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July 9, 2021

Mr D Nkosi, Chairperson: PC on Trade and Industry
Attn: Mr A Hermans, Box 15, Parliament, Cape Town 8000

Re: *Copyright Amendment Bill [B13B-2017]*

Dear Mr Nkosi and Members of the Portfolio Committee on Trade and Industry:

The Computer & Communications Industry Association (“CCIA”)¹ welcomes this opportunity to comment on the alignment of the Copyright Amendment Bill (“CAB”) with the Republic of South Africa’s treaty obligations.² President Ramaphosa expressed concern that the exceptions contained in the CAB may be in conflict with the Three-Step Test (“TST”) set forth in the Berne Convention and other World Intellectual Property Organization (“WIPO”) treaties. One of the CAB provisions cited by President Ramaphosa is new Section 12A, which establishes a fair use provision similar to the fair use right in the U.S. Copyright Act, 17 U.S.C. §107. The U.S. fair use provision has never been challenged before the World Trade Organization (“WTO”) or in any other international forum. There is no credible argument that 17 U.S.C. §107 does not comply with the TST; hence, Section 12A also complies with the TST.³

In this submission, CCIA demonstrates that the U.S. Government has consistently recognized the importance of fair use and how it contributes to creative activity. Next, the submission shows that content creators, technology companies, and many other U.S. industry sectors routinely rely on fair use. Taken together, these two points prove that fair use is TST compliant. Finally, the submission responds to specific objections raised by opponents to fair use in the CAB.

I. U.S. Government Recognition of the Importance of Fair Use

The U.S. Government has long acknowledged the economic and social importance of the U.S. fair use provision. The U.S. Trade Representative (“USTR”) has previously observed that in the United States, “consumers and businesses rely on a range of exceptions and limitations, such as fair use, in their businesses

¹ CCIA is an international, not-for-profit trade association representing a broad cross section of communications and technology firms. For nearly fifty years, CCIA has promoted open markets, open systems, and open networks. CCIA members employ more than 1.6 million workers, invest more than \$100 billion in research and development, and contribute trillions of dollars in productivity to the global economy. For more, visit www.ccianet.org.

² Available at <https://www.parliament.gov.za/committee-notice-details/274>.

³ For additional discussion of the U.S. fair use doctrine’s compliance with the TST, see Neil Netanel & Niva Elkin-Koren, *Transplanting Fair Use Across the Globe: A Case Study Testing the Credibility of U.S. Opposition*, 72 *Hastings L.J.* 121 (2021).

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and daily lives.”⁴ Similarly, the U.S. Intellectual Property Enforcement Coordinator (“IPEC”) has stated that “fair use is a core principle of American copyright law.”⁵ The IPEC added that “the Supreme Court has repeatedly underscored fair use provisions in the Copyright Act as a key means of protecting free speech,”⁶ and that “enforcement approaches should not discourage authors from building appropriately upon the works of others.”⁷ The IPEC discussed how fair use enabled “new and innovative uses of media (e.g., remixes and mashups involving music, video and the visual arts).”⁸ The IPEC concluded that “it is the combination of strong copyright rights with a balance between the protection of rights and exceptions and limitations that encourages creativity, promotes innovation, and ensures our freedom of speech and creative expression are respected.”⁹

Similarly, the U.S. Copyright Office notes that “fair use is a longstanding and vital aspect of American copyright law.”¹⁰ In a study on software-enabled consumer products, the Copyright Office found that “courts repeatedly have used the fair use doctrine to permit copying necessary to enable the creation of interoperable software and products.”¹¹ To that end, in 2019, the Solicitor General of the United States filed a brief in the U.S. Supreme Court asserting that fair use “permits courts to consider whether ‘rigid application of the copyright statute’ in a particular case ‘would stifle the very creativity which that law is designed to foster.’”¹²

These Administration perspectives are consistent with views recently expressed by members of Congress. As Senator Ron Wyden and Congressman Jerry McNerney told USTR last year, in the context of the USTR review of South Africa’s continued eligibility for trade preferences: “In the United States, our fair use policy has spurred the creation of transformative works and technological innovations that create new markets and drive economic activity.”¹³ They concluded by explaining how South Africa adopting fair use would benefit the U.S. and South Africa: “The balanced copyright system adopted by the United States has helped make us a leader in innovation and the creative economy, and we should commend—rather than

⁴ USTR, *USTR Introduces New Copyright Exceptions and Limitations Provision at San Diego TPP Talks* (July 2012), <https://ustr.gov/about-us/policy-offices/press-office/blog/2012/july/ustr-introduces-new-copyright-exceptions-limitations-provision/>.

⁵ U.S. Intellectual Property Enforcement Coordinator, *2013 Joint Strategic Plan on Intellectual Property Enforcement* (June 2013), <https://obamawhitehouse.archives.gov/sites/default/files/omb/IPEC/2013-us-ipecc-joint-strategic-plan.pdf>, at 18.

⁶ *Id.*

⁷ *Id.*

⁸ U.S. Intellectual Property Enforcement Coordinator, *U.S. Joint Strategic Plan on Intellectual Property Enforcement FY 2017-2019* (Dec. 2016), <https://obamawhitehouse.archives.gov/sites/default/files/omb/IPEC/2016jointstrategicplan.pdf>, at 10.

⁹ *Id.*

¹⁰ U.S. Copyright Office, *U.S. Copyright Office Fair Use Index*, <https://www.copyright.gov/fair-use/>.

¹¹ U.S. Copyright Office, *Software-Enabled Consumer Products* (Dec. 2016), <https://www.copyright.gov/policy/software/software-full-report.pdf>, at 54.

¹² Brief for the United States at 17, *Google LLC v. Oracle America, Inc.*, No. 18-956 (S. Ct. Sept. 27, 2019), https://www.supremecourt.gov/DocketPDF/18/18-956/117359/20190927165110897_18-956%20Google.pdf (citations omitted).

¹³ Letter from Ron Wyden, U.S. Senator, and Jerry McNerney, U.S. Congressman, to Ambassador Robert Lighthizer, U.S. Trade Rep. (Jan. 28, 2020).

penalize—trading partners that adopt balanced copyright regimes that both protect U.S. interests and boost developing economies.”¹⁴

In short, different experts in the U.S. Government have repeatedly affirmed the centrality of fair use to the U.S. copyright system, and its importance in promoting creativity and innovation.

II. U.S. Content Creators, Technology Companies, and Other Industry Sectors Routinely Rely on Fair Use

Balanced copyright rules such as fair use and related limitations and exceptions have been critical to the growth of the U.S. technology and Internet economy. A 2017 study illustrated how U.S. firms operating abroad in regimes with balanced copyright law reported higher incomes and increased total sales, encouraging foreign investment.¹⁵ A CCIA study demonstrated that fair use industries account for 16% of the U.S. economy, employ 1 in 8 workers, and contribute \$2.8 trillion to GDP.¹⁶ Driven by increases in service-sector exports, U.S. exports of goods and services related to fair use increased by 21% over four years to \$368 billion.

As a general matter, most creators utilizing fair use rights are likely to be engaged in authorship themselves, and thus most fair use beneficiaries are copyright holders.¹⁷ More specifically, most CCIA members are also copyright holders that benefit from copyright protection in addition to limitations and exceptions like fair use.

Industries traditionally identified as “copyright holders”, like U.S. media companies, regularly rely on fair use when faced by copyright claims against their own creations. For example, in litigation by the Michael Jackson estate concerning the inclusion of excerpts of Jackson’s works in a documentary broadcast by ABC News, Disney asserted that it would not be intimidated by “overzealous copyright holders” such as the Jackson estate. It observed that:

this case is about the right of free speech under the First Amendment, the doctrine of fair use under the Copyright Act, and the ability of news organizations to use limited excerpts of copyrighted works...for the purpose of reporting on, commenting on, teaching about, and criticizing well-known public figures of interest in biographical documentaries....¹⁸

¹⁴ *Id.*

¹⁵ Sean Flynn & Mike Palmedo, *The User Rights Database: Measuring the Impact of Copyright Balance*, Program on Information Justice and Intellectual Property (Oct. 30, 2017), <http://infojustice.org/archives/38981>.

¹⁶ CCIA, *Fair Use in the U.S. Economy: Economic Contribution of Industries Relying on Fair Use* (2017), <http://www.ccia.net.org/wp-content/uploads/2017/06/Fair-Use-in-the-U.S.-Economy-2017.pdf>, at 4.

¹⁷ For example, the seminal U.S. case on copyright fair use involves defendants themselves engaged in creative authorship. *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569 (1994).

¹⁸ See Jonathan Band, *Disney Fights Overzealous Copyright Holders With Fair Use*, Disruptive Competition Project (Aug. 15, 2018), <http://www.project-disco.org/intellectual-property/081518-disney-fights-overzealous-copyright-holders-with-fair-use/>. For other statements of copyright industry support for fair use, see, e.g., Jonathan Band, *Oracle v. Google? Again? Part II: Amici Recognize the Essential Nature of Fair Use*, Disruptive Competition Project (Mar. 2, 2017), <http://www.project-disco.org/intellectual-property/030217-oracle-v-google-again-part-ii-amici-recognize-essential-nature-fair-use/>. For additional cases where creators have employed fair use as a defense to infringement claims, see, e.g., *Fair and Balanced Result in New Jersey Media Group v. Fox News Network*, ARL Policy Notes (Feb. 23, 2015), <http://policynotes.arl.org/?p=896>; Ali Sternburg, *MPAA Opposes Fair Use, Even As Its Members Rely On It*, Disruptive Competition Project (Apr. 17, 2015),

Likewise, the Copyright Alliance has stated that it

is a staunch supporter of fair use principles, which allow for copyright to achieve its purpose without undermining the incentive to create. Its members regularly rely on these principles to create new, expressive, and transformative works, consistent with the Copyright Act's inherent purpose.¹⁹

Further, as Ralph Oman, the former Register of Copyrights, stated:

Fair use is an essential pillar of copyright law. It allows individuals and businesses in certain circumstances to build off of the creativity of others by using existing copyrighted material to create their own original works. Without the fair use limitation, copyright would not serve its core purpose of promoting authorship.²⁰

In sum, the reliance of the copyright industries on fair use to support their creative endeavors demonstrates that fair use complies with the TST. The copyright industries understand that building off the creativity of others is essential to the creative process. The fair use factors ensure that reuse is permitted only in circumstances that do not conflict with the normal exploitation of a work and that do not unreasonably prejudice the legitimate interests of the copyright holder.

III. The Objections to Fair Use in the CAB Have No Merit

A petition filed by the International Intellectual Property Alliance ("IIPA") triggered the USTR review of South Africa's eligibility for trade preferences mentioned above. One of the petition's main arguments was that the CAB's exceptions "far exceed the scope of exceptions and limitations permitted under South Africa's international obligations, namely under Article 13 of the WTO TRIPS Agreement (and Article 9 of the Berne Convention and the corresponding provisions in the WIPO digital treaties)."

IIPA's petition raised several specific objections to the fair use provision in Section 12A, which appear to contribute to IIPA's suggestion that Section 12A does not comply with the TST: South Africa lacks decades

<https://www.project-disco.org/intellectual-property/041715-mpaa-opposes-fair-use-even-as-its-members-rely-on-it/>; Matt Schruers, 2013 Brought Major Fair Use Wins: Update - *Bouchat v. Ravens & NFL*, Disruptive Competition Project (Dec. 18, 2013),

<https://www.project-disco.org/intellectual-property/121813-2013-brought-major-fair-use-wins-update/>; Matt Schruers, 2013 Brought Major Fair Use Wins For Tech, Entertainment, Disruptive Competition Project (Dec. 4, 2013),

<https://www.project-disco.org/intellectual-property/120413-2013-bring-major-fair-use-wins-for-tech-entertainment-industries/>.

¹⁹ See Jonathan Band, *Finding Fair Use in Unexpected Places*, ARL Policy Notes (Jan. 19, 2017), <http://policynotes.arl.org/?p=1464>. The Copyright Alliance has stated, "fair use is a core part of copyright law. It is a doctrine all artists and creators depend on daily....". Sandra Aistars, *Happy Fair Use Day* (May 4, 2012), <http://www.copyrightalliance.org/2012/05/happy-fair-use-day>. The Motion Picture Association likewise said that "our members rely on the fair use doctrine every day when producing their movies and television shows....". Ben Sheffner, *MPAA and Fair Use: A Quick History* (Oct. 22, 2013), <http://www.mpa.org/mpaa-and-fair-use-a-quick-history/>. For other examples of fair use enabling creative activity, see, e.g., Jonathan Band, *Fifty Shades of Fair Use*, Disruptive Competition Project (Feb. 10, 2015), <https://www.project-disco.org/intellectual-property/021015-fifty-shades-fair-use/>; Jonathan Band, *How Copying Promotes Creativity*, Disruptive Competition Project (June 12, 2015),

<http://www.project-disco.org/intellectual-property/061215-how-copying-promotes-creativity/>; Jonathan Band, *Fair Use: The Foundation of Jon Stewart's Success*, Disruptive Competition Project (Feb. 13, 2015),

<http://www.project-disco.org/intellectual-property/021315-fair-use-foundation-jon-stewarts-success/>.

²⁰ Jonathan Band, *Oracle v. Google? Again? Part II: Amici Recognize the Essential Nature of Fair Use*, Disruptive Competition Project (Mar. 2, 2017),

<http://www.project-disco.org/intellectual-property/030217-oracle-v-google-again-part-ii-amici-recognize-essential-nature-fair-use/>.

of legal precedent upon which to base application of fair use; the CAB establishes a hybrid model which “creates an unprecedented mash-up” of fair dealing, fair use, and specific exceptions; South Africa lacks statutory and punitive damages; and the fair use provision is broader in the CAB than in U.S. law. These are discussed in more detail below.

A. Lack of Precedent

Under IIPA’s reasoning, no country would ever be able to adopt fair use because it would never have the body of precedent necessary to apply it. Fortunately, South Africa does have a ready source of fair use precedent: all the fair use opinions in all the countries that have adopted a U.S.-style fair use provision, including the United States and Israel. These countries’ decisions are available online, and South African courts can rely upon them until they develop their own body of case law. This is precisely what happened in Israel. After Israel adopted fair use in 2007, its courts (and litigants) looked to U.S. decisions for guidance until they had their own case law. Notably, Israeli courts created a fifth fair use factor: whether the user gave attribution to the author. Thus, Israeli courts apply fair use more stringently than U.S. courts. Significantly, attribution is already built-in to the South African fair use provision—Section 12A(c). In this respect, the South African fair use provision is more restrictive than 17 U.S.C. § 107.

Additionally, numerous fair use-related resources are available online, in particular the U.S. Copyright Office’s index of fair use cases.²¹ The goal of the index is “to make the principles and application of fair use more accessible and understandable to the public.”²² The index contains a detailed discussion of the holdings of hundreds of fair use decisions.

Finally, South Africa will be able to engage in important capacity building efforts with the U.S. Government, including the U.S. Copyright Office and the U.S. Patent & Trademark Office (“USPTO”) Office of Policy and International Affairs, which is “actively engaged in providing technical assistance and training on copyright-related matters for both U.S. and foreign government officials.”²³ Through these trainings and capacity building efforts, the U.S. Government can ensure that South African fair use law is implemented in a manner consistent with U.S. law and precedent.

B. Hybrid Structure

IIPA criticized the appending of the fair use rubric to the fair dealing provision, and further seems to object to supplementing the fair use/fair dealing exception, Section 12A, with specific exceptions. The hybrid structure IIPA finds so offensive is precisely the structure of exceptions found in the U.S. Copyright Act. Section 12A(a) of the CAB states that copyright is not infringed by “fair use in respect of a work or the

²¹ U.S. Copyright Office, *U.S. Copyright Office Fair Use Index*, <https://www.copyright.gov/fair-use/>.

²² *Id.*

²³ USPTO, *Copyright Policy*, <https://www.uspto.gov/ip-policy/copyright-policy/>.

performance of that work, for purposes such as” research, criticism, reporting, scholarship, comment, preservation, and public administration. This parallels the first sentence of 17 U.S.C. § 107, which provides that “the fair use of a copyright work, ... for purposes such as criticism, comment news reporting, teaching (including multiple copies for classroom use), scholarship, or research is not an infringement of copyright.”

Section 12A(b) of the CAB then provides that “in determining whether an act done in relation to a work constitutes a fair use, all relevant factors shall be taken into account, including but not limited to” the nature of the work, the amount and substantiality of the part used, the purpose of the use, and the effect of the use upon the potential market for the work. Likewise, the second sentence of the 17 U.S.C. § 107 states that “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, the nature of the copyrighted work, the amount and substantiality of the portion used, and the effect of the use upon the potential market for the work. Once again, the wording of the four factors in Section 12A(b) of the CAB is highly consistent with 17 U.S.C. § 107.

Further, it is hard to understand why IIPA objects to providing standards by which a court is to assess whether a particular use is fair. The absence of standards for assessing fairness is at times cited as one of the deficiencies of the traditional fair dealing test, and one respect in which U.S.-style fair use is superior to traditional fair dealing. It is the absence of standards that has led many former British colonies to append the U.S. four fair use factors (or variants thereof) to their existing fair dealing provision.²⁴ The four factors have been adopted by other countries as well.²⁵

Also inexplicable is IIPA’s hostility to the CAB establishing specific exceptions in addition to the general fair use provision. Virtually all countries that have a fair use or fair dealing provision also provide specific exceptions. The United States, for example, has exceptions for libraries and archives (§ 108, § 109(b)(2)(A)), rental car companies (§ 109(b)(1)(B)(i)), museums and galleries (§ 109(c)), videogame arcade operators (§ 109(e)), educational institutions (§ 110(1) and (2)), religious institutions (§ 110(3)), small restaurants (§ 110(5)), agricultural or horticultural organizations (§ 110(6)), record stores (§ 110(7)), organizations that provide services to people with disabilities (§ 110(8), §110(9), §121 and § 121A), veterans’ and fraternal organizations (§ 110(10)), hotel and apartment house owners (§ 111(a)), broadcasters (§ 112(a)), owners of computer programs (§ 117(a)), and computer maintenance or repair organizations (§ 117(c)). The mere presence of additional exceptions does not vitiate the meaning of the underlying fair use provision.²⁶

²⁴ Antigua and Barbuda, Australia, Bahamas, Barbados, Belize, Grenada, Hong Kong, Israel, Jamaica, Malaysia, New Zealand, Saint Christopher and Nevis, Saint Lucia, Saint Vincent and the Grenadines, Singapore, Sri Lanka, and Uganda. See Jonathan Band & Jonathan Gerafi, *The Fair Use/Fair Dealing Handbook* (Mar. 2015), <http://infojustice.org/archives/29136>.

²⁵ Korea, Liberia, Philippines, and Taiwan. *Id.*

²⁶ IIPA also identifies concerns with specific exceptions contained in the CAB, and CCIA takes no position on these provisions. The one exception is Section 12C, which permits the creation of temporary copies. This provision is based on Article 5(2) of the European Union’s Information Society Directive. IIPA objects to the CAB’s clarification that this exception for transient or incidental copies

C. Statutory Damages

IIPA observed that South Africa “lacks statutory and punitive damages, which rights holders in the U.S. rely on to deter and remedy infringement.”

There is no connection between the TST and remedies; these issues are treated separately in the Berne Convention and TRIPS. Moreover, neither Berne nor TRIPS require statutory damages. Most countries do not allow them, including most of the countries that already have fair use or fair dealing.

In any case, IIPA is wrong as a factual matter. Both the Copyright Act of 1978 and the Counterfeit Goods Act in South Africa do allow the imposition of significant punitive fines for copyright infringement. And under Section 24(3) of the Copyright Act of 1978, a court may impose additional damages, “as the court may deem fit,” in cases of flagrant infringement.

Moreover, South Africa follows the “English Rule” for the award of attorney’s fees. Under the English Rule, the prevailing party automatically recovers attorney’s fees. The English Rule not only deters unlawful behavior, it also strongly discourages a defendant from pursuing a defense unless it has a high degree of confidence it would prevail. This would ensure that defendants would assert fair use only in the strongest of cases.

By contrast, the U.S. Copyright Act does not automatically shift fees. Rather, it grants courts the discretion to award fees to the prevailing party. 17 U.S.C. § 505. The Supreme Court clarified that in exercising its discretion, courts should give “substantial weight to the objective reasonableness of the losing party’s position.” *Kirtsaeng v. John Wiley & Sons, Inc.*, 136 S. Ct. 1079 (2016). In other words, the objective reasonableness of a losing defendant’s fair use argument would weigh substantially against the shifting of fees. This means that a U.S. court would be far more lenient and forgiving about fee-shifting than a South African court in a case involving the unsuccessful assertion of fair use. Thus, South African defendants are less likely to attempt to abuse fair use than U.S. defendants.

D. Breadth

IIPA argues that the language of the CAB’s fair use provision is broader than the U.S. fair use provision. As an example, IIPA mentions that the CAB requires that “all relevant factors shall be taken into account, including but not limited to” the four factors imported from the U.S. Copyright Act. IIPA suggests that this is far broader than the parallel language in 17 U.S.C. § 107. In fact, U.S. copyright law provides that “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 four fair use factors. U.S. courts have made clear that the four factors are not exclusive, and indeed many

includes reformatting for the purpose of adapting the work for use on a different device. IIPA ignores that Section 12C, like Article 5(2), applies only “as long as there is no independent economic significance to these acts.” Accordingly, Section 12C would cause no harm to copyright owners.

courts have recognized a fifth factor, the good faith of the user. In short, IIPA is pointing to a distinction without a difference.

IV. Conclusion

Section 12A of the CAB, like the fair use provision of 17 U.S.C. § 107 before it, complies with the TST and the Republic of South Africa's other international treaty obligations. Contrary to the arguments made by opponents, there is nothing inappropriate about the CAB's inclusion of a fair use provision. A fair use provision in South Africa, modeled closely on U.S. law, will protect South African innovators and creators to the benefit of the South African public.

Respectfully submitted,

Ali Sternburg
Senior Policy Counsel
Computer & Communications Industry Association (CCIA)