

SUBMISSION OF PROFESSOR PETER JASZI
TO THE
PORTFOLIO COMMITTEE ON TRADE AND INDUSTRY
REGARDING
THE COPYRIGHT AMENDMENT BILL (B13-2017)

July 7, 2017

Honorable Joanmariae Louise Fubbs
Member of Parliament
Portfolio Committee on Trade and Industry
Attention: Mr. A Hermans, ahermans@parliament.gov.za

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My name is Peter Jaszi, and I am an *emeritus* Professor of Law at the American University Law School in Washington, D.C. Over my 45-year career, I've taught copyright law to hundreds of students, assisted dozens of creative artists with legal issues, and written many articles and books, including *Reclaiming Fair Use* (with Patricia Auderheide, Univ. of Chicago Press 2011, 2d edition forthcoming 2018). I specialize in copyright law, and for the last 15 years I've been working with various creative communities in the United States to assure that they are able to make full use of their rights under the so-called "fair use" doctrine, and I've observed first-hand the way in which artists' ability to rely on fair use correlates positively with the overall quality and interest of their work. I have traveled frequently to South Africa, and am an admirer of (though certainly not an expert in) South Africa art in many different media and genres. In 2009, after a series of intensive conversations with South African filmmakers, I collaborated on a report discussing copyright exceptions as they relate to creativity: "[Untold Stories in South Africa: Creative Consequences of the Rights-Clearing Culture for Documentary Filmmakers.](#)" I submit this comment in my personal capacity, and of a strong conviction that copyright reform in South Africa can and should do more to in its copyright reforms to accommodate the needs of the country's active and accomplished creative communities.

The purpose of copyright is to encourage and reward creative work. As the Preamble to the proposed new Bill 13-2017 (Copyright) acknowledges, this goal can be achieved best through balanced legislation. On the one hand, the Bill aims "to provide for the protection of copyright in artistic work" and, on the other "to allow fair use of copyright work." However, the approach actually taken in that Bill to specify limitations and exceptions does not serve South Africa's artists, musicians, filmmakers, and writers well. It is an obvious proposition that new art, in any medium, must draw selectively on existing culture. This was true since the rock art of the first humans, and it continued to be so as the great classical civilizations of Africa and Europe flourished. And it remains the case today. In order to do their work, and thus to contribute to society, creative artists need not only protection but also freedom – in particular, the freedom to access the culture of the past, wherever it is found, and to make reasonable new uses of that legacy.

In a time when the duration of copyright in even the most ephemeral of works is measured in generations, copyright laws must incorporate balanced limitations and exceptions in order to assure such access. But Bill 13-2017 fails to strike an appropriate balance between protection and creative freedom. Specifically, the proposed new "fair use" provision of Sec. 12 actually makes no clear allowance for the needs of artists. It acknowledges the importance of education, scholarship, criticism, journalism, and accessibility, but it is silent where the needs of working artists are concerned – unless they can claim that their work falls within the categories "comment, illustration, parody, satire, caricature or pastiche" – which is the Bill's proposed formulation of new Sec. 12(a)(1)(v). Why, however, should such legislation take the risk of forcing artists to thread their diverse works and practices through a statutory loophole of narrow, uncertain contours? A different approach to drafting is required so that future South African artists can predict the legal consequences of their creative practices with a reasonable level of

confidence. Of equal concern is the fact that the Bill proposes to gut the existing “quotation right” as it now exists in Sec. 12(3) of the 1978 Copyright Act, making a section that might once have supported various artistic practices effectively useless to the creative community.

The former statutory language relating to the quotation right should be restored in the final legislation. And it is even more vital for South African artists of all kinds that any revision of Sec. 12 contains a true open and flexible fair use clause, so that its balancing test for determining fairness can be applied to all forms of creative expression. Under such a clause, not all artistic uses of copyrighted content would be deemed fair, but many would. Successful art, by definition, uses whatever material it borrows for a “transformative” purpose, conveying new meanings to new audiences.¹ Meaningful fair use flexibilities must enable creators to discover ideas, tinker and transform, to explore both existing genres and new artistic forms, and to share the results and to share the results with other creators and with the larger public.²

Freedom of expression is one of the pillars of the South African constitution. As we all recognize, however, free expression comes in many forms – political speech and journalistic commentary, to be sure, also through art, music, dance, film, and other modes.³ A true fair use provision, which would apply alike to all forms of expression, is the best – and perhaps the only true – means by which to honor the value of free speech in the context of copyright legislation honors and safeguard the fundamental rights that all citizens – including artists – enjoy. In another jurisdiction with strong commitments to both strong copyright and free expression, the United States, has reasoned that without such a provision, the entire apparatus of copyright law would risk being considered an unconstitutional restraint on speech.

In the paragraphs that follow, a few examples of the kind of creative freedom that a true fair use provision would introduce into South African law will be provided. First, however, a few threshold questions deserve consideration. One is whether, if contemporary artists want and need to build on the work of others, they shouldn’t be required to pay for the privilege of doing so? In other words, wouldn’t a licensing solution provide artists with the freedom they require while giving rightsholders an additional licensing income? Three propositions suggest why the answer to these questions should be “No”:

¹ See Neil Netanel, *Making Sense of Fair Use*, 15 Lewis & Clark Law Review 715 (2011), available at <https://law.lclark.edu/live/files/9132-lcb153netanelpdf>, for a discussion of how the concept of “transformativeness” operates in United States fair use doctrine. By definition, a use made for a transformative purpose cannot result in a market substitute for the copyrighted work in question. See also *Authors’ Guild v. HathiTrust*, 755 F.3d 87 (2d. Cir. 2017).

² See *The Scope of Fair Use: Hearing on H.R. 113-82 Before the Subcomm. On Courts, Intellectual Prop., and the Internet of the H.Comm. on the Judiciary*, 113th Cong. 30-31 (2014), <https://judiciary.house.gov/wp-content/uploads/2016/02/113-82-86454-.pdf> (best-selling fantasy author Naomi Novik describes the role that imitation the works of others played in her becoming a highly successful writer); and Organization for Transformative Works, Comment Letter on Fair Use Flexibilities for Noncommercial Remix Communities (Sept. 24, 2015), <http://www.transformativeworks.org/wp-content/uploads/old/OTW%20South%20Africa%20comment.pdf> (South African fan fiction writer Camila Christie describes the personal and political significance of fan culture).

³ S. Afr. Const., 1996, ch. 2, sec. 16 (amended 2012), <http://www.wipo.int/wipolex/en/details.jsp?id=13750> (stating that everyone has the right to freedom of expression, which includes artistic creativity).

- (a) As already indicated, creative freedom is not a “privilege” but a right. As a matter of principle, it is inappropriate to tax citizens, be they political speakers or creative artists, for exercising the speech right that the Constitution and laws of South Africa guarantee. It is no more sensible to require artists to obtain licenses in order to make limited use of preexisting work in their own than to insist, for example, that critics should pay before publishing reviews of new books or movies;
- (b) Creators who have offered their work to the world and derived financial and reputational benefits as a result should not be in a position to dictate the terms on which the creative practice of others will take place. The power to license is, of course, the power to censor, and given that authority some rightsholders would exercise it to suppress rather than to encourage new creativity; and
- (c) Given the spontaneous nature of the creative process, there is no practical system of licensing copyrighted works for the kinds of limited artistic reuses that this comment argues should properly fall under fair use. In the absence of such a “market-clearing” mechanism, a licensing requirement would effectively hamstring today’s creators rather than enable them.

A second threshold question is this: Wouldn’t a true fair use provision that applied to art-making encourage creative laziness and motivate new artists to behave parasitically or take more than was appropriate from preexisting sources? Again, there are both theoretical and practical reasons why this would not be the case:

- (a) A fair use standard involves balancing the interests of the rightsholders and the user, so by definition, simple “ripoffs” of existing works would not qualify. Fair use requires the user to have a new “transformative” purpose – his or her own message, in other words, and doesn’t apply where the new would simply substitute for the existing one. Moreover, fair use only applies when the amount of source material the new user is reasonable and appropriate – wholesale copying for the sake of copying would never be permitted; and
- (b) Even more fundamentally, the motivation of a true artist is to make material their own, rather than to simply recycle the work of others on a wholesale basis. Thus, the very nature of the creative process guarantees that the real beneficiaries of a move to extend fair use to artistic practice would not generally abuse the expressive rights conferred upon them by law.

What, then, are areas of creative practice in which fair use will encourage the flourishing of the arts, conferring benefits on all and costs on none? Here are a few examples:

- **The visual arts** (including painting, sculpture, prints, photography, time-based media, and more) rely, in various ways, on artists’ ability to incorporate reasonable amounts of

preexisting work into their own productions. Thus, for example, the work of the South African artist William Kentridge⁴ involves the use of pastiche, in which (for example) new figures are rendered against backgrounds made up of found materials (book pages, magazine photographs, etc.); like his American counterpart Robert Rauschenberg, Kentridge often proceeds by pasting-up, or juxtaposing dissimilar images, and pointing up the relationship between the made environment and original individual creativity. Such evocative uses are neither “comment” nor “illustration” in any conventional sense of those terms. Only in a legal environment characterized by open, flexible exceptions to copyright law can such graphic art flourish.⁵

- **Non-fiction filmmaking** likewise requires copyright flexibilities to thrive.⁶ South Africa is a country rich in stories, both political and personal, and reality-based cinema is an area in which South African artists have distinguished themselves. Self-evidently, making documentaries concerned with contemporary social issues or recent history requires quotation of excerpts from a variety of copyrighted media, including newsreel footage, television coverage, and newspaper text and photographs, to name a few common sources. In the past, important South African documentaries have been lost to the public as the result of copyright dispute that would not exist if the law provided adequate exceptions.⁷ Nor does the proposed Bill correct the situation. Some documentary uses – though by no means all – may constitute “reporting of current

⁴ Examples of such works by Kentridge include “Office Love,” “Second-Hand Reading,” and “The Nose” <http://www.philamuseum.org/collections/permanent/298777.html?mulR=2073259552%7C1> (Office Love); <https://www.youtube.com/watch?v=IEfUjg5viGk> (Second Hand Reading); <https://www.youtube.com/watch?v=63nfCe6RZ-g> (The Nose). Other South African artists like Candice Breitz (in, for example, “The Character,” “Him + Her,” and “Becoming Reese” (moving image installations that draw on pop culture) rely on the incorporation of preexisting art to create new works. (<http://www.goodman-gallery.com/artists/candicebreitz> ; <http://www.maxhetzler.com/exhibitions/candice-breitz-becoming-film-installation-2003/works/>). Even a controversial case like the music group Die Antwoord’s appropriation of elements from Jane Alexander’s “Butcher Boys” sculpture in a promotional video is more properly discussed in terms of its arguably obnoxious political/ideological significance than as a matter of copyright law. As the artist herself put in in 2012, “Ms. Alexander does not intend to limit her work's interpretation, and she does not seek to interfere with other artists' work.” See Wikipedia, the Free Encyclopedia, *The Butcher Boys*, https://en.wikipedia.org/wiki/The_Butcher_Boys.

⁵ The reference to “pastiche” in proposed new Sec. 12(a)(1)(vii) may not extend to this kind of artistic practice, since that term conventionally refers to generalized stylistic imitation, rather than to the incorporation of elements drawn from specific preexisting works.

⁶ See Sean Flynn & Peter Jaszi, *Untold Stories in South Africa: Creative Consequences of the Rights Clearance Culture for Documentary Filmmakers*, 14-15 (Washington College of Law Research Paper No. 23, 2010), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1654025 .

⁷ A notable example is Francois Verster’s Emmy-winning 2002 documentary “A Lion’s Trail,” which explored the complex history of Solomon Linde’s song “Mbube” and the various unauthorized adaptations of it that enjoyed commercial success in the United States. See <https://itvs.org/films/lions-trail> and the film trailer available at <https://www.youtube.com/watch?v=IGZB7s5qLg8> . Ironically, the film is now unavailable because of copyright disputes around the song. See <http://www.pbs.org/independentlens/lionstrail/video.html> (“Due to the legal issues central to the film itself, copies of A LION’S TRAIL are not available....”)

events,” provided for in proposed Sec. 12(a)(1)(iii), while others could qualify as “comment [or] illustration” under (a)(1)(v); from the filmmakers’ perspective, much will depend on whether these undefined terms are read narrowly or broadly.⁸ Among the kinds of documentaries at special risk are “memory” films South African films such as Yunus Valley’s 2007 “The Glow of White Women,” which employs a wide variety of media artifacts to drive (though perhaps not strictly to “illustrate”) a controversial personal meditation on racial stereotyping.⁹ It may be significant to note that this important non-fiction film genre has flourished in the United States, where artistic latitude under the doctrine fair use is fully recognized; examples include the films of Ross McElwee and the recent meditation on the life and art of James Baldwin, “I Am Not Your Negro,” made by Haitian-American filmmaker Raoul Peck.¹⁰

- **Dance** is widely known as an art form that draws on the works of others for inspiration. However, these artists currently receive little to no protection. Fair use flexibility is necessary for these artists to mirror and reflect on political, societal, and cultural matters through movement to tell stories, extract or express emotions, promote social interactions, and more. Choreographic innovators like PJ Sabbagha, who creates HIV and AIDS focused art¹¹; Dada Masilo, who unconventionally fuses ballet classics with contemporary dance to create artistry that defies gender stereotypes¹²; and Sibonakaliso Nduba¹³, who combines traditional African dance with contemporary styles, will flourish only under a copyright system that provides artists with adequate flexibilities. As a non-linear performance medium, dance communicates with audiences are difficult or impossible to classify as “comment” or “illustration.” But its practitioners are no less deserving of legal support and encouragement for that reason.
- **Poetry** is a famously original – and also a famously derivative – artistic medium. In fact, the practice of poetry is enriched and permeated by sharing. It expresses feelings and ideas through distinctive styles and rhythms that come from quoting, copying, or playing with others words. The poets of every place and age have mined the writings of authors who preceded them for material, endowing the words of others with new meaning by changing their context. Shakespeare “borrowed” lines, scenes, and characters from other writers living and dead, revolutionizing English drama in the process. The ability of

⁸ By contrast, in the United States, clarification of the fair use rights of documentary filmmakers has led to an upsurge in their creativity and with it the social benefit that their work confers on the public. Thus, for example, the implementation of the 2007 Documentary Filmmakers Statement of Best Practices, detailing four classes of situations (social, political or cultural critique, illustrative quoting, incidental inclusion, and inclusion of other unavailable archival material) where fair use is likely to apply has reduced barriers to creativity in the field. See Documentary Filmmakers’ Statement of Best Practices in Fair Use (2005), <http://cmsimpact.org/wp-content/uploads/2016/01/Documentary-Filmmakers.pdf>.

⁹ See discussion at <http://www.indianfilmfestival.org/the-glow-of-white-women/>.

¹⁰ See https://en.wikipedia.org/wiki/I_Am_Not_Your_Negro and <http://www.imdb.com/title/tt5804038/>.

¹¹ See references to Sabbagha’s “Deep Night,” a performance that portrays the harsh realities of a young teenager living with the disease, at https://www.numeridance.tv/en/video/1778_deep-night.

¹² See references to Masilo’s choreography at <http://www.cnn.com/2010/WORLD/africa/11/02/south.africa.dada.masilo/index.html>.

¹³ See references to Nduba’s choreography at <http://www.israel-opera.co.il/eng/?CategoryID=263&ArticleID=1125> and https://www.youtube.com/watch?v=1EwP8iuqd_o.

poets (and other writers) to use canonical literature in new ways is particularly significant in post-Colonial literature. Thus, another case study of the poetic tension between influence and originality is found in the literary career of Dr. Benedict Vilakazi (1906-1947), one of the founders of modern South African poetry, whose work blended European models and Zulu tradition. Contemporaries like Mzwakhe Mbuli, the poet and [Mbaqanga](#) singer, continue to draw on traditional language and forms when creating their poems, while others quote from more current material. Simply put, imitation is an essential and inevitable part of poetic practice.¹⁴ In turn, poetry is itself subject to transformative fair use when quoted in another literary media. The use of poetic epigraphs to introduce chapters is a feature of literary fiction from Sir Walter Scott to Stephen King. Do such literary practices of quotation constitute “comment” or “illustration”? Again the argument is difficult enough, and the result sufficiently unpredictable, so that it would better if the legal fate of South African artists did not depend on the answer.

- So-called “**user-generated content**,” remix culture, and fan art, artistic forms characteristic of the digital age, are in need of flexible copyright exceptions. The internet is where a whole new group of creators tell their stories, share their opinions and motivations, and respond and comment on the world around them. Typically, these new forms of creativity quote from sound recordings, artwork, books, videos, and photographs, responding to existing culture and transform it by adding, removing or changing the piece to create something new. They take specific inspiration from existing culture, but do not “comment” on it as such. Consider, for example, such YouTube tribute videos as “Number 9 – Joost van der Westhuizen” (a compilation highlighting a Springbok player’s career, made for the transformative purpose of raising public awareness about ALS), and “Mr. No 9-Sumi” (a song celebrating his accomplishments, accompanied by various video clips).¹⁵ If sufficient flexibility is present in copyright exceptions, citizen-remixers are able to participate and create in making new culture. However, the current draft does not include any exceptions clearly applicable to such transformative works.

In short, the current draft, which does not include an open fair use provision, fails to meet the present and future needs of the country’s artists, who require an approach that balances strong protection with robust exceptions for new creative work. Under the version of flexibilities proposed in the Bill 13-2017 (Copyright), there is a real risk that South African culture-makers will enjoy less freedom to create at a time when in fact, they need more.

Fortunately, there is a simple and straightforward solution. The Parliament could – and should – modify the Bill’s Sec. 10 so that the Sec. 12(1) of the amended Copyright Act would read as follows:

¹⁴ See Code of Best Practices in Fair Use for Poetry (2011), http://cmsimpact.org/wp-content/uploads/2016/01/fairusepoetrybooklet_singlepg_3.pdf.

¹⁵ See <https://www.youtube.com/watch?v=dzHdCROw9Vs> and <https://www.youtube.com/watch?v=kd3XdVyciik>, respectively.

“a) In addition to uses specifically authorised, fair use in respect of a work or the performance of that work, for ~~the following~~ purposes such as the following, does not infringe copyright in that work.”

This change would assure that any doubts about what kinds of artistic practices were potentially covered by fair use would be resolved in favor of inclusion rather than exclusion. This would not, of course, guarantee that all such uses would actually be considered fair and non-infringing. That would depend, as always, on the application of the statutory balancing test. It would, however, make clear that all kinds of creative expression would be eligible for consideration. The Parliament also should restore the text of the quotation right (which would be found at Sec. 12(3) of the revised Act) to its present form, by eliminating the comma that has been inserted in the Bill, as follows: “Any quotation, including a quotation from articles in a newspaper or periodical, that is in the form of a summary of that work. . . .” By means of these two simple changes, the copyright conditions that will enable the flourishing of the arts in South Africa for decades to come can be assured.