



UNIVERSITY OF CAPE TOWN
INTELLECTUAL PROPERTY UNIT



PROGRAM ON
INFORMATION JUSTICE AND
INTELLECTUAL PROPERTY



University of the Witwatersrand, Johannesburg
Scholarly Communications & Copyright Services Office

Honorable Joanmariae Louise Fubbs
Member of Parliament
Portfolio Committee on Trade and Industry
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Dear Ms Fubbs, MP:

We write to commend the Copyright Amendment Bill for its inclusion of a modernised general copyright exception, and for its many other provisions proposing model user rights. We write also, however, to urge Parliament to make small but important changes that will ensure that South Africa's copyright exceptions are sufficiently open to the purposes they serve so as to be fully compatible with the digital age and the businesses and creators that work within it.

Specifically, we urge two important changes in the bill:

1. Add the words "such as" to the introductory language in the new proposed general exception in Section 12 of the Act, so that it reads: "In addition to uses specifically authorised, a fair dealing or use with respect to a work or performance for purposes such as the following does not infringe copyright in that work: . . ." This change would follow the examples of the U.S., Israel, Korea and many other countries in enabling the general exception for fair uses to be potentially applicable to fair uses of copyrighted content for any

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purpose, including those future uses that cannot be foreseen by the legislature at present.

2. Delete the second comma in Section 12A(a), the addition of which makes the provision only applicable to “a summary of that work,” instead of to all quotations as the provision has historically operated.

We thank you for the opportunity to comment on the Bill and offer our assistance in holding workshops or otherwise assisting in the consideration of the Bill going forward.

I.

We commend the Department of Trade and Industry for its recognition that inclusion of a modernised general exception (or “user right”) is an important part of updating South Africa’s copyright law. The Bill as a whole would modernise many of the law’s specific user rights. The provisions on temporary copies for technological processes, for educational uses, for library and archive uses, and for uses to provide access to people with all disabilities are notable examples where the Bill follows – and indeed establishes – international best practice in the field.¹ We focus here on the general exception in Article 12, which provides a very useful means for authorising rights of users with respect to copyrighted materials that are not authorised by specific exceptions.² We request that the general exception be crafted to be open to application to any purpose, kind of work or type of user so that it can function as a catch-all provision for the use of works in ways that are fair to the author, regardless of whether their specific purpose is envisioned today.

A.

General exceptions, which enable courts to apply a single balancing test to authorise uses for multiple different purposes, are a historical and important aspect of copyright laws derived from the Commonwealth tradition. In UK law, and those of many countries that adopted the terms of its statute, the general exception authorises various types of “fair dealing.” In the US and some other countries, the general exception authorises various types of “fair use.” South Africa proposes to use the phrase “fair use” in new Section 12. But, at bottom, this distinction in terminology is without a difference. What is important functionally is that the general exception be applicable to any purpose. This is a feature of the U.S. fair use

¹ We note that the Bill also includes an exception for orphan works that we have previously criticised as being unduly burdensome. See Academic Comments: South African Copyright Amendment Bill, 2015, <http://infojustice.org/archives/35003>

² We have commented elsewhere that a properly constructed general exception could be used to implement reasonable policies and practices with respect to orphan works, negating the need to include a specific provision on that issue.

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right,³ as well as some modernized “fair dealing” rights, such as in Singapore.

The 2015 Amendment Bill contained an open general exception. By virtue of inclusion of the words “such as” before its list of enumerated purposes, the Bill would have permitted the general exception to potentially apply to a use for any purpose, as long as that use remains fair to the interests of authors.⁶ We request that this key feature of the general exception be retained in the final version of the legislation.

Specifically, we request the following change in the wording of Article 12 (new language underlined):

12 Fair Dealings and Uses (1)(a) In addition to uses specifically authorised, a fair dealing or use with respect to a work or performance for purposes such as the following does not infringe copyright in that work

B.

Having openness in the purposes of the general exception would enable the clause to be applied to purposes not specifically addressed in the general exception or elsewhere in the Act.

One reason to include an open exception is to allow the clause to be applied to specific fair uses of copyrighted materials that exist today but do not appear to be addressed anywhere in the act. These include:

³ See 17 USC 107 (emphasis added):

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:

1. the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
2. the nature of the copyrighted work;
3. the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
4. 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.

⁶ 12(A)(2) of the 2015 Bill stated: “Notwithstanding any provision of this Act, fair use of work for purposes **such as** criticism, comment, news reporting, judicial proceedings, professional advice, teaching which may include, making multiple copies for classroom use, scholarship or research is not an infringement of copyright.” (Emphasis added).

- **Internet indexing for search**, which literally makes copies of nearly all the content on the Internet into a database that is then searched by users.
- **Text and data mining**, and other computational (or “non-consumptive”) uses, which enable useful technologies like plagiarism detectors and machine learning necessary to operate language translation software.
- **Transformative works**, which alter works into new products of creativity to serve different audiences for different purposes, including mashups like the “7 Minute Sopranos” video⁸ or the historical collection of movie posters approved of as a fair use in the U.S. in *Bill Graham Archives v. Dorling Kindersley, Ltd.*, 448 F.3d 605 (2d Cir. 2006).

An open fair use provision would provide means for these and other purposes to justify themselves under Article 12, despite their not falling explicitly within the enumerated purposes mentioned there.

An open fair dealing or use clause could also provide a means for libraries and others to justify reasonable uses of orphan works, rather than through the burdensome provision of the proposed Bill.

Finally, an open fair dealing or use clause would provide the means for the law to protect uses for purposes that are as of yet unknown. This has been an extremely important role of the open fair use clause in the US. When the US fair use clause was drafted, no one envisioned – and therefore did not seek to protect – the many technological fair uses of protected works that we take for granted today. Some notable technologies that depend on an open fair use clause in the US include:

- **The video cassette recorder**, which was approved of by the Supreme Court in *Sony Corp. v. Universal Studios, Inc.*, 464 U.S. 417 (1984), relies on the existence of an exception for the private use of copyrighted materials for the purpose of time shifting. Australia only adopted such an exception in 2006, and South Africa is proposing to do so explicitly only now.
- **Use of thumbnail photographs in internet search**, approved of in the US in *Kelly v. Arriba Soft*, 77 F. Supp. 2d 1116 (C.D. Cal. 1999), is on uncertain footing in many countries that only allow quotation for restricted purposes, such as for criticism or review of a work. South Africa’s open quotation exception (it applies to a quotation for any purpose) could potentially be used to justify similar practices – but only if a thumbnail is considered an excerpt. Otherwise, there appears to be little in the Act or bill that justifies such a core use of the Internet.

⁸ See Virginia Heffernan, *Gotta Minute? So, There’s This Guy Tony ...*, New York Times (April 6, 2007) <http://www.nytimes.com/2007/04/06/arts/television/06sopr.html>

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- **Cloud storage** by remote digital video recorders were upheld in the US in *Cartoon Network, LP v. CSC Holdings, Inc.*, 536 F.3d 121 (2d Cir. 2008). This holding has been linked to billions of dollars of investment into the cloud storage industry in the US.⁹

This final point – that open exceptions allow for innovation – has been supported by numerous studies. Theoretical and empirical economic literature supports the conclusion that high technology, software and other industries that rely on copyright exceptions grow faster in countries with open copyright exceptions; that the traditional copyright dependent industries experience little resulting harm; and the benefits to technology growth from more open user rights systems outweigh any harm to copyright owners.¹⁰ Research, including in South Africa, has also canvassed how creators, such as documentary filmmakers, would benefit from an open general exception in South African law.¹¹

II.

In addition, we would note that the most recent 2017 version of the Copyright Amendment Bill contains an apparently minor change in punctuation – the addition of a comma after the phrase “, including a quotation from articles in a newspaper or periodical,” that curtails the openness of that exception in current South Africa copyright law. In the 1978 version of the exception, there was no second comma, and thus the phrase “that is in the form of a summary of that work” applied only to “a quotation from articles in a newspaper or periodical.” In the 2017 bill, a extra comma is inserted with the result that it appears that the only quotation prevented under the Act are those that are “in the form of a summary”:

(a) Any quotation, including a quotation from articles in a newspaper or periodical, that is in the form of a summary of that work: Provided that the quotation shall be compatible with fair use in that the extent thereof shall not exceed the extent reasonably

⁹ See Josh Lerner and Greg Rafert, *Lost in the Clouds: The Impact of Changing Property Rights on Investment in Cloud Computing Ventures*, http://www.hbs.edu/faculty/Publication%20Files/15-082_ce76cd68-19d3-4328-9df0-fb74913cd5db.pdf

¹⁰ See Thomas Rogers & Andrew Szamosszegi, CCIA, *Fair Use in the U.S. Economy: Economic Contribution of Industries Relying on Fair Use*, 2010, at 8-9; Palmedo 2015 (finding “that adoption of fair use clauses modeled on U.S. law is associated with positive outcomes for the firms in our dataset, both those that may be more dependent on copyright exceptions, and those that may be more dependent on copyright protection.”); Roya Ghafele & Benjamin Gibert, *The Economic Value of Fair Use in Copyright Law: Counterfactual Impact of Analysis of Fair Use Policy on Private Copying Technology and Copyright Markets in Singapore* (2012).

¹¹ See Sean Flynn, Copyright Legal and Practical Reform for the South African Film Industry, <http://infojustice.org/archives/35712> (summarizing research with South African filmmakers since 2008 to document influences of copyright protections and exceptions on the production of documentary films).

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justified by the purpose: Provided further that, to the extent that it is practicable, the source and the name of the author, if it appears on or in the work, shall be mentioned in the quotation;

The addition of the highlighted comma in the first line, between “periodical” and “that,” has the effect of limiting the application of right fair quotation to summaries of copyrighted works, regardless of the format or medium in which they appear. This is because that clause “that is in the form of a summary of that work” now would modify the works “Any quotation,” rather than serving to describe of a particular kind of qualifying quotation. This would represent a significant step backwards in terms of openness, rendering the quotation right unavailable to most scholars, teachers, students, journalists, artists, and others, who quote for purposes other than summarization. Happily, if this is an inadvertent change, it is easily corrected by eliminating this new and unnecessary punctuation.

III.

We would like to conclude by offering our assistance in organizing workshops or otherwise assisting the technical consideration of the Bill. We are members of the Global Expert Network on Copyright User Rights, an international network of public interest scholars and experts who provide technical assistance in processes such as this.¹² Through this network, we have hosted workshops in South Africa on the utility of copyright user rights to promote social and economic objectives.¹³ We are very willing to make ourselves available to host workshops, provide answers to questions and otherwise assist your deliberations.

If we can be of further assistance, including to help host a seminar on copyright reform and the public interest for your Committee’s members or staff, please to hesitate to contact us through Tobias Schonwetter at the University of Cape Town, tobias.schonwetter@uct.ac.za, and Sean Flynn at American University, sflynn@wcl.american.edu.

Signed,

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¹² See <http://infojustice.org/flexible-use>

¹³ See South Africa Workshops on Copyright Reform, <http://infojustice.org/archives/37420>

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