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ANALYSIS OF WOODS AND MYBURGH COMMENTS ON CAB

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¹ Jonathan Band is a copyright lawyer in Washington, D.C. The opinions expressed in this paper are his own and should not be attributed to any of his clients.

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INTRODUCTION

On June 16, 2020, President Ramaphosa of the South African Republic referred the Copyright Amendment Bill (“CAB”) back to the National Assembly on the grounds that he had reservations concerning its constitutionality. In his referral letter, President Ramaphosa stated that the CAB may be in conflict with international intellectual property (IP) treaties South Africa had joined or was planning to join. CAB opponents’ arguments that the CAB is incompatible with IP treaties are based largely on comments prepared by Michele Woods, Director of the Copyright Law Division of the World Intellectual Property Organization, in 2018. Woods prepared these comments as a member of a panel of experts appointed by the Portfolio Committee of the South African Parliament to review the CAB. Woods stated that the comments reflected her views and are not official WIPO interpretations of international treaty obligations.

Additionally, CAB opponents cite comments prepared by Andre Myburgh, a South African attorney, for the Portfolio committee, which likewise argue that the CAB is incompatible with IP treaties.

A close examination of the Woods and Myburgh comments reveal that they failed to prove their contentions that the CAB’s provisions are inconsistent with IP treaties. Moreover, the comments are inconsistent with

one another on critical points, such as fair use.

I. DISTRIBUTION, RENTAL, AND MAKING AVAILABLE

Woods claims that the CAB does not provide an exclusive right of distribution nor a software rental right as required by the WIPO Copyright Treaty (“WCT”). Woods evidently overlooked section 23(2)(c) of the underlying Copyright Act of 1978, which provides that “copyright shall be infringed by any person who, without license of the owner of the copyright and at a time when copyright subsists in a work...distributes in the Republic any article for the purposes of trade, or for any other purpose, to such an extent that the owner of the copyright in question is prejudicially affected.” Similarly, section 23(2)(b) of the 1978 Act specifies that copyright shall be infringed by a person who “sells, lets, or by way of trade offers or exposes for sale or hire in the Republic any article....”

Myburgh asserts that the CAB repeals section 23(2)(b) of the 1978 Act, but it does nothing of the sort. It appears that he misread clause 26 of the CAB to have that effect. Even if the CAB did repeal section 23(2)(b), which it did not, the CAB unquestionably left intact section 23(2)(c), which establishes a distribution right.

Myburgh asserts that the CAB fails to provide exclusive rights of communication to the public and making available with respect to software. But section 11B of the 1978 provides the owners of a copyright in software the exclusive right to reproduce, publish, perform, broadcast, cause the software to be transmitted in a diffusion service, or lend the software. Further, as noted above, section 23(2)(b) of the 1978 provides an exclusive right to sell a copyrighted work, and section 23(2)(c) provides an exclusive right to a copyrighted work. In short, South African copyright law already provides software with the full panoply of rights required by the WCT.

Myburgh also asserts that the CAB is in conflict with Article 14 of the WIPO Performances and Phonograms Treaty (“WPPT”) because the making available right for sound recordings in section 9A(1)(a)(iv) is a “remuneration right” rather than an “exclusive right.” But Article 15 of WPPT allows a country to establish a right to remuneration for communications to the public, and Article 8 of the WCT makes clear that the making available right is a subset of the communication to the public right. Hence, countries are permitted consistent with WPPT to allow the making available of a sound recording subject to remuneration. More generally, the Berne Convention permits compulsory licenses for broadcasts and communications to the public.² Further, Article 13(1) of the Berne Conventions authorizes equitable remuneration for musical works.

² See Article 11bis(2).

II. EXCEPTIONS

Before proceeding to the issues raised by Woods and Myburgh concerning the exceptions in the CAB, it must be noted that Woods did not raise any objections to the CAB's adoption of a flexible fair use test based on the fair use right found in the U.S. Copyright Act. Nor did she criticize the CAB's "hybrid" approach of combining a flexible fair use provision with specific exceptions. Fair use, however, has been the most controversial aspect of the CAB, and the focus of much the opposition to its enactment. CAB opponents routinely contend that fair use is inconsistent with South Africa's treaty obligations. Yet, Woods sees no treaty problems created by the fair use provision, nor the hybrid approach of which it is a part.

In contrast, Myburgh dwells on the incompatibility of fair use and the CAB's hybrid approach with IP treaties. On this point, Woods is right and Myburgh is wrong. If a hybrid of a flexible fair use provision and specific exceptions were incompatible with IP treaties, then leading IP producers such as the United States, Canada, Singapore, Korea, and Israel would all violate their treaty obligations. Every country that has adopted a flexible fair use provision also has enacted a list of specific exceptions.³ The legislatures in all these jurisdictions have identified certain uses that always can be made, while providing courts with the flexibility to allow other uses if warranted under the circumstances. None of these countries' hybrid structure has been challenged before the WTO.

A. *Quotation and Illustration*

In connection to the quotation right in section 12B(1)(a), Woods indicates that the phrase "compatible with fair practice" is "an additional condition required by Art. 10(1) of the Berne Convention." Similarly, in connection to illustration for the purpose of teaching in section 12B(1)(b), Woods indicates that the phrase "compatible with fair practice" is "an additional condition required by Art. 10(2) of the Berne Convention." Contrary to Woods' suggestion, the Berne Convention does not require explicit inclusion of the concept "compatible with fair practice" in national legislation. Rather, the phrase serves as a standard by which to evaluate whether the exceptions for quotations and illustrations in teaching are being applied fairly, or are being applied so broadly that they swallow the author's exclusive rights. Many countries exceptions for quotations and illustration for teaching rights do not include reference to "compatible with fair practice."⁴

³ In addition to those listed above, Liberia, Hong Kong, Taiwan, Malaysia, and the Philippines.

⁴ Myburgh suggests that the quotation right in CAB section 12B(1)(a) is incompatible with the three-step test, discussed in the next section. However, under the Berne Convention, the Article 10(1) quotation right is a mandatory exception that is not subject to the three-step test. The incarnation of the three-step test in the TRIPS agreement arguably applies to quotations, although it could be argued that at least short quotations did not fall within the

B. *Three-Step Test*

Woods and Myburgh suggest that several of the exceptions contained in the CAB do not comply with the “three-step test” set forth in the Berne Convention and other international agreements. The three-step test, first included in the 1967 revision of the Berne Convention, provides that “it shall be a matter for legislation in the countries of the Union to permit the reproduction of such works in certain special cases, provided that such reproduction does not conflict with a normal exploitation of the work and does not unreasonably prejudice the legitimate interests of the author.” The vague standards of the three-step test have been the source of much controversy and debate in academic circles, but have been applied by an international tribunal only once. Accordingly, there is little concrete guidance concerning the meaning of the three-step test and how it should be applied. As a result, the three-step test often is used in a conclusory manner to oppose the adoption of an exception. After all, virtually any exception could be described as conflicting with the normal exploitation of a work and as prejudicing the legitimate interests of the author. Unfortunately, Woods’ and Myburgh’s discussions of the exceptions for educational institutions and libraries adopt this conclusory approach.

Additionally, their terse pronouncements concerning these exceptions fail to consider the interests of other stakeholders. Such a consideration of the interests of other stakeholders is supported by a declaration of IP scholars convened by the Max Planck Institute on a “Balanced Interpretation of the Three-Step Test in Copyright Law.”⁵ The Declaration states that the three-step test

should be interpreted in a manner that respects the legitimate interests of third parties, including

- interests deriving from human rights and fundamental freedoms;
- interests in competition, notably on secondary markets; and
- other public interests, notably in scientific progress and cultural, social, or economic development.

Further, the Declaration states “limitations and exceptions do not conflict with a normal exploitation of protected subject matter, if they...are based on important competing considerations....”

scope of exclusive rights in the first place, just as the distribution right with respect to a copy is exhausted after the first sale of that copy.

⁵ <https://www.jipitec.eu/issues/jipitec-1-2-2010/2621/Declaration-Balanced-Interpretation-Of-The-Three-Step-Test.pdf>.

1. Fair Use

Myburgh focused on the incompatibility of CAB’s fair use provision, section 12A, with the three-step test. As noted above, Woods did not challenge section 12A, presumably recognizing the folly of suggesting that a central feature of U.S. copyright law was not Berne compatible. Myburgh attempted to sidestep this problem by distinguishing CAB section 12A from section 107 of the U.S. Code.

First, he noted that “section 107 is derived from, and inseparably linked to, an extremely rich and complex case law, and it is only along with that case law that it is meaningful.” He added that the “well-established case law is indispensable to guarantee—along with other statutory provisions in the Copyright Act—that the US copyright law is in accordance with the international copyright provisions, and in particular, the cumulative conditions of the Three-Step Test.” In other words, section 107 is three-step compliant only because of the rich fair use jurisprudence in the United States. Under this reasoning, no other country could permissibly enact a fair use provision. But numerous other countries have, without being challenged before the WTO for violating the TRIPS agreement, and without any increase in infringement. To the extent that the U.S. case law is helpful in guiding courts, South African courts could easily rely upon this case law until South Africa courts develops their own fair use jurisprudence. This is exactly what happened in Israel after it adopted a fair use exception in 2007. Moreover, Israeli courts apply fair use more strictly than U.S. courts.⁶

Second, Myburgh flagged differences between section 12A and section 107. In particular, he noted that section 12A enumerated favored purposes for fair use not contained in section 17. Myburgh thereby suggested that section 12A was far broader than section 107. But many of the additional purposes for fair use identified in section 12A reflect purposes favored by U.S. courts in fair use cases. For example, the U.S. Supreme Court recognized that parody could be fair use in *Campbell v. Acuff-Rose Music*.⁷ Similarly, U.S. courts have found that fair use permits digital preservation by libraries. Myburgh claimed that the U.S. Court of Appeals in *Authors Guild Inc. v. HathiTrust*,⁸ did not so hold, but he misread that decision and overlooked the lower court’s holding that it affirmed. Moreover, there is a significant body of U.S. cases permitting digitization to create large databases that serve a variety of socially

⁶ Israeli courts reject the fair use defense in 70% of cases, while U.S. courts’ rejection rate is only 40%. Further, although the statutory language of the Israeli fair use exception is almost identical to Section 107, Israeli courts impose an additional requirement on defendants: providing attribution to the original material. Neil Netanel and Niva Elkin Koren, *Transplanting Fair Use Across the Globe: A Case Study Testing the Credibility of U.S. Opposition*, Hasting L.J. (forthcoming), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3598160.

⁷ 510 U.S. 569 (1994)

⁸ 755 F.3d 87 (2d Cir. 2014)

useful purposes, including internet search, text and datamining, and plagiarism detection.⁹

Third, Myburgh misunderstood the operation of section 12A (and section 107). Even if the purpose of a use coincides with a purpose enumerated in subsection 12A(a) (or the chapeau of section 107), that is merely the starting point of the analysis. In determining whether the use is a fair use, a court must take into “all relevant factors,” including but not limited to the four factors listed in subsection 12A(b). The heavy lifting of the exception is done by subsection 12A(b), not 12A(a). Significantly, there is significant overlap between the four factors set forth in subsection 12A(b) and the three-step test. The “purpose and character of the use” in factor (iii) matches the first step, whether the use is a “special case.” The “amount and substantiality” of the use in factor (ii) and whether “such use serves a different purpose from that of the work affected” in factor (iii)(aa) corresponds to the second step, conflict with a normal exploitation of the work.” And “the substitution effect of the act upon the market for the work” in the fourth factor matches the third step, whether the use “unreasonably prejudice the legitimate interests of the author.” Additionally, the four factors set forth in subsection 12A correspond to the four fair use factors contained in section 107, as interpreted by the U.S. courts.

Finally, Myburgh stated that because the Department of Trade and Industry (DTI) and the Portfolio Committee did not explicitly take the three-step test into account in developing its “hybrid model grounded in fair use,” there is “a material risk of South Africa coming into conflict with its obligations under Berne and TRIPS.” As noted above, the three-step test is so vague that it provides national legislatures with no meaningful guidance concerning the permissible exceptions. Far more useful are the body of existing exceptions adopted around the world. It is obvious DTI carefully considered exceptions in the U.S., the EU, and other jurisdictions with modern copyright laws. There is nothing in the CAB’s hybrid model that doesn’t have precedent in another jurisdiction that it considered to afford a high level of copyright protection.

2. *Translation.*

Woods raises questions concerning the compatibility of the section 12B(1)(f) right of a person giving or receiving instruction to translate a work with the three-step test. Woods does not explain the possible incompatibility of this exception with the three-step test; she simply asserts it. However, the exception is highly circumscribed: the translation can only be done for noncommercial purposes; the translation only can be used for personal, educational, teaching, judicial proceedings, research, and professional advice

⁹ See *Authors Guild v. Google, Inc.*, 804 F.3d 202 (2d Cir. 2015); *A.V. ex rel. Vanderhye v. iParadigms, LLC*, 562 F.3d 630, 640 (4th Cir. 2009); *Perfect 10 v. Amazon.com, Inc.*, 508 F.3d 1146, 1165 (9th Cir. 2007); *Kelly v. Arriba Soft Corp.*, 336 F.3d 811, 818 (9th Cir. 2003).

purposes, provided that the use does not exceed the extent justified by the purpose; and the translated work cannot be communicated to the public for commercial purposes. Taking into account the Max Planck Declaration's understanding that the three-step test should be interpreted in a manner that respects the legitimate interests of third parties, particularly with respect to cultural, social, and economic development, the translation exception complies with the three-step test. Given the multiplicity of languages used in South Africa, and the history of Apartheid resulting in many people not being able to read English and Afrikaans, this translation right is completely appropriate to enable all communities to participate fully in the cultural and economic life of South Africa.

3. *Education.*

Woods likewise questions the three-step compatibility of section 12D(3), which allows educational institutions to copy an entire book into a course pack if a license is not available from the rightsholder on reasonable terms and conditions. She asserts that the systematic use of entire works without payment of equitable remuneration “would unreasonably prejudice the legitimate interests of the authors as well as the publishers as successors in title.” Yet she overlooks that this exception applies only when a license is not available on reasonable terms. If the publisher is seeking to impose unreasonable terms on an educational institution, no legitimate interest is being prejudiced by free use, only an illegitimate windfall profit. Hence, this exception does not implicate the three-step test. Moreover, the reasonable terms standard appears in other copyright laws—for example, the U.S. Copyright Act's exception for libraries and archives.¹⁰ Indeed, Woods herself recommends a reasonable terms standard with respect to the library exceptions, discussed below.

Additionally, the Max Planck Declaration observes that an exception does not conflict with the normal exploitation of a work if it is based on an important competing consideration. Education of an impoverished population certainly qualifies, particularly when the publisher refuses to license works on reasonable terms.

4. *Libraries.*

Woods implies that several of the provisions of the section 19C exception for libraries, archives, museums, and galleries (“GLAMs”) may not comply with the three-step test, but doesn't assert directly that the provisions are not three-step compatible. Further, she does give insufficient weight to the public service mission of these institutions. Moreover, the activities permitted by section 19C are allowed in the United States and the European Union.

- a. Remote access to sound recordings and audiovisual works.

¹⁰ See 17 U.S.C. § 108(h)(2). See also 17 U.S.C. § 108(c)(1) and (e) (“cannot be obtained at a fair price”).

Section 19C(4) permits a GLAM to provide remote access by means of a secure computer network. Woods states that “it is a matter of interpretation whether this provision is compatible with the three-step test.” She acknowledges that “there is a valid argument that the use of material in libraries and other institutions outside the premises of such institutions is necessary for the purposes of distance education, etc.” Nonetheless, to “safeguard the normal exploitation reserved for rightsholders,” Woods recommends limiting the exception to situations where the work is not “commercially available to users on reasonable terms.” However, many educational institutions in the United States and Canada provide remote access to works via secure computer networks under a fair use or fair dealing theory, even if the work is commercially available to users on reasonable terms. There is no reason for South African students and researchers to have less access to works than counterparts in the United States or Canada.

b. Missing parts.

Section 19C(6) permits a GLAM to procure a copy of a missing part of a work in its collection from another GLAM. Woods notes that many national laws condition this copying on the commercial unavailability of the missing part on reasonable terms. She suggests adding such a proviso here “in order to safeguard the normal exploitation of the works and ensure that there is no unreasonable prejudice to the legitimate interests of the rights owners.” Although Woods refers to the three-step test, she doesn’t actually state that the three-step test would require such a proviso. Nor could it. The GLAM already purchased a copy of the work, and a rightsholder could not anticipate that a part of that copy would go missing. Thus, replacement of a missing part of a copy of a work is not a normal exploitation of that work, and a rightsholder is not prejudiced by an uncompensated replacement of a missing part.

c. Format-shifting for preservation.

Section 19C(7) permits a GLAM to format shift a work for preservation purposes. Woods acknowledges that “provisions to this effect are for important reasons increasingly commonplace in national legislation.” She hastens to add that “the production or sale of older works and recordings in new formats is...also becoming a normal part of their commercial exploitation.” She thus suggests a commercial unavailability on reasonable terms proviso “in order to safeguard the normal exploitation of the works and ensure that there is no unreasonable prejudice to the legitimate interests of the rights owners.” Once again, Woods does not actually state that the three-step would require such a proviso. As with missing parts, the exception in its current form clearly meets the three-step test. The GLAMs have already purchased copies of the works in their collections. Rightsholders have no reasonable expectation of selling the same work to a GLAM more than once. And GLAMs should not be prevented from engaging in important preservation activities because they do not have the budget to purchase the same work repeatedly in different formats.

It should be noted that GLAMs in the United States have digitized millions of works for preservation purposes without considering whether they were commercially available under reasonable terms. The U.S. Court of Appeals for the Second Circuit determined that the digital preservation of over 10 million volumes constituted fair use in *Authors Guild Inc. v. HathiTrust*.¹¹ Moreover, Article 6 of the European Union’s Digital Single Market (“DSM”) Directive permits cultural heritage institutions “to make copies of any works or other subject matter that are permanently in their collections, in any format or medium, for purposes of preservation of such works or other subject matter.” The DSM Directive does not limit this exception only to works that are not commercially available under reasonable terms.

d. Orphan works

Section 19C(9) is an orphan works provision; it permits a GLAM to make a copy of a work when the permission of the rightsholder “cannot, after reasonable endeavor, be obtained or where the work is not available by general trade or from the publisher.” Woods states that the compatibility of this provision with the three-step test is “difficult to assess” because the provision does not limit the uses the GLAM institution could make of the work. Accordingly, Woods recommends that the institution be allowed to make a single copy for its collection or the collections of another GLAM institution. This limitation is far narrower than the European Orphan Works Directive, which allows a cultural heritage institution to make orphan works in its collection available to the public, including online. The Israeli orphan works provision is similarly expansive.

e. Retracted works

Section 19C(11) permits a GLAM to reproduce a published work which has been retracted, and to make the work available to the public for scholarship, research or other legal use. Woods states that “it seems difficult to reconcile” the permissibility of the use of retracted copies with the three-step test, because such use “might in practice nullify the effect of the withdrawal of the work and thus unreasonably prejudice legitimate interests of authors.” Here, too, Woods doesn’t directly say that provision is three-step incompatible. This is because international treaties do not provide authors the exclusive right to retract works after publication. If a GLAM has a copy of a work in its collection, the GLAM can lend a copy to the public, even if the rightsholder has retracted the work.

5. *People with disabilities*

Some stakeholders complained that the exception for people with disabilities, section 19D, was inconsistent with the WIPO Marrakesh Treaty because it applied to all disabilities, not just print disabilities. Woods correctly refutes this argument by noting that “the Republic of South Africa

¹¹ 755 F.3d 87 (2d Cir. 2014)

has the ability to adopt a national exception or limitation that applies to all persons with disabilities.”¹² Her concern with section 19D is that it “does not contain a number of provisions that would be needed to benefit from the provisions of the Marrakesh Treaty, and in particular the cross-border provisions.” However, she does not identify these provisions. Instead, she states that the “goal of the Marrakesh Treaty is to harmonize limitations and exceptions to benefit” people with print disabilities, and to that end, urges adoption of the definitions and approaches contained in the Marrakesh Treaty.

Contrary to Woods’ assertion, the goal of the Treaty is not “harmonization;” it is minimum standards. The Marrakesh Treaty makes abundantly clear that contracting parties have great flexibility in how to implement the Marrakesh Treaty’s provisions. Article 10 of the Treaty provides that “Contracting Parties may fulfill their rights and obligations under this Treaty through limitations or exceptions specifically for the benefit of beneficiary persons, other limitations or exceptions, or a combination thereof, within their national legal system and practice. These may include judicial, administrative or regulatory determinations for the benefit of beneficiary persons as to fair practices, dealings or uses....” To be sure, the Treaty does specify one approach contracting parties may use to implement the Treaty, but it makes abundantly clear that contracting parties can adopt other approaches.¹³ Woods notes that “most implementing legislation incorporates the concept of authorized entities as the main actors in cross-border exchanges,” but so does section 19D; it just uses a different term, “an organization that serves people with disabilities.”¹⁴ In short, Woods fails to demonstrate that section 19D falls short of the Marrakesh Treaty.

III. TECHNOLOGICAL PROTECTION MEASURES

Woods indicates that the CAB’s provisions concerning technological protection measures (“TPMs”) may be too narrow to satisfy the requirements of the WCT and the WPPT.¹⁵ However, the language of these treaties concerning TPMs is very general. Article 11 of the WCT simply provides that “Contracting Parties shall provide adequate legal protection and effective legal remedies against the circumvention of effective technological measures that are used by authors in connection with the exercise of their rights under

¹² Myburgh conceded that the Marrakesh Treaty permits adoption of an exception not limited to people with print disabilities. He further acknowledged that the UK and Australia have such broader exceptions. Nonetheless, he questioned whether section 19D’s application to all disabilities exceed the “special cases” requirement of the three-step test.

¹³ See Marrakesh Treaty arts. 4(3) (“A Contracting Party may fulfill Article 4(1) by providing other limitations or exceptions in its national copyright law”); 5(3) (“A Contracting Party may fulfill Article 5(1) by providing other limitations or exceptions in its national copyright law”).

¹⁴ Myburgh made the same error as Woods.

¹⁵ Conversely, Myburgh does not suggest that the CAB’s provisions relating to TPMs violates the requirements of the WCT or the WPPT.

this Treaty or the Berne Convention and that restrict acts, in respect of their works, which are not authorized by the authors concerned or permitted by law.” Article 18 of the WPPT contains similar language. The plain language of these provisions simply requires penalties for the act of circumventing a TPM for the purpose of facilitating a copyright infringement.

In 1998, the United States chose to implement this language in a far more elaborate manner, with a prohibition on the development and sale of devices that circumvent copy controls, as well as the development and use of devices that circumvent technologies that control access to works. When this legislation was pending before the U.S. Congress, Bruce Lehman, the U.S. Undersecretary of Commerce who had advocated the adoption of WCT art. 11 and WPPT art. 18, conceded that the U.S. implementation went far beyond the requirements of the WCT and the WPPT. The EU followed the overbroad US approach in the Information Society Directive in 2001. Nonetheless, the U.S. and EU implementations are what Woods is demanding of South Africa.

She faults the CAB’s definition of a technological protection measure in section 1 because it excludes a measure that controls access to a work for a non-infringing purpose. But as noted above, WCT art. 11 and WPPT art. 15 address controls on infringement, not controls on access. She criticizes the definition of technological protection measure circumvention device even though WCT art. 11 and WPPT. Art. 15 impose no requirements concerning circumvention devices, just acts of circumvention. And she attacks the prohibition in Section 27(5A) on the manufacture or distribution of TPM circumvention devices because it applies only to devices likely to be used to infringe copyright, and not to access a work. Significantly, there is a split in the U.S. courts concerning whether circumventions of access controls with no nexus to infringement violate the prohibition on circumvention of TPMs.¹⁶ Thus, the changes Woods demands not only exceed the requirements of the WCT and the WPPT, they may exceed the standards of U.S. law.

CONCLUSION

As the National Assembly reconsiders the CAB, it should recognize that the issues identified by Woods and Myburgh concerning compliance with international treaties are grossly overstated. If the National Assembly concludes that any of these concerns have merit, they can be addressed by narrow amendments.

¹⁶ Compare *Chamberlain Group, Inc., v. Skylink Techs., Inc.*, 381 F.3d 1178 (Fed. Cir. 2004) with *MDY Indus. LLC v. Blizzard Entertainment, Inc.*, 629 F.3d 928 (9th Cir. 2010).