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Mr. Duma Moses Nkosi
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Attention:
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Cape Town, 8 July 2021

Written Comments concerning the Copyright Amendment Bill [B13B-2017]

Dear Honourable Chairperson:

I appreciate the opportunity to once again submit comments on the Copyright Amendment Bill [B13B-2017] (CAB) and I trust this submission will support parliament's decision-making process.

Involving the public again at this point is indeed appropriate in light of the robust discussions triggered by the President's reservations. I have noted with concern recent attempts to drag the debate into the op-ed space in popular media to influence public opinion – with a problematic tendency to oversimplify what is at stake, employ inappropriately harsh language (mainly directed at the lawmaker but also at "ivory tower" academics) and make numerous claims that are, at best, unsubstantiated and, at worst, legally and/or morally problematic. I therefore welcome this call for submissions as an opportunity to help re-focus the debate and exchange substantiated arguments and stakeholder concerns with a view of ending up with a modern, contextualised and balanced copyright law for our country.

Whether or not many of the claims made by stakeholders are meritorious, depends to a large extent on whether those who put forward these claims have duly appreciated that copyright has indeed *two* primary interlinked goals: First, the promotion of the dissemination of culture and information, and second, the protection of the artist or author so that they are economically rewarded and incentivised to create disseminate such creative works. Often, emphasising just one of these dimensions leads to seemingly comprehensible

but ultimately fragmentary views. It is for this reason, that the CAB seeks to strengthen authors' rights (including vis-à-vis intermediaries) and access opportunities for the public via an updated set of copyright exceptions and limitations. But doing the one without the other will create (or rather reinforce) an imbalanced copyright system. This should be taken into account when with this current call for submissions only some of the key copyright exceptions and limitations are called into question.

Notably, I remarked in one of our previous submissions, that

> *"as an academic research unit in a publicly-funded university, we do not represent specific stakeholder interests! Instead, our aim is to assist law and policy makers in their difficult task to create frameworks that fairly balance the conflicting interests of the relevant stakeholders in the country."*

This remains largely true. However, since our last submission in February 2019, we, too, experienced the negative and stifling effects of our current copyright framework first-hand: First, in April 2021, a wildfire raged through parts of UCT's Upper and Middle Campus, causing extensive damage to several of our buildings. One of the buildings most heavily affected was the Jagger Library. Before its destruction, the Jagger Library housed our library's special collections and it was quickly determined in the aftermath of the fire that some of these valuable and unique collections are now forever lost. The severity of this loss could have been alleviated, however, if at least some of these collections had been digitised for preservation before they were destroyed. Yet, while the Bill's new exceptions expressly allow for this (see clause 20/s19C(5) of the CAB), our current Copyright Act does arguably not permit this. Second, the COVID-19 pandemic required us to convert quickly from offline teaching in a brick-and-mortar institution to online modes of content delivery in an attempt to save the academic and teaching project. Current copyright restrictions and the outdatedness of our current pre-digital copyright regime from the 1970s severely hampered the transition and required time-consuming, costly and not always successful negotiations with publishers to ensure our students have adequate remote access to the materials they need. The exceptions proposed in clause 13 of the CAB, especially in s12A and 12D, would have been tremendously helpful to better respond to the challenges many of our learners, especially from poorer backgrounds, and lecturers faced.

It is noteworthy, in my opinion, to also point out here that the President's very laudable efforts at the WTO to make sure that IP protection does not preclude equitable access to COVID-19 vaccines, should be aligned with similar access concerns in another area of IP – copyright – in as far as cultural and educational materials are concerned. Access to medicines and access to knowledge concerns are two sides of the same coin – as highlighted in South Africa's national IP Policy. The patent-related efforts at the international stage and the President's reservations concerning the exceptions and limitations in the CAB are therefore somewhat at odds with one another.

In direct response to the President's reservations, the author of this submission co-authored with eight other Intellectual Property and Constitutional law experts a *Joint Academic Opinion*. This *Opinion* is attached to (ANNEX A) and forms part of this submission - and most of the points made in the *Opinion* are not repeated here to avoid duplication.

Importantly, the *Opinion* also makes several suggestions for technical changes – with draft language - of ss7A, 8A, 12B and 19D. The *Opinion* also puts forward that while we discuss the constitutionality of the CAB, we should not forget that the current Copyright Act of 1978 violates the Bill of Rights in several respects, and that the CAB seeks to remedy this.

I wish to preface the comments made in the attached *Joint Academic Opinion* with a few additional (and hopefully helpful) remarks triggered by the President's reservations and the public debate that has since continued unabated.

- A few commentors have repeatedly and publicly argued that the CAB is poorly drafted, practically unworkable and that a team of copyright experts (which no doubt should in their view include themselves) should be put together to draft a new CAB from scratch. I wish to caution against this, not only because further delay in this area is undesirable in light of the broader policy objectives of the CAB which require urgent attention but also because the criticism of poor drafting is not sufficiently substantiated in my view – apart from a few minor issues which could easily be fixed. Our reading of the Bill is that many of its provisions are "inspired" by language found in copyright statutes of other countries. In addition, the CAB was considerably improved since the first draft was published in 2015, as a result of several opportunities for public comments and engagement concerning the CAB. While many technical improvements were made over the years, it remains the prerogative of the lawmaker to make certain policy decisions and, after due consideration, to also disagree with comments made by stakeholders. Such disagreement should not be confused with not considering such comments in the first place.

- A commissioned PwC report is frequently mentioned in support of the claim that the proposed changes, and especially the introduction of fair use in South Africa, would have negative consequences for the publishing sector. While the potential impact of proposed changes to laws and policies should always be carefully considered, this particular report has been met with some criticism. For instance, it's estimates seem to be inflated and based, to a large extent, on subjective estimates – sourced from publishing industry executives who are members of the trade association that commissioned the study. This explains, in my view, the rather alarmist conclusion that introducing fair use in South Africa would reduce publishing sales by more than 30%. The study would have been more credible if it had properly considered the potential benefits of fair use and analysed the situation in countries with a fair use provision, especially in those countries which more recently introduced fair use into their law. It is therefore no surprise, in my view, that a similar study was rejected in Australia by the Australian Productivity Commission (https://www.pc.gov.au/inquiries/completed/intellectual-property/report/intellectual-property.pdf, p 179). Moreover, an Impact Assessment prepared for the DTI (now the DTIC) in 2014 recommended incorporating a general fair use provision into the Copyright Act (https://libguides.wits.ac.za/ld.php?content_id=50111158), and official reports on fair use prepared in other countries also support the introduction of fair use.

- Linked to the previous point, I also notice several other claims with regards to fair use which need addressing:

    - It has been suggested that a fair use provision like the one proposed in s12A of the CAB would violate international copyright law, and the three-step test in particular. The vast majority of global copyright experts, myself included, disagree with this view, for the reasons set out in an opinion I prepared for the Portfolio Committee in 2018 - and which I attach to this submission for your convenience. In that opinion, I mention, among other things, that "[i]n 2014, the Australian Law Reform Commission (ALRC) published a report based on a 18-month inquiry during which the ALRC carried out more than 100 consultations and received close to 900 submissions. In that report, the ALRC concluded with regards to the compatibility of fair use and the three step test: '*The ALRC considers that fair use is consistent with the three-step test. […]*'." If anything, the approach chosen by the South African lawmaker to combine a more flexible fair use provision with a specific list of exceptions – sometimes referred to as a hybrid approach – combines the benefits of flexibility and openness with legal certainty and predictability. Which in turn further reduces possible tensions between the three-step test in international copyright instruments and South Africa's proposed copyright regime.

    - It is also worth mentioning that introducing a new doctrine like fair use into our copyright law (which by the way is also based on foreign law) should not be equated with uncritically incorporating a foreign system – as has been suggested by some. Several countries have recently made similar changes to their laws (and it seems that Namibia will soon do the same). It is indeed good legislative practice to consider best practices from abroad which, if included, could improve the legislative status quo. Provided that sufficient consideration is, of course, given to the local context – which I submit was done when the DTIC initially proposed the introduction of a fair use provision and later, when a myriad of submissions on the topic was received and assessed by the DTIC and parliament.

    - The fact that some U.S. government officials have spoken out against fair use in South Africa should not be misunderstood as criticism of the doctrine itself but instead articulates concerns that increased access opportunities for South Africans (i.e. one of the key objectives of the CAB) may be detrimental for copyright holders in the U.S. It is likely that such criticism was triggered by interventions from US rightsholder organisations like the MPAA and/or RIAA.

    - It is worth re-iterating here that in my view, the current version of s12A was sufficiently considered and commented on by the public. Earlier versions of the Bill already contained the term "such as" and public comments were requested and received. Subsequently, comments were also received on a draft which did not contain this term. I therefore conclude that the final

wording was chosen based on all comments received from the public over the years.

- Repeatedly, I have heard the unsubstantiated assertion that Google is behind the CAB. I consider this a conspiracy theory. It is legitimate – and indeed welcome – that affected stakeholders do provide comments on issues in the Bill that affect them. I understand that Google has provided such comments on the Bill in the past, via the appropriate channels – just like other domestic and international corporate stakeholders with potentially conflicting views, such as Netflix, the International Publishers Association, Multichoice and the MPAA. In fact, my own observation is that some of these stakeholders have tried to influence the lawmaking process much more than Google has.

In conclusion, it will be key for parliament to restrict the current debate to the specific issues raised in the call for public submissions as attempts will no doubt be made to re-open the debate on other already settled issues. And some of these issues go in fact beyond of copyright law can or should address. The proposed changes should not only be judged against what copyright law in South Africa currently protects and historically protected - and how; instead, it should be evaluated in acknowledgement of the drafters' intention to re-shape copyright law in South Africa to better address existing domestic socio-economic concerns. Put differently, this is a rare opportunity to create a truly South African and futureproof copyright regime, which is well-aligned with the general principles of our new IP Policy and in compliance with international copyright law.

I am available for oral representations during the upcoming public hearings on the issues raised in this submission. Please do not hesitate to contact me should you have any questions.

Yours sincerely,

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ANNEXURE A: ACADEMIC OPINION
ANNEXURE B: FAIR USE OPINION FOR THE PORTFOLIO COMMITTEE

ANNEXURE A

Joint Academic Opinion
Re: Copyright Amendment Bill (B-13B of 2017)

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May 10, 2021

We offer the enclosed Joint Opinion on the President's referral of the Copyright Amendment Bill back to Parliament. We address the President's reservations about the Bill's constitutionality, as well his expressed concerns about the Bill's domestic application of international law. We analyse each of, and only, the specific clauses in the CAB that are mentioned in the President's letter. The question we ask and answer is whether Parliament should take action to bolster the constitutionality of any of the provisions identified in the President's letter.

To prepare this Opinion, we reviewed the Copyright Act, the President's letter, the 2019 Copyright Amendment Bill (B-13B of 2017) ("CAB"), and the analysis of the

Panel of Experts appointed to Parliament to review the Bill.[1]

We conclude that the CAB could be interpreted and implemented in a constitutional manner, including with regulatory clarifications. But we recommend that Parliament aid the process of constitutionally implementing the proposed law through the following specific technical changes to the Bill, language for which is included in the Appendix:

- Revise Sections 7A and 8A to require only a "fair" royalty in each;
- Require that quotations under Section 12B(1)(a) be "consistent with fair practice", as in the current Act;
- Remove the exception in Section 12B(1)(e)(i) for uses of works not subject to reservations of rights;
- Revise the translation right in Section 12B(1)(f) to include the full range of purposes for which a lawful translation may be made;
- Add a clarification to Section 19D that it authorizes cross-border trade by "authorized entities" as defined by the Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired or Otherwise Print Disabled.

I. Unconstitutionality of the Current Copyright Act of 1978

It is our opinion that the current apartheid-era Copyright Act of 1978 violates the Bill of Rights in several respects. Specifically, the 1978 Act:

- unfairly discriminates against persons living with visual and print disabilities as it does not permit the creation of accessible formats of works under copyright without permission from the rights holder, in violation of the right to equality, Sec. 9;
- does not permit uses of works to the degree required for freedom of expression, in violation of the right to receive and impart information, Sec. 16;
- inhibits access to educational materials in the modern world, including through the digital environment, in violation of the equal right to basic and further education for all, including in languages of the students' choice, Sec. 29;
- does not allow for materials to be translated into underserved languages, in violation of rights to use languages of one's choice and participate in

[1] In particular, we reviewed in detail the comments by Ms Michelle Woods of WIPO, Geneva, Switzerland ("Woods") and the opinion of counsel for the International Publishers Association, André Myburgh, of Lenz Caemmerer, Basel, Switzerland, http://legalbrief.co.za/media/filestore/2018/10/andre_myburgh.pdf ("Myburgh").

cultural life, Sec. 30 and 31;

- does not protect the rights of authors, performers, and other creators to fair remuneration and fair contract terms, as needed to promote the right to dignity and the principle of decent work, Sec. 10.

The CAB promotes the Constitution and the Bill of Rights by amending the deficient Copyright Act with provisions modelled on examples that exist in other open and democratic societies. Until the CAB is adopted, the Copyright Act 1978 will continue to violate the Bill of Rights, and therefore responding to the President's reservations and finalising the Copyright Amendment Bill is urgent. The urgency of amending the Copyright Act is all the more urgent with the advent of the COVID-19 pandemic, which has cut off access to physical schools, libraries and other institutions. These public services, in many cases, are not enabled to share materials for remote access and learning needed to promote the enjoyment of the rights in the Bill of Rights.

II. Tagging

We conclude that re-tagging the Bill is not constitutionally required, and would indeed be constitutionally suspect.

The Copyright Amendment Bill was passed by Parliament following the procedure set out in Section 75 of the Constitution. The Section 75 process is for "Ordinary Bills not affecting provinces." It is the process used for other copyright and intellectual property amendments. The President states that he has reservations that the Section 76 process should have been followed because copyright amendments affect areas like trade and culture, which are subject to joint national and provincial authority.

The President's reservations are, in our opinion, unfounded. The applicable portion of Section 76 of the Constitution describes a process requiring a greater provincial role in legislation only if it "falls within a functional area listed in Schedule 4." The regulation of copyright, and all intellectual property law, does not fall within a functional area listed in Schedule 4. At most, the impact on provincial competencies, such as culture and trade, are mere "knock on effects," rather than the "direct regulation" required to trigger the Section 76 process.[2] Re-tagging and following Section 76 would be contrary to the Constitution and would render the CAB open to subsequent constitutional challenge.

III. Royalty Rights In Existing Contracts

We conclude that the royalty rights provisions of the Bill should be amended to

[2] *Democratic Alliance v President of South Africa and Others* 2014 (4) SA 402 (WCC) para 94-95.

require only "fair" remuneration for current dispositions of copyrights.

The President states his reservation that the royalty requirements in the Bill may constitute "retrospective and arbitrary" regulation of property protected by the Constitution.

The alleged retrospectivity of the royalty provisions is not, in itself, a ground to find the provisions unconstitutional. Many laws, including all minimum wage laws, are "retrospective" in the limited sense of applying to future work under existing contractual or other arrangements. This is the same effect of the CAB's royalty provisions. The CAB applies its royalty requirements "where copyright in that work was assigned before the commencement date" of the Act, but only if the work "is still exploited for profit", and only for uses "after the commencement date" of the Act.[3] The CAB does not require that royalties be paid for past uses of works.

We accept that the royalty provisions must avoid arbitrariness to comply with the Constitution, despite the unclarity in South African constitutional law as to whether rights conveyed in copyright agreements are constitutionally protected property.[4] The provisions do not lack an adequate purpose. There was ample evidence before Parliament of unfairness in current and past contracts between South African creators and distributors of their work.[5] Other copyright laws have responded to similar problems by requiring adequate remuneration of authors and

[3] Copyright Amendment Bill, Sec. 6A(7).

[4] The question of whether copyright is covered by the right not to be arbitrarily deprived of property under section 25 has not been definitively settled in South African law. *See Laugh It Off Promotions CC v South African Breweries* [2005] ZACC 7) (deciding that free expression rights apply to use of parody in trademarks without deciding whether trademarks are property protected by section 25); *Ascendis Animal Health (Pty) Limited v Merck Sharpe Dohme Corporation* [2019] ZACC 41 (characterising patents as a statutory system creating an 'artificial monopoly' rather than property for the purposes of section 25); *Certification of the Constitution of the Republic of South Africa* [1996] ZACC 26 at 75 (holding that there was no defect in the final Constitution on the basis that it did not contain an explicit right to intellectual property in the Bill of Rights). We do not need to opine here, however, on whether the regulation of contract implicates the right not to be deprived arbitrarily of *property* because all legislation must avoid arbitrariness. *See Pharmaceutical Manufacturers Association of South Africa and Another: In re Ex Parte President of the Republic of South Africa and Others* [2000] ZACC 1.

[5] *See* Copyright Review Commission Report 2011 (surveying the plight of South African creators and recommending that unfair contracts be regulated, that excessive costs and unfair practices of collective management organizations be controlled, that copyrights revert to the creator after 25 years, and that the Copyright Tribunal be streamlined).

performers, including recently in the European Union.[6]

Any perceived constitutional problem may arise from the failure of sections 7A and 8A to explicitly limit the required royalty in existing agreements to "fair" remuneration.[7] Without clarifying regulations or interpretation, the law as written could be seen to require the renegotiation of otherwise fair copyright licenses and transfer agreements.[8] This could arguably be considered an arbitrary regulation, as there would be no legitimate reason to alter existing arrangements that are already fair. We therefore advise that the Bill revise sections 7A and 8A to clarify that existing arrangements are required to be modified only when their terms are not fair.

IV. Exceptions To Rights

We conclude that the limitations and exceptions to rights – considered individually and together – are reasonable, justifiable and indeed necessary, and reflect those contained in many open and democratic societies around the world. Nothing in international or comparative copyright law suggests that the number or collective effect of the exceptions is impermissible, excessive or extraordinary.[9] We

[6] Similar provisions were recently included in the European Union's 2019 Digital Single Market Directive. Specifically:

- Article 18 of the DSM Directive gives authors and performers a right to "appropriate and proportionate remuneration."
- Article 19 requires reporting of uses to enable remuneration determination - requiring that "authors and performers receive on a regular basis, at least once a year, and taking into account the specificities of each sector, up to date, relevant and comprehensive information on the exploitation of their works and performances from the parties to whom they have licensed or transferred their rights, or their successors in title, in particular as regards modes of exploitation, all revenues generated and remuneration due."
- Article 20 applies to existing contracts through what some refer to as a "bestseller" clause. The Articles provides a "contract adjustment mechanism" in which authors and performers are "entitled to claim additional, appropriate and fair remuneration from the party with whom they entered into a contract for the exploitation of their rights … when the remuneration originally agreed turns out to be disproportionately low compared to all the subsequent relevant revenues derived from the exploitation of the works or performances."

[7] Proposed section 6A would require that authors of literary and artistic works be entitled to "a fair share" of royalties for uses of their work. Sec 7A and 8A change the standard, proposing that authors of "visual artistic works" and performers in audiovisual works "share in the royalty received for" uses of their protected rights. The provisions apply to prospective uses of works created before the Act goes into effect.

[8] It could require the revision, for example, of an arrangement that provided a fully adequate payment to an author or performer through a lump sum payment, rather than through "a royalty".

[9] There are many countries that have more exceptions than South Africa would under the Bill. See e.g. Australia Copyright Act of 1968 Sections 103, 135A-ZT (providing four separate fair dealing exceptions and 38 provisions for other exceptions). See generally Standing Committee on Copyright and Related Rights, Thirty-Fifth Session, Geneva, November 13 to 17, 2017, Updated Study And Additional Analysis Of Study On Copyright Limitations And Exceptions For Educational Activities prepared by Professor Daniel Seng (surveying the common practice of countries around the world to enact multiple exceptions and limitations).

do, however, propose technical amendments that would dispel any doubts about the constitutionality of some of the provisions questioned by the President.

A. 12A, Fair Use

We conclude that there was adequate public participation in drafting the fair use clause in Sec. 12A, and that the fair use right is fully in compliance with the Constitution.

The fair use clause was adequately considered in public submissions and testimony. Parliament and the Department of Trade and Industry considered in many public processes that South African copyright law currently has a general exception permitting for a "fair dealing" with a work. Semantically, the terms "use" and "dealing" are equivalent.[10] A key difference from present law is the inclusion of the words "such as" before the list of permitted purposes - making clear that the list is open to other purposes of use, as long as the use itself is fair to the copyright owner. Similar openness to purposes is present in about a dozen other countries.[11] The policy reason to include an opening term like "such as" to a list of permitted purposes is to ensure that fair uses of the future – that cannot be known today – are permitted without further legislative amendment.[12] This policy issue was thoroughly canvassed in the parliamentary record. Indeed, the term "such as" was present in the 2015 Bill, removed in a later draft, and then reinserted based on consideration of comments from the public. This legislative history shows that the issue was adequately considered and commented on by the public.

Another difference from present law is that the inclusion of express factors to be considered in determining whether a use is fair. These factors, although new to the statute, substantially reflect South African case law and commentary.[13]

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[10] O H Dean, Handbook of South African Copyright Law (1987) 1-52 ("While it is true that the American Act refers to 'fair use' whereas the South African Act uses the term 'fair dealing' it is submitted that for the present purposes the two terms are synonymous").

[11] *See* Elkin-Koren, Niva and Netanel, Neil Weinstock, *Transplanting Fair Use Across the Globe: A Case Study Testing the Credibility of U.S. Opposition,* Joint PIJIP/TLS Research Paper Series #50, 3-6 (2020) (finding that "the fair use model has been adopted, with some variation, in a dozen countries").

[12] *See Supreme Court of Appeal in Golden China v Nintendo* Golden China TV Game Centre and Others v Nintendo Co Ltd (55/94) [1996] ZASCA 103; 1997 (1) SA 405 (SCA); [1996] 4 All SA 667 (A) (25 September 1996) at 13-14 (discussing the "intention" in the Copyright Act "to cover future technical innovations by using general words"; "This general scheme of the Act suggests to me that the definitions in the Act should be interpreted 'flexibly, so that it would cover new technologies as they appeared, rather than to interpret those provisions narrowly and so force [the Legislature] periodically to update the act'").

[13] *See Moneyweb (Pty) Limited v Media 24 Limited and Another* (31575/2013) [2016] ZAGPJHC 81; [2016] 3 All SA 193 (GJ); 2016 (4) SA 591 (GJ) para 113 (5 May 2016) (considering factors to determine whether a particular dealing is "fair" as including: the nature of the medium in which the work has been published; whether the original work has been published; the time lapse between the publication of the two works; the amount (quality and quantity) of the work that has been taken; the

B. 12B(1)(a), Quotation

We conclude that Parliament could make explicit the "fair practice" standard within the quotation right in Section 12(B)(1)(a) to parallel the requirement in the current Act and in the Berne Convention for the Protection of Literary and Artistic Works.

The President lists the quotation right in Section 12(B)(1)(a) of the CAB among those he alleges may violate the Constitution, but he does not explain his reservations. The Berne Convention, which South Africa is a member of, requires that it "shall be permissible to make quotations from a work …, provided that their making is compatible with fair practice, and their extent does not exceed that justified by the purpose."[14] In the Parliamentary review process, it was suggested that the quotation right include the Berne Convention's standard that every quotation be "compatible with fair practice."[15]

The Berne Convention does not require that the "compatible with fair practice" condition be stated directly in the exception,[16] and many copyright laws provide quotation rights that do not explicitly require compliance with "fair practice."[17] Many

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extent of acknowledgement given to the original work); O H Dean, Handbook of South African Copyright Law (1987) 1-52 (opining that four factors in U.S. fair use right, which also appear in in the Australian fair dealing rights, "are commonsensical and reasonable and should be followed by the South African courts").

[14] Berne Convention for the Protection of Literary and Artistic Works, Art. 10.

[15] See Copyright Act of South Africa, Sec. 12 (3) states (emphasis added):

> "The copyright in a literary or musical work which is lawfully available to the public shall not be infringed by any quotation therefrom, including any quotation from articles in newspapers or periodicals that are in the form of summaries of any such work: *Provided that the quotation shall be compatible with fair practice*, that the extent thereof shall not exceed the extent justified by the purpose and that the source shall be mentioned, as well as the name of the author if it appears on the work."

[16] *See* Jonathan Band, *Analysis of Woods and Myburgh Comments on CAB*, Joint PIJIP/TLS Research Paper Series #55, 4 (2020) ("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.").

[17] See e.g. Copyright in Literary and Artistic Works (Sweden), Art. 22 (as amended up to Act (2018:1099) (permitting quotation "in accordance with proper usage and to the extent necessary for the purpose"); Intellectual Property Code (France), Art. L211 (amended by Act No. 2016-925 of July 7, 2016) (permitting "analyses and short quotes justified by the critical, polemical, educational, scientific or informative nature of the work in which they are incorporated"); Dominican Republic: Law No. 65-00 on Copyright, Art. 31 (August 21, 2000)(permitting quotation "provided that they are not of such length and continuity that they might reasonably be considered a simulated, substantial reproduction of the content of his work that causes injury to the author thereof"); Iran: Act for Protection of Authors, Composers and Artists Rights, Art. 7 (Copyright Law) (January 12, 1970), Translation and Reproduction of Books, Periodical and Phonograms Act (December 26, 1973)("provided that the sources of quotations are mentioned and the customary limitations are

of these laws, however, contain other qualitative terms that require analysis of the fairness of the purpose for which the quotation is used. It is possible that courts would read such a qualitative assessment of purpose into the statute and render it in compliance with international law. The existing quotation right in South Africa explicitly requires that quotation be compatible with fair practice. To resolve any ambiguity and to follow current law, we advise that the "fair practice" criteria be included in the quotation right.

C. 12B(1)(c) Broadcasting

We conclude that no amendment is needed for Section 12B(1)(c), authorizing certain uses of works by broadcasters.

The President lists the exceptions for broadcasters in Sec. 12B(1)(c) among those he alleges may violate the Constitution and international law, but he does not explain his reservations. The purpose of the provision is to authorise expressly incidental reproductions made by broadcasters to facilitate their services. The Section expressly prohibits any reproduction from being "used for broadcasting or for any other purpose without the consent of the owner of the relevant part of the copyright in the work." The currently in force Copyright Act already provides this right; the amendments made by the CAB are merely semantic.[18] We see no reason to amend this provision.

D. 12B(1)(e)(i), News of the day

We propose removing Sec. 12(B)(1)(e)(i) from the Bill.

The President lists Section 12(B)(1)(e)(i) among those for which he expresses reservations. The Section permits the reproduction and communication to the public of articles and broadcasts "on current economic, political or religious topics" if exclusive rights in the work "is not expressly reserved." The provision exists in much the same form in the current Act,[19] and is common in other copyright laws.[20]

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observed"). Jordan: Law No. 22 of 1992, on Copyright and its Amendments, Art. 17 (2005)("for the purpose of clarification, explanation, discussing, criticizing, educating or testing in as much as justifiable by this objective, provided that the name of the product and its author are mentioned); Netherlands: Act of September 23, 1912, containing New Regulation for Copyright, § 15a (Copyright Act 1912, as amended up to September 1, 2017)("the quotation is in accordance with what is generally regarded as reasonably acceptable and the number and size of the quoted parts are justified by the purpose to be achieved").

[18] See Copyright Act of South Africa, Sec. 12(5)(b).

[19] See Copyright Act of South Africa, Sec. 12(7) ("The copyright in an article published in a newspaper or periodical, or in a broadcast, on any current economic, political or religious topic shall not be infringed by reproducing it in the press or broadcasting it, if such reproduction or broadcast has not been expressly reserved and the source is clearly mentioned.").

[20] See, e.g., African Intellectual Property Organization (OAPI), Agreement Revising the Bangui Agreement of March 2, 1977, Article 16 ("it shall be permitted, without the consent of the author and without payment of remuneration, but subject to the requirement of stating the source and the name

One commentator posited that permitting uses of works where copyright is "not expressly reserved" violates the Article 5(2) of the Berne Convention. That Article requires that the "enjoyment and the exercise" of copyright "shall not be subject to any formality." The notice requirement that copyright has been reserved, required for a work to not be subject to the exception in Sec. 12(B)(1)(e)(i), could be intercepted as the kind of "formality" prohibited by Article 5(2) of the Berne Convention. The Berne Convention may not apply here, however, because it expressly provides that its protections "shall not apply to news of the day or to miscellaneous facts having the character of mere items of press information."[21] The question is thus raised as to whether Sec. 12(B)(1)(e)(i) only provides a use right for "news of the day or … items of press information."

We conclude that this section of the law may be safely deleted to resolve any ambiguity as to its permissibility under international law. Any fair use of works for informatory purposes would be adequately dealt with under the general flexible exception in Section 12A. As long as that Section is maintained, Sec. 12(B)(1)(e)(i) may be deleted without harming the objectives of the Bill.

E. 12B(1)(f), Translations

We propose amending the translation exception in 12B(1)(f) to promote the Bill of Rights and reflect the full range of purposes for which a lawful translation may be made.

The President lists the exception for translations "for teaching" (as it is presently worded) in Sec. 12B(1)(f) among those he alleges may violate the Constitution and international law, but he does not explain his reservations. The right to translate works may be necessary to promote various Constitutional rights, such as the right of South Africans "to receive education in the official language or languages of their choice in public educational institutions where that education is reasonably practicable,"[22] the right of everyone "to use the language and to participate in the cultural life of their choice,"[23] and the right of linguistic communities not to be denied the right, "to enjoy their culture" and "use their language."[24] The current Act provides a right of translation that is not limited to "teaching."[25] The limitation of the

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of the author if such name is given in the source, (i) to reproduce in the press, to broadcast or to communicate to the public, an economic, political or religious article published in newspapers or periodicals, or a broadcast work of like nature, in those cases where the right of reproduction, broadcasting or communication to the public has not been expressly reserved").

[21] Berne Convention for the Protection of Literary and Artistic Works, Art. 2(8).

[22] Constitution of South Africa, sec. 29(2).

[23] Constitution of South Africa, sec. 30.

[24] Constitution of South Africa, sec. 31(1)(a).

[25] See Copyright Act of South Africa, sec. 12(11) ("(11) The provisions of subsections (1) to (4) inclusive and (6), (7) and (10) shall be construed as embracing the right to use the work in question

translation right to "teaching" is too narrow to realise the full scope of these rights protected by the Bill of Rights. We therefore recommend the expansion of the translation right to include any translation "for a non-commercial purpose," which is "consistent with fair practice," and which "does not exceed the extent justified by the purpose."

F. 12C Transient copies

We find no reason to amend the exception for transient copies in Section 12C.

The President lists the exception for uses of transient copies in technological processes authorized by Section 12C of the CAB among those he alleges may violate the Constitution and international law, but he does not explain his reservations. Exceptions for transient copies are necessary to facilitate many modern digital activities such as streaming video, reading a website, and sending and receiving email. The provision is substantially similar to the exception for transient copies in current EU law,[26] as well in the laws of many countries around the world.[27] It is widely accepted that exceptions for transient copies for technological processes are reasonable and comply with international law.[28]

G. 12D Education

We conclude that Section 12D is constitutional in its present form.

The President lists the exception for educational uses in 12D among those he alleges may violate the Constitution and international law, but he does not explain his reservations. Some commenters question section 12D(3), which allows educational institutions to copy an entire book into a course pack if "a licence to do so is not available from the copyright owner, collecting society or an indigenous community on reasonable terms and conditions." Section 12D(4) permits reproduction of "a whole textbook" solely for "educational or academic activities" if the "textbook is out of print," "the owner of the right cannot be found," or

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either in its original language or in a different language, and the right of translation of the author shall, in the latter event, be deemed not to have been infringed.").

[26] See EU Directive 2001/29/EC, Art. 5 (requiring exception for "[t]emporary acts of reproduction … which are transient or incidental [and] an integral and essential part of a technological process and whose sole purpose is to enable: (a) a transmission in a network between third parties by an intermediary, or (b) a lawful use of a work or other subject-matter to be made, and which have no independent economic significance").

[27] See, e.g., Botswana Copyright Act, Art. 19(a) (providing exception for "temporary reproduction of a work … made in the process of a transmission of the work or an act of making a stored work perceptible").

[28] See Sam Ricketson, *WIPO Study On Limitations And Exceptions Of Copyright And Related Rights in the Digital Environment*, Standing Committee on Copyright and Related Rights (2003) p.79 (explaining that "no provision concerning temporary reproductions found its way into the text of the WCT", and "[a]ccordingly, it remains a matter for national legislators to determine whether, and to what extent, they will provide for exceptions for this kind of reproduction in their laws").

"authorised copies . . . cannot be obtained at a price reasonably related to that normally charged in the Republic." It is asserted by some commenters that the use of entire works without payment of equitable remuneration could unreasonably prejudice the legitimate interests of the authors.

In our considered view, section 12D is defensible as a legitimate policy choice made by the South African legislature that reconciles its international obligations in respect of copyright and human rights and gives effect to the Bill of Rights in line with its constitutional obligations. The core provision of Sections 12D(3) and (4) is to require that copyright holders of educational materials serve the South Afrcian market on reasonable terms and conditions. This power to control abuses of monopoly power is enshrined in international law, including in the Berne Convention and WTO TRIPS Agreement, which protect the right of countries to control abuses of intellectual property rights.[29] There are parallel concepts in South African patent and competition law, both of which define a failure to serve the market on reasonable terms as an abuse.[30] The provision reflects long standing practice in South Africa, where universities and other educators during Apartheid

[29] See Stockholm Revision Conference Report I ("263. The Committee accepted, without opposition, the proposal of its Chairman that mention should be made in this Report of the fact that questions of public policy should always be a matter for domestic legislation and that countries of the Union would therefore be able to take all necessary measures to restrict possible abuses of monopoly."); WIPO Guide to the Berne Convention for the Protection of Literary and Artistics Works (Paris Act, 1971) ("17.4. However, quite apart from these powers of censorship, it was unanimously agreed in Stockholm that questions of public policy should always be a matter for national legislation and that countries of the Union would therefore be able to take all necessary measures to restrict possible abuse of monopolies."); Sam Ricketson, *Study on Limitations And Exceptions of Copyright and Related Rights in the Digital Environment* (2003) ("Berne Union members are free to take all necessary measures to restrict possible abuses of monopoly, and this will not be in conflict with the Convention so long as this is the purpose of the measures, even if, in some instances, this means that the rights of authors are restricted. All private rights have to be exercised in accordance with the prescriptions of public law, and authors' rights are no exception to this general principle."); World Trade Organization Agreement on Trade Related Aspects of Intellectual Property Rights, Art. 8(2) (clarifying that WTO Members may adopt measures "to prevent the abuse of intellectual property rights by right holders or the resort to practices which unreasonably restrain trade").

[30] See South African Patents Act, Sec. 56(2)(c) ("The rights in a patent shall be deemed to be abused if—(c) the demand for the patented article in the Republic is not being met to an adequate extent and on reasonable terms"); Competition Act of South Africa, Section 8(a) (prohibiting dominant firm from charging "an excessive price to the detriment of consumers", defining "excessive price" as"a price for a good or service which- (aa) bears no reasonable relation to the economic value of that good or service; and (bb) is higher than the value referred to in subparagraph (aa)"); WTO TRIPS Agreement, Art. 8(2) ("Appropriate measures, provided that they are consistent with the provisions of this Agreement, may be needed to prevent the abuse of intellectual property rights by right holders or the resort to practices which unreasonably restrain trade or adversely affect the international transfer of technology."); Art. 40(2) ("Nothing in this Agreement shall prevent Members from specifying in their legislation licensing practices or conditions that may in particular cases constitute an abuse of intellectual property rights having an adverse effect on competition in the relevant market.");

commonly reproduced for educational purposes articles and whole books that were not available in South Africa because of censorship or economic boycotts.[31] The provisions reflect the laws of many other countries that permit greater free uses of works that are not commercially available at reasonable prices.[32] The expansion of education rights in the Copyright Act was recommended by professional reviews of the law commissioned by the Department of Trade and Industry.[33]

Sections 12D(3) and (4) are quite narrow in their application. Each is subject to Section 12D(1), which clarifies that the only purpose for which a whole book can be copied is for non-commercial "educational and academic activities." Similarly, Section 12D(3) provides that educational institutions must by default *first* try to secure a licence from the copyright owner to incorporate whole works into course packs or any other form. *If and only if* such a licence is unobtainable on *reasonable terms* can they incorporate whole works.

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[31] See Eve Gray and Laura Czerniewicz, *Access to Learning Resources in Post-apartheid South Africa*, in Shadow Libraries, 112 (2018) (reviewing publishing practices before and after Apartheid).

[32] See Canada Copyright Act, Section 29.4 (providing that "[i]t is not an infringement of copyright for an educational institution … to reproduce a work, or do any other necessary act, in order to display it" if the work is not "commercially available" - defined as "available on the Canadian market within a reasonable time and for a reasonable price"); Indian Copyright Act, s 52(1)(o) (providing that "the making of not more than three copies of a book … for the use of the library if such book is not available for sale in India"); 17 U.S. Code § 108 (providing right of libraries to make replacement copies of an "entire work, or to a substantial part" if the work "cannot be obtained at a fair price"); Afghanistan, Law Supporting the Rights of Authors, Composers, Artists and Researchers (Copyright Law) (2008), Article 44 (permitting Minister to grant "a nonexclusive license to reproduce and publish" any work if "Copies of the work were not distributed in the state … for a price similar to the prices of similar works"); Albania, Law No. 35/2016 of March 31, 2016, on Copyright and Related Rights, Article 72 (providing right to make personal copy of a whole book if "its sold copies are exhausted for at least two years"); Australia Copyright Act, Section 40(2)(c) (including as a factor for determining a fair dealing for research or study "the possibility of obtaining the work or adaptation within a reasonable time at an ordinary commercial price"); Section. 49 (providing right of libraries and archives to make replacement copies of a whole work if "the work cannot be obtained within a reasonable time at an ordinary commercial price"); Cabo Verde, Copyright Act, Article 72 (permitting reproduction "of a single copy of works which are not yet available in trade or are impossible to obtain, for purely scientific or humanitarian interest purposes"); China, Regulation on the Protection of the Right to Network Dissemination of Information, Art. 7 (2006) (permitting libraries to make a digital replacement copy of a work "which is unavailable or only available at a price obviously higher than the marked one on the market"); Sudan, Copyright and Neighbouring Rights (Protection) and Literal and Artistic Works Act 2013, Art 31 (authorizing libraries and archives to make replacement copies of works if "the edition of the copy in their possession might be out of stock or is impossible to get in a reasonable price").

[33] See Genesis Analytics, *Assessment of the Regulatory Proposals on the Intellectual Property Policy Framework for South Africa*, p. 77-78 (31 July 2014) (advocating for expansion of educational exceptions in the law, including through a general fair use provision, allowances for the utilisation of whole works for teaching, extending exceptions to all types of education, and removing restrictions on the number of copies for educational purposes that can be made of a work).

H. 19B Reverse Engineering

We find no reason to amend the new exception in Section 19B for reverse engineering.

The President listed this exception in his criticisms, but no other commentator to our knowledge criticised this exception as being out of compliance with the Constitution or international law. Reverse engineering exceptions are widespread throughout the world.[34] Sec. 19B(2) closely follows the text of Article 6 of the European Union Software Directive (2009/24/EC) with minor textual changes. Sec. 19B(1) is almost exactly the same as Article 5(3) of the European Union Software Directive. Both exceptions are narrowly tailored to allow very specific actions necessary for the advancement of technology. Such exceptions are critical for enabling competition in the supply of parts of inputs to standard technology that needs to interoperate with other components.

I. 19C Library uses

We find no reason to amend the library rights in Section 19C.

These provisions appear substantially similar to a frequently-referenced international model law to meet the interests of libraries.[35] Some commenters question the provisions in 19C(4) and (9) that permit the making available of works in their collection through a "secure computer network," without the requirement contained in some laws that such network be accessed only from the premises of the library. These criticisms were made before the COVID-19 pandemic cut off physical access to libraries around the world. The CAB now appears prescient. Many libraries and educational institutions in the United States, Canada and Europe provide remote access to at least some works via secure computer networks. This right is necessary to promote the rights of all South Africans to information and to education during periods when physical facilities are closed or inaccessible. We find no reason to amend this Section.

V. International Law

The President's letter states that the President refers the Copyright Amendment Bill back to Parliament "so that it may consider the Bills against South Africa's International Law obligations". However section 79(1) of the Constitution permits

[34] See e.g. India, Art 52 (providing an exception for "the doing of any act necessary to obtain information essential for operating interoperability of an independently created computer programme with other programmes by a lawful possessor of a computer programme provided that such information is not otherwise readily available").

[35] *See* EIFL Draft Law on Copyright Including Model Exceptions and Limitations for Libraries and Their Users (2016).

referral back to Parliament only for constitutional issues. It is possible that in a limited number of highly specific cases a failure to comply with International Law has implications for the constitutionality of a legislative provision. However the President's letter does not explain why any of the reservations on the CAB's compliance with international law raises a constitutional issue, and cites several treaties to which South Africa is not a party.[36] We nevertheless examine each of the President's reservations and suggest possible amendments to respond to any legitimate concerns we identify.

A. Sec. 19D, Marrakesh Treaty

We propose that Parliament may add a reference to "authorised entities" in Section 19D to clarify the application of the cross-border provisions of the Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired or Otherwise Print Disabled. We emphasise, however, that we do not conclude that this clarification is required by the Constitution or to implement the Marrakesh Treaty.

The President's letter asserts that the Bill may not be in compliance with the Marrakesh Treaty, without giving any detail.[37] It has been claimed by some commenters that the CAB does not adequately authorise cross border trade in accessible format copies of works, as intended by the Marrakesh Treaty. We disagree.

It is claimed that the Bill does not establish a mechanism for the cross border trade in accessible format copies of works by so-called "authorised entities" -- a term used in Article 5 of the Marrakesh Treaty. Article 5.1 of the Marrakesh Treaty requires that member countries "shall provide" that accessible format copies of works "may be distributed or made available by an authorised entity to a beneficiary person or an authorised entity in another Contracting Party" (emphasis added). Article 5.2 provides that parties "may" meet this obligation through a specific provision of law for authorised entities. But Article 5.3 makes clear that countries do not need such a provision: "A Contracting Party may fulfill Article 5(1) by providing other limitations or exceptions in its national copyright law".

Section 19D(3) of the CAB promotes cross-border trade of accessible formatted works, including through authorised entities:

> (3) A person with a disability or a person that serves persons with

[36] For further discussion of these points, *see* Samtani, Sanya, *The Domestic Effect of South Africa's Treaty Obligations: The Right to Education and the Copyright Amendment Bill* (2020). PIJIP/TLS Research Paper Series no. 61, at 31-39.

[37] South Africa is not currently a member of the Marrakesh Treaty. However, we recognise that one of Parliament's stated purposes for enacting the CAB is to put in place appropriate domestic legislation in order for South Africa to accede to the Marrakesh Treaty. In its current form, we believe that 19D is constitutionally required as the current Copyright Act does not contain any provisions at all to facilitate access to materials under copyright for persons with disabilities.

> disabilities may, without the authorisation of the copyright owner export to or import from another country any legal copy of an accessible format copy of a work referred to in subsection (1), as long as such activity is undertaken on a non-profit basis by that person.

Section 19D(3) is adequate to implement the cross border provision of the Marrakesh Treaty. By authorising cross border trade by "a person that serves persons with disabilities," the section clearly authorises cross border trade by legal persons, including authorised entities.[38] If Parliament desires to make this fact more clear, it could add a definition of "authorised entity" and add the phrase "including an authorised entity" in Section 19D(3) after the words "a person that serves persons with disabilities." We emphasise, however, that these provisions are not required to implement the Marrakesh treaty.

B. Technological Protection Measures, WIPO Copyright Treaty

We find that no amendments to the Bill are needed for South Africa to accede to the WIPO Copyright Treaty (WCT), including in its definition of a technological protection measure. But, as with the Marrakesh Treaty, South Africa is not a party to the Treaty, so compliance with it cannot raise a constitutional concern. Rather, an intent of the Bill is to allow South Africa to accede to the WCT.

The President states that the WCT requires "legal remedies against the circumvention of technological measures used by authors to protect their works," implying that the Bill does not provide such protection. The Bill provides protections against circumventing technological protection measures, defined in Section 1(i)(a) as "any process, treatment, mechanism, technology, device, system or component that in the normal course of its operation prevents or restricts infringement of copyright in a work." This definition is consistent with the WIPO Copyright Treaty Art. 11, which requires "adequate legal protection and effective legal remedies against the circumvention of effective technological measures that are used … in connection with the exercise of their rights." There is no requirement in the WIPO Copyright Treaty to protect measures that control access to work for a non-infringing purpose. Accordingly, we find no amendment is needed in response to the President's objections.

[38] The term "person" in South African Law includes a legal person - i.e. an organization.

APPENDIX I: PROPOSED AMENDMENTS TO THE CAB

We offer the following proposed amendments to the Bill to better tailor its provisions to its purposes. As we describe above, we do not find that any of these amendments is constitutionally required.

VI. SECTION 6A, 7A, 8A

Option 1

Add the word "fair" before "share of royalty" throughout Sections 7A and 8A.

Option 2

To add further definition of the application of the concept of the fair royalty requirement, including to prospective uses under existing agreements, Parliament could add a definition of a "fair royalty." For example:

> Definitions
>
> 'Royalty' means a periodic payment based on a percentage or other share of the revenue or sales made from commercial exploitation of a work or performance.
>
> 'Fair royalty' means appropriate and proportionate remuneration based on the totality of the circumstances, including:
>
> > the actual or potential economic value of the licensed or transferred rights, taking into account the author's or performer's contribution to the overall work or performance;
> >
> > market practices, the actual exploitation of the work, and amount normally paid in the particular industry in South Africa and globally;
> >
> > amounts or ranges determined fair through collective bargaining or a determination by the Minister, if any.

It could also consider replacing the standard for application to works or performances assigned before the commencement date of the Copyright Amendment Act (i.e. sections 6A(7), 7A(7), 8A(5)) with language based on the so-called "bestseller" clause in current EU law, described above in footnote 5. For example:

> (xx) An author or performer is entitled to claim additional, appropriate and fair remuneration from the party with whom they entered into a contract for the exploitation of their rights or to whom the author or performer licensed or assigned his copyright, or from the successors in title of such party, when the remuneration originally agreed turns out to be disproportionately low compared to all the subsequent relevant revenues derived from the exploitation of the work or performance. Where parties cannot agree on fair remuneration in such a case, any party may refer the matter to the Tribunal for an order determining the fair remuneration.

VII. Section 12B(1)(a)

We offer the following amendment as an option to return the "consistent with fair practice" requirement to the quotation right.

(1) Copyright in a work shall not be infringed by any of the following acts:

(a) Any quotation: Provided that—

(i) **the quotation is compatible with fair practice**

(ii) the extent thereof shall not exceed the extent reasonably justified by the purpose; and

(iii) to the extent that it is practicable, the source and the name of the author, if it appears on or in the work, shall be mentioned in the quotation

VIII. Section 12B(1)(e), News of the Day

We offer the following amendment to remove the exception for uses of news unless the reproduction right is expressly reserved:

12B. (1) Copyright in a work shall not be infringed by any of the following acts: . . .

(e) subject to the obligation to indicate the source and the name of the author in so far as it is practicable—

(i) ~~the reproduction by the press, or in a broadcast, transmission or other communication to the public of an article published in a newspaper or periodical on current economic, political or religious topics, and of broadcast works of the same character in cases in which the reproduction, broadcasting or such communication thereof is not expressly reserved;~~

~~(ii)~~ the reporting of current events, or the reproduction and the broadcasting or communication to the public of excerpts of a work seen or heard in the course of those events, to the extent justified by the purpose; or

(ii~~i~~) the reproduction in a newspaper or periodical, or the broadcasting or communication to the public, of a lecture, address, or sermon or other work of a similar nature delivered in public, to the extent justified by the purpose of providing current information;

IX. Translation

We propose the following language be used to replace the current Section 12B(1)(f) to better reflect the full range of purposes for which a lawful translation may be made.

(f) the translation of such work into any language: Provided that such translation is done for a non-commercial purpose, is consistent with fair practice, and does not exceed the extent justified by the purpose.

X. Section 19D, Disability

We offer the following amendments to better tailor the CAB to the terms of the Marrakesh Treaty designed to enable cross-border exchanges of works.

Definitions

"authorised entity" means an entity that is authorised or recognised by the government to provide education, instructional training, adaptive reading or information access to beneficiary persons on a non-profit basis. It also includes a government institution or non-profit organization that provides the same services to beneficiary persons as one of its primary activities or institutional obligations.

Amend Section 19D(3) to read:

(3) A person with a disability or a person that serves persons with disabilities, **including an authorised entity,** may, without the authorisation of the copyright owner export to or import from another country any legal copy of an accessible format copy of a work referred to in subsection (1), as long as such activity is undertaken on a non-profit basis by that person**, provided that prior to the distribution or making available the person did not know or have reasonable grounds to know that the accessible format copy would be used for other than for persons with disability.**

ANNEXURE B

UNIVERSITY OF CAPE TOWN
INTELLECTUAL PROPERTY UNIT

Development. Innovation. Public Policy.

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Cape Town, 7 July 2021

OPINION

Dear Ms Sheldon:

Thank you for giving me the opportunity to provide my input to a set of questions raised by the Portfolio Committee on Trade and Industry concerning ss12A to 19D of the Copyright Amendment Bill.

I wish to emphasise my respect for the Portfolio Committee's continued efforts - in spite of continued public attacks by one or two stakeholders mainly through popular media - to take measure (like the request for this opinion) to thoroughly examining the remaining issues with a view of creating the best possible copyright law for the country.

Please do not hesitate to contact me should you have any questions.

Kind regards,

Dr. Tobias Schonwetter
Director: IP Law and Policy Unit
Associate Professor, Department of Commercial Law
Faculty of Law, University of Cape Town

A. Do the proposed exceptions and limitations comply with the Berne three-step test? If not, is it necessary to comply?

In order to incentivise and reward creativity, national copyright laws seeks to adequately protect creators and owners of copyrighted works - and they do this through granting copyright owners numerous exclusive rights concerning the use and distribution of their works. However, these exclusive rights are not absolute and copyright laws around the world contain so-called copyright exceptions and limitations that curtail the rights of copyright owners with a view of fairly balancing the rights of copyright owners with the interests of other stakeholders to access and use copyrighted works.

It is the difficult task of national lawmakers to find the "right" balance between protection (through exclusive rights) and access (through exceptions and limitations), with due consideration of domestic needs and circumstances to ultimately maximise creativity for the benefit of society at large.

International treaties and agreements such as the Berne Convention for the Protection of Literary and Artistic Works of 1886 (the Berne Convention), the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) of 1995, the WIPO Copyright Treaty (WCT) of 1996 and the Marrakesh Treaty to Facilitate Access to Published Works by Visually Impaired Persons and Persons with Print Disabilities (the Marrakesh Treaty) seek to harmonise domestic copyright laws. In essence, they prescribe minimum standards for copyright protection and, since the Marrakesh Treaty, minimum standards for copyright limitations and exceptions (in some areas). **As a member of the WTO, South Africa is bound by TRIPS, and as a contracting party to the Berne Convention, South Africa is also bound by the provisions of the Berne Convention.**[1] At this point, however, South Africa has not acceded to or ratified either the WCT or the Marrakesh Treaty.

Crucially, for the purposes of this opinion, both the Berne Convention and TRIPS contain a mechanism commonly referred to as the three-step test. The test narrows down national lawmakers' abilities to freely legislate in the area of copyright exceptions and limitations. Put differently, the three-step test sets limits to copyright

[1] For further details see http://www.wipo.int/treaties/en/remarks.jsp?cnty_id=1026C

exceptions and limitations, thereby creating an international standard against which national copyright exceptions and limitations are to be judged.

For the sake of completeness, it must be mentioned here briefly that the language of the test actually differs from one international instrument to another. In the Berne Convention, for instance, Article 9(2) provides:

> *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.*

Article 13 TRIPS, on the other hand, states:

> *Members shall confine limitations or exceptions to exclusive rights to certain special cases which do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the right holder.*

Hence, the Berne three-step-test only applies to exceptions to the reproduction right (while TRIPS applies to copyright exceptions and limitations more broadly), and while Art 9(2) of the Berne Convention seeks to protect the interests of *authors*, Art 13 TRIPS protects *rights holders*.

Broadly, though, the three-step test puts forward three cumulative conditions for national copyright exceptions and limitations and prescribes that such exceptions and limitations must:

1. **be confined to certain special cases;**
2. **not conflict with the normal exploitation of the copyright work; and**
3. **not unreasonably prejudice the legitimate interests of the rights holder / author.**

The remainder of this section will address the question whether the proposed open-ended, flexible fair use exception as well as the other exceptions and limitations contained in ss12A-19D of the Copyright Amendment Bill comply with the three-step test. Emphasis is on the compatibility of the proposed fair use provision with the three-step test.

This question of whether fair use provisions comply with the three-step test is not new to lawmakers and legal experts, and has been discussed many times over. What is

noticeable, however, is that the number of commentators criticising fair use for being in conflict with the three-step test is on the decline as the views of previously critical authors such as Ruth Okediji, Sam Ricketson and Mihaly Fiscor have evolved[2] (even though their older writings are still frequently cited in support of criticism against fair use provisions). This may have to do with more flexible interpretations of the three-step test in recent times as, for instance, proposed in the Max Planck Institute's Declaration on a Balanced Interpretation of the 'Three-Step Test (see below).

The following table shows that the wording of the proposed South African fair use provision sufficiently aligns with the wording of its U.S. equivalent so that arguments made by commentators with regards to the U.S. provision apply *mutatis mutandis* to the South African fair use provision. In particular, the factors for assessing fairness are strikingly similar. If anything, the South African provision is more detailed and there should thus be less tension between s12A and the three-step test (especially the test's first step).

South Africa	U.S.
12A. General exceptions from copyright protection (1) *(a)* In addition to uses specifically authorised, fair use in respect of a work or the performance of that work, for purposes such as the following, does not infringe copyright in that work: (i) Research, private study or personal use, including the use of a lawful copy of the work at a different time or with a different device; (ii) criticism or review of that work or of another work; (iii) reporting current events; (iv) scholarship, teaching and education; (v) comment, illustration, parody, satire, caricature or pastiche; (vi) preservation of and access to the collections of libraries, archives and museums; (vii) expanding access for underserved populations; and (viii) ensuring proper performance of public administration.	**17 U.S. Code § 107** Notwithstanding the provisions of sections 106 and 106A, the fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified by that section, for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright. In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include— (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;

[2] See P Samuelson and K Hashimoto, Is the U.S. fair use doctrine compatible with Berne and TRIPS obligations? Footnote 9 in T Synodinou (ed) *Universalism or Pluralism in International Copyright Law (2018, forthcoming)*

(b) In determining whether an act done in relation to a work constitutes fair use, all relevant factors shall be taken into account, including but not limited to— (i) the nature of the work in question; (ii) the amount and substantiality of the part of the work affected by the act in relation to the whole of the work; (iii) the purpose and character of the use, including whether— *(aa)* such use serves a purpose different from that of the work affected; and *(bb)* it is of a commercial nature or for non-profit research, library or educational purposes; and (iv) the substitution effect of the act upon the potential market for the work in question. *(c)* For the purposes of paragraphs *(a)* and *(b)* and to the extent reasonably practicable and appropriate, the source and the name of the author shall be mentioned.	(2) the nature of the copyrighted work; (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and (4) the effect of the use upon the potential market for or value of the copyrighted work. The fact that a work is unpublished shall not itself bar a finding of fair use if such finding is made upon consideration of all the above factors.

In recent years, the conflict between fair use and the three-step test was addressed by lawmakers and many legal commentators. It goes beyond the scope of this opinion to summarise and analyse all these contributions – but those interested may find the following two more recent contributions particularly helpful in that they examine numerous contributions by others to reach their conclusions:

> P Samuelson *Is the U.S. Fair Use Doctrine Compatible with Berne and TRIPS Obligations?* (2018), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3228052
>
> C Geiger; D Gervais and M Senftleben *The Three-Step-Test Revisited: How to Use the Test's Flexibility in National Copyright Law* (2014), *available at https://bit.ly/2pYExLa*

In 2014, the Australian Law Reform Commission (ALRC) published a report[3] based on a 18-month inquiry during which the ALRC carried out more than 100 consultations

[3] https://www.alrc.gov.au/sites/default/files/pdfs/publications/final_report_alrc_122_2nd_december_2013_.pdf

and received close to 900 submissions. In that report, the ALRC concluded with regards to the compatibility of fair use and the three step test[4]:

> *The ALRC considers that fair use is consistent with the three-step test. […]*

The ALRC further stated:

> *To deny Australia the significant economic and social benefits of a fair use exception, the arguments that fair use is inconsistent with international law should be strong and persuasive, particularly considering other countries are enjoying the benefits of the exception. The ALRC does not find these arguments persuasive, and considers fair use to be consistent with international law.*

The ALRC emphasised that the "question of whether fair use is compatible with the three-step test is really a question of whether it meets the first step"[5] and it based its conclusion on, among other things:

- the fact that the US and other countries that have introduced fair use exceptions, such as such as the Philippines, Israel and the Republic of Korea, consider their exceptions to be compliant, and have not been challenged in international forums[6];
- the argument that a fair use exception would be a 'special case' because fairness itself is a special case; and
- a statement by the US Trade Representative, Ambassador Ronald Kirk, in September 2012, confirming that "[t]he United States takes the position that nothing in existing US copyright law, as interpreted by the federal courts of

[4] Ibid at 4.139 and 4.164

[5] According to the ALRC report, "Fair use could only conflict with a normal exploitation of the work and could only unreasonably prejudice the legitimate interests of the right holder if it were applied incautiously by the judiciary. The same is true of the existing exceptions. [And] The third limb of the three-step test provides only that limitations or exceptions must not 'unreasonably' prejudice the 'legitimate' interests of the rights holder. The test does not say an exception must never prejudice any interest of an author."

[6] Interestingly, the ALR further stated in this context that "[t]he fact that the US has already been subject to challenge in the WTO with respect to one provision of its copyright statute suggests that the US is not so 'unique' as to be immune from challenge in the WTO if its fair use provision was thought to be inconsistent with the three-step test."

> appeals, would be inconsistent with its proposed three-step test [for the Trans Pacific Partnership Agreement]."

The latter view of the US Trade Representative is echoed by the Copyright Alliance, a US-based group representing the interests of rightsholders. In a blogpost on their website dated 28 September 2017, they state that "[t]he three-step test is the international consensus for ensuring balanced copyright law. It is appropriately tailored, provides legal certainty, ***and is consistent with U.S. law***"[7] [emphasis added].

In addition, the ALRC also referred to a declaration published by the Max Planck Institute for Innovation and Competition in Germany which addressed a potential conflict between fair use provisions and the three-step test. This *Declaration on a Balanced Interpretation of the 'Three-Step Test' in Copyright Law*[8], endorsed by dozens of copyright scholars from around the world, advocated a more permissible interpretation of the three-step test and concluded that *"[t]he Three-Step Test's restriction of limitations and exceptions to exclusive rights to certain special cases does not prevent legislatures from introducing open ended limitations and exceptions, so long as the scope of such limitations and exceptions is reasonably foreseeable"*.

In her aforementioned 2018 book chapter, Prof Samuelson of the University of Berkley, California, and her co-author carried out a very detailed analysis under consideration of all U.S. fair use case law and most literature available on the topic. Her conclusions are instructive for the current debate in South Africa. On this basis, the authors concluded:

> "*that the U.S. fair use doctrine does satisfy Berne and TRIPS three-step tests for permissible L&Es, the doubts of some commentators notwithstanding. Indeed, there has been growing recognition that open-ended L&Es such as fair use allows copyright law to be adapted to a wide range of new uses of protected works made possible by the extraordinary technological advancements in the digital age.*"

In reaching this conclusion, the authors state:

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[7] https://copyrightalliance.org/ca_post/three-step-test-nafta-negotiations/

[8] Available at: https://www.ip.mpg.de/fileadmin/ipmpg/content/forschung_aktuell/01_balanced/declaration_three_step_test_final_english1.pdf

> "*First, the U.S. fair use doctrine was accepted as consistent with the three-step test when the U.S. joined the Berne Convention in 1989. Its statutory embodiment recites several specific criteria that provide guidance to its interpretation, and the fair use caselaw has evolved to refine the types of special cases to which it applies, in accord with the first step of the test. Because fair use cases carefully assess harms that challenged uses to markets for protected works and other legitimate interests, the fair use doctrine satisfies the second and third steps of the test. Second, the U.S. fair use doctrine has remained consistent with the three-step test since the U.S. joined the World Trade Organization (WTO) in 1994. Several developments since then reinforce our conclusion that the U.S. fair use doctrine satisfies the TRIPS three-step test notwithstanding certain recent criticisms.*"

As far as the existence of U.S. case law is mentioned in support of the fair use doctrine's compliance with the three-step test (and in light of the fact that similar case law does obviously not yet exist in South Africa), it is important to stress that while foreign court decisions are of course not binding in South Africa, numerous courts in South Africa have indeed considered, and incorporated in their judgements, foreign authorities. U.S. fair use case law may therefore be used, with caution, to determine the scope of fair use in South Africa. Some legal commentators in South Africa have indeed long argued for interpreting South Africa's current fair dealing provision along the lines of the criteria provided by the U.S. fair use provision – a suggestion which would also require relying on U.S. case law.

It should also be noted that there are obvious parallels between the three-step test criteria and the fair use factors in both the U.S. and the South African versions of fair use. In particular, the test's prohibition of a conflict with a normal exploitation parallels, in South Africa, with the requirement in s12A(1)(b)(iv). Such parallels do further mitigate against a conflict between the three-step test and fair use.

Based on the examination in this section it is respectfully submitted here that newer in-depth research on the topic strongly suggests that open-ended, flexible fair use provisions like the one contained in the South African Copyright Amendment Bill are indeed permissible under and consistent with the three-step test – and in fact needed for copyright law to adapt to digital technology.

As for the other exceptions contained in ss12B-19D the Bill, I cannot see any obvious conflicts with the three-step test either: Several of these provisions stem from the current Copyright Act and it is assumed that their compliance with the three-step test is not all of a sudden challenged now. As far as newly introduced exceptions and limitations are concerned, some of these are based on similar provisions in foreign laws. This may not substantiate compliance with the three-step test *per se* but may at least suggest compliance if these provisions have not been challenged in the other country. Overall, the newly introduced exceptions are flexible but appear, on balance, to be specific enough to meet the requirement of the first step ("certain special cases") as discussed in the context of s12A above. Crucially, most of these exceptions and limitations contain time honoured limits such as "fair practice", "extent justified by the purpose" which limit their scope effectively. And as far as the test's third step is concerned, it should also be remembered that this step does not state that an exception must never prejudice any interest of an author; instead it only provides that limitations or exceptions must not 'unreasonably' prejudice the 'legitimate' interests of the rights holder, thereby giving the lawmaker more leeway in this area than acknowledged by some commentators. If doubts remain, however, one interesting consideration could be to expressly integrate the wording / requirements of the second and third steps of the three-step test into the Act so that it is clear that the proposed exceptions and limitations are subject to these conditions as well. To avoid adding too much complexity to the Act at this point, my suggestion would, however, be to perhaps only do this if and when the exceptions are later challenged – in whatever forum – for non-compliance with the three-step test.

B. Would any of the proposed exceptions and limitations constitute deprivation of property? If so, would section 36 of the Constitution be covered?

This is a question for constitutional law experts. To me, it seems that the relationship between s25 and s36 of the Constitution in the context of intellectual property / copyright needs to be clarified. Prof Owen Dean's blog post provides some useful context in this regard.[9]

Section 25 provides as follows:

25. Property
(1) No one may be deprived of property except in terms of law of general application, and no law may permit arbitrary deprivation of property.

(2) Property may be expropriated only in terms of law of general application
(a) for a public purpose or in the public interest; and
(b) subject to compensation, the amount of which and the time and manner of payment of which have either been agreed to by those affected or decided or approved by a court.

[…]

It thus clearly distinguishes between "deprivation" of property and "expropriation."

In addition, section 36 of the Constitution stipulates:

36. Limitation of rights
(1) The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including—
(a) the nature of the right;
(b) the importance of the purpose of the limitation;
(c) the nature and extent of the limitation;
(d) the relation between the limitation and its purpose; and
(e) less restrictive means to achieve the purpose.
(2) Except as provided in subsection (1) or in any other provision of the Constitution, no law may limit any right entrenched in the Bill of Rights.

[9] http://blogs.sun.ac.za/iplaw/2015/07/14/intellectual-property-and-the-constitution/

It is obvious that the proposed amendments do not constitute expropriations. Whether or not some of the proposed exceptions amount to deprivation of property must be determined by constitutional law experts.[10] However, deprivations are not banned; instead s25(1) requires that "[n]o one may be deprived of property except in terms of law of general application, and no law may permit arbitrary deprivation of property." The proposed provisions would be law of general application, and such deprivations would also not be arbitrary. Hence, any deprivations caused by the new provisions would likely be justified.

Equally, to the extent that s36 of the Constitution applies, the new provisions would qualify as "law of general application", and they appear "*reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom.*" Yet, once again, a detailed analysis – including a consideration of the relevant factors in s36 (1)(a)-(e) – is better left to constitutional law experts.

[10] For a general analysis of takings law applied to copyright in the U.S., see https://harvardlawreview.org/2015/01/copyright-reform-and-the-takings-clause/

C. A word on AGOA compliance

Recently, some stakeholders – including the IIPA - have put forward concerns that the provisions contained in the Copyright Amendment Bill, if enacted, would jeopardise South Africa's compliance with AGOA eligibility criteria. While such concerns need to be taken seriously, the lack of substantiation for such claim makes it difficult to engage with it. I should also state upfront that I am not an expert on AGOA – a U.S. piece of legislation. With respect, however, the manner in which the claim was presented, and the timing of it, suggest that this argument is a smokescreen.

In part A of this opinion, the view was expressed and substantiated that the proposed copyright exceptions – and especially the proposed fair use provision – comply with the international three-step test standard for domestic copyright exceptions and limitations. The proposed ss12A and 12B combine more specific exceptions and limitations with a more general clause (hybrid approach) – an approach not unlike what can be found in U.S. copyright law. On the face of it, it would therefore appear paradoxical if South Africa was, under AGOA, penalised by the U.S. for essentially adopting the approach that the U.S. has taken towards copyright exceptions and limitations.

Given the width of AGOA eligibility criteria, there is a real risk in my opinion, that broadly submitted threats of losing benefits under AGOA could henceforth be used to undermine or attack legislative efforts in a number of areas – be it copyright law or an amendment to section 25 of our Constitution. One should not give in to such pressures.

In response to the IIPA's claim concerning AGOA, two U.S. professors recently submitted to the U.S. Trade Representative the following response that I align myself with:

> *We write in reference to the August 1, 2018, filing of the IIPA, in respect of South Africa's proposed copyright amendments. IIPA claims that adoption of the South Africa copyright amendment bill "would place South Africa out of compliance with the AGOA eligibility criteria regarding intellectual property." We find this claim wholly unsupported.*
>
> *AGOA is a general system of preferences (GSP) program. GSP programs are regulated under the World Trade Organization's GSP "Enabling Clause." The WTO permits GSP*

programs as exceptions to the most favored nation obligation only in so far as GSP criteria are "generalized, non-reciprocal and non discriminatory," and that they "be designed and, if necessary, modified, to respond positively to the development, financial and trade needs of developing countries." See DS246: European Communities — Conditions for the Granting of Tariff Preferences to Developing Countries (explaining that needs of developing countries must be assessed according to an "objective," "[b]road-based recognition of a particular need," such as those "set out in the WTO Agreement or in multilateral instruments adopted by international organizations").

The IIPA's submission vaguely criticizes South Africa's proposed copyright amendments as containing "extremely broad and new exceptions and limitations," and an "ill-considered importation of the U.S. 'fair use' rubric" which it concludes without explanation would violate the so-called three-step test in TRIPS Article 13 and Berne Article 9. We take exception to this cursory analysis.

South Africa's proposed copyright amendment bill contains an innovative, forward-thinking and South Africa-specific set of modernized limitations and exceptions that will contribute to its support of both innovation and access that will serve its public.

The bill's proposed new article 12 (considering A and B together) is a hybrid general exception that combines a set of modern specific exceptions for various purposes (Section 12B) and an open general "fair use" exception that can be used to assess any use for a purpose not specifically covered elsewhere. In this sense, it is akin to US law, which also contains a host of specific exceptions and a general fair use general exception.

The IIPA criticizes the specific exceptions in 12B as being "broad." The breadth of South Africa's new specific exceptions is a virtue, not a flaw. Its current law applies exceptions narrowly to specific types of works, users and uses, to the effect that many modern lawful uses of works permitted under US fair use law are excluded from their scope. For example, the incidental use right in current South Africa law applies to artistic, but not audiovisual, works – with the result that documentary film makers lack a right to capture a radio or television broadcast in the background of a shot. The new law broadens most of its current exceptions to apply to all works (e.g., extending to audiovisual, etc.), uses (including, e.g., display, performance, etc.), and users (e.g., to both individuals and institutions). This breadth will make South Africa's law function more similarly to US and other laws around the world that are more accommodating of modern technology.

The breadth of South Africa's exceptions is a feature that contributes to its development, financial and trade needs. Recent empirical research has shown, for example, that providing exceptions that are open to purposes, uses, works and users is correlated with both information technology industry growth and to increased production of works of knowledge creation. See Sean Flynn and Mike Palmedo, The

User Rights Database: Measuring the Impact of Copyright Balance. PIJIP Working Paper 2017-03; Deloitte, *Copyright in the digital age: An economic assessment of fair use in New Zealand*.

The fair use provision in Article 12A is similarly forward thinking. The main features of the clause draws from the US fair use right, and thus must be unassailable as a matter of US trade policy. The provision contains several innovations in its phrasing that will make the provision more clear in its application and consistent with modern trends in the interpretation of fair use and fair dealing rights.

First, we commend the drafters on the opening phrase — "In addition to uses specifically authorized." This provision makes clear that the fair use clause intends to cover issues unaddressed in its specific exceptions, as is the case with US fair use. This is particularly important to obtain the benefit of fair use as enabling adaptation to technology and culture change. It also signals to the interpreter that there exist a full set of specific exceptions (in 12B et seq.), which we commend for adding to the predictability of the law.

We commend as well the unique and clear phrasing of the opening clause — "for purposes such as the following." The inclusion of the illustrative purposes in an itemized list, preceded by the opening clause, makes it very clear that the listed purposes are illustrative, not exhaustive.

We commend the drafters on the list of illustrative purposes that are included. The list of illustrative purposes is innovative in including both traditional fair dealing purposes (e.g., criticism or review of that work or of another work), as well as more modern purposes that have been recognized by statutes and in case law in other countries (e.g., "comment, illustration, parody, satire, caricature, cartoon, tribute, homage or pastiche").

The inclusion of the interests of "libraries, archives and museums" ensures that such institutions will be able to utilize fair use in addition to the specific rights they are provided later in the Act.

The provision will add to the predictability of its interpretation by reflecting the traditional approach that in interpreting whether a use is fair "all relevant factors shall be taken into account, including but not limited to" the listed four factors. This is also consistent with US law.

The proposal includes a well-considered four-factor test that reflects the global trend, but clarifies its application.

The four fair use factors in the Bill add to the predictability of the law. South Africa's current fair dealing provision contains no standards for how to consider when a dealing is fair. The Bill proposes to ground the law in a growing international trend toward

defining fairness, in both fair use and fair dealing statutes, through a variation of the US four factor test for defining fair use. See Jonathan Band, The Fair Use/ Fair Dealing Handbook, http://infojustice.org/wp-content/uploads/2013/04/Band-and-Gerafi-04032013.pdf (reporting that over a dozen fair use and fair dealing jurisdictions have adopted a similar four factor test).

The four factors in the South African bill contain helpful clarifications that reflect global trends in interpretation.

In evaluating the purpose and character of the use, the provision helpfully instructs consideration of the core of the transformative use test – whether "such use serves a purpose different from that of the work affected." The "transformative use" test has added greatly to the predictability of fair use in the US. Judge Leval's opinion in Authors Guild v. Google, 804 F.3d 202 (2d Cir. 2015)("Google Books") makes the convergence of reasoning within US courts especially clear — he cites authorities from various circuits in reaching his conclusion. The Supreme Court denied certiorari review of the decision, leaving it to stand as the latest and most authoritative interpretation of the transformative use doctrine to date.
The fourth factor in the South African bill is clarified to focus on "the substitution effect of the act upon the potential market for the work in question." The focus on "substitution effect" is important because copyright law is designed to protect consumer markets for protected works rather than licensing revenue in general. The concept is reflected in US interpretations of fair use. For example, the Second Circuit explained in Google Books, 804 F.3d at 214:
The more the appropriator is using the copied material for new, transformative purposes, the more it serves copyright's goal of enriching public knowledge and the less likely it is that the appropriation will serve as a substitute for the original or its plausible derivatives.

Substitutionality is a common-sense concept, based on notions of intended audience. It does not open the floodgates for non-licensed use of derivative works. Art consumers substitute reproductions for originals — that's why there's a reproduction market, and why no one argues that merchandise based on reproductions of copyrighted art works is fair use. An example of a non-substitutional use would be the reproduction of some bars of music in a scholarly article, or a brief sample from one musical work incorporated into another.

IIPA makes vague but unsubstantiated claims that these provisions would violate TRIPS Article 13 and Berne Article 9. We find no basis for these claims. Many other nations have copyright laws with similar exceptions as proposed for South Africa, including the United States.[1] The three-step test in the Berne Convention and in TRIPS is adequately flexible to accommodate the full range of such exceptions. See Christoph Geiger, et al., The Three-Step Test Revisited: How to Use theTest's Flexibility in National Copyright

Law, http://digitalcommons.wcl.american.edu/cgi/viewcontent.cgi?article=1041&context=research

At bottom, the limitations and exceptions in South Africa's proposed legislation are well crafted and completely within their rights under international law. They should not be considered as any basis for sanctioning the country under AGOA.