in the memory of a computer system and made available to the public by any means of retrieval.” Annex Glossary, 27, Law No. 4/2001 of February 27, 2001, Approving Copyright and Repealing the Code of Copyright Approved by Decree-Law No. 46,980 of April 27, 1966. The United States definition of publication has had a complicated journey, including changes in the statute, but also case law distinguishing (sometimes confusingly) between unpublished, limited publication, and general publication. Deborah R. Gerhardt, Copyright Publication: An Empirical Study, 87 Notre Dame L. Rev. 135 (2011).

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However, many author-based works either have no known author, or the author's death date is unknown. We recommend that if an author's death date is not known or cannot be determined, and the work was not made available to the public in any form, the triggering date should be 70 years from creation. If an alternative means of determining the status is not included, many works will remain inadvertently perpetually protected because the author's death cannot be determined. If the exact creation date is not known, clues such as when it was made available or archived can assist in determining when the work was created. If there are no indications of the creation date (an image of a mountain, for example), and no author-based information is included, the work should be in the public domain for lack of identifying information.

Too often, the label "anonymous" or "unknown" leaves one wondering if a work is unknown at the time – deliberate anonymity – or unknown now – accidental anonymity. Because copyright law lasts for so long, it would be ideal to define "unknown creator" as both deliberate and accidental, when works no longer contain information about the author. Those works should be based on a 70-years-from-publication/making available/70-years-from-creation formula to meet the goals of a fair and working copyright system. Additionally, these terms could be used for author-based works where the author's death date is not ascertainable.

Some jurisdictions have included a posthumous publication right of 25 years from publication, if published after the death of the author. This kind of system interferes with the goals of the public domain, locking up a public domain work after the expiration of the original copyright, by giving to one player a twenty-five year term. That publisher often has no

connection to the work, other than being the first to publish. The incentive to publish public domain works should be just that: they are in the public domain. Pulling public domain works out for the benefit of one publisher reduces the public benefit of a free and clear public domain. The incentive to publish public domain works is just that – works that are free to publish. No further incentive is needed, as empirical research by Paul J. Heald and his coauthors has shown.<sup>12</sup> We see many variations of this posthumous publication right, particularly in Europe, but we also see inconsistencies and problems in the application.

**Question 3(c):** Should the duration of protection for sound recordings, cinematograph films, and works with an unknown creator be as follows: (i) 70 years after first publication, but only if they were published within 50 years of creation; or (ii) 70 years after creation, if published after 50 years of creation.

This is an unusually complicated means of determining the status of sound recordings, cinematograph films, and works with an unknown creator. It is not clear why the 50- year mark needs to be met. It appears to disincentivize making a work available in the last twenty years of its copyright. Ideally, copyright term should be as simple as possible in order to make determining duration easy. Moreover, publication has often now been replaced with “made available to the public.” We suggest consistency in terms to make determining the status of the work clear.

### **General Remarks regarding Duration:**

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<sup>12</sup> See, e.g., Christopher Buccafusco and Paul J. Heald, Do Bad Things Happen When Works Enter the Public Domain?: Empirical Tests of Copyright Term Extension, 28 Berkeley Tech. L.J. (2013); Paul J. Heald, Property Rights and the Efficient Exploitation of Copyrighted Works: An Empirical Analysis of Public Domain and Copyrighted Fiction Bestsellers, 92 Minn. L. Rev. 1031 (2008); Paul J. Heald, Testing the Over- and Under-Exploitation Hypotheses: Bestselling Musical (1913-32) and Their Use in Cinema (1968–2007), 60 Case W. Res. L. Rev. 1 (2009).

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Duration is the key to property boundaries. In making changes, we strongly urge clarity and simplicity in order that the laws are understandable to anyone wanting to create or use a copyrighted work, and wanting to know when the work comes into the public domain in Singapore.

Photographs: Photographs are currently protected for 70 years from publication. Section 28(6), Copyright Act (Singapore). It does not appear that the changes address when a photograph is not published, and an additional term should be included, of 70 years from creation if a work is not published within 70 years. Additionally, many times it is not clear whether a photograph has been published. We suggest that any time where publication (or, if our suggestion is accepted, making available) is unclear, 70 years from creation can be used as the triggering event and term.

Retroactivity: Ideally, it would be very useful to state that the new law applies to all works, including those created before the enactment of the amendments. Many countries do not explicitly indicate whether the laws are retroactive. In this case, because unpublished works are being brought into a statutory system, retroactivity is key, and making that clear is an important step.

### **Berne-Related Issues:**

**Rule of the Shorter Term:** Ideally, it would be useful to state whether Rule of the Shorter Term (RST) or comparison of terms apply to foreign works. RST is a presumption in the Berne Convention. (Article 7(8): “In any case, the term shall be governed by the legislation of the country where protection is claimed; however, unless the legislation of that country otherwise provides, the term shall not exceed the term fixed in the country of origin of the work.”) This means that for a foreign work, the term will be no longer in Singapore than in the country of origin. RST is used by Europe for non-European countries,<sup>13</sup> Canada for non-NAFTA countries,<sup>14</sup> and by many other jurisdictions. We encourage adoption of RST, as it allows for the use of foreign works in Singapore for those with shorter terms. Regardless of the choice made about RST, we strongly suggest clarity in the law as to whether RST applies or not.

**Article 18:** Ideally, it would be useful to state whether Article 18 applies in the copyright law in Singapore. Singapore joined the Berne Convention in 1998. Article 18 requires the restoration of any foreign work of a Berne member-country that had fallen into the public domain for lack of treaty relations. The United States applied Article 18 through Section 104A

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<sup>13</sup> For example, Portugal’s law reads: “The works that have as country of origin a foreign country not belonging to the European Union and whose author is not a national of a country of the Union has the protection period laid down in the country of origin law, if not exceed that fixed in the preceding articles. \* Drafting of Art. 2.º. The Decree-Law. 334/97, of 27 November. Article 37, Copyright Code and Related Rights, (Approved by Decree-Law No. 63/85 of 14 March, amended by Laws Nos 45/85 of 17 September and 114/91 of 3 September and Decree Laws n. 332/97 and 334/97 °S, both of 27 November, by Law No. 50/2004, of 24 August, by Law No. 24/2006 of 30 June and Law No. 16/2008 of 1 April) (Portugal). France applies Rule of the Shorter Term. “Where the country of origin of the work, within the meaning of the Paris Act of the Berne Convention, is a third countries to the European Community and the author is not a national of a Member State the Community, the duration of protection is that afforded in the country of origin of the work without which shall not exceed that provided for in Article L. 123-1.” Article 123-12, Intellectual Property Code 1992 (as amended 2015) (France). And for neighboring rights: “Subject to the provisions of international conventions to which France is a party, the holders of related rights who are not nationals of an EU Member State European benefit from the protection provided in the country of nationality but that period may not exceed that provided for in Article L. 211-4.” Article 211-5, Intellectual Property Code 1992 (as amended 2015) (France) .

<sup>14</sup> For instance, Oman’s law on RST: “Article (60): The provisions of this Law shall apply to all works, performances, sound recordings, and broadcasting programs that are produced or broadcasted before the date that was enforced, provided that they have not fallen into public domain due to the expiry of the term of protection as prescribed in the cancelled law, or in the legislations prevailing in their country of origin.” Royal Decree No. 65/2008 promulgating the Law on Copyright and Related Rights (Oman).

(as part of the URAA).<sup>15</sup> A key goal of copyright, and in particular central to the *term* of copyright, is the delineation of clear boundaries. Anything that can further that goal would be useful.

**Question 4(a):** Do you agree to the proposed right of attribution and that this new right is only for the duration of copyright protection in the work?

Duration of moral rights that expire with the copyright term provide a clear path to the public domain, unencumbered. If the author is unknown, no moral rights should attach to the work. In addition, ordinary norms in the relevant creative area should be taken into account in determining whether or not attribution should be required. For example, when should the contributions of editors, speechwriters, and other assistants be governed by an attribution right? At a minimum, consent might be implied from a standard context. But the OTW cautions that law is often too inflexible to track morality in its truest sense, precisely because morality is often so context-specific, even when the only moral right at issue is attribution.<sup>16</sup>

**Question 4(c):** Should there be other defences to an infringement of the right of attribution, other than consent?

The OTW agrees that other defenses to the right of attribution are appropriate, especially in cases of fair use/fair dealing, where otherwise the right of attribution might be asserted to deter or suppress important acts of expression. A use that is for other reasons fair ought not to trigger the right of attribution, although proper attribution may factor into whether a use is fair.

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<sup>15</sup> 17 U.S.C. Section 104A (United States).

<sup>16</sup> See Rebecca Tushnet, *Naming Rights: Attribution and Law*, 2007 Utah L. Rev. 781 (detailing many contexts in which attribution rights would be extremely difficult to apply to creative works).

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One simple solution would be to limit the right of attribution to wholesale copying, so as not to create complexities surrounding rights extending to derivative works.

In addition, many other countries wisely limit attribution rights by asking whether attribution is reasonably provided under the circumstances, and the OTW suggests that Singapore should follow this model. This general principle explains a number of more specific exceptions, such as exceptions for incidental appearances in other works. Reasonability should also take into account the user's level of knowledge—an ordinary user may not know every creator or performer of a song or movie. In an age in which a pop song may have more co-writers credited than it has verses, reasonability of attribution is critical.<sup>17</sup> A blanket exception for noncommercial uses may also be appropriate, given the difficulties that nonprofessionals may have in determining authorship. The consultation paper's example involves professional hiring parties with direct contact with individual authors; this is a situation that merits consideration, but it is also important to remember that many copyright situations encountered daily do not resemble this single author-single user model.

**Question 6(a):** Do you agree that certain exceptions in the CA should not be restricted by contractual terms?

Yes. Standard contractual terms can be anticonsumer and anticompetitive, leveraging copyright to promote non-copyright business interests with no relation to copyright's incentive and creator-protecting functions. Especially in the technology sector, contracts like the End User Licence Agreements and website terms and conditions noted in the proposal can affect large

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<sup>17</sup> See John Seabrook, *The Song Machine: Inside the Hit Factory* (2015); Brendan, 9 Pop Songs That Had WAY Too Many Writers, Smosh, Jan. 4, 2013, <http://www.smosh.com/smosh-pit/articles/9-pop-songs-had-way-too-many-writers>.

numbers of users who would otherwise benefit from fair use/fair dealing protections.<sup>18</sup> If not protected from contractual restrictions, certain exceptions intended to protect users and consumers could easily be effectively gutted by ubiquitous standard contractual terms.

Prohibiting the restriction of certain exceptions protects the efficacy of these exceptions' abilities to best serve the populations they have been introduced to benefit.

**Question 6(b):** What specific exceptions within the CA (including existing exceptions, new ones proposed in this public consultation document, and any other new exceptions you wish to propose) should not be restricted by contractual terms?

The exceptions proposed in Annex A are useful and valuable exceptions. The exceptions to exclude fair use/fair dealing from contractual restriction particularly helps to protect the purpose of the doctrine. Failure to prohibit it from being contractually restricted would doubtlessly lead to broad, expansive attempts to destroy the doctrine, especially on the Internet, where transformative activities flourish but where standard, non-negotiable contracts often frequently govern the behavior. Failure to protect the doctrine of fair use/fair dealing from being restricted in the contracts could therefore have the effect of virtually eliminating it from the Internet. In addition, because of the growing length and complexity of the terms and conditions of the websites they use,<sup>19</sup> most Internet users either do not read them or do not understand them.

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<sup>18</sup> See, e.g., Aaron Perzanowski & Chris Jay Hoofnagle, What We Buy When We 'Buy Now,' 165 U. Penn. L. Rev. (forthcoming 2017), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2778072](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2778072) (empirical study of consumer misunderstanding of digital rights); Yannis Bakos, Florencia Marotte-Wurgler, & David R. Trossen, *Does Anyone Read the Fine Print? Consumer Attention to Standard-Form Contracts*, 43 J. Legal Stud. 1 (2014) [http://www.law.uchicago.edu/files/file/bakos\\_fineprint.pdf](http://www.law.uchicago.edu/files/file/bakos_fineprint.pdf) (finding that only one or two out of every thousand online consumers looked at the terms and conditions of the websites from which they were purchasing goods and services and that the average time spent on the terms and conditions by those few users was only 62.7 seconds, with ninety percent of those users who looked at the terms and conditions spending less than two minutes on them); Jens Grossklags & Nathan Good, *Empirical Studies on Software Notices to Inform Policy Makers and Usability Designers*, <http://people.ischool.berkeley.edu/~jensg/research/paper/Grossklags07-USEC.pdf> (conducting a survey in which only 1.4% of users reported thoroughly reading end user license agreements).

<sup>19</sup> See, e.g., the Norwegian Consumer Council's comments on terms and conditions, <http://www.forbrukerradet.no/side/250000-words-of-app-terms-and-conditions/>.

Therefore, failure to protect fair use/fair dealing from contractual restriction could lead to massive waivers on the part of users most in need of protection, without their awareness of the size and scope of the rights they are relinquishing.

In addition to the exceptions already listed in Annex A, the OTW proposes a more general exception for the purposes of making a back-up copy. Currently it appears from Annex A that such an exception is allowed only in cases of computer software. However, many copyright-protected creations, not just software, are shared and stored digitally these days. In addition, many computer users now take the precaution of having automatic backups of their files made by an off-site storage service or to the cloud. If a user has a legitimate copy of a copyrighted work stored on their computer, they should be permitted to make back-up copies of that copyrighted work, without fear that a particular contract has restricted that right. The harm to copyright holders from being unable to prevent legitimate users from backing up their increasingly digital files would seem to be slim, and making this an exception that cannot be restricted by copyright would lead to comforting and transparent endorsement of the legitimacy of backing up one's computers. Where the use being made of the copyrighted work is non-infringing and excused, back-up copies of that work should be permitted. The same sound policy reasons that counsel allowing back-up copies of computer programs protected in software-specific situations also counsel extending that protection to all instances of digital copies of copyrighted works, not just software.<sup>20</sup>

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<sup>20</sup> See also the discussion in response to Question 16(b), which discusses more generally the allowance of circumvention of TPMs to enable non-infringing and excused uses, of which maintenance of a back-up copy can be one.

**Question 7(a):** 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 the fifth factor (e) should be removed from the “fair use” exception. The fifth factor states that courts must consider the “possibility of obtaining a work or adaptation within a reasonable time at an ordinary commercial price” in determining whether the fair dealing exception applies. This is problematic because the statute presumes that all uses consist of copying a creative work wholesale, without providing just remuneration to the rights holder. Such a presumption thus fails to take into consideration other transformative uses based on existing works, including criticisms, reviews, parodies, satires, and the growing remix culture. While these uses were always present in the creative environment, the digital age has made them especially salient and powerful.

Furthermore, this factor suggests that a use is not fair if licensing the existing work is a feasible option. Such a factor may inadvertently discourage fair use. Licensing is not an adequate substitute for fair use.<sup>21</sup> While a copyright holder may be willing to grant a license to sell copies for distribution at its ordinary commercial price, a copyright owner may be hesitant or unwilling to authorize a transformative work that would otherwise be considered a fair use in the absence of this factor. Licensing also grants the copyright owner censorship rights. As a result, a potential user may face difficulties obtaining a license for a work that is clearly fair use, or a user may end up with a license that limits the use of the existing work. Such a required consideration for fair use in such instances will ultimately chill the development of new works, and limits the

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<sup>21</sup> Comments of the Organization for Transformative Works to the South African Government, 5 (September 2015) [http://www.transformativeworks.org/wpcontent/uploads/old/OTW%20South%20Africa%20comment\\_0.pdf](http://www.transformativeworks.org/wpcontent/uploads/old/OTW%20South%20Africa%20comment_0.pdf) (“Licensing regimes often have gaps in works that are covered, potential licensors usually unresponsive to small creators, and includes censorious terms that suppress the most transformative and critical works. Furthermore, licensing regimes also tend to support anticompetitive market structures, to the detriment of free competition and consumer welfare.”) (footnote omitted).

scope of what constitutes fair use. Roya Ghafele and Benjamin Gilbert accurately reflect this concern by stating that the “erosion of fair use as a result of a growing clearing culture can tilt the balance between control and access to copyrighted works in favor of rightholders.”<sup>22</sup>

The fifth factor requires courts to consider whether a license may be obtained at a “reasonable time” without concretely defining the term. While it is clear that the language of the time period in the statute is meant to be flexible and expansive, it leaves room for ambiguity and confusion. The significance of time can vary greatly depending on the facts of the situation and the type of use. In particular, fair dealings involving news and current events are time-sensitive, and any delay, although short compared to other instances of fair dealings, may be detrimental.

As Singapore’s proposal states, the fifth factor will not be completely eliminated from a court’s fair dealing determinations. As the fair dealing test is non-exhaustive, courts may still consider the fifth factor on a case-by-case basis. The United States, which employs a four-factor fair use analysis similar to the first four factors of Singapore’s Copyright Act, have considered the fifth factor at times in its fair use analysis.<sup>23</sup> Furthermore, the fifth factor’s underlying concern that a use will increase circularity of the copyrighted work is already taken into account in the fourth factor, which considers whether a use will have a significant effect on the market of the copyrighted work.

**Question 7(b):** Are there any other changes to the “fair use” defense that can better fulfill the purposes of a balanced copyright regime?

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<sup>22</sup> Roya Ghafele & Benjamin Gilbert, *The economic value of fair use in copyright law. Counterfactual impact analysis of fair use policy on private copying technology and copyright markets in Singapore*, MPRA Paper 41664 University Library of Munich, Germany, 27 (Oct. 2012)., <http://www.mdpi.com/2075-471X/3/2/327/pdf>

<sup>23</sup> See Wendy J. Gordon, *Fair Use as Market Failure: A Structural and Economic Analysis of the “Betamax” Case and Its Predecessors*, 82 Columbia L. Rev. 1600, 1657 (1982).

A User-Generated Content exception is worth considering. Just as how the fifth factor was adopted in 2004 to take into account the times when “copyrighted works were largely distributed in a physical medium”, copyright reform should look forward to the changing technological landscape to ensure the protection of fair dealing of current user-generated content in digital media. As of 2016, 82% of Singaporeans are Internet users, and 64% of Singaporeans use social media regularly.<sup>24</sup> Internet users have moved to social media platforms to use, distribute, and consume creations and expand their innovative activities.<sup>25</sup> However, such uses may be chilled as a result of current copyright practices, including the “prepublication licensing of previews or other uses, coupled with automatic deletion of alleged copyright infringements from user-generated content sites such as Facebook or YouTube.”<sup>26</sup> To prevent the damage to such fair use and innovative activities, we should create specific carve-outs in the statute to prevent liability for such uses, so long as the use is non-commercial.<sup>27</sup>

Creating a formal safe harbor exception for such uses may be beneficial in providing clarity and expanding the scope of fair use to adapt to the changing times. In 2012, Canada

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<sup>24</sup> *Digital in 2016 - We Are Social Singapore*, WeAreSocial.com, <http://wearesocial.com/sg/special-reports/digital-2016>.

<sup>25</sup> For more information on such innovative activities, see Andrew W. Torrance & Eric A. von Hippel, *Protecting the Right to Innovate: Our ‘Innovation Wetlands’*, 2015 Michigan L. Rev. 793 (2013), (describing such innovative activities as a “great benefit to the individuals involved, and to national economies as well. Individuals create products and services they personally need, and also learn from and enjoy engaging in the innovation process. Also known as user, consumer, or citizen innovation, this phenomenon involves individuals who, either alone or collaborating with others, engage in noncommercial innovation to satisfy their own needs. The practice of innovation by individuals prominently involves factors important to “human flourishing,” such as exercise of competence, meaningful engagement, and self-expression.”) (footnote omitted).

<sup>26</sup> *See id.* at 18 (“Like a stream providing water to an ecological wetland that is dammed or diverted, access to the flow of digital resources that provides a feedstock to creativity within the innovation wetlands has been damaged by the DMCA legislation. ... [I]ndiscriminate application of intellectual property rights to the activities of individual innovators risks doing substantial harm to the innovation wetlands.”); Hannibal Travis, *Free Speech Institutions and Fair Use: A New Agenda for Copyright Reform*, 33 *Cardozo Arts & Ent. L. J.* 673, 676 (2015) (“Prepublication licensing of previews or other uses, coupled with automatic deletion of alleged copyright infringements from user-generated content sites such as Facebook or YouTube, may be inimical to free speech, innovation, and fair competition. Bloggers could be barred from quoting as few as five words of the news without a license.”)

<sup>27</sup> *See Torrance & von Hippel supra* note 16, at 84 (arguing for a copyright reform that “eliminate the high burden, and resulting chill, of detecting and avoiding potential patent and copyright infringements for innovating users.”)

enacted a statutory user-friendly exception for noncommercial user-generated content, colloquially known as the “YouTube” Exception, which protects users so long as they are making noncommercial transformative works.<sup>28</sup> Under this statute, users are permitted to create new works from existing ones and upload the new work on an Internet intermediary, so long as the work is for non-commercial purposes only. We suggest enacting an exemption similar to that of Canada’s recently adopted statutory safe harbor for non-commercial user-generated content. Such a statute would provide more clarity to user-generated content, and insulate those who are interested in creating expressive, non-commercial works that are likely to be highly beneficial to society but are vulnerable to suppression by copyright holders.<sup>29</sup> Uses that do not fall under the safe harbor exception should be considered under the enumerated fair use factors in Singapore’s Copyright Act.

**Question 8(a):** Which of the three options [for orphan works] do you view as most desirable and why? Please help to state whether you would potentially be a copyright owner or a copyright user in your response. Will the proposed options change how you currently deal with the issue of orphan works?

Initially, the OTW emphasizes that it works on behalf of creators, some of whom wish to deliberately “orphan” their works in order to preserve anonymity.<sup>30</sup> Moreover, fanworks may be particularly susceptible to orphaning because so many are written anonymously. Our response to these proposals thus comes from considering the interests of creators as well as audiences.

The OTW does not view any of these options as particularly desirable, though the first has the most potential. Fee-based systems have proven difficult at best to administer, and

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<sup>28</sup> Canada’s Copyright Modernisation Act 2012, S.C. 2012, c. 20 (Can.) (adding Non-commercial User-generated Content Section 29.21 to the Copyright Act).

<sup>29</sup> See David Tan, *Copyright for use: Are we ‘future-ready’?*, Straits Times (Singapore), Sept. 14, 2016, available at 2016 WLNR 27889409.

<sup>30</sup> See Archive of Our Own, *About Orphaning*, <https://archiveofourown.org/orphans/about>.

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generally represent substantial administrative cost for minimal payoff in terms of remuneration or control for creators, who by definition are unlikely to be found and compensated.

“Reasonable search” definitions for identifying orphan works are hotly contested and inject great uncertainty into the process. Fair use and fair dealing remain far better options.

From the perspective of the fans engaging with copyrighted works to create their own transformative noncommercial works, however, the first solution appears to be the best in that it does not impose a burden of a licence fee on the user in a situation where, by definition of an orphan work, no copyright holder exists to demand such a licence fee. Nor does it require the considerable extra burden of the government determining licence fees for every individual use of an orphan work.

Requiring the registration of the orphan work on an orphan works registry does place a burden on the user of the orphan work, above and beyond the reasonable search the user has conducted to determine that there is no accessible copyright holder. Especially where the use is noncommercial, the financial strain placed on users who would engage with orphan works should be considered, as well as the unlikelihood that users will actually be aware of the law. At a minimum, any registration requirement imposed on users should be limited to users who intend to commercialize the orphan work. Furthermore, failure to follow the orphan works procedures should not weigh against a fair use defense in any case where fair use would otherwise apply.

Relatedly, the OTW wishes to clarify that the “U.S. model” referred to in the first option is not actually what the U.S. does. The U.S. doesn’t have an orphan works regime, though it is possible that courts would limit remedies in appropriate circumstances. Instead, the U.S. have used the fair use doctrine highly successfully to protect uses that would otherwise fall under the

“orphan works” label. The OTW commends the report of the Library Copyright Alliance explaining in detail why librarians reject the U.S. Copyright Office’s proposal to change the law to create a special orphan works regime.<sup>31</sup> The costs are simply not worth the benefits.

Encouraging voluntary registration by copyright owners, by contrast, is well worth considering, as well as limitations on remedies where the user of a once-orphaned work engaged in reasonable search beforehand.<sup>32</sup>

**Question 8(c):** Should works with unreachable owners also benefit from any of the proposed three options? How long should the appropriate duration be, in order to consider the owner to be unreachable?

In many cases, an orphan work isn’t necessarily a work for which there is no known owner but a work for which the last known owner was either disbanded or deceased long ago. The burden should not be on the user of the orphan work, especially in the case of amateur users, to determine the difference between entities that no longer exist and entities that still exist but do not respond to inquiries. An owner should be considered unreachable, and a work therefore considered orphan, after a reasonable duration of time. Reasonableness should be determined on a case-by-case basis, taking into account the user’s level of knowledge as well as the purpose of the use itself. The reasonableness of a search to be conducted by a large commercial entity in

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<sup>31</sup> Response To The U.S. Copyright Office’s Notice of Inquiry on a Mass Digitization Pilot Program, <http://www.librarycopyrightalliance.org/storage/documents/massdigitizationfinal.pdf> (explaining concerns with existing licensing models, including limited scope, huge administrative costs, and other problems, in contrast with flexibility of fair use and industry best practices); Additional Comments of The Library Copyright Alliance to the Copyright Office’s Notice of Inquiry Concerning Orphan Works and Mass Digitization, [http://www.copyright.gov/orphan/comments/Docket2012\\_12/Library-Copyright-Alliance\(LCA\)-American-Library-Association\(ALA\)-Association-of-Research-Libraries\(ARL\)-Association-of-College-and-Research-Libraries\(ACRL\).pdf](http://www.copyright.gov/orphan/comments/Docket2012_12/Library-Copyright-Alliance(LCA)-American-Library-Association(ALA)-Association-of-Research-Libraries(ARL)-Association-of-College-and-Research-Libraries(ACRL).pdf) (explaining that there was general rejection of licensing schemes by all interested parties, and detailing librarians’ special concerns with U.S. proposal).

<sup>32</sup> See, e.g., Glushko Samuelson Intellectual Property Law Clinic Response To Notice of Inquiry on the Issue of “Orphan Works”, <http://copyright.gov/orphan/comments/OW0595-Glushko-Samuelson.pdf> (explaining the proposal in detail); Comments of Brigham Young University, <http://copyright.gov/orphan/comments/OW0548-BYU.pdf>.

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pursuit of a profitable enterprise should not be the same as a search to be conducted by an amateur user for the purpose of creating a noncommercial work.

If Singapore decides to establish a copyright registry, as set forth in Proposal 1, requiring record of dealings beyond the first owner can help to establish some guidelines in certain circumstances. A user could search the copyright registry for a work covered by the registry, and if the copyright holder listed there is inaccessible, the user can treat the work as orphaned. Requiring the copyright holder to register its interest on the copyright registry is a small step for the copyright holder. If the copyright holder's valuation of its copyright is so low that such a step is not deemed worthwhile, it makes little sense to continue to withhold the value of that copyright from the general public. Instead, that work should be treated as an orphan work.

**Question 10(c):** Do you agree that the threshold for copying by or on behalf of a non-profit educational institution should be aligned with the threshold for the purposes of research and study (i.e. changed to 10%)?

Research and study are distinct activities from educational materials for courses. Scholars come from great distances to research and study in archives, and as part of that, may copy materials for further use. As long as the uses remain private, no threshold should exist. The arbitrary 10% interferes with the goal and interest of research.

**Question 16(a):** Do you agree with the existing list of exceptions that allow for circumvention of TPMs listed in Part 1 of Annex B? Should they continue to be exceptions in the next EWO or are any of them irrelevant?

**Question 16(b):** Do you have any views/comments on the proposed exceptions that allow for circumvention of TPMs listed in Part 2 of Annex B?

The OTW strongly supports the continuation and expansion of exceptions allowing for circumvention of TPMs to enable noninfringing and excused uses. In particular, exceptions for educational and “derivative” uses of audio-visual works, 4(d) and 4(e), have proved extremely beneficial in the U.S., and should be expanded to explicitly cover all uses of short clips that would qualify as noninfringing. The U.S. has now granted similar exceptions three times, each time without opposition by copyright owners to renewal of the existing exemption (though each time they did oppose any extension). In the hotly contested U.S. exemption proceedings, copyright owners did not identify any increased infringement that resulted from the existence of the audio-visual clip exemptions. And proponents identified hundreds of thousands of new creative works that owe their existence to the ability to make remixes.

Indeed, our experience has shown that the process of creating new works, including by making use of clips from existing works, gives the creators respect for and understanding of the appropriate rights for all creators. Remix creators are *creators*, and this matters to them; they learn to draw boundaries and consider fair use rather than ignoring intellectual property law entirely.<sup>33</sup> This engagement, instead of alienation, is exactly the kind of reflective citizenship our law and culture should encourage. One fan, Anatsuno, told us that:

being part of communities reflecting upon creation and copyright, interrogating the ideas of community and ownership, of ethics and duty and culture and the passing of time, has also led me to learn more about law both national and international, to think about the fabric of the communities I belong to more deeply, and has overall made me a more engaged and more clear-headed citizen of the world.<sup>34</sup>

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<sup>33</sup> See Henry Jenkins et al., *Confronting the Challenges of Participatory Culture: Media Education for the 21st Century 10* (2006) (“[Y]oung people who create and circulate their own media [including remixes] are more likely to respect the intellectual property rights of others because they feel a greater stake in the cultural economy.”).

<sup>34</sup> OTW NTIA comments, *supra*, at 60.

Because the vast majority of people who make noncommercial remix video (“vidders”) are amateurs who engage in video creation as a hobby, they are unlikely to have access to copyright counsel to explain the subtleties of the law governing TPMs to them and are usually unaware of the counterintuitive nature of circumvention liability as applied to DVDs, Blu-Rays, and authorized digital downloads. The counterintuitive, paradoxical situation is this: When law separately protects copyrights and TPMs, a person who downloads an unauthorized copy of a work doesn’t infringe any right related to a TPM, and so may be better off than a person who buys a copy and then circumvents TPMs to make a short clip that doesn’t infringe copyright but does violate the law governing TPMs.

In the absence of an exemption, vidders—especially the tens of thousands of young people who are inventing and reinventing the form for themselves, without an established connection to a larger community—risked becoming liable or having their fair uses suppressed simply because they did what seemed like the fairest thing for the copyright owner and paid for a copy from which they could clip, rather than downloading an unauthorized copy without copy protection.<sup>35</sup> As a result, many vidders in the U.S. were unknowingly violating § 1201(a)(1) in the absence of an exemption. Indeed, the few remixers who did know about anti-circumvention laws were pushed into illegitimate markets.<sup>36</sup>

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<sup>35</sup> Rather than distinguishing methods of obtaining files, vidders use a much more intuitive and fair calculus: “[T]he big legal line many vidders draw [is] between ‘paying’ and ‘not paying’ for source footage.” Comments of the Electronic Frontier Foundation in RM 2011-07, Rulemaking on Exemptions from Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies, December 1, 2011, at 63, available at <http://www.copyright.gov/1201/2011/initial/eff.pdf> (citing Francesca Coppa).

<sup>36</sup> Interview with Jonathan McIntosh, Nov. 17, 2011 (“Before the exemptions many remixers would be afraid of making a fair use video commentary with DVD footage even if they owned the disc(s). Some remixers, including myself, would resort to using the bit torrent file sharing protocol to download DVDs ripped by others rather than decrypting the DVDs from our own home collections.”); Lucas Hilderbrand, *Inherent Vice: Bootleg Histories of Videotape and Copyright* 79 (2009) (“[W]hen people learn about the extent of the DMCA restrictions, they respond with shock and outrage, which tends to turn either to pessimism or to willful disregard for the law.”).

The United States' experience with anti-circumvention rules clearly show that they haven't prevented the widespread availability of circumvention technology. The U.S. Librarian of Congress has repeatedly determined that circumvention technology has remained readily accessible to anyone with an Internet connection.<sup>37</sup> The reason most people don't use circumvention technology on DVDs or Blu-Rays is that they don't need to: for pure consumption purposes, either illegal downloads or, increasingly, legitimate services are generally available. Ironically, anti-circumvention law thus weighs most heavily on remixers and others who need to do more than just consume, and who usually have legitimate fair use or educational needs to use short excerpts. Anti-circumvention law is an arrow that has fatally missed its mark. Exemptions recognizing the law's potential to suppress legitimate uses are fully justified.

**Question 16(c):** Are there any other copyrighted works or specific uses of copyrighted works, which you think should be exempted from the prohibition against circumvention of TPMs, which are not already listed in Annex B?

See above. The law should clarify that, like certain other user rights, the right to engage in circumvention for a permitted purpose should not be waivable by contract. This measure would ensure that users would not inadvertently surrender their legal rights, enabling their work to be suppressed even though its creation benefits both them and their audiences.

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<sup>37</sup> Recommendation of the Register of Copyrights, Section 1201 Rulemaking: Fifth Triennial Proceeding to Determine Exemptions to the Prohibition on Circumvention 135 (Oct. 12, 2012) [http://www.copyright.gov/1201/2012/Section\\_1201\\_Rulemaking\\_2012\\_Recommendation.pdf](http://www.copyright.gov/1201/2012/Section_1201_Rulemaking_2012_Recommendation.pdf) (noting wide availability of circumvention tools).