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Dear Ms Padayachi and Mr. Netshitenzhe,

We write in response to your request for public comments on South Africa's planned copyright legislation reform. We are copyright scholars and experts from around the world who are interested in South Africa's law reform process. Our interest arises both because of the leadership position of South Africa on the global stage and because we desire to be consumers of the products of culture and innovation that will be enabled by a properly balanced copyright system in your country. We write to urge South Africa to join and lead the emerging consensus among rapidly developing countries that inclusion of a generally applicable "flexible" copyright exception is a necessary component of modern copyright reform.

We first describe some of the key attributes of, and the global trend toward, flexible exceptions in copyright law. We then offer some suggestions for different ways to incorporate a flexible exception into South Africa's law. We also comment on the importance of safeguarding and expanding the current law's relatively flexible quotation right. We conclude by offering to meet with you later this year, including through the joint planning of a conference or workshop on copyright limitations and exceptions in comparative experience in August 2015.

A.

There is a clear modern trend toward incorporating within copyright legislation a flexible (or "general" or "open") exception that has two basic components: (1) it can be applied to any use not specifically enabled by enumerated limitations and exceptions, and (2) it is applied through a proportionality test that balances factors such as nature

and importance of the new use, the interests of the author or copyright holder, and the impacts on third parties and society at large.

Applying a flexible exception to all uses and purposes is necessary to ensure that today's copyright law is adaptable to tomorrow's technologies and practices. The problem, simply stated, is that - just as the last generation's copyright laws failed to anticipate new uses like Internet search or "mash ups" of content - we cannot today imagine the next technological or cultural revolution that may arise to make creativity more accessible to all. Generality of application is essential to a flexible clause, but it is not sufficient to achieve the policy aims copyright should promote.

The second part of a flexibility clause - explicitly stating factors to be balanced in an individual case - is necessary to ground the exception in copyright law's and society's values. A clear statement of proportionality factors produces an internal balance between the interests of copyright owners and those of innovators who build on existing knowledge and add new value to it. Such factors can also guide interpreters and users, contextualize the law within a corpus of comparative jurisprudence, and ensure compliance with international norms, such as the "three-step test." See Christophe Geiger, Daniel J. Gervais, & Martin Senftleben, *The Three-Step-Test Revisited: How to Use the Test's Flexibility in National Copyright Law*, 29 Am. U. Int'l L. Rev. 3 (2014), available at <http://digitalcommons.wcl.american.edu/cgi/viewcontent.cgi?article=1816&context=auilr>.

A flexible exception can promote South Africa's objectives in promoting educational, research, library and accessibility-promoting uses that are highlighted as key aims of the South African Intellectual Property Policy (14 September 2013). Flexible exceptions work together with specific use exceptions because they allow the law to adapt to new technologies or practices that were not anticipated at the time legislation was drafted. For similar reasons, adoption of a flexible exception that can be applied to making works accessible by people with disabilities, in addition to specific exemptions, is an important component of implementation of the MARRAKESH TREATY TO FACILITATE ACCESS TO PUBLISHED WORKS FOR PERSONS WHO ARE BLIND, VISUALLY IMPAIRED, OR OTHERWISE PRINT DISABLED.

The incorporation of both of these attributes of flexibility - an open clause and an explicit proportionality test - is the hallmark of the U.S. "fair use" clause, which reads:

[17 U.S.C. § 107](#)

Notwithstanding the provisions of sections [17 U.S.C. § 106](#) and [17 U.S.C. § 106A](#), the fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified by that section, for purposes such as criticism, comment, news

reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright. In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include:

- the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
- the nature of the copyrighted work;
- the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
- the effect of the use upon the potential market for or value of the copyrighted work.

The fact that a work is unpublished shall not itself bar a finding of fair use if such finding is made upon consideration of all the above factors.

The incorporation of this clause, first through case law and later through the 1976 revisions to the U.S. Copyright Act, has been credited with enabling high rates of innovation and cultural production in that country. Similar fair use style clauses with an open list and proportionality test have been adopted in other rapidly developing and high growth countries, including Singapore, Korea, the Philippines, Israel, Taiwan, and Malaysia. *See Appendix II: Examples of Flexible Limitations and Exceptions from Existing and Proposed Laws*, <http://infojustice.org/wp-content/uploads/2012/12/Appendix-II.pdf>. Just this year, after an extensive international consultation on copyright reform, the Australian Law Reform Commission recommended adoption of a fair use style provision with an open clause and a four-factor balancing test. *See The Case for Fair Use in Australia*, <http://www.alrc.gov.au/publications/4-case-fair-use-australia/alrc%E2%80%99s-proposals-reform>.¹

South Africa's law has not yet adopted a modern flexible exception of the kind we advocate. The South Africa Copyright Act contains a "fair dealing" exception in Article

¹ Expert reports in other national law reform processes have contained similar recommendations. *See, e.g.*, Copyright Review Committee (Ireland), *Copyright and Innovation: A Consultation Paper* (2012). In the United Kingdom, recent statutory reforms are moving in the same direction, *see Exceptions to Copyright*, <https://www.gov.uk/exceptions-to-copyright> (last updated Nov. 18, 2014), and expert reports have recommended even bolder steps, *see, e.g.*, Ian Hargreaves, *Digital Opportunity: A Review of Intellectual Property and Growth* (2011). A flexible exception with a somewhat different formulation is close to enactment in Brazil. *See Brazilian Copyright Reform Draft Bills Comparative Tables*, <http://infojustice.org/wp-content/uploads/2012/08/Brazilian-Copyright-Reform-Comparative-Table.pdf>. China is also moving forward with amendments that would add an opening clause to an expanded list of limitations and exceptions in its Act, albeit without express adoption of a balancing test to determine its application in specific cases. *See* Matthew Webb, *A Mixed Bag for Fair Use in China's Newest Copyright Law Draft* (Nov. 27, 2012), <http://infojustice.org/archives/28005>. In countries including Brazil, Canada, and the Netherlands, courts are taking a lead in interpreting limitations and exceptions broadly to apply to new uses and technologies not envisioned in the text of copyright laws.

12(1) that in practice could incorporate a proportionality test. The proportionality test is not, however, stated explicitly in the legislation, although we understand that some commentators advise the use of factors similar to those in the U.S. fair use law. In addition, the fair dealing clause does not apply to any use not specifically enumerated in the Act, but rather is limited in application to a closed list of specific purposes. We therefore urge that you consider in your planned reforms to the Act the inclusion of a modern flexible exception with an open clause and a defined proportionality test applicable to specific cases.

B.

There are a number of ways to incorporate a flexible exception into South Africa's Copyright Act.

One could follow the lead of Korea, Singapore and other countries and adopt the U.S. fair use right into local legislation as a stand alone right. Adopting a clause modeled on the U.S. fair use clause has distinct advantages. U.S. fair use has its origins in a legal culture that, like South Africa's, is strongly protective of freedom of expression values. Adopting fair use gives judges and other interpreters the benefits of a century and three-quarters of comparative jurisprudence from U.S. courts, and emerging comparative jurisprudence from courts and agencies in other jurisdictions. This jurisprudence can help individuals predict the outcome of specific cases – lending some certainty in practice – without determining those outcomes for South Africa's own law.

A second route toward a flexible exception could be to amend the Article 12(1) fair dealing exception. The Article could be redrafted to apply to all works and purposes and add an explicit proportionality test. In addition, the list of purposes subject to the clause could be broadened to include transformative uses of the kind found in the legislation of Finland, Serbia, Peru and Serbia. *See Masterlist: Excerpts of Representative Copyright Limitations and Exceptions* (Nov. 26, 2012), <http://infojustice.org/wp-content/uploads/2013/08/Masterlist-11262012.pdf>. Including both of these changes, the new fair dealing clause could read:

(1) Copyright shall not be infringed by any fair dealing with a ~~literary or musical~~ [any] work-

(a) for the purposes of research or private study by, or the personal or private use of, the person using the work;

(b) for the purposes of criticism or review of that work or of another work; or

(c) for the purpose of reporting current events- (i) in a newspaper, magazine or similar periodical; or (ii) by means of broadcasting or in a cinematograph film; [or]

[(d) for the purpose of transformation of the work, or elements of it, into a new and independent work for a different purpose and audience from the original; or

(e) for any other purpose.]

(2) In determining whether the use made of a work in any particular case is a fair dealing the factors to be considered shall include:

-the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;

-the nature of the copyrighted work;

-the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and

-the effect of the use upon the potential market for or value of the copyrighted work.

The fact that a work is unpublished shall not itself bar a finding of fair use if such finding is made upon consideration of all the above factors.

Finally, South Africa could adopt a unique home-grown flexible exception. To help countries formulate and consider unique flexible exceptions in local copyright reforms that benefit from the many years of scholarship and experience on the topic, the Global Expert Network on Copyright User Rights crafted a Model Flexible Copyright Exception through a broad team of international scholars, including scholars from South Africa. See <http://infojustice.org/flexible-use> (listing network members). This model is the full menu approach – combining a unique and flexible open clause and explicit proportionality factors with important other components such as analogous permitted purposes and instructions on interpreting the right. The full clause can be found at <http://infojustice.org/wp-content/uploads/2012/12/Model-Flexible-Copyright-Exception-Version-4.0.pdf>.

Any of these models would promote the kind of flexibility that we advocate. We would be happy to work with you further to select and implement the right model for you.

C.

In addition to whatever other steps it takes to implement a flexible exception into the South Africa Copyright Act, South Africa should safeguard and expand its existing relatively open quotation right, Article 12(3). Unlike some other quotation rights with

origins in British legal tradition, which often apply only to the criticism or review of the work quoted, South Africa's quotation right applies to any purpose. This is an attribute of the clause that should be safeguarded. Although the clause is laudable for its general openness to any purpose, it does not apply to quotations from all works. Article 12(3) was originally limited to quotation of a "literary or musical work." Later amendments to the Act added sections 16-18 permitting the fair quotation of cinematographic films, sound recordings and broadcasts. This definition still leaves out some kinds of works that could be subject to quotation, such as photographs, which are often quoted through screen captures in documentary films and other works. See Sean Flynn & Peter Jaszi, *Untold Stories in South Africa: Creative Consequences of the Rights Clearance Culture for Documentary Filmmakers* (2010), http://digitalcommons.wcl.american.edu/pijip_facsch/3/. To expand the flexibility of the quotation right, we urge that Article 12(3) be applied to all works, e.g., by including the following edits:

12(3) The copyright in a [work] ~~literary or musical work~~ which is lawfully available to the public shall not be infringed by any quotation therefrom, including any quotation from articles in newspapers or periodicals that are in the form of summaries of any such work: Provided that the quotation shall be compatible with fair practice, that the extent thereof shall not exceed the extent justified by the purpose and that the source shall be mentioned, as well as the name of the author if it appears on the work.

D.

We thank you for the opportunity to share our views on South Africa's legislation review at this exciting time. We hope we can be of further help as the process moves forward. You can find additional responses to frequently asked questions about flexible exceptions in *Appendix III: Responding to Frequently Asked Questions About Flexible Use Provisions*, <http://infojustice.org/wp-content/uploads/2012/12/Appendix-III.pdf>.

Two of the organizers of this letter – Peter Jaszi (pjaszi@wcl.american.edu) and Sean Flynn (sflynn@wcl.american.edu) - plan to be in South Africa in August 2015 and would appreciate the possibility to meet with you and perhaps plan a workshop with you on limitations and exceptions from comparative copyright experience. Please do contact us if that opportunity is of interest, and we will follow up with you in that regard.

Respectfully,

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