



16 July 2021

The Portfolio Committee on Trade and Industry

Parliament Street

Cape Town

8000

Google – Submissions on the on the Copyright Amendment Bill (B13B-2017)

1. Introduction

Google LLC (**Google**) welcomes the opportunity afforded to it by the Portfolio Committee on Trade and Industry (**Committee**) to provide written submissions responding to President Ramaphosa's June 16, 2020 referral of the copyright bill B-13B-2017 back to the National Assembly.

Given our previous comments on previous iterations of the Copyright Bill in September 2015 and June 2017, as well as the important submissions of others, including but not limited to the Global Expert Network on Copyright User Rights' submission on July 9, 2021, Google has focused its comments to those points that we have the most experience with and which therefore may prove of the most assistance to the Committee, namely fair use and international considerations.

Google is a multinational technology company offering Internet related services and products to users in various jurisdictions around the world, including South Africa. As a result, we have a great deal of experience with copyright law around the world. This experience has given us the opportunity to examine the effectiveness of different laws. It is our belief that a law is only effective if it matches the national objectives and interests; not just in theory, but more importantly, in practice.

South Africa has a vibrant, young creative population: 77.6% of its population is under 35 years of age, making them "digital natives." In addition, South African creativity is one of the country's greatest exports, both on the continent, and globally. As a result, we believe that



copyright law in South Africa must support competition, foster an environment conducive to creativity, innovation, and investment, and encourage access to information.

2. Fair Use

Fair use, with its flexible “such as” term of illustrative but not limitative uses, is perfectly tailored to encourage creativity and innovation in practice. Today, there are several countries with fair use regimes, including the United States, Singapore, Korea, Taiwan, and Israel. Studies over the years have shown how important fair use is to creativity, innovation, and investment - driving economic growth and increased access to information.¹ And U.S. courts have noted that “fair use “both permits and requires ‘courts to avoid rigid application of the copyright statute when, on occasion, it would stifle the very creativity which that law is designed to foster.”²

From its founding in 1998, Google has relied on the U.S.’s fair use doctrine. Without it, Google and most of the other best-known Internet companies would likely not exist. In 2010, former UK Prime Minister David Cameron noted the importance of fair use to services like Google Search: *“The service they [Google] provide depends on taking a snapshot of all the content on the Internet at any one time and they feel our copyright system is not as friendly to this sort of innovation as it is in the United States. [In the U.S.], they have what are called ‘fair-use’ provisions, which some people believe gives companies more breathing space to create new products and services.”* And Google is not alone. Today, fair use supports search engines, social media services, streaming platforms, cloud technologies, translation software, artificial intelligence, and more. It also has fostered creativity of all kinds. Progressive copyright laws that include exceptions and limitations, like fair use have fueled economic growth and benefited the public around the world.

3. Recent Criticism of Fair Use Section 12A Amendment

We understand that some stakeholders in this debate have filed petitions with the U.S. government and the European Commission seeking to withdraw trade benefits unless South

¹ See: CCIA, “Fair Use in the Economy 2017” (June 9, 2017), available at: <https://www.cciainet.org/2017/06/study-shows-fair-use-industries-make-up-one-sixth-of-the-economy/>.

² See: Google LLC v. Oracle America Inc., 593 U.S. (2021), available at: https://www.supremecourt.gov/opinions/20pdf/18-956_d18f.pdf.



Africa rejects “importation of the U.S. ‘fair use’ rubric.”³ This is extremely concerning. As detailed above, the U.S. has benefited significantly from such a framework. Even stakeholders from the rightsholder community have embraced fair use in the United States. For example, in 2013, Ben Sheffner, MPA’s Senior Vice President & Associate General Counsel, Copyright & Legal Affairs noted in a legal brief: *“we do want to push back a bit on the suggestion in some of the commentary about our brief that the MPAA and its members somehow “oppose” fair use, or that our embrace of it in the Baltimore Ravens brief represents a shift in our position. That’s simply false, a notion that doesn’t survive even a casual encounter with the facts. Our members rely on the fair use doctrine every day when producing their movies and television shows – especially those that involve parody and news and documentary programs. And it’s routine for our members to raise fair use – successfully – in court.”*⁴ And more recently in a brief for the US Supreme Court, reiterated again: *“MPA members also depend upon the proper application of the fair use defense to protect the free speech interests of filmmakers and their distributors...Copyright law serves as an incentive for creators and distributors to create and disseminate expressive works. The fair use defense, properly applied, also encourages the creation and dissemination of such works without impairing the law’s incentives.”*⁵ Furthermore, there is no evidence that the adoption of fair use or similar rules has had a detrimental effect on traditional creative industries. In a Deloitte study, interviews with copyright creators in Israel suggested that the change did not disrupt their daily operations.⁶ And in Singapore, studies on fair use concluded that it had been “very successful”.⁷

³ See: Comment from Kevin Rosenbaum, International Intellectual Property Alliance to the U.S. Trade Representative (April 26, 2019), available at:

<https://www.regulations.gov/document/USTR-2019-0001-0046>.

⁴ MPAA, “MPAA and Fair Use: A Quick History” (October 22, 2013), available at:

<https://www.motionpictures.org/press/mpaa-and-fair-use-a-quick-history/>.

⁵ Brief for the Motion Picture Association, Inc. as Amici Curiae Supporting Respondent, Google LLC v. Oracle America Inc., 593 U.S. (2021), available at:

https://www.supremecourt.gov/DocketPDF/18/18-956/133443/20200219134025258_18-956%20Amicus%20Brief%20of%20Motion%20Picture%20Association%20Inc_.pdf.

⁶ Deloitte, “Copyright in the digital age: An economic assessment of fair use in New Zealand”, (March 2018), available at:

<https://www2.deloitte.com/content/dam/Deloitte/nz/Documents/Economics/dae-nz-copyright-fair-use-final.pdf>.

⁷ Frankel, S. (2015). Test Tubes for Global Intellectual Property Issues. In Test Tubes for Global Intellectual Property Issues: Small Market Economies (Cambridge Intellectual Property and Information Law, p. 1). Cambridge: Cambridge University Press.



Finally, arguments that the bill's provisions allegedly conflict with international obligations, in particular the Berne Convention's "three-step test", are false. The test is not really a test, but a statement of principles. It is found in Article 9(2) of the 1971 Paris text of the Berne Convention, and reads: *"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 three "steps" derived from Article 9(2) are (1) certain special cases which (2) do not conflict with a normal exploitation of the work, and (3) do not unreasonably prejudice the legitimate interests of the author. Despite recent rhetoric, Article 9(2) is not a centerpiece of the Convention. The three-step test is a very recent addition to the Berne Convention, which was founded in 1888. The provision was proposed in the 1967 Stockholm protocol and then included in the 1971 Paris text.

As Professor Martin Senftleben points out in Chapter 3 of his book "Copyright, Limitations, and the Three-Step Test: Analysis of the Three-Step Test in International and EC Copyright Law", the introduction of the three-step test was a key part of a deal to provide formal recognition to the reproduction right. *"The feasibility of the plan to attain the formal recognition of a general right of reproduction, however, depended on whether or not the Conference would succeed in finding a satisfactory formulation for possible limitations."*⁸ The grant of a right was, in other words, contingent on their being healthy limitations and exceptions to that right. This raised what Mr. Senftleben calls the "dualism inherent in the three-step test." *"Article 9(2) BC was distilled from typical features of the described extensive list of limitations that existed in 1967. The 1965 Committee of Governmental experts unequivocally took the view that in the course of the preparatory work for the Stockholm conference that 'the main difficulty was to find a formula which would allow of exceptions, bearing in mind the exceptions already in many domestic laws.'*⁹

⁸ Senftleben, M (2004), Copyright, Limitations, and the Three-Step Test: Analysis of the Three-Step Test in International and EC Copyright Law. Kluwer Law International. Page 47.

⁹ Ibid. Page 81-82.



A study group found fourteen common limitations: republication of public speeches, quotations, copying of school books and chrestomathies, copying of newspaper articles, reporting current events, ephemeral recordings, copying for private use, reproduction by copying in libraries, reproduction on special characters for the use of the blind, copying of sound recordings of literary works for the use of the blind, copying of the text of songs, taking pictures of sculptures on permanent display in public places, use of artistic works used as background in films and TV programs, and reproductions in the interests of public safety.

In 2017, prominent European academics explained how the three step is intended to work: *“When correctly applied, the Three-Step Test requires a comprehensive overall assessment, rather than the step-by-step application that its usual, but misleading, description implies. No single step is to be prioritized. As a result, the Test does not undermine the necessary balancing of interests between different classes of rightholders or between rightholders and the larger general public. Any contradictory results arising from the application of the individual steps of the test in a particular case must be accommodated within this comprehensive, overall assessment.*

...

1. The Three-Step Test constitutes an indivisible entirety.

The three steps are to be considered together and as a whole in a comprehensive overall assessment.

2. The Three-Step Test does not require limitations and exceptions to be interpreted narrowly. They are to be interpreted according to their objectives and purposes.

3. The Three-Step Test's restriction of limitations and exceptions to exclusive rights to certain special cases does not prevent

(a) legislatures from introducing open ended limitations and exceptions, so long as the scope of such limitations and exceptions is reasonably foreseeable; or



(b) courts from applying existing statutory limitations and exceptions to similar factual circumstances mutatis mutandis; or creating further limitations or exceptions, where possible within the legal systems of which they form a part.”¹⁰

In line with this, Professor Senftleben points out that the particular formulation chosen for the three-step test was not a closed, enumerated list of existing uses, but rather abstract criteria which could reconcile different approaches and permit broad uses. In short, a flexible approach such as fair use.

Since the U.S. adherence to the Berne Convention in 1988 -- 33 years ago -- there has been no legal challenge brought to the U.S. fair use provision as violating either Berne or any other international obligation. WIPO and European copyright experts testified before the U.S. Congress during the hearings on U.S. adherence to Berne, hearings that spanned four years: 1985, 1986, 1987, and 1988. Congress even went to Geneva and convened a roundtable discussion there on November 25 and 26, 1987 with WIPO and European copyright experts, the sole purpose of which was to determine which parts of U.S. law needed to be amended to permit Berne adherence. Not once at this roundtable or during four years of hearings were the words “fair use” ever raised by an expert who appeared before Congress nor did any witness consider there to be a potential problem.¹¹ In addition to then-WIPO Director General Arpad Bogsch who was the lead witness in the very first congressional hearing (before the Senate on May 16, 1985), the following foreign experts participated in the round table: Mr. Shahid Alikhan, Mr. Gyorgy Boytha, Mr. Jean-Louis Comte, Mrs. Mialgros De Corral, Professor Dr. Dittrich, Mr. Mayer Gabay, Mr. Roland Grossbacher, Professor Gunnar Karnell, Mr. Jukka Liedes, Mrs. Margaret Moller, Dr. Werner Rumphorst, Mr. Victor Tarnofsky, Professor Dr. Dirk W.F. Verkade, and Mr. Jean-Alexis Ziegler. In addition, there has also never been a challenge in the other countries that have a fair use provision. Based on this history, the argument that fair use or any of the other

¹⁰ Christophe Geiger, Reto Hilty, Jonathan Griffiths, Uma Suthersanen, Declaration A Balanced Interpretation Of The "Three-Step Test" In Copyright Law, 1 (2010) JIPITEC 119 para 1. Available at: <https://www.jipitec.eu/issues/jipitec-1-2-2010/2621>.

¹¹ A transcript of the round table is reproduced in the House Hearings: “Berne Convention Implementation Act of 1987, Serial No. 50, 100th Congress, 1st & 2d sessions 1135–1213 (1987, 1988).



provisions of the bill under consideration are inconsistent with the three-step test or any other international obligation is without any merit.

Conclusion

The bill as passed and sent to President Ramaphosa admirably served to achieve its purposes of enhancing creativity and innovation and will create significant opportunities for South Africa. We urge the National Assembly to pass it again.

Respectfully submitted,

A handwritten signature in blue ink that reads "C. Murito" with a long, sweeping underline.

Charles Murito
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Submitted for and on behalf of Google LLC